Nos. 19-36054, 2:19-cv-00100-RMP

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUANAH M. SPENCER,
Plaintiff - Appellant

v.

CITY OF SPOKANE, a municipal corporation in and for the State of Washington; GREGORY PAUL LEBSOCK, in his individual and official capacities; SPOKANE COUNTY, a municipal corporation and political subdivision of the State of Washington; CASEY A. EVANS, in his individual and official capacities,

Defendants – Appellees.

Appeal from the United States District Court
for the Eastern District of Washington, Spokane
No. 2:19-cv-00100-RMP

APPELLEES SPOKANE COUNTY AND CASEY A. EVANS' RESPONSE BRIEF

PAUL L. KIRKPATRICK, WSBA # 16491
CHRISTOPHER C. BROWNING WSBA # 47760
KIRKPATRICK & STARTZEL, P.S.
108 N. Washington Street, Ste 201
Spokane, WA 99201
(509) 455-3647
Attorneys for Defendants - Appellees
SPOKANE COUNTY; and CASEY A. EVANS

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

In 2016, Appellant Quanah Spencer ("Mr. Spencer") brought a lawsuit against his former employer, SAS Oregon LLC et al. Mr. Spencer not only lost the lawsuit, but SAS Oregon also obtained a monetary judgment against Mr. Spencer. As a result, SAS Oregon began garnishing his wages. In 2017, Mr. Spencer faxed a forged court order from the trial judge in the case, Judge Moreno, to his employer ordering them to cease garnishments. Once it was discovered that the order was forged, the matter was investigated by Detective Lebsock of the Spokane City Police Department. Detective Lebsock concluded, in part, that because Mr. Spencer was the subject of the garnishment and had faxed the forged order to Judge Moreno, criminal charges should be brought against Mr. Spencer. An application for an arrest warrant was submitted to the court by Deputy Prosecuting Attorney Casey Evans ("DPA Evans"). The court reviewed the information provided and determined that probable cause existed to issue an arrest warrant. Mr. Spencer was arrested in Missoula, Montana, and held for four days in jail. Subsequently, additional information was obtained indicating that the order may have been forged by Mr. Spencer's attorney in the prior lawsuit, Aaron Kandratowicz ("Mr. Kandratowicz"). Once it was established that Mr.

Kandratowicz had forged the order, the charges against Mr. Spencer were dismissed. Mr. Kandratowicz was eventually convicted of multiple felonies arising from the forged order.

Despite the fact that the forgery was perpetrated by his attorney, Mr. Spencer is now suing the detective and prosecutor who handled the case. Mr. Spencer also seems to take issue with the Spokane Superior Court Judge's decision that probable cause existed for the arrest warrant. Mr. Spencer is seeking to blame everyone but his attorney for what occurred. In terms of the actions of Spokane County and DPA Evans, an arrest warrant was sought for Mr. Spencer by DPA Evans after a judge determined probable cause existed, based on an affidavit of Detective Lebsock. DPA Evans submitted a certificate arguing for the arrest warrant, as opposed to seeking a summons for Mr. Spencer to appear in court, based on concerns that Mr. Spencer may not appear for a summons and that a potential existed for evidence to be destroyed.

Mr. Spencer mistakenly claims that DPA Evans acted as a complaining witness when he submitted a certificate arguing for an arrest warrant in lieu of a summons. The Federal District Court Judge rejected this argument and found that DPA Evans' actions are entitled to absolute immunity because he initiated a

prosecution against Mr. Spencer and advocated for an arrest warrant. The finding of immunity and that DPA Evans did not violate any of Mr. Spencer's constitutional rights (or other claims) was correct and should be affirmed.

JURISDICTIONAL STATEMENT

Both the District Court and this Court have jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1367. On November 18, 2019, the District Court entered an Order and Judgment dismissing all claims. ER 2-38; ER 1. On December 11, 2019, Mr. Spencer filed a Notice of Appeal. ER 39-41. The Judgment was final and dispositive of all claims. It was timely appealed under Federal Rule of Appellate Procedure 4(a)(1)(A). ER 39-41.

STATEMENT OF THE ISSUES

1. The District Court did not err when it declined to apply the summary judgment standard to Defendants Spokane County and Casey A. Evans' Fed. R. Civ. P. 12(c) motion that only included material referenced in Mr. Spencer's complaint.
2. The District Court did not err when it granted DPA Evans absolute immunity for the prosecutorial function of filing a certificate in support of an arrest warrant.

3. The District Court did not err when it found Probable Cause existed for Mr. Spencer's arrest and brief prosecution for forgery.
4. The District Court did not err when it dismissed Mr. Spencer's Equal Protection claim against Spokane County and DPA Evans because Mr. Spencer failed to show that other similarly situated individuals were not prosecuted.
5. The District Court did not err when it extended DPA Evans' absolute immunity to Spokane County for Mr. Spencer's state law claims.
6. The District Court did not err when it dismissed Mr. Spencer's 42 U.S.C. § 1983 claims against Spokane County because Mr. Spencer failed to allege a constitutional violation.
7. The District Court did not err when it denied Mr. Spencer's Fed. R. Civ. P. 56(d) motion for continuance because discovery would not aid Mr. Spencer in responding to the Fed. R. Civ. P. 12(c) motion.
8. DPA Evans is also entitled to qualified immunity for Mr. Spencer's claims because he did not violate Mr. Spencer's constitutional rights.

STATEMENT OF THE CASE

The District Court properly granted Appellees Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion to dismiss. Spokane County and DPA Evans did not violate Mr. Spencer's constitutional rights. Further, the actions of DPA Evans are entitled to absolute immunity because he was conducting the prosecutorial function of applying for an arrest warrant. The District Court properly ruled that Mr. Spencer's constitutional rights were not violated and that DPA Evans' actions were entitled to absolute immunity.

A. Underlying Facts of the Forged Court Order

This case arises out of the unusual circumstance of Spokane County Superior Court Judge Maryann Moreno having her signature forged on a court order. The underlying case in which the order was forged involved a lawsuit filed by the Spencers against SAS Oregon LLC et al. for misrepresentations regarding the sale of a home. ER 251. After the lawsuit was instigated, motions for summary judgment were brought by SAS Oregon and the other defendants seeking dismissal of all claims. Judge Moreno granted SAS's motion and awarded attorney's fees against the Spencers in the amount of $37,102.50. SER 38. A garnishment order

was then entered by Judge Moreno against Mr. Spencer's wages from Burlington Northern Santa Fe Railroad. SER 38.

Unexpectedly, BNSF received a "court order" by fax on 10/26/2017, allegedly signed by Judge Moreno quashing the garnishment of Mr. Spencer's wages. SER 38. Attorneys for SAS Oregon brought the order quashing the garnishment to the attention of Judge Moreno. SER 38. When reviewing the "order," Judge Moreno determined that it was dated and signed during the time she was on vacation and that she had not signed the order. SER 39.

The forged order was turned over to the City of Spokane for investigation. ER 251. Detective Lebsock from the Spokane City Police Department conducted the investigation. ER 51; SER 38-44. He found that parts of the coversheet used to fax the forged court order to BNSF contained Mr. Spencer's handwriting. SER 39. Detective Lebsock also determined the UPS store that sent the fax was close to the Spencers' residence in Spokane and Mr. Spencer's debit card was used to pay for the fax. SER 40, 44. When investigating the use of Mr. Spencer's debit card, Detective Lebsock noted Mr. Spencer had a bank account with the Spokane Teachers Credit Union in Spokane and at the Missoula Federal Credit Union ("MFCU") in Missoula, MT. SER 43-44. Detective Lebsock further determined

that "the Spencers had, and may still have, a phone number … with the area code of (406)." SER 42. Area code 406 corresponds to Montana. SER 42. Gwen and Quanah Spencer were joint account holders at the MFCU, and when the account was opened in July of 2017, the Spencers gave an address in Missoula, MT. SER 42.

Detective Lebsock's investigation, including the fact that Mr. Spencer had faxed the forged order to BNSF, was provided to DPA Evans. ER 250-253; SER 38-44. Based on the investigation conducted, DPA Evans made the prosecutorial decision to seek an arrest warrant for Quanah Spencer. ER 253.

B. Facts of DPA Evans' Limited Involvement

DPA Evans filed an Information on January 5, 2018, charging Mr. Spencer with one count of Forgery. ER 250. The Information was filed along with Detective Lebsock's Affidavit of Facts, an Order for Issuance of a Warrant, and a Certificate of Casey Evans. ER 251-253; SER 38-44.

DPA Evans' certificate *argued* for a warrant based upon: (1) the nature of the allegations; (2) the defendant's multistate business dealings between Washington and Montana and the potential risk for the defendant to seek refuge outside of the state of Washington; (3) Det. Paul Lebsock's observation that the

defendant's residence in Spokane appears to be unoccupied and therefore the defendant may not respond to a summons; and (4) the potential for the defendant to interfere with the administration of justice considering the nature of these allegations and the risk of evidence tampering or destruction. ER 252-253.

C. Mr. Spencer's Arrest, Release, and Dismissal

A Spokane County Superior Court Judge granted the request for a warrant, a warrant was issued, and Mr. Spencer was arrested in Montana. ER 266-267. After the arrest, Mr. Spencer implicated his attorney from the underlying action, Aaron Kandratowicz. ER 296. Warrants were obtained to search Kandratowicz' home and computer. SER 8. Evidence of the forgery was found on Mr. Kandratowicz' computer. ER 269. DPA Evans dismissed the charges against Mr. Spencer and Mr. Kandratowicz was charged with multiple counts of forgery and identity theft. ER 300-301. Mr. Kandratowicz ultimately pled guilty to two counts of forgery and one count of identity theft. ER 305-306.

D. Procedural History

Mr. Spencer filed his Complaint in the current action on March 29, 2019. ER 307. Mr. Spencer alleged a violation of his constitutional rights under 42 U.S.C. § 1983 and various state law tort claims. Mr. Spencer propounded written

discovery to Appellees Spokane County and DPA Evans on August 1, 2019. ER 248. Spokane County and DPA Evans filed a motion for protective order and stay of discovery on August 12, 2019. ER 249; SER 49-52. Appellees Spokane County and DPA Evans filed their motion to dismiss on August 9, 2019. ER 254-255; SER 11-31. Mr. Spencer responded to Appellees Spokane County and DPA Evans' motion to dismiss on August 20, 2019, and motion to stay discovery on August 26, 2019. ER 175; SER 54-62; ER 163. Appellees Spokane County and DPA Evans filed a reply brief to the motion to dismiss on September 13, 2019, and a reply brief to the motion to stay discovery on September 3, 2019. ER 102; SER 78-89; SER 64-76.

The District Court held oral argument on the motion to dismiss and the motion for protective order and stay of discovery on October 1, 2019. ER 42-45. On November 18, 2019, the District Court entered an order granting Appellees Spokane County and DPA Evans' motion to dismiss, dismissing all of Mr. Spencer's claims. ER 2. In its November 18, 2019 Order, the District Court determined that the motion for protective order and stay of discovery was moot. ER 34-38.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed all of Plaintiff's claims against Spokane County and DPA Evans. Mr. Spencer mistakenly contends that Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion to dismiss should be decided under a summary judgment standard because the motion included information quoted from and/or referenced in the complaint. Mr. Spencer did not contest the authenticity of the four documents attached to the motion to dismiss. The District Court properly used the Fed. R. Civ. P. 12(b)(6) standard of accepting all factual allegations in the complaint as true, construing pleadings in the light most favorable to the plaintiff, and determining if the complaint fails to state a claim upon which relief can be granted when it granted Spokane County and DPA Evans' motion to dismiss.

The District Court properly dismissed all claims against DPA Evans because his actions were intimately associated with the judicial phase of the criminal process. DPA Evans' involvement in this case was limited. DPA Evans argued via a certificate that an arrest warrant should issue in lieu of a summons. Importantly, DPA Evans did not certify any facts necessary to establish probable cause. Arguing for an arrest warrant is intimately associated with the judicial

phase of the criminal process and entitled to absolute immunity. Likewise, DPA Evans is entitled to absolute immunity for determining when to dismiss the charges against Mr. Spencer.

The District Court also properly determined that probable cause was present in the affidavit of Detective Lebsock and there were no material omissions that would defeat probable cause. For example, Mr. Spencer's wages were garnished in a state action, he possessed a forged court order enjoining the garnishment of his wages, and he faxed that forged order to his employer to halt the garnishments while using a payment card belonging to him.

The District Court properly denied Mr. Spencer's equal protection claim against DPA Evans and Spokane County. Mr. Spencer claims that DPA Evans and Spokane County violated his equal protection rights by selectively prosecuting him because of his race. Mr. Spencer failed to demonstrate that DPA Evans and Spokane County failed to prosecute other similarly situated individuals. Mr. Kandratowicz was prosecuted and convicted for the underlying forgery charge.

The District Court properly extended DPA Evans' absolute immunity to Spokane County for Mr. Spencer's state law claims. Since DPA Evans is entitled to absolute immunity for Mr. Spencer's state law claims, policy reasons require

that immunity extend to Spokane County. As a result, all of Mr. Spencer's state law claims against Spokane County were properly dismissed.

The District Court properly dismissed Mr. Spencer's 42 U.S.C. § 1983 claims against Spokane County. As discussed above, Mr. Spencer failed to show a constitutional violation. Probable cause existed to arrest and charge Mr. Spencer. Likewise, his equal protection claims fail because Mr. Kandratowicz was prosecuted and convicted of the same crime Mr. Spencer was originally charged with. Since Mr. Spencer failed to establish a constitutional violation, Spokane County cannot have any policy that caused a violation of his constitutional rights.

The District Court properly denied Mr. Spencer's Fed. R. Civ. P. 56(d) motion to continue in regards to Spokane County and DPA Evans. First, the District Court properly ruled that Spokane County and DPA Evans' motion to dismiss was on the pleadings, and not a motion for summary judgment. Thus, discovery is not necessary to respond to a motion on the pleadings. Second, it is proper to stay discovery pending a court's ruling on immunity issues raised by motion. Mr. Spencer continues to fail to demonstrate how any discovery would have assisted him in responding to Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion to dismiss.

Alternatively, if this Court determines that DPA Evans is not entitled to absolute immunity, he is entitled to qualified immunity. Mr. Spencer's constitutional rights were not violated under these facts. Probable cause existed for his arrest and prosecution. DPA Evans' certificate arguing for an arrest warrant did not violate the constitutional rights of Mr. Spencer.

ARGUMENT

A. Standards of Review

1. The proper standard of review for a dismissal based on absolute immunity and a Fed. R. Civ. P. 12(c) dismissal is de novo.

A dismissal pursuant to a Fed. R. Civ. P. 12(c) motion on the pleadings is reviewed de novo. *See Lyon v. Chase Bank USA, NA*, 656 F.3d 877, 883 (9th Cir. 2011). Thus, the proper standard of review for Spokane County and DPA Evans' Rule 12(c) motion to dismiss on the pleadings is de novo. "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Dunlap v. Credit Protection Ass'n., L.P.*, 419 F.3d 1011, 1012 n.1 (9th Cir. 2005).

Whether the District Court properly granted DPA Evans absolute immunity is a question of law and reviewed de novo. *See Brown v. California Dep't of Corr.*, 554 F.3d 747, 749-50 (9th Cir. 2009).

2. The proper standard of review for whether the District Court properly denied Mr. Spencer's motion to continue is abuse of discretion.

When reviewing a lower court's decision to grant or deny a Fed. R. Civ. P. 56(d) motion to continue, the standard is abuse of discretion. *Swoger v. Rare Coin Wholesalers*, 803 F.3d 1045, 1047 (9th Cir. 2015). A district court abuses its discretion only if the movant diligently pursued its previous discovery opportunities and if the movant can show how allowing additional discovery would have precluded summary judgment. *See Chance v. Pac-Tel Teletrac Inc.*, 242 F.3d 1151, 1161 n.6 (9th Cir. 2001).

Mr. Spencer incorrectly states that the District Court failed to address his pending motion for discovery. Errata Brief, 20. First, the quote relied on by Mr. Spencer states "[I]f the trial judge fails to address [a discovery] motion before granting summary judgment, we review this omission de novo." *United States v. Sellers*, 906 F.3d 848, 852 (9th Cir. 2018) (quoting *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994)). The District Court did not grant

summary judgment to Spokane County and DPA Evans. Instead, the District Court rejected Mr. Spencer's argument to convert the Fed. R. Civ. P. 12(c) motion for judgment on the pleadings to a motion for summary judgment. ER 8.

Second, Mr. Spencer's argument that the District Court did not address the pending motion for protective order and stay of discovery submitted by Spokane County and DPA Evans is inaccurate. The District Court heard oral argument on the motion for protective order and stay of discovery on October 1, 2019. ER 42-45. Then, in its November 18, 2019 order, the District Court denied the motion as moot, having granted Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion for judgment on the pleadings. ER 38.

B. The District Court did not err when it declined to apply the summary judgment standard to Defendants Spokane County and Casey A. Evans' Fed. R. Civ. P. 12(c) motion that only included material referenced in Mr. Spencer's complaint.

Federal Rule of Civil Procedure 12(b)(6) allows the court to dismiss the complaint for "failure to state a claim upon which relief can be granted." To survive a motion to dismiss, the complaint must state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Federal Rule of

Civil Procedure 12(c) applies after the pleadings are closed and is "functionally identical" to a motion brought under Rule 12(b). *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989). "A judgment on the pleadings is properly granted when, taking all the allegations in the pleading as true, the moving party is entitled to judgment as a matter of law." *Dunlap*, 419 F.3d at 1012 n.1.

1. The standard of a Fed R. Civ. P. Rule 12(b) motion is the same standard as the Fed R. Civ. P. 12(c) motion.

"The principal difference between motions filed pursuant to Rule 12(b) and Rule 12(c) is the time of filing." *Dworkin*, 867 F.2d at 1192. As a result, since the motions are "functionally identical", *Id*., federal courts apply the same analysis that is applicable to motions made under a Rule 12(b) to motions made under Rule 12(c). *See Id*.; *see also Lyon*, 656 F.3d at 883. DPA Evans and Spokane County's Rule 12(c) motion was a motion attacking Mr. Spencer's complaint. Thus, it was identical to a Rule 12(b)(6) motion in all aspects but the time of the filing. *See Id*. Thus, the District Court correctly applied the Rule 12(b)(6) standard to DPA Evans and Spokane County's Rule 12(c) motion to dismiss. ER 8-9.

2. DPA Evans and Spokane County's Fed. R. Civ. P. 12(c) motion did not present matters outside the pleadings.

The Ninth Circuit deems a document "not outside the compliant if the complaint specifically refers to the document and if its authenticity is not questioned." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (overruled on other grounds) (citing *Townsend v. Columbia Operations*, 667 F.2d 844, 848-49 (9th Cir. 1982)). "When [the] plaintiff fails to introduce a pertinent document as part of his pleading, [the] defendant may introduce the exhibit as part of his motion attacking the pleading." *Branch*, 14 F.3d at 453. The court went on to say that "such consideration [of exhibits] does not convert the motion to dismiss into a motion for summary judgment. *Id*. Additionally, a court may consider any documents which it could take judicial notice of pursuant Federal Rule of Evidence 201 when deciding a Fed. R. Civ. P. 12 motion to dismiss. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001). Federal Rule of Evidence 201 permits the court to take judicial notice of "a fact that is not subject to reasonable dispute because it is generally known within the trial court's territorial jurisdiction; or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Federal Rule of Evidence 201(b).

DPA Evans and Spokane County attached four documents to the Rule 12(c) motion: (1) the Information; (2) Detective Lebsock's Affidavit of Facts; (3) the order issuing an arrest warrant; and (4) the Certificate of DPA Evans. ER 250-253, SER 38-44. These attachments were all referred to extensively in Plaintiff's Complaint, but not attached. ER 256-287, SER 6-9. The Information was referenced and quoted by the Plaintiff in his complaint. ER 265. Detective Lebsock's Affidavit of Facts was referenced and quoted extensively throughout the Plaintiff's Complaint. ER 264-265, 270, 276, SER 6-7. The warrant and "other documents … used to accomplish the arrest and detention of Mr. Spencer" were referenced in the Complaint. ER 266, 274, SER 9. The Certificate was referenced and quoted extensively in the Complaint. ER 265-266, 274, 276. Although the Plaintiff relied heavily on these four documents when drafting his Complaint, he chose not to attach them.

Mr. Spencer did not contest the documents' authenticity and referred to the contents of the documents in his Complaint. Thus, the attachments do not convert this Rule 12(c) motion into a summary judgment motion.

Mr. Spencer may argue that his Complaint only refers to the arrest warrant and not the order issuing an arrest warrant that was attached to the Rule 12(c)

motion. The Complaint clearly relies on the fact that an arrest warrant was issued by the court for Mr. Spencer. ER 266, 274, SER 9. Absent the order issuing the arrest warrant, Mr. Spencer would never have been arrested, and the majority of his claims would not have been brought. However, for argument's sake, if this Court determined that the Complaint only relied on the arrest warrant and not the order issuing an arrest warrant, the District Court still did not commit error by not converting the Rule 12(c) motion into one for summary judgment. First, Mr. Spencer does not contest the accuracy of the order issuing the arrest warrant. Second, the order issuing the arrest warrant falls squarely within the purview of Federal Rule of Evidence 201 because it can be accurately and readily determined from Spokane County Superior Court whose accuracy cannot reasonably be questioned. *See* Federal Rule of Evidence 201(b); *Lee*, 250 F.3d at 689. Thus, a court can take judicial notice of the order issuing the arrest warrant without converting the Rule 12(c) motion into a motion for summary judgment.

C. DPA Evans is entitled to absolute immunity for his actions.

"A state prosecuting attorney enjoys absolute immunity from liability under § 1983 for [her] conduct in 'pursuing a criminal prosecution' insofar as [s]he acts within [her] role as an 'advocate for the State' and [her] actions are 'intimately

associated with the judicial phase of the criminal process.'" *Waggy v. Spokane County Washington*, 594 F.3d 707, 710 (9th Cir. 2010) (citing *Cousins v. Lockyer*, 568 F.3d 1063, 1068 (9th Cir. 2009) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 410, 430–31 (1976))). A prosecutor who performs judicial functions is entitled to absolute immunity, but a prosecutor who performs investigative functions usually performed by law enforcement is only entitled to qualified immunity. *See Hampton v. Chicago*, 484 F.2d 602, 608 (C.A.7 1973) cert. denied, 415 U.S. 917, (1974); *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997).

A prosecutor must be entitled to absolute immunity for judicial functions to protect them from unnecessary litigation and to enable them to use independent judgment in deciding which suits to bring and how to conduct them in court. *Imbler*, 424 U.S. at 424. The Court in *Imbler* explained the rationale for the immunity:

> Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials.

Id. at 425-26. The Supreme Court recognizes the ramification of providing absolute immunity for prosecutorial advocacy:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system.

Id. at 427. Analysis of a prosecutor's absolute immunity from suit under state law claims tracks common law immunity analysis under 42 U.S.C. § 1983. *Musso-Escude v. Edwards*, 4 P.3d 151, 155 (Wash. Ct. App. 2000).

1. Mr. Spencer waived the argument that DPA Evans violated his constitutional rights by continuing to prosecute him past January 16, 2018.

"[A]n issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it." *Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016). Mr. Spencer's brief to the District Court opposing Defendants' motion for judgment on the pleadings contains no argument that Mr. Spencer's constitutional rights were violated by the continued prosecution of Mr. Spencer past January 16, 2018. ER 163-174, SER 54-62. This issue is raised for the first time in Mr. Spencer's opening brief. Errata Brief at 31-35. This Court should not review Mr. Spencer's argument in this regard as it is waived.

2. If this Court finds Mr. Spencer did not waive the argument that DPA Evans violated his constitutional rights by continuing to prosecute him past January 16, 2018, DPA Evans is entitled to absolute immunity for continuing a prosecution.

Prosecutors are entitled to absolute immunity for, among other things, their decisions of "whether and when to prosecute [and] whether to dismiss" a case. *See Imbler*, 424 U.S. at 431 n. 33. The decisions of whether to, and when to dismiss a case is clearly "intimately associate with the judicial phase of the criminal process." *Waggy*, *supra*. DPA Evans has absolute immunity for his decision of when to dismiss Mr. Spencer's case because that decision is "intimately associated with the judicial phase of the criminal process." *Id*.

3. DPA Evans is entitled to absolute immunity for his decision to request an arrest warrant with a certificate arguing the reasons an arrest warrant is appropriate in lieu of a summons.

DPA Evans submitted Detective Lebsock's Statement of Facts, an Information, a motion and order for an arrest warrant, and a certificate in support of the arrest warrant. ER 250-253; SER 38-44. He did so to initiate a criminal proceeding. ER 250. He never personally attested to the statement of facts that

was used to establish probable cause and thus was not transformed into a complaining witness. ER 251, SER 38-44. Instead, he used his discretion to seek a warrant and argued for the reasons why a warrant was appropriate. Further, DPA Evans is entitled to rely on the affidavit presented to him by Detective Lebsock and is not required to conduct any additional investigation. *See Broam v. Bogan*, 320 F.3d 1023, 1029-30 (9th Cir. 2003) ("A prosecutor is absolutely immune from liability for failure to investigate the accusations against a defendant before filing charges). DPA Evans had no duty to investigate Mr. Spencer and should be afforded immunity for relying on Detective Lebsock's affidavit.

a. The certificate contained arguments traditionally made by a prosecuting attorney and did not transform DPA Evans into a complaining witness.

DPA Evans' request for the warrant was based on assertions traditionally made by a prosecuting attorney, namely: the nature of the allegations, the potential for interfering with the administration of justice, and the concern that the accused might not appear in response to a summons. Courts have repeatedly found that such assertions are prosecutorial in nature and subject to absolute immunity. For example, in *Tanner v. City of Federal Way*, 997 P.2d 932, 934 (Wash. Ct. App.

2000), the prosecutor filed an Information in King County District Court charging Tanner with a gross misdemeanor. Tanner was 17 years old at the time and the charge should have been filed in juvenile court. *Id*. Tanner's criminal charges were ultimately dismissed and Tanner sued the prosecutor for several causes of action, including a violation of 42 U.S.C. § 1983. *Id*. Tanner's lawsuit was dismissed based on prosecutorial immunity, and Tanner appealed. *Id*.

The prosecutor had signed a one-paragraph amended complaint accusing Tanner of a crime. *Id*. at 5. The amended complaint contained the following statement at the end: "The above signed Prosecutor does certify, under penalty of perjury, that he/she has reasonable grounds to believe, and does believe, that the defendant committed the offense, contrary to law." *Id*. Tanner argued that the prosecutor acted as a complaining witness by certifying the complaint under penalty of perjury. *Id*. The court disagreed and explained the prosecutor only certified that he had reasonable grounds to believe the accused committed the offense. *Id*. The court said "initiating and signing a criminal complaint after reviewing evidence provided by a complaining witness are functions that fall squarely within the traditional functions of a prosecutor." *Id*. at 5-6.

This Court interpreted absolute immunity for a prosecutor in *Waggy* and held that "the act of procuring a bench warrant is one 'intimately associated with the judicial phase of the criminal process,' *Imbler*, 424 U.S. at 430, as it is normally part of the initiation of criminal proceedings." *Waggy*, 594 F.3d at 713. *Waggy* involved a suit against Spokane County and Spokane County prosecutors under 42 U.S.C. § 1983 alleging Waggy's arrest and incarceration violated his due process rights. *Id.* at 708. Mr. Waggy's counselor divulged threats to kill made by Mr. Waggy to his Department of Corrections ("DOC") Officer. *Id*. Spokane Police investigated Mr. Waggy's threats and submitted an affidavit of probable cause to the prosecutor. *Id*. Mr. Waggy was charged with one count of felony harassment, was arrested, and posted bond. *Id*. After a conversation with Mr. Waggy's DOC Officer, the prosecutor determined the new arrest violated his DOC conditions. The prosecutor submitted a request for a bench warrant, attaching an order and a motion for arrest warrant, as well as the affidavit of facts from the police detective submitted on the harassment charge two days prior. *Id*. A judge issued the warrant and Mr. Waggy was arrested. *Id*. at 710.

Mr. Waggy argued that the prosecutor was acting as a complaining witness because she attested to facts in support of the bench warrant and was not protected

by absolute immunity. *Id*. The court disagreed and found that the motion for bench warrant essentially constituted the initiation of new judicial proceedings and the prosecutor was not acting outside of her role as a prosecutor. *Id*. The court concluded absolute immunity applies when a prosecutor submits a motion for bench warrant and applies the law to facts alleged in supporting affidavits signed by witnesses. *Id*.

Similarly, in *Tanner v. Heise*, 879 F.2d 572 (9th Cir. 1989), a prosecutor was granted absolute immunity for submitting a motion and an affidavit that supplied a basis for a bench warrant. Tanner had failed to comply with his sentence after being found guilty in a jury trial. *Id*. at 575. The prosecutor filed a motion and affidavit for an order to show cause compelling Tanner to respond to the City's allegation that he failed to comply with his sentence. *Id*. A bench warrant was ultimately issued based on the motion and affidavit submitted by the prosecutor. *Id*. In dismissing the suit against the prosecutor, the court found that the prosecutor had absolute immunity since his actions in submitting a motion and affidavit as the basis for a bench warrant were judicial in nature. *Id*.

In the present matter, DPA Evans initiated a criminal prosecution against Mr. Spencer and argued facts from Detective Lebsock's Affidavit to support that he

had reasonable grounds to request an arrest warrant. ER 253. This was very similar to the prosecutor's actions in *Waggy* where the court noted the act of procuring a bench warrant is "intimately associated with the judicial phase of the criminal process." *Waggy*, 594 F.3d at 713. Likewise, the prosecutor in *Heise* was afforded absolute immunity when he submitted a motion and affidavit in support of a bench warrant because those actions are judicial in nature. 879 F.2d at 575. DPA Evans' certificate submitted under penalty of perjury is analogous to the prosecutor's actions in the *Tanner* case, where the prosecutor swore under penalty of perjury that he had reasonable grounds to believe the defendant committed a criminal offense. *Tanner*, 997 P.2d 932, 934. DPA Evans certified that he had reasonable grounds to believe that an arrest warrant was proper. ER 253. His actions fall squarely within traditional prosecutorial functions and do not transform him into a complaining witness.

Courts have also granted prosecutors absolute immunity who (1) swore to the fact that an officer reported information to them in support of an arrest warrant, *Spencer v. Peters*, 907 F.Supp.2d 1221, 1233 (W.D. Wash. 2012); and (2) swore under penalty of perjury the reasons for dismissing a criminal charge in a motion to

dismiss, *Anderson v. City of Bellevue*, 862 F.Supp.2d 1095, 1103 (W.D. Wash. 2012).

The actions of DPA Evans are in contrast with actions where a prosecutor supplies the court with facts to support probable cause. In this latter circumstance, the prosecutor is considered similar to a complaining witness and is provided qualified immunity. *Kalina v. Fletcher*, 522 U.S. 118, 131 (1997). In *Kalina* the prosecuting attorney filed a certification for determination of probable cause signed under penalty of perjury. *Id*. at 121. Based on the facts in the prosecutor's certificate, the trial court found probable cause and an arrest warrant was issued. *Id*. It was later determined that the certification contained two inaccurate factual statements. *Id*. at 122.

In addressing the issue of prosecutorial immunity, the Supreme Court reasoned that investigative functions normally performed by law enforcement that are performed by a prosecutor fall outside of the protection of absolute immunity. *Id*. The court found that Kalina was acting in her role as an advocate and thus protected by absolute immunity when she filed the motion for arrest warrant and information. *Id*. at 129. The only action of Kalina that absolute immunity did not

apply to was her certifying under penalty of perjury **the facts necessary to establish probable cause for the charge**. *Id*. (Emphasis added).

Unlike Kalina, DPA Evans did not certify the facts establishing probable cause for the forgery charge. ER 251, 253, SER 38-44. The probable cause determination was made from Detective Lebsock's Affidavit of Facts, not from DPA Evans' certificate. ER 251, 253, SER 38-44. DPA Evans' request for an arrest warrant was a tactical decision based on his assessment that a summons would not be as effective in securing evidence and minimizing any risk of securing the defendant. It is never the function of a complaining witness to establish good cause to issue an arrest warrant in lieu of a summons. A prosecutor, as opposed to a complaining witness, would argue for a warrant because of "the nature of the allegations," or raise the concerns that the defendant may seek "refuge outside the state" or "interfere with the administration of justice." ER 253. There are no cases finding that such assertions are anything other than prosecutorial in nature. Since *Kalina* is easily distinguishable, Mr. Spencer has failed to point to a single case in his Appellate Brief or his response brief to DPA Evans and Spokane County's motion to dismiss that demonstrate the actions of DPA Evans are not entitled to absolute immunity. Errata Brief 43-45; ER 163-174, SER 54-62.

As noted, a prosecutor's reasoning in support of his request for an arrest warrant is "intimately associated with the judicial phase of the criminal process." *See Waggy*, 594 F.3d at 713 (citing *Imbler*, 424 U.S. at 430). Further, DPA Evans' certification contains argument, not factual allegations. For example, his certificate describes: "the **potential** risk" for Mr. Spencer to seek refuge outside of Washington; Mr. Spencer "**may** not respond to a summons," and "the **potential**" for Mr. Spencer to tamper with evidence. ER 253.

The certificate is also based on the information in Detective Lebsock's Affidavit of Facts. ER 251, 253; SER 38-44. Mr. Spencer had bank accounts in both Washington and Montana; SER 38, 42, had an address in Washington and two addresses in Montana SER 40, 42; and had a phone number with a Montana area code. SER 42. Detective Lebsock's Affidavit also indicates that Mr. Spencer's bank account from Spokane Teachers Credit Union was subject to garnishment in the SAS Oregon case from a judgment on June 27, 2017. SER 38. Shortly after the garnishment, the Spencers opened an account at Missoula Federal Credit Union on July 17, 2017. SER 42.

The District Court properly ruled that DPA Evans' actions of advocating for the issuance of an arrest warrant were entitled to absolute immunity. ER 20-23.

As a result, all claims against DPA Evans, as well as any state law claims arising from his actions, were properly dismissed. *See* M*usso-Escude v. Edwards*, 4 P.3d 151, 155 (Wash. Ct. App. 2000) (state laws claims are subject to absolute immunity).

b. DPA Evans' certificate was modeled after Washington Criminal Rule 2.2(b)(2), arguing the reasons why an arrest warrant should issue.

His certificate was based on Washington Criminal Rule 2.2 ("CrR 2.2"), which outlines the relevant factors the court considers in determining whether a summons or an arrest warrant is appropriate. CrR 2.2(b)(2) of Washington's Superior Court Criminal Rules reads in part:

> The court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant (i) **will not appear in response to a summons**, (ii) will commit a violent offense, (iii) **will interfere with witnesses or the administration of justice**, or (iv) is in custody. (Emphasis added).

DPA Evans' certificate explains why the criteria set forth in CrR 2.2(b)(2) had been met. ER 253. The Judge who reviewed the information agreed and signed the order approving the warrant. ER 252. The order used by the court is also on a form that follows CrR 2.2. ER 252.

Mr. Spencer ignores the specific section of CrR 2.2 cited by DPA Evans and Spokane County in the Fed. R. Civ. P. 12(c) motion. Errata Brief, 13, 43-44; SER 82-83. Instead, he points this Court to CrR 2.2(a)(2). Errata Brief, 43-44. Mr. Spencer claims CrR 2.2(a)(2) supports his claim that DPA Evans is not entitled to absolute immunity. Errata Brief, 43-44. The section relied on by Mr. Spencer is titled "probable cause." CrR 2.2(a)(2). The "complainant" identified in that rule is the individual who submits the facts to establish probable cause, in this case, Detective Lebsock. CrR 2.2(a)(2) is irrelevant to the actions of DPA Evans because DPA Evans did not personally attest to the facts necessary to determine probable cause. ER 251, SER 38-44. Instead, DPA Evans argued for an arrest warrant based on the factors set forth in CrR 2.2(b)(2). ER 253.

D. Probable cause exists both facially, and in consideration of the alleged material omissions.

As an introductory point, Mr. Spencer fails to distinguish the alleged acts of Detective Lebsock from the alleged acts of Mr. Spencer in his opening brief. Detective Lebsock investigated this case, submitted an affidavit of probable cause, and signed the affidavit under penalty of perjury. ER 251, SER 38-44. DPA Evans' involvement in this case was initiating, maintaining, and dismissing a

prosecution against Mr. Spencer. ER 250, 252-253. DPA Evans also initiated a prosecution of Mr. Kandratowicz and ultimately obtained a felony conviction from that prosecution. ER 300-306. A substantial portion of Mr. Spencer's opening brief focuses on alleged misrepresentations and omissions in the affidavit of probable cause prepared by Detective Lebsock. Errata Brief, 21-30. Mr. Spencer, however, refers to these "misrepresentations and omissions by Defendants/ Appellees" without distinguishing which Defendants/Appellees he is referring to. Errata Brief, 21-30.

Probable cause existed to arrest Mr. Spencer based on the Affidavit of Detective Lebsock. "Probable cause exists 'when police officers have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed…a crime.'" *United States v. Wallace*, 213 F.3d 1216, 1220 (9th Cir. 2000). To decide if probable cause exists, courts evaluate the totality of the circumstances. *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012).

The Spencers were assessed almost $40,000 in attorney fees in the SAS Oregon case, and their accounts were subject to garnishments to collect that money. SER 38. Mr. Spencer would have motive to avoid paying almost $40,000.

The Spencers opened a checking account in Montana shortly after the garnishments began. SER 42. Later, Mr. Spencer possessed and faxed a forged court order to his employer ordering them to cease garnishments. SER 38-39. He used a payment card that belonged to him to fax the order. SER 43.

These facts also clearly establish probable cause that Mr. Spencer "intended to injure or defraud" and possessed or "put off as true a written instrument which he … [knew] to be forged." *See* RCW 9A.60.020. Intent and knowledge can clearly be inferred from Mr. Spencer's actions. By faxing an order that was contrary to any ruling the court had made in the underlying lawsuit, it can easily be inferred that Mr. Spencer had intent to defraud his employer. These facts as well as the remainder of the affidavit established probable cause to charge Mr. Spencer with forgery.[1]

Last, Mr. Spencer argues that information implicating Mr. Kandratowicz in the forgery automatically exculpates Mr. Spencer. Errata Brief, 25-26. This reasoning is flawed. As the District Court correctly noted, "while the inclusion of

[1] Mr. Spencer argues that there was no probable cause on the face of the affidavit of Detective Lebsock because there was no showing of intent or knowledge. Errata Brief, 30-31. Mr. Spencer apparently is trying to create a claim against the defendants based on the trial judge's correct conclusion that probable cause existed. *Id*. Notably, Mr. Spencer never contested or appealed the judge's finding of probable cause in the underlying criminal action.

[information regarding Mr. Kandratowicz' failure to appear at the show cause hearing] may have implicated Mr. Kandratowicz in addition to Mr. Spencer, it would not have changed the fact that Mr. Spencer faxed a financially advantageous forged court order to his employer." ER 15. Because probable cause existed to arrest and prosecute Mr. Spencer, his fourth amendment claims fail as a matter of law against DPA Evans and Spokane County.

E. The District Court properly dismissed Mr. Spencer's Equal Protection claim against Spokane County and DPA Evans.

Mr. Spencer argues that he was selectively prosecuted based on his race by DPA Evans. Errata Brief, 35-36. He further argues that the District Court improperly relied upon *United States v. Armstrong*, 517 U.S. 456, 465 (1996) to dismiss Mr. Spencer's Fourteenth Amendment claim. Errata Brief, 36. The District Court ruled that Mr. Spencer failed to state a plausible equal protection claim based on selective prosecution in his Complaint. ER 19. The District Court reasoned that Mr. Kandratowicz, a person not in the protected class according to Mr. Spencer, was prosecuted for the crime at issue. ER 19.

To succeed on a selective enforcement claim, the plaintiff must prove "that enforcement had a discriminatory effect and the police were motivated by a

discriminatory purpose." *Holy Ghost Revival Ministries v. City of Marysville*, 98 F.Supp.3d 1153, 1175 (W.D. Wash. 2015) (quoting *Rosenbaum v. City & Cnty. Of San Francisco*, 484 F.3d 1142, 1152-53 (9th Cir. 2007)). To show a discriminatory effect, the plaintiff "must show that similarly situated individuals . . . were not prosecuted." *Rosenbaum*, 484 F.3d at 1153 (quoting *United States v. Armstrong*, 517 U.S. at 465). To prove discriminatory purpose, the plaintiff must show that the defendant "selected or reaffirmed a particular course of action at least in part 'because of its adverse effects on an identifiable group." *Id*.

Mr. Spencer failed to allege a plausible equal protection violation based on selective prosecution. Mr. Spencer is unable to "show that other similarly situated individuals … were not prosecuted." *See Rosenbaum*, 484 F.3d at 1153. Mr. Kandratowicz was prosecuted and convicted for the same crime, forgery, that Mr. Spencer was initially prosecuted for. ER 269, 300-306.

F. The District Court Properly imputed the absolute immunity of DPA Evans to Spokane County for Mr. Spencer's state law claims.

DPA Evans is afforded absolute immunity for his traditional prosecutorial functions. Spokane County is also absolutely immune from suit based on all claims

involving the actions of DPA Evans. In Washington, the personal immunities of state officials do not extend to government entities. *See Babcock v. State*, 809 P.2d 143, 156 (Wash. 1991). An exception to this rule is that when a prosecutor is entitled to absolute immunity, Washington courts extend that immunity to the County based on public policy. *See Creelman v. Svenning*, 410 P.2d 606, 608 (Wash. 1966); *see also Hart v. City of Lakewood*, No. 43304–4–II, 2014 WL 129236, at *5 (Wash. Ct. App. Jan 14, 2014) (absolute immunity of individual city prosecutor extended to the municipality when the prosecutor acted within his official capacity to press charges). In *Creelman*, the court stated:

> The public policy which requires immunity for the prosecuting attorney, also requires immunity for both the state and the county for acts of judicial and quasi-judicial officers in the performance of the duties which rest upon them; otherwise, the objectives sought by immunity to the individual officers would be seriously impaired or destroyed.

Id. at 608. "If the prosecutor must weigh the possibilities of precipitating tort litigation involving the county and the state against his action in any criminal case, his freedom and independence in proceeding with criminal prosecutions will be at an end." *Id*.

Under *Creelman*, DPA Evans' absolute immunity must extend to Spokane County for all state law claims as well as any assertion that Spokane County is

vicariously liable for constitutional violations. *See Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978).

G. The District Court properly dismissed Mr. Spencer's 42 U.S.C. § 1983 claims against Spokane County.

1. Mr. Spencer did not suffer a constitutional violation.

There are two key issues that the Court must address when a plaintiff asserts a Section 1983 claim against a municipality: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992). The District Court properly determined that Mr. Spencer did not suffer a constitutional violation. ER 25. As discussed *supra*, probable cause existed to arrest Mr. Spencer for forgery. Thus, his fourth amendment claim fails. Additionally, his equal protection claim based on selective prosecution against DPA Evans also fails because Mr. Kandratowicz was prosecuted and pled guilty to the underlying forgery charge that Mr. Spencer was initially charged with. *See Rosenbaum*, 484 F.3d at 1153. Thus, Mr. Spencer's alleged harm was not caused by a constitutional violation and his 42 U.S.C. § 1983 claims against Spokane County must fail.

2. The Complaint does not state a plausible claim for relief under the theory that Spokane County has an unconstitutional policy or practice.

The complaint fails to identify any policy of Spokane County that violated a constitutional right of Mr. Spencer. "Recitals of the elements of a cause of action, supported by mere conclusory statements," are not sufficient to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Mr. Spencer's claims that Spokane County had a policy or practice that deprived him of a constitutional right is a legal conclusion couched as a factual allegation. The complaint provides no support or evidence of any such policy or practice.

3. There is no plausible failure to train claim against Spokane County.

As part of his 42 U.S.C. § 1983 claims, the plaintiff alleges that Spokane County failed to train and supervise DPA Evans, and that Spokane County has a policy or custom which constituted deliberate indifference to the constitutional and legal rights of Mr. Spencer. ER 275. A failure to train theory requires the plaintiff to prove (1) a policymaker was deliberately indifferent to the need to train employees, and (2) the lack of training actually caused a constitutional violation.

Connick v. Thompson, 563 U.S. 51, 59 (2011). "Plaintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury." *Id*. at 60 (citing *Monell*, 436 U.S. at 691). "In limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for the purpose of § 1983." *Id*. "A municipality's culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train." *Id*. A municipality must, under color of some official policy, "cause" an employee to violate another's constitutional rights. *Monell*, 436 U.S. at 692. "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id*. A pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. *Connick*, 563 U.S. at 62.

In *Connick*, the Supreme Court found that a district attorney's office could not be held responsible under § 1983 for failing to train its prosecutors based on a single *Brady* violation. *Connick*, 563 U.S. at 54. Thompson, the plaintiff, identified four convictions that were overturned because of *Brady* violations

committed by prosecutors in that District Attorney's office in the preceding 10 years. *Id*. at 62. The court emphasized the fact that prior to entering the legal profession, "attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment." *Id*. at 64. The Court stated "in light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law." *Id*. at 66. (Other citations omitted).

There is no conceivable failure to train claim against Spokane County for DPA Evans' actions. He carried out a traditional prosecutorial function by requesting an arrest warrant and filing criminal charges. His conduct advocating for an arrest warrant is not a constitutional violation. DPA Evans' actions in this case are akin to a request by him for the denial of bail or that a certain sentence be imposed. He is not attesting to the underlying facts. Instead, he is taking facts and advocating for a result. No case has found a failure to train under these circumstances.

H. The District Court properly denied Mr. Spencer's Fed. R. Civ. P. 56(d) continuance request to respond to Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion for judgment on the pleadings.

Mr. Spencer offers little explanation for why he needs discovery to respond to Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion. Errata Brief, 53-54. The majority of Mr. Spencer's argument focuses on why he needed discovery from Detective Lebsock and the City of Spokane. Errata Brief, 49-55. The only explanation of the discovery he needs from Spokane County and DPA Evans is "Lebsock and Evans' knowledge and communications over time between early December 2017 and into at least the first week of May 2018." Errata brief, 54. Mr. Spencer claims the discovery is material because it may relate to the "continuing unconstitutional enforcement and prosecution effort." Errata Brief, 54. If Mr. Spencer's broad reasoning was grounds for a continuance, immunity issues would never be decided prior to discovery, contrary to the general rule that discovery should be stayed pending a court's decision on immunity. *See Harlow v. Fitzgerald*, 457, U.S. 800, 818 (1982). Further, a prosecutor's motive or intent when performing prosecutorial acts plays no role in the immunity inquiry. *See McCarthy v. Mayo*, 827 F.2d 1310, 1315 (9th Cir. 1987) (citing *Ashelman v. Pope*,

793 F.2d 1072, 1078 (9th Cir. 1986)); "[A]llegations that a conspiracy produced a certain decision should no more pierce the actor's immunity than allegations of bad faith, personal interest or outright malevolence." *Mayo*, 827 F.2d at 1315 (citing *Pope*, 793 F.2d at 1078). DPA Evans' intent and state of mind have no relevance in the Court's absolute immunity inquiry, and discovery related to such is not necessary at this stage of the case.

1. Fed. R. Civ. P. 56(d) does not grant the court authority to continue a motion for judgment on the pleadings.

Mr. Spencer requested a continuance to conduct discovery in his response to the Fed. R. Civ. P. 12(c) motion. ER 169-171. Mr. Spencer cites Fed. R. Civ. P. 56(d) in support of his request for a continuance. Errata Brief, 50-51, 55; ER 169-171. Fed. R. Civ. P. 56(d) allows a court to continue a motion for **summary judgment** to allow additional discovery in certain circumstances. Fed. R. Civ. P. 56(d) (emphasis added). As explained *supra*, Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion for judgment on the pleadings should not be converted into a motion for summary judgment. It does not contain material outside of the pleadings. As a result, Fed. R. Civ. P. 56(d) does not apply and the District Court properly denied Mr. Spencer's request for a continuance. No

discovery is necessary to respond to a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c).

2. The District Court did not err by denying as moot the motion for protective order filed by Spokane County and DPA Evans after granting the Motion for judgment on the pleadings.

Mr. Spencer cites *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1519 (9th Cir. 1987), for the proposition that the District Court erred by dismissing the claims against Spokane County and DPA Evans. Errata Brief, 50. In *Garrett*, the court of appeals held that the district court erred in dismissing plaintiff's claims on summary judgment without first deciding the pending motion to compel discovery filed by the plaintiff. *Garrett*, 818 F.2d at 1519.

Garrett does not apply to the facts here. First, *Garrett* involved a motion to compel discovery, not a motion for protective order and stay of discovery. *Id*. Second, Garrett was decided in the summary judgment context. *Id*. Here, the District Court denied the pending motion for protective order and stay of discovery as moot after granting Spokane County and DPA Evans' Fed. R. Civ. P. 12(c) motion. As discussed above, the discovery motion was moot because discovery

was unnecessary for Mr. Spencer to reply to the Fed. R. Civ. P. 12(c) motion on the pleadings.

I. DPA Evans is Entitled to Qualified Immunity Because he Did Not Violate the Constitutional Rights of Mr. Spencer

DPA Evans' actions did not violate a constitutional right, and even if they did, that right was not clearly established. In addressing qualified immunity, courts make two inquiries to determine whether qualified immunity applies: (1) whether a constitutional right was violated; and (2) whether the constitutional right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Qualified immunity protects government officials performing discretionary functions where their conduct is objectively reasonable. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). The 9th Circuit has held that a plaintiff must make not only a substantial showing of deliberate falsehood or reckless disregard for the truth regarding an officer's statements in an affidavit for a warrant, but must also establish that "without the dishonestly included or omitted

information," the warrant would not have issued. *Hervey v. Estes*, 65 F.3d 784, 788–89 (9th Cir.1995).

Mr. Spencer alleged DPA Evans violated the Fourth and Fourteenth Amendments of the United States Constitution by submitting a certificate "under penalty of perjury" in support of an arrest warrant that contained "false statements which were known to be or should have been known to be false." ER 276.

DPA Evans' Certificate contains arguments and not factual statements. Detective Lebsock's Affidavit of Facts relied on by DPA Evans in determining whether to initiate a prosecution against Mr. Spencer explained that Mr. Spencer had bank accounts in both Washington and Montana, SER 38, 42; had an address in Washington and two addresses in Montana, SER 40, 42; and had a phone number with a Montana area code. SER 42. It also indicates that Mr. Spencer's bank account from Spokane Teachers Credit Union was subject to garnishment in the SAS Oregon case from a judgment on June 27, 2017. SER 38. Shortly after the garnishment, the Spencers opened an account at Missoula Federal Credit Union on July 17, 2017. SER 42.

DPA Evans is entitled to qualified immunity because, as discussed above, probable cause existed to arrest Mr. Spencer based on Detective Lebsock's

Affidavit of Facts. As a result, no constitutional right of Mr. Spencer was violated. DPA Evans' certificate provided argument in support of an arrest warrant. The statements contained in the certificate were argument, not factual assertions. Further, they were supported by Detective Lebsock's Affidavit of Facts. Thus, DPA Evans did not make any false statements that led to a violation of Mr. Spencer's constitutional rights.

CONCLUSION

For the reasons state above, Appellees Spokane County and DPA Evans respectfully request that this Court affirm the District Court's Order (ER 2-28) and Judgment (ER 1) dismissing all of Mr. Spencer's claims against Spokane County and DPA Evans.

Respectfully submitted this 20th day of May, 2020.

KIRKPATRICK & STARTZEL, P.S.

/s/ Paul L. Kirkpatrick

Paul L. Kirkpatrick, WSBA # 16491
Attorneys for Appellees Spokane County; and Casey A. Evans

/s/ Christopher C. Browning

Christopher C. Browning, WSBA # 47760
Attorneys for Appellees Spokane County; and Casey A. Evans

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the undersigned attorney states that he knows of no other related cases pending in this Court

Dated this 20th day of May, 2020.

KIRKPATRICK & STARTZEL, P.S.

s/ PAUL L. KIRKPATRICK
_____
PAUL L. KIRKPATRICK, WSBA # 16491
Attorneys for Appellees Spokane County; and Casey A. Evans

CERTIFICATE OF COMPLIANCE

I am the attorney for Appellees Spokane County and Casey A. Evans. **This brief contains 9,822 words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

[ ] it is a joint brief submitted by separately represented parties;
[ ] a party or parties are filing a single brief in response to multiple briefs; or
[ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature: s/ PAUL L. KIRKPATRICK **Date** 05/20/2020

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2020, I electronically filed the foregoing *Appellees' Spokane County and Casey A. Evans Response Brief* with the Clerk of the Court using CM/ECF System which will send notification of such filing to the following:

Ryan D. Poole
Dunn & Black, P.S.
111 N. Post, Suite 300
Spokane, WA 99201

Salvatore J. Faggiano
Nathaniel J. Odle
City of Spokane/Office of the City Attorney
Assistant City Attorney
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Michael E. McFarland, Jr.
Christopher J. Kerley
Thomas B. Rohrer
Evans, Craven & Lackie, P.S.
818 W. Riverside Ave., Ste. 250
Spokane, WA 99201

s/ PAUL L. KIRKPATRICK
PAUL L. KIRKPATRICK, WSBA # 1649
Attorneys for Appellees Spokane County; and Casey A. Evans

ADDENDUM 1

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

ADDENDUM 2

[RCW 9A.60.020

Forgery.

(1) A person is guilty of forgery if, with intent to injure or defraud:

(a) He or she falsely makes, completes, or alters a written instrument or;

(b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

(2) In a proceeding under this section that is related to an identity theft under RCW 9.35.020, the crime will be considered to have been committed in any locality where the person whose means of identification or financial information was appropriated resides, or in which any part of the offense took place, regardless of whether the defendant was ever actually in that locality.

(3) Forgery is a class C felony.

[2011 c 336 § 382; 2003 c 119 § 5; 1975-'76 2nd ex.s. c 38 § 13; 1975 1st ex.s. c 260 § 9A.60.020.]

NOTES:

Effective date—Severability—1975-'76 2nd ex.s. c 38: See notes following RCW 9A.08.020.

ADDENDUM 3

[Federal Rule of Civil Procedure 12]

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TOSERVE ARESPONSIVEPLEADING.

(1) *In General*. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity*. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion*. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its dis-position until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;
(3) improper venue;
(4) insufficient process;
(5) insufficient service of process;
(6) failure to state a claim upon which relief can be granted; and
(7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) MOTION FOR JUDGMENT ON THEPLEADINGS. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) MOTION FOR A MORE DEFINITE STATEMENT. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TOSTRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:
(1) on its own; or
(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.
(1) *Right to Join*. A motion under this rule may be joined with any other motion allowed by this rule.
(2) *Limitation on Further Motions*. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion

under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances de-scribed in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others*. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction*. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion— and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

ADDENDUM 4

[**Federal Rule of Civil Procedure 56**]

Rule 56. Summary Judgment

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDG-MENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE AMOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) *Supporting Factual Positions*. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored in-formation, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an ad-verse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence*. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited*. The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations*. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a non-movant shows by affidavit or declaration that, for specified rea-sons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010.) consider only the cited materials, but it may consider other materials in the record.

ADDENDUM 5

[**Federal Rule of Evidence 201**]

Rule 201 – Judicial Notice of Adjudicative Facts

(a) **Scope**. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) **Kinds of Facts That May Be Judicially Noticed**. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) **Taking Notice**. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) **Timing**. The court may take judicial notice at any stage of the proceeding.

(e) **Opportunity to Be Heard**. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

(f) **Instructing the Jury**. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

ADDENDUM 6

[Washington Superior Court Criminal Rule 2.2]
WARRANT OF ARREST AND SUMMONS

(a) Warrant of Arrest.

(1) Generally. If an indictment is found or an information is filed, the court may direct the clerk to
issue a warrant for the arrest of the defendant.

(2) Probable Cause. Before ruling on a request for a warrant the court may require the complainant to appear personally and may examine under oath the complainant and any witnesses the complainant may produce. A warrant of arrest may not issue unless the court determines that there is probable cause to believe that the defendant committed the offense charged. The court shall determine probable cause based on an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. Sworn testimony shall be recorded electronically, stenographically, or through any other reliable means. The evidence shall be preserved and shall be subject to constitutional limitations for probable cause determinations and may be hearsay in whole or in part.

(3) Ascertaining Defendant's Current Address.

(i) Search for address. The court shall not issue a warrant unless it determines that the complainant has attempted to ascertain the defendant's current address by searching the following: (A) the District Court Information System database (DISCIS), (B) the driver's license and identicard database maintained by the Department of Licenses; and (C) the database maintained by the Department of Corrections listing persons incarcerated and under supervision. The court in its discretion may require that other databases be searched.

(ii) Exemptions from Address Search. The search required by subdivision (i) shall not be required if (A) the defendant has already appeared in court after filing of the same case, (B) the defendant is known to be in custody, or (C) the defendant's name is unknown.

(iii) Effect of Erroneous Issuance. If a warrant is erroneously issued in violation of this subsection (a)(3), that error shall not affect the validity of the warrant.

(b) Issuance of Summons in Lieu of Warrant.

(1) Generally. If an indictment is found or an information is filed, the court may direct the clerk to issue a summons commanding the defendant to appear before the court at a specified time and place.

(2) When Summons Must Issue. The court shall direct the clerk to issue a summons instead of a warrant unless it finds reasonable cause to believe that the defendant

(i) will not appear in response to a summons,

(ii) will commit a violent offense,

(iii) will interfere with witnesses or the administration of justice, or

(iv) is in custody.

(3) Summons. A summons shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall state the name of the defendant and shall summon the defendant to appear before the court at a stated time and place.

(4) Failure To Appear on Summons. If a person fails to appear in response to a summons, or if service is not effected within a reasonable time, a warrant for arrest may issue.

(c) Requisites of a Warrant. The warrant shall be in writing and in the name of the State of Washington, shall be signed by the clerk with the title of the office, and shall state the date when issued and the county where issued. It shall specify

the name of the defendant, or if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The warrant shall specify the offense charged against the defendant and that the court has found that probable cause exists to believe the defendant has committed the offense charged and shall command that the defendant be arrested and brought forthwith before the court issuing the warrant. If the offense is bailable, the judge shall set forth in the order for the warrant, bail, or other conditions of release.

(d) Execution; Service.

(1) Execution of Warrant. The warrant shall be directed to all peace officers in the state and shall be executed only by a peace officer.

(2) Service of Summons. The summons may be served any place within the state. It shall be served by a peace officer who shall deliver a copy of the same to the defendant personally, or it may be served by mailing the same, postage prepaid, to the defendant at the defendant's address.

(e) Return. The officer executing a warrant shall make return to the court before whom the defendant is brought pursuant to these rules. At the request of the prosecuting attorney any unexecuted warrant shall be returned to the issuing court to be canceled. The person to whom a summons has been delivered for service shall, on or before the return date, file a return with the court before which the summons is returnable. For reasonable cause, the court may order that the warrant be returned to it.

(f) Defective Warrant or Summons.

(1) Amendment. No person arrested under a warrant or appearing in response to a summons shall be discharged from custody or dismissed because of any irregularity in the warrant or summons, but the warrant or summons may be amended so as to remedy any such irregularity.

(2) Issuance of New Warrant or Summons. If during the preliminary examination of any person arrested under a warrant or appearing in response to a summons, it appears that the warrant or summons does not properly name or

describe the defendant or the offense with which the defendant is charged, or that although not guilty of the offense specified in the warrant or summons, there is reasonable ground to believe that the defendant is guilty of some other offense, the judge shall not discharge or dismiss the defendant but may allow a new indictment or information to be filed and shall thereupon issue a new warrant or summons.

(g) Failure to Issue Warrant---Dismissal. Upon five days' notice to the prosecuting attorney, the court shall dismiss a charge without prejudice if (i) 90 days have elapsed since the indictment or information was filed and (ii) on the date that the order of dismissal is entered, no warrant has been issued and the defendant has not appeared in court.

[Originally effective July 1, 1973; amended effective September 1, 1983; September 1, 1986;
September 1, 1995; September 1, 2003; September 1, 2006; September 1, 2014.]

Comment

Supersedes RCW 10.31.010, .020.