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Attorneys for Defendants COUNTY OF SACRAMENTO and SCOTT JONES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GARY WAYNE WELCHEN, on behalf of himself and others similarly situated,

Plaintiff,

v.

THE COUNTY OF SACRAMENTO and KAMALA HARRIS, in her official Capacity as the California Attorney General, and SCOTT JONES in his Official Capacity as the Sacramento County Sheriff,

Defendants.
_____/

CASE NO. 2:16-cv-00185 TLN-DB

REPLY TO PLAINTIFF'S RESPONSE TO MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Date: January 12, 2017
Time: 2:00 p.m.
Courtroom: 2, 15th Floor

Amended Complaint Filed: 11/09/2016
Complaint Filed: 01/29/2016

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This Court should conclude that Sheriff SCOTT JONES ("the Sheriff") acts on behalf of the State when he detains a person who does not pay the bail amount prescribed in the bail schedule as set by the Superior Court. As a state actor, the Sheriff is entitled to immunity from suit for money damages under the Eleventh Amendment and Plaintiff GARY WAYNE WELCHEN's ("Plaintiff") claim is barred thereby. As to the COUNTY OF SACRAMENTO ("the County"), the sole claim (violation of the Due Process Clause) fails. The State is the relevant actor when the Sheriff detains a person who does not pay bail and Plaintiff has not alleged a municipal policy or practice for which the County may be held liable. *McMillan v. Monroe Cnty. Ala.*, 520 U.S. 781, 783 (1997) (explaining that the county is liable for the sheriff's actions only if they constitute a county policy) (citing *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 694 (1978)). The County's Motion to Dismiss should be granted.

I. THE SHERIFF IS IMMUNE BECAUSE HE ACTS ON BEHALF OF THE STATE.

Plaintiff misstates Supreme Court and Ninth Circuit precedent and ignores the numerous District Court opinions holding that sheriffs act on behalf of the State, not the County, when detaining a prisoner pursuant to court order or state law. Plaintiff simply lumps together everything that sheriffs do "as jailors." *See* ECF No. 37 at 2-5. This is contrary to the analysis in *Streit v. County of Los Angeles*, 236 F.3d 552, 564 (9th Cir. 2001), in which the Ninth Circuit drew a "critical" distinction between detention caused by the Sheriff's Department's own administrative policy, and detention required by state law. *See* ECF No. 76 at 6-7. Plaintiff not only ignores this distinction, but notably cites no case in which a sheriff was held to be acting on behalf of a county when detaining a person as required by state law or court order.[1]

In any event, every District Court to address the precise issue before this Court—whether a California sheriff is a state or county actor when detaining arrestees at a county jail pursuant to a lawful state order—has found sheriffs to be state actors. The reasoning of these courts is persuasive, as set forth below, and should be adopted by the Court here.

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[1] *See Smith v. Cty. of Los Angeles*, 535 F.Supp.2d 1033, 1035 (C.D. Cal. 2008) (inadequate jail medical care); *Roe v. Cty. of Lake*, 107 F.Supp.2d 1146, 1147 (N.D. Cal. 2000) (rape by sheriff's deputy when coming to plaintiff's home to investigate a report of domestic violence, and alleged policy of encouraging law enforcement officers to violate the civil rights of women and failure to train or discipline the officers involved); *Cortez v. County of Los Angeles*, 294 F.3d 1186, 1190 (9th Cir. 2002) (jail housing policy).

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A. State Law Makes Clear that the Sheriff Acts as a State Official.

While claiming reliance on *McMillan*, Plaintiff disregards the Supreme Court's instruction to examine "whether government officials are final policymakers for the local government in a *particular area*, or on a *particular issue*." *McMillian v. Monroe Cty., Ala.*, 502 U.S. 781, 785-86 (1997). When analyzing state law, the Supreme Court is clear: courts should look beyond any state law simply labeling the Sheriff as a municipal or state official, and instead examine "the actual function of a government official, in a particular area" of his or her authority. *Id*. at 786; *see also Cortez v. County of Sacramento Los Angeles*, 294 F.3d 1186, 1189 (9th Cir. 2002) (analyzing the "official's actual function" in a particular area and the degree of control the municipality has "over the official's performance of the particular function.").

Plaintiff instead invokes factors that would apply categorically to everything that sheriffs do.[2] *See generally* ECF No. 37 at 2-5. For example, Plaintiff observes that the California Constitution does not designate sheriffs as state officers or members of the executive branch and instead states that "County charters shall provide for . . . [a]n elected sheriff." ECF No. 37 at 3:10-13 citing Cal. Const. Art. XI, § 4. But the same is true of District Attorneys ("County charters shall provide for . . . an elected district attorney") and the Ninth Circuit has found them to be state actors depending on the particular function at issue. *Weiner v. San Diego County*, 210 F.3d 1025, 1031 (9th Cir. 2000). Likewise, many district court cases hold that sheriffs act on behalf of the State in particular functions—including the detention of individuals pretrial. *See, e.g., Taylor v. Multnomah County Sheriff's Office*, 2004 U.S.Dist.LEXIS 18219, at *7 (D.Or. Sep. 7, 2004) (nothing in the applicable state law gave the Sheriff's Office "the power to release a prisoner ordered by the court to be held in custody").

Moreover, while citing statutory provisions regarding oversight of the county jail, Plaintiff fails to show how any of those provisions have any bearing on the specific conduct challenged here—the pretrial detention of individuals who do not pay bail established by the

[2] In a section titled "The Analytical Framework of Binding Ninth Circuit Precedent Establishes that the Sheriff Is A County Official" Plaintiff argues that the "Sheriff's function [should not be defined] too narrowly in an effort to argue that he is a state official." ECF No. 37 at 6. Plaintiff argues that the "Sheriff's function is the 'oversight and management of the local jail.'" *Id*. But viewing the Sheriff's function at this level of generality again ignores the Supreme Court's focus on particular functions and the "critical" distinction the Ninth Circuit drew between local jail policies and detention pursuant to court order and/or state law. *Streit*, 236 F.3d at 564.

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superior court—pursuant to state law. And in asserting that counties are financially liable for conduct by sheriffs regardless of whether they act on behalf of the State or the County, ECF No. 37 at 4:21-5:2. (citing Cal. Gov't Code § 815.2), Plaintiff ignores the California Supreme Court's contrary construction of that statute in *Venegas v. Cty. of Los Angeles*, 32 Cal.4th 820, 835 (2004), which is authoritative as a matter of state law.

B. The Sheriff's Actions in this Case Are Controlled by State Law.

Nor are Plaintiff's other efforts to transform the Sheriff into a state actor—with respect to pretrial detention decisions—any more successful. Plaintiff asserts that "The Sheriff's Actions in this Case Are Not Controlled by State Law." ECF No. 37 at 6. But that proposition is contradicted by numerous provisions of California law mandating money bail and the allegations of the FAC itself. *See, e.g.*, ECF No. 31 ¶ 57 ("Any provisions of California law that require the use of secured money bail . . .").

First, Plaintiff contends that the superior court's establishment of the bail schedule is an administrative act rather than a court order, and from that premise leap to the conclusion that the bail schedule is a "county policy." ECF No. 37 at 6. Putting aside Plaintiff's failure to offer any argument or authority establishing the premise, the conclusion does not follow from it in any event. [3] The fact that superior courts are organized by county does not make them county agencies; they are agencies of the State. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987) (the court's "geographical location within any particular county cannot change the fact that the court derives its power from the State and is ultimately regulated by the State); Cal. Const. art. 6 §§ 1, 5.

Thus, even if the bail schedule were deemed an administrative act rather than a court order, it would be the administrative act of a state agency—not the county. *See Wyatt v. County of Butte*, No. 2:06-CV-1003-GEB-DAD, 2007 WL 1100504, at *3 (E.D. Cal. Apr. 11, 2007) (dismissing claim against county and noting that the bail schedule is prepared by judges rather than county officials); *cf. Kirby v. Roberts*, No. CIV-14- 906-M, 2016 WL 1296190, at *1-3 (W.D. Okla. Mar.

[3] The two cases cited by Plaintiff, *Weiner*, 210 F.3d at 1028 and *Wolfe v. Strankman*, 392 F.3d 358, 366 (9th Cir. 2004), are at best irrelevant to Plaintiff's argument. In *Weiner*, the Ninth Circuit found that district attorneys act on behalf of the *state* when instituting criminal proceedings. Whereas *Wolfe* makes the anodyne point that judges do not have judicial immunity for administrative acts; it does not hold (or suggest) that those administrative acts are imputed to counties.

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31, 2016) (granting judgment for county defendants where bail was set pursuant to the court's bail schedule). However characterized, the bail schedule has the force of law, and it can be avoided or altered in a particular case only by an order of the court. *See* Cal. Penal Code §§ 1269c; 1270.1(d).

Second, Plaintiff argues that, when individuals are detained because they do not pay the applicable bail, it involves a "conditional order of detention" rather than an "order of detention." ECF No. 82 at 7. The distinction is irrelevant, because the condition—*i.e.*, the applicable bail amount—is established by the superior court, not by the Sheriff. The Sheriff has no authority or discretion to change the bail set by the court. Cal. Pen. Code § 1269b(a) (sheriff is authorized only to "approve and accept bail in the *amount fixed* by the [warrant, bail schedule, or order and] . . ."). Whether the detention results from an order of detention without conditions, or from the detainee's failure to satisfy a condition for release, the Sheriff is carrying out a duty under state law to detain the person.

Third, Plaintiff asserts that the Sheriff must make "innumerable" decisions about conditional release, by which they mean: (1) whether the person has tendered the bail amount established by the superior court; (2) in what methods payment will be accepted; and (3) implementing other procedures regarding how a detainee can satisfy a condition for release, such as when they receive notification of the amount of bail, whether they receive a list of bail bond companies to call, and whether they may make phone calls to arrange payment. ECF No. 37 at 7. But Plaintiff does not allege that the Sheriff's enforcement of these procedures (several of which are in fact dictated by state law, *see, e.g.*, Cal. Penal Code §§ 851.5, 1269b) is the source of his injury. There is no claim, for example, that the Sheriff's Department failed to timely advise Plaintiff of the applicable bail, or refused to accept bail that was tendered, or did not permit phone calls. The conduct that the FAC challenges is the Sheriff's detention of a person who indisputably does not pay the bail established by the superior court. Plaintiff's contention that the Sheriff makes other decisions does not lead to the conclusion that state law does not control the conduct they actually challenge in the FAC.

Fourth, the same response applies to Plaintiff's assertion that the Sheriff's Department sets the booking charge. ECF No. 37 at 8. There is no claim in the FAC that the Sheriff's Department

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uses inapplicable booking charges to increase the amount due under the superior court's bail schedule. The claim in the FAC is that the detention of a person who cannot afford the applicable bail—whatever it is—is unconstitutional.

In short, Plaintiff offers no credible argument that, for the conduct actually at issue in the FAC, state law does not control it. Plaintiff does not address the fact that state law limits the authority of law enforcement personnel to release a person to cases involving infractions misdemeanors, and in every other circumstance expressly assigns release decisions to the judiciary. *See* Cal. Pen. Code §§ 853.5, 853.6 (authority for law enforcement to cite and release offenders is limited to certain infractions and misdemeanors). That is true before arraignment as well as afterwards: The bail schedule is established by the court, and any person who seeks pre-arraignment release on a lower bail amount or on his or her own recognizance must obtain it by order of the court—not the Sheriff. Cal. Penal Code §§ 1269c, 1318.1(a). When the court specifies a release condition, the natural corollary is that the person cannot be released if the condition is not satisfied. California law requires superior courts to set a bail schedule, and also establishes a pre-arraignment procedure by which a court may lower the amount, and Plaintiff offers no authority why those do not bind the Sheriff.

The Sheriff has a mere ministerial role in in detaining prisoners pursuant to the bail schedule required by state law and "prepare[d], adopt[ed], and annually revise[d]" by Superior Court judges. For that reason, he is a state actor and is immune from money damages under the Eleventh Amendment.

II. THE COUNTY HAS NO *MONELL* POLICY AND PRACTICE RELATING TO MONEY BAIL.

While the fact that the Sheriff acts on behalf of the State, not the County, when detaining a person as required by state law is sufficient to require dismissal, *See Weiner*, 210 F.3d at 1031, Plaintiff's claim also fails because an action mandated by state law is not a municipal "policy and practice" under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978).

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A. *Evers v. Custer County* Does Not Support Liability.

Plaintiff disputes this principle by arguing that three-decade-old *Evers v. Custer County*, 745 F.2d 1196, 1203 (9th Cir. 1984) establishes that counties may be liable for ministerial compliance with state law. *See* ECF No. 37 at 9. Plaintiff misses the mark: (1) *Evers* is distinguishable on its facts; and (2) to the extent it is read to require counties to disregard facially valid state law (in order to avoid § 1983 liability) it has been overruled by subsequent Supreme Court and Ninth Circuit cases.

Evers is distinguishable on its facts. *Evers* held that a County could be sued under *Monell* where its Commissioners issued a "Declaration of Public Road" regarding a road that passed through the plaintiff's property (notwithstanding the action being taken pursuant to state law). *Id.* However, as the Ninth Circuit specifically observed, the "Declaration" was an official decision of the Commissioners, the County's governing body, and the criminal action was instigated at their direction (which no one contended state law required). *Evers*, 745 F.2d at 1203. The County has made no such discretionary choice to institute a money bail system.

Second, even to the extent *Evers* could be read to mean that a county may be liable for acts under state law not deliberately chosen by the County, it has been superseded by Supreme Court (and subsequent Ninth Circuit) cases holding that a municipal policy involves "a deliberate choice to follow a course of action … from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986); *Brass v. Cty. of Los Angeles*, 328 F.3d 1192, 1199 (9th Cir. 2003) (noting that the Ninth Circuit applies that standard); *see also Oklahoma City v. Tuttle*, 471 U.S. 808, 821-23 (1985). Plaintiff argues that *Pembaur* merely established that municipalities cannot be liable for the acts of employees under a respondeat superior theory. ECF No. 37 at 12. But, numerous Circuit Courts have read it otherwise. *See, e.g.*, *Vives v. City of New York*, 524 F.3d 346, 352-53 (2d Cir. 2008) ("[W]e agree with *all* circuits to address state laws mandating enforcement by municipal police officers that a municipality's decision to honor this obligation is not a conscious choice.") (emphasis added).[4]

[4] *See also Snyder*, 745 F.3d at 249 (Indiana law concerning the removal of prisoners from voting rolls left no room for the county to make "an independent choice among various alternatives authorized by state law"); *Doby v. DeCrescenzo*, 17 F.3d 858, 868 (3d Cir 1999); *Whitesel v. Sengenburger*, 222 F.3d 861, 872 (10th Cir. 2000); *Bockes*

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Plaintiff's efforts to distinguish subsequent Ninth Circuit cases holding that *Monell* liability requires a choice are unpersuasive. Initially, the County notes that Plaintiff misstates the holding of *Estate of Brooks ex rel. Brooks v. United States*, 197 F.3d 1245 (9th Cir. 1999). Plaintiff claims that *Brooks* found that federal policy was the sole cause of the detention (and thus no municipal policy could exist). ECF No. 37 at 14. Plaintiff is mistaken. *Brooks* identified two causes of the plaintiff's detention: (1) the actions of the United States Marshals, who failed to bring the plaintiff before a federal magistrate judge; and (2) state law, which required the Sheriff's Department to detain the plaintiff until federal authorities authorized his release. *Brooks*, 197 F.3d at 1248. The court held that the County could not be held liable under *Monell* because it could neither bring the plaintiff before a federal magistrate *nor ignore the state law that required his detention*. *Id.* Nor was the County capable of ignoring state law in this case.

Plaintiff also argues that *Brooks* did not consider that the Sheriff's Department could avoid liability simply by disregarding state law. That argument is also mistaken. There was a dissenting opinion in Brooks, which included the following:

> The County also could have avoided the injury to Brooks in another way: by releasing him. The majority contends that the County was precluded from this step by Cal. Penal Code § 4005(a), which required the County to hold Brooks until federal authorities said otherwise. That requirement, however, could not trump Brooks's federal right not to be locked in jail without being brought before a magistrate. Id. at 1250 (Hawkins, J., dissenting).

The majority opinion thus considered the argument Plaintiff makes here and concluded that it did not furnish a sufficient basis to impose *Monell* liability on the County.

Next Plaintiff argues that the Supreme Court's opinion in *Los Angeles Cty., Cal. v. Humphries*, 562 U.S. 29 (2010) did not overrule *Evers* because it addressed only whether the "policy or custom" requirement applies to suits for injunctive relief. But Plaintiff ignores the Ninth Circuit's opinion, which—as the Supreme Court itself pointed out—considered the argument that state law, rather than county policy, caused the alleged deprivation. *Id. at 33*; *Humphries v. Cty. of*

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v. Fields, 999 F.2d 788, 791 (4th 1993); *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 793 (7th Cir. 1991); *Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980).

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Los Angeles, 554 F.3d 1170, 1202 (9th Cir. 2008). The Ninth Circuit was required to confront that argument as to the claim for damages, because the rule announced in *Chaloux v. Killeen*, 886 F.2d 247 (9th Cir. 1989), excepted from *Monell's* "policy or custom" requirement only claims for injunctive relief. [5] The Ninth Circuit responded to the argument by saying that the relevant state law did not prevent the County from creating a policy to remedy the alleged violation, and remanded to determine whether liability could attach based on the County's failure to act where state law left it free to do so. *Humphries*, 554 F.3d at 1202. Thus, the Ninth Circuit recognized that mere compliance with the requirements of state law itself does not constitute a municipal "policy or practice." Indeed, if such compliance were enough, there would have been no reason for the Supreme Court to grant certiorari and answer the question it did.

B. The County Has No Obligation to Disregard Facially Valid State Law.

Plaintiff asserts that even to the extent state law requires the County to administer the money bail system, the County has an affirmative obligation to disregard state law the County decides violate the Constitution. No such thing is required; the County has no obligation to ignore any and all state laws it deems inconsistent with the Constitution, *before* any court has ruled on their validity (or, for that matter, after a court has upheld them). *See Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944); *Lockyer v. City & Cty. of San Francisco*, 33 Cal.4th 1055, 1119-20 (2004). Moreover, the Ninth Circuit has held that jail officials need not second-guess facially valid judicial orders. *Engebretson*, 724 F.3d at 1042 ("Prison officials who simply enforce facially valid court orders are performing functions necessary to the judicial process. They must not be required to second-guess the courts if that process is to work fairly and efficiently."); *Rivera v. Cty. of Los Angeles*, 745 F.3d 384, 392 (9th Cir. 2014) (upholding dismissal of *Monell* claim, explaining that "[i]f a suspect is held according to court order, county officials are not required to investigate whether the court order is proper"). Other Circuits have reached the same conclusion. *Valdez v. City & Cty. of Denver*, 878 F.2d 1285, 1289 (10th Cir. 1989) ("Officials

[5] The exception was developed after the court concluded that the Supreme Court's decision in *Tuttle* foreclosed municipal liability. The Ninth Circuit's original opinion in *Chaloux* held that the county defendants could not be held liable because sheriffs did not make policy by performing a ministerial duty to enforce state law. *Chaloux v. Killeen*, 873 F.2d 1274, 1276 (9th Cir. 1989) (citing *Tuttle*, 471 U.S. at 821). The panel then withdrew that opinion and reached the opposite result based on its holding that *Monell*'s "policy or custom" requirement did not apply in suits seeking only injunctive relief. 886 F.2d at 250-51. The Supreme Court eliminated that exception in *Humphries*.

such as the defendants must not be required to act as pseudo-appellant courts scrutinizing the orders of judges").

Moreover, in asserting that the County must ignore (in Plaintiff's view) unconstitutional state law, Plaintiff ignores the distinction between acts that state law merely authorizes (therefore leaving open the possibility of choice) and conduct that state law affirmatively requires.[6] For example, Plaintiff argues that *Anela v. City of Wildwood*, 790 F.2d 1063 (3d Cir. 1986) found *Monell* liability when a city enforced state law. But *Anela* did involve a choice. Specifically, the city chose to disregard a New Jersey Supreme Court rule that required law enforcement officers to cite and release people arrested for minor offenses unless certain exceptions applied. The city ignored that rule and the Third Circuit concluded that the city had adopted a policy under *Monell* by disregarding the state supreme court rule that "specifically and unequivocally required" law enforcement officials to follow a contrary practice. *Id.* at 1067 ("The City established a practice contrary to Rule 3:4-1 and must bear responsibility therefor."). In any event, to the extent *Anela* (decided the same year as *Pembaur*) held that a municipality can be held liable for following state law, it was overruled by the Third Circuit in *Doby v. DeCrescenzo*, 171 F.3d 858, 868 (3d Cir. 1999) ("when a county is merely enforcing state law . . . it cannot be held liable under [] *Monell*").[7]

Similarly, the two Arizona decisions cited by Plaintiff construed *Evers* to permit liability based on particular enforcement decisions. See *Puente Arizona v. Arpaio*, 76 F.Supp.3d 833, 867 (D. Ariz. 2015); *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2013 WL 5445483, at *26-28 (D. Ariz. Sept. 30, 2013). Moreover, neither of them considered any of the subsequent Ninth Circuit authority discussed above, or district court cases in this circuit concluding that there is no *Monell* liability for the enforcement of state law.

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[6] The Second Circuit analyzed this distinction in *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008) (collecting authorities which, to varying degrees, found "that a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so.") The County has no such discretionary choice.

[7] Plaintiff cites two other District Court cases from the Third Circuit, one of which predates *Doby* and one which was apparently decided in ignorance of it. *Compare Davis v. City of Camden*, 657 F. Supp. 396, 404 (D.N.J. 1987) *with RJH Medical Center, Inc. v. City of DuBois*, 754 F.Supp.2d 723, 727 (W.D. Penn. 2010)

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C. To Whatever Extent the County has a Policy or Practice, it is Solely a Product of State Law

In short, Plaintiff's argument ignores the limits on *Monell* liability repeatedly articulated by the Supreme Court. "Municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.'" *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (quoting *Pembaur*, 475 U.S. at 480). Where state law requires the act, it is state law, not municipal policy, that is responsible for the violation. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980) (county judge's "duty in implementing section 4.28, much like that of a county sheriff in enforcing a state law, may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility."); *Laurie Q. v. Contra Costa Cty.*, 304 F.Supp.2d 1185, 1201-02 (N.D. Cal. 2004) ("When the County accurately applies the state's mandatory foster care payment schedule (or when a law enforcement officer serves a warrant pursuant to a mandate from a state court) … a plaintiff may seek recourse only against the state for establishing the policy."). See

Plaintiff's "argument would render meaningless the entire body of precedent from the Supreme Court … that requires culpability on the part of a municipality and/or its policymakers before the municipality can be held liable under § 1983, and would allow municipalities to be nothing more than convenient receptacles of liability for violations caused entirely by state actors . . .". *Surplus Store & Exch., Inc. v. City of Delphi*, 928 F.2d 788, 791 n.4 (7th Cir. 1991).

Therefore, Plaintiff's claim against the County must be dismissed.

Dated: January 5, 2017

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