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Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO, ET AL.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MAURICE CALDWELL,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO POLICE DEPARTMENT; KITT CRENSHAW; ARTHUR GERRANS; JAMES CROWLEY; and DOES 1-10, inclusive,

Defendants.

Case No. 12-cv-1892 EDL

**NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS KITT CRENSHAW, ARTHUR GERRANS, JAMES CROWLEY, AND CITY AND COUNTY OF SAN FRANCISCO; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: TBD
Time:
Place: Courtroom E, 15th Floor
450 Golden Gate Avenue
San Francisco, CA

Trial Date: February 29, 2016

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## NOTICE OF MOTION AND MOTION

**TO PLAINTIFF AND HIS COUNSEL OF RECORD**:

**PLEASE TAKE NOTICE** that on a date to be determined in the United States District Court for the Northern District of California, 450 Golden Gate Ave., 15th Floor, Courtroom D, San Francisco, California, Defendants City and County of San Francisco ("the City"), Arthur Gerrans, James Crowley, and Kitt Crenshaw will, and hereby do, move the Court for summary judgment under Federal Rule of Civil Procedure 56 on all claims for relief contained in the second amended complaint in this action. Defendants base this motion on the following grounds:

First, plaintiff's suggestive identification claim fails because there is no such claim in the Ninth Circuit. Plaintiff's claim is a due process, fair trial claim. Properly construed, plaintiff cannot show a deprivation of a fair trial because he challenges only Cobbs's general reliability, not any improper misconduct. The claim also fails because plaintiff cannot show a suggestive or unreliable identification. The claim also fails because the officers did not try and influence or mislead the prosecutor, whose decision to prosecute is an intervening cause.

Plaintiff's fabrication of evidence claim fails because there is no evidence of deliberate fabrication, no evidence that inspectors believed Caldwell was innocent (they still don't, nor does the City), and no evidence that the officers engaged in any abusive or coercive techniques. Again, as the officers did not improperly influence or mislead the prosecutor, his decision to prosecute is an intervening cause.

As there is no underlying constitutional violation, plaintiff's conspiracy and failure to intervene "claims" both fail.

Plaintiff's *Monell* claims fails as he has no competent evidence of a City wide policy or failure that led to a constitutional violation, and he has no evidence besides his one incident.

Lastly, the defendant officers enjoy qualified immunity on all claims.

Defendants base their motion on this notice of motion and motion, the memorandum of points and authorities in support thereof, the declarations, papers and other evidence submitted herewith, and such argument as may be heard.

Dated: November 2, 2015

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## I. INTRODUCTION

On June 30, 1990, around 2:30 a.m., plaintiff Maurice Caldwell and an accomplice shot and killed Judy Acosta inside the Alemany Housing Projects in San Francisco. At the same time, they shot and wounded Domingo Bobila, a close friend of Acosta's. Caldwell shot at Acosta and Bobila numerous times at close range with a large gauge shot gun as Acosta and Bobila tried to retreat in their car. Judy Acosta was 26 years old at the time he was murdered. Bobila was shot multiple times, but survived the attack.

Police immediately began investigating. Unfortunately, almost no one would cooperate with the police. On July 13, 1990, during a routine canvass of the area to search for more witnesses, homicide investigator Arthur Gerrans located a witness, Mary Cobbs, who lived immediately adjacent to where the murder took place. Cobbs was a hard-working, single mother of two young children. Cobbs said she observed the murder first-hand and would cooperate. Cobbs then gave a detailed description of the incident, including the two suspects who shot Acosta and Bobila. She said she would be able to identify the shooters if she saw them again.

The inspectors arranged a photo spread and a lineup. Cobbs identified Maurice Caldwell both times, and both times she said she was certain. Two other eye witnesses, Aguirre and Bobilla also picked out Caldwell and said he was there at the scene. Caldwell also perfectly matched Cobb's initial physical description of the shotgun shooter, including the fact that the shotgun shooter was not wearing a shirt.

At trial, Cobbs testified that she was positive that Caldwell was the shooter. The reliability of Cobbs's identification was never questioned during the criminal proceedings, nor was the reliability of her identification challenged or objected to. The identification was never challenged on appeal.

On September 21, 1990, Caldwell was arrested and charged with the murder of Judy Acosta. The District Attorney Al Giannini reviewed all the available evidence before charging Caldwell. Caldwell claimed he was not the shooter, but refused to give police the names of the other people who were allegedly involved.

Despite Caldwell's lack of cooperation, police continued to investigate his alibi claim. The investigation only further corroborated Caldwell's guilt when his own alibi witnesses confirmed that

Caldwell ran to the scene without a shirt, which matched Cobbs's testimony that the shotgun shooter was barechested.

Later, in October of 1990, while he was awaiting trial, Caldwell's attorney provided police with names of persons he claimed committed the crime, Marrite Funches and Henry Martin. Police followed up on the information. Both men had disappeared by then. Funches had murdered someone in Reno by March of 1991. Martin was a homeless drug addict. Investigators showed pictures of Funches and Henry Martin to Cobbs, Aguirre, and Bobila. No one recognized Martin or Funches, which left the inspectors with no means to identify them as suspects.

In March of 1991, Caldwell was tried and convicted by jury of the murder of Acosta and the attempted murder of Bobila. Caldwell elected not to testify in his own defense. In 1992, the conviction was affirmed on direct appeal. In 1998, Mary Cobbs died. In 2009, plaintiff filed a petition for writ of habeas corpus ("habeas petition"), claiming actual innocence, ineffective assistance of counsel, and that he saw Henry Martin fire the shotgun. In 2010, the petition was granted solely on grounds of ineffective assistance of counsel. The case was later dismissed by the district attorney because their main eye-witness, Mary Cobbs had died.

After his case was dismissed, Caldwell admitted that he had lied in his declaration. He never saw Henry Martin fire the shotgun. Indeed, Henry Martin himself has come forward and testified that he did not shoot the shotgun, does not know why Caldwell is blaming him, and that he also remembers the shotgun shooter not having a shirt on.

In this civil lawsuit, plaintiff now claims that the investigating officers framed him. Plaintiff alleges claims under (1) §1983 for due process violations on a theory that defendants fabricated evidence against him, specifically, (a) that defendants intentionally engineered an alleged unconstitutional identification procedure, and (b) that defendants continued to investigation Caldwell knowing that he was innocent or using overly coercive investigation techniques, (2) §1983 for conspiracy, (3) claims of policy failures under *Monell,* and (4) a §1983 claim for failure to intervene. All plaintiff's claims fail.

First, plaintiff's suggestive identification claim fails because there is no such claim in the Ninth Circuit. Plaintiff's claim is a due process, fair trial claim. Properly construed, plaintiff cannot show a

deprivation of a fair trial because he challenges only Cobbs's general reliability, not any improper misconduct. The claim also fails because plaintiff cannot show a suggestive or unreliable identification. The claim also fails because the officers did not try and influence or mislead the prosecutor, whose decision to prosecute is an intervening cause.

Plaintiff's fabrication of evidence claim fails because there is no evidence of deliberate fabrication, no evidence that inspectors believed Caldwell was innocent (they still don't, nor does the City), and no evidence that the officers engaged in any abusive or coercive techniques. Again, as the officers did not improperly influence or mislead the prosecutor, his decision to prosecute is an intervening cause.

As there is no underlying constitutional violation, plaintiff's conspiracy and failure to intervene "claims" both fail.

Finally, plaintiff's *Monell* claims fails as he has no competent evidence of a City wide policy or failure that led to a constitutional violation, and he has no evidence besides his one incident.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. The Acosta Murder.

On June 30, 1990, at about 2:30 a.m., Judy Acosta, Domingo Bobila, Erick Aguirre, and Dominador Viray, friends from high school who had been out drinking beer that night, pooled their money to buy a small amount of crack cocaine. They went to the Alemany Housing Projects in San Francisco in order to buy the drugs. Declaration of Sean Connolly "Connolly Decl." Exh X, ("Bobila Dep.") 9:10-10:6, 12:9-14:10, 66:25-67:3. The Alemany Projects was an area known for the sale of narcotics and was also known to have a high crime rate. Gerrans Decl.¶3, Crowley Decl.¶3, Crenshaw Decl.¶2. The area and the gang running the drug trade at Alemany was known as the "Black Hole." Crenshaw Decl." ¶3. Bobila drove to the location in his black Toyota Supra sedan. Bobila Dep. 13:1-6; see also Exhibit "X" to Gerrans Decl., ¶5 (photos of car). Bobila's friend, Judy Acosta, sat in the front seat. Bobila Dep. 13:10-15.

The men drove to the 900 block of Ellsworth Street, which runs through the middle of the Alemany Projects. When they arrived, they were approached by a group of young African American men who offered to sell them crack cocaine. Bobila Dep. 14:5-16:22, 19:19-22. The men they

encountered were drug dealers. Bobila Dep. 19:17-22. Acosta, Bobila, and their two friends got out of the car. Decl. of Alfred Giannini ("Giannini Decl.") Exh. D (Trial Transcript "TR") 47:20-22. Bobila and one of the dealers discussed the sale of two rocks of cocaine for a small sum of money. *Id*. Bobila, Acosta, and their friends were unarmed.[1] Bobila Dep. 29:12- 32:14, Gerrans Decl. ¶21. (Aguirre/Viray interview). A disagreement arose about the money at which point one of the dealers punched Bobila in the face, bloodying his nose. Bobila Dep. 17:9-18:22, 89:13-23. Though he was hit, Bobila was alert. Bobila Dep. 22:21-23:10; 90:3-91:16.

Moments after Bobila was punched in the face, Marritte Funches, who was present with the drug dealers at the time, pulled out a .38 hand gun and fired several times from close distance hitting Judy Acosta in the chest. Connolly Decl. Exh. "K" ("Funches Dep.") 130:17-131:20; TR 478:20-25.

Bobila heard the gunshots and immediately tried to get into his car to leave. Bobila Dep. 24:1-23, 92:9-93:18. A second gunman appeared some moments later and began shooting a shotgun at Bobila and Acosta. Giannini Decl. Exh. B (Preliminary Hearing ("PX")) 44:23-45:18, TR 50:3-52:25; Funches Dep. 171. The shotgun shooter shot at the car as Bobila was trying to start the car and put it in gear. His car windows were blown out by a gun blast. TR (Bobila)132:11-133:22, 166:3-10, 196:19; PX (Cobbs) 44-45, 51:5-9. Acosta and Bobila were hit by the shotgun blast. Bobila Dep. 30:4-17; RJN Exh. B (Medical Examiner's Report "ME")]. Bobila pulled Acosta into the car and then drove away. Bobila Dep. 26:13-26; PX 11:13-20. Bobila drove to a gas station near Randall and Mission Street in San Francisco, about a mile away. Bobila Dep. 27:21-28:1; Gerrans Decl.¶6. Acosta, mortally wounded, died in the car. Bobila Dep. 8:16-20; Gerrans Decl. ¶6; Exhibit B to RJN (Medical Examiner Report). Police were summoned. Bobila Dep. 27:21-28:1, Gerrans Decl.¶6, Crowley Decl.¶6. Acosta suffered "multiple gunshot" wounds and "multiple shotgun" wounds as a cause of death. TR (Medical Examiner Boyd Stephens M.D.) 331:26-333:5.

[1] Marritte Funches, who admits to shooting Acosta, is the only person who maintains the men were armed. Funches Dep. 132:9-16. No other witness says so. Police did not locate any weapons of any kind during the investigation. Gerrans Decl. ¶99, Crowley Decl. ¶91.

**B. The Initial Investigation.**

Defendants Inspectors Gerrans and Crowley were assigned to investigate the murder. Gerrans Decl. ¶3, Crowley Decl. This was the third homicide investigation assigned to them in a 48 hour period that weekend. Gerrans Decl.¶23, Crowley Decl.¶23 They responded to the gas station at about 3:10 a.m. to begin their investigation and then later went to the scene of the shooting on Ellsworth Street to continue their investigation. Gerrans Decl.6-7, Crowley Decl. ¶6-7. The inspectors collected evidence and interviewed potential witnesses. As was their practice, the inspectors documented much of their investigation.[2] Despite the fact that many people were present at the time of shooting, no one would identify the suspects. Others refused to cooperate with police. No suspects were identified at the time of the incident. Gerrans Decl., ¶7-14, Crowley Decl.¶7-14.

The Inspectors also directed other police personnel to collect whatever physical evidence they could, including taking videotape and photographs of the crime scene and the car at the gas station. Gerrans Decl ¶11, Crowley Decl. ¶11. Police recovered two shot gun wads and a piece of plastic from the victim's car, which were tested for fingerprints (with negative results). *Id*. The victim's car was seized as evidence. *Id*. Defendants also spoke to the medical examiner about the cause of death and requested further ballistics testing of the decedent. Gerrans Decl.¶ 15-16, Crowley Decl. ¶15-16.

That same day Gerrans and Crowley went to the hospital and interviewed Bobila. Gerrans Decl. ¶12, Crowley Decl. ¶12, Bobila Dep. 37:6- 39:24. At that time, Bobila gave a general description of the drug-dealer suspects as young black males, but told inspectors he thought he could identify some of the people involved if he saw their photographs. Gerrans Decl.¶12. Crowley Decl.¶12. Bobila did not see a gun but said the drug dealers were shooting at him and his friends. Gerrans Decl. ¶12, Exh. B, Crowley Decl.¶12 (notes of the interview with Bobila). Defendants also had subsequent conversations with Bobila. Bobila Dep. 39:25-40:14.

Later that day, the Inspectors conducted research running criminal histories and other information about potential suspects and witnesses. Gerrans Decl. ¶14, Exh. E, Crowley Decl. ¶14. On July 1, 1990, the Inspectors spoke with police officers who regularly patrolled the Alemany

[2] Much of the defendant inspectors' investigation is laid out in their supporting declarations, and hereby incorporated. Attempting to recount every step of the investigation in this document would be impractical given space limitations.

Projects about subjects who sold crack cocaine there. Gerrans Decl. ¶17, Exh A. They also spoke to Judy Acosta's father, Jose Acosta, to discuss with him the circumstances of his son's death and to determine whether he had any information relevant to the investigation. Gerrans Decl.¶18, Crowley Decl.¶18.

On July 2, 1990, the Inspectors attempted to locate the other men in the car, Aguirre and Viray, to question them about the incident. Gerrans Decl. ¶¶19-20, Crowley Decl. ¶¶19-20. On July 3, 1990, the Inspectors conducted a tape recorded interview of Aguirre regarding the homicide. Gerrans Decl. ¶21, Crowley Decl. ¶21. Aguirre's version of the story corroborated Bobila's. Aguirre's description of one of the suspects was generally consistent with Caldwell (Black, male, 5'4"-5'6", "Jeri-curl" style of hair[3]). *Id*. (transcript of interview); Caldwell Dep. 275:11-12.

On July 12, 1990, the Inspectors interviewed Viray, the other friend in the car. Gerrans Decl. ¶24, Crowley Decl.¶24. Viray's version of the story corroborated Bobila's. *Id*. Viray offered the same description of suspects as the other victims. Viray saw the face of the person who punched Bobila and thought he could identify him. Gerrans Decl. ¶24 (transcript of interview).

**C. The Tip.**

On July 12, 1990, Diarmuid Philpott, the Captain of the Ingleside District Police Station, received a phone call from a concerned citizen who wished to remain anonymous. Crowley Decl. ¶25, Connolly Decl. Exh. G ("Philpott Dep.") 12:2-6. The citizen told Captain Philpott that the police should "look at Maurice Caldwell because he's always shooting guns off in the projects." Philpott provided the information to the homicide inspectors. Philpott Dep. 14:15-21. The information was noted in the homicide file. Crowley Decl. ¶25 [CCSF 001087].

**D. The July 13, 1990 Canvass.**

On July 13, 1990, Gerrans prepared to canvass the Alemany projects in search of leads or witnesses. Gerrans enlisted the help of other police units with more specialized knowledge of the Alemany Projects, which is an accepted practice. Gerrans Decl. ¶26. Because the murder arose out of

[3] "The Jheri curl (often spelled "Jerry" or "Jeri") is a permed hairstyle that was popular among African American, Black Canadian, and Black British during the 1980s. Invented by the hairdresser Jheri Redding." Wikipedia, 2015.

a narcotics transaction inside a housing project known for its narcotics activity, Gerran's sought assistance from the narcotics unit. Gerrans Decl., ¶26. Before going to Alemany Projects to conduct the canvass, Gerrans radioed police dispatch and requested assistance from a narcotics unit. *Id.*; Connolly Decl., Exh E ("Gerrans Dep.") 80:3-83:6. At the time, there were approximately 90-100 officers assigned to different units within the narcotics division. Connolly Decl. Exh. H ("Crenshaw Dep.") 41:8-43:20. Gerrans did not specifically ask for Sgt. Crenshaw or any particular person or specific team of officers. Gerrans Decl. ¶26. Gerrans did not have any previous discussions with Crenshaw about Caldwell or the Acosta murder investigation before requesting a narcotics unit to assist. Gerrans Decl. ¶26, Crenshaw Decl. ¶6.

Gerrans arrived at the Alemany projects and waited for the narcotics unit to arrive. Gerrans Decl.¶27. Police dispatch sent defendant Sgt. Crenshaw and Officer Robert Doss, who were assigned to the narcotics unit, to assist. Gerrans Dep. 80:3-83:6. Crenshaw Decl.¶5, Gerrans Decl.¶28. Once there, Gerrans briefly described his purpose and requested assistance conducting a canvass of the area. Gerrans told Crenshaw that Caldwell was a person of interest. Gerrans Dep. 85:3-86:13; Crenshaw Decl. ¶8. Gerrans and Crenshaw and Doss each went separate ways to start canvassing for witnesses. Gerrans Decl. ¶29, Crenshaw Decl. ¶9.

**1. Finding Mary Cobbs.**

During the July 13, 1990, canvass, Gerrans knocked on the door of Mary Cobbs. After a short discussion, Gerrans discovered that Cobbs had witnessed the shooting first-hand from close distance. Gerrans Decl. ¶30. Cobbs was hesitant but agreed to tell him what she had seen. TR (Cobbs) 219:13. The murder occurred directly in front of her apartment just outside her bedroom window. She had been awakened in the middle of the night by the initial gunshots and looked out her window. TR. Cobbs described in detail how the suspect used a shotgun to fire several shots at the car as the car was attempting to leave the scene. Gerrans Decl. ¶¶31-32 (Cobbs Statement p. 2-7); PX 44:19-45:18, 49:12-50:5; TR (Cobbs) 209:15-212:22, 232:17. Her initial statement to police was extremely detailed regarding the crime, including a spot-on physical description of Caldwell. Gerrans Decl. ¶31, Crowley Decl.¶27 (Cobbs Statement 7/13/90 p. 2-7).

Later that evening, the Inspectors researched Caldwell's background and determined that he had significant criminal history in the Alemany projects and had been arrested or a suspect in numerous drug and firearm incidents. Gerrans Decl. ¶36. Caldwell admits having shot guns in the Alemany projects prior to the murder. Connolly Decl. Exh. O ("Caldwell Dep.") 78:23-80:11; 86:4-12, 88:19-93:25, and to a significant arrest history. *Id.* 64:9-18.

At trial Cobbs testified that she could clearly see Caldwell holding the shotgun, that a street light lighted the area, that there were no obstructions, that she recognized him from the area before the shooting, and that there was no doubt Caldwell was the shooter. TR (Cobbs 210-211, 237:16-238:2).

**E. The Identification of Caldwell.**

**1. Cobbs's Description of the Shotgun Shooter Matches Caldwell.**

During the July 13, 1990 interview, Cobbs gave a detailed description of the suspects and also provided a very detailed recitation of the facts of the murder. She described the shotgun shooter as a black male, 21-25 years old, 5'4" and 150 lbs, light skin, short "Geri-curls" close to the head, wearing dark sweat pants, dark shoes, and "no shirt."[4] Gerrans Decl. ¶¶31-32 (Cobbs Stmt. Jul. 13, 1990 p. 2-7 [CCSF805-812]), PX 63:8-13. This description closely matched Caldwell.[5] At the time of the incident Caldwell was 5'4" tall, approximately 150 lbs, light skin, and wore a Jeri-curl hair style close to his head. Crenshaw Decl. ¶10 and photo exhibits, Gerran Decl.¶36.

**2. Cobbs Identification of Caldwell During the Photo Spread.**

On July 26, 1990, Cobbs met with the Inspectors to see if she could identify any suspects from a photo spread. Before conducting the photo lineup the Inspectors gave Cobbs the standard admonition regarding photographic lineups, which included the admonition that she was not obligated to identify anyone, that the suspect may or may not be in the spread, that it is just as important to eliminate innocent individuals as a possible suspect as it is to identify a suspect, and that they did not want the wrong person identified as a suspect. Crowley Decl.¶43-46.

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[4] Cobbs "no shirt" description occurred well before any alleged show up at the front door, undermining any argument that initial description was somehow influenced. Gerrans Decl. at ¶ ; Cobbs 7/13/1990 transcript of interview, p. 3.

[5] Cobbs description of the hand-gun shooter ("bright skinned" "medium brown" black male, 5'7", 130lbs, 19-22 years old Jeri curl hair) was nearly a perfect match to Funches, the admitted shooter of the hand-gun. Connolly Decl-photo of Funches.

Cobbs picked Caldwell's photo almost immediately and identified him as the person who shot at Acosta and Bobila with a shotgun. Cobbs stated she "heard they call him Twan." Cobbs said she saw Caldwell shoot the shotgun at least four times and said that she was "positive" that Caldwell was the person shooting the shotgun. Cobbs stated that she had seen him around the projects prior to and after the shooting. Cobbs also stated that 'Twan" had threatened her twice the previous week by saying: "Bitch, we gonna' fuck you and your family up if you talk to police." The Inspectors did not "confirm" or indicate in any way that Cobbs had identified someone we already suspected. Crowley Decl.43-48, Gerrans Decl. ¶¶47-50.

**a. The Threats.**

Because she cooperated with police, Cobbs and her children were immediately threatened with death and terrorized by Caldwell and his associates. On July 26, 1990, Cobbs told the police that she had been threatened. Gerrans Decl. ¶49, Exh. B(Note to file 7/26/90), Exh. M (Cobbs statement to police 7/27). Cobbs testified at the preliminary hearing that, Caldwell had been threatening her. PX (Cobbs) 60:14-22. Cobbs also testified at trial that once she began cooperating with police, plaintiff's associates threatened her on numerous occasions by stating, "bitch, if you talk, we going to kill you and your family" TR (Cobbs) 224:14; and later as Cobbs was waiting for the bus to go to work, Caldwell himself again threatened her directly: "he told me, if I talked, they were going to fuck me and my family up." *Id*. at 225:5. Her young children were told that their heads would be played with like baseballs. Exh. "N" to Connolly Decl. ¶15.

Funches confirmed that Cobbs had been threatened. Connolly Decl. Exh. K ("Funches Dep.") 230:17-20, 30:2-7. Funches also confirmed that a note was slipped under Cobb's door threatening her for cooperating. Funches Dep. 245:6-17. Funches admitted that he would have killed Cobbs for acting as a witness against Caldwell. Funches Dep. 231:20-234:7. Caldwell's habeas attorneys recorded in a memorandum that Funches told them that there was a plan to kill Cobbs because she had cooperated with police and that Caldwell was aware of that plan. Connolly Decl. ¶14, Exh. M (Kaneb/Starr Memo to Caldwell file).

**b. The Relocation.**

Witness killings were a real problem at the time. Gerrans Decl. Exh. "O." Fearing that the threat was real and that Cobbs would be killed, the Police Department took steps to have Cobbs and her children relocated from the Alemany projects to Section Eight housing elsewhere. Gerrans Dep. 233:20-25; Crowley Dep. 71:5-72:8. *See also* Gerrans Decl.¶60, Crowley ¶55. The fact that there was an allegation that Cobbs had been threatened and relocated was disclosed to Caldwell's trial counsel during the criminal proceedings. Giannini Decl.¶22, Martin Dep. 137:2-24; see also Exhibit "A" to Gerrans Decl. The relocation was done before Caldwell was arrested.

**3. Bobila Identifies Caldwell from Photo Spread.**

On July 27, 1990, the Inspectors showed the same photo spread they had shown to Cobbs to Bobila. Bobila picked the photo of Caldwell as the person he believes he was talking with and the man that punched him. He was not 100% sure, but said that the person depicted in the photo he chose (Caldwell) looked like the person he was speaking with just prior to the shooting. Bobila Dep. 40:15-41:14; Gerrans Decl. ¶57. The Inspectors did not tell him that there was a picture of one of the suspects in the photo spread. PX 35:10-28.

**F. The Alleged Show Up on July 13, 1990.**

**1. Caldwell's Version.**

On July 13, 1990, when Gerrans was interviewing Cobbs in her home, Crenshaw knocked on the door. According to Caldwell, Crenshaw "walked" Caldwell up to the door. Caldwell Dep. 312:7-20. Crenshaw was not wearing a uniform, he was wearing street clothes. *Id.* 311:3-311:25. Crenshaw "knocked on the door, "and "[t]he lady [Cobbs] came to the door, and Crenshaw said, "Is the homicide inspector here?"" and "[Cobbs] said, "Yeah." According to Caldwell, "She [Cobbs] went and got the homicide inspector." *Id.* 312:7-19. Cobbs never returned to the door. *Id.* 315:6-316:3. When Gerrans came to the door Crenshaw said, "This is Maurice Caldwell, or Twone, right here. And can I have your car keys?" *Id.* 313:2-3, 314:5-7, 320:14-16. Nothing more was said. *Id.* 312:15-19. Gerrans said nothing. *Id.* 320:17-22. Gerrans gave Crenshaw keys to the car and shut the door. *Id.* 320:23-321:8. Crenshaw then "escorted" Caldwell to the unmarked police car. *Id*. 328:14-24. In the car, Crenshaw

asked Caldwell "What do you know about this murder that just happened?" *Id.* 329:13-14, 330:12-20. A minute later Caldwell was walking away from the scene. *Id.* 334:20-335:13.

Caldwell was never handcuffed at the time during the incident including when he was taken to the door. *Id.* 316:22- 317:1, 335:14-16. According to Caldwell, he and Crenshaw were positioned directly in front of the door. *Id.* 313:8-314:22. Crenshaw was not holding Caldwell. *Id.* 316:15-17. Caldwell's arms were down at his side. *Id.* 316:20-21. There was no marked "black and white" patrol car anywhere near Caldwell, and that the only car that could have been in view was an "undercover" homicide car double parked on the street in front of the apartment. *Id.* 317:8-318:23. There were no other people or uniformed officers around Caldwell at the time of the alleged door show up. *Id.* 317:4-7, 319:14-22. Caldwell has no recollection of Crenshaw wearing a police star or badge at the time of the alleged show up. *Id.* 319:25-320:6. Crenshaw never exhibited his gun. *Id.* 320:7-11. Caldwell was never physically or verbally threatened during the interaction. *Id.* 336:14-18.

Caldwell knew Cobbs casually by her first name, as a neighbor, but never had any previous conversations with her. *Id.* 327:5-328:11. He knew her only by her first name and had no prior relationship with her. *Id.* 327:5-328:13.

Caldwell initially testified that the entire interaction with Cobbs took "a matter of seconds … like probably seven, eight seconds. *Id.* 315:6-18, 322:4-16. After Cobbs left the door, Gerrans appeared at the door "two or three seconds" later. *Id.* 316:1-6. The entire interaction between the door opening and closing was less than a minute. *Id.* 323:2-7.

In the middle of plaintiff's testimony regarding time estimates he requested a "bathroom break." *Id.* 323:10-19. When plaintiff reappeared 11 minutes later, he and his attorney announced that that they had conducted some kind of experiment where Caldwell and his counsel had timed how long Caldwell was in the bathroom. *Id.* 324:4-17. Then, later, after consulting with his attorney, Caldwell attempted to change his time estimates. With his attorney prompting him, Caldwell then testified that it was "a minute to a minute and a half" that he was in Cobbs presence after Cobbs opened the door. *Id.* 390:22-391:2. He then immediately changed that testimony to say it was "56 seconds." *Id.* 391:5-7. On his attorney's prompting, he then changed that testimony to "50-60" seconds. *Id.* 391:8-9. Caldwell then testified that he changed his time estimates about something that happened 25 years

earlier based on an experiment he and his attorney conducted in the bathroom of the City Attorney's office. Caldwell Dep. *Id.* 391:10-392:12. After explaining the experiment, Caldwell settled on "about a minute" for the time estimate with Crenshaw and Gerrans at the door. *Id.* On cross-examination, Caldwell changed his testimony again. *Id.* 392:20:394:10. Then he changed it again and said he was only in Cobb's presence for 30 seconds. *Id.* 401:12-19. Then he testified the whole door episode (including the time Cobbs was not present) from knocking on the door to when it closed was 3-4 minutes. *Id.* 402:5-403:2. But then he finally clarified that the total time between Cobbs opening the door and Cobbs leaving the door was 20 seconds (*i.e.*, the total time Caldwell was in Cobb's presence). *Id.* 404:17-405:6.

Crowley was not present for the July 13, 1990 interview. *Id.* 369:14-15.

**2. Mary Cobbs Version of the Alleged Show Up.**

Cobbs testified both at the preliminary hearing on December 3, 1990 and in front of a jury at trial in March 1991 that during her interview with Gerrans there was a knock on the door, but that the only person at the door was a black police officer. PX (Cobbs) 64:11-66:2. She was specifically asked whether anyone else was present at the door and she testified, "no." *Id.* She was also asked whether she could see anyone behind the officer at the door and she testified that she could not. *Id.*; TR 221:26-222:23.

**3. Crenshaw's Version of the Alleged Show Up.**

According to Crenshaw, he and Doss located Caldwell during their canvass of the neighborhood. They approached Caldwell, and spoke to him briefly. Caldwell then made a series of spontaneous statements about the murder. Crenshaw explained to him that a homicide investigator wanted to speak with him about the murder. Doss walked with Caldwell to Gerrans' unmarked police car. Crenshaw did not know where Gerrans was, nor was he aware that Gerrans had evidently located a witness to the murder. Crenshaw learned where Gerrans was from Doss. Crenshaw and Gerrans did not have any way to communicate with each other. Crenshaw Decl. ¶¶ 9-14.

Crenshaw walked to the apartment unit that Doss had indicated Gerrans was located and knocked on the door. Crenshaw Dep. 103:14-16. Gerrans answered the door. Crenshaw Decl. ¶11. Crenshaw informed Gerrans that they had found Caldwell. Gerrans indicated that he was busy with an

interview. Crenshaw asked for the keys to his car and walked back to the car where Doss and Caldwell were located, had Caldwell sit in the car for a few minutes to get his information, and then let him go. *Id.*

Caldwell was not present at the door, nor was he in the immediate presence of the door at any point. Crenshaw did not bring Caldwell to the front door of the unit where Gerans was interviewing the witness, nor did he bring him to the front door of any unit. Crenshaw did not see anyone else bring Caldwell to the front door of the unit where Gerrans was interviewing the witness, or any other unit. Cobbs did not answer the door. Crenshaw Decl. ¶13. Crenshaw and Gerrans did not have an agreement to bring Caldwell to the door of Cobbs' apartment. Crenshaw Decl. ¶14.

Shortly thereafter, Crenshaw memorialized the spontaneous statements Caldwell had made about the murder. Crenshaw's note regarding the encounter states that Caldwell told him that prior to the shooting Caldwell was with the suspects dealing drugs. After the shooting Caldwell returned and started yelling at the shooters because he felt he was going to be blamed. Crenshaw Decl. ¶11, Exh. C.

**4. Insp. Gerrans' Version of the Alleged Show Up.**

According to Gerrans, while he was speaking to Cobbs, he heard a knock at the door; he answered the door and saw Crenshaw standing outside. Gerrans cannot recall specifically what Crenshaw said, but they may have discussed the keys to the car. Crenshaw also may have said that he and Doss had located Caldwell, who was down the street. Gerrans vaguely recalls telling Crenshaw that he could not talk at that moment, because he was in the middle of an interview and would follow up with him later. The interaction lasted no more than a few seconds. Gerrans shut the door, returned to the kitchen, and resumed his interview of Cobbs. Gerrans Decl. ¶32.

Caldwell was not present at Cobbs' door, nor was he in the immediate presence of the door. At no time did Crenshaw bring Caldwell to the front door. Cobbs did not answer the door. Crenshaw and Gerrans did not have an agreement to bring Caldwell to the door of Cobbs' apartment. Gerrans not know that Crenshaw had located Caldwell at the time he discovered that Cobbs had witnessed the incident or at the time I interviewed her. Gerrans Decl.¶33.

**G. The Arrest of Maurice Caldwell**

The Inspectors presented the case to District Attorney Al Giannini. Giannini personally reviewed all the evidence available at that time and authorized an arrest warrant for Caldwell. Police arrested Caldwell on September 21, 1990. [Giannini Decl. ¶5]. Giannini also drafted and filed a formal complaint charging Caldwell with the Acosta murder, the attempted murder of Bobila, and shooting at a vehicle. [*Id.*].

Cobbs testified at trial that Caldwell had no shirt on at the time he fired the shotgun. TR (Cobbs) 216:18, 247:13.

Caldwell claims he was inside his aunt's apartment at the time of the shooting, and that he ran out to the scene after hearing gunshots. Caldwell Dep. 217:12-17; 235:14-23. Caldwell kept a shotgun in the closet near the front door of Rodriguez's house. McDougle. Dep. 83:5-84:21.

**H. Witnesses Identify Caldwell During the October 1990 Live Line Up.**

On October 23, 1990, the Inspectors conducted a "live line up" in the police auditorium. Cobbs, Bobila, Aguirre, and Viray were present. Also present was Caldwell's attorney, Craig Martin. Gerrans Decl. ¶82. Cobbs identified Caldwell as the person who shot the shotgun. TR 229:15-230:14; Gerrans Decl. ¶84. Cobbs stated that she was "positive" Caldwell was the one who had the shotgun. She also confirmed that he was also the person who threatened her by saying: "Bitch we gonna fuck you and your family up if you talk to the police." *Id.*

When Bobila filled out the line up card, he put a question make next to Caldwell, which to him meant that he was not sure or that Caldwell was possibly someone he saw on the night of the murder. PX 36:12-39:19. He told the Inspectors after the line up, "I believe [Caldwell] is the one I was talking with and the man who punched me in the nose." Gerrans Decl. ¶85. The Inspectors' notes also indicate that Bobila stated that after he had been punched and the shooting started, he could not see who had guns. Gerrans Decl. ¶85/Crowley Decl. ¶80.

Aguirre also put a question make next to Caldwell on his line up card. He was less than positive that Caldwell was involved in the incident Giannini Exh. TR 80:28-83:20. Aguirre told the Inspectors after the line up, "I remember his face – he was one of the suspects there – I'm not sure if

he had a gun. I saw him there before the shooting started. When the shooting started, I ran." Gerrans Decl. ¶86/Crowley Decl. ¶81. Viray did not identify Caldwell. Gerrans Decl. ¶89.

**I. Police Reinvestigate Caldwell's Alibi.**

Following Caldwell's arrest, the Inspectors interviewed him. He stated he was in Rodriguez's house with a women named Tina at the time he heard the shooting, and he ran out after it was over. He refused to provide Tina's last name. He said he did not know Rodriquez's address and was unsure of her last name. He refused to provide the names of the alleged perpetrators of the murder, despite the Inspectors' please that he do so. [Gerrans Decl. ¶63].

The Inspectors eventually figured out Rodriguez's last name and address and interviewed her on September 27, 1990. [Gerrans Decl. ¶68]. Rodriguez lived just around the corner from the scene of the murder. [Caldwell Dep. 242:16-243:22, Exh. 501]. She told the Inspectors that she had already spoken to Caldwell in jail after his arrest. She stated that on the night of the murder Caldwell ran out of the apartment after she heard 3-4 gunshots. Caldwell had no shirt on at the time. [Gerrans Decl. ¶68]. The Inspectors also interviewed Jacqueline Williams at Rodriguez's house. She said she was also present at the Rodriguez home on the night of the murder. She stated that Caldwell was upstairs with a woman named Linda, and that he ran out of the apartment with no shirt on. [Gerrans Decl. ¶69].

On October 17, 1990, Caldwell's defense attorney, Craig Martin, contacted the Inspectors and provided names of persons who Caldwell said committed the murder. He stated that Henry Martin had the shotgun,[6] Merritt Funches had the hand gun, and that Erick Brown punched Bobila in the face. He also provided names of other people not involved, but may have been witnesses. This was the first time Funches' name had come up in the investigation. [Gerrans Decl. ¶75].

The Inspectors then began to investigate Funches and Henry Martin. They researched their backgrounds. They followed up on the information and scheduled photo lineups to determine if any victim/witnesses recognized any of the persons who were identified as the shooters by Craig Martin.

[6] Henry Martin, who was only recently located by defendants, states that he did not fire a shotgun on the night of June 30, 1990. [Declaration of Henry Martin ¶ 8]. He observed a black male with no shirt on fire several shots at the car as it was driving away. [*Id.* ¶ 6]. Martin states that after Caldwell's release from prison, he contacted Martin and offered him money to testify that Caldwell was not the shooter. [Id. ¶ 12].

Gerrans Decl. ¶76. On October 19, 1990, the Inspectors showed Cobbs three different photo spreads, each of which included photographs of either Henry Martin, Funches, or Brown. Gerrans Decl. ¶77. Cobbs recognized Funches as someone who lived in the neighborhood, but did not recall seeing him during the incident and said he was not one of the people who had a gun. *Id.* Cobbs said Brown looked familiar, but did not identify him as someone involved in the incident. Cobbs did not recognize Henry Martin as being involved in the incident. *Id.* The Inspectors showed the photo spreads to Bobila on October 19, 1990. Gerrans Decl. ¶79. Bobila was unable to identify any of the persons depicted in the photographs. *Id.* On October 23, 1990, the Inspectors showed the photo spreads separately to Aguirre and Viray; they also did not identify anyone. [Gerrans Decl. ¶87].

Sometime after October 23, 1990, the Inspectors looked for Funches, Henry Martin, and Brown. Gerrans Decl. ¶92. They went to the Alemany Projects numerous times in search of them. *Id.* They visited other addresses that they were associated with. *Id.* They went to the Amazon Motel in San Francisco in search of them. *Id.* They spoke to people at those locations about them. *Id.* The Inspectors later learned that Funches had fled San Francisco and murdered a person in Nevada in early 1991. *Id.*

**J. The Preliminary Hearing.**

On December 3, 1990, there was a preliminary hearing in the Caldwell case. Cobbs and Bobila were the only witnesses who testified. PX. Among other things, Bobila testified that Caldwell was one of the three people with whom he was speaking during the drug deal before he got punched in the face. PX 13:2-8. Cobbs testified that on the night of the murder, she looked out her window and saw Caldwell standing in front of a group of people with a shotgun and shooting the shotgun at a car. PX 45:2-18. He was wearing dark sweatpants and no shirt. PX 63:8-13. She also testified that Caldwell had lived next door to her when she moved into 949 Ellsworth, but he moved out prior to the murder. PX 57:4-12. The court held Caldwell to answer on the charges. PX 67:27-68:17.

**K. Giannini's Investigation.**

Before proceeding with the preliminary hearing, Giannini interviewed the witnesses in order to verify the information provided by the police officers. He personally interviewed Cobbs on more than one occasion. During those interviews, Cobbs described in great detail the facts of the incident.

Giannini determined that Cobbs was a credible witness. He did not believe Cobbs was coached or influenced in any way to falsely identify Caldwell. He considered that Cobbs did not initially name Caldwell at the July 13, 1990 interview with Gerrans, but she stated that she had not volunteered the name at that time, because she was not sure of his name. He also considered that Cobbs initially stated that the perpetrators were not from the area, but she stated that Caldwell had initially lived next door but had moved out prior to the murder. Giannini Decl. ¶ 8-9, 25. Cobbs confirmed these facts at trial. TR 221:3-25, 314:18-315:7. Giannini also personally interviewed Bobila, Viray, and Aguirre regarding their observations of the incident. Giannini found no indication that anyone had coached them or otherwise inappropriately attempted to influence their testimony. *Id.* ¶¶ 7-11.

Based on his investigation, Giannini concluded the photo line-ups and the live line-up were not misleading or suggestive, and conducted pursuant to protocol in place at the time regarding the administration of photo line-ups and live line-ups. He further concluded that the statements of the witnesses, and their eventual court testimony, was of their own recall, and not the result of any influence by police officers. *Id.* ¶ 12. Giannini was the sole prosecutor on the case, and he made the decision to charge Caldwell and what to charge him with. Giannini Dep. 171:20-172:6.

**L. Trial and Conviction of Maurice Caldwell**

Caldwell was tried before a jury in San Francisco Superior Court in March 1991. TR. Caldwell elected not to testify in his own defense. Caldwell Dep. 337:8-14, 387:16-388:13; TR. Caldwell did not challenge Cobbs' identification of him in anyway. TR; Giannini Decl. ¶ 26. The prosecution did not elicit any testimony about Caldwell's statement to Crenshaw on July 13, 1990. TR; Giannini Decl. ¶19. Crenshaw did not testify. TR; Crenshaw Decl. ¶19. Crowley did not testify. TR.

Bobila testified about the events leading up to the shooting, the shooting, and his efforts to flee. TR 117:2-138:21. He testified that he had previously identified a photograph of Caldwell as being involved in the incident. TR 141:3-143:16. He further testified that Caldwell looked familiar to him and that he was not sure if Caldwell was in the crowd on the night of the murder. TR 146:9-14. Aguirre also testified that Caldwell resembled one of the people present at the time of the shooting. TR 84:3-5.

Cobbs identified Caldwell as the individual who shot the shotgun. TR 210:26-211:13; 237:22-24. She further testified regarding the other details of what she saw the night of the murder. *See e.g.*, TR 208:17-214:22. She also testified regarding the threats she had received for cooperating with the police in the case. TR 223:6-227:7. Caldwell's defense attorney conducted a vigorous cross-examination. TR 238:5-309:8, 316:1-324:14, 325:11-327:14.

Caldwell put on two defenses: (1) that the shotgun was not the cause of death of Acosta, (2) Caldwell was not present. Caldwell called Rodriguez in support of his "alibi" defense, but did not call "Tina" to testify to his "alibi."

In the opening statement, the prosecution alluded to Crenshaw going to Cobbs' front door on July 13, 1990 during the Gerrans' interview with Cobbs. TR 25:18-27. Giannini mentioned this not because he believed that Cobbs had viewed Caldwell at that time, but because he believed Caldwell had the opportunity to see who the police were speaking to, and therefore knew to threaten Cobbs. Giannini Dep. 23:18-24:24. As stated above, Cobbs testified that she did not see anyone outside the apartment other than a black police officer. TR 221:26-222:23. Gerrans also testified that when Crenshaw knocked on the door, he was alone and Caldwell was not present. TR 379:17-380:12.

The jury convicted Caldwell. Verdict Form, Giannini Decl. ¶17, Exh. E.

**M. The Direct Appeal**

On direct no issue concerning identification was raised. Connolly Decl. (Appeal). No reply brief was filed. *Id*. RFJN. (docket sheet). See also, Doc. 121 (3/19/15) Court (Order on Defendants' Motion to Compel), page 7, fn 3.

**N. The Habeas Petition**

Caldwell filed his habeas petition in 2009. Caldwell's habeas petition was granted on the sole basis of ineffective assistance of counsel.[7] In support of his habeas petition Caldwell submitted the declaration of his trial counsel, Craig Martin, for the proposition that Martin did not hire any investigators to "work on his case." Trial counsel Craig Martin testified that the declaration submitted

[7] In support of his habeas petition Caldwell submitted the declaration of his trial counsel, Craig Martin, for the proposition that Martin did not hire any investigators to "work on his case." However, at his deposition, Martin testified that he himself had done his own investigation, in part attempting numerous times to locate the alibi witnesses, but that no one would cooperate with him. (Connolly Decl. Exh. F (Martin Dep.) at 82:15-89:17)

on his behalf to support the ineffective assistance of counsel claim was misleading. At his deposition, Martin testified that he himself had done his own investigation, in part attempting numerous times to locate the alibi witnesses, but that no one would cooperate with him. Connolly Decl. Exh. F (Martin Dep. Vol I at 82:15-89:17). Martin Dep. Vol. II 210 -217, 235-237, 244-247. Martin testified to numerous attempts at locating alibi witnesses. *Id.* The trial court was unaware of this information.

Remarkably, at his deposition on June 11, 2015, Caldwell admitted that he submitted a false declaration to the court in order to obtain habeas relief. In seeking habeas relief, Caldwell told the court, under penalty of perjury, that he was not the shotgun shooter and that in fact he witnessed another person, Henry Martin, shoot the shotgun at the car. Now, under oath, Caldwell states that he did not see Henry Martin, or anyone else, shoot the shotgun. Henry Martin states that he was not the shotgun shooter, but that he was present at the incident, and the shotgun shooter was not wearing a shirt. Henry Martin Declaration ¶8.

## III. ARGUMENT

### A. Plaintiff's Suggestive Identification Claim Fails

The Ninth Circuit does not recognize § 1983 claims for suggestive identification. *Haupt v. Dillard,* 794 F. Supp. 1480 (D. Nev. 1992) ("[U]se of an unduly suggestive identification procedures does not amount to a constitutional infringement sufficient to support a claim under § 1983.") *affirmed in relevant part, Haupt v. Dillard,* 17 F.3d 285, 291 (9th Cir. 1994); *see also Manson v. Brathwaite,* 432 U.S. 98, 113 n.13 (1977)( "Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest.").

Only a violation of the core right – the right to a fair trial – is actionable under § 1983. *Hensley v. Carey,* 818 F.2d 646, 648-49 (7th Cir. 1987)("The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under §1983."); *Sejnoha v. City of Bisbee,* 815 F. Supp. 1300, 1303 (D. Ariz. 1993)(citing *Hensley* and holding that absent extraordinary circumstances such as "coercion or force or other police misconduct," that would have made the trial unfair, a § 1983 claim for suggestive identification fails as a matter of law).

As there is no independent right to be free of suggestive identifications, the Court should dismiss this claim as duplicative of plaintiff's traditional, fabrication of evidence, fair trial claim. [8] If the claim proceeds, plaintiff must prove that the individual officers – Crenshaw, Crowley, and Gerrans – intentionally or recklessly created an unconstitutional identification procedure and withheld the issue from the trial court. *See Wray v. City of New York*, 490 F.3d 189, 195 (2nd Cir. 2007)("The constitutional harm occurred when the showup was impermissibly used to compromise the fairness of Wray's trial-at behest of the prosecutor, by order of the trial court, and beyond Officer Weller's control.")

Plaintiff cannot prevail for two reasons. First, while plaintiff alleges that Cobbs's identification was unreliable, he cannot come forward with evidence of purposeful police misconduct. Absent such evidence, there is no due process violation. *See Perry v. New Hampshire,* 132 S. Ct. 716, 719 (2012) (holding that only purposeful, police arranged, identification procedures implicate the due process clause, all other factors bearing on reliability are left to the jury).

Second, plaintiff cannot show that Cobb's identification was unconstitutional. *Alexander v. City of S. Bend,* 433 F.3d 550, 555-56 (7th Cir. 2006) ("A plaintiff with this kind of claim must demonstrate, by reference to the *Brathwaite* standard, that unduly suggestive identification procedures led to an unreliable identification that undermined the fairness of his trial.")

**1. Plaintiff Has Not Challenged A Police Arranged Identification Procedure**

Caldwell alleges that Cobb's identification was unreliable for reasons unrelated to any identification procedures – that Cobbs saw Caldwell at the door with Sgt. Crenshaw, and that after Cobbs identified a photograph of Caldwell as "Twan," officers used his full name Maurice Caldwell. These are attacks on Cobbs's credibility generally, not on a particular identification procedure.

A plaintiff may only challenge identification testimony on due process grounds if the plaintiff can identify police misconduct in a purposefully arranged identification procedure. *Perry*, 132 S. Ct. at 719.

[8] To the extent plaintiff is claiming a "substantive" due process claim, his disagreements with the investigation are not competent evidence of "egregious" government conduct that "shocks the conscience." *Lewis v. County of Sacramento,* 523 U.S. 833, 846 (1998).

In *Perry,* the New Hampshire police department received a phone call that an African American man was breaking into cars. *Id.* at 721. When officers arrived on scene, they found a suspect. *Id.* One of the officers detained him while another officer went to interview witnesses in nearby homes. *Id.* During an interview, the officer asked witness to describe the suspect. *Id.* The woman pointed out her kitchen window and said the suspect looked like the man standing next to the uniformed police officer in the parking lot. *Id.* A month later she was unable to identify Perry in a photo spread. *Id.*

The Supreme Court ruled that Perry was not entitled to challenge the identification under the due process clause. *Id.* at 725-26. The Court explained that the due process protections for identifications only applies to issues of intentional police misconduct in the arrangement of a line-up, show up, or photo spread. *Id.* All other issues of reliability, even if they accidently involve a police officer, are left for the regular due process guarantees at trial: discovery, cross examination, the right to testify, and jury instructions. *Id.*[9]

Caldwell does not complain of defects in the two police arranged procedures: the photo spread and lineup.[10] Instead, plaintiff points to unrelated incidents, each discussed below, to undermine Cobbs's testimony, and to argue generally that the defendants should have known Cobbs's testimony was unreliable. Accordingly, this is not a proper constitutional challenge to a police arranged identification procedure. Caldwell's recourse was to address the issues at his criminal trial. The Supreme Court explicitly refused to "open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications." *Perry,* 132 S. Ct. at 727; *see also Howard v. Warden, Lebanon Correctional Inst.,* 519 Fed. Appx. 360, 368 (6th Cir. 2013)(explaining that the Supreme Court has rejected the argument that due process clause applies to identification procedure with witnesses who police believe or have reason to believe are unreliable or otherwise biased.)

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[9] *See also Herring v. U.S.* 555 U.S. 135, 144 (2009)(following a similar approach and explaining that to trigger evidentiary exclusionary standards under due process, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it … .)

[10] Plaintiff will characterize the issue at Cobb's door as a "show-up." This is incorrect. A "show-up" is when a witness is taken to a crime scene and asked to identify, in person, a specific individual as the suspect. If that identification is admitted at trial, then the show up may be challenged. But, as discussed below, decades of caselaw have distinguished a "show up" from simply seeing someone in the presence of a police officer.

**a. The Door Incident**

Caldwell claims that all the identifications were unconstitutional because on July 13, 2009, Crenshaw brought Caldwell to Cobb's front door while Gerrans was interviewing Cobbs. (SAC ¶ 128) Crenshaw was not in uniform. Crenshaw's badge was not visible. There was no marked police car.

According to plaintiff, Crenshaw knocked on the door; Cobbs opened the door; and Crenshaw asked "Is the homicide inspector here?" (Caldwell Depo. at 312:7-20.) Cobbs went back into the apartment and Gerrans came out. (*Id.*) Sergeant Crenshaw said "This is Maurice Caldwell, or Twone, right here. And can I have your car keys?" (Caldwell. Depo. at 311:24-3.) Gerrans gave Crenshaw his keys and then they left.

Crenshaw did not say anything more to Cobbs than is "the homicide inspector here?" During his deposition, Caldwell testified that the whole interaction with Cobbs took seven seconds. (Caldwell Depo. at 315:6-15.) After a break, Caldwell changed his answer to a minute, minute and a half (*Id.* at 390:22-391:5,) and then finally settled on 20 seconds for Crenshaw to knock, Cobbs to answer, and Cobbs to turn around to retrieve Inspector Gerrans. (*Id.* at 403:5-404:6.)

The important fact is that when Crenshaw approached the door, Crenshaw did not know that Cobbs was a witness, let alone a witness who had seen Caldwell firing the shotgun, or that Caldwell would eventually be charged with the crime:

> A: At that time, I didn't know he was speaking to a woman or a man.
>
> (Crenshaw Depo. at 109:23-24.)
>
> A: … I didn't even know it was the Acosta murder. All I knew is that there was a shooting, a homicide and Gerrans was investigating. I never knew the name Acosta, the victim. I never knew any information regarding that.
>
> (Crenshaw Depo. at 112:4-10.)

At that moment, Gerrans did not know that Crenshaw was going to knock on the door. (Gerrans Dec. at ¶ 33.) Crenshaw did not know who Cobbs was or that she was a witness. (Crenshaw Dec. ¶ 15.) Crenshaw and Gerrans, therefore, are no different than the officers in *Perry v. New Hampshire* who unwittingly showed the suspect to the witness by standing next to the witness's window. Because this incident was not a purposeful arranged identification procedure – an intentional act that could be deterred – due process does not apply, and the issue is left to the adversarial process.

*Id.* at 728-30 (explaining that the trial was fair because plaintiff had the opportunity to address any reliability issue.)

Here, as in *Perry*, it is important to recognize that due process gave plaintiff the tools to challenge any reliability issue – discovery, cross examination, motions, jury instructions. Plaintiff told his lawyer, Craig Martin, about this door incident, (Caldwell Depo. at 361:22 - 62:17), but Martin chose not to file a motion to suppress, request a 402 hearing, or request special jury instructions. Instead, Martin cross-examined Cobbs on the issue at the preliminary hearing. PX at 64:8-66:2 [Giannini Dec. Ex. B.] During Martin's deposition, Martin testified that if he thought there was a genuine identification issue, he would have challenged it.[11] Martin Dep. at 71:17-72:12. During closing argument, Martin insinuated that Cobbs's testimony was less reliable because of the incident at the door. TR 758:15-17.

Plaintiff therefore received the process he was due. Under *Perry*, any due process challenge arising out of the door incident fails.

**b. The Name Issue**

Plaintiff claims that the photo spread and lineup were unconstitutional because, during the photo spread, Inspector Crowley told. Cobbs that he had picked out the man with the shotgun, the suspect Maurice Caldwell. SAC ¶ 135. Plaintiff's argument is factually inaccurate.

Any mention of the name occurred after the photo spread. After Crowley and Gerrans conducted the photo spread, after Cobbs identified Caldwell's photograph, after Cobbs said his nickname was Twan, after Cobbs said that Twan walked up to her and said "If you talk anymore, we're gonna 'f' you up," after Cobbs repeated that she is certain that Twan had the shotgun, only then did the Inspectors identify the photograph as depicting "Maurice Caldwell." Cobbs July 26 Interview

[11] As explained below, Martin's decision not to challenge was likely correct under California law at the time. Even had Cobbs seen Caldwell at the door, it was well established, at the time, that simply seeing someone, standing next to a police officer would not support a due process challenge to the eyewitness's identification. *People v. Johnson*, 210 Cal. App. 3d 316, 321 *(*1989) (affirming trial court's decision that seeing a suspect handcuffed in a police car and in the police station was not grounds to exclude the later identification); *see also People v. Contreras*, 144 Cal. App. 3d 749, 759 (1983)(happenstance viewing of the defendant by the victim does not constitute a denial of due process). The rule is the same today but because of the Supreme Court's holding in *Perry v. New Hampshire* that it would not be considered an intentionally arranged police procedure.

at 1-12 [Gerrans Dec. Ex. M]. Both inspectors have testified that they never indicated to Cobbs which photograph to pick, and they never provided Cobbs with his name until after she chose the photograph. Gerrans Dec. ¶ 50; Crowley Decl. ¶ 45.

After Cobbs says that she has "no doubt" that it was Caldwell and signs the back of the photograph, then Inspector Crowley makes the formal record and says that Cobbs has chosen the picture of "Maurice Caldwell," "SF No. 445392." Cobbs July 26 Interview at 12.

Again, plaintiff is not challenging the photo spread. Plaintiff is challenging the reliability of Cobb's testimony by pointing to an after the fact statement. As the photo spread had already occurred, and the line-up would not occur until months later, this is an issue for cross examination, not a constitutional challenge. *Perry Hampshire,* 132 S. Ct. at 730.

Plaintiff received the opportunity to challenge this evidence at his trial. During opening statements, Giannini said that Cobbs "never did know the defendant's real name until it was given to her later." TR at 25:4-5 [Giannini Ex. D]. Craig Martin argued that Cobb's couldn't be trusted because of how she learned his real name. *Id.* at 33:1-12. Giannini and Martin then engaged in considerable back and forth to clarify exactly when and how Cobbs first learned of Caldwell's nickname and then real name. (*Id.* at 233:17-234:7, 243:1-18, 261:1-262:7, 389:21-23.) Finally, in closing, Martin implied that knowing his name made the identification unreliable. (*Id.* at 761:9-762:3.)

Plaintiff therefore fails to state a proper suggestive identification claim. In both instances, plaintiff attacks a collateral issue, unrelated to the actual police arranged procedure. As he already received the opportunity to challenge this evidence at trial, and he had no valid due process challenge then, he cannot succeed on such a claim now.

**2. Plaintiff Cannot Show A Suggestive Identification Infringed His Due Process Right to a Fair Trial**

To succeed on his fair trial claim, plaintiff must show that the identification procedure violated due process. *Briscoe v. Cnty. of St. Louis, Missouri*, 690 F.3d 1004, 1012 (8th Cir. 2012)(rejecting § 1983 due process claim because identifications were not unconstitutionally suggestive.) To determine if a due process violation occurs, courts employ a two-step analysis.

The first step focuses on whether the identification procedure itself was impermissibly suggestive. *Manson v. Brathwaite*, 432 U.S. 98, 107 (1977); *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972). Each case must be considered on its own facts, and whether due process was violated depends on the totality of the circumstances surrounding the confrontation. *Simmons v. United States*, 390 U.S. 377, 383 (1968); *see also Stovall v Denno*, 388 U.S. 293, 302 (1967). If the court finds that a challenged procedure is not impermissibly suggestive, the due process inquiry ends. *United States v. Bagley*, 772 F.2d 482, 493 (9th Cir.1985).

The court must then determine whether, under the totality of the circumstances, the identification was nevertheless reliable. *Biggers*, 409 U.S. at 198. Factors to be considered include: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention paid to the criminal; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the confrontation; and (5) the length of time between the crime and the confrontation. *Id.* at 199–200.

**a. The Identifications Were Not Suggestive**

On July 26, 1990, Gerrans and Crowley conducted a photo spread with Cobbs. Gerrans Dec. at ¶ 49. The photographs were all of young, black, men of similar age, weight, and build. *Id.*; *Id.* at Photographs Ex. N. The inspectors provided Cobbs with the standard admonitions, which included the admonition that she was not obligated to identify anyone, that it is just as important to eliminate innocent individuals as a possible suspect, and that no one wants the wrong person to be identified. Gerrans Dec. at ¶ 49. Neither inspector did anything to indicate that Cobbs should choose Caldwell's photograph, and neither inspector told Cobbs Caldwell's name or nickname. Gerrans Dec. at ¶ 49; Crowely Dec. at ¶ 44.

On October 23, 1990, Inspector Gerrans and Crowley conducted a live line-up, with plaintiff's criminal defense counsel present, and with Cobbs, Aguirre, and Bobila. (Gerrans Dec. at ¶ 82.) The inspectors used the admonitions in SFPD Form 56 for each witness, which included telling the witnesses not to communicate. Gerrans Dec. Ex. W, X, Y, Z. During the lineup, Cobbs identified Caldwell as the person who shot the shotgun. *Id.* at ¶ 84. Bobila identified Caldwell as having

punched him in the face. *Id.* at ¶ 85. Aguirre identified Caldwell as being present at the scene. *Id.* at ¶ 86.

Plaintiff argues that the photo spread and lineup were unconstitutionally suggestive because Cobbs saw Caldwell at her door with Crenshaw 13 days earlier. This argument fails as a matter of law. Seeing someone with a police officer does not make a subsequent identification procedure suggestive. *Perry v. New Hampshire*, 132 S.Ct. 176 (2012); *Mock v. Rose*, 472 F.2d 619 (6th Cir.)(seeing suspect being taken to holding cell did not make identification suggestive); *Mikel v. Thieret*, 887 F.2d 733, 738 (7th Cir. 1989) (seeing a suspect in the newspaper did not make subsequent victim's identification of suspect in a photo array suggestive); *United States v. Gonzalez*, 864 F.Supp. 375, 386 (S.D.N.Y 1994) (show-up procedure not unduly suggestive where off-duty officer was driven by scene and viewed defendant in the presence of officers with his hands placed on the trunk of a vehicle); *Washington v. Cupp*, 586 F.2d 134 (9th Cir. 1978) (no due process violation when police show victim photograph of suspect four days before photo identification); *People v. Johnson*, 183 Cal. App. 4th 253, 273 (2010) (prior showing of robbery surveillance video did not taint photo lineup).

Moreover, the circumstances of the alleged door incident were minimally suggestive. Caldwell was not handcuffed, Crenshaw was not in uniform, and Crenshaw, according to plaintiff, said nothing to Cobbs except for 'Is the homicide inspector here?":

> A: So he knocked on the door. The lady came to the door, and he said, "Is the homicide inspector here?" She said, "Yeah." She went and got the homicide inspector.
>
> Q: And that was it?
>
> A: That was it.

Caldwell Depo. at 312:15-20.

There is nothing in that interaction that suggests to Cobbs that she should identify Caldwell as the shooter. *See Valtin v. Hollins*, 248 F. Supp. 2d 311 (S.D.NY. 2003)(not suggestive when surrounded by plain-clothes officers and not in handcuffs.)

In addition, Cobbs already knew Caldwell from around the neighborhood. Cobbs said she had seen Caldwell before (TR at 215:2-3 [Giannini Dec. Ex. D]), she said she had no difficulty recognizing him (*Id.* at 230:8-11), and she had seen him about 15 to 20 times during the course of a year, year and half (*Id.* at 262:1-6.) Since she already knew who he was before the shooting, seeing him again

wouldn't have caused her to confuse him with someone else. *See U.S. v. Omar*, 786 F.3d 1104, 1109-1110 (8th Cir. 2015)(reasoning that concerns about suggestiveness are absent when someone is already familiar with a suspect.) Further, since she knew Caldwell, and she knew he sold drugs in the area, it would not have come as a surprise to see Caldwell with a police officer.

Finally, Cobbs and Caldwell are both African American, which prevented any cross-racial identification problem. *See United States v. Stevens*, 935 F.2d 1380, 1392 (3d Cir. 1991)(recognizing that same race identifications are more reliable than cross-racial identifications.

Plaintiff may also argue that providing Cobbs the name of Caldwell was suggestive. Even though plaintiff has no evidence that officers provided Cobbs with Caldwell's name, it still wouldn't have made the identification of his photograph suggestive. *State v. Goodson*, 101 N.C. App. 665, 401 S.E.2d 118, 122 (1991) ("The officer's suggestiveness with respect to the name of the defendant could in no way affect [the witnesses's] choice of the photograph bearing defendant['s] [] image.")

Plaintiff may also argue that the lineup was suggestive because only Caldwell was in both the photo spread and line up. This too has already been rejected by the federal courts. See *Briscoe v. County of St. Louis, Missori*, 690 F.3d 1004, 1014 (8th Cir. 2012) ("Without more, the fact that [defendant] was the only person in both lineups is not enough to establish suggestiveness.")

Finally, plaintiff has no evidence that Cobbs was persuaded or influenced by any of the alleged suggestiveness for which plaintiff now complains. In the majority of successful wrongful conviction cases, a witness recants, comes forward, and explains how the police influenced them. That has not happened in this case. No one has recanted. No one has changed their testimony. Plaintiff is left arguing that Cobbs must have been influenced because he is innocent, otherwise she wouldn't have identified him. This is circular. Plaintiff's claim of innocence has been rejected by every fact finder who has reviewed the case: the jury, the appellate court, and the habeas petition court. Without testimony from Cobbs, plaintiff cannot present evidence of any suggestive effects.

**b. The Identifications Were Reliable**

Cobbs's identification was also reliable. The totality of the circumstances show that Cobbs was able to describe detailed facts that corroborated what officers already knew about the crime, giving the inspectors no reason to doubt her statements or identification. For example:

- Cobbs said she heard several shots at about 2:30 in the morning. July 13, Interview at 2:6-7, 10:13-17 [Gerrans Dec. Ex H]. That matched Aguirre and Bobilla's statements. Aguirre Interview at 16, Bobila Interview at 8-10. [Gerrans Dec. Ex. G, D respectively].
- Cobbs accurately identified the incident as a drug deal gone bad. July 13 Interview at 11:18-26. That matched Aguirre and Bobila's statements. Aguirre Interview at 8, Bobila Interview at 6.
- Cobbs said there were about four or five more men around the victims. July 13, 2009 Interview at 3:11-12. That matched Aguirre and Bobila's statements. Aguirre Interview at 11, Bobila Interview at 11.
- Cobbs said she saw the window of the car be shot. July 13, 2009 Interview at 2:19-20. That matched the physical evidence of the car (Car Photo [Gerrand Dec. Ex. C CCSF_CALDWELL_001338] and Bobila's statement, (Bobila Interview at 4), and Bobila's preliminary hearing testimony (PX at 10:21-28).
- Cobbs said the two men in the car were light skinned. July 13, 2009 Interview at 2:23-3:4. Bobila and Aguirre were light skinned Filipino men.
- Cobbs said the man had car trouble, she thought maybe a stick shift, because the car kept jacking when turning around. 4:19-5:7. That matched Bobila's preliminary hearing testimony that he couldn't start his car. Prelim. Hrng. at 13-20.
- Cobbs described that the car had to turn around to leave (Cobbs July 13, 2009 Interview at 17:24-18:6. That matches Aguirre's testimony about the direction they drove into the area. Aguirre Interview at 10.
- Cobbs described the car as an older car, dark, two seater. 6:1-6. That matched the physical evidence. Photos of Car [Gerrans Dec. Ex. C CCSF_CALDWELL_001329].
- Cobbs accurately identified Acosta as a big guy, laying, injured, across the front seat. Cobbs July 13 Interview 17:2-5. That matched Bobila's statement that he pulled Acosta in the car, into the front seat. Bobila Interview at 18.
- Cobbs accurately described the car being shot by a shotgun as it tried to turn around. Cobbs July 13 Interview at 4:19-5:3. That matched the physical evidence of the shotgun spray from different angles. Car Photo CCSF_CALDWELL_001328-1345 [Gerrans Dec. Ex. C]
- Cobbs' described the shotgun shooter physically and said he had no shirt on. (Cobbs July 13 Interview at 6:13-7:4, 8:8-18.) The description matched Caldwell (Caldwell Photo [Crenshaw Dec. Ex. C]) and matched Jackie William and Debra Rodriguez's statements that Caldwell had no shirt on. William Interview at 4 [Gerrans Dec. Ex. R]; September 27, 1990 Rodriguez Note [Gerrans Dec. Ex. B CCSF_CALDWELL_1363].
- Cobbs' said the handgun was in the man's right hand. (Cobbs July 13 Interview at 19.) That matched Aguirres's statement. (Aguirre Interview at 23.)

In addition, under the *Manson* factors, Cobb's testimony would have been admitted as reliable.

*The opportunity of the witness to view the criminal at the time of the crime.* Cobbs looked out her bedroom window, she watched the entire shotgun shooting unfold in front of her bedroom window until everyone dispersed, tilting her head in order to get a better view of the armed suspects. Cobbs

July 13 Interview at 2-21. She also had time to listen to the conversation of the individuals at the scene. *Id.* at 2. There was sufficient light to see from a streetlight, and she described the course of events. *Id.* at 18.; s*ee also* PX at 43-52 (Cobbs recounting the whole story of the car turning around and being repeatedly shot.)

*The witness' degree of attention paid to the criminal.* Cobbs paid close attention to the events that unfolded in front of her window on June 30, 1999 as evidenced by the details she was able to describe. She described the suspects' clothing, hair, general appearance and what the weapons looked like. Cobbs July 13 Interview 8-11.

*The accuracy of the witness's prior descriptions of the criminal.* During her first interview, Cobbs described the suspect as between 21-25 years old, about 5-4, 150 pounds, with light skin, and a short jerry curl. (Cobbs July 13 Interview at 6.) This matched Caldwell's appearance (Photo of Caldwell [Crenshaw Dec. Ex. B] and it matches Caldwell's identification sheet. SFPD Identification Sheet CCSF_CALDWELL_1017 [Gerrans Dec. Ex. B](identifying Caldwell as 65 inches, 123 lbs, medium complexion, curly hair with a medium build).

*The level of certainty demonstrated by the witness at the time of the confrontation.* Cobbs was steadfast in her belief about Caldwell from the very first interview. During her first conversation with police, Cobbs confirmed, "I got a pretty good look at them" and said she would recognize them again. (Cobbs July 13 Interview at 11 [Gerrans Dec. Ex. H.) On July 26, at the photo spread, Cobbs immediately identified Caldwell, didn't pick out anyone else, and said she had no doubt that Caldwell had the shotgun. (Cobbs July 26 Interview at 2, 11. [Gerrans Dec. Ex. M].) At the lineup, Cobbs again chose Maurice Caldwell, without choosing anyone else, and said she was positive that he is the one with the shotgun. Gerrans Dec. at ¶ 85; *see also* October 23, 1990 Note [Gerrans Dec. Ex. B CCSF_CALDWELL_000876].

*The length of time between the crime and the confrontation.* Cobbs gave a detailed description of the crime less than two weeks after it had occurred at her July 13 interview. Her description remained unwavering each time she was confronted with a request to view a line up and each time she was confronted by cross-examination at the preliminary hearing and at trial.

Finally, Cobb's identification was corroborated by two other witnesses. Both Aguirre and Bobila identified Calwell at the lineup as having been present at the scene. (Gerrans Dec. at ¶ 86, 87.) In light of Cobb's detailed recounting of the event, her certainty, and that it was corroborated, the inspectors had no reason to doubt the reliability of her identification.

Plaintiff will argue that the inspectors missed signs that Cobb's testimony was unreliable. In doing so, plaintiff will engage in considerable second guessing, more than 25 years later, with citations to evidence that the inspectors did not have access to.[12]

**B. Plaintiff's Fabrication of Evidence Claim Fails**

To prove a fabrication of evidence claim under *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001), the plaintiff must first come forward with evidence deliberately fabricated by the defendant. *Bradford v. Scherschigt*, ____ F.3d _____, 2015 WL 5637534, at *3 (9th Cir. Sept. 25, 2015) ("Fundamentally, the plaintiff must first point to evidence he contends the government deliberately fabricated.") If can meet the first prong, the plaintiff must then prove that the defendant deliberately intended to fabricate. *Bradford*, 2015 WL 5637534, at *3 (two Devereux prongs "are methods of proving one element—intent—of a claim that the government deliberately fabricated the evidence at issue.")

The plaintiff may use one of two circumstantial methods to prove deliberate fabrication. The first is to demonstrate that the defendant continued his investigation of the plaintiff even though he knew or should have known that the plaintiff was innocent. *Devereaux*, 263 F.3d at 1076. The second is to demonstrate that the defendant used "investigative techniques that were so coercive and abusive that [he] knew or should have known that those techniques would yield false information." *Id.*

The test for establishing fabrication of evidence under *Devereaux* is a stringent one. *Gausvik v. Perez*, 345 F.3d 813, 817 (9th Cir. 2003) (upholding grant of summary judgment on fabrication of evidence claim). There is no constitutional right to have witnesses interviewed in a particular manner or to have the investigation carried on in a particular way. *Devereaux*, 263 F.3d at 1075.

[12] The Court should recall the inspectors spoke to many of the people who eventually filed declarations in support of plaintiff's habeas petition. These people stated at the time that they had no knowledge of the incident. Gerrans Dec. at ¶ 9.

**1. Defendants Did Not Fabricate Evidence.**

Plaintiff cannot point to any evidence fabricated by Gerrans or Crowley. Presumably, Caldwell will contend that Cobb's testimony is the fabricated evidence. Yet, Cobbs never recanted this testimony. This is not a case where the witness comes forward and admits that police told her how to testify. There is no evidence that officers told Cobbs how to testify, pressured her, or otherwise coerced her. Plaintiff's speculation that inspectors could have influenced her inadvertently, at best, shows negligence. Thus, the inquiry ends, and Gerrans and Crowley cannot be liable for a due process violation based on fabrication of evidence.

**2. There Is No Evidence Of Intent To Fabricate**

**a. There Is No Evidence That Defendants Knew or Should Have Known Plaintiff Was Innocent**

There is no evidence that defendants knew or should have known plaintiff was innocent but nonetheless continued their investigation. Cobbs testified, in great detail, to the facts in the murder and then identified Caldwell – who she already knew. No other evidence that came out during the investigation was sufficient to overcome Cobb's testimony and prove that defendants knew of Caldwell's innocence.

Plaintiff argues that, in essence, the inspectors should have figured it out. Plaintiff contends the inspectors should have known because (1) Caldwell's attorney told the inspectors the names of the supposed perpetrators; (2) witnesses said that Caldwell was not at the scene when the murder occurred; (3) Mary Cobbs said in her first statement that the shooters did not live in the area and were from Sunnydale or Hunter's Point; (4) Mary Cobbs did not indicate the shotgun shooter was Caldwell when he was brought to the door; (5) Mary Cobbs did not volunteer the name of the shotgun shooter at the first interview; and (6) Caldwell told the inspectors that he was not involved in the murder. (SAC ¶¶ 70, 71, 72, 150, 151, 155).

These assertions do not establish that officers knew of plaintiff's innocence; they merely identify facts that may be inconsistent with the theory that plaintiff committed the murder. Inconsistency alone is not sufficient to state a fabrication of evidence claim. *See, e.g., Cunningham v. City of Wenatchee,* 345 F.3d 802, 811-12 (9th Cir. 2003) (that victims did not corroborate one

witness's statement not sufficient to require the officer to cease investigation); *Aragonez v. Cnty. of San Bernardino*, 2008 WL 4948410, at *10 (C.D. Cal. 2008) ("[A] careless or inaccurate investigation that does not ensure an error-free result does not rise to the level of a constitutional violation.

Further, none of the "facts" identified by Plaintiff are sufficient to create a material dispute on this *Devereaux* prong. First, the inspectors did investigate plaintiff's claim that Martin and Funches committed the murder. Gerrans and Crowley showed Cobbs and the surviving victims the photo arrays with photos of Funches and Martin; no one identified Funches or Martin as being involved in the crime. Crowley Dec. at ¶¶ 71-74, 82, 85; Gerrans Dec. at ¶¶ 77-80, 87, 90. Second, at trial, Cobbs explained her statement that the men weren't from Alemeny, testifying that Caldwell initially stayed next door to her but moved out prior to the murder and she did not know where he lived. TR at 214:23-215:1, 314:21-315:7 [Giannini Dec. Ex. D]. Third, Cobbs never said the suspect's name at the first interview because she was never asked. She explained at trial that she did not volunteer the name because she only knew his nickname, and she did not want to give a name unless she was certain. TR at 215:23-216:1, 221:3:221:25, 233:3-234:7. Finally, that Caldwell himself told the inspectors that he was innocent is not sufficient to support a constitutional violation against the inspectors. The notion that a criminal defendant's claim of innocence and story twenty years later could create constitutional liability on police officers for "fabricating" evidence would pervert the entire criminal justice system.

Again, it should be noted that even now, twenty-five years later, it has not been established that Caldwell is innocent. Nor do the individual defendants believe, today, that Caldwell is innocent. Gerrans at ¶ 100; Crowley Dec. at ¶ 92. And they did not believe in Caldwell's innocence during the investigation. *Id*. Indeed, the person who plaintiff claims committed the crime – Henry Martin – has testified that he did not shoot anyone.[13] Martin Dec. at ¶ 8.

In addition, as noted above, the court that considered Caldwell's habeas petition did not rule on his claim of factual innocence. *See Milstein v. Cooley*, 208 F. Supp. 2d 1116, 1123-24 (C.D. Cal. 2002) (noting that while conviction was reversed on appeal, this did not prove innocence or that the

[13] Notably, Ms. Kaneb, plaintiff's habeas lawyer, testified that Henry Martin told Bergeson, plaintiff's appellate lawyer, that Martin would admit to the crime in exchange for immunity. Martin has now testified that Ms. Kaneb's declaration is a fabrication. Martin Dec. at ¶ 11.

defendants show have known the plaintiff was innocent during the investigation); *Tennison v. City and County of San Francisco*, No. C-04-0574-CW, 2006 WL 733470 at *43 (N.D. Cal. Mar. 22, 2006) (as here, the plaintiff's habeas petition granted on grounds unrelated to factual innocence and considering this fact relevant to a fabrication of evidence claim).

The inspectors also had numerous facts other than Cobbs's testimony that suggested guilt. Bobila and Aguirre identified Caldwell as being present during the drug deal preceding the murder, which supported the theory that Caldwell committed the crime and contradicted Caldwell's alibi that he was inside. Crowley Dec. at ¶ 57; Gerrans Dec. at ¶ 62. Bobila identified Caldwell at the initial photo spread and again at the preliminary hearing. Gerrans Dec at ¶ 57. An anonymous tip pointed to Caldwell as someone to look into concerning the murder. Crowley Dec. at ¶ 25. There was evidence that Caldwell threatened Cobbs, which suggested guilt. *Id.* at ¶¶ 43-44. There was evidence that other people were lying on Caldwell's behalf. Adrena Gray said that Caldwell was with her in Oakland the night before his arrest, which she later admitted was not true. Gerrans Dec. at ¶ 63. Finally, even the witnesses who Caldwell identified in his defense provided facts that tended to support guilt. Debbie Rodriguez said that on the night of the murder Caldwell ran out of the house half naked, without a shirt on; Jacqueline Williams told the inspectors the same thing. William Interview at 4 [Gerrans Dec. Ex. R]); September 27, 1990 Rodriguez Note [Gerrans Dec. Ex. B CCSF_CALDWELL_1363]. This corroborated Mary Cobbs's testimony that Caldwell was bare chested when she saw him fire the shotgun.[14] Cobbs July 13 Interview at 8 [Gerrans Ex. H].

To the extent Caldwell contends that the declarations made by witnesses years later support his claim, such information was not known to the inspectors at the time of the investigation and cannot form the basis of this claim. *See e.g., Walker v. County of Santa Clara*, 2007 WL 1201789, at *5 (N.D. Cal. Apr. 23, 2007) (no fabrication claim based on innocence where plaintiffs did not "demonstrate[] that the facts that served as the basis for the subsequent vacating of Walker's conviction were known to the deputies at the time of the investigation and trial."). At the time of the

[14] At trial, Rodriguez, realizing the damning nature of her statement, attempted to explain that by no shirt she meant a tank top but not a button down. TR 458:10-26. That Rodriguez changed her testimony at trial has no bearing on what the inspectors knew during the investigation.

investigation, the investigators spoke everyone they could find - Maurice Tolliver, Demetrius Williams, Peter Labrado, Robert Johnson, and Anthony C. Moore. Each of them denied having any knowledge of the murder. Gerrans Dec. at ¶ 9.

Finally, to the extent this theory of liability is alleged against Crenshaw, there is no evidence to support it. Crenshaw's involvement in this investigation ended on July 17, 1990. He wrote the note regarding his encounter with Caldwell, participated in one more canvass that was not fruitful, and that was the end of his participation in this case. There is no basis to support the contention that Crenshaw deliberately continued an investigation of Caldwell knowing of his innocence since Crenshaw was not part of the investigation.

As the court observed in *Tennison v. City and County of San Francisco*, No. C-04-0574-CW, 2006 WL 733470 at *43 (N.D. Cal. Mar. 22, 2006), very few cases have addressed this *Devereaux* prong, and none are analogous to plaintiff's claim in this case. Contradictory information regarding the defendant's guilt is not sufficient to support a constitutional violation for continuing an investigation of an allegedly innocent person. Here, there was no physical evidence – videos, photos, DNA, etc. – that showed Caldwell was not the shooter and that Mary Cobbs could not be believed. Plaintiff's complaint amounts to nothing more than the inspectors did not see the case as he does now. Under those circumstances, the stringent *Devereaux* standard cannot be met.

**3. Defendants Did Not Engage In Coercive or Abusive Investigative Tactics**

**a. Cobbs's Door.**

With respect to Gerrans and Crenshaw, Caldwell appears to contend that the abusive or coercive tactic was allegedly bringing Caldwell to Cobbs's front door. These facts do not establish that the investigative techniques were "so coercive and abusive that [the officers] knew or should have known that those techniques would yield false information." *Devereaux*, 263 F.3d at 1076.

As *Devereaux* explained and later cases have confirmed, even if the identification technique was improper, that does not necessarily establish a constitutional deprivation, because there is no due process right to have an investigation conducted in the manner one prefers. *Devereaux*, 263 F.3d at 1075 (noting that "mere allegations that Defendants used interviewing techniques that were in some sense improper, or that violated state regulations, without more, cannot serve as the basis for a claim

under § 1983"); *Gausvik*, 345 F.3d at 816-17 (overbearing interview tactics alone do not state a claim that a defendant knew or should have known the interview would yield false evidence under the second prong of *Devereaux*).

Plaintiff's testimony of a brief incident at the door, out of handcuffs, is not legally sufficient to allow a jury to determine it to be an abusive tactic known to lead to false evidence. Cases that have found sufficient evidence to create a factual dispute on this *Devereaux* prong have involved much more extreme conduct. *See Costanich v. Dep't of Soc. & Health Servs.*, 627 F.3d 1101, 1111-12 (9th Cir. 2010) (evidence that the defendant deliberately falsified material statements in investigative report); *Gantt v. City of Los Angeles*, 717 F.3d 702, 708 (9th Cir. 2013) (witness testified that officers threatened to charge him with murder if he did not provide information, told him to testify falsely, and interrogated him when he was on a crack binge, was still high, and had not slept for two days).

**b. Confirmation that Cobbs "Identified the Shooter."**

Plaintiff claims that a statement by Gerrans or Crowley at the conclusion of the July 26, 1990 Cobbs interview that Cobbs identified the person with the shotgun constitutes an abusive tactic known to lead to false information. Again, as explained above, this argument is based on an inaccuracy. Cobbs identified the photograph of Maurice Caldwell as the person having the shotgun before anyone used the name Caldwell. In any event, the comment does not threaten, intimidate, or otherwise use the authority of the state to bully someone into changing testimony.

**4. Crenshaw's Note Cannot Support A § 1983, Fair Trial Claim Because It Was Not Introduced At Trial**

On July 13, 1990, Crenshaw wrote a note that said Caldwell said he was down the street when the shooting occurred, that he was dealing drugs with the people who shot Acosta, and that he yelled at the shooters afterwards because he thought he would be blamed. Plaintiff claims that this was a fabrication.

First, this note was never used in the criminal prosecution and cannot therefore support a § 1983 fabrication of evidence claim. *See Hennick v. Bowling*, 115 F. Supp. 2d 1204, 1208-09 (W.D. Wash. 2000) (no fabrication of evidence claim where alleged fabrication was not used at trial and there was probable cause to arrest the defendant independent of the fabrication).

Second, the note does not contradict plaintiff's testimony. The note says that plaintiff was not at the murder scene when the shooting happened, but he was "down the street." July 13 Note [Crenshaw Dec. Ex. C]. Plaintiff testified that he was in his aunt's apartment when the shooting happened, which was down the street. Caldwell Dep. at 245:3-24. The note says that plaintiff came to the scene after the shooting happened and yelled at the suspects. July 13 Note [Crenshaw Dec. Ex. C] Plaintiff testified that he came to the scene after the shooting happened and spoke to the alleged perpetrators. Caldwell Dep. at 250:6-21. The distinctions between "in the house" down the street and "speaking" or "yelling" are not sufficient to find deliberate intent of fabrication.

Third, the note does not implicate plaintiff. *See e.g., Arden v. Kastell*, 553 Fed. App'x 697, 698 (9th Cir. 2014) (reversing summary judgment where report implicated defendant but later testimony explicitly denied the inculpatory statements were made); *Costanich*, 627 F.3d at 1112 (defendant's report and declaration contained misrepresentations about the number of witnesses interviewed, amount of contact with witnesses, and the substance of interviews relevant to the conclusion reached in the report, which directly supported termination of guardianship).

Because Crenshaw's note played no role in plaintiff's trial, was of minimal to no importance to the investigation and prosecutor's decision to charge (they interviewed Caldwell) (Giannini Dec. at ¶ 19), and that the note does not materially differ from plaintiff's testimony, Crenshaw cannot be held liable for "fabricating" evidence in violation of plaintiff's due process rights.

### C. The Prosecutor's Decision To Proceed Immunizes The Investigating Officers From Plaintiff's 1983 Claims.

A prosecutor's independent judgment breaks the chain of causation and immunizes police officers from 1983 liability for an unfair trial. *McSherry v. City of Long Beach*, 584 F.3d 1129, 1136-37 (9th Cir. 2009).

The defendant officers need only show that the prosecutor filed charges. "[I]t is presumed that the prosecutor filing the complaint exercised independent judgment … ." *Smiddy v. Varney*, 665 F.2d 261 (9th Cir. 1981); *see also Newman v. County of Orange*, 457 F.3d 991, 994 (9th Cir. 2006)("We have long recognized that 'filing a criminal complaint immunizes investigation officers … from

damages suffered thereafter because it is presumed that the prosecutor …. exercised independent judgment…").

To overcome the presumption of independent judgment, a plaintiff must present evidence that the district attorney was "subjected to unreasonable pressure by the police officers, or that the officers knowingly withheld relevant information with the intent to harm, or that the officers knowingly supplied false information." *Newman*, 457 F.3d. at 994; *See also Wray v. City of New York*, 490 F.3d, 189, 193 (2nd Cir. 2007)("In the absence of evidence that [the officer] misled or pressured the prosecution or trial judge, we cannot conclude that his conduct caused the violation of [plaintiff's] constitutional rights; rather, the violation was caused by the ill-considered acts and decisions of the prosecutor and trial judge"). Most importantly, **a plaintiff's account of the incident in question does not overcome the presumption of independent judgment.** *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994). To hold otherwise would vitiate the immunity since a plaintiff's version will always conflict with the police officer's. *Id.*

Just as in *McSherry*, Caldwell was held to answer at a preliminary hearing where the eyewitness testified, and identified him as the suspect, and the defendant officers did not. The prosecutor, Al Giannini, then filed an information based on the court's preliminary hearing ruling and his own independent investigation and consideration of the case. Giannini Decl. at ¶¶ 6-9.

Giannini reviewed all the witness identifications, the witness statements, the officer statements, photographs, and all other evidence. *Id*. at ¶ 6. Giannini personally spoke to Cobbs on a number of occasions to assess her testimony. Giannini Dec. at ¶ 9. Giannini found Cobbs to be as credible a witness as he had seen in 35 years, and he did not believe that Cobbs had been coached or influenced in any way. Giannini Dec. at ¶ 9; Giannini Depo. at 175:8-176:3. Giannini also interviewed the other witnesses, such as Bobila, Aguierre, and Viray and found their testimony credible and reliable. Giannini Dec. at ¶ 10. Giannini explained to all the witnesses that they should only testify about issues for which they had personal knowledge, and not anything they may have heard from other sources. *Id.* at ¶ 11. Finally, Giannini reviewed the identification procedures and concluded them to be proper and the identifications to be reliable. *Id.* at ¶ 12.

Further, Giannini considered the very issues that plaintiff raises. In response to cross examination at the preliminary hearing, Giannini considered the possibility that Cobbs had seen Caldwell during the interview with Gerrans, but Giannini decided that she had not, and that, even if she had, it did not substantially undermine her testimony or identification. *Id.* at ¶ 14. Giannini also considered that Cobbs was being relocated and considered if it was materially altering her testimony. *Id.* at ¶¶ 22-23. Giannini decided that it was not. *Id.* Giannini also reviewed all the interviews of Cobbs and considered the fact that Cobb's didn't volunteer Caldwell's nickname at the first interview. *Id.* at ¶ 25. Giannini spoke to Cobbs and determined that she hadn't volunteered anything because she wasn't sure of his name, that she was telling the truth, and that her testimony was reliable. *Id.* at ¶ 25.

Caldwell will argue that Cobbs saw Caldwell at the door, so the officers must therefore have lied to Giannini. But plaintiff's own conflicting story does not overcome the presumption of independent judgment. *Sloman v. Tadlock*, 21 F.3d 1462, 1474 (9th Cir. 1994).

Caldwell will also argue that police provided Cobbs with Caldwell's name. There is no evidence to support this theory. Caldwell's only evidence is that Cobbs did not reference Caldwell by name during the first interview, and that she did during the second. For the reasons discussed above, this argument depends on an incorrect assumption about timing. At trial, Cobbs explained that she knew Caldwell as Twan before the shooting because she had learned it from her kids. TR at 233:3-234:7, 242:20-25 [Giannini Ex. D]. The reason it doesn't appear in the first interview is because Inspector Gerrans never asked Cobbs if she knew his name. *See* Cobbs July 13 Interview [Gerrans Dec. Ex. H]. When asked why she didn't volunteer the name, Cobbs said she didn't want to say anything to the police that she wasn't sure of, and she wasn't sure of his name though she had heard him called Twan.[15] TR at 221:2-35.

Al Giananni considered the veracity of Cobbs's testimony, considered the relocation benefits, considered the transcripts, and considered all the other evidence in the case, and decided to proceed. Without concrete evidence that officers intentionally withheld information or intentionally misled Giannini, plaintiff cannot overcome the presumption of an intervening cause.

[15] Cobb's concern about casually using the name "Twan" proved to be correct as there are two Twans: Big Twan and Little Twan. (TR 225:9-18.)

**D. Plaintiff's Conspiracy and Failure to Intervene Claim Fails**

Plaintiff's conspiracy and failure to intervene claims are not separate claims but theories to hold defendants liable for the §1983 violations of others. As there is no underlying § 1983 violation, both theories fail. Regarding the conspiracy, plaintiff does not have evidence that the defendants "reached a unity of purpose" or "common design" in an "unlawful arrangement." *Gilbrook v. City of Westminster,* 177 F.3d 839, 856–57 (9th Cir.1999)(describing the requirements for a conspiracy). Regarding the failure to intervene, plaintiff does not have evidence that each defendant knew of any violation or had an opportunity to intervene. *Cunningham v. Gates,* 229 F.3d 1271, 1290 (9th Cir. 2000) ("To be liable, each participant in t that a person have a realistic opportunity to have done so. he conspiracy need not know the exact details of the plan, but each participant must at least share the common objective of the conspiracy.")

**E. Each Officer Is Entitled To Qualified Immunity**

Public officials are immune from suit under 42 U.S.C. § 1983 unless they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard,* 134 S.Ct. 2012, 2023 (2014) An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it," ibid., meaning that "existing precedent ... placed the statutory or constitutional question beyond debate." *Ashcroft v. al–Kidd,* 563 U.S. ——, ——, 131 S.Ct. 2074, 2083 (2011). The standard "gives government officials breathing room to make reasonable but mistaken judgments" by "protect [ing] all but the plainly incompetent or those who knowingly violate the law." *City and County of San Francisco v. Sheehan,* 135 S.Ct. 1765, 1774 (2015).

Caldwell cannot point to any case from before 1991 that would have put Sergeant Crenshaw, Inspector Gerrans, and Inspector Crowley on notice that Cobb's identifications were unconstitutional. The law regarding suggestive identifications is complex, and requires a case by case basis analysis. Indeed, at the time in California, the officers would have thought that seeing Caldwell at the door,

even if it did occur, did not make the identifications unconstitutional.[16] The more recent cases show that courts around the country have since agreed with the inspectors' belief that they didn't violated the Constitution. Even if a violation, having Caldwell exposed to Cobbs for less than 20 seconds, out of handcuffs, and without any indicia that he was under arrest, is nothing more than a reasonable mistake. Absent evidence of intentional misconduct, each officer is entitled to qualified immunity.

In the context of fabrication of evidence, the *Deveraux* case itself shows that officers would not have been on notice that their actions violated the Constitution. In *Deveraux*, officers interviewed a child for more than six hours, even after the children denied being abused. By comparison, there is no evidence that Gerrans, Crowley, or Crenshaw pressured anyone. At the very worst, they unwittingly influenced a witness and submitted it all to the District Attorney just to be safe.

These inspectors are entitled to enjoy immunity, twenty years later, from anything that can be construed as a reasonable mistake. As there is no evidence of intentional fabrication or misconduct, this Court must grant qualified immunity.

**F. The City is Entitled to Summary Judgment on Plaintiff's Municipal Liability Claim.**

"Congress did not intend municipalities to be held liable [under section 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort. . . . [A] municipality cannot be held liable under § 1983 on a respondeat superior theory." "[A] municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) (quotations and brackets omitted). The municipality's actions must reflect a deliberate or conscious choice and cannot result from negligence. *See id.* The plaintiff must demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged." *Bd. of the Cnty. Comm'rs of Bryan Cnty v. Brown*, 520 U.S. 397, 404 (1997) (emphasis in original). There also must be a close causal connection between the alleged constitutionally deficient policy and the resulting injury. *City of Canton*, 489 U.S. at 385.

[16] *People v. Johnson*, 210 Cal. App. 3d 316, 321 (1989) (affirming trial court's decision that seeing a suspect handcuffed in a police car and in the police station was not grounds to exclude the later identification); *see also People v. Contreras*, 144 Cal. App. 3d 749, 759 (1983)(happenstance viewing of the defendant by the victim does not constitute a denial of due process).

Regarding municipal liability under Section 1983, this Court has stated,

> There are three ways to show an affirmative policy or practice of a municipality: (1) by showing "a longstanding practice or custom which constitutes the 'standard operating procedure' of the local government entity;" (2) "by showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision;" or (3) "by showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate." *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir.2005) (quoting *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 984 (9th Cir.2002)). "[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of County Commissioners of Brown County, Oklahoma v. Brown*, 520 U.S. 397, 404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1996).

*Doherty v. City of Alameda*, No. C-09-4961-EDL, 2010 WL 1265178, at *5 (N.D. Cal. Mar. 30, 2010).

Plaintiff claims the City had no established or clear policy regarding ensuring that eyewitness identifications complied with due process requirements, and did not properly train officers regarding eyewitness identifications. (SAC ¶¶ 96-97). Plaintiff further claims that the City failed to maintain an adequate disciplinary system. (SAC ¶ 100-101). Plaintiff does not have sufficient evidence to proceed on either theory.

**1. Policy or Custom Regarding Eyewitness Identification**

Plaintiff points to no formal policy of the City with regard to eyewitness identifications that is unconstitutional. "In the absence of a formal governmental policy, a plaintiff must show a 'longstanding practice or custom which constitutes the standard operating procedure of the local government entity.'" *Alegrett v. City and County of San Francisco,* C-12-5538-MEJ, 2014 WL 1911405, at *4 (N.D. Cal. May 13, 2014) "Consistent with the commonly understood meaning of custom, proof of random acts or isolated events are insufficient to establish custom. Only if a plaintiff shows that his injury resulted from a 'permanent and well-settled' practice may liability attach for injury resulting from custom." *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1443-44 (9th Cir. 1989).

There is no evidence of any incident involving the SFPD where eyewitness identifications were improperly conducted and resulted in constitutional violations. Plaintiff can come forward with no

evidence that there was a pervasive custom among SFPD officers to conduct cold shows at the front door of a potential witness. With no supporting evidence, this claim cannot proceed.

**2. Failure to Train.**

Plaintiff also appears to contend that the City failed to properly train employees regarding eyewitness identification procedures. The Supreme Court has recognized that "[i]n limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983. A municipality's culpability for a deprivation of rights is *at its most tenuous where a claim turns on a failure to train.*" *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011) (citation omitted) (emphasis added). A municipality's failure to train its employees in a relevant respect must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). A plaintiff must present evidence that "city policymakers are on actual or constructive notice that a particular omission in their training program *causes city employees to violate citizens' constitutional rights, [and] the policymakers choose to retain that program.*" *Connick*, 131 S.Ct. at 1360 (citing *Board of Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 407 (1997)) (emphasis added). Further, a plaintiff must show "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation." *City of Canton*, 489 U.S. at 385.

"A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train. . . . Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights." *Connick*, 131 S.Ct. at 1360 (citing *Bryan Cty*, 520 U.S. at 409). There could hypothetically be liability on a "single incident" theory, but only where a violation of a constitutional right is a "highly predictable consequence" of an alleged failure to train. *Id.* at 1361-63. A claim for inadequate supervision is evaluated under the same deliberate indifference standard. *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir. 1989).

There is no evidence of a pattern of constitutional violations by untrained employees. The City and County of San Francisco has thorough training on all facets of investigation, including the collection of evidence, witness statements, and identification procedures. Killshaw Dec. at ¶¶ 15-17, Exhibits G, H, I, J, K, and L. Thus, plaintiff's *Monell* claim on this theory also fails.

**3. Failure to Discipline**

Plaintiff claims that that the City maintained an inadequate disciplinary system that led to the alleged constitutional violations in this case. This claim also fails.

"A list of complaints against police officers, without more, is insufficient to create an issue of fact regarding the City's policy of inadequately investigating or disciplining police officers." *Simms v. City and County of Honolulu*, 2008 WL 3349069, *8 (D. Haw. Aug. 12, 2008). Instead, Plaintiff has an obligation "to produce some evidence that the complaints against [the officers] had some merit." *Brooks v. Scheib*, 813 F.2d 1191, 1195 (11th Cir. 1987); *Simms*, 2008 WL 3349069, at *8; *Haynes v. City and County of San Francisco*, No. C-09-0174-PJH, at *4 (N.D. Cal. Jul 28, 2010) ("providing evidence of past complaints against officers is generally insufficient to establish a policy or custom of indifference"). This is true in part because "officers in high crime areas attract a greater number of citizens' complaints," *Brooks*, 813 F.2d at 1194, and "the number of complaints filed, without more, indicates nothing[;] [p]eople may file a complaint for many reasons, or for no reason at all." *Strauss v. City of Chicago*, 760 F.2d 765, 768-69 (7th Cir. 1985). Thus, citizen complaints "show, at most, that the City has a policy of investigating citizen complaints and occasionally imposing discipline against officers, not that they do *not* investigate complaints." *Davis v. Clearlake Police Department***,** No. C-07-3365-EDL, 2008 WL 4104344, at *8 (N.D. Cal. Sept. 3, 2008) (emphasis in original).

Additionally, for prior complaints of misconduct to create municipal liability, plaintiff must show that "it was almost impossible for a police officer to suffer discipline as a result of" the complaint. *See Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir. 2001) (citation and internal quotation marks omitted). It is not enough that the police department was ineffective or even incompetent in overseeing citizen complaints. "If [the department] took steps to eliminate the practice, the fact that the steps were not effective would not establish that [the department] had acquiesced in it and by doing so adopted it as a policy of the city." *Wilson v. City of Chicago*, 6 F.3d 1233, 1240 (7th Cir. 1993).

Deliberate indifference to complaints requires a much stronger showing, such as "[i]f [the police chief] had thrown the complaints into his wastepaper basket or had told the office of investigations to pay no attention to them." *Id.*

Here, there is no evidence that the City lacks a system for disciplining officers or that it is impossible to be disciplined. In fact, defendants have produced evidence that shows exactly the opposite. *See* Killshaw Dec at ¶¶ 3-8. The OCC is an independent agency created for the sole purpose of investigating allegations of misconduct. *Id* If after investigating the complaint, OCC determines it has merit, OCC will sustain the complaint and send its recommendations are sent to the SFPD, which then determines discipline. *Id.* In addition to OCC, the SFPD has an internal division that investigates misconduct when employees of the SFPD or other officers complain against an officer. *Id.* at ¶¶11-14. This is not deliberate indifference to alleged fabrication of evidence or the other due process allegations in this case.

Moreover, in order to prove a *Monell* claim, Plaintiff must show that the allegedly unconstitutional policy was the moving force behind the Plaintiff's constitutional violation. *City of Canton*, 489 U.S. at 388. Here, there is no evidence that the defendant officers had any knowledge regarding a supposedly inadequate disciplinary system. Thus, Plaintiff cannot establish that an allegedly inadequate disciplinary system was the moving force behind any of the defendant officers' actions.

## IV. CONCLUSION

Plaintiff does not have evidence of a suggestive identification or fabrication of evidence. In any event, Al Giannini's decision to prosecute is an intervening cause and the officers are immunized from liability. The Court should grant judgment for the defendants.

Dated: November 2, 2015

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