

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ZACHARIAH JUDSON RUTLEDGE,	No. C 07-4274 CW
Plaintiff,	ORDER GRANTING
v.	DEFENDANTS' MOTIONS FOR
COUNTY OF SONOMA, et al.,	SUMMARY JUDGMENT
Defendants.	(Docket Nos. 159, 171,
	182 & 183)

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Defendant Michael Potts and Defendants County of Sonoma, Sonoma County Sheriff's Department, Sonoma County District Attorney's Office, Stephan Passalacqua, J. Michael Mullins, Greg Jacobs, Christine M. Cook, Russell L. Davidson and James Patrick Casey (collectively, the County Defendants) separately move for summary judgment or, in the alternative, for partial summary judgment. Plaintiff Zachariah Judson Rutledge opposes both motions. The matter was heard on August 6, 2009. Having considered oral argument and all of the papers submitted by the parties, the Court grants County Defendants' motion and Defendant Potts' motion.

BACKGROUND

This case arises out of Plaintiff's prosecution for two murders that occurred in 1998. Plaintiff was acquitted of these

1 crimes after a jury trial. He now charges malfeasance by a number  
2 of the individuals who were involved in his prosecution.

3 Plaintiff claims that in August, 2000, Defendant Potts, a  
4 criminalist for the California Department of Justice, authored a  
5 forensic laboratory report containing false statements.  
6 Specifically, Plaintiff alleges the report stated that a paint  
7 sample found on a knife at the crime scene visually had the same  
8 sequence of colored layers as a paint sample collected from  
9 Plaintiff's residence, but did not disclose that the paints may  
10 have been chemically different.

11 Mr. Potts allegedly colluded with Defendant Casey, a deputy  
12 district attorney, and Defendant Davidson, a detective with the  
13 Sonoma County Sheriff's Department, to present a declaration  
14 containing the false evidence described above to a magistrate in  
15 May, 2002 to secure a warrant for Plaintiff's arrest. Plaintiff  
16 claims that Mr. Casey and Mr. Davidson omitted exculpatory evidence  
17 from the declaration, and included fabricated evidence. Plaintiff  
18 was arraigned in mid-May, 2002. County Defs.' Req. for Judicial  
19 Notice (RJN), Ex. B at 3.<sup>1</sup>

20 On October 30, 2002, the superior court ordered the  
21 prosecution to produce "any and all notes pertaining to forensic  
22 tests or analyses performed in this case" to Plaintiff's attorney.  
23 See Pl.'s Opp'n Ex. 39 at 9; Third Am. Compl. ¶¶ 46-47; County  
24 Defs.' RJN, Ex. B at 3. On the same day, Mr. Casey telephoned Mr.  
25 Potts to notify him that Plaintiff's attorney would be requesting  
26 Mr. Potts' bench notes, which contained Mr. Potts' raw observations

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28 <sup>1</sup> The Court grants the Requests for Judicial Notice by County  
Defendants and Mr. Potts (Docket Nos. 168 & 172).

1 and data. See Pl.'s Opp'n Ex. 33 at 3; Pl.'s Opp'n Ex. 36 at 77.  
2 Mr. Potts, however, produced only approximately one-third of his  
3 bench notes to Plaintiff's attorney. See Pl.'s Opp'n Ex. 39 at 4-  
4 18; Jacobs Decl. Ex. B (Potts' memorandum to Casey). Mr. Potts  
5 claimed that he believed the public defender's office did not  
6 request his entire set of notes. See Pl.'s Opp'n Ex. 39 at 10. In  
7 a memorandum written by Mr. Potts at the same time he sent his  
8 bench notes to the public defender's office, Mr. Potts informed Mr.  
9 Casey that he needed to perform additional tests on the paint in  
10 order to confirm the match between the paint on the knife and the  
11 paint retrieved from Plaintiff's residence. See Pl.'s Opp'n Ex. 36  
12 at 6; Jacobs Decl. Ex. B. Plaintiff alleges that these actions  
13 show that Mr. Casey and Mr. Potts concealed the infirmity in the  
14 forensic report. See Pl.'s Opp'n at 9-11; Pl.'s Opp'n Ex. 39 at 4-  
15 18.

16 On November 15, 2002, Mr. Potts provided the following  
17 testimony at Plaintiff's first preliminary hearing, which Plaintiff  
18 alleges was false:

19 [T]he paint on the knife matches the paint on the other  
20 two items [from Plaintiff's residence], not only in  
21 color, but also layer sequence and type of paint.  
22 . . . [W]e're talking about separate layers and four  
23 different colored layers as well. And also the paint on  
24 this is the architectural type paint in that it's  
25 different in chemical composition from paint that you  
26 would find like, for instance, on automobiles and things  
of that nature. . . . It not only matches in color, in  
other words, the color of the paint on People's 13 and 12  
is the same as the paint on the knife, but also it's the  
layer sequence, and the colors of each of those layers is  
the same that appears on the knife [and] matches the same  
chemical composition of each one of those layers that you  
can see on People's 12 and 13.

27 Pl.'s Opp'n Ex. 69 at 172. Mr. Potts also testified at the hearing  
28 that the odds were at least "a million to one" that the paint would

1 match. Id. at 173-74. Plaintiff was held to answer the charges.

2 Plaintiff claims that Mr. Potts' testimony was based on an  
3 obsolete and inapplicable article on paint comparison (the Wales  
4 study), and that Mr. Potts was aware of this fact and the  
5 consequent weakness in his testimony. Had Mr. Potts' undisclosed  
6 bench notes been provided, Plaintiff claims, he would have been  
7 able to demonstrate the unreliability of Mr. Potts' testimony.

8 On January 27, 2004, Mr. Potts sent Defendant Jacobs, who by  
9 that time had taken over the prosecution of the case from Mr.  
10 Casey, a letter in which he admitted to "over-simplifying" his  
11 testimony regarding the examination he had performed on the paint  
12 samples. In particular, the letter stated:

13 My response [at the preliminary hearing] implies that I  
14 conducted a chemical analysis of the paint on the  
15 molding. In fact, I had only performed a microscopical  
16 computation of the paint on the knife with the paint on  
17 the molding.

18 Furthermore, in reviewing the transcript, it could be  
19 interpreted that I performed an analysis on each  
20 individual colored layer of paint on the knife. In  
21 fact, because the paint on the knife was in the form of  
22 a smear, I was unable to fully separate the paint  
23 transfers into distinct individual layers; and  
24 therefore, analysis was conducted on more than one  
25 layer at the time.

26 Jacobs Decl. Ex. A.

27 On March 8, 2004, Plaintiff moved to dismiss the charges  
28 against him based on "recently discovered misrepresentations made  
29 by senior criminalist Michael Potts of the California Department of  
30 Justice at the preliminary examination." County Defs.' RJN Ex. B at  
31 13 (Docket No. 168.) This motion was denied. Plaintiff renewed  
32 his motion to dismiss in May, 2004 based on the prosecution's  
33 failure to disclose all of Mr. Potts' bench notes before the first

1 preliminary hearing. See id. at 30; County Defs.' RJN Ex. D  
2 110:27-111:8; Jacobs Decl. Ex. B. In ruling on Plaintiff's renewed  
3 motion to dismiss, the presiding judge reviewed the entirety of the  
4 evidence presented at the preliminary hearing. She found that Mr.  
5 Potts' testimony was central to the prosecution's case:

6 [U]pon weighing all the evidence, the evidence produced  
7 at the preliminary hearing and considering the  
8 undisclosed evidence and the effect of the undisclosed  
9 evidence and the effect of the testimony of Mr. Potts,  
10 this Court finds that there is a reasonable probability  
11 that the magistrate would not have found probable cause  
12 [in the absence of Mr. Potts' testimony].

13 The Court finds that the exculpatory value of the  
14 suppressed evidence outweighs the possible incriminating  
15 evidence presented against the defendant at the  
16 preliminary hearing.

17 But during one of the arguments that [Mr. Rutledge's  
18 counsel] made that this Court finds compelling, it's not  
19 only what wasn't produced, it's what was produced.

20 I think there's sufficient reason for this Court to turn  
21 over the preliminary hearing based upon what was not  
22 produced, but I'm more concerned about what was produced,  
23 and the effect of having this marginal testimony  
24 remaining and the effect of Mr. Potts' statement that  
25 based upon all of his analysis it was a million to 1 that  
26 all of these layers matched. It had to have had an  
27 unbelievable -- well, completely believable effect upon  
28 the magistrate, and it completely outweighs the rest of  
this evidence so the Court is granting the motion.

Pl.'s Opp'n Ex. 39 at 32-33.

Accordingly, the case was dismissed on June 14, 2004. The  
next day, the prosecution filed another complaint against  
Plaintiff. In March, 2006, a second preliminary hearing was held,  
at which Mr. Potts did not testify. Plaintiff was again held to  
answer. The action proceeded to trial, after which Plaintiff was  
acquitted.

PROCEDURAL HISTORY

1  
2 Plaintiff filed a third amended complaint on July 29, 2008  
3 alleging twelve causes of action. (Docket No. 49.) On September  
4 26, 2008, this Court dismissed with prejudice Plaintiff's first  
5 (state law intentional/negligent infliction of emotional distress),  
6 third (state law false arrest), fourth (state law false  
7 imprisonment) and ninth (state law violation of constitutional  
8 rights) causes of action against Defendant Potts. (Docket No. 60.)  
9 The September, 2008 order also dismissed with prejudice Plaintiff's  
10 twelfth cause of action for state law malicious prosecution against  
11 all Defendants. Id.

LEGAL STANDARD

12  
13 Summary judgment is properly granted when no genuine and  
14 disputed issues of material fact remain, and when, viewing the  
15 evidence most favorably to the non-moving party, the movant is  
16 clearly entitled to prevail as a matter of law. Fed. R. Civ.  
17 P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986);  
18 Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir.  
19 1987).

20 The moving party bears the burden of showing that there is no  
21 material factual dispute. Therefore, the court must regard as true  
22 the opposing party's evidence, if supported by affidavits or other  
23 evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815  
24 F.2d at 1289. The court must draw all reasonable inferences in  
25 favor of the party against whom summary judgment is sought.  
26 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,  
27 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d  
28 1551, 1558 (9th Cir. 1991).

1 Material facts which would preclude entry of summary judgment  
2 are those which, under applicable substantive law, may affect the  
3 outcome of the case. The substantive law will identify which facts  
4 are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
5 (1986).

6 Where the moving party does not bear the burden of proof on an  
7 issue at trial, the moving party may discharge its burden of  
8 production by either of two methods. Nissan Fire & Marine Ins.  
9 Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir.  
10 2000).

11 The moving party may produce evidence negating an  
12 essential element of the nonmoving party's case, or,  
13 after suitable discovery, the moving party may show that  
14 the nonmoving party does not have enough evidence of an  
15 essential element of its claim or defense to carry its  
16 ultimate burden of persuasion at trial.

17 Id.

18 If the moving party discharges its burden by showing an  
19 absence of evidence to support an essential element of a claim or  
20 defense, it is not required to produce evidence showing the absence  
21 of a material fact on such issues, or to support its motion with  
22 evidence negating the non-moving party's claim. Id.; see also  
23 Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 888 (1990); Bhan v.  
24 NME Hosps., Inc., 929 F.2d 1404, 1409 (9th Cir. 1991). If the  
25 moving party shows an absence of evidence to support the non-moving  
26 party's case, the burden then shifts to the non-moving party to  
27 produce "specific evidence, through affidavits or admissible  
28 discovery material, to show that the dispute exists." Bhan, 929  
F.2d at 1409.

If the moving party discharges its burden by negating an

1 essential element of the non-moving party's claim or defense, it  
2 must produce affirmative evidence of such negation. Nissan, 210  
3 F.3d at 1105. If the moving party produces such evidence, the  
4 burden then shifts to the non-moving party to produce specific  
5 evidence to show that a dispute of material fact exists. Id. at  
6 1103.

7 Where the moving party bears the burden of proof on an issue  
8 at trial, it must, in order to discharge its burden of showing that  
9 no genuine issue of material fact remains, make a prima facie  
10 showing in support of its position on that issue. UA Local 343 v.  
11 Nor-Cal Plumbing, Inc., 48 F.3d 1465, 1471 (9th Cir. 1994). That  
12 is, the moving party must present evidence that, if uncontroverted  
13 at trial, would entitle it to prevail on that issue. Id.; see also  
14 Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1264-65 (5th  
15 Cir. 1991). Once it has done so, the non-moving party must set  
16 forth specific facts controverting the moving party's prima facie  
17 case. UA Local 343, 48 F.3d at 1471. The non-moving party's  
18 "burden of contradicting [the moving party's] evidence is not  
19 negligible." Id. This standard does not change merely because  
20 resolution of the relevant issue is "highly fact specific." See id.

21 DISCUSSION

22 I. Immunity

23 A. Absolute Immunity for Prosecutor Defendants

24 County Defendants assert that the prosecutor Defendants  
25 (Casey, Jacobs, Cook, Passalacqua and Mullins) are absolutely  
26 immune from liability for Plaintiff's claims because their actions  
27  
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1 related to the criminal prosecution of Plaintiff.<sup>2</sup> County  
2 Defendants assert absolute immunity under federal case law and  
3 state statutes. Plaintiff contends that prosecutor Defendants are  
4 not absolutely immune because their conduct was investigative,  
5 served a police function or was otherwise non-judicial (e.g., the  
6 fabrication of evidence).

7 1. Federal and State Prosecutorial Immunities

8 Under federal law, absolute immunity bars claims for damages  
9 against prosecutors performing "quasi-judicial" functions. Broam  
10 v. Bogan, 320 F.3d 1023, 1029 (9th Cir. 2003). The party asserting  
11 absolute immunity bears the burden of establishing that it is  
12 warranted. Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 432  
13 (1993). Courts generally apply federal absolute prosecutorial  
14 immunity only to federal claims. See, e.g., Cousins v. Lockyer,  
15 568 F.3d 1063 (9th Cir. 2009); Rosenthal v. Vogt, 229 Cal. App. 3d  
16 69 (1991).

17 "[I]n deciding whether to accord a prosecutor immunity from a  
18 civil suit for damages, a court must first determine whether a  
19 prosecutor has performed a quasi-judicial function. If the action  
20 was part of the judicial process, the prosecutor is entitled to the  
21 protection of absolute immunity whether or not he or she violated  
22 the civil plaintiff's constitutional rights." Broam, 320 F.3d at  
23 1029 (internal citation omitted); see Buckley v. Fitzsimmons, 509  
24 U.S. 259, 272-73 (1993). For example, a prosecutor is absolutely  
25 immune from liability for filing an information or motion, see  
26 Kalina v. Fletcher, 522 U.S. 118, 129 (1997), "for failure to

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27  
28 <sup>2</sup> County Defendants do not claim absolute immunity for the  
state defamation claim against Defendant Cook.

1 investigate the accusations against a defendant before filing  
2 charges," "for the knowing use of false testimony at trial," for  
3 his or her decision not to preserve or turn over exculpatory  
4 material in violation of Brady v. Maryland, 373 U.S. 83 (1963), and  
5 "for gathering additional evidence after probable cause is  
6 established or criminal proceedings have begun," Broam, 320 F.3d at  
7 1029-30.

8 If a prosecutor performs administrative or investigatory  
9 functions, however, he or she is entitled to only qualified, not  
10 absolute, immunity. See Van de Kamp v. Goldstein, \_\_\_ U.S. \_\_\_,  
11 129 S. Ct. 855, 861 (2009); Kalina, 522 U.S. at 125-29.  
12 Prosecutors are not absolutely immune, for example, when they take  
13 part in the preliminary gathering of evidence that may ripen into a  
14 potential prosecution, fabricate evidence or make out-of-court  
15 statements in a press conference. See Buckley, 509 U.S. at 273-77.  
16 Nor are prosecutors absolutely immune when they give advice to the  
17 police in the investigative phase of a criminal case before trial,  
18 see Burns v. Reed, 500 U.S. 478, 495-96 (1991), or act as a  
19 complaining witness by preparing a declaration in support of an  
20 arrest warrant, see Kalina, 522 U.S. at 129-30; Morley v. Walker,  
21 175 F.3d 756, 761 (9th Cir. 1999).

22 California Government Code § 821.6 states, "A public employee  
23 is not liable for an injury caused by his instituting or  
24 prosecuting any judicial or administrative proceeding within the  
25 scope of his employment, even if he acts maliciously and without  
26 probable cause." Immunity under § 821.6 covers "actions taken in  
27 preparation for formal proceedings, including investigation, which  
28 is an essential step toward the institution of formal proceedings."

1 Paterson v. City of Los Angeles, 175 Cal. App. 4th 1393, 1405  
2 (2009) (citation omitted). It also applies to government employees  
3 in malicious prosecution cases involving "the government employees'  
4 acts in filing charges or swearing out affidavits of criminal  
5 activity against the plaintiff." Sullivan v. County of Los  
6 Angeles, 12 Cal. 3d 710, 720 (1974). The immunity extends to  
7 emotional distress claims to the extent that the conduct challenged  
8 involves the institution of formal proceedings. Amylou R. v.  
9 County of Riverside, 28 Cal. App. 4th 1205, 1209-10 (1994).

10 Section 821.6 does not apply, however, to false arrest or  
11 false imprisonment claims where the employee "knowingly imprison[s]  
12 a person without proper legal authority." Sullivan, 12 Cal. 3d at  
13 720; see also Asgari v. City of Los Angeles, 15 Cal. 4th 744, 752  
14 (1997). A public employee is not shielded from liability where the  
15 "public employee [takes] a very active role in actually securing  
16 the arrest warrant and [participates] in having it served by a  
17 fellow [public employee] under his own authority." Harden v. S.F.  
18 Bay Area Rapid Transit Dist., 215 Cal. App. 3d 7, 17 (1989). State  
19 false arrest and imprisonment claims arising out of criminal  
20 prosecutions may challenge only conduct preceding the suspect's  
21 arraignment. Asgari, 15 Cal. 4th at 757-58. In other words,  
22 § 821.6 does not immunize a public employee from false arrest and  
23 imprisonment claims for knowing misconduct occurring before a  
24 suspect's arraignment. See id.; see also County of Los Angeles v.  
25 Superior Court, 78 Cal. App. 4th 212, 221 (2000). State law  
26 immunities do not apply to federal constitutional claims. See  
27 Asgari, 15 Cal. 4th at 758 n.11.

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1                   2.     Defendant Casey

2             Plaintiff challenges Defendant Casey's conduct before  
3 Plaintiff's May, 2002 arrest, before the first preliminary hearing  
4 in November, 2002 and during the first preliminary hearing. As a  
5 deputy district attorney, Mr. Casey assumed responsibility for the  
6 double homicide in the summer of 2001 before Plaintiff was  
7 arrested. Casey Decl. ¶¶ 4-5. Mr. Casey has not been involved in  
8 the prosecution of Plaintiff since "shortly after" the November,  
9 2002 preliminary hearing. Casey Decl. ¶ 5.

10            Plaintiff alleges that Defendant Casey colluded with  
11 Defendants Davidson and Potts to present a declaration containing  
12 false evidence to a magistrate in order to secure a warrant for  
13 Plaintiff's arrest. Plaintiff alleges these Defendants also  
14 omitted exculpatory evidence from the warrant. Plaintiff further  
15 alleges that Mr. Casey, along with Mr. Potts, withheld exculpatory  
16 evidence before the preliminary hearing and conspired to present  
17 false testimony from Mr. Potts at the preliminary hearing.

18                   a.     Before Plaintiff's May, 2002 Arrest

19            Plaintiff argues that, before Plaintiff's arrest, Mr. Casey  
20 was acting as an investigator, not as a prosecutor, because he had  
21 conversations and meetings with Mr. Davidson and then Detective  
22 Bradford Burke, asked Mr. Davidson to prepare a synopsis and  
23 requested that Mr. Davidson or Mr. Burke conduct interviews with  
24 witnesses. The pre-arrest conduct that Plaintiff challenges is  
25 that the arrest declaration contained false information and Mr.  
26 Casey knew of the falsity when the declaration was presented to the  
27 magistrate. However, Plaintiff presents no evidence that Mr. Casey  
28 fabricated evidence or instructed Mr. Davidson to include witness

1 statements that Mr. Casey knew were false. Nor is there evidence  
2 from which a jury could infer that Mr. Casey had knowledge of any  
3 falsity. For this conduct, the Court need not determine whether  
4 federal or state immunities apply because Plaintiff has not  
5 presented evidence that Mr. Casey had knowledge of any falsity in  
6 the arrest warrant declaration.

7           b. Before November, 2002 Preliminary Hearing  
8           Plaintiff claims that Mr. Casey acted as an investigator, not  
9 a prosecutor, before the November, 2002 preliminary hearing because  
10 he participated in an interview of James Larry Lewis Jr. just prior  
11 to the preliminary hearing. Pl.'s Opp'n Ex. 44 at 122-23. He also  
12 spoke with other witnesses in preparation for the preliminary  
13 hearing. See Pl.'s Opp'n Ex. 36 at 90 (Davidson Testimony, May 19,  
14 2004).

15           Mr. Casey also had several conversations and meetings with  
16 Defendant Potts in the weeks before the preliminary hearing. Pl.'s  
17 Opp'n Ex. 36 at 58-64 (Casey Testimony, May 19, 2004). After these  
18 interactions, Mr. Potts only produced approximately one-third of  
19 his bench notes to Plaintiff's attorney, despite the superior  
20 court's order requiring the prosecution to disclose all relevant  
21 notes. As noted above, the superior court's dismissal of the case  
22 against Plaintiff was based in part on the prosecution's failure to  
23 disclose exculpatory evidence, including Mr. Potts' complete bench  
24 notes. See Pl.'s Opp'n Ex. 39. Mr. Potts' and Mr. Casey's  
25 versions of the circumstances of the withholding of the bench notes  
26 are conflicting. See Pl.'s Opp'n Ex. 39 at 9-17 (summary of both  
27 versions); see also Pl.'s Opp'n Ex. 36 (Potts testimony, May 19,  
28 2004).

1           Nonetheless, Mr. Casey's conduct before the first preliminary  
2 hearing was related to the judicial process because it was  
3 undertaken in preparation for the preliminary hearing. Mr. Casey  
4 is therefore entitled under federal law to absolute immunity on the  
5 federal claims based on such conduct, including any failure to  
6 disclose exculpatory evidence, even if his conduct violated  
7 Plaintiff's rights. See Buckley, 509 U.S. at 272-73; Broam, 320  
8 F.3d at 1029-30. Moreover, he is also entitled under California  
9 Government Code § 821.6 to immunity on the state law malicious  
10 prosecution, emotional distress and civil rights claims. Mr. Casey  
11 cannot be held liable for state law false arrest and imprisonment  
12 because these claims do not apply to conduct that followed  
13 Plaintiff's May, 2002 arraignment. See Asgari, 15 Cal. 4th at 757  
14 (holding that a claim of false arrest and imprisonment applies to  
15 conduct before arraignment).

16                           c.    November, 2002 Preliminary Hearing

17           Mr. Casey was the prosecutor who handled the November, 2002  
18 preliminary hearing. He examined multiple witnesses at the  
19 preliminary hearing, including Mr. Potts, Mr. Davidson and Mr.  
20 Lewis Jr. Mr. Casey is entitled to absolute immunity under federal  
21 and state law against any claims for his conduct at the preliminary  
22 hearing, even if he conspired to elicit and did elicit false  
23 testimony, because it was part of the judicial process after  
24 criminal proceedings began. See Broam, 320 F.3d at 1029-30; Cal.  
25 Gov. Code § 821.6.

26           Accordingly, summary judgment is granted on Plaintiff's  
27 federal and state law claims against Defendant Casey on the basis  
28 of federal and state immunities and lack of evidence.

1           3.     Defendant Jacobs

2           Plaintiff contends that Assistant District Attorney Jacobs'  
3 conduct was investigative when he interviewed new witnesses or  
4 directed Mr. Davidson to interview witnesses, and concealed  
5 exculpatory evidence. However, Plaintiff presents no evidence that  
6 Mr. Jacobs fabricated evidence, concealed exculpatory evidence or  
7 presented false testimony. Further, Mr. Jacobs became involved in  
8 this matter in 2003, after the first preliminary hearing and during  
9 pretrial motion practice. See Jacobs Decl. ¶ 3.

10          Due to his prosecutorial role, Mr. Jacobs is entitled under  
11 federal law to absolute immunity against any federal claims for  
12 damages for his conduct, even for any alleged Brady violation,  
13 because it was part of the judicial process after criminal  
14 proceedings began. See Broam, 320 F.3d at 1029-30. Mr. Jacobs is  
15 also entitled under California Government Code § 821.6 to immunity  
16 from state law claims related to this conduct. Even if he were not  
17 immune, summary judgment would nonetheless be proper because  
18 Plaintiff failed to present evidence of Mr. Jacobs' wrongdoing.  
19 Thus, summary judgment is granted as to all federal and state law  
20 claims against Defendant Jacobs.

21           4.     Defendant Cook

22          In the third amended complaint, the only conduct by Defendant  
23 Cook that Plaintiff challenges is her out-of-court statements  
24 during a radio broadcast. County Defendants do not claim absolute  
25 immunity for the state defamation claim against Defendant Cook.

26          In his opposition, however, Plaintiff challenges other conduct  
27 by Ms. Cook. Plaintiff asserts that Ms. Cook, with Mr. Jacobs and  
28 Mr. Passalacqua, filed a new complaint against Plaintiff despite

1 knowing that Tyson McLain committed the murders. He claims that  
2 her conduct was investigatory, not prosecutorial, because she and  
3 Kris Allen re-interviewed James Larry Lewis Sr. The filing of the  
4 second complaint and the re-interview of Mr. Lewis Sr. occurred  
5 during the criminal proceedings. Even if Ms. Cook were involved in  
6 filing the second complaint and re-interviewing Mr. Lewis Sr.  
7 during the proceedings, she is entitled under federal law to  
8 absolute immunity against any claims for damages for this conduct  
9 because it was part of the judicial process. See Kalina, 522 U.S.  
10 at 129 (absolute immunity for filing information); Broom, 320 F.3d  
11 at 1029-30. Ms. Cook is entitled under § 821.6 to immunity for  
12 state law claims because this conduct involved the prosecution of a  
13 criminal case in court. Moreover, even if these immunities did not  
14 apply, Plaintiff has provided no evidence showing intentional  
15 misconduct on the part of Ms. Cook. Summary judgment is granted as  
16 to all federal and state law claims against Ms. Cook. The  
17 defamation claim against Ms. Cook is discussed below.

18 5. Supervisor District Attorney Defendants Passalacqua  
19 and Mullins

20 Plaintiff alleges that the District Attorney, Defendant  
21 Passalacqua, and the former District Attorney, Defendant Mullins,  
22 failed to establish procedures to ensure communication of all  
23 relevant information on each case to every lawyer, to supervise or  
24 train prosecutors to disclose exculpatory evidence and to supervise  
25 or train prosecutors to refrain from using perjured testimony.  
26 Third Am. Compl. ¶¶ 78, 80. Plaintiff also claims that these  
27 supervisor Defendants enacted and/or maintained policies that  
28 established discovery procedures which interfered with the



1 disclosure of exculpatory evidence. Id. at ¶¶ 79, 81.

2 County Defendants argue that supervisor Defendants Passalacqua  
3 and Mullins are entitled to absolute immunity for any lack of  
4 supervision or failure to establish procedures for conduct  
5 intimately related to the judicial phase of the criminal process.  
6 Plaintiff does not respond to the County Defendants' argument in  
7 his opposition. The claims against Defendant Mullins have already  
8 been dismissed (Docket No. 220).

9 The Supreme Court recently held that supervisor prosecutors  
10 were entitled to absolute immunity for claims that the prosecution  
11 failed to disclose impeachment material due to the supervisors'  
12 failure to train properly, supervise and establish an information  
13 system regarding impeachment material. Van de Kamp v. Goldstein,  
14 \_\_\_ U.S. \_\_\_, 129 S. Ct. 855, 861-62 (2009). Though the plaintiff  
15 was challenging the District Attorney's administrative procedures,  
16 the Supreme Court reasoned that absolute immunity extended to  
17 "administrative obligation[s]" that are "directly connected with  
18 the conduct of a trial." Id. at 862. The Court further noted that  
19 the challenged acts "necessarily require legal knowledge and the  
20 exercise of related discretion." Id.

21 Under Van de Kamp, supervisor Defendant Passalacqua is  
22 entitled under federal law to absolute immunity for Plaintiff's  
23 federal claims because the disclosure of exculpatory evidence and  
24 use of perjured testimony are "directly connected with the conduct  
25 of a trial" and "require legal knowledge and the exercise of  
26 related discretion." See id. Mr. Passalacqua also is entitled to  
27 immunity under California Government Code § 821.6 for Plaintiff's  
28 state law claims because his conduct related to his prosecution of

1 a criminal case in court. Summary judgment is granted as to all  
2 federal and state law claims against Defendant Passalacqua.

3 B. Qualified Immunity For Defendant Davidson

4 County Defendants argue that Defendant Davidson is entitled to  
5 qualified immunity. Plaintiff responds that Mr. Davidson is not  
6 entitled to qualified immunity because he ignored exculpatory  
7 evidence that would negate a probable cause finding and the arrest  
8 warrant was based on false evidence he fabricated.

9 The defense of qualified immunity protects government  
10 officials "from liability for civil damages insofar as their  
11 conduct does not violate clearly established statutory or  
12 constitutional rights of which a reasonable person would have  
13 known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The rule  
14 of qualified immunity protects "all but the plainly incompetent or  
15 those who knowingly violate the law." Saucier v. Katz, 533 U.S.  
16 194, 202 (2001) (quoting Malley v. Briggs, 475 U.S. 335, 341  
17 (1986)).

18 The Court need not reach the question of qualified immunity  
19 because Plaintiff presents no evidence of wrongdoing by Mr.  
20 Davidson. Plaintiff makes § 1983 and state law claims of false  
21 arrest, false imprisonment and malicious prosecution by Defendant  
22 Davidson in violation of the Fourth Amendment. Plaintiff also  
23 claims that Mr. Davidson withheld exculpatory evidence during the  
24 criminal proceedings in violation of Plaintiff's due process  
25 rights. Third Am. Compl. ¶¶ 187-93. Plaintiff's claims are based  
26 on allegations that Defendant Davidson submitted a false  
27 declaration in support of the arrest warrant, fabricated evidence,  
28 and withheld exculpatory evidence. There is no evidence from which

1 a jury could reasonably infer that Mr. Davidson's declaration was  
2 false, that he fabricated evidence or that he withheld exculpatory  
3 evidence during the criminal proceedings. Plaintiff's conclusory  
4 statements and hypotheses do not constitute evidence.

5 Plaintiff contends that Mr. Davidson's declaration was false  
6 because it referred to Mr. Potts' August, 2000 report which was  
7 false. Mr. Davidson's declaration described Mr. Potts' report,  
8 including language from the report. County Defs.' RJN Ex. A at 20;  
9 Potts' Decl. Ex. A. Plaintiff has not submitted evidence that Mr.  
10 Davidson knew of the alleged falsity of Mr. Potts' report at the  
11 time of his May, 2002 declaration.

12 Plaintiff alleges that Mr. Davidson misrepresented Plaintiff's  
13 alibi in the arrest warrant declaration by including statements  
14 suggesting that Plaintiff had said that he was with two individuals  
15 at the same time on the evening before the discovery of the  
16 murders, and that the two individuals said they had not been  
17 together. Plaintiff claims that he told Mr. Davidson that he spent  
18 time with these two individuals that evening, not that both  
19 individuals were with him together. In his declaration, Mr.  
20 Davidson did not state that Plaintiff said that he was actually  
21 with these two individuals at the same time that evening. County  
22 Defs.' RJN Ex. A at 17, 19-20. At most, Mr. Davidson reported that  
23 the two individuals had been asked whether they were with Plaintiff  
24 at the same time. This does not amount to evidence that the arrest  
25 warrant declaration was false.

26 Plaintiff also asserts that Mr. Davidson fabricated the date  
27 of Debbie Becker's statements in his arrest warrant declaration.  
28 Plaintiff argues that Mr. Davidson falsely declared that she made

1 certain statements in October, 1998. In July, 1999, the Sheriff's  
2 Department issued a press release announcing a reward in the case.  
3 Plaintiff hypothesizes that Mr. Davidson lied about the date of Ms.  
4 Becker's first statements in order to misrepresent that she made  
5 them before the reward was announced. This hypothesis is  
6 unsupported.

7 Plaintiff further asserts that statements by Mr. Lewis Sr.  
8 described in Mr. Davidson's declaration were not reliable because  
9 Mr. Lewis Sr. later made inconsistent statements in his interview  
10 with Ms. Cook. But there is no evidence that Mr. Davidson knew at  
11 the time his declaration was presented to the magistrate in May,  
12 2002 that the statements by Mr. Lewis Sr. were unreliable; Mr.  
13 Lewis Sr. made the inconsistent statements after 2002.

14 Plaintiff has failed to present any evidence that Mr. Davidson  
15 engaged in conduct resulting in Plaintiff's false arrest, false  
16 imprisonment or malicious prosecution. Nor is there evidence from  
17 which a jury could reasonably infer such misconduct. Accordingly,  
18 summary judgment is granted as to all § 1983 and state law claims  
19 against Mr. Davidson. Further, without evidence of Mr. Davidson's  
20 misconduct, there is likewise no evidence that Mr. Davidson  
21 intentionally or negligently inflicted emotional distress upon  
22 Plaintiff or denied Plaintiff a fair trial or due process. Thus,  
23 summary judgment is granted as to all federal and state law claims  
24 against Mr. Davidson.<sup>3</sup>

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25  
26 <sup>3</sup> County Defendants also assert immunity for Mr. Davidson from  
27 state law claims under California Civil Code § 43.55 and California  
28 Penal Code § 847(b)(1). California Civil Code § 43.55 provides  
immunity from liability to "any peace officer who makes an arrest  
pursuant to a warrant of arrest regular upon its face if the peace  
officer in making the arrest acts without malice and in the

1 C. Absolute Immunity for Defendant Potts

2 Mr. Potts argues that he is entitled to absolute immunity for  
3 his testimony at the preliminary hearing and his alleged  
4 involvement in withholding material evidence. Plaintiff appears to  
5 contend that there is no immunity for conspiracies where conduct in  
6 addition to the false testimony is challenged. Neither party is  
7 entirely correct.

8 A witness has absolute immunity from civil liability for his  
9 or her testimony, including false testimony, and from allegations  
10 of conspiracy to commit perjury. Franklin v. Terr, 201 F.3d 1098,  
11 1099, 1101-02 (9th Cir. 2000); see Briscoe v. LaHue, 460 U.S. 325,  
12 329-31 (1983). But this immunity is limited. It "does not shield  
13 non-testimonial conduct" or shield conduct not "inextricably tied"  
14 to the testimony, such as fabricating or tampering with evidence,  
15 or "effort[s] to keep certain witnesses or physical evidence from  
16 the opposing party." Paine v. City of Lompoc, 265 F.3d 975, 981-82  
17 (9th Cir. 2001); see Cunningham v. Gates, 229 F.3d 1271, 1291 (9th  
18 Cir. 2000). A witness is not "insulated from liability" for all of  
19 his or her conduct simply because of his or her role as a witness.  
20 Paine 265 F.3d at 982.

21 Therefore, to the extent that Plaintiff's claims are based on  
22 Mr. Potts' testimony at the preliminary hearing, even if that

23 \_\_\_\_\_  
24 reasonable belief that the person arrested is the one referred to  
25 in the warrant." California Penal Code § 847(b)(1) provides peace  
26 officers and law enforcement officers with immunity from liability  
27 for false arrest or false imprisonment when "[t]he arrest was  
28 lawful, or the peace officer, at the time of the arrest, had  
reasonable cause to believe the arrest was lawful." There is no  
evidence showing that Mr. Davidson acted with malice or without a  
reasonable belief that the arrest was lawful. Thus, Mr. Davidson  
would also be immune from Plaintiff's state law claims.

1 testimony was false as Plaintiff alleges, Mr. Potts is entitled to  
2 absolute immunity. Mr. Potts is also entitled to absolute immunity  
3 from allegations of a § 1983 conspiracy to commit perjury during  
4 his testimony. Mr. Potts is not, however, entitled to absolute  
5 immunity from Plaintiff's § 1983 claims for any non-testimonial  
6 conduct or conduct not "inextricably tied" to his testimony at the  
7 preliminary hearing, including allegations of falsifying his  
8 August, 2000 report or withholding potentially exculpatory  
9 evidence, or conspiring to falsify or withhold evidence.

10       There may be disputed evidence as to Plaintiff's § 1983 false  
11 arrest and imprisonment, malicious prosecution and conspiracy  
12 claims against Mr. Potts based on the allegations that he falsified  
13 his report and withheld exculpatory evidence. However, Plaintiff  
14 cannot pursue the § 1983 false arrest and imprisonment and  
15 malicious prosecution claims because collateral estoppel applies,  
16 as discussed below. Further, any disputed evidence regarding Mr.  
17 Potts' conversations with Mr. Casey, even viewed in the light most  
18 unfavorable to Mr. Potts, is insufficient to surmount summary  
19 judgment on the § 1983 conspiracy claim against him. See Fonda v.  
20 Gray, 707 F.2d 435, 438 (9th Cir. 1983). There, the Ninth Circuit  
21 affirmed a grant of summary judgment on the plaintiff's § 1983  
22 conspiracy claim when the plaintiff failed to provide sufficient  
23 evidence showing that the defendants had a "meeting of the minds"  
24 to violate her civil rights. Id. "Mere acquiescence" is  
25 insufficient to show the requisite agreement. Id. The evidence  
26 that Defendants Potts and Casey communicated, without more, is  
27 insufficient to amount to evidence that they agreed to violate  
28 Plaintiff's rights. Accordingly, summary judgment is granted on

1 Plaintiff's § 1983 conspiracy claim against Defendant Potts.

2 II. Collateral Estoppel Regarding Probable Cause to Arrest and  
3 Probable Cause to Prosecute

4 Plaintiff must establish lack of probable cause to arrest to  
5 support his § 1983 claims based on false arrest and imprisonment  
6 and a lack of probable cause to prosecute to support his § 1983  
7 malicious prosecution claim. See Cabrera v. City of Huntington  
8 Park, 159 F.3d 374, 380 (9th Cir. 1998) (false arrest and  
9 imprisonment); Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th  
10 Cir. 2004) (malicious prosecution).

11 County Defendants contend that collateral estoppel bars  
12 Plaintiff from relitigating probable cause to arrest because  
13 findings of probable cause were made by the state court judge, at  
14 the second preliminary hearing to hold Plaintiff for trial<sup>4</sup> and in  
15 rulings on various motions in the criminal proceedings. Plaintiff  
16 responds that, because a magistrate's finding of probable cause at  
17 a preliminary hearing to hold a defendant for trial is not  
18 necessarily a finding that there was probable cause to arrest,  
19 litigation of probable cause to arrest is not barred.

20 County Defendants contend that collateral estoppel likewise  
21 bars Plaintiff from relitigating probable cause to prosecute.

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22  
23 <sup>4</sup> The probable cause finding to hold Plaintiff at the first  
24 preliminary hearing in November, 2002 is not at issue here. In  
25 June, 2004, the trial court granted Plaintiff's non-statutory  
26 motion to dismiss the first complaint. County Defs.' RJN Ex. G;  
27 Pl.'s Opp'n Ex. 39. Based on Mr. Potts' undisclosed bench notes,  
28 the undisclosed memorandum from Mr. Potts to Mr. Casey regarding  
the bench notes and Mr. Potts' testimony at the preliminary  
hearing, the court held that there was a reasonable probability  
that the magistrate would not have found probable cause to hold  
Plaintiff to answer at the first preliminary hearing had all of  
these facts been known. County Defs.' RJN Ex. G at 32; Pl.'s Opp'n  
Ex. 39 at 32.

1 Plaintiff did not respond to this basis for summary judgment in his  
2 reply.<sup>5</sup>

3 "Collateral estoppel precludes relitigation of issues argued  
4 and decided in prior proceedings." Diruzza v. County of Tehama,  
5 323 F.3d 1147, 1152 (9th Cir. 2003) (quoting Lucido v. Superior  
6 Court, 51 Cal. 3d 335, 341 (1990)). Under California law,  
7 collateral estoppel (or issue preclusion) is applied if (1) the  
8 issue sought to be precluded is identical to that decided in a  
9 former proceeding; (2) the issue was actually litigated in the  
10 former proceeding; (3) the issue was necessarily decided in the  
11 former proceeding; (4) the decision in the former proceeding was  
12 final and on the merits; and (5) the party to be estopped was a  
13 party to the former proceeding or in privity with a party to the  
14 former proceeding. Id.

15 A probable cause determination at a preliminary hearing is  
16 considered a final judgment on the merits because the defendant can  
17 immediately appeal the determination. See Haupt v. Dillard,

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19  
20 <sup>5</sup> Mr. Potts did not plead collateral estoppel as an  
21 affirmative defense in his answer to Plaintiff's complaint or in  
22 his summary judgment motion. Generally, the failure to plead an  
23 affirmative defense in the responsive pleading waives the defense.  
24 Fed. R. Civ. P. 8(c)(1). However, County Defendants asserted  
25 collateral estoppel in their summary judgment motion. (Docket No.  
26 182.) Plaintiff responded to it and did not claim waiver or  
27 prejudice. Pl.'s Opp'n 31-33. Although Mr. Potts did not move for  
28 summary judgment based on collateral estoppel or join in County  
29 Defendants' motion, a federal court may dismiss claims as to non-  
30 moving defendants where such defendants are in a position similar  
31 to that of moving defendants, or where the claims against all  
32 defendants are integrally related. See Abagninin v. AMVAC Chem.  
33 Corp., 545 F.3d 733, 742-43 (9th Cir. 2008); Silverton v.  
34 Department of the Treasury, 644 F.2d 1341, 1345 (9th Cir. 1981).  
35 Thus, the Court may grant summary judgment on the § 1983 false  
36 arrest and imprisonment and malicious prosecution claims against  
37 Defendant Potts.



1 17 F.3d 285, 288-89 (9th Cir. 1994);<sup>6</sup> McCutchen v. City of  
2 Montclair, 73 Cal. App. 4th 1138, 1145-46 (1999). In California,  
3 an accused can immediately appeal the determination by filing a  
4 motion to set aside the preliminary hearing under California Penal  
5 Code § 995 and then obtain review of the decision on this motion by  
6 filing a writ of prohibition under California Penal Code § 999a.  
7 See McCutchen, 73 Cal. App. 4th at 1146. Though Haupt only  
8 requires that a determination be immediately appealable for the  
9 purposes of finality, Plaintiff actually appealed the determination  
10 through a motion to set aside the preliminary hearing under  
11 California Penal Code § 995. See County Defs.’ RJN Ex. X, Ex. C at  
12 34; see also McCutchen, 73 Cal. App. 4th at 1146. This motion was  
13 denied, thereby affirming the probable cause determination.

14 A determination cannot be considered final when “the decision  
15 to hold a defendant to answer was made on the basis of fabricated  
16 evidence presented at the preliminary hearing or as the result of  
17 other wrongful conduct by state or local officials.” Awabdy, 368  
18 F.3d at 1068. Awabdy is not applicable here because the decision  
19 to hold Plaintiff to answer at the second preliminary hearing was  
20 not based on fabricated evidence or other wrongful conduct. Mr.  
21 Potts’ allegedly false and misleading testimony was made during the  
22 first preliminary hearing and the prosecution did not offer Mr.  
23 Potts as a witness in the second preliminary hearing. By the time  
24 of the second preliminary hearing, Plaintiff had the opportunity to  
25 review the exculpatory evidence that had been withheld at the time

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26  
27 <sup>6</sup> The Haupt court applied Nevada law of collateral estoppel.  
28 17 F.3d at 288. Nevada’s collateral estoppel law is identical to  
California’s. See McCutchen v. City of Montclair, 73 Cal. App. 4th  
1138, 1145 (1999).

1 of the first preliminary hearing: Mr. Potts' bench notes and the  
2 memorandum from Mr. Potts to Mr. Casey. Thus, the probable cause  
3 determination at Plaintiff's second preliminary hearing serves as a  
4 final judgment on the issue. Haupt, 17 F.3d at 288-89.

5 A. False Arrest and Imprisonment Claims

6 A finding of probable cause to hold at a preliminary hearing  
7 may bar relitigation of probable cause to arrest in a subsequent  
8 civil action if the evidence at the time the arrest warrant issued  
9 is the same as the evidence presented at the preliminary hearing.  
10 See Haupt, 17 F.3d at 288-89.

11 The plaintiff in Haupt argued that a probable cause finding at  
12 a preliminary hearing was different from the probable cause to  
13 arrest. Id. The court concluded that, because the plaintiff did  
14 not identify any evidence presented at the preliminary hearing that  
15 was not available to the officers when they obtained the arrest  
16 warrant, the finding of probable cause at the preliminary hearing  
17 was identical to the issue of probable cause to arrest. Id. A  
18 finding of probable cause at a preliminary hearing would not be  
19 conclusive as to whether there was probable cause to arrest only if  
20 additional evidence, discovered after the arrest, had been  
21 presented at the preliminary hearing. Id.

22 Here, as in Haupt, Plaintiff points to no new inculpatory  
23 evidence presented at the second preliminary hearing that was not  
24 presented by the County Defendants when they obtained his arrest  
25 warrant. Further, the allegedly false information in the arrest  
26 warrant declaration was not proffered at the second preliminary  
27 hearing and all of the exculpatory information was presented.

28 Citing Schmidlin v. City of Palo Alto, 157 Cal. App. 4th 728

1 (2007), Plaintiff urges this Court to not rely on Haupt. In  
2 Schmidlin, the court stated that the "issue of probable cause to  
3 arrest (or sufficient cause to detain) is simply not the same as --  
4 let alone identical to -- that of sufficient cause to hold the  
5 defendant for trial." Id. at 767 (citation omitted). However, the  
6 court stated that "an order . . . denying a motion to suppress  
7 evidence on the ground that officers detained the defendant  
8 unlawfully" provides a probable cause determination identical to a  
9 probable cause determination at arrest. Id. at 768.

10 Such an order exists here. Before his second preliminary  
11 hearing, the state court denied Plaintiff's motion to suppress  
12 evidence obtained pursuant to a May 8, 2002 search warrant. See  
13 County Defs.' RJN, Ex. W at 4; County Defs.' RJN Ex. F 1720:3-17.  
14 Probable cause for the search warrant was supported by the training  
15 and experience of the detective who applied for the warrant, the  
16 incorporation by reference of the declaration in support of the  
17 arrest warrant leading to Plaintiff's initial arrest, and the  
18 applying detective's knowledge that Plaintiff lived at two  
19 different addresses. County Defs.' RJN Ex. W at 4. Plaintiff  
20 argued that the search warrant was defective because the arrest  
21 warrant was not supported by sufficient probable cause given the  
22 falsities contained in Mr. Davidson's declaration in support of the  
23 arrest warrant. Id. at 19. Under Schmidlin, the denial of  
24 Plaintiff's suppression motion after all of the challenged facts  
25 were litigated provides a determination of probable cause identical  
26 to the determination of probable issue for arrest. Even under

27

28

1 Schmidlin,<sup>7</sup> collateral estoppel would apply.

2       Thus, the determination that the unchallenged inculpatory  
3 evidence at the second preliminary hearing amounted to probable  
4 cause to hold for trial, even in the light of the exculpatory  
5 evidence, amounts to a determination that the same inculpatory  
6 evidence was sufficient to support the arrest warrant. Haupt, 17  
7 F.3d at 289. Collateral estoppel therefore bars Plaintiff from  
8 relitigating the issue of probable cause to arrest, and summary  
9 judgment must be granted on Plaintiff's § 1983 false arrest and  
10 imprisonment claims against Mr. Potts.

11       B. Malicious Prosecution Claim

12       Under the analysis discussed above, because the state court  
13 proceedings in the second preliminary hearing provided a final  
14 determination that there was probable cause to prosecute,  
15 collateral estoppel bars Plaintiff from relitigating this issue in  
16 connection with his malicious prosecution claim. Plaintiff  
17 provided no argument or evidence disputing County Defendants'  
18 argument on this point. Summary judgment is therefore granted as  
19 to Plaintiff's § 1983 claim for malicious prosecution against Mr.  
20 Potts.

21       III. Entity Liability for 42 U.S.C. § 1983 Claims

22       In their reply, the County Defendants assert for the first  
23 time that under Monell v. Dep't of Social Services of City of New  
24 York, 436 U.S. 658 (1978), Plaintiff has failed to present evidence

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25  
26       <sup>7</sup> The Court does not decide whether Schmidlin is controlling  
27 California law. Schmidlin conflicts with McCutchen, and the  
28 California Supreme Court has not spoken on this issue. Because the  
McCutchen court primarily relies upon Haupt for its analysis,  
McCutchen offers no support for Plaintiff's position. See  
McCutchen, 73 Cal. App. 4th at 1145-47.

1 of liability against the entity County Defendants (the County,  
2 Sheriff's Department and District Attorney's Office) for his § 1983  
3 claims. At the hearing, the Court provided Plaintiff with the  
4 opportunity to submit a supplemental brief responding to the County  
5 Defendants' Monell argument. (Docket No. 220.) Plaintiff did not  
6 do so.

7 Local governments are "persons" subject to liability under  
8 § 1983 only where an official policy or custom causes a  
9 constitutional violation. See Monell, 436 U.S. at 690-91. They  
10 may not be held vicariously liable for the unconstitutional acts of  
11 their employees under the theory of respondeat superior. See Board  
12 of County Comm'rs v. Brown, 520 U.S. 397, 403 (1997); Monell, 436  
13 U.S. at 691; Fuller v. City of Oakland, 47 F.3d 1522, 1534 (9th  
14 Cir. 1995). "Instead, it is when execution of a government's  
15 policy or custom, whether made by its lawmakers or by those whose  
16 edicts or acts may fairly be said to represent official policy,  
17 inflicts the injury that the government as an entity is responsible  
18 under § 1983." Monell, 436 U.S. at 694.

19 Plaintiff has not identified or presented evidence of an  
20 official policy or custom of any entity Defendant that caused the  
21 alleged constitutional violations. Summary judgment is granted as  
22 to Plaintiff's § 1983 claims against the entity Defendants.

23 IV. Claims under 42 U.S.C. § 1985

24 Plaintiff appears to assert a conspiracy claim under both  
25 § 1985(3) for deprivation of Plaintiff's rights and § 1985(2) for  
26 obstruction of justice in state court. See Third Am. Compl.  
27 ¶¶ 176-79. Mr. Potts contends that Plaintiff has not sufficiently  
28 plead a conspiracy claim under § 1985(3) because Plaintiff does not

1 allege or provide evidence that the conspiracy was based on his  
2 race or gender. Plaintiff did not respond to Mr. Potts' argument  
3 in his opposition.

4 To state a claim under § 1985(3), a plaintiff must allege a  
5 conspiracy to deprive him or her of a right, motivated by racial or  
6 other class-based discrimination, and the plaintiff must be a  
7 member of the protected class. McCalden v. Cal. Library Ass'n, 955  
8 F.2d 1214, 1223 (9th Cir. 1990), amended on denial of reh'g and reh'g  
9 en banc (9th Cir. 1992); RK Ventures, Inc. v. City of Seattle, 307  
10 F.3d 1045, 1056 (9th Cir. 2002).

11 "Section 1985(2) contains two clauses that give rise to  
12 separate causes of action." Portman v. County of Santa Clara, 995  
13 F.2d 898, 908 (9th Cir. 1993). The first clause concerns access to  
14 federal courts and the second clause concerns access to state or  
15 territorial courts. Id. at 909. Plaintiff's § 1985(2) claim is  
16 based on the alleged obstruction of justice in state court. Like a  
17 § 1985(3) claim, a claim under § 1985(2) for obstruction of justice  
18 in state court requires allegations of class-based discrimination.  
19 See id.

20 Plaintiff's conspiracy claims under § 1985(3) and § 1985(2)  
21 fail as a matter of law because he has not alleged or provided  
22 evidence of discrimination based on his membership in a protected  
23 class. The Court grants summary judgment against Plaintiff on his  
24 § 1985 claims against all Defendants.<sup>8</sup>

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25  
26  
27 <sup>8</sup> Though County Defendants did not move for summary judgment  
28 on Plaintiff's § 1985 claim, summary judgment is nonetheless  
proper. See n.4 above.

1 V. State Law Defamation Claim

2 After Plaintiff was acquitted, a local radio station  
3 interviewed Plaintiff's counsel and his mother. Ms. Cook called  
4 the radio station during this interview and made statements that  
5 were broadcast. Cook Decl. ¶¶ 4-8. In his defamation claim,  
6 Plaintiff challenges two statements by Ms. Cook. First, Ms. Cook  
7 stated that Plaintiff was not found innocent and that "finding a  
8 person not guilty, does not mean they are innocent." Third Am.  
9 Compl. ¶ 87 (Docket No. 49.) No defamation claim can be based on  
10 this statement because it is true. See Cal. Civil Code § 46  
11 (slander must be false). Plaintiff was not "found innocent"-- he  
12 was, in fact, found not guilty.

13 Second, Ms. Cook stated that Plaintiff took a valid polygraph  
14 examination and "failed it miserably, the worst results that [the]  
15 Department of Justice Examiner had ever seen in her career." Third  
16 Am. Compl. ¶ 87. Plaintiff asserts that Ms. Cook's statement that  
17 Plaintiff had failed a valid exam was false because the polygraph  
18 exam administered to Plaintiff was invalid and the polygraph  
19 examiner and Ms. Cook knew it. Plaintiff has not, however,  
20 submitted evidence that Ms. Cook had knowledge of the alleged  
21 invalidity of the exam. Plaintiff's conclusory statements and  
22 hypotheses are not evidence.

23 No defamation claim can be based on Ms. Cook's statement  
24 reporting the examiner's opinion because there is no evidence that  
25 Ms. Cook's statement was false. The evidence shows that the  
26 examiner did make that statement of opinion to the prosecutors, see  
27 Gomez Decl. ¶ 4; Cook Decl. ¶ 8; Allen Decl. ¶ 3, and Plaintiff  
28 presents no evidence that she did not. Ms. Cook was not providing

1 her own opinion, but describing the examiner's opinion, as stated  
2 to her.

3 Plaintiff's defamation claim is summarily adjudicated in favor  
4 of Defendant Cook.<sup>9</sup>

5 VI. Entity Liability for State Law Claims

6 Plaintiff asserts various state law claims against the entity  
7 County Defendants, apparently under a respondeat superior theory.

8 California Government Code § 815.2(b) states, "Except as  
9 otherwise provided by statute, a public entity is not liable for an  
10 injury resulting from an act or omission of an employee of the  
11 public entity where the employee is immune from liability." Thus,  
12 a public employer is immune from liability if its employee is  
13 immune under § 821.6. See, e.g., Gillan v. City of San Marino, 147  
14 Cal. App. 4th 1033, 1050 (2007).

15 To the extent that individual County Defendants Casey, Jacobs,  
16 Cook, and Passalacqua are granted immunity under California  
17 Government Code § 821.6, the entity County Defendants are also  
18 immune from liability for claims based on their conduct. See Cal.  
19 Gov. Code § 815.2(b). The entity County Defendants cannot be  
20 liable for Defendants Davidson's and Casey's conduct on Plaintiff's  
21 state law civil rights, false arrest and imprisonment and emotional  
22 distress claims because Plaintiff failed to show evidence of Mr.  
23 Davidson's and Mr. Casey's liability. Accordingly, summary  
24 judgment is granted as to all state law claims against the entity  
25 County Defendants.

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26  
27 <sup>9</sup> Because the defamation claim is summarily adjudicated in  
28 favor of Defendant Cook, the Court does not examine County  
Defendants' state law immunity arguments with regard to that claim.



1 VII. Evidentiary Objections

2 To the extent that the Court relied upon evidence to which  
3 Defendants object, those objections are overruled. Defendants  
4 object to several of Plaintiff's exhibits on the basis of  
5 authentication and foundation. The Court notes that almost all of  
6 Plaintiff's exhibits are documents that were produced by Defendants  
7 to Plaintiff during discovery. See Lerman Decl. (Docket No. 211.)  
8 Defendants have not suggested any reason to believe that the  
9 documents they produced are not authentic.

10 To the extent the Court did not rely on evidence to which the  
11 parties objected, the objections are overruled as moot.

12 CONCLUSION

13 For the foregoing reasons, Mr. Potts' motion for summary  
14 judgment (Docket Nos. 171 & 183) and the County Defendants' motion  
15 for summary judgment (Docket Nos. 160 & 182) are GRANTED.

- 16 1. Summary judgment is granted as to all claims against  
17 Defendants Jacobs and Passalacqua based on absolute  
18 immunity under federal law and immunity under California  
19 Government Code § 821.6, as well as lack of evidence.
- 20 2. Summary judgment is granted as to all claims against  
21 Defendant Casey based on absolute immunity under federal  
22 law, immunity under California Government Code § 821.6  
23 and lack of evidence.
- 24 3. Summary judgment is granted as to all claims against  
25 Defendant Cook. To the extent that Plaintiff's claims  
26 are based on Defendant Cook's conduct related to the  
27 second complaint filed against Plaintiff and witness  
28 interviews during the criminal proceedings, summary

1 judgment is granted as to those claims based on absolute  
2 immunity and lack of evidence. The defamation claim is  
3 summarily adjudicated in favor of Defendant Cook based on  
4 a lack of evidence.

5 4. Summary judgment is granted as to the § 1983 and state  
6 law claims against Defendant Davidson because there is no  
7 evidence to support them. Mr. Davidson is also entitled  
8 under both California Civil Code § 43.55 and California  
9 Penal Code § 847(b)(1) to immunity from liability for  
10 Plaintiff's state law claims.

11 5. To the extent that Plaintiff's § 1983 claims against Mr.  
12 Potts are based on Mr. Potts' testimony at the  
13 preliminary hearing, summary judgment is granted as to  
14 those claims based on absolute immunity. There is no  
15 evidence to support Plaintiff's § 1983 conspiracy claim  
16 against Mr. Potts. Collateral estoppel bars Plaintiff  
17 from relitigating probable cause to arrest and probable  
18 cause to prosecute, which prevents him from pursuing his  
19 § 1983 claims for false arrest and imprisonment and  
20 malicious prosecution. Summary judgment is therefore  
21 granted as to Plaintiff's § 1983 claims against Mr.  
22 Potts.

23 6. Summary judgment is granted as to Plaintiff's § 1983  
24 claims against the entity County Defendants under Monell.

25 7. Summary judgment is granted as to Plaintiff's state law  
26 claims against the entity County Defendants under  
27 California Government Code § 815.2(b) (for claims based  
28 on the conduct of Casey, Jacobs, Cook and Passalacqua)

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and for lack of evidence.

8. Summary judgment is granted as to Plaintiff's §§ 1985(2) and 1985(3) conspiracy claims against all Defendants for failure to provide evidence of class-based discrimination.

9. Defendants' objections to Plaintiff's evidence (Docket No. 207) are overruled. Plaintiff's motion to reschedule the summary judgment hearing and reopen discovery (Docket No. 211) is denied as moot.

IT IS SO ORDERED.

Dated: September 22, 2009



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CLAUDIA WILKEN  
United States District Judge