IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Debra Jean Milke,

Plaintiff,

v.

City of Phoenix, et al.,

Defendants.

No. CV-15-00462-PHX-ROS

ORDER

Plaintiff Debra Jean Milke's previous complaint contained ten claims against fourteen defendants. In resolving the motions to dismiss aimed at that complaint, the Court concluded some claims and defendants should be dismissed while other claims against a few defendants could proceed. Milke was given leave to amend in part and her amended complaint contains new factual allegations while narrowing the claims and defendants. Thus, there are now five claims brought against four defendants. Three of the defendants have again moved to dismiss. All three motions will be denied.

BACKGROUND

The Court's prior order recounted the factual background in great detail. (Doc. 73). The amended complaint contains that same factual background and it need not be recounted here. In short, Milke's claims are based on events during the investigation and prosecution of her for her alleged involvement in the murder of her son. The current complaint identifies two individuals and two entities as defendants: Armando Saldate, the lead detective on Milke's case; Sergeant Silverio Ontiveros, Saldate's supervisor; the

City of Phoenix; and Maricopa County. The claims against these four defendants are as follows.

The first claim is brought against Saldate and Ontiveros for depriving Milke "of liberty without due process of law" and for violating her "right to a fair trial." (Doc. 74 at 65). This claim is primarily based on Saldate allegedly fabricating Milke's confession. The second claim is also brought against Saldate and Ontiveros for violating Milke's "right against self-incrimination in violation of the Fifth, Sixth, and Fourteenth Amendments." (Doc. 74 at 67). This claim focuses on the manner in which Saldate conducted his interrogation of Milke. The third claim is brought only against Ontiveros for "supervisory liability" based on, among other things, Ontiveros "creating the conditions by which Saldate was able to fabricate Ms. Milke's confession." (Doc. 74 at 70). The fourth claim is brought against the City of Phoenix based on its alleged failure to supervise its police officers. (Doc. 74 at 71). And the fifth claim is brought against Maricopa County based on three theories involving alleged policies or practices that resulted in prosecutors not turning over exculpatory and impeachment information. (Doc. 74 at 73). The City of Phoenix answered the complaint but the other three defendants have moved to dismiss.

ANALYSIS

I. Standard for Motion to Dismiss

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* This does not require "detailed factual allegations," but it does require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* This is not a "probability requirement," but a requirement that the factual allegations show "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

II. Second Amended Complaint is Sufficient

Saldate, Ontiveros, and Maricopa County have each filed a motion to dismiss. Saldate's motion is easily resolved but the other two require more analysis.

A. Officer Saldate

The previous order found Milke had stated plausible claims against Saldate. Milke's amended complaint does not make any material changes to the claims previously found sufficient. Saldate has again moved to dismiss portions of the claims in the amended complaint. It appears Saldate' motion is largely a motion for reconsideration. There is not, however, any basis to reconsider the Court's conclusions regarding Saldate's potential liability. And to the extent Saldate is not merely seeking reconsideration, his motion asks the Court to go through the complaint and pare it down by removing all the alternative factual bases alleged in connection with the two claims brought against him. It would be unduly burdensome to "prune" the complaint in this manner. *See Bernheim v. Litt*, 79 F.3d 318, 326 (2d Cir. 1996). Milke has alleged sufficient facts to support both of her claims against Saldate and if there is genuine confusion about the nature of Milke's claims, contention interrogatories are the appropriate course.[1] Therefore, Saldate's motion to dismiss will be denied in full.

B. Ontiveros

As in the previous complaint, Milke's amended complaint names Ontiveros as a defendant largely based on Ontiveros being Saldate's supervisor at the time Saldate allegedly engaged in the relevant misconduct. The Court previously explained that such liability is "theoretically possible" but to state plausible claims, Milke would have to "allege facts showing [Ontiveros] either knew or should have known that Saldate would engage in misconduct." (Doc. 73 at 13). Milke has now added factual allegations alleging precisely that.

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[1] Such interrogatories must be used with caution. *See Aldapa v. Fowler Packing Co. Inc.*, 310 F.R.D. 583, 591 (E.D. Cal. 2015) (contention interrogatories may be used but they "should not require a party to provide the equivalent of a narrative account of its case, including every evidentiary fact, details of testimony of supporting witnesses, and the contents of supporting documents") (quotation marks and citation omitted).

Milke alleges Ontiveros began working with the Phoenix Police Department no later than 1980 and he began working with Saldate in the Homicide Detail sometime prior to April 1988. (Doc. 74 at 7). As of 1988, Ontiveros was working as a sergeant in the Homicide Detail and Saldate was working as a detective. From 1988 through the investigation of Milke in 1989, "the Homicide Detail consisted of approximately 20 detectives and approximately 3 sergeants." (Doc. 74 at 15). The complaint does not explain how supervisory responsibilities were handled in the Homicide Detail but Ontiveros worked as Saldate's supervisor on numerous cases between 1988 and 1990. (Doc. 74 at 16).

On December 3, 1989, Milke's son was reported missing. Ontiveros, in his role as supervisor, "made the decision to call in Detective Saldate, who was scheduled to be off from work" that day. (Doc. 74 at 10). Ontiveros made Saldate the lead investigator in the case. (Doc. 74 at 10). Later, when the police wished to re-interview Milke in Florence, other officers were already driving to Florence when "Ontiveros arranged for Saldate to travel to Florence by helicopter in order to interrogate Ms. Milke." (Doc. 74 at 22). Milke alleges these actions by Ontiveros were meant to ensure Saldate was the key player in the investigation. And Milke further alleges Ontiveros was motivated to place Saldate in this position by Saldate's reputation. At the time, Saldate's reputation was that he was able to obtain incriminating evidence from any individual "because he was willing to conduct illegal interrogations, lie under oath, and otherwise ignore the constitutional limits on police investigations." (Doc. 74 at 10). This allowed Saldate to close cases he could not otherwise close. Ontiveros had a strong incentive for detectives to close cases because Ontiveros's own performance was evaluated "at least in part . . . on the rate at which [Homicide Detail] detectives, like Saldate, were able to close cases." (Doc. 74 at 15).

The Court's prior order explored most of this same background information regarding Onvtiveros and Saldate but observed Milke had not alleged facts establishing Ontiveros either knew or should have known of Saldate's reputation for misconduct.

(Doc. 73 at 13). The current complaint changes that by incorporating a letter written by Detective Antonio Morales Jr., a detective who worked in the Homicide Detail with Saldate. (Doc. 74 at 15).

In March 2015, Detective Morales wrote a letter to the Arizona Republic. That letter explained that, at the time of the Milke investigation, it was well known within the Homicide Detail that Saldate routinely acted inappropriately. The letter stated, in relevant part,

> I am painfully aware that Detective Armando Saldate and his now deceased partner were notorious for bending the rules, especially when it came to suspect interviews.
>
> Other homicide detectives attempted to make supervisors aware of these serious issues. They were met with disdain and angrily told that if they couldn't be a team player, they could find another place to work. Nothing else was said for fear of retaliation, and no corrective steps were taken.

Antonio Morales Jr., *Milke Doesn't Deserve Her Freedom*, *The Arizona Republic*, Mar. 20, 2015, available at http://www.azcentral.com/story/opinion/letters/2015/03/19/milke-deserve-freedom/25057361. While this letter does not identify which "supervisors" knew of Saldate's actions, the Homicide Detail only had three supervisors at the relevant time. Viewed in the light most favorable to Milke, the letter indicates other detectives complained of Saldate's misconduct and Ontiveros, as one of only three supervisors, would have been aware of the complaints.

In light of Detective Morales's letter, the factual allegations in the amended complaint establish what follows. As of 1989, supervisors in the Homicide Detail knew Saldate routinely ignored constitutional restraints but continued to assign him cases. When Milke's son went missing, and with Saldate's reputation in mind, Ontiveros made special efforts to ensure Saldate was involved in the most critical portions of the investigation. That is, Ontiveros called in Saldate on a day when Saldate was not scheduled to work and arranged for Saldate to travel to Florence by helicopter so that he was the officer who conducted the re-interview of Milke. Viewed as a whole, the complaint alleges Ontiveros took these actions not merely in spite of Saldate's reputation,

but because of that reputation. This alleged intentional behavior by Ontiveros is enough to make Ontiveros potentially liable for Saldate's misconduct. *See Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (supervisor can be liable if he "participated in or directed the violations, or knew of the violations and failed to act to prevent them").

Likely anticipating that Milke may have alleged sufficient facts to state plausible claims against him, Ontiveros devotes a large portion of his briefing to qualified immunity. As conceded by Ontiveros, assessing qualified immunity at the motion to dismiss stage presents special challenges. Doing so means the Court must assess "far-reaching constitutional questions on a nonexistent factual record." *Kwai Fun Wong v. United States*, 373 F.3d 952, 957 (9th Cir. 2004). And importantly, asserting qualified immunity at the pleading stage means the Court must "accept as true all well-pleaded allegations of material fact, and construe them in the light most favorable to the non-moving party." *Padilla v. Yoo*, 678 F.3d 748, 757 (9th Cir. 2012). However, Ontiveros's qualified immunity argument does not focus on the first step in the qualified immunity framework regarding whether the allegations establish a violation of Milke's rights. *Sandoval v. Las Vegas Metro. Police Dep't*, 756 F.3d 1154, 1160 (9th Cir. 2014) (analysis of "qualified immunity involves two distinct steps"). Instead, Ontiveros argues he is entitled to qualified immunity under the second step involving the right in question being "clearly established." *Id.* Whether a particular right was clearly established "is solely a question of law for the judge." *Tortu v. Las Vegas Metro. Police Dep't*, 556 F.3d 1075, 1085 (9th Cir. 2009). Accordingly, it is proper to consider at this point.

Ontiveros argues that, as of 1989, it was not clearly established that a supervisor could be held liable for a subordinate fabricating evidence or coercing statements. (Doc. 94 at 5). Ontiveros bases this argument on the Supreme Court's recent emphasis that "clearly established law" not be defined "at a high level of generality." (Doc. 94 at 4). In other words, Ontiveros effectively concedes it was clearly established in 1989 that a supervisor could be held liable for certain acts of misconduct by subordinates but he claims there was no authority establishing such liability was possible in the specific

context of subordinates fabricating evidence or obtaining coerced statements. (Doc. 94 at 5). This argument is based on an inappropriately narrow view of qualified immunity.

To begin, in 1989 it was clearly established that fabricating evidence or coercing statements violated an individual's rights. *See Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001) ("Perhaps because the proposition is virtually self-evident, we are not aware of any prior cases that have expressly recognized this specific right, but that does not mean that there is no such right."); *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) ("It is bedrock Constitutional law that police officers may not attempt to compel or coerce a suspect into confessing by disregarding his clearly established civil rights."). It was also clearly established in 1989 that a supervisor could be held "liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). *See also Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) ("A supervisor may be liable if there exists . . . a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation."). But according to Ontiveros, these general statements regarding supervisory liability were insufficient to clearly establish the rights at issue in the present case. That is not correct.

As of 1989, supervisory liability had been applied in a variety of contexts.[2] *Compare Taylor*, 880 F.2d at 1045 (discussing supervisory liability standard in prison

[2] The Supreme Court clarified supervisory liability in *Iqbal*, but not in any way relevant here. As explained by the Ninth Circuit in 2012, "*Iqbal* makes crystal clear that constitutional tort claims against supervisory defendants turn on the requirements of the particular claim—and, more specifically, on the state of mind required by the particular claim—not on a generally applicable concept of supervisory liability." *OSU Student All. v. Ray*, 699 F.3d 1053, 1071 (9th Cir. 2012). For particular claims, supervisory liability now exists only if the supervisors had the requisite state of mind. Thus, "invidious racial discrimination claims against supervisory defendants" now require supervisors have the specific intent to engage in discrimination. *Id.* Other types of supervisory liability claims, however, do not impose such a state of mind requirement. For example, claims under the Eighth Amendment and the First Amendment require nothing beyond the supervisor knowing about the subordinate's behavior and acquiescing in that behavior. *Id.* at 1075. There is no indication that *Iqbal* changed the state of mind required for claims based on a subordinate fabricating or coercing a confession.

context); *with Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989) (discussing supervisory liability standard in excessive force context). While Ontiveros may be correct that there is no case from before 1989 "directly on point" regarding supervisory liability in a case involving the fabrication of evidence or coercion of statements, qualified immunity has never required there be a case precisely on point. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quotation omitted). Instead, "[t]he relevant inquiry is whether existing precedent placed the conclusion that" Ontiveros could be liable "beyond debate." *Id.* at 309. There can be no serious debate that, even in 1989, existing precedent would have alerted Ontiveros to potential liability for his alleged actions.

The simplest illustration of why Ontiveros's qualified immunity argument is incorrect comes from the allegations regarding Saldate's fabrication of evidence. The "proposition is virtually self-evident" that suspects have a clearly established "constitutional due process right not to be subject to criminal charges on the basis of false evidence that was deliberately fabricated by the government." *Devereaux v. Abbey*, 263 F.3d 1070, 1075 (9th Cir. 2001). Therefore, Saldate himself cannot assert qualified immunity. But Ontiveros claims a reasonable supervisor would not have known he could be liable if he assigned a detective to a case *because of* that detective's willingness to fabricate evidence. That cannot be correct. Even in 1989, it was "sufficiently clear [to] every reasonable official" that a supervisor might be liable for his knowing and intentional involvement with such extreme conduct by a subordinate as is alleged in the complaint. *Luna*, 136 S. Ct. at 308. As of 1989, precedent "placed the conclusion that [Ontiveros] acted unreasonably in these circumstances beyond debate." *Id.* at 309. Therefore, Ontiveros is not entitled to qualified immunity at the present time.

The decision on Ontiveros's qualified immunity is not final. A more developed factual record may disprove Milke's allegations or raise other issues. Ontiveros is free to reurge appropriate qualified immunity arguments at a later date.

C. Maricopa County

The final motion to dismiss addresses Maricopa County's liability. As in the

original complaint, Milke has three different theories in support of her policy or practice claim against Maricopa County. First, Milke alleges Maricopa County had a policy or practice of not disclosing "exculpatory and impeachment evidence." (Doc. 74 at 73-74). Second, Maricopa County allegedly had a policy or practice of failing "to supervise and/or discipline" employees who did not disclose such information. (Doc. 74 at 74). And third, Maricopa County allegedly failed to maintain "an administrative system or internal policies and procedures for the deputy county attorneys handling criminal cases to access exculpatory and impeachment information." (Doc. 74 at 75). As with Saldate's request to "prune" the complaint, it is unnecessary to analyze each of these three claims in detail; if one of the theories is sufficient, the single claim against Maricopa County can proceed. However, to prevent any confusion during discovery the Court will briefly explore why all three theories are, at present, viable. The first two theories are closely related and will be analyzed together.

According to the complaint, the Maricopa County Attorney's Office ("MCAO") engaged in a years-long practice of not disclosing exculpatory and impeachment evidence and not disciplining its employees for this practice. Milke alleges her "post-conviction team" and her counsel have spent "thousands of hours" researching criminal cases and they have "not uncovered a *single* case in which MCAO prosecutors disclosed *any* of the judicial findings of Saldate's misconduct to another criminal defendant." In fact, Milke now alleges the "exculpatory/impeachment evidence" involving Saldate's many instances of misconduct "was not disclosed by MCAO prosecutors to *any* criminal defendant investigated by Saldate and prosecuted by the MCAO." (Doc. 74 at 55-56). Milke also identifies, by name and case number, six cases before and after Milke's prosecution where Saldate "was a key investigator and/or obtained key witness or suspect statements" but the information regarding Saldate's misconduct was not disclosed. (Doc. 74 at 56). These cases involved multiple prosecutors and none of the prosecutors were disciplined for their failures to comply with their constitutional obligations. These allegations describe identical behavior across many cases by many different actors. That is sufficient

to state a policy or practice claim based on nondisclosure of evidence or failure to supervise.

Milke's third theory is based on Marciopa County's alleged failure to maintain a system whereby prosecutors could access exculpatory and impeachment evidence. The Court's previous order cast some doubt on this theory because it appeared there was "no dispute the prosecutor in Milke's case had the information regarding Saldate's misconduct." (Doc. 73 at 35). In other words, it appeared Milke was harmed by the inappropriate actions of a single prosecutor, not any systemic flaw regarding Maricopa County's failure to maintain a list regarding exculpatory and impeachment evidence. But it now appears the parties disagree on what the prosecutor in Milke's case knew. There is no dispute the prosecutor was aware of Saldate's incident of misconduct in 1973. However, it is unclear whether the prosecutor knew of Saldate's other instances of misconduct. Those other instances were undoubtedly known to other prosecutors in the same office but possibly not to the prosecutor handling Milke's case. Thus, Maricopa County's failure to maintain an accessible system informing prosecutors of Saldate's instances of misconduct may have caused harm to Milke. Moreover, the failure to maintain such a list may have been responsible for the widespread nondisclosure of Saldate's misconduct in other cases. At the pleading stage, these allegations are enough to establish a policy or practice claim.

Accordingly,

IT IS ORDERED the Motions to Dismiss (Doc. 79, 80, 84) are **DENIED**.

Dated this 6th day of July, 2016.

Honorable Roslyn O. Silver
Senior United States District Judge