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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DAVID MARTIN,

Plaintiff,

vs.

COUNTY OF SAN DIEGO; SAN DIEGO
COUNTY SHERIFF'S DEPARTMENT;
DETECTIVE ROLAND MAUS; DEPUTY
DISTRICT ATTORNEY ELIZABETH
SILVA; WILIAM A. PHILLIPS; and
ANDY'S ORCHIDS,

Defendants.

CASE NO. 03cv1788-IEG(WMc)

**ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
ADJUDICATION; GRANTING IN
PART AND DENYING IN PART
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Following remand of this case from the Ninth Circuit Court of Appeals, Plaintiff David Martin and Defendants Roland Maus ("Det. Maus") and the County of San Diego have filed cross-motions for summary judgment/adjudication. Both parties filed opposition and reply briefs regarding the cross-motions.

A hearing was held before Chief Judge Irma E. Gonzalez on August 4, 2009. Upon consideration of the arguments presented by the parties, for the reasons set forth herein, the Court denies Plaintiff's motion for summary adjudication and grants in part and denies in part Defendants' motion for summary judgment.

1 *Factual and Procedural Background*

2 The underlying facts regarding this case are fully set forth in this Court’s March 17, 2006
3 order and will be re-stated herein only as necessary in the discussion of the parties’ arguments. In
4 short, Plaintiff’s complaint arises from the May 1, 2002 execution of a search warrant, which
5 Defendant Maus procured the previous day, calling for “sufficient hair, blood, and saliva samples
6 for comparison purposes.” Det. Maus obtained the search warrant as part of his investigation of a
7 December 29, 2000 robbery which occurred at William Phillips’ business in Encinitas, California,
8 Andy’s Orchids.

9 Plaintiff’s complaint alleged nine causes of action against the County of San Diego, San
10 Diego County Sheriff’s Department, Det. Maus, District Attorney Elizabeth Silva, William
11 Phillips, and Andy’s Orchids. This Court initially granted summary judgment in favor of all the
12 County Defendants on all of Plaintiff’s substantive claims¹ on March 17, 2006. The Court found
13 none of the alleged misrepresentations or omissions from the search warrant affidavit were
14 material, and further found that even if all the identified misrepresentations and omissions were
15 considered, the totality of circumstances supported a finding there was probable cause to issue the
16 warrant. Based thereon, the Court dismissed all Plaintiff’s federal and state law claims against the
17 individual County Defendants as well as the County of San Diego. By separate order filed on
18 March 30, 2006, the Court denied Defendants Phillips and Andy’s Orchids’ motion for summary
19 judgment. Plaintiff, however, settled and dismissed his claims against these Defendants on
20 August 2, 2006.

21 The Ninth Circuit reversed this Court’s grant of summary judgment in favor of the County
22 and Det. Maus, but affirmed the grant of summary judgment in favor of District Attorney Silva.
23 The court found Det. Maus omitted four pieces of material information from his affidavit: (1)
24 Phillips had a motive to lie and falsely accuse Plaintiff; (2) Det. Maus knew federal agents
25 believed in Plaintiff’s credibility and honesty; (3) Plaintiff claimed he had potentially exculpatory
26 phone records placing him 190 miles from the scene of the crime on the morning of the burglary;

27
28 ¹ The Court denied summary judgment on Plaintiff’s claim for injunctive relief, for
destruction of the DNA samples and photographs in the County’s possession, but the Court
ultimately granted summary judgment on that claim by order filed on July 18, 2006.

1 and (4) Det. Maus knew, based on statements from federal agents, that Plaintiff displayed no
2 visible signs of injury one week after the burglary, despite Phillips' contention that he had drawn
3 significant amounts of blood during his altercation with the burglar. The Ninth Circuit determined
4 that an affidavit which included the omitted material would *not* have established probable cause,
5 and thus remanded for further proceedings as against the County and Det. Maus.

6 Both parties now, again, move for summary adjudication or summary judgment.

7 **Summary Judgment Standard**

8 Pursuant to Fed. R. Civ. Proc. 56, a party may move for summary judgment on all or part
9 of the claims in the case. Summary judgment is appropriate where the pleadings and other
10 evidence show "that there is no genuine issue as to any material fact and that the movant is
11 entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c); Celotex Corp. v. Catrett, 477
12 U.S. 317, 322 (1986). A material issue of fact is a question the trier of fact must answer to
13 determine the rights of the parties under the applicable substantive law. Anderson v. Liberty
14 Lobby, Inc., 477 U.S. 242, 248 (1986).

15 A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict
16 for the nonmoving party." Id. at 248. Summary judgment may be granted in favor of a defendant
17 on an ultimate issue of fact where the defendant carries its burden of "pointing out to the district
18 court that there is an absence of evidence to support the nonmoving party's case." Celotex, 477
19 U.S. at 325; see Nissan Fire & Marine Ins. Co. v. Fritz Cos., 210 F.3d 1099, 1106 (9th Cir. 2000).

20 The moving party bears "the initial responsibility of informing the district court of the basis
21 for its motion." Celotex, 477 U.S. at 323. To satisfy this burden, the moving party must
22 demonstrate that no genuine issue of material fact exists for trial. Id. at 322. However, the
23 moving party is not required to negate those portions of the non-moving party's claim on which
24 the non-moving party bears the burden of proof. Id. at 323. To withstand a motion for summary
25 judgment, the non-movant must then show that there are genuine factual issues which can only be
26 resolved by the trier of fact. Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736, 738 (9th Cir.
27 2000) (citing Fed. R. Civ. P. 56; Celotex, 477 U.S. at 323).

28 The nonmoving party may not rely on the pleadings but must present specific facts creating

1 a genuine issue of material fact. Nissan Fire, 210 F.3d at 1103. The inferences to be drawn from
2 the facts must be viewed in a light most favorable to the party opposing the motion, but conclusory
3 allegations as to ultimate facts are not adequate to defeat summary judgment. Gibson v. County of
4 Washoe, Nev., 290 F.3d 1175, 1180 (9th Cir. 2002). The Court is not required “to scour the record
5 in search of a genuine issue of triable fact,” Keenan v. Allan, 91 F.3d 1275, 1279 (9th Cir. 1996),
6 but rather “may limit its review to the documents submitted for purposes of summary judgment
7 and those parts of the record specifically referenced therein.” Carmen v. San Francisco Unified
8 Sch. Dist., 237 F.3d 1026, 1030 (9th Cir. 2001).

9 Discussion

10 Plaintiff moves for summary adjudication of Defendants’ liability under 42 U.S.C. § 1983
11 as well as each state law cause of action. Plaintiff argues the Ninth Circuit’s decision, finding that
12 Det. Maus omitted material facts from the search warrant affidavit and further finding that the
13 corrected affidavit would not have established probable cause, requires a finding of liability
14 against both Maus and the County of San Diego on each of Plaintiff’s causes of action.
15 Defendants, by contrast, once again move for summary judgment on the basis of qualified
16 immunity. Defendants argue that notwithstanding the Ninth Circuit’s finding there were material
17 omissions, and the warrant lacked probable cause, Det. Maus reasonably believed probable cause
18 existed and relied thereon. Defendants also argue Plaintiff has failed to establish there are genuine
19 issues of material fact and they are entitled to judgment on Plaintiff’s state law claims.

20 I. Plaintiff’s Claim under 42 U.S.C. § 1983

21 The first question raised by the parties’ motions is whether Det. Maus is entitled to
22 qualified immunity on Plaintiff’s claims under § 1983. “The principles of qualified immunity
23 shield an officer from personal liability when an officer reasonably believes that his or her conduct
24 complies with the law.” Pearson v. Callahan, ___ U.S. ___, 129 S. Ct. 808, 823 (2009). In
25 determining whether an officer is entitled to qualified immunity, the court generally determines
26 first whether the alleged facts establish the defendant violated a constitutional right, and second
27 whether the right at issue was “clearly established” at the time of the alleged misconduct. Rodis v.
28 City and County of San Francisco, 558 F.3d 964, 968 (9th Cir. 2009) (citing Saucier v. Katz, 53

1 U.S. 194, 201 (2001)).

2 Plaintiff argues Det. Maus is not entitled to qualified immunity and, instead, Plaintiff is
3 entitled to summary adjudication on the issue of liability under § 1983 because the Ninth Circuit
4 determined Det. Maus violated his Fourth Amendment right to be free from unreasonable search
5 and seizure. By contrast, Defendants argue Det. Maus is entitled to qualified immunity on
6 Plaintiff's claim because Det. Maus, at all times, reasonably believed there was probable cause for
7 the warrant.

8 In cases alleging judicial deception in the procurement of a search warrant, in order to
9 establish a violation of the Fourth Amendment under the first prong of the qualified immunity
10 inquiry, the plaintiff must show that "in allegedly omitting relevant information from his affidavit
11 in support of the application for a search warrant ... [the officer] acted 'with deliberate falsehood
12 or reckless disregard for the truth'." Butler v. Elle, 281 F.3d 1014, 1024 (9th Cir. 2002) (quoting
13 United States v. Stanert, 762 F.2d 775, 781 (9th Cir. 1985)). Thus, the Ninth Circuit has articulated
14 the following standard to be applied on summary judgment in cases alleging judicial deception:

15 The plaintiff alleging judicial deception must make a substantial showing of
16 deliberate falsehood or reckless disregard for the truth and establish that but for the
dishonesty, the challenged action would not have occurred.

17 Butler, 281 F.3d at 1024 (quoting Hervey v. Estes, 54 F.3d 784, 788-89 (9th Cir. 1995)). This
18 "deliberate falsehood or reckless disregard for the truth" standard does *not* require plaintiff to
19 demonstrate defendant acted with a subjective intent to mislead. Lombardi v. City of El Cajon,
20 117 F.3d 1117, 1123 (9th Cir. 1997). Where the plaintiff has made a "substantial showing" that the
21 officer intentionally or recklessly omitted the information, "the question of intent or recklessness is
22 a 'factual determination for the trier of fact'." Liston v. County of Riverside, 120 F.3d 965, 974
23 (9th Cir. 1997) (quoting Hervey, 65 F.3d at 791); Butler, 281 F.3d at 1026.

24 With regard to the second prong of the qualified immunity analysis, an officer cannot be
25 said to have acted in an objectively reasonable manner so as to be entitled to qualified immunity
26 where the officer has made *obvious* false misrepresentations or omitted information which was
27 obviously relevant. Lombardi, 117 F.3d at 1126.

28

1 In cases of “outrageous” conduct such as Hervey,² where probable cause is clearly
2 lacking without the false statements, the officer “cannot be said to have acted in an
objectively reasonable manner and the shield of qualified immunity is lost.”

3 Id. “However, in other cases, particularly where omissions are involved, materiality may not have
4 been clear at the time the officer decided what to include in, and what to exclude from, the
5 affidavit. In such cases, when it is not plain that a neutral magistrate would not have issued the
6 warrant, the shield of qualified immunity should not be lost, because a reasonably well-trained
7 officer would not have known that the misstatement or omission would have any effect on issuing
8 the warrant.” Id.

9 In examining the second prong of the qualified immunity analysis, the Ninth Circuit has
10 noted that the where the plaintiff has made a substantial showing of judicial deception, the issue of
11 qualified immunity is “effectively intertwine[d]” with the substantive Fourth Amendment
12 determination. Butler, 281 F.3d at 1024. The court in Butler noted that:

13 “[O]ur cases effectively intertwine the qualified immunity question (1) whether a
14 reasonable officer should have known that he acted in violation of a plaintiff’s
constitutional rights with (2) the substantive recklessness or dishonesty question.

15 Id. Thus, the question of “whether a reasonable officer should have known that he acted in
16 violation of a plaintiff’s constitutional rights” depends upon the answer to the question of whether
17 the defendant acted dishonestly or recklessly. Id.; Liston, 120 F.3d at 974.

18 Defendants cite and rely heavily upon two very recent Ninth Circuit cases, Johnson v.
19 Walton, 558 F.3d 1106, 1111 (9th Cir. 2009), Millander v. County of Los Angeles, 564 F.3d 1143,
20 1148-49 (9th Cir. 2009). Defendants rely upon these cases for the proposition that even though the
21 Ninth Circuit found the search warrant here lacking in probable cause, Det. Maus is nevertheless
22 entitled to qualified immunity if he acted reasonably. Millander, 564 F.3d at 1149 (citing KRL v.
23 Estate of Moore, 512 F.3d 1184, 1189-90 (9th Cir. 2008)) (“When reasonable minds could differ as
24 to the existence of probable cause, approval of a warrant by a government attorney and ratification
25 by a neutral and detached magistrate usually establishes objectively reasonable reliance”);

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27 ²The Court in Lombardi pointed out that in Hervey, “[t]he officer fabricated perceptions of
28 sight, smell and sound, which was ‘unforgivable’” and “[w]ithout the falsely included facts, all
that remained was unproven, uncorroborated and unreliable informant information which no
neutral magistrate could possibly have credited.” 117 F.3d at 1126.

1 Johnson, 558 F.3d at 1111 (quoting Malley v. Briggs, 475 U.S. 335, 344-45 (1986)) (“Officers
2 lose their shield of qualified immunity ‘[o]nly where the warrant application is so lacking in
3 indicia of probable cause as to render official belief in its existence unreasonable.’”) Neither of
4 these cases, however, involve allegations of judicial deception based upon omission of material
5 information from a search warrant affidavit.

6 In both Johnson and Millander, the magistrate had all the relevant information in front of
7 her and determined the information established probable cause, a determination which courts later
8 found to be inappropriate. The very nature of the judicial deception claim asserted by Plaintiff in
9 this case is that Det. Maus, by omitting material information from his affidavit, deprived the
10 neutral magistrate of the opportunity to review all of the relevant facts and determine whether
11 probable cause existed to justify the intrusive search to obtain Plaintiff’s DNA samples. “Courts
12 treat magistrates as more qualified than police officers to make determinations of probable cause.”
13 KRL, 512 F.3d at 1189. Where, as in this case, a plaintiff alleges judicial deception, the Ninth
14 Circuit in Butler, Lombardi, and Liston have defined with particularity the circumstances under
15 which the officer’s actions can be found to have been “reasonable” so as to justify application of
16 qualified immunity. Thus, the Court will apply the standards set forth in Butler, Lombardi, and
17 Liston to determine whether Det. Maus is entitled to qualified immunity.

18 *(a) Application of Legal Standards to Defendants’ Summary Judgment Motion*

19 For the reasons set forth below, the Court DENIES Defendant Maus’ motion for summary
20 judgment based upon qualified immunity. As noted above, the first prong of the qualified
21 immunity analysis requires plaintiff to “make a substantial showing of deliberate falsehood or
22 reckless disregard for the truth and establish that but for the dishonesty, the challenged action
23 would not have occurred.” Butler, 281 F.3d at 1024. The Ninth Circuit’s findings regarding
24 material omissions and lack of probable cause establish, as a matter of law in this case, that “but
25 for the dishonesty, the challenged action would not have occurred.”

26 The only remaining factual question under the first prong, therefore, is whether Det. Maus,
27 in omitting the material information from his affidavit, “acted ‘with deliberate falsehood or
28 reckless disregard for the truth.’” Butler, 281 F.3d at 1024. The Court finds Plaintiff has made a

1 “substantial showing of ... reckless disregard for the truth,” Butler, 281 F.3d at 1024, so as to
2 preclude summary judgment. Det. Maus undisputably knew all of the information which the Ninth
3 Circuit found he should have included in the search warrant. Defendants, in their motion, discuss
4 the relevance of the information and the inferences which Det. Maus could have legitimately
5 drawn from the information within his possession, and argues Det. Maus reasonably could have
6 believed he was not required to include the information in his affidavit.

7 Plaintiff, however, disputes many of the facts cited by Defendants in their reasonable
8 analysis. For example, Defendants argue the purportedly exculpatory telephone bills were never
9 provided to Det. Maus and even Plaintiff’s retained attorney admitted prior to the issuance of the
10 warrant that he knew of no specific facts showing Plaintiff did not commit the burglary.
11 Defendants further argue the bills themselves are not exculpatory as they still show an 8½ hour
12 time frame during which Plaintiff could have traveled from Santa Barbara to Andy’s Orchids in
13 Encinitas to commit the burglary, and then returned to Santa Barbara. In response, however,
14 Plaintiff argues Det. Maus could not have reasonably believed Plaintiff drove from Santa Barbara
15 to Encinitas, carefully selected 266 very rare and exotic orchids from the 250,000 separate plants
16 which were in the greenhouse (in total darkness at 4:30 a.m.), fought with Plaintiff, and then
17 returned to Santa Barbara in less 8½ hours. The parties’ varying arguments regarding the relevant
18 underlying facts demonstrate that there exists a genuine issue of material fact as to whether Det.
19 Maus omitted facts from his affidavit “with deliberate falsehood or reckless disregard for the
20 truth.”

21 Because there is a genuine issue of material fact as to whether Det. Maus omitted facts
22 from his affidavit “with deliberate falsehood or reckless disregard to for the truth,” there is
23 likewise a genuine issue of material fact as to whether Det. Maus acted reasonably under the
24 second prong of the qualified immunity analysis. No reasonable officer could have believed he
25 was acting appropriately in omitting relevant material facts from his affidavit “with deliberate
26 falsehood or reckless disregard for the truth.” Butler, 281 F.3d at 1024. Thus, qualified immunity
27 is not appropriate and the Court DENIES Defendant’s motion.

28

1 (b) Application of Legal Standards to Plaintiff's Motion for Summary Adjudication

2 Applying the legal standards discussed above, the Court also DENIES Plaintiff's motion
3 for summary adjudication of the issue of qualified immunity. Plaintiff incorrectly asserts that the
4 Ninth Circuit found as a matter of law that Det. Maus violated his constitutional rights. The Ninth
5 Circuit found that Det. Maus omitted material facts from his affidavit and if those facts were added
6 to the affidavit there would have been no probable cause for the warrant. In order to establish that
7 Det. Maus violated his rights under the Fourth Amendment, however, Plaintiff must also show the
8 omissions were made "with deliberate falsehood or reckless disregard for the truth." Butler, 281
9 F.3d at 1024. The Ninth Circuit did not address this prong of the constitutional analysis in its
10 decision and, as discussed above with regard to Defendants' motion, there exist genuine issues of
11 material fact as to whether Det. Maus acted "with deliberate falsehood or [in] reckless disregard
12 for the truth." Therefore, the Court DENIES Plaintiff's motion for summary adjudication on the
13 question of Det. Maus' immunity from suit under § 1983.³

14 2. Plaintiff's § 1983 Claims Against the County of San Diego

15 In the original summary judgment order, the Court dismissed Plaintiff's § 1983 claim
16 against the County after finding no constitutional violation. Defendants now move for summary
17 judgment on Plaintiff's § 1983 claim against the County arguing Plaintiff has failed to demonstrate
18 any policy, custom, or practice exists which was the moving force behind the constitutional
19 violation. Plaintiff affirmatively moves for summary adjudication of liability on his claim against
20 the County, again asserting the Ninth Circuit found Det. Maus violated his constitutional rights.

21 A municipality may not be held liable under 42 U.S.C. § 1983 for the acts of its employees

22
23 ³In drafting jury instructions for the trial of Plaintiff's claims, it would appear there is no
24 need to include any instructions to the jury with regard to Det. Maus' qualified immunity
25 argument. In Butler, as noted above, the Ninth Circuit found the qualified immunity question of
26 whether a reasonable officer should have known that he acted in violation of the plaintiff's
27 constitutional rights was effectively intertwined with the substantive recklessness or dishonesty
28 question. Thereafter, the court went on to note that the issue of qualified immunity was not
appropriate for the jury:

26 Because the two issues merge, there need be no separate inquiry at trial, and no
27 discrete instructions, on whether [defendant] Elle is entitled to qualified immunity.

27 If he was reckless or deceitful in preparing the warrant affidavit, then he both
28 violated [plaintiff] Butler's rights and is not entitled to qualified immunity.

28 281 F.3d at 1024. Thus, it is not likely the Court will instruct the jury specifically as to Det.
Maus' qualified immunity defense.

1 based solely upon the employment relationship. City of Oklahoma v. Tuttle, 471 U.S. 808, 818
2 (1985). “[O]nly deprivations visited pursuant to municipal ‘custom’ or ‘policy’ could lead to
3 municipal liability.” Id. Liability will be imposed upon a municipality where the plaintiff
4 establishes a series of similar acts sufficient to establish a “longstanding practice or custom which
5 constitutes the ‘standard operating procedure’ of the local government entity.” Ulrich v. City and
6 County of San Francisco, 308 F.3d 968, 984 (9th Cir. 2004). Alternatively, a plaintiff may
7 establish the liability of municipal defendants

8 (1) by showing that the decision-making official was, as a matter of law, a final policymaking
9 authority ‘whose edicts or acts may fairly be said to represent official policy’ in the area of the
10 decision; ... or (2) by showing that an official with final policymaking authority either delegated
11 that authority to, or ratified the decision of, a subordinate. Id.

12 Regardless of how it is characterized, municipal liability under § 1983 may only arise
13 based upon the municipality’s “official policy.” Pembauer v. City of Cincinnati, 475 U.S. 469,
14 480 (1986). A municipality may not be held liable under § 1983 unless plaintiff can prove the
15 existence of an unconstitutional municipal policy. City of St. Louis v. Praprotnik, 485 U.S. 112,
16 128 (1988).

17 Where liability is based upon a final policy-maker’s ratification of the unconstitutional
18 decision or action of a subordinate, the official involved must have “adopted and expressly
19 approved of the acts of others who caused the constitutional violation.” Trevino v Gates, 99 F.3d
20 911, 920 (9th Cir. 1996). Liability based upon ratification requires “that an official policymaker
21 make a deliberate choice from among various alternatives to follow a particular course of action.
22 Gillette v. Delmore, 979 F.2d 1342, 1348 (9th Cir. 1992). In addition, “there must be an affirmative
23 link between the policy and the particular constitutional violation alleged.” Tuttle, 471 U.S. at 823.
24 “A plaintiff cannot demonstrate the existence of a municipal policy or custom based solely on a
25 single occurrence of unconstitutional action by a non-policymaking employee.” McDade v. West,
26 223 F.3d 1135, 1141 (9th Cir. 2000).

27 (a) Application of Legal Standard to Defendants’ Motion

28 Defendants argue Plaintiff has identified no practice, custom, or policy of the County
encouraging its employees to obtain and execute search warrants without probable cause. In
response (and in his own affirmative motion), Plaintiff argues Det. Maus and the County have

1 maintained throughout this case that Maus acted properly and “in accordance with Department
2 policy.” Plaintiff further argues the County’s failure to discipline Det. Maus, even after the Ninth
3 Circuit reversed and remanded this case, constitutes ratification. Finally, Plaintiff points to Det.
4 Maus’ inclusion in the affidavit of the fact Phillips would not voluntarily allow his DNA to be
5 tested, and argues there exists a County policy of taking into account a person’s reliance on his
6 constitutional right not to voluntarily produce information in determining whether probable cause
7 exists.

8 Plaintiff has not, however, presented any evidence establishing the existence of a County
9 policy, custom or practice which would support his claim under § 1983. Plaintiff has not pointed
10 to any prior instances of San Diego County officers omitting material facts from their affidavits in
11 support of search warrants. Ulrich, 308 F.3d at 984 (prior instances of similar unconstitutional
12 conduct may establish a “longstanding practice or custom which constitutes the ‘standard
13 operating procedure’ of the local government entity.”) In addition, Plaintiff has presented no
14 evidence of any written or verbal statement of policy by any County official, who can be said to be
15 an “official policy-maker,” encouraging County officers to omit material information from their
16 affidavits in order to secure search warrants for which there would not otherwise be probable
17 cause.

18 Although Plaintiff argues “County officials” have ratified Det. Maus’ actions, Plaintiff
19 again does not point to any individual, with authority to make policy on behalf of the County, who
20 has expressed the opinion that if Det. Maus omitted material information from his affidavit “with
21 deliberate falsehood or reckless disregard for the truth,” the County as a matter of policy approves
22 of such conduct. At the hearing Plaintiff identified Det. Maus, District Attorney Silva, and County
23 Counsel Ricky Sanchez as “policymakers” who have ratified Det. Maus’ unconstitutional conduct.
24 However, Plaintiff has presented no evidence that any of these individuals are authorized to
25 establish policy on behalf of the County or have made any affirmative decision to ratify
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1 unconstitutional conduct by Det. Maus.⁴

2 Because Plaintiff has failed to establish a County policy, custom or practice which resulted
3 in the alleged constitutional violation in this case, the Court GRANTS Defendant County of San
4 Diego's motion for summary judgment on Plaintiff's claim under § 1983.

5 (b) Application of Legal Standards to Plaintiff's motion

6 A public entity may not be held liable under § 1983 where the plaintiff fails to establish
7 any underlying constitutional violation. Forrester v. City of San Diego, 25 F.3d 804, 808 (9th Cir.
8 1994). Because there are a genuine issues of material fact as to whether Det. Maus violated
9 Plaintiff's constitutional rights, and because Plaintiff has failed to establish the existence of a
10 County policy, custom or practice which resulted in the violation of his constitutional rights, the
11 Court DENIES Plaintiff's motion for summary adjudication of his § 1983 claim against the
12 County.

13 3. Plaintiff's State law claims⁵

14 Plaintiff's complaint alleges claims against Defendants under Cal. Civ. Code § 52.1, as
15 well as for common law false imprisonment, battery, and negligence. Defendants move for
16 summary judgment, arguing Plaintiff has failed to demonstrate a genuine issue of material fact as
17 to their liability on these state law claims, and that they are immune from liability under various
18 provisions of the California Code. Plaintiff also moves for summary adjudication of Defendants'
19 liability on these claims.

20 (a) False arrest/imprisonment

21 The Court originally granted summary judgment on Plaintiff's claim for false arrest/
22

23 ⁴As Defendants note, a California district attorney is considered to be a State, rather than a
24 County, officer under most circumstances. Weiner v. San Diego County, 210 F.3d 1025, 1031 (9th
25 Cir. 2000). As such, any statements by District Attorney Silva would not be the basis of liability
26 against the County.

27 ⁵Plaintiff's complaint contains an independent claim under the California constitution.
28 Plaintiff, in his motion, does not affirmatively seek summary adjudication of the Defendants'
liability on such claim. In addition, although Plaintiff argues in opposition to Defendants' motion
that the facts establish as a matter of law that Defendants violated his right to be free from
unreasonable searches and seizures under the California constitution, Defendants also did not
move for summary judgment on this claim. Just as there are genuine issues of material fact
precluding summary judgment on Plaintiff's federal constitutional claim against Det. Maus under
§ 1983, Plaintiff's claim under the California constitution is also appropriately resolved at trial.

1 imprisonment after finding the conduct of which Plaintiff complained, being handcuffed and
2 transported to the hospital for the taking of DNA samples, occurred pursuant to a valid search
3 warrant. Following remand, Plaintiff argues the fact the officers acted pursuant to an invalid
4 search warrant establishes the tort of false imprisonment as a matter of law. By contrast,
5 Defendants argue Plaintiff cannot state a claim for false arrest/imprisonment against Det. Maus
6 because Det. Maus never personally detained, handcuffed or transported Plaintiff. Defendants
7 further argue they are immune from liability in connection with the warrant and its execution
8 because the warrant was regular on its face.

9 The tort of false imprisonment and false arrest are considered one in the same, because
10 “false arrest is but one way of committing a false imprisonment.” Collins v. City and County of
11 San Francisco, 50 Cal. App. 3d 671, 673 (1975). The tort consists of the “nonconsensual,
12 intentional confinement of a person, without lawful privilege, for any appreciable length of time,
13 however short.” Fermino v. Fedco, Inc., 7 Cal. 4th 701, 715 (1994) (quoting Alterauge v. Los
14 Angeles Turf Club, 97 Cal. App. 2d 735, 736 (1950)). Under Cal. Code Civ. Proc. § 262.1, an
15 officer who executes process which is regular on its face is immune from liability. In addition,
16 Under Cal. Civ. Code § 43.55, a peace officer cannot be liable on account of an arrest made
17 pursuant to a facially regular warrant so long as the officer “acts without malice.”

18 The Court DENIES Plaintiff’s motion for summary adjudication of Defendants’ liability
19 for false arrest/imprisonment. Plaintiff incorrectly asserts that the Ninth Circuit’s findings
20 regarding Det. Maus’ omissions and the resulting lack of probable cause establishes, as a matter of
21 law, each element of the false arrest/imprisonment claim. Plaintiff’s detention and transportation
22 to the hospital, however, constitutes false arrest/imprisonment only if the officers were “without
23 lawful privilege” to execute the warrant. Under Cal. Civ. Code § 43.55, Plaintiff must also
24 demonstrate Det. Maus acted “with malice,” a standard California courts have equated with
25 “deliberate falsehood” and “reckless disregard of the truth.” Harden, 215 Cal. App. 3d at 15. As
26 discussed more fully above with regard to Plaintiff’s claim against Det. Maus under § 1983, the
27 Ninth Circuit made no finding as to whether Det. Maus’ material omissions were made “with
28 deliberate falsehood or reckless disregard for the truth” and there remain genuine issues of

1 material fact precluding this Court from making such a finding.

2 The Court also DENIES Defendants' motion for summary judgment on Plaintiff's false
3 arrest/imprisonment claim. Under California law, a person who sets in motion a false arrest/
4 imprisonment can be held liable for the tort even if he does not directly participate in the
5 actionable conduct. Bell v. State of California, 63 Cal. App. 4th 919, 928 (1998) (finding
6 defendants could be held liable for false arrest effected by other officers where defendants'
7 conduct lead to the unlawful arrest); Harden v. San Francisco Bay Area Rapid Transit Distr., 215
8 Cal. App. 3d 7, 15-16 (1989) (defendant could be held liable on claim of false arrest where his
9 false statements to the arresting officer "were intended to induce [plaintiff's] arrest and in fact
10 directly encouraged, instigated and incited [plaintiff's] subsequent arrest."). Det. Maus is entitled
11 to immunity under § 262.1 and § 43.55 only if he acted without malice in connection with the
12 issuance of the warrant. Harden, 215 Cal. App. 3d at 15. The discussion of facts above on page 8,
13 concluding there are genuine issues of material fact regarding whether Det. Maus omitted material
14 information from the affidavit "with deliberate falsehood or reckless disregard to for the truth," is
15 equally relevant here. Because the parties dispute the relevance and materiality of the information
16 Det. Maus omitted from his affidavit, there exist genuine issues of material fact precluding
17 summary judgment as to whether Det. Maus acted "without malice" so as to entitle him to
18 immunity on Plaintiff's false arrest/imprisonment claim.

19 **(b) Battery**

20 The Court originally granted summary judgment in favor of the Defendants on Plaintiff's
21 claim for battery after finding the conduct of which Plaintiff complained, being handcuffed and
22 transported to the hospital for the taking of DNA samples, occurred pursuant to a valid search
23 warrant. Following remand, Plaintiff argues the fact he was handcuffed and his DNA taken,
24 pursuant to an invalid search warrant, establishes the tort of battery as a matter of law. By
25 contrast, Defendants argue Plaintiff cannot state a claim for battery against Det. Maus because
26 Det. Maus never came into contact with Plaintiff and there is no evidence Det. Maus instructed
27 others to touch or handcuff Plaintiff. Defendant Maus also argues he is immune under Cal. Gov't
28 Code § 820.8 for any injury caused by the acts or omission of other persons.

1 The tort of battery consists of “violation of an individual’s interest in freedom from
2 unlawful, harmful or offensive unconsented contacts with his or her person.” Rains v. Superior
3 Court, 150 Cal. App. 3d 933, 938 (1984). In a battery action against a police officer arising out of
4 an arrest, plaintiff must demonstrate unreasonable use of force by the officer. Edson v. City of
5 Anaheim, 63 Cal. App. 4th 1269, 1272 (1998).

6 Upon review, the Court DENIES Plaintiff’s motion for summary adjudication of
7 Defendants’ liability for battery. Because the search warrant may have been valid on its face, the
8 officers who executed the warrant are immune for their actions in executing the warrant under Cal.
9 Civ. Proc. Code § 262.1.⁶ Plaintiff has not produced evidence that the actions of the officers who
10 actually executed the warrant were unreasonable or excessive so as to expose those officers to
11 liability for battery. Edson, 63 Cal. App. 4th at 1273. The Court declines to find Det. Maus is
12 liable as a matter of law for the tort of battery based solely upon the underlying alleged Fourth
13 Amendment violation in procuring the warrant. None of the authorities cited by Plaintiff hold that
14 an officer who did not personally come into contact with a plaintiff while executing a facially valid
15 warrant may nonetheless be held liable for the intentional tort of battery because he made material
16 omissions in the search warrant affidavit. The cases cited by Plaintiff hold that a person alleging
17 battery against one officer, based upon another officer’s use of force in executing a warrant, must
18 demonstrate that the executing officer’s use of force was unreasonable. Arpin v. Santa Clara
19 Valley Transp., 261 F.3d 912, 922 (9th Cir. 2001).⁷ Plaintiff has made no showing the use of force
20 by the officers who executed the search warrant was in any way unreasonable. The fact Det.
21 Maus’ affidavit contained material omissions, rendering the subsequently issued search warrant
22 invalid, does not establish as a matter of law that Det. Maus is liable for battery based upon the
23 execution of such warrant where there is no evidence Det. Maus had any unconsented contact with

25 ⁶Section 262.1 states that “[a] sheriff or other ministerial officer is justified in the execution
26 of, and shall execute, all process and orders regular on their face and issued by competent
authority, whatever may be the defect in the proceedings upon which they were issued.”

27 ⁷The remainder of the cases cited by Plaintiff hold that an officer can be held liable for
28 false arrest/imprisonment, or for a constitutional violation under § 1983, where the officer’s
actions set the arrest or search in motion. None of the other cases cited by Plaintiff actually
discuss the tort of battery.

1 Plaintiff.

2 For these very same reasons, the Court GRANTS Defendants’ motion for summary
3 judgment on Plaintiff’s battery claim. The only evidence Plaintiff has produced in support of his
4 battery claim is that other officers handcuffed and transported him to the hospital for the extraction
5 of his DNA. There is no indication that these officers’ actions were unreasonable taking into
6 account the fact the warrant may have been facially valid and there is no evidence of any
7 unconsented contact between Det. Maus and Plaintiff. None of the authorities cited by Plaintiff
8 hold that an officer may be held liable for the intentional tort of battery when his material
9 omissions in a warrant affidavit result in the execution of that warrant. Plaintiff’s theory of Det.
10 Maus’ liability for battery is not supported by the law.

11 (c) Cal. Civ. Code § 52.1

12 Because the Court in its first summary judgment order found no constitutional violation, it
13 also granted Defendants’ motion for summary judgment on Plaintiff’s claim under Cal. Civ. Code
14 § 52.1. Both parties now again move for summary adjudication of this claim.

15 Cal. Civ. Code section 52.1 provides:

16 (a) If a person or persons, whether or not acting under color of law, interferes by
17 threats, intimidation, or coercion, or attempts to interfere by threats, intimidation, or
18 coercion, with the exercise or enjoyment by any individual or individuals of rights
19 secured by the Constitution or laws of the United States, or of the rights secured by
20 the Constitution or laws of this state, the Attorney General, or any district attorney
or city attorney may bring a civil action for injunctive and other appropriate
equitable relief in the name of the people of the State of California, in order to
protect the peaceable exercise or enjoyment of the right or rights secured....

21 (b) Any individual whose exercise or enjoyment of rights secured by the
22 Constitution or laws of the United States, or of rights secured by the Constitution or
23 laws of this state, has been interfered with, or attempted to be interfered with, as
described in subdivision (a), may institute and prosecute in his or her own name
and on his or her own behalf a civil action for damages

24 A claim under this section requires a showing of “an attempted or completed act of
25 interference with a legal right, accompanied by a form of coercion.” Jones v. Kmart Corp., 17 Cal.
26 4th 329, 334 (1998). Although the language of § 52.1(a) does not mention “violence,” § 52.1(j)
27 explicitly provides that violence is a required element where the “threat, intimidation or coercion”
28 is based purely upon a defendant’s statements:

1 Speech alone is not sufficient to support an action brought pursuant to subdivision
2 (a) or (b), except upon a showing that the speech itself threatens violence against a
3 specific person ...; and the person ... against whom the threat is directed reasonably
4 fears that, because of the speech, violence will be committed against them or their
5 property and that the person threatening the violence had the apparent ability to
6 carry out the threat.

7 Plaintiff contends Det. Maus violated his Fourth Amendment rights not only by making
8 material omissions in the search warrant affidavit, but also by actually collecting the DNA samples
9 pursuant to the invalid search warrant. In his papers regarding these pending motions, Plaintiff
10 identifies two types of threats, intimidation and coercion which purportedly accompanied the
11 alleged constitutional violation, giving rise to his claim under § 52.1: (1) Det. Maus' statements to
12 Plaintiff during a September 9, 2001 phone conversation prior to the procurement of the search
13 warrant, and (2) being handcuffed, and his arm twisted and bruised, in order to transport him to the
14 hospital to extract his DNA. The Court finds neither of these types of "threats, intimidation and
15 coercion" are sufficient to support Plaintiff's claim under § 52.1.

16 During the September 9, 2001 telephone conversation, Det. Maus told Plaintiff that if he
17 did not consent to voluntarily submit a DNA sample he would attempt to get a warrant and "come
18 look[ing] for you." Det. Maus did not threaten violence against Plaintiff, and there is no evidence
19 Plaintiff reasonably feared Det. Maus would commit violence against him or his property if he did
20 not voluntarily consent to the collection of his DNA. Thus, under the plain language of § 52.1(j),
21 Det. Maus' statements cannot form the basis of Plaintiff's claim under § 52.1. Cabesuela v.
22 Browning-Ferris Industries, 68 Cal. App. 4th 101, 111 (1998).⁸ Furthermore, although Plaintiff
23 argues the act of handcuffing him and transporting him to the hospital to extract his DNA
constitutes "threats, intimidation or coercion," Plaintiff sets forth no evidence that Det. Maus
handcuffed, touched, or transported him to the hospital. Thus, the Court finds that there exist no

24 ⁸California courts have called into question Cabesuela's holding because it was based, in
25 part, upon an incorrect belief that § 52.1 should be read in conjunction with § 57.1, a separate
26 statute protecting civil rights which *does* require a showing of violence. Venegas, 32 Cal. 4th at
27 842. Nothing in subsequent California cases, however, calls into question the proposition that
28 under the plain language of § 52.1(j), where a violation is premised solely upon speech, the
plaintiff must demonstrate the speech threatened violence. See Trigueros v. Southwest Airlines,
2007 WL 2502151 (S.D. Cal. 2007) (where plaintiff alleged violation of § 52.1 solely based on
speech, court found statute clear on its face and granted summary judgment on plaintiff's claim
because plaintiff failed to demonstrate the speech threatened violence in the form of some physical
force).

1 genuine issues of material fact and Defendants are entitled to judgment as a matter of law on
2 Plaintiff's claim under § 52.1.

3 (d) Negligence

4 In one sentence, Defendants assert they are entitled to summary judgment on Plaintiff's
5 negligence claim against Det. Maus "because he acted reasonably as stated above and he is
6 immune under state law." Because there exist genuine issues of material fact as to whether Det.
7 Maus acted reasonably when he omitted to include material facts in his search warrant affidavit,
8 the Court DENIES Defendants' motion for summary judgment on Plaintiff's negligence claim.⁹

9 (e) County immunity under Cal. Gov't Code § 815.2(b)

10 The County argues it is immune from liability for all of Plaintiff's state law claims
11 pursuant to Cal. Gov't Code § 815.2(b). Section 815.2(b) provides: "Except as otherwise provided
12 by statute, a public entity is not liable for an injury resulting from an act or omission of an
13 employee of the public entity where the employee is immune from liability." As a general rule,
14 California law holds government entities liable for the torts of their employees under the theory of
15 *respondeat superior*. Hoblitzell v. City of Ione, 110 Cal. App 4th 675, 680-81 (2003). "A public
16 entity is liable for injury proximately caused by an act or omission of an employee of the public
17 entity within the scope of his employment if the act or omission would, apart from this section,
18 have given rise to a cause of action against that employee or his personal representative." Cal.
19 Gov't Code § 815.2(a). Thus, under California law, the County's immunity from suit depends
20 upon whether the individual officers are immune. Robinson v. Solano County, 278 F.3d 1007,
21 1016 (9th Cir. 2002).

22 Here, the Court has not found any statutory immunity which would bar Plaintiff's
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28 ⁹Plaintiff does not affirmatively move for summary adjudication on this claim.

1 remaining state law claims against Det. Maus for false imprisonment¹⁰ and negligence.¹¹

2 Therefore, the Court DENIES Defendants' motion for summary judgment of the County's liability
3 for Plaintiff's state law claims.

4 4. Punitive Damages

5 Defendants move for summary judgment on Plaintiff's claim against Det. Maus for
6 punitive damages, arguing there is no evidence Det. Maus' conduct was motivated by evil motive
7 or intent, or involved reckless or callous indifference to Plaintiff's constitutional rights. A jury
8 may assess punitive damages under § 1983 when a defendant's conduct involves "reckless or
9 callous indifference to the federally protected rights of others" without regard to actual intent or
10 malice. Larez v. City of Los Angeles, 946 F.2d 630, 639 (9th Cir. 1991).

11 In this case, the Ninth Circuit has already determined Det. Maus had in his possession but
12 omitted to disclose material information in his search warrant affidavit. Although subjective intent
13 is not an element Plaintiff must prove on his claim under § 1983, Plaintiff has raised a genuine
14 issue of material fact as to the motive for Det. Maus' failure to include the information in his
15 affidavit. Plaintiff points to Det. Maus' statements during the September 9, 2001 phone
16 conversation with Plaintiff, in which Det. Maus demanded Plaintiff relinquish his right to privacy
17 and submit to DNA testing. Plaintiff also points to testimony by Det. Maus during his deposition
18 to the effect that he assumes an individual who refuses to cooperate is probably guilty. These facts
19 raise a genuine issue as to whether Plaintiff can demonstrate Det. Maus acted with evil motive or
20 intent or with reckless or callous indifference to Plaintiff's constitutional rights. Defendants'
21 motion for summary judgment on Plaintiff's claim for punitive damages against Det. Maus is
22 DENIED.

23
24 ¹⁰Although Cal. Gov't Code § 821.6 provides immunity to a public employee "for injury
25 caused by his instituting or prosecuting any judicial or administrative proceeding within the scope
26 of his employment" § 820.4, which grants immunity for a public employee's "act or omission,
exercising due care, in the execution or enforcement of any law" specifically exempts false arrest
and false imprisonment from the category of torts for which there is immunity. Asgari v. City of
Los Angeles, 15 Cal. 4th 744, 847 (1997).

27 ¹¹Defendants cite Cal. Gov't Code §§ 815.2(b), 820.8, 818.8, and 821.6 at the conclusion of
28 brief argument for summary judgment on Plaintiff's negligence claim. Absent any analysis by the
Defendants of the immunities available under those sections, the Court declines to find they
provide the basis for summary judgment in favor of Defendants.

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Conclusion


For the reasons set forth herein, the Court DENIES Plaintiff's motion for summary adjudication and GRANTS IN PART AND DENIES IN PART Defendants' motion for summary judgment as follows:

1. The Court GRANTS Defendants' motion for summary judgment on Plaintiff's claim against the County of San Diego under 42 U.S.C. § 1983, as well as Plaintiff's claims against Det. Maus and the County of San Diego for battery and for violation of Cal. Civ. Code § 52.1;
2. The Court DENIES Defendants' motion for summary judgment on Plaintiff's claim against Det. Maus under 42 U.S.C. § 1983 and for punitive damages; and
3. The Court DENIES Defendants' motion for summary judgment on Plaintiff's claims against Det. Maus and the County of San Diego under the California constitution and for common law false arrest/imprisonment and negligence.

The parties shall appear before Magistrate Judge William McCurine for a telephonic case management conference on Thursday, August 13, 2009 at 4:00 p.m. Counsel for Defendant shall initiate the conference call to Judge McCurine's chambers.

IT IS SO ORDERED.

DATED: August 12, 2009


IRMA E. GONZALEZ, Chief Judge
United States District Court