IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

NICHOLAS JAMES MCGUFFIN; and S.M.,

Plaintiffs,

v.

MARK DANNELS; PAT DOWNING; SUSAN HORMANN; MARY KRINGS; KRIS KARCHER; SHELLY MCINNES; RAYMOND MCNEELY; KIP OSWALD; MICHAEL REAVES; JOHN RIDDLE; SEAN SANBORN; ERIC SCHWENNINGER; RICHARD WALTER; CHRIS WEBLEY; ANTHONY WETMORE; KATHY WILCOX; CRAIG ZANNI; DAVID ZAVALA; ESTATE OF DAVE HALL; VIDOCQ SOCIETY; CITY OF COQUILLE; CITY OF COOS BAY; COOS COUNTY; and OREGON STATE POLICE,

Defendants.

Civ. No. 6:20-cv-01163-MK

FINDINGS AND RECOMMENDATION

KASUBHAI, Magistrate Judge:

Plaintiffs Nicholas McGuffin and his minor daughter, S.M. ("Plaintiffs") brought this

action against Defendants alleging claims under 42 U.S.C. § 1983 for violation of the Fourteenth Amendment, illegal detention and prosecution, failure to disclose exculpatory information, failure to intervene, conspiracy, destruction of evidence, unconstitutional practices, policies, and customs; claims under Oregon law of false imprisonment, malicious prosecution, false light, defamation, civil conspiracy, negligent training and supervision, intentional infliction of emotional distress, negligent and/or intentional spoliation of evidence; and a claim for indemnification. Defendants Riddle, Hormann, Krings, Wilcox, and the Oregon State Police (collectively, "State Defendants"); Defendants Dannels, Downing, Kracher, McInnes, McNeely, Oswald, Reeves, Sanborn, Schwenninger, Webley, Wetmore, Zanni, Zavala, City of Coquille, City of Coos Bay, and Coos County (collectively, "City and County Defendants"); and Defendants Vidocq Society and Richard Walter ("Vidocq Defendants") each filed motions to dismiss Plaintiffs' Complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiffs also filed a motion to strike and moved to substitute the Estate of David E. Hall as a defendant. The Estate of David E. Hall (the "Estate") filed a motion to dismiss Plaintiffs' Complaint for failure to state a claim.

For the reasons stated, the City and County Defendants' motion should be granted in part and denied in part. The State Defendants' motion to dismiss should be granted in part and denied in part. The Vidocq Defendants' motion to dismiss should be granted in part and denied in part. Plaintiffs' motion to strike should be denied as moot, and Plaintiffs' motion to substitute the Estate of David E. Hall should be granted. The Estate of David E. Hall's motion to dismiss should be denied.

BACKGROUND

Plaintiff Nicholas McGuffin ("McGuffin") spent nine years in prison after being convicted of manslaughter for the death of his girlfriend Leah Freeman ("Freeman") on July 19, 2011 in

Coos County Circuit Court. Freeman disappeared from her hometown of Coquille, Oregon, on June 28, 2000. Her decomposed body was found on August 3, 2000, in a rural area adjacent to the North Fork of the Coquille River, approximately 9 miles from where she was last seen alive. Freeman was then 15 years old and McGuffin was 18 years old.

The Complaint alleges that the Coquille Police Department initially refused to investigate Freeman's disappearance. (Compl. ¶ 46.) After Freeman's body was found, several of the City and County Defendants (the "Original Investigating Officers") investigated the murder but did not make an arrest. The Original Investigating Officers included City and County Defendants Reaves, Hall, McInnes, Zavala, Downing, Oswald, Zanni, Wetmore, and Karcher. During the original investigation, Oswald, a Coos County Sheriff's Deputy, allegedly discovered Freeman's left shoe but did not take any steps to preserve evidence from the shoe or the area where it was found. (Compl. ¶ 39.) Plaintiffs allege that all Original Investigating Officers agreed to fabricate evidence against McGuffin and falsely reported that McGuffin failed a polygraph examination in an attempt to coerce false confessions from McGuffin and his friend, Brent Bartley. (Compl. ¶¶ 54, 56, 57.)

The Original Investigating Officers used the fabricated polygraph evidence to obtain two search warrants for McGuffin's property, and fabricated reports of traffic stops with McGuffin on the night of Freeman's murder. (Compl. ¶¶ 60, 61.) The Original Investigating Officers also allegedly destroyed a videotape containing exculpatory evidence and attempted to persuade a witness, Kristen Steinhoff, to falsely implicate McGuffin in Freeman's murder, later suppressing evidence of these attempts as well. (Compl. ¶ 65.) Although they did not indict or arrest McGuffin, the Original Investigating Officers continued to harass and question him about Freeman's murder without McGuffin's attorney present.

Freeman's right shoe was found during the original investigation and tested for DNA at the OSP Lab in July 2000. The test revealed Freeman's DNA as well as the DNA of an unidentified male that did not match McGuffin's DNA. Plaintiffs allege that this evidence was suppressed by Defendants Krings, Hormann, and Wilcox ("OSP Lab Defendants") and the Original Investigating Officers. Sometime after the original investigation concluded, the case of Freeman's murder went cold.

Eight years after Freeman's death, in 2008, Defendant Reeves resigned as the Coquille Chief of Police and Defendant Dannels became the new Chief. Working with a team of Defendants McNeely, Sanborn, Webley, Karcher, Zanni, Schwenninger, Hormann, and Wilcox (the "Cold Case Investigators"), Dannels reopened the Freeman investigation. Plantiffs allege that the Cold Case Investigators knew that the Original Investigating Officers crafted a false theory of McGuffin's guilt based on fabricated evidence and knew of exculpatory evidence that established McGuffin's innocence. (Compl. ¶¶ 97, 98.)

In addition to suppressing the evidence fabricated by the Original Investigating Officers, the Cold Case Investigators allegedly fabricated additional evidence, including a false report that blood was found on Freeman's right shoe. The City of Coquille also requested assistance from the Vidocq Society, a charitable organization comprised of volunteers with forensic expertise and experience who provide pro bono assistance at the request of law enforcement agencies across the U.S. as they work to solve cold case homicides.

Defendant Walter was a volunteer for the Vidocq Society at the time Dannels reopened the Freeman investigation. Walter allegedly agreed to create a psychological profile of Freeman's killer that implicated McGuffin in her murder, and then presented it to the media and to the Cold Case Investigators. Together with the Cold Case Investigators, Walter also allegedly fabricated a

motive for Freeman's murder and falsely reported that Freeman may have been pregnant at the time of her murder, and that McGuffin was afraid he would be charged with statutory rape if the pregnancy was discovered. Plaintiffs allege that Defendant McNeely reported this theory on the news program "20/20" even though he knew that it was false, as did Walter.

The Cold Case Investigators also allegedly fabricated evidence by making false reports and eliciting false testimony from witnesses Scott Hamilton, Richard Bryant, and John Lindegren, whose statements were used against McGuffin both at grand jury and at trial. In 2010, 10 years after Freeman's death, McGuffin was indicted for Freeman's murder based on Defendants' fabricated evidence.

McGuffin was arrested and charged on August 23, 2010. The Cold Case Investigators invited "20/20" to film the arrest while making false and inflammatory statements about McGuffin to the show's producers, including statements about McGuffin's motive for murdering Freeman; that McGuffin could be carrying a gun; that McGuffin's car had been "wiped" of evidence of the murder; and that several witnesses had placed McGuffin with Freeman on the night Freeman was abducted. Plaintiffs allege that at the time they made these statements, the Cold Case Investigators knew or should have known that they were false and failed to intervene in each other's wrongdoing.

McGuffin was detained continuously from his arrest date until his trial. About one year after the indictment, McGuffin was tried and convicted of manslaughter by a non-unanimous vote of the jury. The DNA evidence found on Freeman's shoe was never disclosed by the prosecution to McGuffin's lawyers, or to the jury at McGuffin's trial. McGuffin appealed his conviction but the direct appeals of his conviction were denied and he sought post-conviction relief in the Malheur County Circuit Court. In November 2019, after McGuffin had spent nine years in prison,

McGuffin's conviction was vacated by Malheur County Circuit Court Judge Patricia Sullivan. Judge Sullivan denied McGuffin's actual innocence claim but allowed two claims of ineffective assistance of trial counsel, and one claim of discovery violation involving the undisclosed DNA evidence. Based on these claims, Judge Sullivan vacated McGuffin's conviction and he was granted a new trial. The Coos County District Attorney, noting that he agreed with the Judge Sullivan's statement that the record contained evidence of McGuffin's guilt, nonetheless moved to dismiss the charges against McGuffin. The Coos County District Attorney noted that at least two of the witnesses at McGuffin's original trial were deceased, and that even if McGuffin were convicted on retrial, he could not receive a sentence longer than his original 10-year sentence for manslaughter, of which he had already served over 9 years. McGuffin was released from prison with all criminal charges against him dismissed.

Plaintiffs filed this action on July 20, 2020, alleging various claims against twenty-four different Defendants. While some claims are alleged against all named Defendants, others are alleged against groups of Defendants: the Original Investigators, Cold Case Investigators, and the OSP Lab Defendants (Defendants Hormann, Krings, and Wilcox). Plaintiffs' Complaint alleges eleven distinct claims for relief arising from various permutations of these Defendants' coordinated and individual actions in violation of state and federal law. Plaintiffs' First Claim for Relief under 42 U.S.C. § 1983 alleges seven separate counts of federal violations: violation of the Fourteenth Amendment (Count 1), illegal detention and prosecution (Count 2), failure to disclose exculpatory information (Count 3), failure to intervene (Count 4), conspiracy (Count 5), destruction of evidence (Count 6), and unconstitutional practices, policies, and customs (Count 7).

Plaintiffs' ten remaining claims for relief arise under state law: false imprisonment (Second Claim), malicious prosecution (Third Claim), false light (Fourth Claim), defamation (Fifth Claim),

civil conspiracy (Sixth Claim), negligent training and supervision (Seventh Claim), intentional infliction of emotional distress (Eighth Claim), negligent and/or intentional spoliation of evidence (also titled "Eighth Claim" but referred to hereinafter as "Spoliation Claim"), and indemnification ("Ninth Claim"). The State Defendants, City and County Defendants, and the Vidocq Defendants all filed motions to dismiss. The Estate of David E. Hall also filed a motion to dismiss.

STANDARD OF REVIEW

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a plaintiff's factual allegations must be sufficient to raise a right to relief above the speculative level. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). While a complaint need not make detailed factual allegations, a complainant must provide the grounds of his entitlement to relief using "more than labels and conclusions." Id., at 545 ("a formulaic recitation of a cause of action's elements will not do").

DISCUSSION

I. Arguments Common to Defendants

The State Defendants, the City and County Defendants, and the Vidocq Defendants all raise arguments that Plaintiffs' claims should be dismissed due to (1) lack factual specificity sufficient to state a federal claim or put Defendants on notice; (2) lack of factual specificity to state a claim under state law or put Defendants on notice; (3) untimeliness; and (4) res judicata. The Court considers these arguments together before turning to Defendants' more particularized arguments.

1. Lack of Factual Specificity to State a Claim Under 42 U.S.C. § 1983

All moving Defendants argue that Plaintiffs have not pled sufficiently specific facts to state a claim for relief under 42 U.S.C. § 1983. Personal liability under § 1983 requires that a claimant

plead "that each [g]overnment-official defendant, through the official's own individual actions, has violated the Constitution." Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009). The claimant must "set forth specific facts as to each individual defendant's" contributory role in the resulting constitutional injury. Leer v. Murphy, 844 F.2d 628, 634 (9th Cir. 1988). The pleadings must also "give fair notice and … enable the opposing party to defend itself effectively." Starr v. Baca, 652 F.3d 1202, 1216 (9th Cir. 2011).

Plaintiffs plead seven distinct counts of violation of their federal rights under § 1983: violation of the Fourteenth Amendment (Count One), illegal detention and prosecution (Count Two), failure to disclose exculpatory information (Count Three), failure to intervene (Count Four), conspiracy (Count Five), destruction of exculpatory evidence (Count Six), and unconstitutional policies, practices, and customs (Count Seven). Counts One through Five are alleged simply against "Defendants." Count Six is alleged against the Original Investigating Officers and the Cold Case Investigators, and Count Seven is alleged against the City of Coquille, the Oregon State Police, the OSP Lab, Coos County, and the City of Coos Bay.

i. Notice and Group Pleading: Counts One through Four

The Court first considers Defendants' arguments that Counts One through Four of Plaintiffs' § 1983 claim should be dismissed because the Complaint does not precisely identify which Defendants are responsible for which constitutional harms and thus fails to provide adequate notice to each set of Defendants as to what conduct is alleged of them. The court may dismiss a cause of action because the claims are too undifferentiated to place defendants on notice of the claims and therefore warranted dismissal. Roberts v. Cty. of Riverside, 2020 WL 3965027, at *3-4 (C.D. Cal. June 5, 2020). A claimant, however, need not specify a subcategory of defendants if

all defendants are responsible for the alleged conduct or if the claimant does not possess the necessary information to specify a subcategory of defendant. Id., at *12.

Counts One through Four of Plaintiffs' First Claim for Relief are alleged against all Defendants. Defendants argue that this mode of pleading fails to provide adequate notice because each count fails to allege specifically which acts, and whose, violated a federal right. Plaintiffs respond by arguing that the allegations in the Complaint tie each of the Defendants to the wrongful conduct by their own acts and their direct involvement in the investigation, and that these specific factual allegations provide adequate notice to the Defendants. Plaintiffs also argue it is proper to name "the Defendants" instead of individual actors because the Complaint alleges that a group of government officials engaged in wrongful conduct together.

In the Ninth Circuit "there is no flaw in a pleading … where collective allegations are used to describe the actions of multiple defendants who are alleged to have engaged in precisely the same conduct." United States ex rel. Silingo v. Wellpoint, Inc., 904 F.3d 667, 681 (9th Cir. 2018). Here, however, the Complaint does not allege that each Defendant engaged in precisely the same conduct. Plaintiffs have alleged, rather, that various actors contributed in different ways and at different times to unconstitutional and tortious actions.

Specifically, Count One alleges that "Defendants deprived McGuffin of his constitutional right to due process and his right to a fair trial." (Compl. ¶ 183.) Count One alleges that Defendants deliberately withheld exculpatory and impeachment evidence from McGuffin, and fabricated and solicited false evidence including false witness statements and other evidence falsely implicating McGuffin. The Complaint alleges that the Original Investigating Officers, the Cold Case Investigators, and the Vidocq Defendants knew of and withheld potentially exculpatory DNA evidence from McGuffin and from the public. While Defendants argue that the Complaint does

not allege which Defendants withheld which evidence and when, Plaintiffs have alleged sufficient facts to link each Defendant (with the exception of Defendants Riddle and McInnes) to the fabrication of evidence, knowledge of potentially exculpatory evidence, and failure to disclose that evidence in violation of the Fourteenth Amendment.

Plaintiffs concede that Defendant Riddle is referenced only once in the Complaint, as having allegedly committed misconduct related to an interview with witness Kristen Steinhoff during the Cold Case Investigation. Plaintiffs acknowledge that Riddle should have been listed in ¶ 98 of the Complaint, defining the group of Cold Case Investigators. Because no facts pled in the Complaint implicate Riddle in any wrongdoing, Riddle should be dismissed from this action, and with leave to amend.

Defendant McInnes is mentioned only once in the Complaint. She is identified as a police officer of the City of Coquille acting under color of law and within the scope of her employment by and for the City of Coquille. The Complaint also makes clear that McInnes is sued in her individual capacity but does not specify what specific conduct she is accused of. Because there are no allegations of wrongdoing against her, McInnes should also be dismissed from this action, and with leave to amend.

Count Two alleges illegal detention and prosecution, and states that Defendants "accused McGuffin of criminal activity and exerted influence to initiate, continue, and perpetuate judicial proceedings against McGuffin without any probable cause" and therefore deprived McGuffin of his liberty (Compl. ¶¶ 193, 194.) The Complaint, however, contains no factual allegations that all named Defendants both accused McGuffin of criminal activity and perpetuated the criminal proceedings against McGuffin. Although the DNA evidence found in the OSP Lab was never disclosed, for example, OSP Lab Defendants Hormann, Krings, and Wilcox are not clearly

implicated in accusing McGuffin of murder. Count Two should therefore be dismissed because the Complaint fails to identify which specific Defendants caused McGuffin's alleged illegal detention and prosecution, and with leave to amend.

Count Three, which alleges failure to disclose exculpatory information, states that each and every named Defendant knowingly possessed exculpatory evidence and failed to disclose it. With the exception of Defendants McInnes and Riddle, the Complaint has alleged that each Defendant knew of the potentially exculpatory DNA evidence found on Freeman's shoe. While the Vidocq Defendants argue that there is no duty for a private citizen to disclose exculpatory evidence, these Defendants became agents of the state when they were allegedly hired by the City of Coquille to assist in the investigation of Freeman's murder.[1] As such, the Vidocq Defendants also had a duty to intervene when their fellow state agents violated the constitutional rights of a suspect or other citizen. United States v. Koon, 34 F.3d 1416, 1447 n.25 (9th Cir. 1994), rev'd on other grounds, Koon v. U.S., 518 U.S. 81 (1996). The allegations in the Complaint are sufficient to link each Defendant to this conduct for the purposes of stating a claim that Defendants failed to disclose exculpatory evidence.

Defendants next argue that Count Four, which alleges failure to intervene, does not allege which specific acts required intervention on what date, who failed to intervene, and who had the opportunity to do so. As the Ninth Circuit has stated, failure to intervene in the violation of a federal right is actionable only against an officer who "had an opportunity to intercede." Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000). Here, as noted, Plaintiffs have alleged that all Defendants knew about the fabricated and suppressed evidence. Defendants argue that

[1] The Vidocq Society's argument that they are not state actors for purposes of § 1983 liability is discussed in greater detail below.

Plaintiffs have not alleged which Defendants had the opportunity to intercede in the alleged violations of McGuffin's constitutional rights beyond making the conclusory statement that Defendants "had the duty and the opportunity to do so." (Compl. ¶ 206.) Given the nature of the allegations in this case, however, all Defendants who knew of the suppressed evidence had an opportunity to intervene at any time during the relevant period by disclosing the suppressed DNA evidence. Because Plaintiffs have alleged that all Defendants knew of the suppressed evidence and failed to intervene in McGuffin's arrest or prosecution by disclosing potentially exculpatory information, Defendants' motion to dismiss Count Four should be denied.

Plaintiffs' failure to identify specific actions and actors in Count Two, which require specific allegations of causation, renders the pleadings in these Counts insufficient to state a claim under § 1983. Defendants' motions to dismiss Count Two should therefore be granted. Defendants Riddle and McInnes should be excused from this case. Plaintiffs should be given leave to reallege this Count with greater factual specificity.

ii. Count Five: Conspiracy

All Defendants also argue that Plaintiffs' allegation of conspiracy, Count Five of Plaintiffs' First Claim for Relief,[2] while consistent with a conspiracy, do not plausibly allege a conspiracy because Plaintiffs have not alleges the dates, times, and words of express agreement required to form a conspiracy. In the Ninth Circuit, the existence of a conspiracy is a factual issue for the jury so long as the claimant provides circumstantial evidence that the alleged conspirators had a meeting of the minds to achieve the conspiracy's objectives. Mendocino Envtl. Ctr. v. Mendocino Cnty., 192 F.3d 1283, 1301-02 (9th Cir. 1999). While parallel conduct is insufficient to satisfy the

[2] Plaintiffs' state law claim of conspiracy, which suffers from the same deficiencies, is discussed below.

heightened pleading requirement for a conspiracy claim, "a circumstance pointing toward a meeting of the minds" is enough of a setting that would suggest the agreement necessary to make out a conspiracy claim. Twombly, 550 U.S. at 557. All that is required at the pleading stage is enough factual allegations "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." Id., at 557. The facts presented in the complaint must "nudge [the] claim across the line from conceivable to plausible." Id., at 570.

Here, Plaintiffs state that each Defendant played a role in investigating Freeman's abduction and murder, and that each individual Defendant worked together over the course of the ten years between Freeman's murder and McGuffin's trial to ensure his conviction. Plaintiffs allege that "Defendants and other co-conspirators…reached an agreement amongst themselves to 'close' the Freeman case by arresting and indicting McGuffin with the intent that he would be convicted." (Compl. ¶ 270.) Plaintiffs also allege that all Defendants furthered a conspiracy by fabricating evidence, suppressing, tampering with, or destroying material exculpatory and impeachment evidence, manipulating witnesses, and concealing misconduct in violation of McGuffin's constitutional rights. (Compl. ¶ 272.) Plaintiffs have also alleged that Defendants reported fabricated evidence to the media in order to influence the jury pool before McGuffin's criminal trial, which incited public pressure to secure a conviction.

The specific allegations in the Complaint, however, do not support a plausible claim of conspiracy among all named Defendants. As an initial matter, as noted above, the Complaint does not implicate Defendants Riddle or McInnes in any wrongful conduct. Further, while the Complaint alleges that all Original Investigating Officers participated in a conspiratorial scheme, it also notes that the original investigation into Freeman's murder went "cold" and that no arrest was made, despite the Original Investigating Officers' alleged participation in a conspiracy. Only

in 2008, eight years after Freeman's death and after the resignation of Defendant Reaves, did the Cold Case Investigators allegedly conspire with the Vidocq Defendants to wrongfully convict McGuffin. The only named Defendant who participated in both the original investigation and cold case investigation was Zanni of the Coos County Sheriff's Department. Plaintiffs have not plausibly pled that Reaves and the other Original Investigating Officers participated in a conspiracy with the Cold Case Investigators, the State Defendants, and the Vidocq Defendants to deprive McGuffin of his constitutional rights.

Further, it has not been plausibly alleged that all of the OSP Lab Defendants participated in the alleged conspiracy in a way that suggests a meeting of the minds. Of the State Defendants, the Complaint alleges that only Hormann and Wilcox belonged to the group of Cold Case Investigators. State Defendant Krings worked for the OSP Lab but is not implicated in the specific allegations of wrongdoing against the Cold Case Investigators. On this record, while the Complaint alleges that each Defendant played a role in the investigation of Freeman's death and McGuffin's eventual wrongful conviction, it does not plausibly suggest "a circumstance pointing toward a meeting of the minds" involving all of the named Defendants under the heightened pleading standards articulated in Twombly. 550 U.S. at 557.

Without more, Plaintiffs have not alleged a plausible claim of conspiracy in Count Five of their First Claim for Relief. Alleging that law enforcement officers ultimately focused their investigation on a particular suspect, who was then convicted, does not create a plausible inference of conspiracy. Lawful investigations and prosecutions also frequently result in convictions. Because Plaintiffs have failed to alleged circumstances that point toward a meeting of the minds of all named Defendants, Count Five of Plaintiffs' First Claim should be dismissed, and with leave to amend.

iii. Count Six: Destruction of Exculpatory Evidence

Defendants also argue that Count Six of Plaintiffs' federal Claim fails to meet the pleading standards of Rule 12(b)(6). Count Six alleges that the Original Investigating Officers and the Cold Case Investigators "suppressed, destroyed, and/or caused to be destroyed exculpatory and materially favorable evidence" in bad faith. (Compl. ¶ 220). Based on the allegations in the Complaint discussed above, this Count meets the pleading standards to properly put the Original Investigating Officers and the Cold Case Investigators on notice of a violation of federal law.

iv. Count Seven: Supervisory Liability

Count Seven alleges unconstitutional policies, practices, and customs of the City of Coquille, the Oregon State Police, the OSP Lab, Coos County, and the City of Coos Bay. This count, which the Supreme Court recognized as allowed under § 1983 in Monell v. Dept. of Soc. Services, 436 U.S. 658 (1978), requires the allegation of a specific policy followed by the named City and County Defendants that resulted in McGuffin's conviction. Here, Plaintiffs allege that the named agencies "failed to create and institute proper and adequate policies and procedures that would have prevented the harm that came to Plaintiffs." (ECF 51, p. 10.) Because Plaintiffs have alleged constitutional harms resulting from specific policies of the named Defendants, they have properly stated a Monell claim under § 1983.

The State Defendants also argue that Count Seven should be dismissed as to OSP because it is not a "person" under § 1983 that is subject to suit, relying on Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71 (1989). In Will, the Supreme Court relied on a footnote from its decision in Kentucky v. Graham, 473 U.S. 159 (1985) recognizing that states cannot be sued directly "unless a State has waived its Eleventh Amendment immunity or Congress has overridden it." Id. at 167 n.14.

Citing Harter v. Vernon, 101 F.3d 334 (4th Cir. 1996) for the proposition that the Eleventh Amendment is "a bar to the jurisdiction of a federal court," Plaintiffs argue that any entity not immune from suit under the Eleventh Amendment is a "person" subject to suit under § 1983. Id. Here, however, OSP has not waived its Eleventh Amendment immunity. As the Ninth Circuit reiterated in Aquarian Foundation v. State of Washington, 19 F.3d 25, at *1 (9th Cir. 1994) (unpublished), "Will's conclusion that a state is not a 'person' within the meaning of § 1983 bars [the plaintiff's] claims." Id. OSP is not a 'person' for the purposes of Plaintiffs' § 1983 claim and is therefore immune from suit. There is therefore a jurisdictional bar to Plaintiffs' federal claims against OSP and those claims should be dismissed.

2. Lack of Factual Specificity to State a Claim Under State Law

Defendants also argue that some of Plaintiffs' state law claims fail to allege sufficient facts (i) to state a claim and to provide proper notice to Defendants due to group pleading; and (ii) to state a claim of civil conspiracy under state law.

i. Group Pleading and Proper Notice

Plaintiffs' state law claims of false imprisonment (Second Claim), malicious prosecution (Third Claim), invasion of privacy/false light (Fourth Claim), defamation per se (Fifth Claim), intentional infliction of emotional distress (Eighth Claim), and Spoliation are alleged against all Defendants. Defendants reiterate their arguments that this mode of pleading fails to provide notice to individual Defendants of the accusations against them.

Throughout their Complaint, Plaintiffs make specific allegations with respect to the conduct and participation of the Original Investigating Officers, the Cold Case Investigators, and the OSP Lab Defendants (with the exception of Defendants Riddle and McInnes, as noted above)

to satisfy the Twombly requirements by stating "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570.

ii. Civil Conspiracy Claim

Defendants also argue that Plaintiffs' state law claim of civil conspiracy must be dismissed due to inadequate pleadings. The Vidocq Defendants[3] argue, additionally, that the civil conspiracy claim should be dismissed because civil conspiracy is not a tort under Oregon law. The Oregon Court of Appeals addressed the issue of civil conspiracy in Crosby v. SAIF Corp., 73 Or. App. 372, 376 (1985). The Crosby court found that while a civil conspiracy is not an independent tort, in the absence of a statute or unusual circumstances, the damage in a civil conspiracy flows from the overt acts and not from the conspiracy. Id. The Oregon Supreme Court has elaborated that civil conspiracy under Oregon law is a way "in which the person may become jointly liable for another's tortious conduct." Granewich v. Harding, 329 Or. 47, 53 (1999). The court in Keller v. Commecial Credit Co., 149 Or. 372, 375 (1935) stated that "[i]t is now well established that, in civil actions, the conspiracy is not the gravamen of the charge, but may be pleaded and proved in aggravation of the wrong of which the plaintiff complains, and as enabling him to recover against all the conspirators, as joint tort feasors." Thus if a claimant has sufficiently pled the existence of a conspiracy, the damages can be sustained against all alleged co-conspirators.

Here, however, as discussed above, Plaintiffs have not pled the existence of overt acts that plausibly support a conspiracy. Plaintiffs allege that the Vidocq Defendants fabricated a psychological profile that implicated McGuffin in Freeman's murder, as well as other evidence that supported a false theory of McGuffin's guilt. Plaintiffs also alleged that the Vidocq Defendants

[3] Some of the Vidocq Defendants' specific arguments about their roles in Plaintiffs' allegations of state law violations are discussed in section IV, below.

suppressed exculpatory evidence, and that the fabricated evidence formed the basis for McGuffins' wrongful arrest, indictment, and conviction. While the facts presented in the complaint present parallel conduct that facilitated McGuffin's indictment and eventual conviction, they do not "nudge [the] claim across the line from conceivable to plausible." Twombly, 550 U.S. at 570. Because Plaintiffs have failed to plausibly allege a meeting of the minds between all Defendants implicated in the alleged conspiracy, Plaintiffs' Sixth Claim should be dismissed, and with leave to amend.

3. Timeliness Issues

Defendants also contend that various claims in the Complaint are untimely. Defendants first argue that almost all of Plaintiffs' federal claims[4] are time-barred by the two-year statute of limitations because they accrued as of McGuffin's conviction date of July 19, 2011. Because 42 U.S.C. § 1983 does not contain a statute of limitations, the Court applies the state's statute of limitations for personal injury claims. Wilson v. Garcia, 471 U.S. 261, 276 (1985). There is a two-year statute of limitations on federal claims set forth in Or. Rev. Stat. 12.110(1). Bonneau v. Centennial School District No. 281, 666 F.3d 577 (2012). In order to determine the date upon which the statute of limitations begins to run, that is, the date that a plaintiff's claim accrues, federal interpretations of accrual are controlling. Johnson v. State of California, 207 F.3d 650, 653 (9th Cir. 2000). The accrual of a § 1983 claim depends upon the substantive basis of the claim. Id. The statutes of limitations for civil claims challenging a criminal prosecution or conviction do not accrue until the conviction is reversed. McDonough v. Smith, 139 S.Ct. 2149, 2158 (2019).

[4] Defendants do not raise this argument about Plaintiffs' federal counts of malicious prosecution and fabrication of evidence, because these claims accrued after McGuffin's conviction was vacated.

i. Count Two: Illegal Detention and Prosecution

The State Defendants argue that Plaintiffs' Count of "illegal detention and prosecution" is barred by the statute of limitations. To support this argument, the State Defendants cite Wallace v. Kato, 549 U.S. 384, 388 (2007) and Mills v. City of Covina, 921 F.3d 1161 (9th Cir. 2019) for the proposition that the Heck bar does not apply to § 1983 claims for unlawful detention, false arrest, false imprisonment, and failure to train. Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). Both Wallace and Mills held the statute of limitations on a claim of unlawful arrest began to run at the time of the claimant's unlawful arrest, not the date that the petitioner's conviction was vacated. Applying this holding to the Complaint would imply that Plaintiffs' claim of illegal detention and prosecution is time-barred, because McGuffin's allegedly unlawful arrest occurred in 2010.

Plaintiffs argue that the unlawful arrests at issue in Wallace and Mills were separate and distinct from the ensuing prosecution that followed the issuance of legal process and continued detention. Plaintiffs' claims of constitutional violations, by contrast, arise out of allegedly fabricated and suppressed evidence that resulted in McGuffin's pretrial detention, prosecution, and conviction, after the arrest was completed. Plaintiffs argue that it was McGuffin's pretrial detention and resulting wrongful conviction and continued incarceration that is alleged to be illegal under Count Two, and that they have therefore alleged an ongoing wrong commencing at McGuffin's pretrial detention and ending after his conviction was vacated. The Seventh Circuit has stated that "[w]hen a wrong is ongoing rather than discrete, the period of limitations does not commence until the wrong ends." Manuel v. Joliet, 903 F.3d 667, 669 (7th Cir. 2018). As stated in the Complaint, Plaintiffs' Count Two pertains to Defendants' efforts to "initiate, continue, and perpetuate judicial proceedings against McGuffin." (Compl. ¶ 193.)

In the Ninth Circuit, however, a claimant's false arrest and false imprisonment claims based on an arrest that ultimately led to a conviction and which was later invalidated because the arrest was not supported by probable cause, are barred by Heck. Mills v. City of Covina, 921 F.3d 1161 (9th Cir. 2019). Plaintiffs could have brought their false arrest and false imprisonment claims immediately after McGuffin's arrest, notwithstanding his pending criminal proceedings. As such, Plaintiffs' claim of illegal detention should be dismissed because it fails to sufficiently establish an ongoing wrong commencing at McGuffin's pretrial detention.

ii. State Law Claims

The State Defendants and City and County Defendants also argue that Plaintiffs' state law claims are barred, variously, by the two-year statute of limitations, the statute of ultimate repose, and the 180-day tort claim limit. Under the Oregon Tort Claims Act, Or. Rev. Stat. 30.275(9), there is a two-year statute of limitations for tort claims and a 180-day notice provision. Under Or. Rev. Stat. 12.120(2), a defamation claim has a one-year statute of limitations. The statute of limitation on a tort claim begins to run when the claim accrues, which is "when the party owning it has a right to sue on it." Duyck v. Tualatin Valley Irr. Dist., 304 Or. 151, 161 (1987). Accrual occurs when the claimant has a reasonable opportunity to discover his injury and the identity of the party responsible for it.

A. Statute of Limitations Issues

Defendants argue that Plaintiffs' state law claim for false imprisonment is time-barred because it accrued when McGuffin was detained in 2010. Plaintiffs' Second Claim for Relief alleges "False Imprisonment" based on a wrongful arrest and incarceration that took place on August 23, 2010. (Compl. ¶ 240.) Plaintiffs notified Defendants of their state law claims by letters dated May 8, 2020, and May 12, 2020. Defendants argue that because Plaintiffs did not provide

notice of their false imprisonment claim within 180 days of McGuffin's allegedly wrongful arrest, Plaintiffs' Second Claim for Relief should be dismissed.

In Wallace, 549 U.S. at 397, as discussed above, the Supreme Court held that a Fourth Amendment claim based on a pre-process arrest was time-barred by the statute of limitations. Id. Plaintiffs argue that this case is distinct from Wallace because Plaintiffs allege a post-process false imprisonment under Oregon common law. The statute of limitations in Oregon for false imprisonment claims raised under Oregon law "does not begin to run until the prior action, pursuant to which the process was issued, has finally terminated in plaintiff's favor." Guyot v. Multnomah Cnty., 51 Or. App. 373, 378 (1981). Because this Claim arises out of an ongoing harm that ended when McGuffin's conviction was vacated by the Malheur County Circuit Court, it is not time-barred.

Plaintiffs' claims of invasion of privacy/false light and defamation (Fourth and Fifth Claims) accrued before McGuffin's conviction. Both claims have the same factual basis: Defendants' allegedly false reports to the media and to the public that McGuffin killed Freeman. Generally, a cause of action for defamation accrues on the date of publication unless the defamatory statements were made confidentially. Holdner v. Oregon Trout, Inc., 173 Or. App. 344, 350 (2001).

Plaintiffs argue that their claims of false light and defamation per se were tolled during McGuffin's incarceration, distinguishing this case from Laird v. Stroot, 188 Or. App. at 120. In Laird, the Oregon Court of Appeals addressed a claimant's civil claims that were unrelated to the reason for his incarceration. The Laird court therefore did not address a claimant's ability to bring a civil claim that would imply the wrongfulness of a criminal conviction. Here, Plaintiffs allege that Defendants reported fabricated evidence to the media, and that McGuffin's conviction was

based on those statements. Plaintiffs argue that the alleged defamation implies that McGuffin's conviction was wrongful and that Plaintiffs could not raise these claims until McGuffin's conviction was determined to be wrongful. The Court disagrees. The allegedly false and defamatory statements made by Defendants would have been harmful and offensive at the time they were made, which preceded McGuffin's arrest and incarceration. For this reason, Plaintiffs Fourth and Fifth claims for relief should be dismissed with prejudice because they are time-barred. Or. Rev. Stat. 12.120(2).

Defendants also argue that Plaintiffs' Eighth Claim of intentional infliction of emotional distress accrued within a reasonable time after the allegedly false and defamatory statements were made and is therefore barred by the two-year statute of limitations. Or. Rev. Stat. 30.275(9). Nothing in Plaintiffs' Eighth Claim, however, suggests that it is limited to the emotional distress caused solely by Defendants' acts of defamation. Plaintiffs' Eighth claim for relief is not time-barred.

B. Statute of Ultimate Repose

Defendants next argue that all of Plaintiffs' state claims that allege negligence are barred by the statute of ultimate repose. There is a 10-year period of ultimate repose in Oregon law. Or. Rev. Stat. 30.265(6)(d). Plaintiffs' allegations of negligence that occurred prior to July 20, 2020, the date the Complaint was filed, include Plaintiffs' claims of defamation, negligent supervision and training, and negligent spoliation of evidence are based. Defendants argue that Plaintiffs' Fifth, Seventh, and Eighth claims are therefore barred by the statute of ultimate repose.

Oregon's statute of ultimate repose does not apply to claims that allege conduct that is reckless or intentional. Here, only three of Plaintiffs' claims can be proved by negligent conduct – defamation, negligent supervision and training, and negligent spoliation of evidence. However, the

statute of ultimate repose does not apply to these claims because they allege harm to reputation and rights, not person or property. The statute, by its terms, applies to actions for negligent injury to "person or property of another." Or. Rev. Stat. 112.115(1). The Court thus rejects Defendants' argument.

4. Res Judicata Issues

The Vidocq Defendants and the City and County Defendants also argue that the scope of Plaintiffs' relief should be limited by the General Judgment signed by the post-conviction relief Judge Sullivan, who resolved three claims in McGuffin's favor and issued a General Judgment for the purposes of appellate review and for purposes of res judicata. Thus, these Defendants argue, Plaintiffs are only entitled to assert claims based on the three claims resolved by Judge Sullivan in McGuffin's favor: ineffective assistance of counsel, and the discovery violation by the State of Oregon involving DNA evidence detected on Freeman's shoes. Defendants also ask the Court to take judicial notice of the facts recited in Judge Sullivan's General Judgment. Plaintiffs object to this request.

Res judicata or claim preclusion requires (1) an identity of claims, (2) a final judgment on the merits, and (3) the same parties, or privity between the parties. Harris v. Cnty. Of Orange, 682 F.3d 1126, 1132 (9th Cir. 2012). Here, because there is no identity of claims between McGuffin's claims for post-conviction relief and this action, res judicata cannot apply. Harris, 682 F.3d at 1132. Further, the Court declines to take judicial notice of facts recited in Judge Sullivan's General Judgment.

II. Remaining Arguments Common to Multiple Defendants

In what follows the Court addresses further arguments advanced by multiple Defendants: (1) that the Vidocq Defendants and the City and County Defendants are shielded by qualified

immunity; (2) that there is no direct cause of action for indemnification; and (3) that Plaintiffs' Spoliation Claim is improper.

1. Qualified immunity

The Vidocq Defendants and the City and County Defendants also argue that they are shielded from § 1983 liability by qualified immunity. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009). The Court analyzes a qualified immunity question using a two-step process. First the Court "must decide whether the facts that a plaintiff has alleged … make out a violation of a constitutional right." Pearson, 555 U.S. at 231. "Second … the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." Id.

i. City and County Defendants

In their briefing on qualified immunity, the City and County Defendants reiterate their arguments that Plaintiffs' allegations do not include sufficient factual detail to put Defendants on notice. Specifically, they argue that the Complaint does not provide notice of Defendants' conduct sufficient for the Court to perform the two-step qualified immunity analysis. Pearson, 555 U.S. at 231. Here, the City and County Defendants argue that they cannot ascertain what conduct is being alleged as unconstitutional and therefore have no way of knowing whether their conduct violated a clearly established federal right, and therefore whether or not qualified immunity applies. The Court has addressed the issues related to Plaintiffs' specific factual allegations above.

Here, the Complaint alleges fabrication of evidence depriving McGuffin of his liberty and the right to a fair trial in violation of due process; the suppression of exculpatory evidence

depriving McGuffin of liberty and right to a fair trial in violation of due process; and detention without probable cause in violation of McGuffin's rights under the Fourth and Fourteenth Amendments. These rights were clearly established at the time the alleged acts occurred. Insofar as Plaintiffs have properly alleged claims under § 1983, the City and County Defendants are not shielded from these claims by qualified immunity.

ii. Vidocq Defendants

The Vidocq Defendants argue that if Plaintiffs have pled facts demonstrating that the Vidocq Defendants were state actors for the purposes of § 1983 liability, the Vidocq Defendants are entitled to qualified immunity. As discussed below, Plaintiffs' federal § 1983 claims against the Vidocq Society should be dismissed. With respect to Defendant Walter's conduct, Plaintiff's constitutional rights under the Fourteenth Amendment were clearly established at the time of the alleged deprivation. Miller v. Pate, 386 U.S. 1, 7 (1967), Devereaux v. Abbey, 263 F.3d 1070, 1074-75 (9th Cir. 2001). Thus, insofar as Plaintiffs have stated federal claims against Walter, he is not shielded by qualified immunity.

2. No Direct Cause of Action for Indemnification

In addition to the arguments discussed above, both the State Defendants and City and County Defendants argue that Plaintiffs have no cause of action under the indemnification provisions of the Oregon Tort Claims Act. While Plaintiff alleges a claim for indemnity under, Or. Rev. Stat. 30.285, that statute's provision of indemnification runs between the public body's employee and the public body itself and does not provide a separate cause of action in favor of the Tort Claims Act claimant. See Krieger v. Just, 319 Or. 328, 329 (1994). Further, nothing in the Oregon indemnification statute, Or. Rev. Stat. 30.287, provides a separate cause of action for

indemnification. Plaintiffs' Ninth Claim for Relief, entitled "State Law – Indemnification," should therefore be dismissed.

3. Spoliation Claim

The Vidocq Defendants and State Defendants also ask the Court to dismiss Plaintiffs' Claim of spoliation of evidence. The Vidocq Defendants contend that Plaintiffs have not pled a plausible claim for negligent and/or intentional spoliation of evidence, citing Blincoe v. Western States Chiropractic College, 2007 WL 2071916 at *16 (D. Or. June 12, 2007) for the proposition that Oregon law does not recognize a cause of action for this claim. After Blincoe was decided, however, the Oregon Court of Appeals recognized the existence of a claim for negligent spoliation of evidence. Marcum v. Adventist Health System/West, 215 Or. App. 166, 191 (2007), rev'd on other grounds, 345 Or. 237 (2008). Oregon law thus allows a claimant to plead a claim for negligent and/or intentional spoliation of evidence. Plaintiffs have alleged that all Defendants, including the Vidocq Defendants, suppressed evidence, including evidence of their own wrongful conduct as well as evidence of McGuffin's innocence.

The State Defendants argue that Plaintiffs' Spoliation Claim should be dismissed as to the State Defendants because it does not allege spoliation by any State Defendant. On the contrary, Plaintiffs allege that the State Defendants suppressed DNA evidence found on one of Freeman's shoes, as well as other potentially exculpatory evidence and evidence of Defendants' own misconduct. (Compl. ¶¶ 65-66, 296.) Plaintiffs have thus identified the State Defendants' roles in the spoliation of evidence.

The State Defendants also argue that Plaintiffs' spoliation claim is premature because a spoliation claim is not cognizable until after the underlying claim has been resolved and the claimant either lost or suffered a diminution in its value. Because Plaintiffs bring their original tort

claims in this action, the State Defendants argue, Plaintiffs cannot bring a claim for diminution of value via spoliation in the same action. To advance this claim, the State Defendants rely on Melo v. Oregon, 2016 WL 297430, *2 (D. Or. Jan. 20, 2016). In Melo, the claimant filed suit against the State of Oregon after the claimant's son died while in the care of an adult foster care facility operated by the State. The claimant also sued a medical doctor who was hired to conduct an autopsy of the claimant's son and failed to preserve blood and urine samples to conduct a toxicology review. The claimant sued the doctor for spoliation of evidence. The Judge in Melo dismissed the spoliation claim as premature, citing Classen v. Arete NW for the proposition that before a spoliation claim is cognizable, a claimant must first suffer the loss, or diminution in value, of the underlying claims. 254 Or. App. 216, 222 (2012). Because the plaintiff in Classen had not filed any underlying claims, the court held that the plaintiff could not establish that the doctor's failure to preserve evidence caused her any damage.

Plaintiffs' spoliation claim, unlike the claims in Classen and Melo, arises from the same nucleus of facts as the other underlying claims against Defendants. Here, the alleged spoliation arises from Defendants' destruction of evidence including potentially exculpatory videotapes. Under Plaintiffs' spoliation theory, the damage is the diminution in value of the underlying claims alleged in this Complaint. For these reasons, Plaintiffs have adequately pled a claim of spoliation.

The Vidocq Defendants argue that, even if Plaintiffs have adequately pled a spoliation claim, they have not alleged any acts of spoliation of evidence against Vidocq or Walter. The Court agrees. Although Plaintiffs allege that Walter fabricated evidence to implicate McGuffin in Freeman's murder, there are no specific allegations that either of the Vidocq Defendants participated in the destruction of any evidence. Similarly, the State Defendants are not alleged to have participated in the destruction of videotapes or any other evidence. Because Plaintiffs have

not alleged any acts of spoliation of evidence against the Vidocq Defendants or the State Defendants, the Spoliation Claim should be dismissed as to these parties, and with leave to amend.

III. The State Defendants' Remaining Arguments

In addition to their arguments discussed above, the State Defendants also make arguments that (1) Plaintiff S.M.'s claims should be dismissed; and (2) that Plaintiffs' claims implying an unlawful conviction must be dismissed because the criminal case against McGuffin did not terminate in McGuffin's favor.

1. Plaintiff S.M.'s Claims

The State Defendants argue that all of Plaintiff S.M.'s claims should be dismissed. All of S.M.'s alleged damages result from the loss of consortium with her father while he was incarcerated. The State Defendants first argue that a child's claim for loss of consortium with her parent is not recoverable in negligence, citing Norwest, By & Through Crain v. Presbyterian Intercommunity Hosp., 293 Or. 543, 569 (1982). A child, however, can sustain a negligence claim for loss of consortium if "that person's consequential loss has a legal source besides its foreseeability." Id. To the extent that the State Defendants ask the Court to find that their alleged conduct was not intentional or reckless, the Court declines to engage in this fact-specific inquiry on a Rule 12 motion. House v. Hicks, 218 Or. App. 348, 360 (2008) (holding that whether conduct is an extraordinary transgression is "a fact-specific inquiry"). Plaintiffs have properly alleged loss of consortium due to Defendants' intentional and reckless actions, and S.M.'s claims are cognizable under Oregon law. See Shoemaker v. Management Recruiters Int'l, 125 Or. App. 568, 572 (1993).

S.M.'s claims are also cognizable under federal law because she alleges a claim for loss of consortium that arises out of her substantive due process liberty interest in her relationship with

her father. See Curnow v. Ridgecrest Police, 952 F.2d 321, 325 (9th Cir. 1991) (recognizing a "constitutionally protected liberty interest under the Fourteenth Amendment" in the companionship and society between a parent and child). In Ovando v. City of Los Angeles, 92 F. Supp. 2d 1011, 1018 (C.D. Cal. 2000), the court recognized that a child's due process rights can be vindicated through a § 1983 action to redress unwarranted state interference with the relationship between a child and her parents. On this record, Plaintiffs have adequately pled a claim for loss of consortium arising from S.M.'s liberty interest in her relationship with her father.

2. Favorable Termination of Criminal Proceedings

The State Defendants also argue that Plaintiffs' claims that allege an unlawful conviction, including both Plaintiffs' state and federal malicious prosecution claims, must be dismissed because the relevant criminal proceedings did not terminate in McGuffin's favor. McDonough v. Smith, 139 S. Ct. 2149, 2156 (2019). Federal courts rely on state common law for the elements of state law malicious prosecution. Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004). To prevail on a malicious prosecution claim under Oregon law, the claimant must demonstrate (1) the institution of continuation of criminal proceedings; (2) by or at the insistence of the defendant; (3) termination of such proceedings in the claimant's favor; (4) malice in instituting the proceedings; (5) lack of probable cause for the proceedings; and (6) injury or damage as a result. Miller v. Columbia City, 282 Or. App. 348, 360 (2016). While "[d]ismissal of an indictment at the request of the district attorney is generally sufficient to satisfy the requirement that the criminal proceeding has terminated in the favor of the plaintiff," Rose v. Whitbeck, 277 Or. 791, 798-99 (1977), the dismissal must "reflect adversely on the merits of the action." Perry v. Rein, 215 Or. App. 113, 130 (2007).

Here, Judge Sullivan's General Judgment vacating McGuffin's conviction contained no indication of a finding of innocence or exoneration. After McGuffin's conviction was vacated, it was within the discretion of the Coos County District Attorney to proceed with a new criminal trial against McGuffin. The Coos County District Attorney chose not to so proceed and dismissed the charges against McGuffin, stating that he chose this course of action because two of prosecution's key witnesses were deceased, and because McGuffin had already served 9 years of a potential 10-year sentence for manslaughter. The dismissal of charges against McGuffin therefore does not "reflect adversely on the merits" of those charges as required by state law for a favorable termination. Perry, 215 Or. App. at 130.

Plaintiffs argue that it is improper for the Court to consider the reason that the charges against McGuffin were dismissed in determining whether the termination of McGuffin's charges was "favorable." The court in Perry, however, noted that in Oregon, a fact-specific inquiry is required to determine whether a voluntary dismissal of charges was favorable. The purpose of the inquiry is to determine whether the decision to dismiss the charges reflected adversely on the merits of the case. Id., at 126. The Perry court found that a complainant's motivations for dismissing a complaint were directly relevant to the question of favorable termination. Id., at 128. Because Plaintiffs have not alleged facts to show that the criminal charges against McGuffin were favorably terminated in a way that reflects adversely on the merits of the charges, Plaintiffs' state law claim of malicious prosecution (Third Claim) should be dismissed, and with leave to amend.

The termination standard for Plaintiffs' federal claim of malicious prosecution, however, is determined by federal law. Under Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), a claimant is not permitted to bring a civil rights claim that would render his criminal conviction invalid until his underlying conviction has been "reversed on direct appeal, expunged by executive

order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." The Supreme Court reiterated in McDonough v. Smith, 139 S. Ct. 2149, 2157 (2019) that the favorable termination requirement is satisfied "once the criminal proceeding has ended in the defendant's favor, or a resulting conviction has been invalidated within the meaning of Heck." Id.

Here, Plaintiffs have alleged that after McGuffin's conviction was vacated, the charges against him were dismissed. Under McDonough and Heck, all that is required to bring a § 1983 claim of malicious prosecution is that the underlying conviction has been invalidated "in some way." Thus, the District Attorney's reasons for dismissing the charges against McGuffin notwithstanding, McGuffin's conviction was vacated by Judge Sullivan's General Judgment and the Coos County District Attorney dismissed all criminal charges against him. McGuffin's underlying conviction was thus terminated in McGuffin's favor within the meaning of Heck, and Plaintiffs are entitled to bring their federal claim of malicious prosecution against Defendants.

IV. The Vidocq Defendants' Remaining Arguments

In addition to the arguments discussed above, the Vidocq Defendants raise several issues specific to Plaintiffs' allegations against Walter and the Vidocq Society. They argue that (1) the Vidocq Defendants cannot be liable under § 1983 because they are not state actors; (2) the Vidocq Society cannot be liable under § 1983; and (3) that Plaintiffs' remaining claims and counts against them should be dismissed. In the alternative, the Vidocq Defendants move for a more definite statement pursuant to Fed. R. Civ. P. 12(e).

1. Liability Under § 1983 as State Actors

As an initial matter, the Vidocq Defendants argue that they are not state actors and therefore cannot be sued for violations of rights under § 1983. Vidocq is a nonprofit Pennsylvania

corporation and Walter was a volunteer at Vidocq at the time of the cold case investigation. Private parties may only be held liable for alleged violations of rights under the United States Constitution under 42 U.S.C. § 1983 when "the party charged with the deprivation [of a federal right is] a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). This requirement is difficult to satisfy if the defendant is a private citizen, for "[o]nly in rare circumstances can a private party be viewed as a 'state actor' for section § 1983 purposes." Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001).

Whether a defendant is a state actor is often a mixed question of law and fact. Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 835-36 (9th Cir. 1999). Unanswered questions of fact are improper for resolution on a motion to dismiss. Focus on the Family, 344 F.3d at 1276. Here, Plaintiffs have alleged facts to establish that the Vidocq Defendants partnered with the police to investigate Freeman's murder, and jointly deprived Plaintiffs of constitutional rights. Plaintiffs allege that the City of Coquille hired the Vidocq Defendants specifically "to fabricate evidence implicating McGuffin." (Complaint ¶ 103.) On this record, Plaintiffs have alleged that the Vidocq Defendants were state actors for the purposes of § 1983 liability.

2. The Vidocq Society's Liability Under § 1983

The Vidocq Defendants next argue that Plaintiffs cannot allege federal claims against the Vidocq Society based on a respondeat superior theory of liability. While the Complaint repeatedly alleges that the Vidocq Society is responsible for the actions of its agent Walter under a theory of "supervisory liability/respondeat superior," Plaintiffs acknowledge that the "Vidocq Society's section 1983 liability will be based upon its policies and practices, or its knowledge of

misconduct." (ECF 61, p. 12.) Plaintiffs, however, do not include the Vidocq Society in their list of "policies and practices that were the moving force behind the constitutional violations" alleged in the Complaint. (Compl. p. 27.) Thus, Plaintiffs' federal claims against the Vidocq Society must be based solely on its knowledge of Walter's misconduct.

A private corporation may be liable under § 1983 if the injury alleged is the result of the corporation's policy or practice or if that corporation knew of its employees' misconduct and failed to take steps to end the misconduct. Gonzalez v. Ahern, 2020 WL 4368211 (N.D. Cal. Nov. 19, 2020). Here, while the Complaint alleges that the Vidocq Society became an agent of the City of Coquille when it was contracted to assist in the investigation of Freeman's murder, it does not allege that Vidocq Society had any information about Walter's conduct, or the conduct of the State, City, or County Defendants. Because the Complaint does not allege that the Vidocq Society had knowledge of Walter's conduct throughout the investigation and prosecution, Plaintiffs have not sufficiently pled facts to state a claim of liability against the Vidocq Society under § 1983. Plaintiffs' federal claim and counts against the Vidocq Society should be dismissed, and with leave to amend.

3. Remaining Claims and Counts

i. False Imprisonment and Illegal Detention and Prosecution

The Vidocq Defendants argue that they cannot be liable for Count Two of Plaintiffs' First Claim for illegal detention, and Plaintiffs' Second Claim of false imprisonment. The Vidocq Defendants assert that they cannot be liable for these claims because they did not imprison McGuffin or participate in his arrest or prosecution. In Oregon, "liability for false imprisonment extends not only to the person who directly confines a plaintiff, but equally to one who instigates the confinement by directing, requesting, inviting or encouraging it." Hiber v. Creditors Collection

Serv., Inc., 154 Or. App. 408, 414 (1998). While an actor cannot be held liable for merely giving information to the police, it can be held liable for persuading or influencing the police as to what shall be done about any arrest. Pearson v. Galvin, 253 Ore. 331, 335-37 (1969).

Here, Plaintiffs have pleaded facts that support Walter's liability for instigating McGuffin's imprisonment by producing a psychological profile that implicated McGuffin in Freeman's murder and by knowingly suppressing other evidence. The Complaint alleges that Walter took an active role in the investigation and prosecution by partnering with law enforcement to become an agent of the City of Coquille. An actor instigates an arrest if he plays a role in persuading or influencing the decision "as to what shall be done about any arrest." Pearson, 253 Or. at 335-37. The Vidocq Defendants cite Shqeirat v. U.S. Airways Group, Inc., 645 F. Supp. 2d 765, 793 (2007), a case from the District of Minnesota, for the proposition that a party must directly persuade or command police to detain a suspect in order to be liable for false imprisonment. Under Oregon law, however, Plaintiffs have met the pleading standard for false imprisonment by alleging facts that Walter instigated McGuffin's wrongful arrest and prosecution. Because Plaintiffs have alleged that Walter actively influenced the investigation of Freeman's murder and McGuffin's subsequent indictment, arrest, and prosecution, the Court rejects the Vidocq Defendants' arguments.

ii. Malicious Prosecution and Illegal Prosecution

The Vidocq Defendants also argue that Plaintiffs fail to allege any facts that the prosecutor in McGuffin's trial or Grand Jury indictment relied on the Vidocq Defendants' "ideas" and that the Vidocq Defendants should be excused from Plaintiffs' state claim of malicious prosecution, and federal claims of illegal detention and prosecution. As discussed above, Plaintiffs' Third Claim of malicious prosecution under state law should be dismissed because the criminal charges against McGuffin did not terminate favorably under Oregon law.

With respect to Plaintiffs' federal count of illegal prosecution, however, the Court disagrees with the Vidocq Defendants' argument for the same reasons stated above. Here, Plaintiffs have alleged that Walter fabricated evidence that formed the basis of McGuffin's wrongful prosecution, indictment, and conviction, and that Walter made statements to prosecutors to influence the criminal proceedings. Specifically, Walter created a psychological profile of Freeman's killer and presented it to the media and to the Cold Case Investigators. Together with the Cold Case Investigators, Walter also allegedly fabricated a motive for Freeman's murder by falsely reporting that Freeman may have been pregnant at the time of her murder, and that McGuffin was afraid he would be charged with statutory rape if the pregnancy was discovered. On this record, the Vidocq Defendants' motion to dismiss Plaintiffs' federal count of illegal detention and prosecution should be denied.

iii. Seventh Claim: Negligent Training and Supervision

The Vidocq Defendants also argue that Plaintiffs failed to plead facts to state a state law claim of negligent training and supervision. Specifically, they argue that Plaintiffs fail to demonstrate that Vidocq Society owed Plaintiffs a duty to train and supervise Walter and how that duty was breached. They also argue that Plaintiffs fail to plead that Walter violated McGuffin's constitutional rights. Under Oregon law, "in the absence of a special status or relationship, the appropriate question is 'whether the defendant's conduct resulted in a foreseeable and unreasonable risk of harm of the kind that the plaintiff suffered.'" Scheffel v. Or. Beta Chapter of Phi Kappa Psi Fraternity, 273 Or. App. 390, 401 (2015). In Oregon, a claimant need not prove that a defendant owed the claimant a duty because "everyone owes each other the duty to act reasonably in light of foreseeable risks of harm." Id., at 401.

Here, Plaintiffs pled that Walter was employed by Vidocq Society, that the City of Coquille hired both Vidocq Society and Walter as a "profiler" and employee. Plaintiffs allege that the Vidocq Society knew that Walter would develop a profile that would falsely link McGuffin to Freeman's murder, even though he was innocent. Plaintiffs have also alleged that Walter's profile helped to bring about McGuffin's wrongful conviction. Plaintiffs allege that the Vidocq Society "fail[ed] to institute policies, practices, and customs that would prohibit the misconduct" alleged in the complaint, including Walter's allegedly negligent fabrication and suppression of evidence. Finally, Plaintiffs have alleged that Walter's actions were in violation of McGuffin's right to due process and a fair trial, and that Walter's misconduct resulted in wrongful prosecution, conviction, and incarceration in violation of McGuffin's constitutional rights. On this record, Plaintiffs have successfully alleged the elements of a claim of negligence based on Vidocq Society's negligent training and supervision.

iv. Eighth Claim: Intentional Infliction of Emotional Distress (IIED)

The Vidocq Defendants next argue that Plaintiffs failed to plead facts to support their claim that Walter inflicted severe emotional distress. Here, Plaintiffs allege that Walter played an active role in the investigation, and alleged facts showing Walter's active involvement and influence on McGuffin's criminal trial, including the prosecution, conviction, and efforts to taint the jury pool in advance of the trial. Plaintiffs' IIED claim satisfies the pleading standard under Rule 8(a).

4. Motion for a More Definite Statement

The Vidocq Defendants move in the alternative for a more definite statement of facts to support a cognizable legal theory, to identify dates and specific conduct of individual defendants, under Rule 12(e). Motions under Rule 12(e) "are generally disfavored, are left to the court's discretion, and are rarely granted." Adidas Am., Inc. v. Forever 21, Inc., No. 3:17-cv-00377-YY,

at *1 (D. Or. Aug. 9, 2017). Insofar as the Court should give Plaintiffs leave to refile some of their claims in an amended complaint, as explained above, the Vidocq Defendants' motion for a more definite statement should be granted.

V. Plaintiffs' Motion to Substitute Party

Finally, Plaintiffs move to substitute the Estate of David E. Hall for the Estate of Dave Hall as a defendant in this case. The Estate of David E. Hall filed a response and also moved to dismiss Plaintiff's allegations against the Estate of Dave Hall for failure to state a claim under Rule 12(b)(6).

Because the Complaint simply misnamed the Estate, the Court converts Plaintiffs' motion to substitute a party to a motion for leave to amend under Rule 15(a)(2). Plaintiffs in their Complaint named the Estate of Dave Hall as a defendant and petitioned the probate court to appoint an Administrator for the purpose of accepting service of this lawsuit. Plaintiffs timely notified the probate court about the existence of this lawsuit, provided the court with the caption and case number, and asked that the probate court appoint an Administrator for the purpose of accepting service of this complaint and acting in the role of a defendant in this lawsuit. Here, the Estate of David E. Hall was clearly on notice of Plaintiff's action. Plaintiff's converted motion should therefore be granted and Plaintiffs given leave to amend the Complaint to remove the Estate of Dave Hall as a defendant and add the Estate. The Estate's motion to dismiss Plaintiffs' claims, which argues that the Complaint should be dismissed because the Estate was never named as a defendant, should be dismissed as moot.

RECOMMENDATION

For the reasons stated above, the City and County Defendants' motion under Rule 12(b)(6) (ECF 49) should be granted in part and denied in part. The State Defendants' motion to dismiss

(ECF 57) should be granted in part and denied in part. The Vidocq Defendants' motion to dismiss (ECF 55) should be granted in part and denied in part. Plaintiffs' federal claims against the Oregon State Police should be dismissed. Count Two of Plaintiffs' First Claim for Relief is time-barred and should be dismissed with prejudice. Count Five of Plaintiffs' First Claim for Relief and Plaintiffs' Sixth Claim should be dismissed without prejudice. Plaintiffs' Fourth and Fifth Claims for Relief are time-barred and should be dismissed with prejudice. Plaintiffs' Ninth Claim should be dismissed with prejudice. Defendants Riddle and McInnes should be dismissed from this action. All federal claims and counts against the Vidocq Society should be dismissed. The Spoliation Claim should be dismissed as to the Vidocq Defendants and the State Defendants.

Plaintiffs' motion to strike (ECF 62) should be denied as moot. Plaintiffs' motion (ECF 72) should be granted. The Estate of David E. Hall's Motion to Dismiss (ECF 77) should be denied as moot. Plaintiffs should be granted leave to file an amended complaint within 30 days of the final order.

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This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 27th day of July 2021.

s/ Mustafa T. Kasubhai
MUSTAFA T. KASUBHAI (He / Him)
United States Magistrate Judge