No. 19-36054

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

QUANAH M. SPENCER,

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; and CASEY A. EVANS, in his individual and official capacities,

Appellees.

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

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

As recent events in the United States have shown, law enforcement should be fairly scrutinized, and unconstitutional conduct should not be tolerated. The criminal justice system should not foster or perpetuate injustice of any kind and should be especially sensitive to the treatment of all people of color. The balance should not be unfairly tipped in favor of law enforcement, especially when malicious, deceitful and racially discriminatory conduct is at issue.

In the present case, Appellant Quanah M. Spencer ("Spencer") was clearly treated differently from a non-minority up until Appellees were exposed and took steps to cover up their unconstitutional conduct. The discrimination Spencer experienced was because he was a litigation opponent of friends and former colleagues (the Pences) of Appellees and because he is Native American. Appellees have not disputed that enforcement, searches, prosecution, and threats of prosecution continued against Spencer until at least May 4, 2018. These facts, among many others, though not fully understood because meaningful discovery was denied, show that Spencer has presented a case worthy of resolution by jury. Appellees abused their power, committed unlawful acts and violated Spencer's constitutional rights, and this should not go unpunished.

All Appellees repeatedly rely on immaterial arguments about what Spencer should have done, or could have done, with regard to other non-parties and other

issues that cannot have any effect on Spencer's present claims and this appeal. See, e.g., County/Evans Brief, p. 34, fn. 1. It is not a defense for Appellees to argue Spencer's claims here somehow lack merit because of how he has handled other discretionary issues with non-parties.

Ninth Circuit Rule 28-2.8 requires that "*[e]very assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found*." Appellees County and Evans ("County/Evans") make a number of assertions without any citation to the record, as do Appellees City and Lebsock ("City/Lebsock"). For example, County/Evans mistakenly point out that Spencer has failed to hold his former attorney, Aaron Kandratowicz ("Kandratowicz"), to account for his malpractice and they do so without citation to the record. County/Evans Brief, p. 2. This is an immaterial assertion; moreover, Appellees already know Spencer did bring suit against Kandratowicz. ER 241 ("*[The Spencers] initiated litigation against Kandratowicz in January of 2018*.").

Appellees totally overlook, and fail to account for or respond to, the material significance of Kandratowicz's malpractice and its effect on the probable cause issue. Appellees also avoid accounting for the entire, material chronological detail of the events between November 30, 2017 and to at least May 4, 2018. County/Evans Brief, p. 8. This avoidance is telling, because these chronological

and temporal specifics in the facts are material and support liability attaching to Appellees.

Highlighted by the many times Appellees argue Spencer has allegedly failed to present evidence, the District Court should be reversed because it denied Spencer relief under FRCP 56(d). Spencer cannot be fairly expected to present evidence he has not been allowed to obtain from discovery. By denying relief under FRCP 56(d), the District Court improperly deprived Spencer a fair and meaningful opportunity to complete, review and present material discovery prior to resolution of dispositive motions.

II. ADDENDUM TO BRIEF

Except for the following, all applicable statutes, etc. are contained in the addenda to Spencer's Opening Brief:

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III. ARGUMENT

A. The District Court Erred By Failing To Apply The Summary Judgment Standard To Appellee Spokane County's And Appellee Evans' Dispositive Motion.

A trial court must accept as true all of the factual allegations in the complaint when determining whether a plaintiff has stated a claim. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Spencer has sufficiently alleged all of his claims against each Appellee.

Rule 12(b) does not apply to County/Evans' dispositive motion, because County/Evans relied on material outside the pleadings, to include an Affidavit of Facts of Lebsock, dated January 2, 2018, and the order issuing the arrest warrant. ER 251; ER 256; ER 8. Neither of these documents was attached to Spencer's Complaint. The "but for" argument made by County/Evans about the order for an arrest and Spencer being arrested does not equate to the "*pertinent document*" needed for avoiding the summary judgment standard. County/Evans Brief, pp. 17, 19. Appellees' reliance on Branch v. Tunnell, 14 F.3d 449, 453 (9th Cir. 1994), relating to the argument about what is a "*pertinent document*" is misplaced because that case was overruled by Galbraith v. Cty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) on the issue of what is "*pertinent*" to the stated claim.

County/Evans fail to provide support for judicial notice to apply under Federal Rule of Evidence (FRE) 201. County/Evans did not make reference to

FRE 201 in anything presented to the District Court, thus, they did not ask the District Court to take judicial notice. Notably, County/Evans do not cite to the record for any prior argument they made to the District Court for application of FRE 201. Further, FRE 201(e) requires that Spencer be given an opportunity to be "*heard on the propriety of taking judicial notice and the nature of the fact to be noticed*." Spencer was never given any such opportunity.

As mentioned above, County/Evans relied on the Affidavit of Facts of Lebsock, dated January 2, 2018, in support of their dispositive motion, and that document was not attached to Spencer's Complaint. ER 251. Said Affidavit of Facts is not susceptible to judicial notice, because it does not meet the criteria for application of FRE 201. Said Affidavit of Facts is also not a "*pertinent document*" as argued by County/Evans. Galbraith, 307 F.3d 1119, 1125–26 (9th Cir. 2002), overruling Branch, 14 F.3d 449 (9th Cir. 1994).

Thus, County/Evans presented a dispositive motion relying on material and matters outside of the pleadings, and their motion should have been "*treated as one for summary judgment under Rule 56*," and "*[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion*." FRCP 12(d).

B. Appellee Evans Is Not Entitled To Absolute Immunity Because He Acted Outside The Scope Of His Role As An Advocate.

Appellee Evans ("Evans"), as a matter of law, supplied false facts in his Certificate that caused Spencer to be arrested. It was County/Evans themselves that argued to the District Court that the Certificate by Evans was a sworn statement supplied under Criminal Rule 2.2. ER 255 ("*[Evans'] certificate was based on CrR 2.2*"). That Rule dictates, as a matter of law, that the Certificate by Evans is sworn testimony of a witness in support of issuing an arrest warrant. See CrR 2.2(a) ("*Probable Cause*"); and see CrR 2.2(b). County/Evans' argument directly contradicts CrR 2.2, to include the application of CrR 2.2(a) and CrR 2.2(b), and their prior reliance upon that Rule in arguments to the District Court. ER 255.

Evans' ***Certificate*** was a ***certificat***ion by sworn testimony to establish the factual basis for issuance of the arrest warrant, as opposed to a mere summons, just like in Kalina v. Fletcher, 522 U.S. 118 (1997). As pointed out by Spencer, and not responded to by County/Evans in their brief, the signing line on the Certificate makes no reference to Evans' bar number, unlike all of the other documents he submitted as an advocate which had his bar number at the signature line. See ER 250; ER 252; ER 253.

Thus, even under CrR 2.2(b)(2), Evans was providing sworn testimony in his Certificate, not advocacy, when he presented facts supporting issuance of the

warrant. Accordingly, it was error for the District Court to conclude that Evans, and by relation Spokane County, had absolute immunity.

The claims against County/Evans relating to their continuing unlawful and unconstitutional conduct targeting Spencer have merit. County/Evans advised Appellee Lebsock ("Lebsock") relative to the investigation, enforcement and unconstitutional warrants that targeted Spencer. See City/Lebsock's SER 14, 18-20, and 43-44. A prosecutor is not entitled to absolute immunity in connection with advising law enforcement. Lacey v. Maricopa Cty., 693 F.3d 896, 914 (9th Cir. 2012). A prosecutor is also not entitled to absolute immunity for administrative duties and investigatory functions unrelated to the initiation of a prosecution, or the judicial proceedings themselves. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993).

Spencer has alleged conduct by Evans that was not undertaken as an "*advocate*." The evidence presented by Spencer thus far, without any opportunity to conduct meaningful discovery, shows interactions between Appellees County and Evans and Appellees City and Lebsock that related to the perpetuation of enforcement, investigation, searches and prosecution, and continuing even after January 16, 2018. There was no probable cause prior to January 16, 2018, and Appellees have admitted there was no probable cause after January 16, 2018. Spencer was never given an opportunity to develop additional evidence in support

of claims for which Evans is not entitled to any immunity. Thus, the District Court unfairly and improperly denied Spencer his fair opportunity to seek and obtain justice.

C. Appellant Spencer Did Not Waive Any Claims, Including His Merited Claim For An Unlawful And Unconstitutional Continuing Prosecution.

County/Evans' argument that Spencer waived his claims for liability based on continuing prosecution is without merit and unsupported by the record presented to the District Court. Waiver on appeal follows no bright line rule, and it is discretionary, not jurisdictional, as to issues actually waived. In re Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 992 (9th Cir. 2010). This Court will even sometimes consider issues not presented to a district court. Id. Here, there has been no waiver. Contrary to County/Evans' argument, the record before the District Court shows Spencer stated claims for liability based on a continuing prosecution and presented law and argument on the issue.

In Spencer's response in opposition to the dispositive motion filed by County/Evans, he presented:

> *Plaintiff Spencer, as is set forth in his Complaint (ECF No. 1, ECF No. 1-1), was unconstitutionally and unlawfully…* ***prosecuted… without proper cause or justification****, and all Defendants acted in concert to cause him harm and injury. Facts in support of Plaintiff Spencer's claims were outlined in correspondence filed with the Complaint. ECF No. 1-1; Declaration of Quanah Spencer, filed and served herewith. The contents of ECF No. 1 and ECF No. 1-1 are incorporated herein by reference as though fully set forth.*

ER 165 (emphasis added). Even more, Spencer filed additional authorities in opposition to the dispositive motions that specifically presented authority in support of his claims and argument about liability for a continued prosecution. FER 315-317 (ECF No. 42).

In the present case, Spencer did raise the issue of liability for a continued prosecution, and it was presented with both facts and authority in support of such liability. Thus, it would not be appropriate to apply waiver here, especially with the record developed below establishing factual and legal support for the claim.

D. The District Court Committed Reversible Error By Depriving Appellant Spencer A Meaningful Opportunity To Complete Material Discovery Prior To Dismissing All Claims.

A trial court's approach to granting relief under FRCP 56(d) is usually supposed to be generous, and should be granted "*fairly freely*." BNSF v. Assiniboine & Sioux Tribes, 323 F.3d 767, 773–74 (9th Cir. 2003), citing Metabolife Int'l, Inc. v. Wornick, 264 F.3d 832, 846 (9th Cir.2001) ("*the Supreme Court has restated the rule as* ***requiring****, rather than merely permitting, discovery 'where the non-moving party has not had the opportunity to discover information that is essential to its opposition.'*") (emphasis added). In BNSF, this Court recognized that a continuance should be granted almost as a matter of course unless the non-moving party has not diligently pursued discovery. Id.

"*[I]f the trial judge fails to address [a discovery] motion before granting summary judgment, we review this omission de novo*." U.S. 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); see ER 38; and see ER 249.

In the present case, Spencer did diligently seek discovery, and discovery responses were outstanding at the time of dismissal. Spencer was also not allowed any opportunity to take any depositions. A meaningful and fair discovery process was not allowed to unfold here because the District Court denied relief under FRCP 56(d). ER 34-38. Diligence does not mean exhaustion, and a continuance may even be appropriate in situations where a party fails to even make a formal request. Conkle v. Jeong, 73 F.3d 909, 914 (9th Cir. 1995); Nidds v. Schindler Elevator Corp., 113 F.3d 912, 920–21 (9th Cir. 1997); U.S. v. Kitsap Physicians Serv., 314 F.3d 995, 1000 (9th Cir. 2002). In the present case, the District Court's dismissal should be reversed because the discovery sought by Spencer was not "*fruitless*." See Jones v. Blanas, 393 F.3d 918, 930 (9th Cir. 2004).

County/Evans suggest that Evans had "*limited involvement*," but the extent of his involvement is not known because Spencer was denied discovery – including the opportunity to depose, at minimum, Evans and Lebsock. County/Evans Brief, p. 7. Evans made false statements in support of an unconstitutional arrest warrant issued against Spencer, and Spencer has been

denied any opportunity to meaningfully conduct discovery of evidence relating to these false statements. In addition, the statements submitted by Lebsock have thus far not been subject to cross-examination, and justice cannot be done if witnesses or parties are not exposed to cross-examination – this is a most basic foundation for the exclusion of hearsay evidence.

County/Evans attempt to distinguish Garrett v. City and County of San Franscisco, 818 F.2d 1515 (9th Cir. 1987) but merely present distinctions without any meaningful difference. As described above, the District Court erred when it failed to properly apply the summary judgment standard to Spencer's claims against Appellees County and Evans. Further, the discovery issues contested before the District Court are not better presented or understood by the technical labeling of the *kind* of discovery motion (i.e., a motion to compel). County/Evans Brief, p. 44. All of the issues relating to necessary, material discovery were raised collectively for all practical purposes as part of Spencer's FRCP 56(d) motion and County/Evans' motion seeking a stay of discovery. Thus, Garrett should apply in the present case.

Appellees admit that there were warrant**s** executed against Spencer. City/Lebsock Brief, pp. 12, 20, and 27; FER 318-343. Contrary to City/Lebsock's assertion, the District Court was not correct when it found that all of Spencer's claims related to only "*the arrest warrant[.]*" City/Lebsock Brief, p. 25. Of

course the unconstitutional arrest and detention was a significant part of Spencer's argument to the District Court, because it was an extremely unjust and injurious experience. However, it was not the only unlawful and unconstitutional conduct or warrant activity presented in the claims, facts and argument to the District Court.

City/Lebsock assert "*[t]he trial court in this matter had full access to the investigatory materials related to* ***the*** *warrant in question*." City/Lebsock Brief, p. 18 (emphasis added). First, there is no citation to the record to support this claim. Second, there are a number of warrant***s*** in question here, not just a single arrest warrant. FER 318-343. Third, no court involved in any of these matters relating to Spencer, and including Spencer himself, has had full access to the investigatory materials possessed by Appellees.

City/Lebsock argue that because *some* production of documents was received *after* Spencer's response to the dispositive motions was due and just days before the hearing on these matters, it was appropriate for the District Court to deny any relief under FRCP 56(d). City/Lebsock Brief, pp. 21, 23. This argument undermines the very purpose of FRCP 56(d).

City/Lebsock claim, without citation to the record, "*Spencer was provided the documents related to*" Appellees' investigation. City/Lebsock Brief, p. 24. City/Lebsock similarly claim, without support in the record or proper citation, "*[t]he reasoning for the investigation is clearly laid out in these materials*." Id.,

pp. 24-25. However, the record before the Court does not contain what City/Lebsock refers to as "*these materials*." Id. City/Lebsock fail to cite to any support in the record for their claim that they sufficiently responded to written discovery, or did so in a timely manner. Spencer was caused unfair prejudice here, because, among other reasons, he was not "*armed*" with any discovery when his response was due to the District Court; thus, relief should have been granted to Spencer under FRCP 56(d).

City/Lebsock also fail to cite the record for the assertion that "*Det. Lebsock advocated for, and received, Mr. Spencer's release from jail*." City/Lebsock Brief, pp. 28 and 32 (asserting Lebsock "*was able to get*" Spencer "*released*" from jail, without citation to the record); see also City/Lebsock Brief, p. 6 (asserting "*Det. Lebsock found the information credible and…. had spoken with the Spokane County Prosecutors Office and had the warrant recalled[,]*" without citation to the record). City/Lebsock's assertions highlight the prejudice to Spencer to have been denied an opportunity to depose Lebsock about his purported "*advoca[cy]*." Information relating to his purported "*advoca[cy]*" would go directly to the known lack of probable cause from at least January 16, 2018 to at least May 4, 2018 and the unconstitutional conduct by Appellees during that time.

City/Lebsock's argument that Spencer has not established that Appellee City of Spokane officially sanctioned or ordered the conduct by Lebsock highlights the

prejudice to Spencer caused by the District Court improperly denying relief under FRCP 56(d). If there are any evidentiary deficiencies, it is because Spencer was denied an opportunity to conduct discovery and thus gives cause for remand.

Contrary to Appellees' arguments, Spencer has not failed to identify how further discovery is material to his claims. The requested discovery goes directly to the issue of misrepresentations in, and material omissions from, the submissions by Appellees to the court issuing the warrants against Spencer and the judicial deception issue. For example, the opportunity to depose STCU employee Rebecca Berger would establish the falsity of City/Lebsock's sworn statement that alleges Spencer falsely reported to the Spokane Police Department that someone had attempted to gain access to the Spencers' bank account by means of identity theft. ER 119; ER 184; ER 105-112. Lebsock fabricated information to secure warrants against Spencer by using hearsay from his alleged contact with Ms. Berger, and Spencer should have been granted an opportunity to depose Ms. Berger.

Appellees repeatedly argue that Spencer lacks evidence to support certain claims but at the same time argue it was proper to deny Spencer any opportunity to meaningfully acquire and make use of the evidence they argue is lacking. These arguments by Appellees actually support the reversal of the District Court for its failure to grant Spencer relief under FRCP 56(d).

E. There Was Never Probable Cause For Any Search Or Seizure Targeting Spencer, But Even If There Was, The Unlawful And Unconstitutional Conduct Of Appellees Continued After Any Alleged Probable Cause Was Destroyed.

City/Lebsock and County/Evans rely entirely on a unilateral and generic argument that there was probable cause as of January 5, 2018 to argue against a multilateral set of issues presented here by Spencer involving events occurring from December of 2017 to at least May 4, 2018. The necessary elements for qualified immunity to apply are also lacking, because, taken in the light most favorable to Spencer, Appellees violated Spencer's constitutional rights, and these rights were clearly established. See KRL v. Estate of Moore, 512 F.3d 1184, 1189 (9th Cir. 2008).

The necessary elements of knowledge and specific intent relating to the charge of Forgery have never been met. The District Court's analysis, and Appellees' response briefing, fails to ever account for the lack of any evidence of specific intent "*to injure or defraud*" on Spencer's part. See City/Lebsock Brief, p. 18; ER 14-15 (the District Court only ever referred to the "*knowledge*" element of Forgery); See RCW 9A.60.020.

Moreover, the facts show that City/Lebsock were judicially deceptive by knowingly and recklessly failing to present exculpatory evidence they possessed that would have destroyed any purported probable cause. For example, they clearly failed to account for the failures and inculpatory conduct by Aaron

Kandratowicz known to Appellees prior to any application for any warrant. ER 148-149; ER 158; ER 181; ER 182; ER 203; ER 233; ER 236.

County/Evans make an incorrect factual statement that Spencer made claims in 2016 "*against his former employer, SAS Oregon LLC et al.*" County/Evans Brief, pp. 1, 6. Spencer was never employed by SAS Oregon, LLC; rather, the employer that County/Evans fail to property identify is BNSF Railway. SER 38. Spencer brought suit in an underlying civil case against SAS Oregon, LLC, among other parties – including two former Spokane police officers (the Pences).

Appellees incorrectly rely on the argument that knowledge and specific intent relating to the alleged crime of Forgery can arise from an inference based on the allegation that Spencer intended to "*defraud his employer*." County/Evans Brief, p. 34. There is no evidence Spencer had any intent to "*defraud*" BNSF. The allegations by Appellees simply do not equate to any specific intent to cause injury or loss to BNSF. See State v. Simmons, 113 Wn. App. 29, 32 (2002), citing Black's Law Dictionary, 434 (7th ed.1999) ("'*Defraud' means '[t]o cause injury or loss to... by deceit.*'").

Appellees have also not shown that probable cause was ever present on the knowledge element. There was no evidence that Spencer knew the subject forged order was a forgery. See RCW 9A.60.020; State v. Skorpen, 57 Wn. App. 144, fn. 2 (1990) (without knowledge there can be no commission of the crime of Forgery).

Moreover, any such purported evidence of knowledge on the part of Spencer would have been fully contradicted if Appellees had not been deceptive. Appellees included false statements and material omissions in their submissions that caused judicial deception and continued to do so even after Spencer was released from jail. One example of a patently false statement made by Lebsock is that Spencer reported monies being stolen from him on July 3, 2017 by "*the caller*." City/Lebsock Brief, p. 5; contrast ER 211-212. Appellees' only citation to anywhere in the record where this is stated is in the statements of Appellees *themselves*, including specifically Lebsock and Spokane Police Officer House (Badge No. 335). See, e.g., ER 206; City/Lebsock Brief, p. 5, citing Officer House's report, and Lebsock's Declaration (SER 5-6). Thus, City/Lebsock's statement that Spencer "*filed a false police report*" is false and has always been so. City/Lebsock Brief, p. 11. The record shows this statement to be false, and there is no evidence Spencer "*filed a false police report*." See ER 204; ER 206; ER 211-212, 214.

The false statements and material omissions by Appellees deceived the underlying criminal court about the purported presence of probable cause on the elements of Spencer's alleged knowledge and specific intent. Thus, Appellees' arguments in support of probable cause are invalid because they rely on a finding made by a judicially-deceived underlying criminal court. City/Lebsock Brief, p. 5;

County/Evans Brief, p. 33. An erroneous finding of probable cause by a deceived judge is not a defense.

Appellees' arguments on appeal continue to fail to account for the full temporal spectrum of the events, actions and omissions at issue – including those happening after January 16, 2018. Even assuming for the sake of argument there was probable cause for the arrest, there was not any probable cause thereafter. Significantly, City/Lebsock now claim Spencer was "in the clear" after he was released from jail, with Lebsock even claiming he "*advocated*" for Spencer's release after learning that it was Kandratowicz, not Spencer, that perpetrated the forgery. City/Lebsock Brief, pp. 6, 28, and 40.

Thus, the facts on record here contradict Lebsock's claims, because Appellees continued to prosecute Spencer, execute unconstitutional search warrants, and threaten charges against him (and his wife) after his release from jail and until at least May 4, 2018. ER 241, 244-245.

The false statements and material omissions at issue here were not the result of mere negligence or good faith; rather, they give rise to liability because they were the result of malice and bias. See U.S. v. Smith, 588 F.2d 737, 740 (9th Cir. 1978). City/Lebsock's rhetoric that they "*relied on evidence obtained from valid warrants and court records*" is simply not supported by the record, and the argument does not even provide citation to the record. See City/Lebsock Brief, p.

12. The argument that Appellees' conduct was merely in error and their errors were merely "*stemming from negligence or good faith*" gives rise to questions of fact, at minimum. City/Lebsock Brief, p. 14.

Spencer has made a sufficient showing that Appellees were motivated by malice due to Spencer having brought suit against City/Lebsock's friends and former colleagues (the Pences), and racial discrimination targeting Spencer (which was supported by statistics showing Appellees disproportionately target Native Americans, just as they did targeting Spencer in the present case). See, e.g., ER 262, ER 291, ER 192-193, and ER 257-258.

Appellee's reliance on Cameron v. Craig, 713 F.3d 1012 (9th Cir. 2013) is misplaced because in that case, the District Court was actually reversed in part, and the plaintiff/appellant was granted a remand to the trial court. Further, Cameron is distinguishable from the present case on the facts because the elements of the alleged crime in that case did not require both knowledge and specific intent like the Forgery charge in the present case. 713 F.3d at 1019. Cameron is also distinguishable because it does not involve continuing enforcement, warrants, prosecution and threats thereof after any purported probable cause no longer existed. Id. at 1015-1018. Cameron is also distinguishable because it does not involve evidence of racial discrimination. Id.

Appellees' arguments that Spencer allegedly failed to present evidence of them being motivated by their relationship with friends and former colleagues – the Pences – is misplaced on summary judgment because they merely raise material fact questions in dispute. See City/Lebsock Brief, p. 19 ("*[Spencer] offers no proof establishing such.*"). City/Spokane admit they had a relationship with the Pences, that the Pences are former employees of the Spokane Police Department, and that Lebsock had contact with the Pences outside of their workplace relationship. City/Lebsock SER 23-24. Moreover, Spencer was never given a fair chance to discover and present the evidence Appellees conveniently allege he is lacking. See City/Lebsock's Brief, pp. 19-20. Appellees' arguments highlight the material prejudice caused to Spencer, because he was denied a meaningful opportunity to conduct, and use, discovery.

Chism v. Washington State, 661 F.3d 380 (9th Cir. 2011) is applicable in the present case, because just as there was no evidence needed to establish probable cause for material elements of the crime charged in that case, here, there was no evidence of Spencer having the necessary knowledge and specific intent for a Forgery charge. Moreover, if Appellees had not been judicially deceptive, there would have been even further reason to conclude that probable cause was lacking for the necessary elements of knowledge and specific intent.

In the present case, the totality of the circumstances, had they been reasonably presented and considered, showed that there was no "*financial benefit*" to Spencer; rather, the opposite is overwhelmingly self-evident. This is especially true when the malpractice of Kandratowicz, which was known to Appellees, is properly considered. The financial *detriment* to Spencer was clear to any reasonable person considering the unavoidable consequences of forging a court order and sending it to an employer; to include, among many other things, the loss of employment and the significant income it generated; the available option to stop any collection activity with a relatively inexpensive supersedeas bond because the underlying civil case was on appeal; loss of a law license; and significant, lasting financial injury to his wife and children.

Absent malice and judicial deception, and based on the totality of the circumstances, no reasonable person would conclude the alleged criminal conduct would have been any "*financial benefit*" to Spencer. Spencer was a crime victim himself, yet Appellees unlawfully and unconstitutionally victimized him, and they should be held responsible.

F. Appellees Admit To Continuing Enforcement, Prosecution And Warrant Activity Against Spencer After Knowing They Did Not Have Probable Cause.

Appellees make the false argument that they cannot be liable for unconstitutional enforcement, searches and prosecution after Spencer was released

from jail. City/Lebsock Brief, pp. 25-30. Appellees are wrong about the law because they can be liable for the continuing, unconstitutional enforcement, searches and prosecution continuing after January 16, 2018. Appellees' liability is not limited to only the question of whether there was a subsequent, additional arrest or additional charges; they are liable for continuing enforcement, searches, prosecution and threats thereof. Awabdy v. City of Adelanto, 368 F.3d 1062, 1070 (9th Cir. 2004); Whren v. United States, 517 U.S. 806, 812–813 (1996); Arkansas v. Sullivan, 532 U.S. 769 (2001); U.S. v. Lopez, 482 F.3d 1067 (9th Cir. 2007).

Spencer does not merely "*claim*" there was "*an investigation and prosecution that continued despite the lack of probable cause*," because it cannot be disputed that there was an enforcement, searches and prosecution continuing after any alleged probable cause was destroyed. City/Lebsock Brief, p. 25; FER 318-343. Spencer does not merely "*believe[]*" he was searched and prosecuted after he was released from jail because he was, without dispute, searched, investigated, prosecuted and threatened with charges after his release from jail, and all without probable cause. Id.; City/Lebsock Brief, p. 26. City/Lebsock's reference to the District Court failing to make a temporal reference to the allegations by Spencer spanning from at least early January 2018 until at least May 4, 2018 only highlights the inadequacy of the District Court's analysis and findings, and the need for reversal. City/Lebsock Brief, p. 26.

City/Lebsock make an obvious false statement by stating "*[t]his is not true*," when referring to the continuing enforcement, searches and prosecution after Spencer's release from jail. City/Lebsock Brief, p. 26. City/Lebsock also misrepresent the record and contradict the sworn statements of Lebsock when stating "*Mr. Spencer was not charged, arrested, **searched** or detained following his release*" from jail on January 16, 2018. City/Lebsock Brief, p. 35 (emphasis added). Spencer may not have had *additional* charges actually filed (though Lebsock threatened them and requested them after January 16, 2018), an *additional* arrest, or an *additional* detention, but he undisputedly endured continued enforcement, prosecution, searches and threats thereof that lacked any purported probable cause after January 16, 2018. FER 318-343; ER 244-245.

City/Lebsock's portrayal of Lebsock's conduct on and after January 16, 2018 as being that of an "ally" and "*advocate[]*" to Spencer is contradicted by Lebsock's own sworn statements contained in his May 4, 2018 Affidavit of Facts. ER 244-245; City/Lebsock Brief, pp. 28-29. However, this does show Appellees admit any purported probable cause was lost as of January 16, 2018. It also serves as an admission that Appellees' enforcement, warrants, threats of charges and continuing prosecution after January 16, 2018 was an unlawful and unconstitutional violation of Spencer's rights.

A key term used by the District Court highlights the importance of the temporal spectrum. The District Court vaguely stated that "*eventually*" the charges against Spencer were dropped, and "*eventually*" Kandratowicz was prosecuted. ER 18; City/Lebsock Brief, p. 26. The span of time relating to the "*eventually*" is critical, because it demonstrates that unconstitutional conduct persisted without probable cause after Spencer's release from jail. It also shows that until Appellees were exposed and challenged by Spencer's counsel on January 12, 2018, they were investigating, searching, arresting, detaining, threatening, and prosecuting Spencer without probable cause and based on bias, malice and racial discrimination.

An ultimate "fix" that "*eventually*" happens after unconstitutional conduct should not provide a shield from liability for Appellees for the injuries and harm done before an "*eventually*" ultimately happens.

City/Lebsock's attempt to distinguish and limit the application of U.S. v. Sellers, 906 F.3d 848, 852 (9th Cir. 2018), is misplaced. In Sellers, this Court did not limit its holding about selective enforcement to only the particulars of the "*stash house reverse-sting context*." Id. The question at issue in Sellers was "***whether Armstrong's standard is equally applicable to claims for selective enforcement****, particularly in the stash house reverse-sting context*." Id. (emphasis added). The "*particularly*" language did not change the more broad statement of

the issue in Sellers, which applied to "*claims for selective enforcement*" more broadly than just the "*particular[s]*" of the "*stash house reverse-sting context*." Id.

Contrary to Appellees' assertions, continued prosecution after the loss of probable cause is unconstitutional, and a plaintiff need not show that they were arrested or charged *repeatedly*. "*Arrests and charges*" are not the only basis for Appellees to have liablity. City/Lebsock Brief, pp. 29-30. A continued enforcement effort, searches and continued prosecution without probable cause is unlawful and unconstitutional, and Appellees have admitted to all of these things occurring after January 16, 2018. All of Spencer's claims have merit, but at the very least Appellees should be liable for the continued enforcement, threats of enforcement, threats of charges, threats of prosecution, searches and actual prosecution continuing after January 16, 2018. Thus, Spencer should be given an opportunity to present his claims to a jury.

G. Spencer Has Sufficiently Alleged And Supported His Claims Under The Fourteenth Amendment For Equal Protection And For Violation Of His Due Process Rights.

Spencer has sufficiently shown for purposes of his claims surviving Appellees' dispositive motions, and despite being denied relief under FRCP 56(d), that he was investigated, charged and prosecuted because of bias, malice and racial discrimination. Spencer has shown Appellees targeted him without probable cause.

Appellees cite to Baker v. McCollan, 443 U.S. 137, 145 (1979), for the proposition that the "*Constitution does not guarantee that only the guilty will be arrested*." See City/Lebsock Brief, p. 33. However, the Constitution does guarantee that a person will not be arrested, searched, prosecuted and threatened with such without probable cause. Chism, 661 F.3d at 393; Butler v. Elle, 281 F.3d 1014, 1024 (9th Cir. 2002); Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995); Awabdy, 368 F.3d at 1067; Spencer v. Peters, 857 F.3d 789, 798-802 (9th Cir. 2017); Hardwick v. Cty. of Orange, 844 F.3d 1112, 1116-17 (9th Cir. 2017). It is a cancer on our justice system and a systemic failure for government actors, especially law enforcement, to be shielded from liability when they unjustly do harm to a plaintiff. The *justice* system should be just that, a system providing *justice* – not a system that fosters injustice by shielding those that violate the rights of a plaintiff.

Spencer has shown that evidence in support of warrants being issued against him was fabricated, and Appellees are liable for these fabrications and the violations they caused to Spencer's constitutional rights and the other injuries they caused him. See Awabdy, 368 F.3d at 1067; Spencer, 857 F.3d at 798-802; Hardwick, 844 F.3d at 1116-17. The evidence fabricated by Appellees includes the false information Lebsock claims to have received from Rebecca Berger of STCU. The evidence fabricated by City/Lebsock includes the false statements

about the quality, and status of, the representation by Kandratowicz in the underlying civil case. The evidence fabricated by City/Lebsock includes the false statements about the so-called "*false report*" to the Spokane Police Department about the identity theft. The evidence fabricated by City/Lebsock includes the false statement that Spencer would have had any financial benefit from forging the subject court order.

City/Lebsock assert, without citation, Lebsock's investigation of Spencer continuing after Spencer's release from jail "*did not cause any damage to Mr. Spencer*." Id. The continued enforcement, searches and prosecution were without probable cause and, thus, were unconstitutional, exposing Appellees to liability. Spencer has presented undisputed evidence of "*damage*," including the emotional distress and injuries he suffered while enduring the enforcement, threats, searches and prosecution which continued for months without probable cause. ER 133.

Appellees argue Spencer "*cannot show*" that they targeted him for enforcement and prosecution "*because of its adverse effects on Native American population*." City/Lebsock Brief, p. 41. Continuing, they argue "*there is no evidence that has been or could be produced establishing such*." Id. Spencer has sufficiently alleged facts and claims relating to racial discrimination disproportionately targeting Native Americans generally, and Spencer specifically;

however, he was also deprived of any opportunity to meaningfully conduct and complete related discovery to develop additional evidence on these issues.

IV. CONCLUSION

For the reasons stated above, Appellant again respectfully requests that this Court reverse the District Court's Order (ECF No. 48, pp. 1-37/ER 2-38) and Judgment (ECF No. 49/ER 1) and remand this case for discovery to be conducted and to proceed to trial on all claims.

DATED this 22nd day of June, 2020.

DUNN & BLACK, P.S.

s/ RYAN D. POOLE
RYAN D. POOLE
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

I am the attorney for Appellant. This brief contains 6,133 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:

☒ 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;
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- ☐ 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).

June 22, 2020
Date

s/ RYAN D. POOLE
Signature of Attorney

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system. The electronic filing system will send notification of such filings to the following:

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ADDENDUM 1

Federal Rules of Civil Procedure 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing
Primary tabs

(a) Time to Serve a Responsive Pleading.

(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 disposition 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 the Pleadings. 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 to Strike. 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 described 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.
Notes

(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 2

Federal Rules of Civil Procedure 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. 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 a Motion. 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 information, 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 adverse 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 nonmovant shows by affidavit or declaration that, for specified reasons, 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.)

ADDENDUM 3

Federal Rules of Evidence 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.
Notes

(Pub. L. 93–595, §1, Jan. 2, 1975, 88 Stat. 1930; Apr. 26, 2011, eff. Dec. 1, 2011.)

ADDENDUM 4

Ninth Circuit Rule 28-2.8. Record References

Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found. (Rev. 7/1/98; 12/1/09).

Circuit Advisory Committee Note to Rule 28-2.8

Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. See Mitchel v. General Elec. Co., 689 F.2d 877 (9th Cir. 1982).