UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

CHRISTOPHER TAPP, an individual,

Plaintiff,

vs.

THE CITY OF IDAHO FALLS, JARED FUHRIMAN, STEVEN G. FINN, KEN BROWN, CURTIS STACEY, PHILLIP GRIMES, KENT LIVSEY, and STEVE ROOS,

Defendants.

Case No. 4:20-cv-00476-CWD

ORDER RE: MOTION TO DISMISS AND TO STRIKE (DKT. 23)

Before the Court is Defendants' motion to dismiss and to strike. (Dkt. 23.) The motion is fully briefed and the parties presented argument on April 27, 2021. Having carefully considered the briefing, arguments, and entire record, the Court will deny the motion for the reasons that follow.

FACTUAL AND PROCEDURAL BACKGROUND

The circumstances giving rise to this case began on June 13, 1996, when Angie Dodge was raped and murdered in her apartment in Idaho Falls, Idaho. The Idaho Falls Police Department (IFPD) immediately began investigating the crimes by gathering evidence and questioning neighbors and other individuals who knew Ms. Dodge. Among the individuals questioned was Christopher Tapp, who was nineteen years of age at the time.

Between January 7 and February 1, 1997, Tapp was interviewed several times by IFPD and polygraph tested.[1] What transpired during the interviews and polygraph tests and over the course of IFPD's investigation, are the basis for many of the claims raised in this lawsuit.

Tapp alleges Defendants engaged in deceptive tactics to coerce, manipulate, threaten, and lie to him during the interviews and polygraph tests for the purpose of causing Tapp to make several false confessions regarding the crimes. Additionally, Tapp alleges IFPD fabricated and falsified evidence to build a case against Tapp, and concealed exculpatory evidence of his innocence.

In the first interviews, Tapp denied having any knowledge of or involvement in the crimes. Later, Tapp claimed an individual named Ben Hobbs had confessed to the crimes and asked Tapp to help him with an alibi. However, Tapp denied having ever been to the crime scene. Following the January 10 interview, Tapp's parents retained counsel to represent him. On January 11, Tapp was arrested and charged as an accessory to a felony after he failed to appear for a scheduled interview.

Thereafter, Tapp was questioned a number of times while in police custody. Tapp's statements regarding the crimes changed during the in-custody interviews.

At the January 15 and January 17 in-custody interviews, Tapp entered into 1) a

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[1] The record reflects that Tapp was interviewed on January 7, 10, 11, 13, 15, 17, 18, 29, 30, and 31.

limited use immunity agreement and 2) a cooperation and settlement agreement with the State (collectively "immunity agreements"), whereby Tapp agreed to cooperate in the investigation and to plead guilty to a charge of aiding and abetting an aggravated battery in exchange for the State's agreement to not file any other charges relating to the Dodge crimes. Pursuant to the immunity agreements, Tapp was released from custody on January 17, and the charge of accessory to a felony was dismissed.

Tapp was questioned again on January 18 and January 29. However, prior to the January 29 interview, the prosecutor informed Tapp and his attorney that the prosecutor considered the immunity agreements void, because Tapp had been untruthful in describing the crimes. *See State v. Tapp*, 33 P.3d 828, 832 (Idaho Ct. App. 2001) (*Tapp I*). Nevertheless, Tapp continued with the interview and proceeded to make statements implicating himself in the crimes.[2] As a result, Tapp was rearrested and, on February 3, was charged with the crimes of rape and first degree murder of Angie Dodge.

Prior to trial, Tapp moved to suppress his statements made to IFPD on the grounds that his right to counsel was violated during the interviews, his statements were involuntary, and the immunity agreements precluded IFPD from using the statements. The trial court denied the motion except as to his statements made on January 11, 1997, following his first arrest and before his attorney had arrived.

The matter proceeded to trial and, on May 28, 1998, a jury found Tapp guilty on both of the charges - rape and first degree murder. Tapp was sentenced to a unified

[2] The January 29, 1997 interview was conducted both at the crime scene and at the Law Enforcement Building in Idaho Falls, Idaho.

sentence of life plus fifteen years' imprisonment with a thirty-year minimum term for first degree murder, and a concurrent unified twenty-year sentence with a ten-year minimum term for rape.

During the trial and the ensuing twenty-plus years of his incarceration, Tapp maintained his innocence. However, the judgment of conviction and sentence were affirmed on direct appeal, *State v. Tapp*, 33 P.3d 828 (Idaho Ct. App. 2001) (*Tapp I*), and his several petitions for post-conviction relief were dismissed, *Tapp v. State*, No. 43347, 2017 WL 993188, at *1 (Idaho Ct. App. 2017) (*Tapp V*).

In 2017, DNA evidence established that Tapp was not the individual who committed the Dodge crimes. As a result, on March 22, 2017, Tapp was released from prison upon an agreement with the State of Idaho for dismissal of the rape conviction, but the murder conviction against Tapp remained. Thereafter, in May 2019, new DNA testing identified Brian Dripps as the actual perpetrator of the crimes. After Dripps was apprehended he plead guilty to the crimes, admitting that he acted alone.

On July 25, 2019, the jury verdict and judgment of conviction against Tapp were vacated and, on August 12, 2019, the criminal case (*State of Idaho v. Christopher Conley Tapp*, Bonneville County Case No. CR-1997-481) was dismissed based on Tapp's actual innocence pursuant to Idaho Code Section 18-4901(6). (Dkt. 23, Attach. 2, 3, 4.)[3]

On October 8, 2020, Tapp filed this civil action against the City of Idaho Falls (the

[3] The trial court's order vacating the conviction also amended the order in the post-conviction petition case, (CV-2016-2549), to reflect that the conviction was vacated and dismissed due to actual innocence. (Dkt. 23, Attach. 3.)

City) and the following named individuals who worked at IFPD during the time of the Dodge investigation: Jared Fuhriman, Steven G. Finn, Ken Brown, Curtis Stacey, Phillip Grimes, John Kent Livsey,[4] Steve Roos. (Dkt. 1.)[5] The Complaint raises seven federal causes of action under 42 U.S.C. Section 1983 and six state law causes of action as follows:

<u>Federal Claims for violations of 42 U.S.C. § 1983</u>

Count I: Deprivation of Liberty Without Due Process of Law and Violation of Right to a Fair Trial under the Fourteenth Amendment based on fabrication of false evidence, including confessions against Fuhriman, Finn, Grimes, Brown, and Stacey.

Count II: Deprivation of Liberty Without Due Process of Law and Violation of Right to a Fair Trial under the Fourteenth Amendment based on withholding exculpatory evidence from the prosecution and defense against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey.

Count III: Post-Trial Due Process Deprivation of Liberty Without Due Process of Law under the Fourteenth Amendment against Fuhriman, Finn, Grimes, Brown, Stacey, Livsey, and Roos.

Count IV: Malicious Prosecution and Violation of the Fourth and Fourteenth Amendments against Fuhriman, Finn, Grimes, Brown, and Livsey.

Count V: Violation of the Right Against Self-Incrimination in Violation of the Fifth and Fourteenth Amendments against Fuhriman,

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[4] Defendants represent that the complaint incorrectly names Defendant Livsey by the first name "Kent," but that his true first name is "John." (Dkt. 23 at 6.) The parties are directed to confer and ensure that the individual Defendants are accurately named. If necessary, the parties should jointly file a notice correcting the record.

[5] The individually named Defendants were employed by IFPD during the Dodge investigation as follows: Fuhriman, Finn, Brown, and Grimes were all detectives; Defendant Stacey was a Sergeant; and Defendant Livsey was the Chief of Police. Defendant Roos was the Chief of Police during Tapp's post-conviction proceedings.

Finn, Grimes, Brown, and Stacey.

Count VI: Civil Rights Conspiracy Claim against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey.

Count VII: Supervisory Liability Claim against Livsey and Roos.

Count VIII: Failure to Intervene against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey.

Count IX: *Monell* Claim for Direct Involvement of Policymakers against the City of Idaho Falls.

Count X: *Monell* Claim Failure to Train, Supervise, or Discipline in Constitutionally Adequate Investigation Techniques, Interrogation Procedures, or *Brady* duties against the City of Idaho Falls.

Idaho State Law Claims

Count XI: Malicious Prosecution against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey.

Count XII: False Imprisonment against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey.

Count XIII: Intentional Infliction of Emotional Distress against Fuhriman, Finn, Grimes, Brown, Stacey, Livsey, and Roos.

Count XIV: Negligent Infliction of Emotional Distress against Fuhriman, Finn, Grimes, Brown, Stacey, Livsey, and Roos.

Count XV: Invasion of Privacy against Fuhriman.

Count XVI: Vicarious Liability against the City of Idaho Falls.

On December 7, 2020, Defendants filed the motion to dismiss and to strike the Complaint presently before the Court. (Dkt. 23.)

STANDARD OF LAW

Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," sufficient to "give the defendant fair notice of what the...claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A suit must be dismissed if the plaintiff fails to "state a claim upon which relief can be granted." Fed. R. Civ. Proc. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts "to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when the factual content pleaded allows a court "to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678.

In making this determination, the Court must take all material factual allegations as true and draw reasonable inferences in the non-moving party's favor. *Id.* However, the Court is "'not bound to accept as true a legal conclusion couched as a factual allegation,'" or to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Id.* (quoting *Twombly*, 550 U.S. at 555). Leave to amend the pleading should be freely granted, unless a "pleading could not possibly be cured by the allegation of other facts." *Cooks, Perkiss, & Leiche, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

DISCUSSION

On this motion, Defendants seek dismissal of the Complaint in its entirety based on collateral estoppel. Alternatively, Defendants assert that certain of the claims should be dismissed or stricken from the Complaint because they fail to state plausible claims for relief.[6] Plaintiff opposes the motion, arguing collateral estoppel does not apply and that the Complaint alleges facts sufficient to state plausible claims for relief.[7]

1. Collateral Estoppel

Defendants argue the claims in the Complaint are barred by collateral estoppel because they are all based on the contention that Tapp's confessions were coerced, and the Idaho Court of Appeals previously determined to the contrary on that issue in *Tapp I*. (Dkt. 23.)[8] In response, Tapp argues collateral estoppel does not bar his claims, because the judgment of conviction against him was vacated based on his actual innocence and, therefore, has no final preclusive judgment. (Dkt. 28.) Further, Tapp disputes that his claims are predicated solely on allegations of coerced confessions, pointing to his allegations that Defendants fabricated and concealed evidence.

"Collateral estoppel stems from the doctrine of *res judicata*, and establishes a legal barrier against the relitigation of an identical issue with the same party or its privy." *Picatti v. Miner*, 449 P.3d 403, 409 (Idaho 2019) (citing *Rodriguez v. Dep't of Correction*, 29 P.3d 401, 403 (Idaho 2001); *Anderson v. City of Pocatello*, 731 P.2d 171,

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[6] The Court previously addressed, in a separate order, the motion to dismiss to the extent it seeks dismissal of the state law claims based on Idaho Code Section 6-610(2). (Dkt. 36.)

[7] Plaintiff voluntarily dismissed his state law claim for vicarious liability against the City of Idaho Falls (Count XVI). (Dkt. 28 at 33, n. 10.)

[8] Defendants' briefing on the collateral estoppel issue is based primarily on the *Tapp I* decision. (Dkt. 23 at 12-16); (Dkt. 31 at 3-9.) Accordingly, the Court's discussion of the issue focuses on *Tapp I*. To the extent other rulings from Tapp's criminal proceedings are relevant to the issue, the Court finds they are not preclusive of the claims raised in this matter for the same reasons stated herein.

178 (Idaho 1986)). "This doctrine, also known as issue preclusion, prevents a party from resurrecting a lawsuit already put to rest; it protects litigants from unnecessary costs and promotes judicial economy from needless and likely inconsistent adjudications." *Id.* (citing *Berkshire Investments, LLC v. Taylor*, 278 P.3d 943, 951 (Idaho 2012); *Pines, Inc. v. Bossingham*, 963 P.2d 397, 400 (Idaho Ct. App. 1998)). State law governs the application of collateral estoppel to a state court judgment in a federal civil rights action. *Mills v. City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019).

In Idaho, there are five factors that must be evident for collateral estoppel to bar the relitigation of an issue determined in a prior proceeding:

> (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation.

Id. For the reasons that follow, the Court finds collateral estoppel does not apply here.

A. No Final Judgment

There is no final judgment preclusive of Tapp's claims in this matter. Tapp's convictions and the judgment have been vacated, and all of the charges against him have been dismissed based on Tapp's actual innocence. (Dkt. 23, Attach. 3, 4.)

Under Idaho law, a "final judgment includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." *Picatti*, 449 P.3d at 620 (quoting *Rodriguez*, 29 P.3d at 405). However, "a conviction or judgment that has been reversed on appeal and vacated cannot serve as collateral estoppel in a later proceeding." *Mills*, 921 F.3d at 1169-70.

In *Mills*, the plaintiff's conviction was reversed on appeal based on the illegality of a search. The United States Court of Appeals for the Ninth Circuit held that the plaintiff was not collaterally estopped from later litigating the issue of probable cause for his arrest under Section 1983, because the reversed conviction was not a final judgment. *Id.* at 1169. The court concluded that, because the reversed conviction and the jury's factual determinations underlying that conviction had been vacated, they lacked preclusive effect. *Id.* at 1169-70.

Similarly here, Tapp's conviction and judgment have been vacated. Therefore, the Idaho Court of Appeal's decisions affirming Tapp's now vacated conviction lack preclusive effect and cannot serve as collateral estoppel of his claims brought in this proceeding. Defendants' arguments to the contrary, discussed below, are unavailing.

Defendants maintain *Tapp I* decided the issue of whether Tapp's confessions were coerced and that the decision remains "good law" that is final, binding, and valid, irrespective of the fact that Tapp's convictions and judgment were vacated. (Dkt. 31 at 4-5.) Thus, Defendants argue, *Tapp I* is preclusive of any claims based on coerced confessions. The Court disagrees.

In *Tapp I*, the Idaho Court of Appeals denied Tapp's direct appeal of his conviction, concluding: "the judgment of conviction and sentences are affirmed." *Tapp I*, 33 P.3d 828, 841 (Idaho 2001). The judgment of conviction affirmed in *Tapp I* later was vacated, however. (Dkt. 23, Attach. 3, 4.) Consistent with the Ninth Circuit's reasoning in *Mills*, the Court finds *Tapp I* is not preclusive of the claims raised in this matter. *Mills*, 921 F.3d at 1169-70.

Defendants seek to limit the holding in *Mills*, and other cited cases, to instances where a prior conviction was reversed on direct appeal. (Dkt. 31 at 8.) That the conviction in *Mills* was reversed on direct appeal was not the determining factor in the Ninth Circuit's analysis finding collateral estoppel inapplicable, however. Instead, the Ninth Circuit focused on the finality of the judgment, or lack thereof, in determining whether preclusion applied. The Ninth Circuit concluded that, because Mills' conviction had been reversed and vacated, the conviction and all of the factual determinations underlying the conviction lacked preclusive effect in later proceedings. This was despite the fact that Mills challenged his conviction only on Fourth Amendment grounds, rather than by attacking the jury's underlying factual determinations. *Mills*, 921 F.3d at 1170.

Defendants further attempt to distinguish this matter from other case law where the convictions were overturned and collateral estoppel was determined to not apply. Defendants argue those cases lack an appellate ruling on the issue directly related to collateral estoppel, whereas here, *Tapp I* decided the issue of whether Tapp's confessions were coerced. (Dkt. 23 at 11-18); (Dkt. 31 at 6-7.) Again, Defendants' position is premised on the argument that *Tapp I* stands unaffected by the vacatur of the judgment of conviction. Defendants' position, however, is inconsistent with the Ninth Circuit's decision in *Mills* as discussed above and would result in an illogical application of collateral estoppel under the circumstances presented in this case.

For these reasons, the Court finds there is no final judgment precluding Tapp's claims in this action.

B. Identity of the Issues and Full and Fair Opportunity to Litigate

Even if the decision in *Tapp I* was "final" for purposes of collateral estoppel, it is not preclusive of the claims here, because the identity of issues requirement is not met. That is to say, the issues decided in *Tapp I* are not identical to the issues presented in this action such that Tapp had a full and fair opportunity to litigate the same issues previously.

"[A] prior criminal proceeding may bar a plaintiff from relitigating the same issue in a subsequent civil action, including suits brought under 42 U.S.C. [S]ection 1983." *Picatti*, 449 P.3d at 409 ("Generally, civil tort actions remain inappropriate vehicles to challenge the validity of criminal judgments—concerns for finality and consistency have invariably restricted opportunities for collateral attacks."). "The key inquiry… is to 'consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.'" *Id*. at 410 (quoting *Heck v. Humphrey*, 512 U.S. 477, 484-87 (1994)). "If it would so imply, the complaint must be dismissed until the plaintiff proves the criminal adjudication was invalidated; [however,] if it would not imply invalidity, the civil action should proceed." *Id*.

The claims brought in this civil action do not challenge the validity of Tapp's prior conviction and judgment or relitigate the same issues decided in the prior criminal proceedings. Again, the conviction and judgment have been vacated and, therefore, their validity is not being challenged here. Further, the ultimate issues decided in *Tapp I* are distinct from the allegations raised in the claims brought in this action.

In *Tapp I*, the court considered Tapp's contention that his statements made to law enforcement should have been suppressed based on: 1) the immunity agreements; 2) violation of his right to counsel under the Fifth and Sixth Amendments; and 3) violation of due process because the confessions were coerced and involuntary. *Tapp I*, 33 P.3d at 838-39. Relevant here, the Idaho Court of Appeals upheld the trial court's ruling that Tapp's disclosures to law enforcement were not the product of coercion. *Id.* at 839. The court specifically considered the use of interrogation techniques that promised leniency, referenced religious beliefs, and included provocative questions. Critically, however, *Tapp I* was based on the facts as they were then-known.

Conversely, the claims in this action are based on allegations that Defendants engaged in a calculated series of misconduct during the investigation and thereafter, for the purpose of obtaining and maintaining Tapp's conviction for the Dodge crimes. For example, the Complaint alleges Defendants manipulated Tapp into making false confessions by: lying about the evidence; feeding him non-public information about the crimes and then falsely testifying that Tapp had volunteered the non-public facts; and using abusive, threatening, and manipulative techniques to pressure him during the questioning as well as on unrecorded breaks during the interviews. (Dkt. 1 at ¶¶ 5, 62-63, 66, 68, 72-84.) Importantly, the claims further allege Defendants falsified evidence, withheld evidence, concealed investigative misconduct, and engaged in other unlawful actions. (Dkt. 1 at ¶¶ 3-7, 63, 66, 68, 71-79, 82-103, 106-107, 111, 142, 146-148.)

For purposes of this motion, the Court finds the claims here present issues that are materially distinct from those decided in *Tapp I*.[9] While the Idaho Court of Appeals considered the voluntariness of Tapp's confessions, the *Tapp I* decision was based on facts and circumstances as they were then-known to be true. The allegations presented here, however, include that Defendants engaged in several forms of misconduct designed to attain Tapp's conviction not only during the interviews and polygraph exams, but also during the investigation itself by falsifying and fabricating evidence. Further, the Complaint alleges Defendants knew of and concealed the misconduct during the investigation and after Tapp's conviction. Thus, the claims here are not limited to allegations that Tapp's confessions were coerced.

Construing these allegations as true, the facts and circumstances making up the claims in this matter were not entirely known at the time of the *Tapp I* decision. As such, Tapp did not have a full and fair opportunity to litigate the issues. Further, the allegations present issues that are distinct from those addressed in the prior criminal proceedings. Consequently, the Idaho Court of Appeals' decision does not preclude Tapp's claims in this case. *See e.g.*, *Wige v. City of Los Angeles*, 713 F.3d 1183, 1186 (9th Cir. 2013) (recognizing exceptions to collateral estoppel where: 1) the evidence known to the arresting officers is materially different from the evidence presented at the preliminary hearing, and 2) a plaintiff alleges the law enforcement officer lied or fabricated evidence at the preliminary hearing); *McCutchen v. City of Montclair*, 87 Cal.Rptr.2d 95, 99–101 (1999) (interpreting California law). For all of these reasons, the Court will deny Defendants' motion to dismiss based on collateral estoppel.

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[9] While there could be some overlap with *Tapp I*, it is not enough to prelude the claims in this matter.

2. Section 1983 *Monell* Claims: Count IX and Count X

To state a claim under 42 U.S.C. Section 1983, a plaintiff must allege two essential elements: 1) that a right secured by the Constitution or laws of the United States was violated, and 2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). "A local governmental entity can be sued under [Section] 1983 where a municipal policy or custom has caused an alleged violation of constitutional rights." *Herd v. County of San Bernardino*, 311 F.Supp.3d 1157, 1166-67 (C.D. Cal. 2018) (citing *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690–91 (1978)).

There are three ways a plaintiff can establish municipal liability under *Monell*. *Rodriguez v. Cty. of Los Angeles*, 891 F.3d 776, 802 (9th Cir. 2018). First, a plaintiff can show the alleged constitutional violation resulted from the governmental entity's official policies or customs. *Monell*, 436 U.S. at 694. Second, a plaintiff can show that "the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Id.* (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013)). Third, a plaintiff can show that a local government was "deliberately indifferent" to the plaintiff's rights by demonstrating a failure to train the officers or "through evidence of a 'failure to investigate and discipline employees in the face of widespread constitutional violations.'" *Rodriguez*, 891 F.3d at 802–03 (quoting *Hunter v. Cty. of Sacramento*, 652 F.3d 1225, 1234 n.8 (9th Cir. 2011)). However, municipal liability "may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy." *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

Here, Tapp asserts two *Monell* claims using the second and third avenues for establishing municipal liability under Section 1983. Namely, Tapp claims that the City had a policy, custom, or practice that violated his constitutional rights based on: 1) the direct involvement of policymakers, and 2) the failure to train, supervise, or discipline in constitutionally adequate investigation techniques, interrogation procedures, or *Brady* duties. (Dkt. 1 at ¶¶ 238-252.) Defendants argue both *Monell* claims fail because the allegations in the Complaint are insufficient to show the existence of a persistent and widespread custom, policy, or practice. (Dkt. 23.) The Court disagrees.

The Complaint alleges that IFPD created and maintained a policy, practice, or custom of engaging in unconstitutional techniques and misconduct in homicide investigations involving interrogation procedures to obtain coerced and false confessions and statements; fabrication of inculpatory evidence; suppression of exculpatory evidence or impeachment evidence; and intentional failure to conduct adequate investigation of crimes. (Dkt. 1 at ¶¶ 19, 118-124, 163-165, 238-252.) Tapp claims IFPD's deliberate indifference allowed a culture of impunity and misconduct in its unconstitutional investigation practices in homicide cases dating back to the early 1990's, that continued through the Dodge investigation. (Dkt. 1 at ¶¶ 118, 123, 124.)[10]

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[10] Defendants move to strike the allegations contained in Paragraph 123 of the complaint regarding the 1991 Whiteley case under Rule 12(f), arguing the allegations are unsupported and

The Complaint alleges the City's policymakers - Livsey, Roos, and Fuhriman - were directly involved in and supervised the Dodge investigation and post-conviction proceedings, knew of and participated in the alleged misconduct, and endorsed the unconstitutional practices. (Dkt. 1 at ¶¶ 117, 121, 122, 238-245.) Further, Tapp alleges that the City failed to train, supervise, and discipline its employees to prevent or ameliorate the unconstitutional misconduct that were the custom, policy, and practice of IFPD in homicide investigations. (Dkt. 1 at ¶¶ 118, 123, 124, 246-252.)

These allegations are sufficient to identify the unconstitutional policies, practices, and customs allegedly engaged in by IFPD, how the practices were constitutionally deficient, and the resulting harm to Tapp. (Dkt. 1 at ¶¶ 117-124.) Taking the allegations as true, as the Court must under Rule 12(b)(6), the Court finds both *Monell* claims are plausibly stated. While Plaintiff bears the burden of proving the allegations going forward, Defendants' desire for greater specificity on this motion demands too much at this phase of the case.

3. Claims Based on Failure to Conduct Post-Trial DNA Testing

Defendants argue that all of the claims predicated on allegations that Defendants refused or failed to conduct DNA testing on or after 2009, should be dismissed. Namely,

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scandalous. (Dkt. 23 at 18-20.) The motion to strike as to Paragraph 123 will be denied. The allegations in Paragraph 123 do not rise to the level of "scandalous" material necessitating that they be stricken under Rule 12(f). *Guerrero v. Halliburton Energy Servs., Inc.*, 231 F.Supp.3d 797, 802 (E.D. Cal. 2017) (Scandalous matter is that which "improperly casts a derogatory light on someone, most typically on a party to the action.). Whether the allegations regarding Fuhriman's misconduct in the Whiteley investigation are unsupported or unsubstantiated, remains to be seen. At this stage, the allegations are presumed to be true. *McCoy v. City of Vallejo*, 2020 WL 374356, at *3 (E.D. Cal. Jan. 23, 2020).

Count III as to all Defendants and all claims against Defendant Roos alleged in Counts VII, XIII, and XIV. (Dkt. 23 at 26.)[11] Defendants contend they were not required to conduct any further investigation or DNA testing, and any claims based on allegations that Defendants refused or failed to conduct DNA testing after 2009 are meritless and should be dismissed. (Dkt. 23.) Indeed, Defendants argue the "onus" was on Tapp to pursue post-trial DNA testing in accordance with Idaho Code Section 19-4902. Defendants point out that Tapp knew as much because he requested additional DNA testing pursuant to Idaho Code Section 19-4902 on July 20, 2012, but the request was denied because it was procedurally flawed.

In response, Tapp maintains he has stated plausible claims that Defendants violated his liberty interest in proving his innocence through newly discovered exculpatory evidence by: 1) making false representations about the evidence and misconduct that occurred during the investigation; and 2) refusing to conduct post-conviction DNA testing despite knowing of the misconduct, new testing techniques, and Tapp's likely innocence. (Dkt. 28.)

The Court finds the allegations in the Complaint plausibly plead claims that Defendants violated Tapp's due process rights and liberty interest in proving his innocence post-trial (Count III); and that Defendants intentionally and negligently caused Tapp emotional distress by unlawfully obtaining his wrongful conviction, failing to turn over evidence directly proving his innocence, and failing to take steps that would have

[11] Count III (§ 1983 post-trial deprivation of liberty without due process); Count VII (§ 1983 supervisory liability); Count XIII (intentional infliction of emotional distress); Count XIV (negligent infliction of emotional distress). (Dkt. 1.)

led to his exoneration years earlier (Counts VII, XIII, XIV).

The claims state facts which, if true, show that despite knowing of Tapp's innocence, Defendants' actions, or refusals to act, prevented or interfered with Tapp's post-trial efforts to prove his innocence and resulted in his continued incarceration and prolonged wrongful conviction. (Dkt. 1 at ¶¶ 18, 134-136, 139-142, 145, 204-208, 229-231, 267, 272.) The Complaint alleges that, in an effort to obtain and preserve Tapp's conviction, Defendants actively suppressed evidence of the misconduct that occurred during the investigation and prosecution of Tapp. Further, the Complaint alleges that, following his conviction, Defendants refused to act on newly discovered information that would have proven Tapp's innocence sooner despite knowing of the misconduct and of Tapp's likely innocence. *Id*. (e.g., alleging Defendants refused to pursue new DNA testing.) Most notably, the Complaint alleges Defendants "buried" or wrongfully represented evidence during the investigation and prosecution, made false representations about the evidence and circumstances of the investigation when refusing to perform additional testing, and prevented the additional testing and discovery of exculpatory evidence sooner. (Dkt. 1 at ¶¶ 18, 136.)

Defendants contest the sufficiency and consistency of the factual allegations, arguing the Complaint fails to specify what misrepresentations were made and why they were false. (Dkt. 31.)[12] However, the level of specificity Defendants demand on this

[12] Defendants quibble over the allegation that the Idaho State Police (ISP), not Defendants, denied the request to compare samples from the crime scene to the databases in California and Colorado. (Dkt. 31 at 13.) Critically however, the allegation states that ISP's refusal to do additional testing was "based on Defendants' false representations about the evidence." (Dkt. 1

motion exceeds the notice pleading requirements applicable at this stage of this lawsuit.

When considered in its entirety, the Complaint sufficiently states that the false representations making up the claims involved Defendants' alleged misconduct during the investigation and their later efforts to conceal the misconduct and Tapp's innocence. *See e.g.*, (Dkt. 1 at ¶¶ 8-18, 62, 69-72, 81-116, 136, 141-142, 147, 165, 225, 230-231, 267, 272.) While Plaintiff retains the burden of proving each of the elements of the claims going forward, these allegations are sufficient to state plausible claims for relief on Counts III, VII, XIII, and XIV.

4. Idaho Tort Claims Act: Counts XII, XIII, XIV, and XV

The Complaint alleges state law tort claims against the individual Defendants as follows: malicious prosecution, (Count XI), false imprisonment (Count XII), intentional infliction of emotional distress (Count XIII), negligent infliction of emotional distress (Count XIV), and invasion of privacy (Count XV). (Dkt. 1.) Defendants argue all of the state law tort claims against the individual Defendants, except the malicious prosecution claim, should be dismissed because they fail to allege malice or criminal intent as required to prove liability under the Idaho Tort Claims Act.

The Idaho Tort Claims Act (ITCA) provides that "governmental entities are subject to liability for their own negligent or wrongful acts, and those of their employees who were acting within the course and scope of their employment." *Hoffer v. City of Boise*, 257 P.3d 1226, 1228 (Idaho 2011); *see also* Idaho Code § 6-903(1). However, governmental employees acting within the scope of their employment are immune from

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at ¶ 136.)

liability for claims arising out of certain listed intentional torts, absent evidence that they acted with malice or criminal intent. Idaho Code § 6–904(3). The torts enumerated include: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contact rights. There is "a rebuttable presumption that any act or omission of an employee within the time and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." Idaho Code § 6–903(e).

In the ITCA context, "malice" has been defined as "the intentional commission of a wrongful or unlawful act without legal justification or excuse, whether or not the injury was intended." *James v. City of Boise*, 376 P.3d 33, 51 (Idaho 2016). "Criminal intent" means "the intentional commission of what the person knows to be a crime." *Id*. Malice and intent may be alleged generally. Fed. R. Civ. P. 9(b).

The Court finds the allegations in the Complaint plausibly plead malice with regard to the state law tort claims. (Dkt. 1 at ¶¶ 264, 267, 268, 272, 273, 277.)

The false imprisonment and intentional infliction of emotional distress claims, Counts XII and XIII, both expressly state that the Defendants' wrongful and unlawful acts during the investigation and in obtaining Tapp's wrongful conviction, were "intentional." (Dkt. 1 at ¶¶ 264, 267-268) (Defendants "intentional conduct in fabricating evidence, coercing false confessions, and concealing exculpatory evidence" and "intentional acts in both unlawfully obtaining his wrongful conviction and by failing to overturn evidence directly proving his innocence.") The allegations giving rise to the claims, which are expressly incorporated, involve the many contentions discussed above that Defendants acted intentionally, wrongfully, and unlawfully during the investigation and thereafter, to secure and maintain Tapp's wrongful conviction. (Dkt. 1 at ¶¶ 62-113, 136, 141, 142, 152, 165.) These allegations are sufficient to plead malice on the claims of false imprisonment and intentional infliction of emotional distress. Fed. R. Civ. P. 9(b).

Similarly, the negligent infliction of emotional distress claim is predicated on the same allegations of intentional and wrongful conduct by Defendants as the false imprisonment and malicious prosecution claims. (Dkt. 1 at ¶¶ 272-273.)[13] Namely, the allegations include that Defendants unlawfully obtained Tapp's wrongful conviction and failed to take steps that would have led to his earlier exoneration. (Dkt. 1 at ¶¶ 62-113.) As such, malice has been sufficiently plead for the negligent infliction of emotional distress claim.

As to the invasion of privacy claim, the Complaint alleges:

> Fuhriman placed Tapp in a false light in the public eye by making false and injurious public statements to the press that Tapp was guilty of the murder of Angie Dodge. Fuhriman made these statements even though he knew or should have known that Tapp was innocent.

(Dkt. 1 at ¶ 277.) In particular, the Complaint points to statements made by Fuhriman in 2012 during a NBC Dateline interview, and alleges that Fuhriman "lied and said that Tapp had provided non-public information that was 'absolutely…not fed,' and that there were 'no doubts' in Fuhriman's mind that 'Tapp is a part of the homicide itself.'" (Dkt. 1 at ¶ 147.) These allegations are sufficient to plead malice on the invasion of privacy claim.

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[13] Defendants recognize as much in their briefing. (Dkt. 23 at 31, n. 15.)

Liability under a claim for false light invasion of privacy requires public disclosure of some falsity or fiction concerning the plaintiff. *Uranga v. Federated Publications, Inc.*, 67 P.3d 29, 32 (Idaho 2003). A defendant will be liable for invasion of privacy by placing another in a false light, if 1) the false light is "highly offensive to a reasonable person," and 2) the defendant "had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts § 652E.

As Defendants acknowledge, an invasion of privacy claim arises out of conduct constituting libel, slander, misrepresentation, and deceit. (Dkt. 23 at 31, n. 15.) In those contexts, actual malice is defined as a statement made "with knowledge that the statement made was false or was made with reckless disregard of whether the statement was false or not." *Wilson v. St. Luke's Reg'l Med. Cntr., Ltd.*, 2014 WL 7186811, at *14 (D. Idaho Dec. 16, 2014) (quoting *Steele v. Spokesman-Review*, 61 P.3d 606, 609 (Idaho 2002)). Actual malice concerns the speaker's attitude towards the truth of the information, not how the speaker feels about the plaintiff. *Id.* (discussing express malice and actual malice in the context of defamation).

Without delving into the contours and nuances of the claim, for purposes of this motion, the Court finds the Complaint sufficiently pleads malice by alleging Defendant Fuhriman made public statements about Tapp which Fuhriman knew or should have known were false. (Dkt. 1 at ¶¶ 147, 277.)

5. Malicious Prosecution: Count XI

Count XI raises a claim for malicious prosecution against Fuhriman, Finn, Grimes, Brown, Stacey, and Livsey. (Dkt. 1 at ¶¶ 253-260.) To recover under a malicious prosecution claim, a plaintiff must prove: 1) there was a prosecution; 2) it terminated in favor of the plaintiff; 3) the defendant was the prosecutor; 4) malice; 5) lack of probable cause; and 6) damages sustained by the plaintiff. *Berian v. Berberian*, 483 P.3d 937, 944-45 (Idaho 2020) (quoting *Taylor v. McNichols*, 243 P.3d 642, 659 (Idaho 2010)); *see also Bliss v. Minidoka Irrigation Dist.*, 468 P.3d 271, 285 (Idaho 2020).

Defendants argue the Complaint fails to establish the lack of probable cause element necessary to sustain the claim for malicious prosecution. (Dkt. 23.) Defendants assert that any issues concerning probable cause were resolved by the Court of Appeals in *Tapp I*, which addressed contentions that Tapp's confessions were coerced and the lack of DNA evidence. Additionally, Defendants argue the Complaint's allegations are vague and ambiguous as to what inculpatory and exculpatory evidence was withheld. (Dkt. 23.) The Court disagrees.

"[P]robable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation." *Berian*, 483 P.3d at 945 (quoting *Clark v. Alloway*, 170 P.2d 425, 428 (Idaho 1946)). "The question of probable cause is to be determined in the light of those facts that the accuser knows or reasonably believes to exist at the time when he acts." *Id.* (quoting *Badell v. Beeks*, 765 P.2d 126, 128 (Idaho 1988) (quoting Restatement (Second) of Torts § 675 cmt. c)). "Although the probable cause analysis generally focuses on what the defendant knew at the time of his actions, an 'independent finding of probable cause by a magistrate preclude[s] as a matter of law a finding that there was no probable cause to arrest the plaintiff in a malicious prosecution action where there [has] been a full disclosure to the magistrate.'" *Id.* (quoting *Herrold v. Idaho State Sch. for the Deaf and Blind*, 732 P.2d 379, 381 (Idaho 1987)).

Here, the allegations in the Complaint are clearly sufficient to plead lack of probable cause. The Complaint alleges that Tapp's prosecution and conviction were based on false and fabricated evidence obtained as a result of Defendants' misconduct. (Dkt. 1 at ¶¶ 61-115, 164, 198, 254-256.) Most notably, Defendants' use of improper tactics and misconduct to procure Tapp's false confessions as well as to obtain other inculpatory and exculpatory evidence. (Dkt. 1 at ¶¶ 62-79, 81-85, 90-107, 198.) Taking these allegations as true, Defendants knew there was no probable cause to pursue the charges against Tapp, because the Defendants themselves falsified and fabricated the evidence used against him. This is sufficient to state a plausible claim of malicious prosecution. *Berian*, 483 P.3d at 945 (Probable cause is determined based on what the defendant knew or reasonably believed at the time he or she acted.). Defendants' desire for greater particularity with this motion demands more than is required at the pleading stage of this lawsuit.

Moreover, the *Tapp I* decision does not negate Tapp's allegations that probable cause was lacking. Independent judicial findings of probable cause do not preclude malicious prosecution claims where full disclosure was not made to the judicial officer. *Berian*, 483 P.3d at 944-45. Here, *Tapp I* was decided without full disclosure of the facts and circumstances surrounding the investigation and Tapp's conviction as alleged in the Complaint. Namely, Defendants' falsification and fabrication of the evidence used to convict Tapp. Indeed, Defendants' fabrication of evidence and concealment of their misconduct are at the very core of Tapp's claims in this case.

6. Punitive Damages

Defendants move to strike punitive damages from the Complaint's prayer for relief under Federal Rule of Civil Procedure 12(f). (Dkt. 23 at 7.) Specifically, Defendants argue punitive damages are not allowed under Section 1983 against the City, and that Idaho Code Section 6-1604 requires Tapp to request leave to amend before pursuing punitive damages on his state law claims. In response, Tapp contends there is nothing to strike from the Complaint at this time as it seeks punitive damages only against the individually named Defendants under Section 1983. (Dkt. 28 at 40.) Plaintiff is correct.

The prayer for relief seeks an award of punitive damages "against all individual Defendants." (Dkt. 1 at 57.) It is undisputed that punitive damages are an available remedy against the individual Defendants under Section 1983. The prayer for relief therefore properly requests punitive damages that are available under the law.

Further, as Tapp clarified in his response, the Complaint does not request punitive damages against the City or on any of the state law claims. (Dkt. 28 at 40.) This is apparent from the plain language of the Complaint. There is, therefore, nothing to strike from the prayer for relief.

The Court will take up the question of whether to allow leave to amend the Complaint to add a claim for punitive damages pursuant to Idaho Code Section 6-1604(2), if and when it is raised by Tapp. Requiring a wholesale amendment of the

Complaint as suggested by Defendants is entirely unnecessary at this stage of the proceedings, however. (Dkt. 23 at 39.) The motion to strike will be denied.

ORDER

THEREFORE IT IS HEREBY ORDERED that Defendants' Motion to Dismiss and to Strike (Dkt. 23) is **DENIED**.

IT IS FURTHER ORDERED that Count XVI, the claim of vicarious liability against the City of Idaho Falls, is **DISMISSED**.

UNITED STATES COURTS DISTRICT OF IDAHO

DATED: June 14, 2021

Honorable Candy W. Dale
United States Magistrate Judge