APPENDIX A

Ninth Circuit opinion
(April 24, 2019)

Case: 17-56343, 04/24/2019, ID: 11274682, DktEntry: 37-1, Page

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES MILLS, *Plaintiff-Appellant*, v. CITY OF COVINA, a California municipal corporation; KIM RANEY, in his official capacity as the Chief of the City of Covina Police Department; TERRANCE HANOU, Officer; DOES, 1–100, *Defendants-Appellees.*	No. 17-56343 D.C. No. 2:16-cv-07127-DOC-RAO OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding
Argued and Submitted March 8, 2019
Pasadena, California
Filed April 24, 2019
Before: Andrew J. Kleinfeld, Jacqueline H. Nguyen, and Ryan D. Nelson, Circuit Judges.
Opinion by Judge R. Nelson

SUMMARY*

Civil Rights

The panel affirmed the district court's dismissal of plaintiff's Fourth Amendment claims as time-barred and affirmed a judgment on the pleadings in favor of defendants in an action brought pursuant to 42 U.S.C. § 1983 alleging that plaintiff was stopped and searched by police officers without probable cause, falsely arrested, and maliciously prosecuted.

Plaintiff brought suit under § 1983 after a California Court of Appeal overturned his convictions for possession of a controlled substance and a smoking device on the grounds that the Superior Court erred by denying plaintiff's suppression motion.

The panel held that plaintiff's claims for unlawful stop and detention, false arrest and false imprisonment were time- barred because *Heck v. Humphrey*, 512 U.S. 477 (1994) did not legally prevent plaintiff from commencing those claims during his criminal appeal and thus tolling under California Code of Civil Procedure § 356 was not triggered. The panel noted that plaintiff's Fourth Amendment claims accrued at the time he was searched and arrested and that under California

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

law, the statute of limitations was tolled during the criminal proceedings in Superior Court, but not during the criminal appeal. The panel held that where, as in this case, a § 1983 claim accrues pre-conviction, the *possibility* that *Heck* may require dismissal of that "not-yet-filed, and thus utterly indeterminate, § 1983 claim," is not sufficient to trigger tolling under California Code of Civil Procedure § 356.

Addressing the malicious prosecution and *Monell* liability claims, the panel found that collateral estoppel did not apply because a conviction or judgment that has been reversed on appeal and vacated lacks preclusive effect and cannot serve as collateral estoppel in a later proceeding. The panel nevertheless affirmed the district court's dismissal of the claims on the alternative ground that the reversal of plaintiff's conviction on basis of the exclusionary rule was not a favorable termination, for purposes of a malicious prosecution claim, because the reversal did not address plaintiff's guilt or innocence.

COUNSEL

Joseph M. Adams (argued), Adams & Pham APC, Costa Mesa, California; Thomas H. Schelly and Kevin A. Lipeles, Lipeles Law Group APC, El Segundo, California; for Plaintiff-Appellant.

Trisha E. Newman (argued), Tony M. Sain (argued), and Andrea K. Kornblau, Manning & Kass Ellrod Ramirez Trester LLP, Los Angeles, California, for

Defendants- Appellees.

OPINION

R. NELSON, Circuit Judge:

We consider whether the statute of limitations for a criminal defendant's 42 U.S.C. § 1983 action is tolled under California Code of Civil Procedure § 356 during the pendency of an appeal from a conviction, in light of the Supreme Court's rule in *Heck v. Humphrey*, 512 U.S. 477 (1994). The district court held that § 356 does not toll Appellant James Mills's § 1983 claims and thus, all but two of Mills's claims are time-barred. Because *Heck* did not legally prevent Mills from filing his § 1983 claims during his criminal appeal, we agree with the district court. We also find Mills's remaining claims were properly dismissed, not because those claims are barred by collateral estoppel, but because reversal of Mills's conviction was not a favorable termination. We therefore affirm.

I

On April 14, 2013, Covina Police Department Officer Terrance Hanou pulled Mills over for a traffic stop after seeing Mills exit a hotel and drive to another hotel. Hanou claimed he pulled Mills over because his vehicle registration was expired. Mills alleges Hanou noticed Mills "for no reason other than his physical appearance—large framed, bald headed, Caucasian," and that when Hanou checked Mills's vehicle license, the database showed the

registration was current.

Hanou acknowledged Mills's registration was valid but asked to search Mills's car. Mills refused. Hanou then made two calls to his supervisor and asked Mills if there were any weapons in the vehicle. Mills informed Hanou of an unloaded shotgun in the cargo compartment.

Hanou requested that Mills exit the vehicle and Mills complied. Hanou immediately handcuffed Mills, conducted a pat down search, and found $10,000 cash on Mills's person. Hanou then searched Mills's vehicle and found the shotgun and an additional $7,000 cash. After the search, Hanou arrested Mills claiming he found illegal drugs and "a smoking device" in Mills's vehicle.

Prior to Mills's criminal trial, Mills moved to suppress evidence of the alleged drugs, arguing Hanou's search violated his Fourth Amendment rights. The California Superior Court denied the motion. At trial, Hanou testified he found drugs during the search. Mills testified "there were no drugs in his vehicle," "there was evidence that the drugs were planted," and Mills's counsel closed by stating, "Mr. Mills did not have drugs in his car. Those drugs were planted, and he's not guilty." On June 6, 2014, Mills was convicted of one count of possession of a controlled substance (methamphetamine) and one count of possession of a smoking device and was sentenced to eighteen months' probation.

On March 3, 2016, the California Court of Appeal overturned Mills's conviction. The Court of Appeal held, in an unpublished opinion, that Hanou violated Mills's Fourth Amendment rights by searching the vehicle without probable cause and therefore, the Superior Court erred by denying Mills's suppression motion. Because "[t]he methamphetamine Hanou recovered from the center console and the methamphetamine and methamphetamine pipe he recovered from the luggage formed the evidentiary basis for [Mills's] convictions in th[e] case," the Court of Appeal held that further proceedings below would be an "idle gesture," and remanded for dismissal.

On September 22, 2016, Mills filed this suit against the City of Covina, Covina Police Chief Kim Raney, and Hanou, alleging, under 42 U.S.C. § 1983, claims for: (1) unlawful stop and detention, (2) false arrest, (3) false imprisonment, (4) malicious prosecution, (5) failure to screen and hire properly, (6) failure to train properly, (7) failure to supervise and discipline, and (8) *Monell* municipal liability against the City of Covina. The district court dismissed all but Mills's § 1983 claim for malicious prosecution and the related *Monell* claim as time-barred. The district court held that *Heck* "did not bar [Mills] from filing his claims while he was subject to a criminal prosecution," and thus, California Code of Civil Procedure § 356 did not toll his claims during the pendency of his criminal appeal.

Mills filed two amended complaints against

only the City of Covina and Hanou (collectively "Appellees") alleging, under § 1983, claims for: (1) malicious prosecution and (2) *Monell* municipal liability. On August 4, 2017, Appellees moved for judgment on the pleadings, arguing that Mills's amended claims were barred by collateral estoppel or, in the alternative, that Mills failed to establish a favorable termination of his criminal proceedings. The district court held that collateral estoppel barred Mills from relitigating the issue of whether he possessed drugs, and thus, probable cause was conclusively established. The district court did not reach Appellees' favorable termination argument. Mills now appeals.

II

We have jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal based on the statute of limitations. *Johnson v. Lucent Techs., Inc.*, 653 F.3d 1000, 1005 (9th Cir. 2011). We also review de novo the district court's judgment on the pleadings based on collateral estoppel. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992).

III
A

We begin by determining whether Mills's § 1983 claims for unlawful stop and detention, false arrest, false imprisonment, failure to screen and hire properly, failure to train properly, and failure to supervise and discipline are time-barred. The

parties and the district court agree that those claims accrued on April 14, 2013, when the search was conducted and Mills was arrested. That is correct. "[T]he accrual date of a § 1983 cause of action is a question of federal law . . . ." *Wallace v. Kato*, 549 U.S. 384, 388 (2007). "[A]ccrual occurs when the plaintiff has a complete and present cause of action, . . . that is, when the plaintiff can file suit and obtain relief." *Id.* (internal citations, quotation marks and brackets omitted).[1] Mills had complete and

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[1] Prior to *Wallace*, the rule in this circuit was that a § 1983 action like this one "alleging illegal search and seizure of evidence upon which criminal charges are based does not accrue until the criminal charges have been dismissed or the conviction has been overturned." *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000). District courts have expressed confusion over whether this deferred accrual rule survived the Supreme Court's decision in *Wallace*. *See, e.g.*, *Choma v. Arnold*, No. CV 11-5906, 2012 WL 1340387, at *3 (C.D. Cal. Mar. 19, 2012)
("The Ninth Circuit has not yet addressed explicitly whether *Harvey*'s accrual rule has survived the Supreme Court's decision in *Wallace* . . . ."); *Hawkins v. Suisun City Police Dep't*, No. 2:08cv0529, 2008 WL 3974388, at *1 (E.D. Cal. Aug. 22, 2008) (relying on *Harvey*'s proposition that "*Heck* has been interpreted to apply to pending charges"); *Kamar v. Krolczyk*, No. 1:07-CV-0340, 2008 WL 2880414, at *6 (E.D. Cal. July 22, 2008) (finding *Wallace* "has effectively overruled *Harvey*"). The deferred accrual rule we announced in *Harvey* for Fourth Amendment claims was based on our more general holding "that *Heck* applies to pending criminal charges, and that a claim, that if successful would necessarily imply the invalidity of a conviction in a pending criminal prosecution, does not accrue so long as the potential for a conviction in the pending criminal prosecution continues to exist." *Harvey*, 210 F.3d. at 1014. That general holding is "clearly irreconcilable" with *Wallace*'s holding that "the *Heck* rule for deferred accrual is

present causes of action for all but his malicious prosecution and *Monell* liability claims when he was subjected to a search in violation of the Fourth Amendment and was arrested; therefore, those claims accrued at that time.

Next, to determine whether the statute of limitations ran on Mills's claims, we "apply [California's] statute of limitations for personal injury actions, along with [California's] law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law." *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132 (9th Cir. 2007) (internal quotation marks omitted). California's two-year statute of limitations for personal injury actions thus applies to Mills's claims. *See* Cal. Civ. Proc. Code § 335.1; *Canatella*, 486 F.3d at 1132– 33.

Mills filed his claims on September 22, 2016, roughly three years and five months after the search and arrest. His claims would therefore be time-barred absent tolling. The parties agree that California Government Code § 945.3 tolled the statute of limitations during Mills's criminal proceedings in the Superior Court, but not during his criminal appeal. The parties also agree that, but for additional tolling, the statute of limitations

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called into play only when there exists a conviction or sentence that has *not* been . . . invalidated." 549 U.S. at 393 (internal quotation marks omitted). Thus, *Harvey's* deferred accrual rule has been "effectively overruled" and is no longer good law. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

elapsed during Mills's criminal appeal. Mills, however, argues that California Code of Civil Procedure § 356 tolled the statute of limitations during the pendency of his criminal appeal because he was legally prevented from bringing those claims during that period by the Supreme Court's decision in *Heck*. We disagree.

Under § 356, "[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." As Appellees argue, a judicially created bar to commencing an action appears to fall outside § 356 based on its plain language. The California Supreme Court, however, has explained that § 356 "has been applied in situations where the action is legally prohibited by other means than injunctions or statutory prohibition." *Hoover v. Galbraith*, 7 Cal. 3d 519, 526 (1972) (collecting cases). Indeed, while the California Supreme Court has not specifically addressed the impact of a judicially created bar on § 356, it has held "that the running of the statute of limitations is suspended during any period in which the plaintiff is legally prevented from taking action to protect his rights." *Dillon v. Bd. of Pension Comm'rs of City of Los Angeles*, 18 Cal. 2d 427, 431 (1941); *see also Hoover*, 7 Cal. 3d at 526 (confirming that "[t]he limitation period has been tolled during the period in which a plaintiff is legally prevented from taking action to protect his rights"). We are bound by this interpretation. *See Lewis v. Tel. Emps. Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996)

("When interpreting state law, federal courts are bound by decisions of the state's highest court.") (internal quotation marks omitted).

Notably, however, in *Hoover* and each case it discussed, a *definitive* bar to commencing an action was required to trigger tolling under § 356, regardless whether the prohibition was by statute, injunction, or otherwise. *See Hoover*, 7 Cal. 3d at 526 (plaintiff precluded by statute from commencing action against directors of corporation until appeal from judgment on his claim against debtor corporation became final); *Dillon*, 18 Cal. 2d at 430–31 (plaintiff precluded by city charter from commencing action until decision from pension board became final); *Skaggs v. City of Los Angeles*, 43 Cal. 2d 497, 500 (1954) (same). Because we hold the *Heck* bar did not operate as such a definitive bar to the commencement of Mills's action, we need not decide whether a judicially created bar can trigger tolling under § 356.

In *Heck*, the Supreme Court announced that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been [set aside]. A claim for damages bearing that relationship to a conviction or sentence . . . is not cognizable under § 1983." 512 U.S. at 486–87 (internal citations omitted).

In *Wallace*, the Supreme Court recognized a

"complication" in applying the *Heck* bar to claims like Mills's that "arises from the fact that § 1983 actions, unlike the tort of malicious prosecution which *Heck* took as its model . . . sometimes accrue before the setting aside of— indeed, even before the existence of—the related criminal conviction." 549 U.S. at 394 (internal citation omitted). As the Court explained, application of *Heck* to such claims "raises the question whether, assuming that the *Heck* bar takes effect when the later conviction is obtained, the statute of limitations on the once valid cause of action is tolled as long as the *Heck* bar subsists." *Id.* There, like here, "[i]f petitioner's conviction . . . caused the statute of limitations on his (possibly) impugning but yet-to-be-filed cause of action to be tolled until that conviction was set aside, his filing [] would have been timely." *Id.*

Finding no basis for tolling under Illinois state law, the Court declined to adopt a federal equitable tolling rule in such circumstances. *Id.* The Court reasoned:

> Under such a regime, it would not be known whether tolling is appropriate by reason of the *Heck* bar until it is established that the newly entered conviction would be impugned by the not-yet-filed, and thus utterly indeterminate, § 1983 claim. It would hardly be desirable to place the question of tolling *vel non* in this jurisprudential limbo, leaving it to be determined by those later events, and then

pronouncing it retroactively.

Id. at 394–95 (internal footnote omitted).

For these same reasons, we find that where, as here, a § 1983 claim accrues pre-conviction, the *possibility* that *Heck* may require dismissal of that "not-yet-filed, and thus utterly indeterminate, § 1983 claim," is not sufficient to trigger tolling under California Code of Civil Procedure § 356. In such circumstances, it is not known whether the claim is barred by *Heck* until the claim is filed and the district court determines that it will impugn an extant conviction. Until that determination is made, a plaintiff is not "legally prevented from taking action to protect his rights." *Hoover*, 7 Cal. 3d at 526.

Mills nevertheless implores us to adopt a rule allowing California plaintiffs to wait until the resolution of their criminal appeals to file their § 1983 claims, leaving district courts to retroactively pronounce the applicability of the *Heck* bar and, in turn, tolling under § 356. As discussed above, however, the Supreme Court rejected the petitioner's invitation to adopt a similar rule in *Wallace* in part because "[d]efendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense; and a statute that becomes retroactively extended, by the action of the plaintiff in crafting a conviction-impugning cause of action, is hardly a statute of repose." 549 U.S. at 395. We likewise decline to adopt such a rule.

Ultimately, nothing prevented Mills from

commencing his suit during his criminal appeal. Had he done so, the district court could have determined whether his claims impugned his conviction. If so, the district court could have dismissed those claims without prejudice, and Mills could have refiled the claims once his conviction was reversed. *See id.* at 395 n.4 ("If under those circumstances he were not allowed to refile his suit, *Heck* would produce immunity from § 1983 liability, a result surely not intended."). If Mills's claims did not impugn his conviction, the suit could have proceeded. Because Mills was not legally precluded from commencing his § 1983 claims during the pendency of his criminal appeal, he was not "legally prevented from taking action to protect his rights" and tolling under § 356 was not triggered. *See Hoover*, 7 Cal. 3d at 526. We therefore affirm the district court's holding that all but Mills's claims for malicious prosecution and *Monell* liability are time-barred.

B

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We next consider whether the district court properly dismissed Mills's § 1983 malicious prosecution claim under the doctrine of collateral estoppel. Federal courts rely on state common law for elements of malicious prosecution. *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004). California law requires a plaintiff claiming malicious prosecution to establish "that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in

his, plaintiff's, favor; was brought without probable cause; and (3) was initiated with malice." *Sheldon Appel Co. v. Albert & Oliker*, 47 Cal. 3d 863, 871 (1989) (internal quotation marks omitted). Additionally, to maintain a § 1983 action for malicious prosecution, "a plaintiff 'must show that the defendants prosecuted [him] . . . for the purpose of denying [him] equal protection or another specific constitutional right.'" *Awabdy*, 368 F.3d at 1066 (quoting *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1189 (9th Cir. 1995)).

State law also governs the application of collateral estoppel to a state court judgment in a federal civil rights action. *Ayers v. City of Richmond*, 895 F.2d 1267, 1270 (9th Cir. 1990). Under California law, collateral estoppel bars the relitigation of an issue in a subsequent proceeding when certain threshold requirements are fulfilled:

> [1] the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding[; 2] this issue must have been actually litigated in the former proceeding[; 3] it must have been necessarily decided in the former proceeding[; 4] the decision in the former proceeding must be final and on the merits[; 5] the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Gikas v. Zolin, 6 Cal. 4th 841, 849 (1993).

In holding collateral estoppel applied, the district court reasoned that "[w]hether Hanou actually discovered drugs and thus had probable cause to arrest [Mills], as opposed to planting or fabricating the drugs, appear[ed] to be identical to an issue already decided in the prior criminal proceeding." That was because "[t]he jury necessarily had to determine whether [Mills] actually possessed drugs in order to convict him of possession of a controlled substance in violation of California Health & Safety Code § 11377(a)." In the district court's view, "that factual finding ha[d] not been overturned" by the Court of Appeal because Mills sought reversal of his conviction only on Fourth Amendment grounds and because "[t]he Court of Appeal's analysis assume[d] that [Hanou] did find methamphetamine in [Mills's] vehicle."

Mills argues he is not collaterally estopped from litigating the issue of probable cause here because his reversed conviction was not final. We agree. Under California law, "[f]or purposes of issue preclusion, final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *People v. Cooper*, 149 Cal. App. 4th 500, 520 (2007) (quoting *Border Bus. Park, Inc. v. City of San Diego*, 142 Cal. App. 4th 1538, 1564 (2006)) (internal quotation marks omitted). "A final judgment is defined as one that is free from direct attack. Stated differently, [t]o be final for purposes of collateral estoppel the decision need only be immune, as a practical matter, to reversal or

amendment." *Id.* (internal quotation marks omitted). It follows from this that a conviction or judgment that has been reversed on appeal and vacated cannot serve as collateral estoppel in a later proceeding.[1] Accordingly, Mills's reversed conviction and the factual determinations underlying that conviction lack conclusive effect here.

That Mills challenged his conviction on Fourth Amendment grounds rather than attacking the jury's underlying factual determinations does not change this result. As the Sixth Circuit explained considering nearly identical facts: where a criminal defendant successfully appealed his conviction on constitutional grounds, "he was not acquiescing in adverse factual determinations made at his trial." *Dodrill v. Ludt*, 764 F.2d 442, 444 (6th Cir. 1985). Thus, "[w]hen he won his appeal and the judgment was vacated, all such factual determinations were vacated with it, and their preclusive effect surrendered." *Id.* at 444–45.

Nor does the Court of Appeal's reference to Mills possessing methamphetamine change the fact that the jury's underlying factual determinations to that effect were vacated with Mills's conviction. The Court of Appeal had no occasion to reassess the jury's underlying findings of fact. Instead, the Court of Appeal was tasked with determining whether

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[1] This is also the federal rule. *See, e.g.*, *Ornellas v. Oakley*, 618 F.2d 1351, 1356 (9th Cir. 1980) ("A reversed or dismissed judgment cannot serve as the basis for a disposition on the ground of res judicata or collateral estoppel.").

violation of Mills's Fourth Amendment rights warranted overturning his conviction. The Court of Appeal concluded that it did and reversed. That "reversal . . . vacate[d] the judgment entirely, technically leaving nothing to which we may accord preclusive effect." *Dodrill*, 764 F.2d at 444.

Finally, Appellees' reliance on the California common law rule, that probable cause in a malicious prosecution action may be conclusively established by a conviction or judgment despite reversal, does not support their collateral estoppel argument. As the California Supreme Court has made clear, that common law rule, sometimes referred to as the "interim adverse judgment rule," is not part of the doctrine of collateral estoppel as it "does not operate, like collateral estoppel, to preclude relitigation of an issue of fact." *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811, 825 (2002); *see also L.G. v. M.B.*, 25 Cal. App. 5th 211, 230 n.15 (2018) ("Our Supreme Court has explained that the interim adverse judgment rule is not part of the doctrine of res judicata or any of its branches, but is derived from the definition of probable cause.") (internal quotation marks omitted). Because the district court did not make any findings as to the applicability of the interim adverse judgment rule, and because we affirm the district court's dismissal on alternative grounds, we do not decide whether the interim adverse judgment rule applies here. It is enough to find that collateral estoppel does not bar Mills from pursuing his malicious prosecution claim.

Appellees argue that we can affirm the district court's dismissal of Mills's malicious prosecution claim on the alternative ground that Mills's reversed conviction did not constitute a legal termination in Mills's favor. We agree.

Under California law, the favorable termination element of a malicious prosecution claim "requires a termination reflecting the merits of the action and plaintiff's innocence of the misconduct." *Pattiz v. Minye*, 61 Cal. App. 4th 822, 827 (1998). "If . . . the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute a favorable termination." *Jaffe v. Stone*, 18 Cal. 2d 146, 150 (1941). Put differently, "[i]f the resolution of the underlying action leaves some doubt concerning plaintiff's innocence or liability, it is not a favorable termination sufficient to allow a cause of action for malicious prosecution." *Pattiz*, 61 Cal. App. 4th at 827.

The California Court of Appeal reversed Mills's conviction because it held that the government's evidence that Mills possessed drugs should have been excluded on Fourth Amendment grounds. We have never considered whether reversal of a conviction under the exclusionary rule qualifies as a favorable termination. District courts in this circuit have held categorically that it does not. *See, e.g.*, *Willis v. Mullins*, 809 F. Supp. 2d 1227, 1241 (E.D. Cal. 2011) (stating that "a conviction overturned due to the exclusionary rule does not

qualify as a favorable termination for the purposes of malicious prosecution"). At least in circumstances such as these, we agree.

The exclusionary rule excludes relevant and probative evidence not because of a person's innocence, but rather to prevent violations of the Fourth Amendment. *See Lego v. Twomey*, 404 U.S. 477, 488–89 (1972). As the Supreme Court has explained, applying the exclusionary rule diverts "from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding." *Stone v. Powell*, 428 U.S. 465, 490 (1976). Indeed, "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." *Id.*

In reversing Mills's conviction based on the exclusionary rule, the Court of Appeal did not find that Mills actually possessed drugs or that those drugs were planted. The Court of Appeal held only that the drug evidence should have been excluded. Absent more, the Court of Appeal's ruling does not speak to Mills's "innocence of the misconduct." *Pattiz*, 61 Cal. App. 4th at 827. Certainly, the Court of Appeal's decision leaves at minimum "some doubt" as to Mills's innocence. *Id.* That is sufficient under California law to find that there was no favorable termination. *Id.* Accordingly, we affirm the district court's dismissal of Mills's malicious prosecution and *Monell* liability claims on this alternative ground.

IV

All but Mills's § 1983 malicious prosecution and *Monell* liability claims are time-barred because the *Heck* bar did not legally prevent Mills from commencing those claims during his criminal appeal and thus, tolling under California Code of Civil Procedure § 356 was not triggered. Mills's malicious prosecution and *Monell* actions are also barred, not because of collateral estoppel, but because reversal of Mills's conviction was not a favorable termination. Accordingly, the district court's judgment is

AFFIRMED.

APPENDIX B

District court order granting motion to dismiss (February 7, 2017)

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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 16-7127-DOC (RAOx)
Date: February 7, 2017

Title: JAMES MILLS V. CITY OF COVINA ET AL.

PRESENT:

THE HONORABLE DAVID O. CARTER JUDGE

Deborah Goltz	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF None Present	ATTORNEYS PRESENT FOR DEFENDANT None Present

PROCEEDINGS (IN CHAMBERS): ORDER GRANTING MOTION TO DISMISS [13]

Before the Court is Defendants City of Covina, Kim Raney, and Terrence Hanou's (collectively, "Defendants") Motion to Dismiss Plaintiff's Complaint with Prejudice ("Motion") (Dkt. 13). The

Court finds this matter suitable for resolution without oral argument. Fed. Civ. P. 78; L.R. 7-15. Having reviewed the papers and considered the parties' arguments, the Court GRANTS Defendants' Motion.

I. Background

A. Facts

The following facts are drawn from Plaintiff's Complaint ("Compl.") (Dkt. 1).

On April 14, 2013[1] at around 4:20 p.m., Defendant Officer Terrence Hanou[2] ("Hanou") pulled Plaintiff over for a traffic stop. Compl. ¶¶ 9, 10. Hanou apparently saw Plaintiff walk from the lobby of the Fairfield Hotel in West Covina, California to Plaintiff's Ford SUV. *Id.* ¶ 9. Hanou then saw Plaintiff drive around the Fairfield and

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[1] Plaintiff's Complaint mistakenly alleges that Plaintiff was pulled over and arrested on April 14, 2014. *See* Compl. ¶ 9. However, the parties appear to agree that the arrest date was April 14, 2013. *See* Opp'n at 3. This date is also supported by judicially noticed documents. *See* Mot. Exs. A (Claim for Damages Injury or Loss, citing incident date of "4/14/2013"), C (Los Angeles County Criminal Case Summary, listing "violation date" as April 14, 2013).

[2] Plaintiff spells Defendant Hanou's name as "Terrance." *See* Compl. at 2. However, documents of which the Court takes judicial notice, and the Defendants' briefing, suggest that the correct spelling is "Terrence." *See generally* Mot.; Declaration of Thomas Schelly ("Shelly Decl.") (Dkt. 14-1).

stop at another hotel. *Id.* Hanou checked the license of Plaintiff's vehicle and has represented that he discovered that the registration had expired. *Id.* This discovery led Hanou to pull Plaintiff over. *Id.*

Plaintiff alleges that Hanou actually noticed Plaintiff "for no reason other than his physical appearance—large framed, bald headed, Caucasian[.]" *Id.* ¶ 10. Plaintiff also alleges that when Hanou checked Plaintiff's vehicle license in the police database, the database showed that the registration was current. *Id.*

Ultimately, the parties agree that Hanou pulled Plaintiff over. *Id.* During the traffic stop, Hanou's dashboard camera was functioning and in operation. *Id.* ¶ 11. However, immediately before exiting his patrol car, Hanou turned up the volume on the patrol car's radio such that the radio "drowned out all other sounds" on the dashboard camera. *Id.* After approaching Plaintiff, Hanou asked whether Plaintiff was on parole or probation, and whether he had ever been arrested. *Id.* ¶ 12. Plaintiff answered in the negative. *Id.* Plaintiff produced his driver's license, vehicle registration, and proof of insurance. *Id.* Hanou acknowledged that the registration was valid, and then asked if he could search Plaintiff's car. *Id.* Plaintiff said no. *Id.*

After Plaintiff refused to consent to a vehicle search, Hanou made a call on his cell phone and then asked Plaintiff if Plaintiff had any weapons in his vehicle. *Id.* ¶ 13. Plaintiff informed Hanou that there was an unloaded shotgun in the "cargo

compartment." *Id.* Hanou then made another call on his cell phone and asked Plaintiff to exit his vehicle. *Id.* ¶ 14. Plaintiff complied. *Id.*

Dashboard camera footage shows that Hanou immediately handcuffed Plaintiff and conducted a pat down search. *Id.* ¶ 15. During the pat down, Hanou found $10,000 in cash on Plaintiff's person. *Id.* Hanou then conducted a search of Plaintiff's entire vehicle, starting with the "cargo area." *Id.* ¶ 16. Hanou removed the contents of Plaintiff's vehicle, placing items on the ground—including a firearm case containing the shotgun that Plaintiff had reported to Hanou. *Id.* ¶¶ 16, 17.

During the search, Hanou found an additional $7,000 in cash in the front seat area of Plaintiff's vehicle. *Id.* ¶ 18. After Hanou finished searching the car, he placed Plaintiff in the back seat of his patrol car. *Id.* ¶ 22. Plaintiff was placed under arrest, and Hanou apparently informed Plaintiff that Hanou was arresting Plaintiff because Hanou found illegal drugs and "a smoking device" in Plaintiff's vehicle. *Id.* ¶ 23. This was not true. *Id.* The only thing confiscated from Plaintiff's vehicle was cash. *Id.*

At trial, no drugs were introduced into evidence and the prosecutors denied that Hanou's patrol car had a dashboard camera. *Id.* ¶ 24. In spite of the prosecutor's misrepresentations and the absence of evidence, on June 6, 2014, Plaintiff was convicted of one count of possession of a controlled substance and one count of possession of a smoking device. *Id.* Plaintiff was sentenced to eighteen

months of probation. *Id.* Because of his arrest, Plaintiff spent twenty-eight days in jail. *Id.* ¶ 25.

Only $15,950 of the $17,000 confiscated from Plaintiff was ever returned. *Id.* ¶ 26. Plaintiff's conviction was overturned by the California Court of Appeals on March 3, 2016 and remittitur issued on May 20, 2016. *Id.* ¶ 27.

B. Procedural History

Plaintiff filed suit against the City of Covina, Kim Raney ("Raney") in his official capacity as the Chief of the City of Covina Police Department, and Office Terrence Hanou on September 22, 2016 (Dkt. 1). Plaintiff brings eight claims. Under 42 U.S.C. § 1983, Plaintiff alleges (1) unlawful stop and detention; (2) false arrest; (3) false imprisonment; (4) malicious prosecution; (5) failure to screen and properly hire, against the City of Covina and Raney; (6) failure to train properly, against the City of Covina and Raney; and (7) failure to supervise and discipline, against the City of Covina and Raney. *See generally* Compl. Plaintiff also alleges an eighth claim, styled as a "*Monell* municipal liability civil rights claim," against the City of Covina. *See id.* ¶¶ 80–88.

Defendants filed the instant Motion on November 2, 2016. Plaintiff opposed on November 14, 2016 ("Opposition") (Dkt. 14), and Defendants replied on November 21, 2016 ("Reply") (Dkt. 15).

II. Legal Standard

A. Motion to Dismiss

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to set forth a set of facts which, if true, would entitle the complainant to relief. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (holding that a claim must be facially plausible in order to survive a motion to dismiss). The pleadings must raise the right to relief beyond the speculative level; a plaintiff must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). On a motion to dismiss, a court accepts as true a plaintiff's well-pleaded factual allegations and construes all factual inferences in the light most favorable to the plaintiff. *See Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court is not required to accept as true legal conclusions couched as factual allegations. *Iqbal*, 556 U.S. at 678.

In evaluating a Rule 12(b)(6) motion, review is ordinarily limited to the contents of the complaint and material properly submitted with the complaint. *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Under the incorporation by reference doctrine, the court may also consider documents "whose contents are alleged in a complaint and

whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119, 1121 (9th Cir. 2002). The court may treat such a document as "part of the complaint, and thus may assume that its contents are true for purposes of a motion to dismiss under Rule 12(b)(6)." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

When a motion to dismiss is granted, the court must decide whether to grant leave to amend. The Ninth Circuit has a liberal policy favoring amendments and, thus, leave to amend should be freely granted. *See, e.g.*, *DeSoto v. Yellow Freight System, Inc.*, 957 F.2d 655, 658 (9th Cir. 1992). However, a court need not grant leave to amend when permitting a plaintiff to amend would be an exercise in futility. *See, e.g.*, *Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile.").

B. Requests for Judicial Notice

Defendants have asked the Court to take judicial notice of two court records and ten "adjudicative facts." *See generally* Defendants' Request for Judicial Notice ("Def.'s RJN") (Dkt. 13-7). Plaintiff has asked the Court to take judicial notice of the appellate opinion in *People v. Mills*,

Case No. B257145. *See* Plaintiff's Request for Judicial Notice ("Pl.'s RJN") (Dkt. 14-2).

The court may take judicial notice of court filings and other matters of public record. Fed. R. Evid. 201(b); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (citing *Burbank–Glendale–Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998). Therefore, the court takes judicial notice of:

- Letter from James E. Mills to City Clerk, stamped by City Clerk, and attachments (Mot. Ex. A);
- Letter from City of Covina Risk Manager to James E Mills, date April 15, 2014 (Mot. Ex. B);
- Superior Court of California, County of Los Angeles Criminal Case Summary of Case No. CITKA101563-01, James Edward Mills (time stamped October 31, 2016) (Mot. Ex. C);
- Superior Court of California, County of Los Angeles Criminal Case Summary of Case No. XEAKA101563-01, James Edward Mills (time stamped October 31, 2016) (Mot. Ex. D);
- People v. James Edward Mills, Case No. B257145, filed March 3, 2016 (Mot. Ex. E); and
- People v. James Edward Mills, Case No. B257145, filed March 3, 2016 (Declaration of Thomas Schelly ("Schelly Decl.") (Dkt. 14-1) Ex. 1).

III. Discussion

A. Statute of Limitations

Defendants first argue that Plaintiff's entire action must be dismissed as time- barred. *See* Mot. at 6–12.

The parties agree that California's two-year statute of limitation for injury claims applies to Plaintff's § 1983 claims. Mot. at 6; Opp'n at 2–3. This is correct. "'For actions under 42 U.S.C. § 1983 . . . courts apply the forum state's statute of limitations for personal injury actions, along with the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law.'" *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132 (9th Cir. 2007) (citing *Jones v. Blanas,* 393 F.3d 918, 927 (9th Cir. 2004), *cert. denied*, 546 U.S. 820 (2005)). In California, actions other than for the recovery of real property are subject to a two-year statute of limitations. Cal. Code Civ. P. § 335.1.

Federal courts also borrow state rules governing "closely related questions of tolling and application." *Sain v. City of Bend*, 309 F.3d 1134, 1138 (9th Cir. 2002) (quoting *Wilson v. Garcia*, 471 U.S. 261, 269 (1985) *superceded on other grounds as stated in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)).

The parties agree that the statute of limitations began to run on April 14, 2013, the date of the traffic stop, search, and arrest. Mot. at 7; Opp'n at 3 n.2. Thus, barring evidence of tolling, Plaintiff's statute of limitations expired on April 14, 2015. *See* Opp'n at 3 n.2 (Plaintiff conceding this

point). This action was filed on September 22, 2016, more than a year later. Plaintiff argues that his claim was tolled for 1,054 days and the limitation period expires on March 3, 2018. Opp'n at 3.

For the reasons explained below, the Court finds that Plaintiff's unlawful stop and detention, false arrest, false imprisonment, failure to screen and properly hire, failure to train properly, and failure to supervise and discipline claims are time-barred.

1. Statutory Tolling

Under California law, a statute of limitations is tolled while a criminal case is pending in the Superior Court. Cal. Gov. Code § 945.3. Thus, Plaintiff's limitations period was tolled between his arrest and his sentencing on June 24, 2014. *See* Mot. Ex. D at 2. This means June 24, 2016 was Plaintiff's deadline to file.

Plaintiff argues that the limitations period was also tolled pursuant to California Code of Civil Procedure § 356. Opp'n at 4. Section 356 provides that "[w]hen the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action." In other words, if Plaintiff was legally barred from filing his claims, his limitation period is tolled for that period of time.

Plaintiff argues that *Heck v. Humphrey*, 512 U.S. 477 (1994), operated to "legally prevent" him from commencing the instant action until his criminal conviction was invalidated on appeal. Opp'n at 4–5. Plaintiff's conviction was invalidated on March 3, 2016. Compl. ¶ 27; *see also* Schelly Decl. Ex. 1 (appellate opinion in *People v. Mills*, Case No. B257145). Therefore, under Plaintiff's reading, he would have until March 3, 2018 to file his claims.

Under *Heck*, "[w]hen 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence' . . . § 1983 is not an available remedy. 'But if . . . the plaintiff's action, even if successful, will not demonstrate the invalidity of [his conviction or sentence], the [§ 1983] action should be allowed to proceed " *In re Pruett*, 784 F.3d 287, 290 (5th Cir.), *cert. denied sub nom. Pruett v. Stephens*, 135 S. Ct. 1919, 191 (2015) (quoting *Heck*, 512 U.S. at 487). The policy behind this rule is the recognition that "[§] 1983 actions, like civil tort actions, are not appropriate vehicles to challenge the validity of outstanding criminal judgments if such a challenge necessarily requires the plaintiff to prove the unlawfulness of his conviction." *Kamar v. Krolczyk*, No. 1:07-CV-0340 AWITAG, 2008 WL 2880414, at *6 (E.D. Cal. July 22, 2008) (citing *Heck*, 512 U.S. at 486).

In *Wallace v. Kato*, 549 U.S. 384 (2007), the Supreme Court clarified that "there is no federal tolling of constitutional torts while a plaintiff is subject to a criminal prosecution." *Lindsey v. Myer*, No. 02:10-CV-1437-SU, 2012 WL 1114181, at *5 (D.

Or. Feb. 13, 2012), *report and recommendation adopted*, No. 2:10-CV-1437-SU, 2012 WL 1114151 (D. Or. Apr. 2, 2012) (citing *Wallace*, 549 U.S. at 394–95). Rather,

> [i]f a plaintiff files a false-arrest claim before he has been convicted (or files any other claim related to rulings that will likely be made in a pending or anticipated criminal trial), it is within the power of the district court, and in accord with common practice, to stay the civil action until the criminal case or the likelihood of a criminal case is ended.

Wallace, 549 U.S. at 393–94.

Thus, in *Kamar*, for example, the plaintiff brought claims under § 1983, alleging unlawful search and seizures that led to three complaints filed against the plaintiff. *Kamar*, 2008 WL 2880414, at *3. However, the plaintiff waited until after the charges were against him were dismissed to file suit. *Id.* The court found that "[i]n light of *Wallace,* the *Heck* bar did not prohibit [the p]laintiff from filing this action until the criminal charges against him were dismissed." *Id.* at *7. Rather, the action accrued at the time of the challenged search. *Id.*

"Nothing in *Wallace* appears to limit it to certain types of civil rights violations." *Id.* at *7. Thus, "[a] § 1983 claim based upon illegal conduct leading to an arrest accrues at the time of injury." *Lindsey*, 2012 WL 1114181, at *7.

Plaintiff argues that his claims necessarily imply the invalidity of his criminal conviction, pointing out that "the same constitutional violations for which [he] now sues were the very reasons the State Court of Appeal reversed [his] criminal conviction." Opp'n at 5 (citing Schelly Decl. Ex. 1 at 26 n.13 ("The methamphetamine Hanou recovered . . . formed the evidentiary basis for appellant's convictions Respondent does not claim the People would be able to proceed absent this evidence. Remanding the matter for further proceedings other than dismissal would be an idle gesture.")). This appears to be true—but it does not entitle Plaintiff to a later accrual date or to tolling under California Code of Civil Procedure § 356.

Plaintiff's unlawful stop and detention, false arrest, false imprisonment, failure to screen and properly hire, failure to train properly, and failure to supervise and discipline claims fall within the ambit of *Wallace*, and the Court finds that *Wallace* expressly rejected the kind of tolling Plaintiff requests.

As described in *Wallace*, had Plaintiff filed his claims during his criminal proceedings, the Court could have stayed the suit until the criminal case ended. *Wallace*, 549 U.S. at 393–94. Here, that would have meant staying the case until Plaintiff's conviction was overturned and/or dismissed. At that point, as explained in *Wallace*, the civil action could have proceeded, absent some other bar to suit. *Id.* at 394. As it is, Plaintiff filed his claims on September

22, 2016, three months after the June 24, 2016 expiration date provided by tolling under California Government Code § 945.3. Because *Heck* did not bar Plaintiff from filing his claims while he was subject to a criminal prosecution, Plaintiff's limitation period was not tolled under California Code of Civil Procedure § 356. Accordingly, absent equitable tolling, Plaintiff's unlawful stop and detention, false arrest, false imprisonment, failure to screen and properly hire, failure to train properly, and failure to supervise and discipline claims were not timely filed.

2. Malicious Prosecution Claim

Plaintiff's malicious prosecution claim is subject to a different limitations period, as Defendants acknowledge. *See* Reply at 8, 9. "[M]alicious prosecution claims do not accrue until the underlying prosecution terminates in favor of the plaintiff." *Braunstein v. U.S. Postal Serv.*, No. 05-16390, 2007 WL 1112620, at *1 (9th Cir. Apr. 12, 2007) (citing *Heck*, 512 U.S. at 484 (1994); *Hartman v. Moore*, 547 U.S. 250, 257 (2006)). Here, Plaintiff's conviction was reversed, with directions for the trial court to dismiss, on March 3, 2016. Accordingly, the two-year statute of limitations for this claim expires on March 3, 2018. Plaintiff's malicious prosecution claim is therefore timely.

3. Equitable Tolling

Plaintiff does not oppose, and thus concedes, Defendants' argument that there is no basis to

equitably toll Plaintiff's statute of limitations. *See* Mot. 9–11.

For the reasons explained in this Section, the Court finds that Plaintiff's unlawful stop and detention, false arrest, false imprisonment, failure to screen and properly hire, failure to train properly, and failure to supervise and discipline claims are time-barred. Accordingly, despite the Court's grave concern with Defendants' alleged conduct and the strength of Plaintiff's claims, the Court is compelled to DISMISS these claims WITH PREJUDICE.

B. Failure to State a Claim

In their Reply, Defendants argue that Plaintiff fails to state a malicious prosecution claim because he alleges facts that defeat such a claim. Reply at 9. Because Defendants did not raise this argument in their Motion, Plaintiff has not had an opportunity to oppose. Nevertheless, the Court finds it prudent to address Defendants' argument and provide guidance to Plaintiff.

"In order to prevail on a § 1983 claim of malicious prosecution, a plaintiff 'must show that the defendants prosecuted [him] with malice and without probable cause, and that they did so for the purpose of denying [him] equal protection or another specific constitutional right.'" *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (insertions in original) (citing *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1189 (9th Cir. 1995)). "[M]alicious prosecution with the intent to deprive a

person of equal protection of the law or otherwise to subject a person to a denial of constitutional rights is cognizable under § 1983." *Id.* 1069 (citing *Poppell v. City of San Diego,* 149 F.3d 951, 961 (9th Cir. 1998)).

The 'denial of a constitutional right' element is critical, because "no substantive due process right exists under the Fourteenth Amendment to be free from prosecution without probable cause." *Id.* at 1069 (citing *Albright v. Oliver*, 510 U.S. 266, 268, 271 (2004) (plurality); *id.* at 275 (Scalia, J., concurring); *id.* at 277 (Ginsburg, J., concurring); *id.* at 282–83 (Kennedy, J., concurring in the judgment and joined by Thomas, J.); *id.* at 291 (Souter, J., concurring in the judgment)).

The Court has taken judicial notice of the Court of Appeal decision in *People v. Mills*, Case No. B257145. As Defendants points out, Plaintiff conceded to that court that "the initial stop of the SUV for a Vehicle Code violation was lawful." Schelly Decl. Ex. 1 at 13. However, Plaintiff has alleged here that Defendant Hanou did not "discover[] that [Plaintiff's] registration had expired" and that Hanou's representations otherwise were a "false and erroneous" basis upon which to conduct a traffic stop. Compl. ¶ 9. Plaintiff alleges that, to the contrary, when Hanou checked the database, it "showed that [Plaintiff's] vehicle registration was correct . . . and the database showed that it was current." *Id.* ¶ 10. On this basis, Plaintiff alleges that his criminal prosecution was instituted "without probable cause." *Id.* ¶ 52. This is sufficient to allege lack of probable cause.

Plaintiff also alleges that Defendants "acted with reckless disregard of the law and of Plaintiff's legal rights." *Id.* ¶ 54. Generally, Plaintiff alleges that Defendants convicted him using falsified evidence. *See generally* Compl. This is insufficient to allege that Defendants' prosecuted Plaintiff "*for the purpose of* denying [him] equal protection or another specific constitutional right." *Awabdy*, 368 F.3d at 1066 (emphasis added).

Because Plaintiff has failed to allege the 'denial of a constitutional right' element of a malicious prosecution claim, the Court DISMISSES Plaintiff's claim WITHOUT PREJUDICE.

C. *Monell* Claim

To hold a city liable under § 1983 for the violation of a constitutional right, a plaintiff must establish liability under *Monell v. Dep't. of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). "[M]unicipalities may be held liable as 'persons' under § 1983 'when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent the official policy, inflicts the injury.'" *Price v. Sery*, 513 F.3d 962, 966 (9th Cir. 2008) (quoting *Monell*, 436 U.S. at 694). Four conditions must be satisfied in order to establish municipal liability under *Monell*. The plaintiff must show "'(1) that he possessed a constitutional right of which he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right;

and (4) that the policy is the moving force behind the constitutional violation.'" *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 835 (9th Cir. 1996) (quoting *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992)).

Plaintiff alleges that the City of Covina had an "unconstitutional policy which allowed its police officers to violate citizen's rights through unlawful and illegal stops, searches, and seizures, and arrests." *Id.* ¶ 81. Plaintiff alleges the City of Covina was "deliberately indifferent to [their officers'] widespread misconduct," and to Plaintiff's "right to be free from, and protected from, harm by the police officers and secure in his bodily integrity." *Id.* ¶¶ 82, 85. As a result of this indifference, Plaintiff alleges that he was "intentionally and negligently inflicted with emotional distress," "his Constitutional rights were violated," and he was "deprived of the rights, privileges, and immunities secured to him by the Constitutions of the United States and of the State of California." *Id.* ¶¶ 86–88.

However, Plaintiff's *Monell* liability claim rests on his other substantive claims. *See* Compl. ¶ 80. To the extent the *Monell* claim stands alone, it stems from the same underlying events as Plaintiff's other claims—the April 14, 2013 traffic stop, search, and arrest—and is thus untimely for the same reason. To the extent Plaintiff bases his *Monell* claim on his amendable malicious prosecution claim, the Court finds that amendment of the *Monell* claim would not be futile. Accordingly, the Court DISMISSES Plaintiff's *Monell* claim WITHOUT PREJUDICE.

D. Dismissal of Raney

Defendants move to dismiss, and Plaintiff does not oppose the dismissal of, Defendant Raney. Mot. at 14–15; Opp'n at 7. The Court therefore DISMISSES Plaintiff's claims against Raney.

E. Disposition

For the reasons explained above, the Court GRANTS Defendants' Motion to Dismiss. Plaintiff may file an amended complaint as to malicious prosecution claim, if desired, **on or before February 27, 2017**.

The Clerk shall serve this minute order on the parties.

APPENDIX C

California Court of Appeal
opinion
(March 3, 2016)

Filed 3/3/16 P. v. Mills CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD MILLS, Defendant and Appellant.	B257145 (Los Angeles County Super. Ct. No. KA101563)

APPEAL from a judgment of the Superior Court of Los Angeles County, Juan Carlos Dominguez, Judge. Reversed and remanded with directions.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah Hill, Jessica C. Owen and Nathan Guttmar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant James Edward Mills appeals from the judgment entered following his convictions by jury on count 1 – possession of a controlled substance (methamphetamine), and count 2 – possession of a smoking device, following the denial of his suppression motion. (Health & Saf. Code, §§ 11377, subd. (a), 11364.1, subd. (a)(1); Pen. Code, § 1538.5.)[1] The court suspended imposition of sentence and placed him on probation for 18 months. We reverse and remand with directions.

ISSUES

Appellant claims the trial court (1) erroneously denied his Penal Code section 1538.5

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[1] A detailed recitation of the facts of the offenses is unnecessary to resolve this appeal. It is sufficient to note that on April 14, 2013, in West Covina, appellant was driving a Ford Escape containing methamphetamine and a methamphetamine pipe.

suppression motion and (2) erroneously denied his *Pitchess*[2] motion.

DISCUSSION

The Trial Court Partially Erred by Denying Appellant's Suppression Motion.

1. *Suppression Proceedings at the Preliminary Hearing.*

a. *People's Evidence.*

(1) *Events Leading to the Stop of the SUV.*

At appellant's preliminary hearing, appellant made a Penal Code section 1538.5 suppression motion and the magistrate indicated it would be heard concurrently with the preliminary hearing. Covina Police Officer Terrence Hanou testified as follows. About 4:20 p.m. on April 14, 2013, Hanou was in his marked police car on the west side of the Fairfield Motel in West Covina when appellant, nearby, saw him. Appellant had been walking from the lobby of the motel. Appellant quickly drove a Ford Escape SUV around the motel, onto the street, and stopped at a nearby Best Western Motel. Hanou conducted a traffic stop of the SUV. Hanou stopped the SUV because its registration tags had expired and Hanou believed 2014 tags on the SUV's license plate were fraudulent. Moreover, when Hanou stopped the SUV, he thought it was suspicious that appellant had driven from one hotel to the next.

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[2] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

(2) *The Prolonging of the Detention Prior to the Search of the SUV.*

Hanou testified about the circumstances in which appellant revealed to Hanou that appellant had a firearm. Hanou testified he contacted appellant, the sole occupant of the SUV, and asked for his license, registration, and insurance. Hanou testified, "He *provided* the paperwork to me *and I asked* him if he was on probation or parole or *if he had any weapons in the vehicle*." (Italics added.) The following also occurred: "Q. [The Prosecutor]: . . . So you are asking him for documentation *and he hands* the documents to you; right? [¶] A. Correct. [¶] Q. At which time do you *ask* him whether he's on probation or parole and *if he has weapons in the car*? [¶] A. *At the same time*." (Italics added.) Appellant told Hanou that appellant had a "firearm inside the vehicle." When appellant said that, Hanou believed that maybe a crime was afoot. Appellant's counsel asked Hanou what crime, and he testified, "[p]ossession of a handgun, possession of a rifle, maybe it's possessed illegally, maybe he's a prior felon in possession of a handgun or a weapon. I don't know at that point, but I'm going to investigate it." Hanou called for backup.

Hanou testified in more detail concerning these events as discussed below. Appellant handed Hanou the appropriate papers, Hanou saw the SUV was validly licensed and the registration had been updated, and Hanou concluded the Department of Motor Vehicles (DMV) had not updated its computer. Hanou determined DMV had made a mistake. However, appellant was not free to leave

because Hanou was still conducting his traffic stop. The following then occurred during cross-examination: "Q. And what was the basis of a traffic stop for registration violation after you determined the registration was valid? [¶] A. This area has numerous motels, and I had made numerous narcotics-related investigation arrests from this area. The fact that Mr. Mills was parked, saw me, had went around the north side of the [Fairfield Motel] building, had fled out the east side, onto Garvey, quickly darted into another motel raised suspicion of what he was doing."

Hanou also testified about these events as follows. It appeared appellant had valid registration. At that point Hanou was investigating why appellant went from one motel to another. The following then occurred: "Q. What criminal activity was Mr. Mills involved in? [¶] A. At the time of the stop, it was for fraud. [¶] Q. Okay. [¶] A. And we resolved that issue. But I *had* asked him he was on probation or parole and if any weapons. He told me he had a firearm in the vehicle." (*Sic*; italics added.) Hanou provided additional detail. He testified he asked appellant "about probation and parole." The following occurred: "Q. And did you make note of whether, in your report, he told you he was on probation or parole? [¶] A. . . . [¶] He *told* me that he had a firearm in the vehicle *when I asked* those questions." (Italics added.) Hanou also testified that when he talked to appellant, Hanou immediately asked him six questions, i.e., "license, insurance, registration, parole, probation and weapons." The prosecutor asked why it was important to Hanou to know whether there was a

firearm or any weapon in the vehicle that Hanou had stopped, and Hanou replied, "[f]or my safety and also for the safety for the occupant of the vehicle." Hanou did not remember if appellant told him where the weapon was.

After Hanou called for backup, another officer arrived and Hanou then had appellant exit the SUV. Hanou conducted a patdown search of appellant and found possible contraband, i.e., $10,000, in appellant's right back pocket. Hanou asked appellant for consent to search appellant's SUV but appellant refused to consent. Prior to the search of the SUV, appellant was "[o]n the front hood" of Hanou's police car and Hanou did not believe appellant was in handcuffs.

(3) *Hanou's Search of the SUV.*

Hanou also testified as follows. Hanou searched the vehicle for a weapon. He searched the vehicle against appellant's consent because a weapon was in the vehicle. During the search of the SUV, Hanou found, inter alia, the subject methamphetamine and methamphetamine pipe, as well as a shotgun and ammunition.[3]

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[3] In particular, Hanou testified he found an "unloaded 12-gauge Remington shotgun in the rear cargo area next to approximately 125 rounds of ammunition." Hanou also testified "[i]n the center console I found a baggie of methamphetamine and also in the rear cargo area in the luggage container I found another large baggie of methamphetamine and a methamphetamine pipe." Hanou further testified concerning the large baggie of

Hanou also testified as follows. The cargo area was immediately accessible to appellant. The weapon was immediately accessible to appellant because he was driving an SUV that had no trunk but only a cargo area behind a second row of seats. Appellant could not have reached the firearm from the driver's seat but could have reached it if he had crawled out the driver's seat and into the back. Following the search of the SUV, appellant was arrested. Hanou carried a cell phone when patrolling but did not remember whether he used it during the stop.

b. *Defense Evidence.*

Appellant testified, in pertinent part, as follows. Appellant was driving the SUV and Hanou stopped him. Hanou first asked appellant if he was on parole or probation, and appellant replied no. Hanou then asked if appellant had ever been arrested, and appellant replied no. Hanou then asked if appellant had his driver's license, registration, and insurance. Appellant replied yes and presented them to Hanou. Hanou told appellant the registration was valid. Hanou asked appellant for consent to search his vehicle and appellant refused to give it. Hanou walked away, spoke with someone on a cell phone, and returned. Hanou asked appellant if he had any "weapons" in the car. Appellant replied yes. Appellant said "it" was in the back where it belonged and told Hanou the weapon

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methamphetamine that it was found "inside the cargo area, inside the luggage."

was not loaded. The weapon was in the cargo area of the SUV. Hanou went and made another call, returned, and asked appellant to exit the SUV. Appellant complied. Hanou immediately handcuffed appellant and conducted a patdown search.

c. *The Magistrate's Ruling.*

Following argument, the magistrate ruled as follows. Hanou's detention of appellant was lawful. Moreover, the prolonging of the detention was lawful. As to the prolonging, Hanou approached the SUV and was entitled to ask the six questions during the time it took to investigate the incident that caused Hanou to be there in the first place. When appellant was handing the documents to Hanou, Hanou knew a weapon was in the SUV and the registration was valid. Hanou was entitled to prolong the detention because, during the "primary detention," appellant said there was a weapon in the SUV. The search of the SUV was lawful under *Michigan v. Long* (1983) 463 U.S. 1032 [77 L.Ed.2d 1201] (*Long*). Moreover, because appellant said there was a firearm in the SUV, the search of the SUV for the firearm was lawful under *Arizona v. Gant* (2009) 556 U.S. 332 [173 L.Ed.2d 485] (*Gant*) and *United States v. Ross* (1982) 456 U.S. 798, 825 [72 L.Ed.2d 572] (*Ross*). The magistrate denied the suppression motion.

2. *Appellant's Renewed Suppression Motion.*

On May 29, 2014, appellant filed in the trial court a Penal Code section 1538.5 suppression motion. Appellant sought renewal of the motion based on evidence in a police dashboard camera video.[4] On June 3, 2014, pursuant to the parties' agreement, the trial court viewed the video, discussed below.

a. *The Video (People's Exhibit No. 3).*

People's exhibit No. 3 consists of the video and an accompanying video player. The exhibit reflects that the video recorded events beginning about 4:20 p.m. on April 14, 2013, and the video was about 33

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[4] Where, as here, appellant's suppression motion was denied at the preliminary hearing and appellant renewed it before the trial court, the evidence at the special hearing in the trial court on the renewed motion was, pursuant to Penal Code section 1538.5, subdivision (i), limited, in this case, to the video (i.e., evidence presented that was "agreed to by all parties" (Pen. Code, § 1538.5, subd. (i)) plus the preliminary hearing transcript. The video was defense exhibit A. That exhibit, so designated, is not before this court. Appellant asserts People's exhibit No. 3, admitted into evidence *at trial*, is a dashboard camera video of the events. This court has viewed People's exhibit No. 3. There is no dispute there was only one video recording of the events, whether reflected in defense exhibit A or People's exhibit No. 3, nor is there any dispute People's exhibit No. 3 accurately reflects those events. People's exhibit No. 3 does not contain audio of any statements clearly identifiable as made by appellant or the police.

minutes long. The exhibit, considered with Hanou's testimony, provides substantial evidence as follows.

(1) *Events from Appellant's Exit from His SUV to Franco Escorting Him Away from the Police Car.*

At 4:26 p.m., appellant exited his car and, during the next two minutes, the following occurred. Hanou and another officer (hereafter, Franco) handcuffed appellant, then Hanou, followed by Franco, escorted appellant to the front of the police car (which was behind the SUV). Hanou left appellant there with Franco, then Franco escorted appellant to the passenger side of the police car, permitting a citizen's car to back out and exit between the SUV and police car.[5]

(2) *Events from the Opening of the Cargo Door to Hanou's Initial Entry into the Driver's Area.*

Below are events from the time Hanou opened the SUV's rear door (cargo door) to the cargo area to the time he initially entered the driver's area (that entry being his first opportunity to search the center console and find methamphetamine). At "16:28:55" p.m.,[6] Hanou, behind the SUV, opened the cargo

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[5] The citizen's car made a number of attempts to maneuver out of its parking place, obscuring some events before eventually leaving.

[6] Hereafter, where the exhibit used military time, e.g., 16:28:55, we will use civilian time (4:28:55) with the understanding the events occurred in the afternoon.

door. At 4:28:56, the reflections of appellant and Franco on the side of the citizen's car showed the two standing outside the passenger side of the police car. At 4:29:01, Hanou removed from the cargo area red luggage and, without opening it, put it on the ground behind the SUV. At 4:29:10, Hanou removed from the cargo area an open square box and looked in it in passing while putting it on the ground behind the SUV. At 4:29:12, appellant and Franco were visible on the passenger side of the police car through reflections from the citizen's car, which was still trying to leave. At 4:29:14, Hanou removed from the cargo area a gray rectangular box and, without opening it, put it on the ground.

From 4:29:22 to 4:30:21, Hanou, behind the SUV, removed from the cargo area a firearm case, removed a shotgun from the case, examined the shotgun, appeared to talk on a hand-held device, then put the shotgun back in the case and put the case on the ground. During this period, appellant and Franco, at 4:29:28, were visible on the passenger side of the police car through their reflections from the citizen's car, and, at 4:29:50, Franco moved appellant back to the front of the police car. From 4:30:26 to 4:30:34, Hanou appeared to continue to search the cargo area, then left the cargo area (although the view of portions of Hanou's actions during this period are blocked by appellant's body). From 4:31:13 to 4:31:19, Hanou entered the driver's area, looked under the driver's seat, then left the

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Subsequent references to areas (e.g., the driver's area, or the front passenger area) are to areas of the SUV.

driver's area. (This is the first opportunity Hanou had to find the baggie of methamphetamine that, according to his preliminary hearing testimony, he found in the center console.)

(3) *Events from the Initial Entry into the Left Rear Passenger Area to the Entry into the Red Luggage.*

Below are events from the time Hanou initially entered the left rear passenger area to the time he removed and entered the red luggage. (There is no dispute this was the luggage in which, according to Hanou's preliminary hearing testimony, he found a baggie of methamphetamine.) At 4:31:23, Hanou entered the left rear passenger area and appeared to search that area, and appellant's body blocked the view of Hanou's subsequent actions until 4:31:43.

4:31:43, Hanou was standing outside the left rear passenger side. He remained there until, at 4:31:53, he left that area. (Hereafter, we will refer to this period as period one. This was one of several periods, discussed below, that prolonged appellant's detention.) Hanou then walked around the front of the SUV and, from 4:32:19 to 4:33:08, appeared to search the right rear passenger area, then left that area. At 4:33:08, Hanou left the right rear passenger area, then walked to an area to the right of the police car and out of view until, at 4:36:03, he returned to the SUV from an area to the right of the police car. (Hereafter, period two.) From 4:36:09 to 4:36:33, Hanou, behind the SUV, again reached into the firearm case (which he earlier had put on the

ground), retrieved documents from the case, and later returned them to the case. (Hereafter, period three). At 4:36:38, Hanou left the cargo area again.

After Hanou left the cargo area, Hanou, from 4:36:55 to 4:37:22, was using a hand-held device to talk with someone while he was standing outside the left rear passenger area and later walking to the front left corner of the SUV. From 4:37:22 to 4:37:23, he stopped using his hand-held device, then walked back towards the rear of the SUV. (Hereafter, period four.) From 4:37:27 to 4:38:18, Hanou was in the driver's area. From 4:39:52 to 4:41:14, the following occurred. Hanou left the SUV, then returned to appellant and talked to him. Hanou checked appellant's handcuffs and eventually escorted him towards the back of the passenger side of the police car and out of view. A sound of a car door is audible. Appellant is never again seen in the video.

From 4:41:26 to 4:41:49, Hanou quickly entered and exited the driver's area. From 4:41:51 to 4:41:59, Hanou, holding papers, walked towards the passenger side of the police car and out of view. (Hereafter, period five.) From 4:42:41 to 4:44:22, the following occurred. Hanou entered the driver's area. He later entered the left rear passenger area. Franco walked (without appellant) from the police car to the SUV and entered the driver's area. Both officers later concurrently exited the SUV. From 4:44:22 to 4:44:44, the officers conversed. (Hereafter, period six.) From 4:44:44 to 4:45:16, Hanou, behind the SUV, entered the cargo area

again, and Hanou removed from the cargo area a brown bag and put it on the ground.[7]

From 4:46:44 to 4:48:59, the following occurred. Hanou picked up the red luggage (which he earlier had put on the ground), put it in the cargo area, and made motions as if he was searching it (his back to the video camera). (This appears to be the first opportunity Hanou had to find the baggie of methamphetamine that, according to his preliminary hearing testimony, he found in luggage.) Hanou appeared to take an item from in front of him (from the area in which he had placed the red luggage) and put the item on the ground. Hanou then put the red luggage and items on the ground.

(4) *Subsequent Events to the Closing of the Cargo Door.*

From 4:49:03 to 4:50:52, the following occurred. Hanou took a gray item that was on or inside the open square box and made motions as if he was searching the gray item (his back to the video camera). He later left the cargo area. Hanou subsequently entered the right rear passenger area, then the right front passenger area. Hanou later entered the lower portion of the right front passenger area.

Hanou returned to the area behind the SUV and, at 4:53:18, searched the gray rectangular box,

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[7] Based on Hanou's testimony and the video, the brown bag was not a baggie in which he found methamphetamine.

then, at 4:53:24, searched the open square box (each of which he earlier had put on the ground). At 4:54:10, Hanou closed the cargo door. On a number of occasions from the time appellant was last seen in the video to the time Hanou closed the cargo door, a person (presumably appellant) was clearing the person's throat in the police car.

b. *The Trial Court's Ruling.*

After argument at the special hearing, the court stated, inter alia, "based on the totality of the circumstances, and for the reasons very well articulated by [the magistrate] at the preliminary hearing, the court denies the 1538.5."

3. *Analysis.*

Appellant claims the trial court erroneously denied his Penal Code section 1538.5 suppression motion. He concedes the initial stop of the SUV for a Vehicle Code violation was lawful, but argues the prolonging of the stop of the SUV, and the search of the SUV, violated the Fourth Amendment.

a. *Hanou's Weapons Question Did Not Unlawfully Prolong the Stop.*

Appellant cites *People v. McGaughran* (1979) 25 Cal.3d 577 (*McGaughran*) and *Williams v. Superior Court* (1985) 168 Cal.App.3d 349 (*Williams*), for the proposition his detention was unlawfully prolonged where "Hanou, *after* obtaining all the information he needed in order to decide that

appellant's license tags were in good standing, and a citation was therefore unnecessary, *chose to ask a series of investigative questions which were unrelated* to the suspected Vehicle Code violation." (AOB/15) (Italics added.)

Concerning prolonged detentions following traffic stops, *People v. Bell* (1996) 43 Cal.App.4th 754 (*Bell*), is instructive. In *Bell,* an officer stopped a car for speeding. Stewart was the driver and the defendant was a passenger. The officer conversed with Stewart while writing a ticket, then gave Stewart the speeding ticket. (*Id.* at pp. 757, 759.) Stewart made statements leading the officer to suspect Stewart and the defendant were transporting drugs. (*Id.* at pp. 757-758.) The defendant claimed Stewart was unlawfully detained for questioning unrelated to the purposes of the traffic stop and Stewart's detention was unlawfully prolonged. (*Id.* at pp. 758, 760.)[8]

Bell indicated the leading California case concerning the permissible scope of a traffic stop was *McGaughran.* (*Bell, supra,* 43 Cal.App.4th at p. 765.) *Bell* also discussed *Williams*, a similar case. (*Bell,* at pp. 766-767.) *Bell* stated, "*McGaughran* and *Williams* indicate that investigative activities beyond the original purpose of a traffic stop are permissible as long as they do not prolong the stop beyond the *time* it would otherwise take. Federal cases are generally in accord." (*Bell*, *supra,* 43

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[8] *Bell* earlier had concluded the defendant therein had "standing" to challenge the scope of Stewart's detention. (*Bell, supra,* 43 Cal.App.4th at p. 765.)

Cal.App.4th at p. 767, italics added.) *United States v. Shabazz* (5th Cir. 1993) 993 F.2d 431 (*Shabazz*) was one of the federal cases cited by *Bell*. *Bell* later observed, "[t]he appellate court [in *Shabazz*], . . . stated, '[W]e reject any notion that a police officer's *questioning*, even on a subject unrelated to the purpose of the stop, is itself a Fourth Amendment violation. . . . Mere questioning . . . is neither a search nor a seizure.' (Citation.) [*Shabazz*] explained that the nature of the questioning during a detention might be relevant, but only as evidence of prolongation—'that the justification for the original detention no longer supports its continuation.' (Citation.)" (*Bell*, at p. 768, italics added; *People v. Brown* (1998) 62 Cal.App.4th 493, 496-500 [accord].) *Bell* later stated, "[h]ere, [the officer] testified that his 'conversation' with Stewart took place *while* he was writing the speeding ticket *and did not add to the delay otherwise resulting from the traffic stop*." (*Bell*, at p. 767, italics added.) *Bell* concluded the officer's questioning did not unlawfully prolong Stewart's detention. (*Id.* at p. 758.)

On the other hand, *Rodriguez v. United States* (2015) ___ U.S. ___ [191 L.Ed.2d 492] (*Rodriguez*), exemplifies an unlawfully prolonged detention. *Rodriguez* stated, "[t]his case presents the question whether the Fourth Amendment tolerates a *dog sniff* conducted *after* completion of a *traffic* stop. We hold that a police stop *exceeding the time needed to handle the matter for which the stop was made* violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore,

'become[s] unlawful if it is prolonged *beyond the time* reasonably required to *complete th[e] mission'* of issuing a ticket for the violation. [Citation.]" (*Id.* at p. ___ [191 L.Ed.2d at p. 496], italics added.) In *Rodriguez*, seven or eight minutes elapsed from the time the canine officer issued the written warning to the time the dog alerted to the presence of drugs. (*Id.* at p. ___ [191 L.Ed.2d at p. 497].)[9]

In the present case, Hanou testified he asked for appellant's license, registration, and insurance, and "[appellant] *provided* the paperwork to me *and I asked* . . . if he had any weapons in the vehicle." (Italics added.) Hanou also testified he was asking appellant for documentation and "*he hands* the documents to [Hanou]" (italics added) *and* "*[a]t the same time*" (italics added), Hanou "*ask[ed]*

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[9] A recent case, *United States v. Evans* (2015) 786 F.3d 779 (*Evans*), applied *Rodriguez.* In *Evans*, an officer stopped the defendant for traffic violations. *After* all tasks tied to those traffic violations had been, or reasonably should have been, completed, the officer detained the defendant while conducting an eight-minute ex-felon registration check, later indicated to the defendant that the defendant could go, but subsequently further detained him during a "dog sniff" of his car. (*Evans,* at pp. 782-784.) *Evans* stated, "[a]pplying *Rodriguez*, we hold that, by conducting an ex-felon registration check and a dog sniff, both of which were unrelated to the traffic violation for which he stopped Evans, [the officer] 'prolonged [the traffic stop] *beyond the time* reasonably required to complete' his traffic *'mission,'* and so violated the Fourth Amendment, unless there was independent reasonable suspicion justifying each prolongation. [Citation.]" (*Evans,* at p. 786, italics added.) *Evans* remanded to the district court to permit it to consider in the first instance whether reasonable suspicion justified each such prolongation. (*Id.* at pp. 788-789.)

[appellant] . . . if he has weapons in the car." (Italics added.) Thus, there was substantial evidence Hanou's activity of *asking* whether appellant had any weapons in the SUV occurred *while* Hanou was receiving documentation related to the traffic stop *and did not add to the delay otherwise resulting from the traffic stop.* Hanou's weapons question did not violate the Fourth Amendment by unlawfully prolonging appellant's detention.

Appellant argues the contrary as to Hanou's weapons question, citing the colloquy in which appellant's counsel asked Hanou, "And what was *the* basis of a traffic stop for registration violation after you determined the registration was valid?" (Italics added.) However, Hanou, in his *reply*, did not expressly state that, after he determined the registration was valid, the narcotics investigation was "the," i.e., the *sole*, basis for prolonging the stop. Our factual review is limited to determining whether substantial evidence supported the express or implied factual findings of the magistrate. (Cf. *People v. Soun* (1995) 34 Cal.App.4th 1499, 1507.) There was, as previously discussed, substantial evidence Hanou properly asked the weapons question while he was investigating the Vehicle Code violation supporting the initial stop.

b. *The Search of the SUV Was Unlawful.*

(1) *Pertinent Law.*

Appellant also argues Hanou did not have "sufficient cause" to search the SUV. He argues, inter alia, "[t]he mere fact that appellant had a gun

in his vehicle was not unlawful, and was not automatically an officer safety concern."

Concerning protective weapons searches, *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2d 889] (*Terry*) discussed the Fourth Amendment contours of a lawful "protective seizure [of a person] and search for weapons" (*id.* at p. 29), and *Long,* relying on *Terry*, discussed when protective searches of *vehicles* for weapons are permissible under the Fourth Amendment.

In *Terry*, in pertinent part, an officer believed based on personal observations that the defendant Terry and two other men were involved in casing activity preparatory to a robbery likely to involve weapons. The officer approached the three, identified himself as a police officer, and asked for their names. When the men later mumbled something, the officer grabbed the defendant, spun him around, patted down the outside of his clothing, and felt a gun in his overcoat pocket. The officer reached in the pocket but was unable to remove the gun, so he later removed the defendant's overcoat and took the gun from the pocket. (*Terry, supra,* 392 U.S. at pp. 5-7, 28.)

Terry stated, "We . . . decide nothing today concerning the constitutional propriety of an *investigative* 'seizure' upon less than probable cause for purposes of '*detention*' . . . ." (*Terry*, *supra,* 392 U.S. at p. 19, fn. 16, italics added.) Instead, *Terry* focused upon whether a seizure of a person *for the purpose of searching for weapons*, and the later said search *for weapons*, i.e., a "protective seizure and search for weapons" (*id.* at p. 29), violated the Fourth Amendment.

The high court observed that "[t]he question is whether in all the circumstances of this on-the-street encounter, [Terry's] right to personal security was violated by an unreasonable search and seizure." (*Terry*, *supra,* 392 U.S. at p. 9.) *Terry* acknowledged arguments that police needed an escalating set of flexible responses, graduated in relation to the amount of information they possess. (*Id.* at p. 10.) However, *Terry* also acknowledged arguments that judicial acquiescence to the compulsive field interrogation techniques at issue would constitute "abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in 'the often competitive enterprise of ferreting out crime.' " (*Id.* at p. 12.)

Terry later stated, "[the officer] 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for [the officer] to have interfered with petitioner's personal security as he did. [Fn. omitted.] And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one -- whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." (*Terry, supra*, 392 U.S. at pp. 19-20.)

Terry, considering "the nature and extent of the governmental interests involved" (*Terry*, *supra,* 392 U.S. at p. 22), indicated there was a

governmental interest in crime detention and prevention, and the officer properly approached the defendant to investigate a possible robbery. (*Ibid.*) However, *Terry* stated, "The crux of this case, . . . is not the propriety of [the officer's] taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for [the officer's] invasion of Terry's personal security by *searching him for weapons* in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." (*Id.* at p. 23, italics added.)

Terry later concluded, "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take *necessary* measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm." (*Terry, supra,* 392 U.S. at p. 24, italics added.)

Terry, turning to "the nature and quality of the intrusion on individual rights" (*Terry*, *supra,* 392 U.S. at p. 24) noted "[a] search for weapons in the absence of probable cause to arrest, however, must, like any other search, be *strictly circumscribed* by the exigencies which justify its initiation. [Citation.] Thus it must be *limited* to that which is *necessary* for

the discovery of weapons which might be used to harm the officer or others nearby." (*Id.* at pp. 25-26; italics added.) *Terry* later concluded "there must be a *narrowly drawn* authority to permit a reasonable search for weapons *for the protection of the police officer*, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that *his safety or that of others was in danger*. [Citations.]" (*Id.* at p. 27, italics added.)

Terry later discussed whether the defendant's "search and seizure . . . were reasonable, both at their inception and as conducted." (*Terry*, *supra*, 392 U.S. at pp. 27-28.) As to inception, *Terry* noted the officer believed the defendant was engaged in casing activity preparatory to an armed robbery, and that "on the facts and circumstances [the officer] detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior." (*Id.* at p. 28.) Accordingly, *Terry* indicated the officer's "decision at that point to seize Terry and pat his clothing *for weapons*" was not improper. Instead, *Terry* stated, "the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took *limited* steps to do so." (*Ibid.*, italics added.)

As to the manner in which the seizure and search were conducted, *Terry* stated, inter alia, "evidence may not be introduced if it was discovered by means of a seizure and search which were *not reasonably related in scope* to the justification for their initiation. [Citation.]" (*Terry, supra,* 392 U.S. at p. 29, italics added.) *Terry* observed, "[t]he *sole* justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be *confined* in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Ibid.*, italics added.)

Terry concluded the "scope of the search" (*Terry, supra,* 392 U.S. at p. 29) in that case presented no serious problem because the officer patted down the outer clothing of petitioner, felt a gun in the overcoat pocket, and then merely reached for and removed the gun. (*Id.* at pp. 29-30.) The officer "confined his search strictly to what was *minimally necessary* to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." (*Id.* at p. 30, italics added.) *Terry* later observed the officer "*carefully restricted* his search to what was appropriate to the discovery of the particular items which he sought." (*Ibid.*, italics added.)

As mentioned, *Long* pertained to protective searches of vehicles. *Long* acknowledged at the outset that *Terry* did not "expressly address whether such a protective search for weapons could extend to an area beyond the person in the absence of probable

cause to arrest." (*Long, supra,* 463 U.S. at p. 1034.) However, *Long* later stated, "[w]e hold that the protective search of the passenger compartment [at issue in *Long*] was reasonable under the principles articulated in *Terry* and other decisions of this Court." (*Id*. at p. 1035.)

In *Long*, a defendant speeding and driving erratically in a rural area after midnight drove his car into a ditch. The defendant, who had been the sole occupant of the car, met officers at the rear of the car and they asked for, inter alia, registration information. The door on the driver's side of the car had been left open. An officer thought the defendant appeared to be under the influence. The defendant began walking towards the open door of his car and the officers followed him and observed a long hunting knife on the driver's side floorboard. The officers conducted a patdown search which revealed no weapons. An officer, using his flashlight, illuminated the interior of the car to search for other weapons. After the officer saw something protruding from under the front seat armrest, he knelt in the car and lifted the armrest. The officer saw on the front seat an open pouch containing what appeared to be marijuana and subsequently arrested the defendant. Police decided to impound the car and found in the trunk 75 pounds of marijuana. (*Long, supra,* 463 U.S. at pp. 1035-1036.)

Long observed that principles in past high court decisions compelled the conclusion that "the search of the *passenger compartment* of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if

the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." (*Long, supra,* 463 U.S. at p. 1049, italics added.)

Long indicated that, under the circumstances in that case, the officers reasonably believed the defendant posed a danger if he were permitted to reenter his vehicle. (*Long, supra,* 463 U.S. at p. 1050.) *Long* then observed, "[t]he subsequent search of the car was restricted to those areas to which [the defendant] would generally have immediate control, and that could contain a weapon. The trial court determined that the leather pouch containing marihuana could have contained a weapon. . . . It is clear that the intrusion was 'strictly circumscribed by the exigencies which [justified] its initiation.' [Citation.]" (*Id.* at pp. 1050-1051, fn. omitted.)

Long later stated, "[i]n evaluating the validity of an officer's investigative or protective conduct under *Terry*, the '[touchstone] of our analysis . . . is always "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." ' [Citation.] In this case, the officers did not act unreasonably in taking preventive measures to ensure that there were no other weapons within [the defendant's] *immediate* grasp before permitting him to reenter his automobile. Therefore, the balancing required by *Terry* clearly weighs in favor of allowing the police to conduct an area search of the *passenger compartment* to uncover weapons, as long as they

possess an articulable and objectively reasonable belief that the suspect is potentially dangerous." (*Long, supra,* 463 U.S. at p. 1051, italics added.)

In *Long*, the high court concluded the officers could reasonably fear the defendant could injure them even if the defendant "was *effectively under their control* during the investigative stop and *could not* get access to any weapons that might have been located in the automobile." (*Long, supra*, 463 U.S. at p. 1051, italics added.) This was so because (1) a suspect in the defendant's position "might . . . break away from police control and retrieve a weapon from his automobile" (*ibid.*), (2) "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside" (*id.* at p. 1052), or (3) "the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons." (*Ibid.*)[10]

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[10] See *United States v. Holmes* (2004) 376 F.3d 270, 280, stating, "we hold that where a suspect is an occupant or recent occupant of a vehicle at the initiation of a *Terry* stop, and where the police reasonably believe the suspect may be dangerous and that there may be readily-accessible weapons in his vehicle, *Long* authorizes a protective search of the vehicle for weapons, provided the police harbor a reasonable belief that the suspect may gain access to the vehicle *at a time* when that access would endanger the safety of the officers conducting the stop or of others nearby -- including the reasonable belief that the suspect *will return to the vehicle* following the conclusion of the *Terry* stop." (Italics added.) (Accord, *United States v. Brown* (1998) 133 F.3d 993, 998-999.)

The Michigan Supreme Court had held that the search of the interior of the car at issue in *Long* was not justified as a protective search, and the marijuana taken from the trunk had to be suppressed as fruit of the illegal search of the car's interior. (*Long, supra,* 463 U.S. at p. 1037.) The high court, having held the protective search of the passenger compartment was proper, reversed the judgment of the Michigan Supreme Court and, since the latter court had not passed upon the issue of whether the search of the trunk was lawful under the Fourth Amendment, the high court remanded to permit a determination of that issue. (*Id.* at p. 1053.)

(2) *Application of the Law to the Facts.*

Appellant seeks suppression of (1) the methamphetamine Hanou found in the center console and (2) the methamphetamine and methamphetamine pipe Hanou found in the luggage in the cargo area. We note the sole reason Hanou gave as supporting his search of the passenger compartment and cargo area of the SUV was he was searching for a weapon for safety reasons, i.e., he was conducting a protective weapons search.[11]

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[11] Of course, we realize " ' "[T]he fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." ' [Citation.]" (*People v. Woods* (1999) 21 Cal.4th 668, 680.)

(a) *The Methamphetamine Recovered from the Center Console Must Be Suppressed.*

The threshold issue is whether the initial search of the cargo area effected by the opening of the cargo door was justified as a protective weapons search. We have found no published California case upholding the search of such an area as a lawful protective weapons search. *Long*, of course, upheld a protective weapons search of the *passenger compartment* of a car that had a trunk. *Long* had no occasion to decide whether a cargo area such as the one in this case could be subjected to a lawful protective weapons search, and *Long's* holding does not control this case.

Arguably, the risk to officer safety attending accessibility of a weapon located in a cargo area such as the one in this case is greater than the safety risk attending accessibility of a weapon located in a common trunk accessible only by a rear trunk door. Such a trunk is completely inaccessible from the passenger compartment, a fortiori, no one in the passenger compartment can reach inside such a trunk. On the other hand, the cargo area of the SUV was not completely inaccessible from the passenger compartment. Instead, Hanou testified to the effect the cargo area was immediately accessible to appellant in the sense the cargo area was immediately accessible from the passenger compartment (so that, e.g., if a person had been seated in the back seat, the person could have reached into the cargo area).

However, appellant was the driver and sole occupant of the SUV. Whether or not the cargo area

was, in a general sense, immediately accessible from the passenger compartment, Hanou testified *appellant* could not reach the cargo area from the driver's seat and could not have reached the cargo area unless he climbed in the back. Moreover, the cargo area and a common trunk are alike to the extent they hold cargo and are not designed for driver or passenger seating. Absent any other consideration, if police have a driver exit the driver's side of a car, the driver, if released, will in all likelihood simply return to the driver's seat, not to a cargo area or trunk. There was no evidence that if appellant had been released, he would have headed towards the cargo area containing the shotgun, as opposed to the driver's side of the passenger compartment from which he had exited.

In *Long*, after the defendant exited his car, police ultimately followed him while, at night in a rural area, he was heading to the open door of his car that contained a long hunting knife on the driver's side floorboard. That is, the knife was in the passenger compartment. An officer, looking for additional weapons, saw an object protruding from under the front seat armrest, again, in the passenger compartment. After observing that object, the officer searched the passenger compartment. We note *Long*, stated, inter alia, "a *Terry* suspect in *Long's* position [might] break away from police control and retrieve a weapon from his automobile." (*Long, supra*, 463 U.S. at p. 1051, italics added.)

On the other hand, Hanou stopped appellant during the afternoon in a commercial area, and Hanou's testimony provided no evidence that it was more likely the firearm was in the cargo area than

in the passenger compartment. Appellant's testimony that he told Hanou that "it" was in the "back" where it belonged did not make clear whether appellant was referring to the cargo area or the back seat. Nonetheless, Hanou first searched the cargo area. Unlike the defendant in *Long*, Hanou was in handcuffs virtually from the moment he exited the SUV.

Moreover, prior to any search of the SUV, Franco at one point (4:28:44) moved appellant from the front of the police car to its side to permit the citizen's car to exit. From 4:29:22 to 4:29:36, Hanou, behind the SUV, seized the firearm case from the cargo area, removed the shotgun from the case, and examined the shotgun. At 4:29:50, with Hanou behind the SUV and in possession of the shotgun, Franco *returned appellant to the front* of the police car, about a car length from Hanou. Appellant was even closer to the shotgun than he had been before it was removed from the cargo area, and there was ammunition in the cargo area, i.e., ammunition that, for all the record reflects, may have been shotgun ammunition. At 4:30:21, Hanou put the shotgun back in the case and put it on the ground *behind the SUV*, i.e., even closer to appellant, and with ammunition in the cargo area. Any weapons searches of the passenger's compartment for "safety" (including the search of the center console from which Hanou seized methamphetamine) occurred later.

We hold, first, that the initial search of the cargo area effected by the *opening* of the cargo door violated the Fourth Amendment and was not

justified as a protective weapons search.[12] That initial search was not justified even at its inception.

Moreover, Hanou's subsequent *entry* into the cargo area was not reasonably related in scope to the circumstances which would have justified a protective search in the first place. (Cf. *Terry, supra*, 392 U.S. at pp. 19-20.) That entry was not a "necessary" measure (*id.* at p. 24) to determine if

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[12] We note that in *United States v. Arnold* (2004) 388 F.3d 237 (*Arnold*), the Seventh Circuit upheld, as a lawful *Long* protective weapons search, a search effected by an officer pulling down an armrest in the backseat of a car's passenger compartment where the armrest opened into the trunk. (*Id.* at pp. 238-241.) *Arnold* concluded "the boundaries of the passenger compartment under [*New York v. Belton* (1981) 453 U.S. 454 [69 L.Ed.2d 768] (*Belton*)] apply equally to the scope of a search under *Long*" (*Arnold*, at p. 240) (assuming an officer limited the protective weapons search to those areas that might contain a weapon and to which the motorist might have access). *Arnold* cited federal appellate court cases that relied on *Belton* to hold "a search under *Belton* encompasses cargo spaces of sports utility vehicles, hatchbacks, and station wagons." (*Arnold,* at p. 240.) *Arnold* relied on those cases to conclude the search in *Arnold* was a lawful protective weapons search. (*Id.* at pp. 238-241.) However, *Arnold* is distinguishable from the present case. In *Arnold*, the officer stopped the car the defendant was driving, and *Arnold* noted that "[a]fter [the officer] observed Arnold turn around to look back at him, Arnold then wormed his way between the passenger and the driver's seats into the back seat. [The officer] testified that Arnold appeared to have been either retrieving or placing something in the back seat, although [the officer] could not see below Arnold's shoulders. Arnold then returned to the driver's seat." (*Id.* at p. 238.) The search effected by pulling down the armrest occurred later. (*Id.* at pp. 238-239.) Appellant did not do what the defendant did in *Arnold*.

appellant was carrying a weapon and to neutralize the threat of physical harm (*ibid*.), was not an entry "*limited* to that which is *necessary* for the discovery of weapons which might be used to harm the officer or others nearby" (*id.* at pp. 25-26; italics added), and was not "minimally necessary" (*id*. at p. 30) to learn whether appellant was armed and to disarm him once appellant told Hanou that appellant had a firearm (cf. *ibid*.). The entry was not "*restricted* to those areas to which [appellant] would generally have *immediate* control" (*Long, supra*, 463 U.S. at p. 1050, italics added) and was not a preventive measure taken to ensure there were no weapons in appellant's "immediate grasp" (*id.* at p. 1051) if he had been permitted to reenter the SUV.

Although Hanou testified to the effect he recovered methamphetamine during a protective search of the center console, the video reflects that any entries by Hanou into the passenger compartment, and thus any entry into the center console containing methamphetamine, occurred only after the unlawful initial search of the cargo area effected by the opening of the cargo door. Accordingly, the methamphetamine Hanou recovered from the center console must be suppressed as tainted by the above-mentioned unlawful initial search of the cargo area effected by the opening of the cargo door, and by the subsequent unlawful entry into the cargo area.

Second, the justification for the seizure of appellant to permit a protective weapons search of the *passenger compartment* did not support the initial search of the *cargo area*. Instead, Hanou's detention of appellant from the time the unlawful

initial search of the cargo area began to the time Hanou found methamphetamine in the center console exceeded the time needed to handle the matter for which appellant properly could have been detained—a protective weapons search of the passenger compartment—and prolonged appellant's seizure beyond the time reasonably required to complete the mission of a protective weapons search of the passenger compartment. Accordingly, we hold the methamphetamine Hanou recovered from the center console must be suppressed because the seizure of that methamphetamine occurred during an unduly prolonged detention. (Cf. *Rodriguez, supra*, __ U.S. at pp. __ - __ [191 L.Ed.2d at pp. 496-497].)

Third, after Hanou opened the cargo door, but prior to any search of the passenger compartment (and therefore prior to any search of the center console for weapons), Hanou seized from the cargo area three items, i.e., the red luggage (at 4:29:01), an open square box (at 4:29:10), and a gray rectangular box (at 4:29:14). However, after engaging in numerous other searches and seizures and other activity, and near the end of the encounter, Hanou finally searched the red luggage at 4:46:44, i.e., about 15 minutes after he initially seized it. He later searched the gray rectangular box at 4:53:18, about 14 minutes after he initially seized it. He subsequently searched the open square box at 4:53:24, removing items from it, about 14 minutes after he initially seized it.

In other words, Hanou initially *seized* the above three items *to search* them, but only searched them about 15 minutes later. If Hanou had believed

any of these three items contained a firearm that he needed to seize for safety reasons, he would not have waited so long to search them and would not have conducted the numerous other searches and seizures in the passenger compartment and other activities that the record clearly reflects he conducted in the interim. We hold the seizures of these three items violated the Fourth Amendment and were not justified as *protective* weapons seizures for officer *safety*. The methamphetamine subsequently seized from the center console must be suppressed as tainted by the illegal initial seizures of the above three items and because the seizure of that methamphetamine occurred during the unduly prolonged detention of appellant resulting from the unlawful initial seizures of those three items.

Fourth and finally, as mentioned, Hanou testified to the effect he recovered methamphetamine during a protective search of the center console, but the video reflects he searched the driver's area and right front passenger area multiple times, including, e.g., the driver's area at 4:42:41, i.e., 14 minutes after Hanou opened the cargo door. Thus, for all Hanou's testimony and the video reflect, it was during this search of the driver's area 14 minutes after Hanou opened the cargo door (and not during the first search of the driver's area that occurred at 4:31:13) that Hanou found the methamphetamine in the center console. If so, this was not a *protective* search conducted for officer *safety*. The burden was on the People to prove which search of the driver's area produced the methamphetamine in the center console (see *People v. Williams* (1999) 20 Cal.4th 119, 136) and the

People failed to meet that burden. For each of the above four independent reasons, the methamphetamine Hanou recovered from the center console must be suppressed.

(b) *The Methamphetamine and Methamphetamine Pipe Recovered from the Luggage Must Be Suppressed.*

Reasoning similar to the above four points requires suppression of the methamphetamine and methamphetamine pipe (collectively, contraband) found in the luggage. That is, first, the contraband Hanou recovered from the luggage must be suppressed as tainted by the above mentioned unlawful initial search of the cargo area effected by the opening of the cargo door, and by the subsequent entry into the cargo area to seize the luggage, an entry not reasonably related in scope to the circumstances which justified a protective weapons search. Second, the contraband must be suppressed because its seizure occurred during an unduly prolonged detention resulting from the unlawful search of the cargo area.

Third, the contraband must be suppressed as tainted by the illegal seizures of the red luggage, open square box, and gray rectangular box and because the seizure of the contraband occurred during the unduly prolonged detention of appellant resulting from the unlawful seizures of those three items.

Fourth, at points during the period from the time Hanou opened the cargo door (at 4:28:55) to the time he seized the red luggage (at 4:46:44), Hanou

(1) searched the driver's side five times and the left rear passenger area twice, (2) engaged in about five minutes of unexplained conduct (the previously identified periods one, two, and four through six; we note Hanou denied remembering using a cell phone), and (3) reached into the gun case and retrieved documents (period three) even though he had already searched the gun case for safety earlier. The contraband recovered from the luggage must be suppressed because the seizure of the luggage occurred during a detention unduly prolonged by the three above enumerated factors.

For each of the above four independent reasons, the contraband Hanou seized from the luggage must be suppressed. We will reverse the judgment with directions to the trial court to dismiss this case.[13]

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[13] The methamphetamine Hanou recovered from the center console and the methamphetamine and methamphetamine pipe he recovered from the luggage formed the evidentiary basis for appellant's convictions in this case. Respondent does not claim the People would be able to proceed absent this evidence. Remanding the matter for further proceedings other than dismissal would be an idle gesture. We will reverse the judgment with directions to the trial court to dismiss this case. (Cf. *People v. Dickey* (1994) 21 Cal.App.4th 952, 955, 957; see *McGaughran, supra*, 25 Cal.3d at p. 591 [reversing judgment after stating suppressed evidence "was essential to the case against defendant, and the ensuing conviction therefore cannot stand."].)

(c) *None of Respondent's Arguments Compel a Contrary Conclusion.*

Respondent argues the search of the SUV was justified by the vehicle search and search-incident-to-arrest exceptions to the warrant requirement. We disagree. "In [*Ross, supra,* 456 U.S. at p. 825], the court held that police who have *probable cause* to believe a lawfully stopped car contains contraband may conduct a warrantless search of any compartment or container in the car that may conceal the object of the search." (*People v. Diaz* (2011) 51 Cal.4th 84, 95, italics added.) In *Gant,* the high court stated, "we hold that *Belton does not* authorize a vehicle search incident to a recent occupant's *arrest* after the *arrestee has been secured and cannot access the interior of the vehicle*." (*Gant*, *supra,* 556 U.S. 332, at p. 335, italics added.) The fact a defendant is not formally arrested until after a search does not invalidate the search as incident to arrest if probable cause to arrest existed prior to the search and the search is substantially contemporaneous with the arrest. (*People v. Adams* (1985) 175 Cal.App.3d 855, 861.)

Even if we assume that, just prior to the search of the SUV, Hanou had probable cause to arrest appellant, there was evidence that, before Hanou searched the SUV, (1) appellant had been handcuffed and escorted away from the SUV, and (2) appellant had been situated "on the front hood" of Hanou's police car (behind the SUV). The search of the SUV was not authorized by *Gant* because the search occurred after appellant had been secured and could not access the interior of the SUV.

Moreover, *Ross* requires *probable cause to believe a* lawfully stopped *vehicle contains contraband*, and *Gant*, as indicated above, requires *probable cause* to arrest. We have set forth pertinent events preceding any search of the SUV. Simply put, and notwithstanding respondent's argument to the contrary, prior to any search of the SUV, Hanou lacked probable cause to believe the SUV contained contraband and lacked probable cause to arrest. Significantly, we note the mere fact an officer observes a firearm does not provide *probable cause* to believe it is *loaded* (cf. *People v. Muniz* (1970) 4 Cal.App.3d 562, 565-567) or, therefore, probable cause to believe the possessor of the firearm is committing the crime of carrying a loaded firearm (Pen. Code, § 25850, subd. (a)) or possessing the contraband of a loaded firearm. There is no reason this should not be equally true where, as here, according to Hanou, appellant simply told him there was a firearm in the vehicle.

None of the additional facts, including the way appellant drove or his driving from one motel to another, the registration matter, the fact there were numerous motels in the area, Hanou's numerous past narcotics-related arrests in the area, the $10,000 found on appellant, or his refusal to consent to the search of the SUV, gave Hanou *probable cause* to believe the SUV contained contraband or *probable cause to arrest* appellant for purposes of *Ross* and *Gant*, respectively, therefore, the search of the SUV cannot be justified under *Ross's* vehicle search exception or *Gant's* search-incident-to-arrest exception.[14]

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[14] During oral argument, respondent urged for the first time that a permissible protective search of the passenger compartment *would* have given Hanou probable cause to arrest appellant, therefore, an automobile search thereafter would have been permissible. However, nothing in this case compels a departure from the general prohibition against respondent advancing new theories on appeal (cf. *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640-641; but see *Green v. Superior* Court (1985) 40 Cal.3d 126, 137-138), therefore, we decline to consider respondent's new argument. We decline to consider it for the additional reason respondent made it for the first time during oral argument. (Cf. *People v. Mateljan* (2005) 129 Cal.App.4th 367, 376, fn. 4.) Finally, in light of our analysis, there is no need to address appellant's *Pitchess* claim.

DISPOSITION

The judgment is reversed and the matter is remanded with directions to the trial court (1) to vacate its order denying appellant's Penal Code section 1538.5 motion to suppress the methamphetamine and methamphetamine pipe that Covina Police Officer Terrence Hanou testified he recovered from appellant's SUV, (2) to enter a new order granting that motion, and (3) to dismiss the case.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JONES, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

APPENDIX D

Ninth Circuit order denying petition for panel rehearing and rehearing *en banc* (June 4, 2019)

Case: 17-56343, 06/04/2019, ID: 11318602, DktEntry: 40, Page 1 of 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES MILLS, Plaintiff-Appellant, v. CITY OF COVINA, a California municipal corporation; KIM RANEY, in his official capacity as the Chief of the City of Covina Police Department; TERRANCE HANOU, Officer; DOES, 1-100, Defendants-Appellees.	**FILED** JUNE 4, 2019 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS No. 17-56343 D.C. No. 2:16-cv-07127-DOC-RAO Central District of California, Los Angeles ORDER

Before: KLEINFELD, NGUYEN, and R. NELSON, Circuit Judges.

The panel judges have voted to deny petitioner's petition for rehearing. Judges Nguyen and R. Nelson voted to deny the petition for rehearing en banc, and Judge Kleinfeld

recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Petitioner's petition for rehearing and petition for rehearing en banc, filed May 9, 2019, is DENIED.