

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

NOV 9 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

ROBERT A. COTTON,

No. 16-56898

Plaintiff-Appellant,

D.C. No. 5:15-cv-02314-VAP-AGR

v.

MEMORANDUM*

COUNTY OF SAN BERNARDINO, a
political subdivision; et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Virginia A. Phillips, Chief Judge, Presiding

Submitted October 23, 2017**

Before: McKEOWN, WATFORD, and FRIEDLAND, Circuit Judges.

Robert A. Cotton appeals pro se from the district court's judgment dismissing his 42 U.S.C. § 1983 action alleging federal and state law claims stemming from his arrest and criminal prosecution. We have jurisdiction under 28 U.S.C. § 1291. We review de novo a dismissal for failure to state a claim under

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Fed. R. Civ. P. 12(b)(6). *Ebner v. Fresh, Inc.*, 838 F.3d 958, 962 (9th Cir. 2016).

We affirm.

The district court properly dismissed Cotton’s claims for false arrest, false imprisonment, and malicious prosecution because Cotton was collaterally estopped from relitigating the probable cause determination made in Cotton’s prior state criminal action. *See Wige v. City of Los Angeles*, 713 F.3d 1183, 1185-86 (9th Cir. 2013) (setting forth requirements in a subsequent § 1983 action for issue preclusion under California law and circumstances for when a court can give preclusive effect to a probable cause determination from a prior preliminary hearing).

The district court properly dismissed Cotton’s claims against the prosecutor defendants on the basis of prosecutorial immunity because Cotton failed to allege facts sufficient to show that the actions of these defendants were not “intimately associated with the judicial phase of the criminal process” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003) (prosecutorial immunity applies even where a prosecutor commits a *Brady* violation).

The district court properly dismissed Cotton’s claims against his public defenders because those defendants are not state actors subject to liability under § 1983. *See Miranda v. Clark County, Nev.*, 319 F.3d 465, 468 (9th Cir. 2003)

(public defender performing the role of an attorney for a client is not a state actor under § 1983).

The district court properly dismissed Cotton's conspiracy claims because Cotton failed to allege facts sufficient to show that defendants conspired together to violate Cotton's rights based on his membership in a protected class. *See Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010) (although pro se pleadings are construed liberally, a plaintiff must present factual allegations sufficient to state a plausible claim for relief); *Gillespie v. Civiletti*, 629 F.2d 637, 641 (9th Cir. 1980) (elements of a § 1985 claim); *see also Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988) ("A claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985.").

The district court did not abuse its discretion by denying Cotton leave to amend his first amended complaint because Cotton had already been given notice of the pleading deficiencies and an opportunity to amend, and further amendment would be futile. *See Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) (setting forth standard of review and noting that a district court's discretion is particularly broad where it has already granted leave to amend).

We reject as unsupported by the record Cotton's contentions that the district court applied the incorrect pleading standard and that the district court was biased

against him.

AFFIRMED.

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 ROBERT A. COTTON,
12 Plaintiff,

13 v.

14 COUNTY OF SAN BERNARDINO,
15 et al,
16 Defendants.
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NO. EDCV 15-02314-VAP (AGR)

REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

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19 The court submits this Report and Recommendation to the Honorable
20 Virginia A. Philips, United States District Judge, pursuant to 28 U.S.C. § 636 and
21 General Order No. 05-07 of the United States District Court for the Central District
22 of California. For the reasons set forth below, the magistrate judge recommends
23 that Defendants' motion to dismiss be granted in part and denied in part as set
24 forth below.
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I.

PROCEDURAL BACKGROUND

On November 10, 2015, Plaintiff, proceeding *pro se* and *in forma pauperis*, filed a complaint under 42 U.S.C. § 1983. Plaintiff named the following defendants: the County of San Bernardino ("County"); Sheriff John McMahon; Deputy Sheriff Scott Abernathy; District Attorney Michael Ramos; Deputy District Attorney Timothy Haskell; and Deputy District Attorney Paul Levers. The complaint stems from Plaintiff's arrest and prosecution on a domestic violence charge.

On December 15, 2015, the County, McMahon, and Abernathy ("County Defendants") filed a motion to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6), accompanied by a request for judicial notice. On January 6, 2016, Ramos, Haskell, and Levers ("Prosecutor Defendants") filed an answer to the complaint.

On January 13, 2016, Plaintiff filed an opposition to the County Defendants' motion to dismiss and an opposition to their request for judicial notice. On January 27, 2016, the County Defendants filed a reply. On February 18, 2016, Plaintiff filed a supplemental opposition.

II.

REQUEST FOR JUDICIAL NOTICE

The County Defendants request the Court to take judicial notice of a minute order issued April 15, 2014 in Plaintiff's criminal case. (Req. for Jud. Notice, Ex. A.)

Plaintiff objects that the minute order constitutes hearsay. (Opp. to Req. for Jud. Notice at 1.) The minute order reflects the proceedings at Plaintiff's preliminary hearing and falls within the public records exception to the hearsay rule. Fed. R. Evid. 803(8). Plaintiff also objects that the minute order is unaccompanied by a transcript of the preliminary hearing and does not mention

1 Defendants' failure to produce exculpatory evidence. (*Id.* at 1-2.) These matters
2 are irrelevant to the propriety of taking judicial notice of the minute order. The
3 request for judicial notice is granted. See *Rosales-Martinez v. Palmer*, 753 F.3d
4 890, 894 (9th Cir. 2014) ("It is well established that we may take judicial notice of
5 judicial proceedings in other courts.").

6 III.

7 ALLEGATIONS IN COMPLAINT

8 On March 29, 2014, Plaintiff's ex-wife accused him of domestic violence.
9 (Compl. ¶ 18.) She was "high on pain killers at the time" and Plaintiff had acted in
10 self-defense. (*Id.*) Deputy Abernathy arrested Plaintiff instead of performing an
11 investigation that would have disclosed that his ex-wife had hit him first. (*Id.* at ¶¶
12 18, 21a, 21b.) Plaintiff spent 47 days in jail until he posted bail. (*Id.* at ¶ 19.)

13 Plaintiff was charged with a violation of California Penal Code § 273.5,
14 felony domestic violence. (*Id.* at ¶ 20.) The charges stemmed from racial bias
15 against him as an African-American and favoritism towards his ex-wife. (*Id.* at ¶¶
16 31, 34.) On April 15, 2014, Deputy Abernathy testified as the sole witness at the
17 preliminary hearing. (Req. for Jud. Notice, Exh. A.) The superior court held
18 Plaintiff to answer on the domestic violence charge. (*Id.*)

19 Plaintiff was tried before a jury. (Compl. ¶ 20.) Defendants Haskell and
20 Levers were the prosecutors. (*Id.*) Despite their obligations under *Brady v.*
21 *Maryland*, 373 U.S. 83 (1963), they did not disclose evidence showing that
22 Plaintiff's ex-wife was the aggressor until the last day of trial. (*Id.* at ¶¶ 20, 37.)
23 On February 25, 2015, the jury acquitted Plaintiff. (*Id.* at ¶¶ 20, 32.)

24 On July 29, 2015, Plaintiff filed a claim with the County Department of Risk
25 Management, which failed to timely adopt or reject it. (*Id.* at ¶¶ 23, 24.)

26 Plaintiff asserts six federal claims and five state-law claims against the
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County Defendants.¹ The federal claims are: three overlapping claims under 42 U.S.C. § 1983 challenging his arrest, detention, and prosecution under the Fourth, Fifth, Eighth, and Fourteenth Amendments; conspiracy claims under 42 U.S.C. § 1985(2) and (3); and a claim under 42 U.S.C. § 1986. (*Id.* at ¶¶ 12-76). The state-law claims are: invasion of privacy; false imprisonment; intentional infliction of emotional distress; violation of Cal. Civ. Code § 51.7; and violation of Cal. Civ. Code § 52.1. (*Id.* at ¶¶ 87-137.)

Plaintiff requests compensatory damages, punitive damages against all individual defendants, and wide-ranging injunctive relief enjoining the County Defendants from discriminating against people of color, arresting persons without probable cause, failing to disclose *Brady* evidence, and violating the rights of arrestees and jail detainees. (*Id.* at 25.)

IV.

LEGAL STANDARDS

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted) “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of “entitlement to relief.”’” *Id.* (citations omitted).

[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the

¹ There is no Claim Eight. (Compl. at 17, 19.)

1 elements of a cause of action, supported by mere conclusory statements, do not
2 suffice. *Id.* at 678; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

3 A *pro se* complaint is to be liberally construed. *Erickson v. Pardus*, 551
4 U.S. 89, 94 (2007) (per curiam). Before dismissing a *pro se* civil rights complaint
5 for failure to state a claim, the plaintiff should be given a statement of the
6 complaint's deficiencies and an opportunity to cure them unless it is clear the
7 deficiencies cannot be cured by amendment. *Eldridge v. Block*, 832 F.2d 1132,
8 1135-36 (9th Cir. 1987).

9 V.

10 DISCUSSION

11 A. Section 1983 Claims (Claims One through Three)

12 1. The County

13 The County Defendants contend Plaintiff has not sufficiently alleged the
14 elements of a municipal liability claim against the County. (Mot. P. & A. at 3-4.).

15 A local government may not be sued under § 1983 for an injury inflicted
16 solely by its employees or agents. *Monell v. Department of Social Service of the*
17 *City of New York*, 436 U.S. 658, 694 (1978). A local governmental entity may be
18 held liable under § 1983 "when execution of a government's policy or custom,
19 whether made by its lawmakers or by those whose edicts or acts may fairly be
20 said to represent official policy, inflicts the injury." *Id.* "Official municipal policy
21 includes the decisions of a government's lawmakers, the acts of its policymaking
22 officials, and practices so persistent and widespread as to practically have the
23 force of law." *Connick v. Thompson*, 563 U.S. 51, 61 (2011); see *Monell*, 436
24 U.S. at 690-91, 694. A local governmental entity is liable only if there is "a direct
25 causal link" between its policies or customs and the alleged constitutional
26 violation. *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 957 (9th Cir.
27 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).
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1 Plaintiff has not alleged facts setting forth the allegedly wrongful County
2 policies or customs and how they led to the alleged violations of his constitutional
3 rights, namely, the arrest without probable cause, failure to investigate thoroughly,
4 false charges and delay in turning over *Brady* material until the last minute.

5 Plaintiff alleges that the County “conspired to cause to come into being,
6 maintained, fostered, condoned, approved of, . . . ratified, took no action to
7 correct, an official policy, practice, procedure, or custom of permitting the
8 occurrence of the categories of wrongs set forth . . .” in the Complaint. (Compl.
9 ¶ 15.) He further alleges that the County follows “a policy of ‘no policy’ in
10 protecting the rights of persons” (*id.*), and “knowingly maintains and permits
11 official *sub-rosa* policies or customs permitting the occurrence” of the kinds of
12 wrongs alleged in the Complaint, by deliberate indifference to police abuses and
13 refusal to “impartially investigate, discipline, and prosecute peace officers who
14 commit acts of felonious dishonesty and crimes of violence” (*Id.* at ¶ 17).

15 These allegations are too conclusory to support *Monell* claims against the
16 County. See *Iqbal*, 556 U.S. at 681-82 (requiring specific allegations regarding
17 the policies at issue in a civil rights case). Plaintiff does not describe any specific
18 policies or customs; his *Monell* allegations are “labels and conclusions.” *Iqbal*,
19 556 U.S. at 678. Plaintiff disputes that he is required to allege a factual basis for
20 his claims, citing pre-*Iqbal* cases. (Opp. at 9-10.) He is mistaken. After *Iqbal*, he
21 cannot rely on a mere recitation of the elements of *Monell* liability. See *Lopez v.*
22 *County of Los Angeles*, No. CV 15-01745-MMM (MANx), 2015 WL 3913263, at *6
23 (C.D. Cal. Jun. 25, 2015) (concluding that after *Iqbal* prior Ninth Circuit standard
24 allowing bare allegations of *Monell* liability is no longer viable; collecting cases).

25 It is recommended that Plaintiff’s § 1983 claims against the County be
26 dismissed with leave to amend.
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1 **2. Sheriff McMahon**

2 The County Defendants contend that Plaintiff has not alleged a factual
3 basis for holding Sheriff McMahon liable. (Mot. P. & A. at 5-6.)

4 Each government official “is only liable for his or her own misconduct.”
5 *Iqbal*, 556 U.S. at 677. Supervisory officials are not liable under § 1983 for the
6 actions of their subordinates on any theory of vicarious liability. *Crowley v.*
7 *Bannister*, 734 F.3d 967, 977 (9th Cir. 2013); *Hansen v. Black*, 885 F.2d 642,
8 645-46 (9th Cir. 1989). A defendant may be held liable as a supervisor under
9 § 1983 if there exists either (1) personal involvement in the constitutional
10 deprivation, or (2) a sufficient causal connection between the supervisor's
11 wrongful conduct and the constitutional violation. *Starr v. Baca*, 652 F.3d 1202,
12 1207 (9th Cir. 2011). The causal connection may be established by setting in
13 motion a series of acts by others, or by knowingly refusing to terminate a series of
14 acts by others, that the supervisor knew or reasonably should have known would
15 cause others to inflict a constitutional injury. *Id.* at 1207-08. “A supervisor can be
16 liable in his individual capacity for his own culpable action or inaction in the
17 training, supervision, or control of his subordinates; for his acquiescence in the
18 constitutional deprivation; or for conduct that showed a reckless or callous
19 indifference to the rights of others.” *Id.* at 1208 (citation omitted).

20 Plaintiff does not contend that Sheriff McMahon was personally involved in
21 his arrest and prosecution. Rather, he alleges that Sheriff McMahon “ratified and
22 approved” policies and customs “permitting the occurrence of the kinds of
23 wrongs” set forth in the Complaint. (Compl. ¶ 17; see also *id.* at ¶ 16.) He further
24 alleges that Sheriff McMahon required and encouraged the employment and
25 retention of peace officers who had “demonstrated their brutality, dishonesty,
26 bigotry” and abuses of power. (*Id.* at ¶ 16.) Finally, he alleges that Sheriff
27 McMahon is liable for the deliberate indifference demonstrated by his “action or
28 inaction in the training, supervision, or control” of his subordinates. (*Id.* at ¶ 22.)

1 These allegations are too conclusory to provide a factual basis for holding
2 Sheriff McMahon liable. Plaintiff has not linked Sheriff McMahon to any specific
3 policy or custom responsible for his arrest, investigation and prosecution. He has
4 not alleged any facts plausibly suggesting that Sheriff McMahon knew of and
5 acquiesced in deprivations such as was allegedly perpetrated by Deputy
6 Abernathy, *i.e.*, an arrest without an adequate investigation of the victim's version
7 of the events. *Contrast Starr*, 652 F.3d at 1216 (allegations against sheriff
8 sufficient when plaintiff alleged sheriff failed to take action despite notice of
9 numerous prior incidents involving inmate death or injury) *with Hydrick v. Hunter*,
10 669 F.3d 937, 942 (9th Cir. 2012) (allegations against supervisory officials
11 insufficient when plaintiff did not allege specific policy or sequence of events
12 instigated by them that led to unconstitutional searches). To the extent Plaintiff
13 seeks to hold Sheriff McMahon liable based on a failure-to-train theory, he must
14 allege facts showing that he "disregarded the known or obvious consequence that
15 a particular omission in [the] training program" would cause sheriff's deputies to
16 violate the constitutional rights of individuals. *Flores v. County of Los Angeles*,
17 758 F.3d 1154, 1159 (9th Cir. 2014) (finding that plaintiff failed to sufficiently
18 allege that sexual assault by deputy sheriff was attributable to insufficient
19 training); *see Connick*, 563 U.S. at 61 (discussing failure to train in *Monell*
20 context). Plaintiff has not alleged that the allegedly deficient training in
21 investigation resulted in Plaintiff's arrest without probable cause.

22 It is recommended that Plaintiff's complaint against Sheriff McMahon be
23 dismissed with leave to amend.

24 **3. Collateral Estoppel**

25 Plaintiff's section 1983 claims for false arrest, false imprisonment and
26 malicious prosecution require him to prove that Defendants lacked probable
27 cause to arrest, detain and prosecute him. *Wige v. City of Los Angeles*, 713 F.3d
28 1183, 1185 (9th Cir. 2013). The County Defendants contend that these claims

1 are barred by the doctrine of collateral estoppel (also called issue preclusion)
2 because the existence of probable cause was determined at Plaintiff's preliminary
3 hearing. (Mot. P. & A. at 6.)

4 The doctrine of collateral estoppel applies in section 1983 actions. *Allen v.*
5 *McCurry*, 449 U.S. 90, 105 (1980). "Under collateral estoppel, once a court has
6 decided an issue of fact or law necessary to its judgment, that decision may
7 preclude relitigation of the issue in a suit on a different cause of action involving a
8 party to the first case." *Id.* at 94. Collateral estoppel is only applicable, however,
9 if the party against whom the earlier decision is asserted had a "full and fair
10 opportunity" to litigate the issue in the earlier case. *Id.* at 95.

11 "Federal courts must give 'preclusive effect to state-court judgments
12 whenever the courts of the State from which the judgments emerged would do
13 so.'" *Wige*, 713 F.3d at 1185 (quoting *Allen*, 449 U.S. at 96). Under California
14 law, collateral estoppel applies when five requirements are met: (1) the issue
15 sought to be relitigated is identical to the issue decided in the earlier action; the
16 issue was (2) actually litigated and (3) necessarily decided in the earlier action;
17 (4) the earlier decision was final and on the merits; and (5) the party against
18 whom collateral estoppel is asserted was a party (or in privity with a party) to the
19 earlier action. *Id.*; see *Lucido v. Superior Court*, 51 Cal. 3d 335, 341 (1990).

20 "As a general rule, each of these requirements will be met when courts are
21 asked to give preclusive effect to preliminary hearing probable cause findings in
22 subsequent civil actions for false arrest and malicious prosecution." *Wige*, 713
23 F.3d at 1185 (citing *McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138, 1145-
24 46 (1999)). The issue to be resolved at a preliminary hearing is identical to the
25 issue that must be resolved in a false arrest or malicious prosecution action -- the
26 existence of probable cause. *Id.* The quantum of evidence also is the same. *Id.*
27 So long as the evidence known to the arresting officers is not materially different
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1 from the evidence presented at the preliminary hearing, a finding of probable
2 cause to stand trial is a finding of probable cause to arrest the defendant. *Id.*

3 There are two exceptions to the general rule: (1) when additional evidence
4 not available to the arresting officer at the time of the arrest is presented at the
5 hearing; and (2) when the plaintiff alleges that the arresting officer lied or
6 fabricated evidence at the preliminary hearing. *Id.* at 1186. Under the second
7 exception, a plaintiff may litigate the issue of probable cause “with the falsified
8 evidence removed from the equation or, in cases involving intentional
9 concealment of exculpatory evidence, with the undisclosed evidence added back
10 into the equation.” *Id.* In *Wige*, the Ninth Circuit held that collateral estoppel did
11 not apply when the arresting officer’s testimony at the preliminary hearing
12 regarding the victim’s identification of defendant met the standard for probable
13 cause, but the victim testified that the police pressured him into making a false
14 identification. The state court’s finding of probable cause was based on its view
15 that a reasonable jury could believe either the officer or the victim. *Id.* at 1186-87.
16 Similarly, in *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004), the
17 Ninth Circuit held that the probable cause determination at the preliminary hearing
18 did not bar Awabdy’s malicious prosecution claim because he alleged that the
19 probable cause finding was based on fabricated evidence and other wrongful
20 conduct. The Ninth Circuit explained that “[a]mong the ways that a plaintiff can
21 rebut a prima facie finding of probable cause is by showing that the criminal
22 prosecution was induced by fraud, corruption, perjury, fabricated evidence, or
23 other wrongful conduct undertaken in bad faith.” *Id.* at 1067; *see also*
24 *McCutchen*, 73 Cal. App. 4th at 1147 (“When the officer misrepresents the nature
25 of the evidence supporting probable cause and that issue is not raised at the
26 preliminary hearing, a finding of probable cause at the preliminary hearing would
27 not preclude relitigation of the issue of integrity of the evidence.”).

1 On the other hand, in *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994), there
2 was no contention that any evidence was fabricated or that any of the evidence
3 presented at the preliminary hearing was unavailable to the arresting officers
4 when they obtained a warrant for Haupt's arrest. *Id.* at 289. Thus, the probable
5 cause determination at the preliminary hearing barred Haupt's false arrest and
6 malicious prosecution claims. *Id.* at 289-91; *see also Forest v. City of Fort Bragg*,
7 520 F. App'x 616, 617 (9th Cir. 2013) (affirming dismissal of false imprisonment
8 and malicious prosecution claims when existence of probable cause was fully
9 litigated at preliminary hearing and factual innocence proceedings; distinguishing
10 *Wige*); *Beckway v. Deshong*, 717 F. Supp. 2d 908, 919-21 (N.D. Cal. 2010)
11 (probable cause determination at preliminary hearing collaterally estopped
12 arrestee from litigating false arrest claim when no showing court relied on
13 information unavailable to officers).

14 The County Defendants argue that neither exception applies here. They
15 point out that Plaintiff does not contend that evidence unavailable to Deputy
16 Abernathy at the time of the arrest was presented at the preliminary hearing.
17 They also argue that Plaintiff does not contend that Deputy Abernathy lied.
18 Instead, Plaintiff alleges his ex-wife lied and Abernathy believed her. (Mot. P. &
19 A. at 7; Reply at 3.) Plaintiff, on the other hand, analogizes his case to *Awabdy*
20 and argues that collateral estoppel is inapplicable because the prosecution failed
21 to disclose until the last day of trial *Brady* evidence showing that his ex-wife hit
22 him. (Opp. at 7, 11-12; Supp. Opp. at 1-3.)

23 Collateral estoppel is an affirmative defense, *see* Fed. R. Civ. P. 8©, and the
24 County Defendants have not provided the court with the transcript of the
25 preliminary hearing. The record before the court, therefore, is insufficient to
26 enable it to determine the merits of the County Defendants's collateral estoppel
27 argument. *Cf. Beckway*, 717 F. Supp. 2d at 912 n.1 (taking judicial notice of
28 preliminary hearing transcript in Rule 12© motion based on collateral estoppel);

1 *Harvey v. City of Fresno*, No. 1:08-CV-01399-OWW-DLB, 2010 WL 892114, at *9
 2 n.6 (E.D. Cal. Mar. 9, 2010) (taking judicial notice of preliminary hearing transcript
 3 in Rule 12(b)(6) motion based on collateral estoppel); *Hernandez v. City of Los*
 4 *Angeles*, No. CV 04-9262-FMC (SHx), 2005 WL 5714358, at * 2 n.3 (C.D. Cal.
 5 Jan. 6, 2005) (same). Collateral estoppel is often adjudicated at summary
 6 judgment. *E.g.*, *Wige*, 713 F.3d at 1185.

7 It is recommended that the County Defendants' motion to dismiss based on
 8 collateral estoppel be denied without prejudice.

9 **4. Equal Protection**

10 Plaintiff's equal protection claim against the County Defendants rests on
 11 allegations that Deputy Abernathy was motivated by racial bias when he arrested
 12 Plaintiff without performing an adequate investigation. (Compl. ¶¶ 21a & b, 31,
 13 34.) The County Defendants contend that Plaintiff has not alleged intentional
 14 discrimination. (Mot. P. & A. at 8-9.)

15 The Equal Protection Clause of the Fourteenth Amendment "is essentially a
 16 direction that all persons similarly situated should be treated alike." *City of*
 17 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To state an equal
 18 protection claim under § 1983, a plaintiff must allege that the defendant acted with
 19 an intent or purpose to discriminate because of the plaintiff's membership in a
 20 protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

21 Plaintiff contends that Deputy Abernathy discriminated against him based on
 22 race. The Complaint contains no factual allegations from which it could be inferred
 23 that Deputy Abernathy's arrest of Plaintiff was based on a discriminatory motive.
 24 *See Moss v. United States Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (bald
 25 allegation of impermissible motive standing alone is not entitled to assumption of
 26 truth). Plaintiff's factual allegations state that Abernathy arrested him based
 27 "solely" on Plaintiff's ex-wife's false accusation. (Compl. ¶ 18.)
 28

1 It is recommended that Plaintiff's equal protection claim be dismissed with
2 leave to amend.

3 **B. Claims under Sections 1985(2), 1985(3), and 1986 (Claims Four through**
4 **Six)**

5 **1. Section 1985**

6 Plaintiff's fourth and fifth claims assert civil rights conspiracies in violation of
7 42 U.S.C. § 1985. (Compl. ¶¶ 54-76.) Plaintiff alleges that Defendants violated
8 § 1985(2) by conspiring together, by reason of racial animus, (1) to obstruct the
9 due course of justice in state courts and (2) to deny him equal protection of the
10 laws, in particular the right to be free from unreasonable arrest and deprivations of
11 liberty and property without due process. (*Id.* at ¶¶ 55-59.) He alleges that
12 Defendants violated § 1985(3) by conspiring to deprive him of equal protection of
13 the laws. (*Id.* at ¶¶ 67-70.)

14 Plaintiff's claims arise under the second clause of § 1985(2), which prohibits
15 conspiracies to obstruct the due course of justice in a state with the intent to deny
16 equal protection, and under the first clause of § 1983(3), which prohibits
17 conspiracies to deprive a person of equal protection of the laws or equal privileges
18 and immunities under the laws. *See Kush v. Rutledge*, 460 U.S. 719, 724-25
19 (1983); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n. 3 (9th Cir. 1985) (en banc). Both
20 provisions require a plaintiff to allege a conspiracy and overt acts in furtherance of
21 the conspiracy that caused him injury. *See Sever v. Alaska Pulp Corp.*, 978 F.2d
22 1529, 1536 (9th Cir. 1992); *Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1039
23 (9th Cir. 1990). Both provisions also require a plaintiff to allege a racial or
24 otherwise class-based discriminatory animus. *See Griffin v. Breckenridge*, 403
25 U.S. 88, 103 (1971); *Bretz*, 773 F.2d at 1028. A mere allegation of conspiracy
26 without specific facts is insufficient. *Karim-Panahi v. Los Angeles Police Dep't*,
27 839 F.2d 621, 626 (9th Cir. 1988); *Sanchez*, 936 F.2d at 1039.

1 The County Defendants correctly point out that Plaintiff's allegations
 2 regarding the alleged § 1985 conspiracy are entirely conclusory. He does not
 3 describe any agreement between the defendants, the scope of the purported
 4 conspiracy, the role of each defendant in the conspiracy, or how the conspiracy
 5 operated. See *Lacey v. Maricopa County*, 693 F.3d 896, 937 (9th Cir. 2012) (en
 6 banc); *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 929-30 (9th Cir. 2006)
 7 (dismissing section 1985 claim when complaint was "devoid of any discussion of
 8 an agreement" to violate plaintiff's constitutional rights). Moreover, although
 9 Plaintiff alleges that Defendants were motivated by racial animus towards him as
 10 an African-American (Compl. ¶¶ 21b, 31, 34), he does not allege any supporting
 11 facts showing that a discriminatory animus motivated the alleged conspiracy.
 12 *Turner v. Larsen*, 536 F. App'x 748, 748-49 (9th Cir. 2013); see *Veth Mam v. City*
 13 *of Fullerton*, No. SACV 11-1242-JST (MLGx), 2012 WL 443840, * 6 (C.D. Cal.
 14 Feb. 13, 2012) (dismissing section 1985 claim). Without factual allegations setting
 15 forth acts or statements by Defendants from which discriminatory animus could be
 16 inferred, Plaintiff's allegation that he was arrested and prosecuted due to his race
 17 is conclusory and is not entitled to be accepted as true. *Iqbal*, 556 U.S. at 678-79;
 18 *Twombly*, 550 U.S. at 555.

19 It is recommended that Plaintiff's claims under § 1985(2)-(3) be dismissed
 20 with leave to amend.

21 2. Section 1986

22 The sixth claim for relief asserts a claim under 42 U.S.C. § 1986. (Compl.
 23 ¶¶ 77-86.) Section 1986 imposes liability on a person who knows of an impending
 24 violation of § 1985 but neglects or refuses to prevent it. *Karim-Panahi*, 839 F.2d at
 25 626. "A claim can be stated under section 1986 only if the complaint contains a
 26 valid claim under section 1985." *Id.*; see also *McCalden v. California Library*
 27 *Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990) (same). Plaintiff's failure to state a
 28 claim under section 1985 is fatal to his claim under section 1986.

1 It is recommended that Plaintiff's claims under § 1986 be dismissed with
2 leave to amend.

3 **3. Monell**

4 Plaintiff's claims against the County under § 1985 and § 1986 fail for an
5 additional reason: the absence of adequate *Monell* allegations. Courts have
6 generally applied *Monell* analysis to claims against local governments under §
7 1985 and § 1986. See *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir. 1979) (§
8 1985); *Zimmerman v. City & Cnty. of San Francisco*, No. C 93-4045 MJJ, 2000 WL
9 1071830, at *4-5 (N.D. Cal. Apr. 30, 2012) (§ 1985); *Luke v. Abbott*, 954 F. Supp.
10 202, 202 n. 1 (C.D. Cal. 1997) (§§ 1985, 1986); *Vasquez v. City of Reno*, 461 F.
11 Supp. 1098, 1102 (D. Nev. 1978) (§ 1986).

12 As discussed in Section A. 1., Plaintiff's *Monell* allegations are conclusory
13 and unsupported by facts setting forth a policy or practice of the County that was
14 responsible for his arrest, investigation and prosecution. Accordingly, his claims
15 against the County under § 1985 and § 1986 should be dismissed with leave to
16 amend for this additional reason.

17 **C. State-Law Claims (Claims Seven through Twelve)**

18 Plaintiff has asserted state-law claims for invasion of privacy, false
19 imprisonment, intentional infliction of emotional distress ("IIED"), and violations of
20 Cal. Civ. Code § 51.7 and § 52.1. (Compl. ¶¶ 87-137.) The County Defendants
21 have moved to dismiss all the claims except the invasion of privacy claim.² (Mot.
22 P. & A. at 11-13.)

23 **1. False Imprisonment**

24 The County Defendants contend that Plaintiff's false imprisonment claim is
25 barred by the doctrine of collateral estoppel because the issue of probable cause
26 for his arrest was determined at his preliminary hearing. (Mot. P. & A. at 11.) As

27 ² The County Defendants erroneously believe that this claim is not
28 asserted against them. (Mot. at 3 n.1; see Compl. at 17.)

1 discussed in Section A.3., the record before the court is currently insufficient to
2 determine the merits of the County Defendants' collateral estoppel argument.
3 Accordingly, for the reasons already discussed, their motion to dismiss Plaintiff's
4 state-law false imprisonment claim should be denied without prejudice.

5 2. IIED

6 The elements of an IIED claim are: (1) outrageous conduct by the
7 defendant, (2) an intention by the defendant to cause, or reckless disregard of the
8 probability of causing, emotional distress; (3) severe emotional distress; and (4) an
9 actual and proximate causal link between the tortious conduct and the emotional
10 distress. *Nally v. Grace Community Church of the Valley*, 47 Cal. 3d 278, 300
11 (1988). For conduct to be sufficiently outrageous to support an IIED claim, it must
12 be "so extreme as to exceed all bounds of that usually tolerated in a civilized
13 community." *Id.* (citation omitted). "The defendant must have engaged in conduct
14 intended to inflict injury or engaged in with the realization that injury will result."
15 *Potter v. Firestone*, 6 Cal. 4th 965, 1001 (1999) (internal quotation marks and
16 citation omitted).

17 Plaintiff alleges that the County Defendants falsely arrested him, kept him in
18 jail for 47 days, and subjected him to criminal proceedings for 13 months, with
19 reckless disregard of the probability of causing him emotional distress. (Compl. ¶
20 111).

21 Given that it is recommended that Defendants' motion to dismiss the § 1983
22 claim against Deputy Abernathy be denied, it is recommended that the motion to
23 dismiss the IIED claim against Deputy Abernathy also be denied. As to the County
24 and Sheriff McMahon, it is recommended that the motion to dismiss be granted
25 with leave to amend. *Iqbal*, 556 U.S. at 678; see *Ramirez v. County of Los*
26 *Angeles*, No. CV 11-5370-AHM (MANx), 2012 WL 2574826, at *6 (C.D. Cal. Jul. 3,
27 2012) (dismissing IIED claim against supervisory defendant when allegations did
28 not meet *Iqbal* standard).

1 **3. Cal. Civ. Code § 51.7**

2 Plaintiff asserts a claim under Cal. Civ. Code § 51.7, California's Ralph Act.³
 3 (Compl. ¶¶ 118-27.) Section 51.7 provides, in pertinent part, that all persons in
 4 California "have the right to be free from any violence, or intimidation by threat of
 5 violence, committed against their persons or property" because of their race or
 6 other enumerated characteristics. Cal. Civ. Code § 51.7(a)-(b). A plaintiff
 7 asserting a race-based section 51.7 claim must allege that "(1) the defendant
 8 threatened or committed violent acts against the plaintiff; (2) the defendant was
 9 motivated by his perception of plaintiff's race; (3) the plaintiff was harmed; and (4)
 10 the defendant's conduct was a substantial factor in causing the plaintiff's harm."
 11 *Warren v. Marcus*, 78 F. Supp. 3d 1228, 1248 (N.D. Cal. 2015).

12 The County Defendants contend that Plaintiff fails to state a section 51.7
 13 claim because he has not alleged facts showing a racial motivation for the
 14 allegedly wrongful acts. (Mot. P. & A. at 13.) The court agrees. Although Plaintiff
 15 ascribes his arrest and prosecution for domestic violence to his race (Compl. ¶¶
 16 21b, 31, 34), such conclusory allegations are not entitled to be accepted as true.
 17 See *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 555. The Complaint contains
 18 no facts from which the court could infer that Plaintiff was arrested, detained and
 19 prosecuted on account of his race. Plaintiff's subjective belief about Deputy
 20 Abernathy's motivations is not enough. See *Hernandez v. City of Richmond*, No.
 21 14-cv-03079-JST, 2014 WL 5034756, * 1, 6-7 (N.D. Cal. Oct. 8, 2014) (dismissing
 22 § 51.7 claim when plaintiff failed to allege facts showing racial motivation of officer
 23 who disclosed confidential information about plaintiff, who was shot as a result);
 24 *Boarman v. County of Sacramento*, No. 11-cv-02825 KJM KJN, 2013 WL
 25 3894167, at * 2-3 (E.D. Cal. Jul. 26, 2013) (dismissing § 51.7 claim when plaintiff

26
 27 ³ Plaintiff incorrectly describes section 51.7 as part of California's
 28 Unruh Act. See *Stamps v. Superior Court*, 136 Cal. App. 4th 1441, 1445,
 1449-1450, 1451 (2006).

1 failed to allege facts showing officer was motivated by racial animus in arresting
2 her for shoplifting and refusing to contact store to verify her claim of mistaken
3 identity; "plaintiff's own speculation that racial animus motivated defendant's
4 action" is not enough).

5 Furthermore, Plaintiff has not alleged any violence or threat of violence on
6 the part of Deputy Abernathy or any other defendant. "[A]n arrest or threat of
7 arrest alone does not necessarily involve violence or a threat of violence" within
8 the meaning of § 51.7. *Moreno v. Town of Los Gatos*, 267 F. App'x 665, 666-67
9 (9th Cir. 2008); *Shay v. County of Los Angeles*, No. 2:15-cv-04607-CAS-RAO,
10 2015 WL 6513632, at *1-2, 7 (C.D. Cal. Oct. 26, 2015) (dismissing § 51.7 claim
11 when plaintiff did not allege threat of violence during arrest for mortgage fraud).

12 It is recommended Defendants' motion to dismiss be granted this claim with
13 leave to amend.

14 **4. Cal. Civil Code § 52.1**

15 Plaintiff asserts a claim under Cal. Civil Code § 52.1, California's Bane Act.⁴
16 (Compl. ¶¶ 128-37.) The County Defendants contend that Plaintiff fails to state a
17 Bane Act claim because he has not alleged threats or coercive acts independent
18 of the alleged constitutional violations. (Mot. P. & A. at 12-13.)

19 The Bane Act creates a cause of action when a person interferes "by
20 threats, intimidation, or coercion . . . with the exercise or enjoyment by any
21 individual . . . of rights secured by the Constitution or laws" of the United States or
22 California. Cal. Civ. Code § 52.1(a), (b). Although the Bane Act was initially
23 interpreted to apply only to hate crimes, the California Supreme Court has
24 construed it to include any unconstitutional acts "so long as those acts were
25 accompanied by the requisite threats, intimidation, or coercion." *Venegas v.*
26 *County of Los Angeles*, 32 Cal. 4th 820, 843 (2004). In *Lyall v. City of Los*

27 ⁴ Plaintiff incorrectly characterizes section 52.1 as part of the Unruh
28 Act.

1 *Angeles*, 807 F.3d 1179 (9th Cir. 2015), the Ninth Circuit stated that “[n]umerous
2 California decisions make clear that a plaintiff in a search-and-seizure case must
3 allege threats or coercion beyond the coercion inherent in a detention or search in
4 order to recover under the Bane Act.” *Id.* at 1195-96 (citing *Allen v. City of*
5 *Sacramento*, 234 Cal. App. 4th 41, 69 (2015); *Quezada v. City of Los Angeles*,
6 222 Cal. App. 4th 993, 1008 (2014); *Shoyoye v. County of Los Angeles*, 203 Cal.
7 App. 4th 947, 959-60 (2012)).

8 Here, Plaintiff does not allege any threats or coercive acts by the County
9 Defendants other than those inherent in his arrest, detention and prosecution. See
10 *Lyall*, 807 F.3d at 1195 (coercion inherent in search and detention insufficient for
11 Bane Act violation); *Allen*, 234 Cal. App. 4th at 69 (allegedly unlawful arrest not
12 enough for Bane Act claim); *Shoyoye*, 203 Cal. App. 4th at 959 (overdetention in
13 jail did not violate Bane Act).

14 It is recommended Defendants’ motion to dismiss this claim be granted with
15 leave to amend.

16 VI.

17 RECOMMENDATION

18 For the reasons discussed above, it is recommended that the district court
19 issue an order: (1) accepting the Report and Recommendation; (2) granting the
20 motion to dismiss in part and denying it in part, as set forth in the Report and
21 Recommendation; (3) dismissing the following claims with leave to amend:

- 22 a. the equal protection claims under § 1983 against Defendant Abernathy;
- 23 b. all § 1983 claims against the County and Sheriff;
- 24 c. claims four through six against the County, Sheriff and Abernathy;
- 25 d. the IIED claims against the County and Sheriff; and
- 26 e. the claims under Cal. Civ. Code § 51.7 and § 52.1 against the County,
27 Sheriff and Abernathy.

28 It is further recommended that the court grant leave to file a First Amended

1 Complaint within 30 days of the district court's order.

2
3 DATED: February 26, 2016

Alicia G. Rosenberg

ALICIA G. ROSENBERG
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. COTTON,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO,
et al.,

Defendant.

NO. EDCV 15-2314-VAP (AGR)

ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the complaint, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge.

Plaintiff objects that his claims under 42 U.S.C. § 1983 are not barred by issue preclusion. The Report recommends that Defendant's motion to dismiss the complaint based on collateral estoppel be denied without prejudice. (Report at 12.) Therefore, Plaintiff's objections are moot.

Plaintiff objects that he should not have to provide facts to support his *Monell*¹

¹ *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

1 claims. Plaintiff argues that he was falsely arrested based on his wife's complaint for
2 domestic violence on March 29, 2014 because he is African American, and that
3 Defendants were anxious to arrest him due to the upheaval after an African American
4 professional football player, Ray Rice, hit his fiancée in the elevator on February 15,
5 2014. (Objections at 2.) Plaintiff further argues that the Sheriff's Department has
6 repeatedly engaged in *Brady*² violations and cites cases in support of that
7 proposition.

8 The Report correctly states that the complaint did not identify the specific
9 policies at issue (for example, *Brady* violations) and did not allege supporting facts
10 (for example, Plaintiff's allegation of a pattern of cases in which *Brady* violations were
11 found). (Complaint ¶¶ 15-17.) Plaintiff appears able to amend the complaint to
12 identify the policies and supporting facts.

13 Plaintiff's objects that he has stated a claim for intentional infliction of emotional
14 distress. The Report recommends that the motion to dismiss be denied as to Deputy
15 Abernathy. Plaintiff's objections are therefore moot as to Deputy Abernathy.
16 However, the Report recommends that the motion be granted with leave to amend as
17 to the County due to the same deficiencies (failure to allege the County policies, such
18 as *Brady* violations, that allegedly caused the emotional distress) and as to Sheriff
19 McMahon due to failure to allege facts showing supervisory liability. (Report at 16.)
20 Plaintiff appears able to amend the complaint to identify the policies and supporting
21 facts.

22 The remaining objections are without merit.

23 IT IS ORDERED that (1) Defendant's motion to dismiss the complaint is
24 granted in part and denied in part; and (2) the following claims are dismissed with
25 leave to amend:

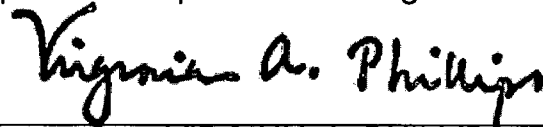
26 a. the equal protection claims under § 1983 against Defendant Abernathy;

27
28 ² *Brady v. Maryland*, 373 U.S. 83 (1963).

- b. all § 1983 claims against the County and Sheriff;
- c. claims four through six against the County, Sheriff and Abernathy;
- d. the intentional infliction of emotional distress claims against the County and Sheriff; and
- e. the claims under Cal. Civ. Code § 51.7 and § 52.1 against the County, Sheriff and Abernathy.

IT IS FURTHER ORDERED that Plaintiff may file a First Amended Complaint that cures the deficiencies within 30 days after entry of this order. The First Amended Complaint should be complete in and of itself, and should not refer to the prior complaint. The First Amended Complaint will supersede the original complaint.

DATED: April 1, 2016



VIRGINIA A. PHILLIPS
United States District Judge

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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
10

11 ROBERT A. COTTON,
12 Plaintiff,

13 v.

14 COUNTY OF SAN BERNARDINO,
15 et al.,
16 Defendants.
17

NO. EDCV 15-2314-VAP (AGR)

REPORT AND
RECOMMENDATION OF UNITED
STATES MAGISTRATE JUDGE

18 The court submits this Report and Recommendation to the Honorable
19 Virginia A. Phillips, United States District Judge, pursuant to 28 U.S.C. § 636 and
20 General Order No. 05-07 of the United States District Court for the Central District
21 of California. For the reasons set forth below, the magistrate judge recommends
22 the disposition set forth in the Report and Recommendation.
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I.

PROCEDURAL BACKGROUND

This action stems from Plaintiff's arrest, prosecution, and eventual acquittal on a domestic violence charge. On November 10, 2015, Plaintiff, proceeding *pro se* and *in forma pauperis*, filed a complaint under 42 U.S.C. § 1983. He named the following defendants: the County of San Bernardino ("County"); Sheriff John McMahon; Deputy Sheriff Scott Abernathy; District Attorney Michael Ramos; and Deputy District Attorneys Timothy Haskell and Deputy District Attorney Paul Levers. On December 15, 2015, the County, McMahon, and Abernathy ("County Defendants") filed a motion to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). On February 26, 2016, this court issued a report and recommendation that the motion to dismiss be granted in part and that Plaintiff be granted leave to file an amended complaint. On April 1, 2016, the district court accepted the findings and recommendations.

On May 2, 2016, Plaintiff filed a First Amended Complaint ("FAC"). In addition to the defendants named in the original complaint, the FAC named as defendants Public Defender Phyllis Morris and Deputy Public Defenders William Figueroa, Dave Sanders, Edward Wilson and Shane Mathias ("Public Defender Defendants").

On May 19, 2016, the County Defendants and Prosecutor Defendants filed a motion to dismiss the FAC for failure to state a claim under Fed. R. Civ. P. 12(b)(6) ("County Motion"). On June 20, 2016, Plaintiff filed an opposition to the County Motion. On June 28, 2016, the County Defendants and Prosecutor Defendants filed a reply.

Also on June 28, 2016, the Public Defender Defendants filed a motion to dismiss the FAC for failure to state a claim under Fed. R. Civ. P. 12(b)(6) ("Public Defender Motion"). On July 28, 2016, Plaintiff filed an opposition to the Public

1 Defender Motion. On August 10, 2016, the Public Defender Defendants filed a
2 reply.

3 **II.**

4 **JUDICIAL NOTICE**

5 Defendants request that the court take judicial notice of the preliminary
6 hearing transcript in Plaintiff's criminal case. (Defs. Req. Jud. Notice, Ex. A.)
7 Plaintiff requests the Court to take judicial notice of the same transcript and of
8 selected pages from the reporter's transcript of his trial. (Pl. Req. Jud. Notice,
9 Exs. A, B.) The requests for judicial notice are granted. See Fed. R. Civ. Evid.
10 201(b); *Rosales-Martinez v. Palmer*, 753 F.3d 890, 894 (9th Cir. 2014).

11 **III.**

12 **ALLEGATIONS OF FAC**

13 On March 29, 2014, Plaintiff's estranged wife¹ accused him of domestic
14 violence. (FAC ¶ 26.) She was "high on pain killers at the time" and "[n]o
15 violence was done by Plaintiff, except in self-defense." (*Id.*) During an argument
16 she bit him on the lips and he reflexively pushed her away. (*Id.* ¶ 27.) She
17 "purposely bruised herself."² (*Id.*) Plaintiff then took her to the hospital. (*Id.*)

18 At the hospital, defendant Abernathy, a Victorville sheriff's station detective,
19 interviewed Plaintiff without reading him his *Miranda*³ rights and arrested him
20 "solely on Plaintiff's ex-wife's say-so." (*Id.* ¶ 28.)

21 Plaintiff spent 47 days in jail until he posted bail on May 21, 2014. (*Id.*)

23 ¹ Most of the time Plaintiff refers to the victim as his ex-wife, but according
24 to the preliminary hearing testimony she and Plaintiff were married at the time of
25 the incident. (Defs. Req. Jud. Notice, Ex. A at 9.) The Court will refer to her as
Plaintiff's wife.

26 ² Plaintiff contends his wife did not have all of the bruises shown on the
27 photographs at trial when he took her to the hospital. (*Id.* ¶ 29.) The
28 photographs showing her bruises were not date-stamped. He contends that the
bruises were either self-inflicted or were inflicted by her drug dealers later. (*Id.*)

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

1 ¶ 31.) He was charged with felony domestic violence in violation of Cal. Penal
2 Code § 273.5 in the case *People v. Cotton*, Victorville Superior Court case No.
3 FVI1401155. (*Id.* ¶¶ 32, 47.) The preliminary hearing was held on April 15,
4 2014. (Defs. Req. Jud. Notice, Ex. A at 4.) Abernathy was the sole witness. (*Id.*
5 at 5.) Abernathy testified that he interviewed Plaintiff's wife in the hospital and
6 saw that she "had a lump on the back of her head and a swollen right eye." (*Id.*
7 at 8-10.) She told him that she and Plaintiff argued while she was sitting on her
8 bed, and the next thing she remembered was waking up in the bed with head
9 injuries.⁴ (*Id.* at 9.) Plaintiff told Abernathy that during an argument his wife "tried
10 to bite him near the lip," and "in self-defense he shook her several times, and she
11 consequently hit her head several times on the head board of the bed." (*Id.* at
12 11.) The court held Plaintiff to answer on the charge. (*Id.* at 16.)

13 Deputy public defenders Figueroa, Sanders, Wilson and Mathias
14 represented Plaintiff between March 29, 2014, and February 25, 2015. (FAC
15 ¶ 33.) They did not move to dismiss the charges, did not read the file on his
16 case, and did not seek disclosure of *Brady*⁵ evidence, specifically evidence that
17 Plaintiff's wife admitted to deputy district attorney Levers that she had bitten
18 Plaintiff's lip. (*Id.* ¶¶ 33(a)-(d) & 35; Pl. Req. Jud. Notice, Ex. B at 21-22.) The
19 public defenders also kept "shishing" Plaintiff, and conspired with the prosecutors
20 to try to get him to plead guilty and with the prosecutors and superior court judges
21 to prolong his case. (FAC ¶ 33(e)-(f).)

22 Deputy district attorneys Haskell and Levers did not turn over *Brady*
23 evidence regarding the admission made by the victim to Levers until February 25,
24 2015, the last day of trial. (*Id.* ¶ 35, 38, 54.) The trial court instructed the jury that
25

26 ⁴ On the day of the preliminary hearing she told Abernathy that "she had
27 suffered a brain bleed to the right lobe and she was having trouble walking
28 because of the brain injury." (Defs. Req. Jud. Notice, Ex A at 10.)

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963)

1 “[a]n attorney for the People failed to disclose a statement by Rosalyn Cotton that
2 she had bitten [Plaintiff]’s lip.” (Pl. Req. Jud. Notice, Ex. B at 22.) The jury
3 acquitted Plaintiff. (FAC ¶ 38.)

4 On July 29, 2015, Plaintiff filed a claim with the County Department of Risk
5 Management, which failed to timely adopt or reject it. (*Id.* ¶¶ 40-41.)

6 Plaintiff asserts six federal claims and five state-law claims.⁶ The federal
7 claims are three overlapping claims under 42 U.S.C. § 1983 challenging his
8 arrest, detention and prosecution under the Fourth, Fifth, Eighth and Fourteenth
9 Amendments, and conspiracy claims under 42 U.S.C. § 1985 (2)&(3) and 42
10 U.S.C. § 1986. (*Id.* ¶¶ 17-105). The state-law claims are: invasion of privacy;
11 false imprisonment; intentional infliction of emotional distress; violation of Cal.
12 Civ. Code § 51.7; and violation of Cal. Civ. Code § 52.1. (*Id.* ¶¶ 106-56.) Plaintiff
13 asserts his federal claims against all Defendants, the state-law invasion of privacy
14 and false imprisonment claims against the County Defendants and the
15 Prosecutor Defendants, and the intentional infliction of emotional distress and
16 §§ 51.7 and 52.1 claims against the County Defendants only. (FAC at 4, 11, 14,
17 15, 18, 20, 22, 23, 25, 26, and 28.) He does not assert state-law claims against
18 the Public Defender Defendants.

19 Plaintiff requests compensatory damages, punitive damages against all
20 Defendants except the County, and wide-ranging injunctive relief. (FAC at 30.)

21 IV.

22 DISCUSSION

23 A. Legal Standards

24 To survive a motion to dismiss, a complaint must contain sufficient factual
25 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). “A claim has facial
27

28 ⁶ The claims are labeled one through twelve but there is no claim eight.
(FAC at 22-23.)

1 plausibility when the plaintiff pleads factual content that allows the court to draw
2 the reasonable inference that the defendant is liable for the misconduct alleged.
3 The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
4 more than a sheer possibility that a defendant has acted unlawfully. Where a
5 complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it
6 ‘stops short of the line between possibility and plausibility of “entitlement to
7 relief.”’” *Id.* (citations omitted).

8 In reviewing a complaint, “the tenet that a court must accept as true all of
9 the allegations contained in a complaint is inapplicable to legal conclusions.
10 Threadbare recitals of the elements of a cause of action, supported by mere
11 conclusory statements, do not suffice.” *Id.*; *Bell Atlantic Corp. v. Twombly*, 550
12 U.S. 544, 555 (2007) (“labels and conclusions” or “formulaic recitation of the
13 elements of a cause of action” are insufficient). A “naked assertion” without
14 factual enhancement is insufficient. *Id.* at 557. “[W]here the well-pleaded facts
15 do not permit the court to infer more than the mere possibility of misconduct,” the
16 complaint is subject to dismissal. *Iqbal*, 556 U.S. at 679.

17 As a general rule, the court must limit its review to the operative complaint
18 and may not consider facts presented in briefs or extrinsic evidence. See *Lee v.*
19 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Materials submitted as
20 part of the complaint are not “outside” the complaint and may be considered. *Id.*;
21 *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19
22 (9th Cir. 1990). Even if documents are not physically attached to the complaint,
23 they may be considered if their authenticity is uncontested and the complaint
24 necessarily relies on them. *Lee*, 250 F.3d at 688.

25 A *pro se* complaint is to be liberally construed. *Erickson v. Pardus*, 551
26 U.S. 89, 94 (2007) (per curiam). Before dismissing a *pro se* civil rights complaint
27 for failure to state a claim, the plaintiff should be given a statement of the
28 complaint’s deficiencies and an opportunity to cure them unless it is clear the

1 deficiencies cannot be cured by amendment. *Eldridge v. Block*, 832 F.2d 1132,
 2 1135-36 (9th Cir. 1987). Nevertheless, “[u]nder Ninth Circuit case law, district
 3 courts are only required to grant leave to amend if a complaint can possibly be
 4 saved. Courts are not required to grant leave to amend if a complaint lacks merit
 5 entirely.” *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

6 **B. Public Defender Motion**

7 The Public Defender Defendants move for dismissal on the grounds that
 8 (1) they are not state actors; (2) the FAC fails to state any claim against Morris;
 9 and (3) the FAC fails to state §§ 1985 and 1986 claims against them. (Pub.
 10 Defender Mot. at 3-7.) The court recommends that their motion should be
 11 granted.

12 **1. Section 1983 (Claims One through Three)**

13 **a. Figueroa, Sanders, Wilson and Mathias**

14 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege (1) a
 15 violation of a right secured by the Constitution or laws of the United States (2)
 16 committed by a person acting under color of state law. *West v. Atkins*, 487 U.S.
 17 42, 48 (1988). A public defender does not act under color of state law when
 18 performing the traditional functions of counsel to a criminal defendant. *Polk*
 19 *County v. Dodson*, 454 U.S. 312, 325 (1981); *Miranda v. Clark County, Nevada*,
 20 319 F.3d 465, 468 (9th Cir. 2003) (en banc) (public defender appointed in
 21 criminal case was not state actor even though he was “paid by government funds
 22 and hired by a government agency”).

23 Plaintiff alleges that public defenders Figueroa, Sanders, Wilson and
 24 Mathias failed to seek disclosure of *Brady* evidence, move for dismissal of the
 25 charges at the preliminary hearing stage, file a motion to dismiss under Cal.
 26 Penal Code § 995, and read the file on his case. (FAC ¶ 33(a)-(e).) These acts
 27 and omissions all relate to traditional functions of criminal counsel. Whether the
 28 public defenders acted deficiently, or were biased against Plaintiff while

1 representing him (*id.* ¶ 39(a)), is irrelevant to whether they were acting as state
2 actors. See *Miranda*, 319 F.3d at 468 (public defender who “did essentially
3 nothing” was not a state actor even if his “conduct was deficient and to the
4 detriment of his client”).

5 Plaintiff also alleges that Figueroa, Sanders, Wilson, and Mathias
6 conspired with the prosecutors on the case “to plea Plaintiff guilty” even though
7 he was innocent, and that both the public defenders and the prosecutors
8 conspired with superior court judges to try to get a guilty plea and “unduly prolong
9 and continue Plaintiff’s case.” (FAC ¶ 33(f).) A public defender may be deemed
10 to have acted under color of state law if he conspired with state officials to
11 deprive his client of federal rights. *Tower v. Glover*, 467 U.S. 914, 920, 923
12 (1984). “Establishing liability for a conspiracy between a private actor and a state
13 actor is no different from establishing liability for a conspiracy between two state
14 actors.” *Crowe v. County of San Diego*, 608 F.3d 406, 440 (9th Cir. 2010).
15 Conclusory allegations of conspiracy are insufficient. *Simmons v. Sacramento*
16 *County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003); *Price v. Hawaii*, 939
17 F.2d 702, 708 (9th Cir. 1991). Rather, the plaintiff must allege specific facts
18 showing an agreement or meeting of the minds among the alleged conspirators
19 to violate his constitutional rights. *Crowe*, 608 F.3d at 440; *Margolis v. Ryan*, 140
20 F.3d 850, 853 (9th Cir. 1998).

21 Plaintiff views the public defenders’ failure to move for dismissal of the
22 case, and their willingness to contemplate a plea deal, as evidence that they were
23 conspiring with the prosecutors to convict him. (FAC ¶¶ 33(f), 34, 73; see Opp.
24 Pub. Defenders Mot. at 2-4.) But the mere fact that the public defenders
25 engaged in plea negotiations despite Plaintiff’s insistence on his innocence does
26 not give rise to a reasonable inference that they conspired with prosecutors to
27 obtain a wrongful conviction. See *Perkins v. Kemalyan*, No. CV 09-7439-DDP
28 (JCG), 2010 WL 6416247, at *5-6 (C.D. Cal. Aug. 6, 2010) (allegations that

1 counsel failed to make certain motions and call certain witnesses, and that
2 codefendant's counsel negotiated a plea deal for codefendant and advised him
3 not to testify, did not indicate counsel conspired with each other and prosecutor to
4 violate plaintiff's rights), *accepted by*, 2011 WL 1211534 (C.D. Cal. Mar. 31,
5 2011); *Carroll v. Lee*, No. C08-975RSL, 2009 WL 2855727, at *2 (W.D. Wash.
6 Aug. 31, 2009) ("But even assuming for the sake of argument that [plaintiff's
7 lawyer] exhibited gross incompetence, nothing plaintiff describes about her
8 actions or behavior suggests that she had a mutual understanding with state
9 defendants to specifically harm plaintiff. It does not reasonably follow from
10 plaintiff's outrage at his lawyer's assistance that [she] was engaged in a
11 conspiracy against him.") The existence of a viable (and ultimately successful)
12 defense of self-defense did not mean that Plaintiff faced no risk of conviction.

13 The FAC contains no facts from which such a conspiracy could be inferred.
14 See *Crowe*, 608 F.3d at 440; *Margolis*, 140 F.3d at 853. Plaintiff's allegation that
15 the public defenders were hoping to get jobs in the district attorney's office is
16 sheer speculation. (See FAC ¶ 25; Opp. Pub. Defender Mot. at 3.) And his
17 contention that they conspired with the judge and the prosecutors to prolong and
18 continue his case is utterly conclusory. See *Simmons*, 318 F.3d at 1161.

19 It is recommended that the § 1983 claims against Figueroa, Sanders,
20 Wilson and Mathias be dismissed without leave to amend. See *Lopez*, 203 F.3d
21 at 1129 (leave to amend not required if amendment would be futile).

22 **b. Public Defender Morris**

23 A public defender acts under color of state law when performing
24 administrative functions. *Miranda*, 319 F.3d at 469; see *Polk County*, 454 U.S. at
25 325 (listing hiring and firing decisions as administrative functions that might be
26 under color of state law). Plaintiff contends that Public Defender Morris is liable
27 because she promulgated policies and customs that harmed him, including (1)
28 not investigating a defendant's guilt or innocence, (2) not reading a defendant's

1 client file, (3) not conferring with a defendant about his or her case, (4) not visiting
 2 a defendant in jail or returning his calls, (5) not making objections and motions in
 3 a defendant's case, (6) not seeking dismissal of a defendant's case, (7) "always
 4 seeking deals with the District Attorney's Office in hopes that said Office would
 5 hire them away from the Public Defender's Office." (FAC ¶ 25.)

6 As an initial matter, these are not administrative functions. *Compare*
 7 *Miranda*, 319 F.3d at 469-70 (head of public defender's office acted under color
 8 of state law in allocating resources based on results of polygraph tests).
 9 Plaintiff's alleged policies relate to matters such as conferring with clients,
 10 investigating a case, deciding whether to file a motion, and engaging in plea
 11 discussions. (*Id.*) A public defender's performance of these functions is
 12 controlled by professional standards and not by administrative directions of a
 13 supervisor. See *id.* at 468; *Polk County*, 454 U.S. at 321-22. Furthermore,
 14 Plaintiff has not alleged how these alleged policies caused a violation of his
 15 constitutional rights. See *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir.
 16 2013); *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). Plaintiff did not enter
 17 into a plea agreement. He was acquitted. (FAC ¶ 38.)

18 It is recommended that the § 1983 claims against Public Defender Morris
 19 be dismissed without leave to amend.

20 **2. Section 1985 (Claims Four and Five)**

21 Plaintiff's fourth and fifth claims assert civil rights conspiracies in violation
 22 of 42 U.S.C. § 1985. (FAC ¶¶ 71-95.) The claims arise under the second clause
 23 of § 1985(2), which prohibits conspiracies to obstruct the due course of justice in
 24 a state with the intent to deny equal protection, and under the first clause of
 25 § 1985(3), which prohibits conspiracies to deprive a person of equal protection of
 26 the laws or equal privileges and immunities under the laws. See *Kush v.*
 27 *Rutledge*, 460 U.S. 719, 724-25 (1983); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.
 28 3 (9th Cir. 1985) (en banc). Both provisions require a plaintiff to allege a

1 conspiracy and overt acts in furtherance of the conspiracy that caused him injury.
2 See *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1536 (9th Cir. 1992); *Sanchez v.*
3 *City of Santa Ana*, 936 F.2d 1027, 1039 (9th Cir. 1990). Both provisions also
4 require a plaintiff to allege a racial or otherwise class-based discriminatory
5 animus. See *Griffin v. Breckenridge*, 403 U.S. 88, 103 (1971); *Bretz*, 773 F.2d at
6 1028. A mere allegation of conspiracy without specific facts is insufficient.
7 *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 626 (9th Cir. 1988);
8 *Sanchez*, 936 F.2d at 1039.

9 Plaintiff alleges that Defendants, by reason of their "animus against
10 minorities, including African-Americans, invidiously discriminated and conspired
11 together to act and to fail to act . . . for the purpose of impeding, hindering,
12 obstructing, and defeating the due course of justice." (FAC ¶ 72.) He further
13 alleges that the Public Defender Defendants conspired with the other defendants
14 "to get Plaintiff to plead guilty to Felony Domestic Violence," a crime of which he
15 was innocent. (*Id.* ¶¶ 73, 85.) As discussed above, Plaintiff has not alleged facts
16 showing a wrongful agreement between the public defenders and the other
17 Defendants. See *Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 929-30
18 (9th Cir. 2006) (dismissing § 1985 complaint). Moreover, Plaintiff does not allege
19 injury, as he did not plead guilty and was acquitted. See *Sanchez*, 936 F.2d at
20 1039 ("conspiracy must result in overt acts, done in furtherance of the conspiracy,
21 that are both the cause in fact and proximate cause of plaintiffs' injuries").

22 Plaintiff also fails to allege facts giving rise to a plausible inference that the
23 Public Defender Defendants were motivated by racial animus against him as an
24 African-American. See *Griffin*, 403 U.S. at 103; *Bretz*, 773 F.2d at 1028.

25 Conclusory allegations are not enough; Plaintiff must allege acts or statements
26 from which discriminatory animus could be inferred. The FAC contains no such
27 facts. See *Turner v. Larsen*, 536 Fed. Appx. 748, 748-49 (9th Cir. 2013)
28 (affirming dismissal of § 1985(3) claim); *Veth Mam v. City of Fullerton*, No. SACV

1 11-1242-JST (MLGx), 2012 WL 443840, * 6 (C.D. Cal. Feb. 13, 2012) (dismissing
2 § 1985 claim).

3 It is recommended that the § 1985 claims against the Public Defender
4 Defendants be dismissed without leave to amend. See *Lopez*, 203 F.3d at 1129
5 (leave to amend not required if amendment would be futile).

6 **3. Section 1986 (Claim Six).**

7 Section 1986 imposes liability on a person who knows of an impending
8 violation of § 1985 but neglects or refuses to prevent it. *Karim-Panahi*, 839 F.2d
9 at 626. "A claim can be stated under section 1986 only if the complaint contains
10 a valid claim under section 1985." *Id.*; see also *McCalden v. California Library*
11 *Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990) (same). Plaintiff's failure to state a
12 claim under § 1985 is fatal to his claim under § 1986. Therefore, it is
13 recommended that this claim be dismissed without leave to amend as well.

14 **C. County and Prosecutors' Motion**

15 The County Defendants and Prosecutor Defendants move for dismissal on
16 the following grounds: (1) the FAC does not sufficiently allege municipal liability
17 on the part of the County; (2) the FAC does not sufficiently allege supervisory
18 liability on the part of McMahon and Ramos; (3) the Prosecutor Defendants are
19 immune from liability; (4) the Fourth Amendment claims are barred by collateral
20 estoppel; (5) the FAC fails to allege equal protection claims or claims under
21 §§ 1985 (2)&(3) and 1986; (6) the FAC fails to state claims for invasion of privacy,
22 intentional infliction of emotional distress, and violation of Civ. Code §§ 52.1 and
23 57.1, and (7) the state-law false imprisonment claim is barred by collateral
24 estoppel. (Cnty. Mot. at 3-17.) The court recommends that the motion should be
25 granted as set forth below.

26 **1. Collateral Estoppel**

27 Plaintiff's § 1983 claims for false arrest, false imprisonment and malicious
28 prosecution require him to prove the absence of probable cause to arrest, detain

1 and prosecute him. See *Wige v. City of Los Angeles*, 713 F.3d 1183, 1185 (9th
2 Cir. 2013). Defendants contend these claims are barred by the doctrine of
3 collateral estoppel because the existence of probable cause was determined at
4 Plaintiff's preliminary hearing.⁷ (Cnty. Mot. at 8-10.)

5 The doctrine of collateral estoppel applies in § 1983 actions. *Allen v.*
6 *McCurry*, 449 U.S. 90, 105 (1980). "Under collateral estoppel, once a court has
7 decided an issue of fact or law necessary to its judgment, that decision may
8 preclude relitigation of the issue in a suit on a different cause of action involving a
9 party to the first case." *Id.* at 94. Collateral estoppel is only applicable, however,
10 if the party against whom the earlier decision is asserted had a "full and fair
11 opportunity" to litigate the issue in the earlier case. *Id.* at 95.

12 "Federal courts must give 'preclusive effect to state-court judgments
13 whenever the courts of the State from which the judgments emerged would do
14 so.'" *Wige*, 713 F.3d at 1185 (quoting *Allen*, 449 U.S. at 96). Under California
15 law, collateral estoppel applies when: (1) the issue to be relitigated is identical to
16 the issue decided in the earlier action; (2) the issue was actually litigated and (3)
17 necessarily decided in the earlier action; (4) the earlier decision was final and on
18 the merits; and (5) the party against whom collateral estoppel is asserted was a
19 party (or in privity) to the earlier action. *Id.*; see *Lucido v. Superior Court*, 51 Cal.
20 3d 335, 341 (1990).

21 "As a general rule, each of these requirements will be met when courts are
22 asked to give preclusive effect to preliminary hearing probable cause findings in
23 subsequent civil actions for false arrest and malicious prosecution." *Wige*, 713
24 F.3d at 1185 (citing *McCutchen v. City of Montclair*, 73 Cal. App. 4th 1138, 1145-
25 46 (1999)). The issue to be resolved at a preliminary hearing is identical to the
26

27 ⁷ The County Defendants made the same argument in their motion to
28 dismiss the original complaint. (Dkt. No. 8 at 14-16.) Their motion on this ground
was denied without prejudice because they failed to provide the transcript of the
preliminary hearing. (Dkt. No. 22 at 8-12; No. 27 at 2.)

1 issue that must be resolved in a false arrest or malicious prosecution action -- the
2 existence of probable cause. *Id.* The quantum of evidence also is the same. *Id.*
3 So long as the evidence known to the arresting officers is not materially different
4 from the evidence presented at the preliminary hearing, a finding of probable
5 cause to stand trial is a finding of probable cause to arrest the defendant. *Id.*

6 There are two exceptions to the general rule: (1) when evidence not
7 available to the arresting officer at the time of arrest is presented at the hearing;
8 and (2) when the plaintiff alleges the arresting officer lied or fabricated evidence
9 at the hearing. *Id.* at 1186. Under the second exception, a plaintiff may litigate
10 the issue of probable cause "with the falsified evidence removed from the
11 equation or, in cases involving intentional concealment of exculpatory evidence,
12 with the undisclosed evidence added back into the equation." *Id.* In *Wige*, the
13 Ninth Circuit held that collateral estoppel did not apply when the arresting officer's
14 testimony at the preliminary hearing regarding the victim's identification of
15 defendant met the standard for probable cause, but the victim testified that the
16 police pressured him into making a false identification. Under those
17 circumstances, the state court's finding of probable cause was based on the view
18 that a reasonable jury could believe either the officer or the victim. *Id.* at 1186-87.
19 Similarly, in *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1068 (9th Cir. 2004), the
20 Ninth Circuit held that the probable cause determination at the preliminary
21 hearing did not bar Awabdy's malicious prosecution claim because he alleged the
22 probable cause finding was based on fabricated evidence. "Among the ways that
23 a plaintiff can rebut a *prima facie* finding of probable cause is by showing that the
24 criminal prosecution was induced by fraud, corruption, perjury, fabricated
25 evidence, or other wrongful conduct undertaken in bad faith." *Id.* at 1067; see
26 also *McCutchen*, 73 Cal. App. 4th at 1147 ("When the officer misrepresents the
27 nature of the evidence supporting probable cause and that issue is not raised at
28

1 the preliminary hearing, a finding of probable cause at the preliminary hearing
2 would not preclude relitigation of the issue of integrity of the evidence.”).

3 On the other hand, in *Haupt v. Dillard*, 17 F.3d 285 (9th Cir. 1994), there
4 was no contention that the evidence was fabricated or that the evidence
5 presented at the preliminary hearing was unavailable to the arresting officers
6 when they obtained a warrant for Haupt’s arrest. *Id.* at 289. The probable cause
7 determination at the preliminary hearing barred Haupt’s false arrest and malicious
8 prosecution claims. *Id.* at 289-91; see also *Forest v. City of Fort Bragg*, 520 Fed.
9 Appx. 616, 617 (9th Cir. 2013) (affirming dismissal of false imprisonment and
10 malicious prosecution claims; distinguishing *Wige*); *Beckway v. Deshong*, 717 F.
11 Supp. 2d 908, 919-21 (N.D. Cal. 2010) (applying collaterally estoppel to bar false
12 arrest claim when no showing court relied on information unavailable to officers);
13 *Harvey v. City of Fresno*, No. 1:08-CV-01399- 2010 WL 892114, at *10 (E.D.
14 Cal. Mar. 9, 2010) (collateral estoppel barred claims against arresting detectives
15 when no allegation that officers fabricated evidence at preliminary hearing).

16 Here, Abernathy was the only witness at the preliminary hearing. He
17 testified that he interviewed Plaintiff’s wife in the hospital on the day of the
18 incident, and she told him that she and Plaintiff had argued while she was sitting
19 on a bed, and the next thing she remembered was waking up on the bed with
20 head injuries and icepacks. (Defs. Req. Jud. Notice, Ex. A at 8-9.) Plaintiff was
21 standing next to her and told her that he had struck her head against the
22 headboard, but she herself did not remember how she got her injuries. (*Id.* at 9,
23 12-13.) Abernathy saw that she had a lump on her head and a swollen right eye.
24 (*Id.* at 9-10, 13-14.) Abernathy testified that he spoke with Plaintiff at the hospital,
25 and Plaintiff told him that during an argument his wife stood up from the bed and
26 tried to bite him near the lip. (*Id.* at 11.) “So in self-defense [Plaintiff] shook her
27 several times, and she consequently hit her head several times on the headboard
28

1 of the bed.” (*Id.*) Abernathy testified that he asked Plaintiff’s wife whether she
2 had attempted to bite Plaintiff, and she claimed that she did not. (*Id.* at 12-13.)

3 The court held Plaintiff to answer. (*Id.* at 16.)

4 Neither of the exceptions to collateral estoppel applies. The only evidence
5 presented at the preliminary hearing that was unavailable to Abernathy when he
6 arrested Plaintiff was the victim’s statement to Abernathy on the day of the
7 preliminary hearing that she required rehabilitation because the incident had
8 caused a brain bleed and had impaired her ability to walk. (Def. Req. Jud.
9 Notice, Ex. A at 10.) This evidence was unnecessary to the determination of
10 whether there was probable cause to hold Plaintiff to answer on the § 273.5
11 charge. Section 273.5 applies when the defendant wilfully inflicts corporal injury
12 resulting in a “traumatic condition” upon a spouse or other qualifying victim
13 through the direct application of force. Cal. Penal Code § 273.5(a); *United States*
14 *v. Laurico-Yeno*, 590 F.3d 818, 822-23 (9th Cir. 2010). The statute defines
15 “traumatic condition” as a wound or external or internal injury caused by physical
16 force. Cal. Penal Code § 273.5(d); see *United States v. Hall*, 419 F.3d 980, 986
17 (9th Cir. 2005) (“Bruising is a ‘traumatic condition’ for purposes of the statute.”).
18 Abernathy testified that Plaintiff told him that he shook his wife after she tried to
19 bite him, causing her head to strike the bedboard several times. (Def. Req. Jud.
20 Notice, Ex. A at 11.) He further testified that the victim told him that she did not
21 remember anything until she woke up with head injuries, and Abernathy could
22 see that she had a lump on her head and a swollen right eye. (*Id.* at 9-10, 13-
23 14.) This evidence, which was known to Abernathy before he arrested Plaintiff,
24 supported a finding of probable cause. Abernathy’s additional testimony
25 regarding the victim’s later statement did not render the evidence supporting
26 probable cause materially different from that known to him at the time of arrest.
27 See *Wige*, 713 F.3d at 1185.
28

1 Nor is there any indication that Abernathy fabricated evidence or engaged
2 in other wrongful conduct. Plaintiff vigorously argues that the victim lied and
3 contends she “purposely bruised herself.”⁸ (FAC ¶ 27.) Plaintiff does not dispute
4 that Abernathy correctly relayed what Plaintiff told him. (*Id.* ¶ 28.)

5 Plaintiff nevertheless argues that, as in *Awabdy*, the probable cause finding
6 at the preliminary hearing was based on the withholding of *Brady* evidence,
7 namely, the victim’s admission to Levers that she bit Plaintiff. (Opp. Cnty. Mot. at
8 20-23; Pl. Req. Jud. Notice, Ex. B at 22.) The victim made this admission to
9 Levers *after* Plaintiff’s arrest by Abernathy on the day of the incident. (FAC ¶ 47.)
10 Evidence about the bite was introduced at the hearing. Levers elicited testimony
11 from Abernathy that Plaintiff had told him that his wife tried to bite him. Levers
12 acknowledged the bite in arguing for a finding of probable cause. (Defs. Req.
13 Jud. Notice, Ex. A at 10, 15.) And this is not a case like *Awabdy*, where a police
14 officer colluded with city officials to falsely accuse the plaintiff of embezzlement in
15 order to bring about his removal from office, and the probable cause finding was
16 based on evidence known to be false. 368 F.3d at 1065. “The mere existence of
17 some evidence that could suggest self-defense does not negate probable cause.”
18 *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015) (noting that
19 “Yousefian’s claim of self-defense apparently created doubt in the minds of the
20 jurors, but probable cause can well exist (and often does) even though ultimately,
21 a jury is not persuaded that there is proof beyond a reasonable doubt.”), *cert.*
22 *denied*, 136 S. Ct. 136 (2015).

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24
25
26 ⁸ Plaintiff also contends that the photographs of the victim’s bruises were
27 not date-stamped and thus the bruises may have been inflicted “by her drug
28 dealers” later. (FAC ¶ 29). But the photographs of the victim’s bruises were not
introduced at the preliminary hearing and the probable cause determination did
not rely on them. (Def. Req. Jud. Notice at 5-15.)

1 Accordingly, it is recommended that Plaintiff's false arrest, false
2 imprisonment and malicious prosecution claims be dismissed without leave to
3 amend.

4 2. Prosecutor Defendants

5 The Prosecutor Defendants contend that the claims against them are
6 barred by prosecutorial immunity.

7 Prosecutors are absolutely immune from § 1983 liability for damages for
8 initiating and pursuing criminal prosecutions. *Imbler v. Pachtman*, 424 U.S. 409,
9 430-31 (1976); see also *Botello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005)
10 ("it is well established that a prosecutor has absolute immunity for the decision to
11 prosecute a particular case"). Prosecutorial immunity extends to all conduct
12 "intimately associated" with the judicial phase of the criminal process. *Imbler*, 424
13 U.S. at 430. "If the action was part of the judicial process, the prosecutor is
14 entitled to the protection of absolute immunity whether or not he or she violated
15 the civil plaintiff's constitutional rights." *Broam v. Bogan*, 320 F.3d 1023, 1029
16 (9th Cir. 2003). Allegations of conspiracy do not overcome prosecutorial
17 immunity. *Lacey v. Maricopa County*, 693 F.3d 896, 937 (2012) ("irrespective of
18 any claim of conspiracy, prosecutors are absolutely immune for quasi-judicial
19 activities taken within the scope of their authority") (citation, quotation marks, and
20 alteration omitted).

21 Plaintiff alleges that the prosecutors in his case, Haskell and Levers,
22 conspired with the public defenders representing him to try to get him to plead
23 guilty, and with the public defenders and superior court judges to "unduly prolong
24 and continue [his] case." (FAC ¶ 33(f).) Haskell and Levers did not turn over
25 *Brady* evidence showing that Plaintiff acted in self-defense until the last day of
26 trial. (*Id.* ¶¶ 35, 54.) They proceeded with the prosecution knowing that the
27 charges were unfounded. (*Id.* ¶¶ 39(a), 48, 54.) Haskell made an inflammatory
28 argument to the jury. (*Id.* ¶¶ 35, 36; Pl. Req. Jud. Notice. Ex. B at 24.)

1 None of these allegations suggest activities outside traditional prosecutorial
2 functions. Haskell and Levers are absolutely immune from liability for initiating a
3 prosecution against Plaintiff and presenting the government's case. See *Imbler*,
4 424 U.S. at 416, 431 (prosecutors immune from claims they knowingly used false
5 testimony at trial, deliberately suppressed exculpatory evidence, and prosecuted
6 defendant with knowledge he had been "cleared" by lie detector test); *Buckley v.*
7 *Fitzsimmons*, 509 U.S. 259, 273 (1993) (prosecutors immune from claims they
8 conspired to manufacture false evidence); *Broam*, 320 F.3d at 1029-30
9 (prosecutor absolutely immune from liability for failing to investigate accusations
10 before filing charges and for knowing use of false testimony at trial); see also
11 *Botello*, 413 F.3d at 977 (prosecutors immune from liability for refusing to
12 prosecute cases investigated by plaintiff police officer). Prosecutorial immunity
13 also shields Haskell and Levers from liability based on plea negotiations. See
14 *Briley v. State of Cal.*, 564 F.2d 849, 856 (9th Cir. 1977) ("prosecutorial immunity
15 extends to the process of plea bargaining"); *Law v. Johnson*, No. 11-CV-06163-
16 LHK, 2012 WL 2906570, at *3 (N.D. Cal. Jul. 13, 2012) (collecting cases).

17 Plaintiff argues that "producing *Brady* evidence is a law enforcement
18 function, not a prosecutorial function." (Opp. Cnty. Mot. at 18.) The Ninth Circuit
19 has held that although "[a] prosecutor's decision not to preserve or turn over
20 exculpatory material before trial, during trial, or after conviction is a violation of
21 due process under [*Brady*]," it is nevertheless "an exercise of the prosecutorial
22 function and entitles the prosecutor to absolute immunity from a civil suit for
23 damages." *Broam*, 320 F.3d at 1030; accord *Ybarra v. Reno Thunderbird Mobile*
24 *Home Vill.*, 723 F.2d 675, 679-80 (9th Cir. 1984); see also *Imbler*, 424 U.S. at
25 431-32 n.34 (explaining that "deliberate withholding of exculpatory information" is
26 included within "exercise of prosecutorial discretion").

27 As for defendant Ramos, Plaintiff does not allege he was directly involved
28 in Plaintiff's prosecution, but sues him in his supervisory role for promulgating

1 policies and practices that allegedly harmed Plaintiff (FAC ¶ 24) and for failing to
2 supervise the prosecutors handling Plaintiff's case (*id.* ¶ 21).

3 Although absolute immunity may not apply when a prosecutor is engaged
4 in administrative tasks, the policies allegedly promulgated by Ramos -- not
5 disclosing *Brady* evidence at the earliest opportunity, trying to obtain a plea
6 agreement instead of proving a case beyond reasonable doubt, and trying to
7 obtain a conviction through inflaming the jury (FAC ¶ 24) -- relate to obligations
8 "directly connected with the conduct of a trial" and requiring "legal knowledge and
9 the exercise of related discretion." *Van de Kamp v. Goldstein*, 555 U.S. 335, 342,
10 344 (2009). Ramos is shielded by absolute immunity for these alleged policies.
11 *Id.* at 339 (district attorney was absolutely immune from claims he failed to train
12 prosecutors to disclose impeachment material, failed to supervise prosecutors,
13 and failed to establish system for sharing information about informants). As for
14 failing to supervise Haskell and Levers, "[a]n attorney supervising a trial
15 prosecutor who is absolutely immune is also absolutely immune." *Garmon v.*
16 *County of Los Angeles*, 828 F.3d 837, 845 (9th Cir. 2016) (citing *Van de Kamp*,
17 555 U.S. at 345-46). Absolute immunity applies even if Plaintiff challenges
18 general methods of training and supervision, rather than specific supervision and
19 training related to his case. *Van de Kamp*, 555 U.S. at 346-48.

20 Accordingly, the Prosecutor Defendants are absolutely immune from
21 Plaintiff's § 1983 claims. Absolute immunity also bars Plaintiff's conspiracy
22 claims against these defendants under §§ 1985 (2)&(3) and 1986. See *Snelling*
23 *v. Westoff*, 972 F.2d 199, 200 (8th Cir. 1992) (applying absolute immunity to
24 conspiracy claims brought against prosecutor under §§ 1985 and 1986); *Agnew*
25 *v. Moody*, 330 F.2d 868, 869 (9th Cir. 1964) (prosecutorial immunity applies to §
26 1985 conspiracy claims); *Lewis v. Franklin*, No. C-03-0359-MMC, 2007 WL
27 30592, at *4 n.2 (N.D. Cal. Jan. 3, 2007) ("Absolute prosecutorial immunity also
28 bars conspiracy claims . . . asserted under § 1985 and § 1986.").

1 It is recommended that the federal claims against the Prosecutor
2 Defendants be dismissed without leave to amend. See *Lopez*, 203 F.3d at 1129
3 (leave to amend not required if amendment would be futile).

4 3. County

5 A local government may not be sued under § 1983 based on vicarious
6 liability for its employees or agents. *Monell v. Department of Social Service of the*
7 *City of New York*, 436 U.S. 658, 694 (1978). A local governmental entity may be
8 held liable under § 1983 “when execution of a government’s policy or custom,
9 whether made by its lawmakers or by those whose edicts or acts may fairly be
10 said to represent official policy, inflicts the injury.” *Id.* “Official municipal policy
11 includes the decisions of a government’s lawmakers, the acts of its policymaking
12 officials, and practices so persistent and widespread as to practically have the
13 force of law.” *Connick v. Thompson*, 563 U.S. 51, 61 (2011); see *Monell*, 436
14 U.S. at 690-91, 694. A local governmental entity is liable only if there is “a direct
15 causal link” between its policies or customs and the alleged constitutional
16 violation. *Villegas v. Gilroy Garlic Festival Ass’n*, 541 F.3d 950, 957 (9th Cir.
17 2008) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)).

18 Plaintiff alleges the County follows “a policy of ‘no policy’ in protecting the
19 rights of persons” (FAC ¶ 20), and knowingly maintains and permits official *sub*
20 *rosa* policies or customs permitting the occurrence of the kinds of wrongs alleged
21 in the FAC, by deliberate indifference to widespread police abuses and refusal to
22 “impartially investigate, discipline, and prosecute peace officers who commit acts
23 of felonious dishonesty and crimes of violence” (*id.* at ¶ 22). These allegations
24 were found insufficient to support *Monell* liability in the original complaint.

25 The FAC contains some new *Monell* allegations. Plaintiff alleges that the
26 County and Sheriff McMahon have promulgated policies and customs such as (1)
27 not investigating all facts; (2) not reading *Miranda* rights; (3) arresting people of
28

1 color based on events in the news⁹; (4) “not properly preserving the evidence,
 2 including date-stamping the photos”; and (5) “not recognizing self-defense as a
 3 defense.” (*Id.* ¶ 23.) The County and District Attorney Ramos have promulgated
 4 policies and customs such as (1) not preserving and disclosing *Brady* evidence at
 5 the earliest opportunity; (2) “not proving beyond a reasonable doubt that a
 6 defendant is guilty of a crime in hopes that the District Attorney’s Office would
 7 secure a deal with the Public Defender’s Office instead”; and (3) trying to secure
 8 a conviction by inflaming the jury instead of proving guilt beyond a reasonable
 9 doubt. (*Id.* ¶ 24.) The County and Public Defender Morris have promulgated
 10 policies such as (1) not investigating the guilt or innocence of a defendant; (2) not
 11 reading a defendant’s client file; (3) not conferring with a defendant about his or
 12 her case; (4) not visiting the defendant in jail or returning his calls; (5) not making
 13 objections or motions; (6) not seeking dismissal of the case; and (7) “always
 14 seeking deals with the District Attorney’s Office in hopes that said Office would
 15 hire them away from the Public Defender’s Office.” (*Id.* ¶ 25.)

16 To the extent Plaintiff’s claim against the County rests on purported policies
 17 and customs of the Sheriff’s department that led to his allegedly wrongful arrest
 18 by Abernathy (*id.* ¶ 24), it cannot proceed because his Fourth Amendment claims
 19 are barred by collateral estoppel. Moreover, his allegations are too vague and
 20 conclusory to support a *Monell* claim. See *Iqbal*, 556 U.S. at 681-82 (requiring
 21 specific allegations regarding the policies at issue in a civil rights case). Plaintiff
 22 has not alleged facts showing that the alleged policies and customs constituted
 23 formal policies of County policymakers, or were “practices so persistent and
 24 widespread as to practically have the force of law.” *Connick*, 563 U.S. at 61. In
 25 fact, Plaintiff’s *Monell* allegations are no more than generalizations from his own
 26 arrest, e.g., “not reading the *Miranda* rights prior to interrogating Plaintiff,”

27 ⁹ Plaintiff asserts that he was arrested around the time that football player
 28 Ray Rice’s assault on his fiancée was in the news. (FAC ¶¶ 23, 30(c).)

1 “arresting people of color based on events of the day . . . such as . . . Ray Rice,”
2 “not properly preserving the evidence, including date-stamping the photos,” and
3 “not recognizing self-defense as a defense.” (FAC ¶ 23.) A single incident is
4 insufficient to establish a custom. See *Davis v. City of Ellensburg*, 869 F.2d
5 1230, 1233 (9th Cir. 1989) (“ A plaintiff cannot prove the existence of a *municipal*
6 policy or custom based solely on the occurrence of a single incident of
7 unconstitutional action by a non-policymaking employee.”). Plaintiff’s allegation
8 that the County fails to investigate and discipline officers “who commit acts of
9 felonious dishonesty and crimes of violence” (FAC ¶ 22) is irrelevant because
10 Plaintiff does not allege that Abernathy committed any dishonest or violent act.

11 To the extent Plaintiff’s claim against the County rests on purported policies
12 and practices of the district attorney’s office (FAC ¶ 24), Plaintiff similarly has not
13 alleged facts showing that the alleged policies constituted formal policies or
14 widespread practices. See *Iqbal*, 556 U.S. at 681-82. Moreover, the County
15 cannot be liable unless the district attorney was acting as a county official rather
16 than a state official, a determination that depends on state law. *Weiner v. San*
17 *Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000) (citing *McMillian v. Monroe*
18 *County Alabama*, 520 U.S. 781, 786 (1997)). “[A] California district attorney is a
19 state officer when deciding whether to prosecute an individual.” *Id.* at 1031; see
20 *Pitts v. County of Kern*, 17 Cal. 4th 340, 362 (1998) (“when preparing to
21 prosecute and when prosecuting criminal violations of state law, a district attorney
22 represents the state and is not a policymaker for the county”). In contrast, a
23 California district attorney acts as a county official when the challenged conduct
24 “does not involve prosecutorial strategy, but rather administrative oversight of
25 systems used to help prosecutors comply with their constitutional duties.”
26 *Goldstein v. City of Long Beach*, 715 F.3d 750, 762 (9th Cir. 2013) (district
27 attorneys were county officials for purposes of adopting and implementing
28

1 internal policies and procedures regarding use of jailhouse informants), *cert.*
2 *denied*, 134 S. Ct. 906 (2014).

3 Plaintiff's allegations fall under *Weiner* rather than *Goldstein*. All of the
4 challenged policies and customs pertain to acts and omissions by prosecutors
5 prosecuting criminal cases. (FAC ¶ 24.) They cannot be a basis for a *Monell*
6 claim against the County because district attorneys act as state officials, not as
7 County officials, in prosecuting cases. *Weiner*, 210 F.3d at 1031; *Riese v. Cnty.*
8 *of Del Norte*, No. 12-cv-3723-WHO, 2013 WL 5568707, at *3 (N.D. Cal. Oct. 9,
9 2013) (plaintiff could not allege *Monell* claim based on investigation and
10 prosecution by district attorney's office because district attorney acted as state
11 official); *Pellerin v. Nevada County*, No. CIV S 12-665 KJM CKD, 2013 WL
12 1284341, at *4 (E.D. Cal. Mar. 28, 2013) (district attorney's office "is deemed to
13 be a state agency when involved in prosecutorial activities"); *Nazir v. Cnty. of Los*
14 *Angeles*, No. CV 10-06546 SVW (AGRx), 2011 WL 819081, at *7-8 (C.D. Cal.
15 Mar. 2, 2011) (district attorney's office exercised prosecutorial function and acted
16 for state when creating procedure to place police officers on *Brady* lists).

17 To the extent Plaintiff's claim against the County rests on purported policies
18 and practices of the public defender's office, he again fails to allege formal
19 policies or widespread practices. See *Iqbal*, 556 U.S. at 681-82. As already
20 discussed in connection with Plaintiff's claim against Morris, he has not alleged a
21 causal connection between the alleged policies and injury to him.

22 Plaintiff argues he is not required to allege specific facts to plead a *Monell*
23 claim, citing pre-*Iqbal* cases. (Opp. Cnty. Mot. at 14-17.) As he was previously
24 advised, after *Iqbal* he must allege "plausible facts supporting [the alleged] policy
25 or custom." *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 637 (9th
26 Cir. 2012); see also *Lopez v. County of Los Angeles*, No. CV 15-01745-MMM
27 (MANx), 2015 WL 3913263, at *6-7 (C.D. Cal. Jun. 25, 2015) (concluding that
28

1 after *Iqbal*, prior Ninth Circuit standard allowing bare allegations of *Monell* liability
2 is no longer viable; collecting cases).

3 Plaintiff, therefore, fails to state a § 1983 claim against the County. His
4 claims against the County under §§ 1985 (2)&(3) and 1986 fail for the same
5 reasons. Courts have applied the *Monell* analysis to claims against local
6 governments under §§ 1985 and 1986. See *Small v. Chao*, 398 F.3d 894, 898
7 (7th Cir. 2005) (§ 1985); *Owens v. Haas*, 601 F.2d 1242, 1247 (2nd Cir. 1979)
8 (§ 1985); *Zimmerman v. City and County of San Francisco*, No. C 93-4045 MJJ,
9 2000 WL 1071830, at *4-5 (N.D. Cal. Apr. 30, 2012) (§ 1985); *Luke v. Abbott*, 954
10 F. Supp. 202, 202 n. 1 (C.D. Cal. 1997) (§§ 1985, 1986); *Vasquez v. City of*
11 *Reno*, 461 F. Supp. 1098, 1102 (D. Nev. 1978) (§ 1986).

12 It is recommended that all federal claims against the County be dismissed
13 without leave to amend. See *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th
14 Cir. 1990) ("The district court's discretion to deny leave to amend is particularly
15 broad where plaintiff has previously amended the complaint.").

16 **4. Supervisory Liability**

17 Defendants contend Plaintiff has not alleged a factual basis for supervisory
18 liability against Sheriff McMahon and District Attorney Ramos.

19 As discussed above, Ramos is absolutely immune for the acts alleged in
20 the FAC. To the extent Plaintiff seeks to hold McMahon liable for the allegedly
21 wrongful arrest by Abernathy, his claim is barred by collateral estoppel.
22 Moreover, Plaintiff has not alleged a factual basis for liability against McMahon.
23 Each government official "is only liable for his or her own misconduct." *Iqbal*, 556
24 U.S. at 677. Since Plaintiff does not contend McMahon was personally involved
25 in his arrest and prosecution, he must allege a causal connection between
26 wrongful conduct by McMahon and the alleged constitutional violation. See *Starr*
27 *v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011); *Hansen*, 885 F.2d at 646. The
28 requisite causal connection may be established by setting in motion a series of

1 acts by others, or by knowingly refusing to terminate a series of acts by others,
2 that the supervisor knew or reasonably should have known would cause others to
3 inflict a constitutional injury. *Starr*, 652 F.3d at 1207–08. “A supervisor can be
4 liable in his individual capacity for his own culpable action or inaction in the
5 training, supervision, or control of his subordinates; for his acquiescence in the
6 constitutional deprivation; or for conduct that showed a reckless or callous
7 indifference to the rights of others.” *Id.* at 1208 (citation omitted).

8 Plaintiff attempts to hold McMahon liable based on the purported customs
9 and policies discussed in connection with his *Monell* claim. Plaintiff’s allegations
10 are wholly conclusory. (FAC ¶ 23); see *Iqbal*, 556 U.S. at 681–82. The allegation
11 that McMahon refused to investigate and discipline officers who committed “acts
12 of felonious dishonesty and crimes of violence” (FAC ¶ 22) has no relevance to
13 the arrest by Abernathy, who is not alleged to have been dishonest or violent.
14 Plaintiff refers to McMahon’s “culpable action or inaction in the training,
15 supervision, or control of [his] subordinates” (FAC ¶ 39), but this is the very type
16 of “formulaic recitation” of the elements of a supervisory liability claim that the
17 Supreme Court has held inadequate. *Iqbal*, 556 U.S. at 681. Plaintiff has not
18 identified any deficiency in Abernathy’s training or supervision or shown how such
19 deficiency caused Abernathy to arrest him. See *Flores v. County of Los Angeles*,
20 758 F.3d 1154, 1159 (9th Cir. 2014).

21 Plaintiff has not cured the deficiencies in his claim against McMahon
22 identified in the previous report and recommendation. It is recommended that his
23 claims against McMahon be dismissed without leave to amend for this additional
24 reason.

25 5. Equal Protection

26 Plaintiff contends that Abernathy was motivated by racial bias when he
27
28

1 arrested him without performing an adequate investigation.¹⁰ (FAC ¶¶ 39(a)&(b),
 2 48, 56.) Defendants contend that Plaintiff has not alleged intentional
 3 discrimination.

4 The Equal Protection Clause of the Fourteenth Amendment “is essentially a
 5 direction that all persons similarly situated should be treated alike.” *City of*
 6 *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To state an equal
 7 protection claim under § 1983, a plaintiff must allege that the defendant acted with
 8 an intent or purpose to discriminate because of the plaintiff’s membership in a
 9 protected class. *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

10 The FAC contains no factual allegations from which it could be inferred that
 11 Abernathy’s arrest of Plaintiff was based on a discriminatory motive. See *Moss v.*
 12 *United States Secret Service*, 572 F.3d 962, 970 (9th Cir. 2009) (bald allegation
 13 of impermissible motive standing alone is not entitled to assumption of truth).
 14 Plaintiff alleges he is African-American, and that his arrest took place around the
 15 time football player Ray Rice assaulted his fiancée in an elevator. (FAC ¶¶
 16 30(a)&(c), 39(a).) The mere fact that domestic violence by an African-American
 17 athlete was in the news at the time does not give rise to a plausible inference that
 18 Plaintiff’s arrest on domestic violence charges was racially motivated. Plaintiff
 19 has not “‘nudged [his] claims’ of invidious discrimination ‘across the line from
 20 conceivable to plausible.’” *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at
 21 570).

22 It is recommended that Plaintiff’s equal protection claims be dismissed
 23 without leave to amend.

24 **6. Sections 1985 and 1986 (Claims Four through Six)**

25 Plaintiff alleges that the County Defendants and Prosecutor Defendants
 26 conspired with the Public Defender Defendants “to get Plaintiff to plead guilty” to a
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28 ¹⁰ Plaintiff also alleges racial bias on the part of the other Defendants, but
 the equal protection claims against them fail for the reasons discussed above.

1 charge of which he was innocent, and that the County Defendants and Prosecutor
 2 Defendants conspired with each other to obtain a guilty plea or verdict without
 3 proof he had committed a crime, and based solely on his race. (FAC ¶¶ 73, 85.)

4 As discussed in connection with the Public Defender Motion, Plaintiff's
 5 § 1985 claims arising out of plea negotiations are deficient because he has
 6 alleged neither an agreement to violate his constitutional rights nor discriminatory
 7 animus, and in any event did not plead guilty. To the extent Plaintiff contends that
 8 the County Defendants and Prosecutor Defendants conspired to prosecute him
 9 based on insufficient evidence because of his race, his claims also fail for lack of
 10 supporting factual allegations. See *Olsen*, 363 F.3d at 929-30; *Sanchez*, 936
 11 F.2d at 1039. Plaintiff's allegations that he was arrested and prosecuted due to
 12 his race are conclusory and not entitled to be accepted as true. *Iqbal*, 556 U.S. at
 13 678-79; *Twombly*, 550 U.S. at 555. His failure to state a § 1985 claim mandates
 14 the dismissal of his § 1986 claims. See *Karim-Panahi*, 839 F.2d at 626.

15 It is recommended that Plaintiff's claims under §§ 1985(2)-(3) and 1986 be
 16 dismissed without leave to amend.

17 **7. State-Law Claims (Claims Seven and Nine through Twelve)**

18 Plaintiff asserts state-law claims for invasion of privacy and false
 19 imprisonment claims against the County Defendants and the Prosecutor
 20 Defendants. (FAC at 22-25.) He asserts state-law claims for intentional infliction
 21 of emotional distress and violation of Cal. Civ. Code §§ 51.7 and 52.1 against the
 22 County Defendants only. (FAC at 25-29.) Defendants have moved for dismissal
 23 of the false imprisonment claim as barred by collateral estoppel and of the other
 24 claims for failure to state a claim. (Cnty. Mot. at 13-17.)

25 In light of the recommended dismissal of Plaintiff's federal claims,
 26 supplemental jurisdiction of his state-law claims should be declined. *Ove v.*
 27 *Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) ("A court may decline to exercise
 28

1 supplemental jurisdiction over related state-law claims once it has dismissed all
2 claims over which it has original jurisdiction.”)

3 V.

4 **RECOMMENDATION**

5 For the reasons discussed above, it is recommended that the district court
6 issue an order (1) accepting this Report’s findings and recommendation; (2)
7 granting Defendants’ motions to dismiss; (3) dismissing the First Amended
8 Complaint without leave to amend; and (4) and ordering that judgment be entered
9 dismissing this action with prejudice as to claims one through six and without
10 prejudice as to claims seven and nine through twelve.

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13 DATED: November 9, 2016

14

ALICIA G. ROSENBERG
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. COTTON,

Plaintiff,

v.

COUNTY OF SAN BERNARDINO,
et al.,

Defendant.

NO. EDCV 15-2314-VAP (AGR)

ORDER ACCEPTING FINDINGS AND
RECOMMENDATIONS OF UNITED
STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the complaint, records on file, and the Report and Recommendation of the United States Magistrate Judge. Further, the Court has engaged in a *de novo* review of those portions of the Report to which Plaintiff has objected. The Court accepts the findings and recommendation of the Magistrate Judge except as described below.

Plaintiff was acquitted of domestic violence in violation of Cal. Penal Code § 273.5 in *People v. Cotton*, Case No. FVI 1401155 (County of San Bernardino). At trial, the prosecutor, Mr. Haskell, stated he “found out this morning” that the victim, Plaintiff’s wife, had stated she bit Plaintiff’s lip and informed Mr. Mathias, Plaintiff’s defense counsel. (Pl. Req. Jud. Notice, Exh. B at 20, Dkt. No. 35.)¹ Matthias requested, and the trial judge gave, a jury instruction on late discovery. (*Id.* at 19, 23-

¹ Page citations are to the page numbers assigned by CM/ECF in the header.

24) (“[An] attorney for the People failed to disclose a statement by Rosalyn Cotton that she had bitten the defendant’s lip.”)

The First Amended Complaint (“FAC”) alleges that prosecutors did not turn over “Brady evidence” that “was available at or before the preliminary hearing.” (FAC ¶ 35.) Plaintiff alleges that he was in custody 47 days from March 29, 2014 until May 21, 2014, when he posted bond. (FAC ¶ 54.)

In his Objections, Plaintiff explicitly states that his wife made the statement to prosecutor Levers “before the Preliminary Hearing, and [Levers] never disclosed this evidence at that Hearing.” (Obj. at 1.) Plaintiff argues that he has thereby rebutted the *prima facie* evidence of probable cause from the judge’s decision to hold Plaintiff to answer after his preliminary hearing.

To state a malicious prosecution claim under 42 U.S.C. § 1983, Plaintiff must allege “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 (citation omitted).

The decision to hold a criminal defendant to answer after a preliminary hearing constitutes *prima facie* evidence of probable cause. *Awabdy*, 368 F.3d at 1067.

“Among the ways that a plaintiff can rebut a *prima facie* finding of probable cause is by showing that the criminal prosecution was induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith.” *Id.*

“[C]ollateral estoppel does not apply when the decision to hold a defendant to answer was made on the basis of fabricated evidence presented at the preliminary hearing or as the result of other wrongful conduct by state or local officials.” *Id.* at 1068.

Even assuming that collateral estoppel does not apply, the question remains whether Plaintiff has sufficiently alleged the absence of probable cause. When the facts are undisputed, the existence of probable cause is a question of law. *Tsao v. Desert Palace*, 698 F.3d 1128, 1146 (9th Cir. 2012). For purposes of the probable

1 cause analysis, the court assumes as true the allegation in the Objections that
2 Plaintiff's ex-wife told prosecutor Levers, prior to the preliminary hearing, that she bit
3 Plaintiff. "The mere existence of some evidence that could suggest self-defense
4 does not negate probable cause. [The criminal defendant]'s claim of self-defense
5 apparently created doubt in the minds of the jurors, but probable cause can well exist
6 (and often does) even though ultimately, a jury is not persuaded that there is proof
7 beyond a reasonable doubt." *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014
8 (9th Cir. 2015). In California, self defense is not established as a matter of law simply
9 because the criminal defendant is not the initial aggressor:

10 A person threatened with an attack that justifies the exercise
11 of the right of self-defense need not retreat. In the exercise
12 of his right of self-defense a person may stand his ground
13 and defend himself by the use of all force and means which
14 would appear to be necessary to a reasonable person in a
15 similar situation and with similar knowledge; and a person
16 may pursue his assailant until he has secured himself from
17 danger if that course likewise appears reasonably
18 necessary. This law applies even though the assailed
19 person might more easily have gained safety by flight or by
20 withdrawing from the scene.

21 CALJIC 5.50; CALCRIM 3470.

22 Defendant Abernathy, the deputy sheriff who was the sole witness at the
23 preliminary hearing, testified that he interviewed Plaintiff at the hospital. Abernathy
24 testified that Plaintiff said his wife, during an argument, "stood up from the bed and
25 tried to bite him near the lip. So in self-defense he shook her several times, and she
26 consequently hit her head several times on the headboard of the bed." (Pl. Req. Jud.
27 Not., Exh. A at 11.) Plaintiff's wife could not recall how she got her injuries. She told
28 Plaintiff she wanted a divorce. "She was sitting on her bed, and next thing she

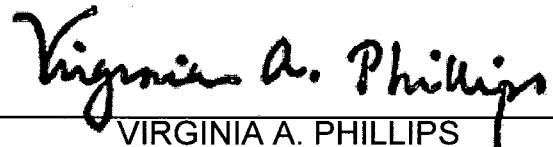
1 remembered is waking up on her bed.” (*Id.* at 9.) Q: “She doesn’t recall whether
2 she attempted to bite Mr. Cotton before she blacked out or doesn’t remember what
3 happened?” A: “I asked her. She claimed she did not.” (*Id.* at 12-13.) She told
4 Abernathy that Plaintiff struck her head on the headboard, but “she only knew this
5 because Mr. Cotton told her.” (*Id.* at 13.) Plaintiff told her he became frustrated at
6 her and hit her head against the headboard several times. (*Id.* at 14.) Abernathy
7 observed that she had a swollen right eye and a lump to the back of her head. (*Id.* at
8 9-10.) Plaintiff does not allege that Abernathy fabricated or omitted evidence. The
9 court held Plaintiff to answer on Count 1 of the First Amended Felony Complaint. (*Id.*
10 at 16.)

11 Taking as true the allegation that Plaintiff’s wife admitted to a prosecutor that
12 she attacked first by biting Plaintiff, the question remained whether Plaintiff defended
13 himself by use of force that would appear necessary to a reasonable person in a
14 similar situation and with similar knowledge. Thus, the prosecutor acknowledged at
15 the preliminary hearing Plaintiff’s statement that “[s]he tried to bite him,” but argued
16 that Plaintiff “hit her head repeatedly against the headboard and knocked the victim
17 unconscious.” (*Id.* at 15.) “Probable cause does not require proof beyond a
18 reasonable doubt.” *United States v. Noster*, 590 F.3d 624, 629 (9th Cir. 2009).
19 Probable cause exists when, “under the totality of the circumstances known to the
20 officer, a prudent person would have concluded that there was a fair probability that
21 the suspect had committed or was committing a crime.” *Id.* at 629-30. The facts
22 presented by Abernathy show a fair probability that Plaintiff’s response to the bite
23 was unreasonable. See also Cal. Penal Code § 13701(b) (“The dominant aggressor
24 is the person determined to be the most significant, rather than the first, aggressor.”).

25 Plaintiff’s remaining objections are without merit.
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1 IT IS ORDERED that (1) Defendants' motions to dismiss are granted; (2) the
2 First Amended Complaint is dismissed without leave to amend; and (3) judgment be
3 entered dismissing this action with prejudice as to claims one through six and without
4 prejudice as to claims seven and nine through twelve.

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6
7 DATED: December 8, 2016



VIRGINIA A. PHILLIPS
Chief United States District Judge

JS - 6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. COTTON,
Plaintiff,

v.

COUNTY OF SAN BERNARDINO,
et al.,
Defendant.

NO. EDCV 15-2314-VAP (AGR)

JUDGMENT

Pursuant to the Order Accepting Findings and Recommendation of United
States Magistrate Judge,

IT IS ADJUDGED that Judgment is entered for Defendants and that this action
is dismissed with prejudice as to claims one through six and without prejudice as to
claims seven and nine through twelve.

DATED: December 8, 2016


VIRGINIA A. PHILLIPS
Chief United States District Judge

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code, §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2) OBSTRUCTING JUSTICE; INTIMIDATING PARTY, WITNESS, OR JUROR

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an

action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding \$5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.