IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 12-35957

ABDULLAH AL-KIDD,

Plaintiff-Appellee,

v.

THE UNITED STATES OF AMERICA,

Defendant,

and

MICHAEL GNECKOW,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

APPELLANT BRIEF FOR DEFENDANT MICHAEL GNECKOW

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STATEMENT OF JURISDICTION

Among other claims, this suit involves claims by plaintiff Abdullah al-Kidd against several federal officials in their individual capacities for damages pursuant to *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court had

jurisdiction over those claims pursuant to 28 U.S.C. 1331. See Amended Complaint at 8-11, Excerpts of Record ("ER") 556-559.

On September 27, 2012, the district court granted summary judgment for plaintiff al-Kidd with respect to one of his Fourth Amendment *Bivens* claims against defendant Michael Gneckow. In the same order, the district court denied Gneckow's qualified immunity-based motion for summary judgment regarding that claim. See Order Adopting Report and Recommendations (ER 14). Gneckow filed a timely notice of appeal from that order on November 19, 2012. See ER 83. This Court has jurisdiction over defendant Gneckow's appeal under 28 U.S.C. 1291. *See KRL* v. *Estate of Moore*, 512 F.3d 1184, 1188 (9th Cir. 2008).

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Federal Bureau of Investigation (FBI) Special Agent Michael Gneckow is not entitled to summary judgment based on qualified immunity regarding plaintiff's claim that Gneckow omitted material information from an affidavit Gneckow prepared to support plaintiff's arrest as a material witness.

2. In the alternative, whether the district court's order granting summary judgment to plaintiff on his Fourth Amendment claim against Agent Gneckow should be vacated and remanded for trial.

STATEMENT REGARDING STATUTES INVOLVED

The principal statutes involved are discussed at pp. 4-5, *infra*, and set out in full as an addendum to this brief.

STATEMENT OF THE CASE

This case stems from plaintiff Abdullah al-Kidd's arrest as a material witness in 2003. Plaintiff brought multiple claims against several defendants, including *Bivens* claims for damages against former Attorney General John Ashcroft and two FBI Agents. The instant appeal concerns plaintiff's Fourth Amendment *Bivens* claim against defendant Michael Gneckow for damages in his individual capacity. On that claim, plaintiff alleges that Gneckow, who was then an FBI Special Agent, violated plaintiff's Fourth Amendment rights by omitting material information from an affidavit Gneckow prepared to support the application for a material witness warrant.

Al-Kidd and Agent Gneckow both moved for summary judgment regarding the above claim, with Agent Gneckow arguing that plaintiff's Fourth Amendment claim against him is barred by the doctrine of qualified immunity. The district court granted plaintiff's motion and denied Agent Gneckow's motion, holding that Agent Gneckow's affidavit failed to show probable cause for plaintiff's arrest as a material witness -- even though the

affidavit noted that plaintiff had purchased an airline ticket, with no return date, for a flight that was scheduled to leave for Saudi Arabia approximately 30 days from when plaintiff would be needed to testify at the trial of an individual who was suspected of supporting organizations that espoused violence and terrorism. In this appeal, Agent Gneckow argues that the district court should have granted his motion for summary judgment because Gneckow is entitled to qualified immunity regarding plaintiff's Fourth Amendment claim.

STATUTORY BACKGROUND

The federal statutes pursuant to which plaintiff was arrested as a material witness provide a two-step process for such arrests. First, pursuant to, 18 U.S.C. 3144, a judicial officer may order a person's arrest as a material witness "[i]f it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena."

Once such a person is arrested, the judicial officer is required to "treat the person in accordance with the provisions of [18 U.S.C.] 3142." 18 U.S.C. 3144. Section 3142 requires the court to hold a prompt hearing regarding whether the individual should continue to be detained, at which

the individual is entitled to be represented by counsel and to testify, present witnesses, and cross-examine witnesses. See 18 U.S.C. 3142(f)(2)(B).

Based on the evidence presented at that hearing, the judicial officer must determine "whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required." 18 U.S.C. 3142(f). In making that determination, the judicial officer must take into account, among other enumerated factors, the person's character, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, and record concerning appearance at court proceedings. *Id.* 3142(g)(3).

Depending on the result of that determination, the judicial officer may direct that the individual be released on personal recognizance or upon execution of an unsecured appearance bond, 18 U.S.C. 3142(b); released subject to the "least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required . . .," *id.* 3142(c)(1)(B); or detained, "if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required . . .." *Id.* 3142(e)(1).

STATEMENT OF FACTS

A. Factual Background

1. Al-Hussayen Investigation and Indictment

In 2001, FBI Special Agent Michael Gneckow was the lead agent on a criminal investigation into the activities of Sami Omar al-Hussayen, see Gneckow Dep. at 53-54 (ER 378-79), a citizen of Saudi Arabia who had entered the United States on a student visa. See Indictment, at 2-3 (ER 167-68). During that investigation, the government learned that during the time al-Hussayen was in the United States on a student visa, he had been substantially involved in supporting the efforts of an organization called the Islamic Assembly of North America ("IANA"). Al-Hussayen's activities on behalf of IANA included registering and helping maintain a number of websites that disseminated radical Islamic ideology, the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism. See Indictment at 6-8 (ER 157-59). Al-Hussayen also was found to have used multiple bank accounts in the United States to receive large sums of money and transfer those monies to the IANA and other organizations and individuals. See *id.* at 8-10 (ER 159-161).

a. During the FBI's criminal investigation of al-Hussayen, Agent Gneckow also learned that al-Hussayen had transferred substantial amounts of money to plaintiff Abdullah al-Kidd. See Gneckow Dep. at 53-54 (ER 378-379). Plaintiff passed along that information to FBI Special Agent Joe Cleary, who was the case agent assigned to a separate intelligence investigation of al-Hussayen. See *id.* at 54-57 (ER 379-382); Cleary Dep., at 109-110 (ER 337-338).[1] Agent Cleary then obtained approval to open an intelligence investigation of plaintiff. See Cleary Dep. at 111 (ER 339); Dezihan Dep. at 53 (ER 370).

As part of that intelligence investigation, Agent Cleary interviewed plaintiff twice in the summer of 2002. See Cleary Dep. at 163 (ER 343). Although plaintiff agreed to speak to Agent Cleary voluntarily on both occasions, see *id.* at 170, 173-74 (ER 344-346), Agent Gneckow later determined that plaintiff had not been forthcoming about important information. For example, plaintiff refused to identify al-Hussayen by name or divulge anything relating to the activities of al-Multaqa, an Islamic charitable organization that supported violent jihad, see Superseding Indictment, p. 15 (ER 222), even though plaintiff had received substantial

[1] The purpose of an intelligence investigation, which is not designed to lead to a possible criminal prosecution, is to gather information about the activities of an individual. See Cleary Dep. at 17-18 (ER 333-334).

salary payments from al-Hussayen for plaintiff's work for al-Multaqa. See Gneckow Dep., at 69-70 (ER 384-85); al-Kidd Dep. at 156 (ER 261).

After the second interview, plaintiff spoke to a reporter, and an article subsequently appeared in the Seattle Post-Intelligencer on August 2, 2002, concerning an FBI investigation into Muslim charities. After seeing the article, Agent Gneckow became concerned that plaintiff's communication with the press would jeopardize the criminal investigation of al-Hussayen. As a result, the FBI terminated all contact with plaintiff while the al-Hussayen investigation was ongoing. See Gneckow Dep. at 193-94 (ER 436-437); Lindquist Dep. at 76-80 (ER 465-469); Mace Dep. at 47-48 (ER 487-488).

b. On February 26, 2003, a criminal indictment against al-Hussayen was unsealed and the government arrested him. See Indictment (ER 151); Order (ER 195). The indictment charged al-Hussayen with seven counts of visa fraud and four counts of making false statements to the United States in connection with visa applications. The indictment alleged that al-Hussayen falsely certified that he sought to enter and remain in the United States solely for the purpose of pursuing a full course of study at the University of Idaho. In that regard, the indictment cited evidence showing that al-Hussayen engaged in computer web-site activities, including web-site

registration, management, and maintenance, that exceeded his course of study at the University of Idaho. See Indictment at 6, 11-18 (ER 157, 162-169).

2. Application for a Warrant for Plaintiff's Arrest as a Material Witness

As part of his intelligence investigation of plaintiff, Agent Cleary asked U.S. Immigration and Customs Enforcement ("ICE") Agent Robert Alvarez to enter a "lookout" for plaintiff, to track any international travel. Consequently, on March 12, 2003, as part of a routine inspection of the passengers on an outbound flight from JFK International Airport to Saudi Arabia, Customs and Border Protection Officer Jaime Alvarado discovered plaintiff's name on the flight manifest. See Alvarado Dep. at 54-55, 170-72, 180-81 (ER 279-283, 285-286). Pursuant to routine procedures, Officer Alvarado then ran plaintiff's name through a government database, which advised him to contact Agent Alvarez. See Alvarado Dep. at 171, 181-82, 184-85 (ER 282, 286-289).

The reservation information to which Officer Alvarado had access showed that plaintiff had booked his ticket on March 6, 2003, and that he had two reservations for travel to Saudi Arabia, one for March 13, 2003, and the other for either March 15 or 16, 2003. See Alvarado Dep. at 179-80, 197-99, 232-33 (ER 284-285, 296-298, 301-302). The reservation

information did not list a return flight. See *id.* at 194-96 (ER 293-295). Officer Alvarado contacted the airline, which informed him that the second flight was scheduled to leave on the 16th rather than the 15th and that plaintiff had purchased a first-class ticket. See *id.* at 199, 206-07 (ER 298-300).

Officer Alvarado contacted Agent Alvarez and informed him of plaintiff's scheduled travel, noting that plaintiff had purchased a first-class, one-way ticket to Saudi Arabia that was scheduled to depart on either March 13 or March 16. See Alvarez Dep. at 30, 43-46 (ER 313-317); Alvarado Dep. at 180, 190-91, 193-96, 206-07 (ER 285, 290-296, 299-300). Officer Alvarado explained that he characterized the reservation as one-way because "we've seen it in the past, where passengers will book themselves like that and they will never return." Alavardo Dep. at 194 (ER 293).

a. On March 13, 2003, al-Hussayen's two-day detention hearing concluded. That same day, Agent Alvarez informed Agent Gneckow that plaintiff had purchased a one-way, first-class plane ticket to Saudi Arabia for $5000 that was scheduled to depart within a few days. See Alvarez Dep. at 43-44, 52, 60 (ER 314-315, 318-319); Gneckow Dep. at 163-65, 170-71, 175 (ER 415-417, 422-423, 426). That information caused Agent Gneckow to become concerned about whether plaintiff would be available to testify at the al-Hussayen criminal trial, which was scheduled to begin on April 15,

2003. Agent Gneckow believed plaintiff could provide evidence concerning al-Hussayen's engagement in business activities that exceeded the scope of his student visa and certifications al-Hussayen had made in obtaining that visa. See Gneckow Dep. at 156-59 (ER 411-414).

Agent Gneckow was particularly concerned about plaintiff's availability for that trial because of the timing of plaintiff's expected departure from the country. See Gneckow Dep. at 147 (ER 407). As Agent Gneckow explained at his deposition, al-Hussayen's detention hearing had resulted in widespread press coverage of the fact that al-Hussayen was being investigated for terrorism-related charges, even though at that point al-Hussayen had not actually been charged for terrorism-related activity. See *ibid.* For example, it had been disclosed at the hearing that "images were recovered from [al-Hussayen's] computer that dealt with September 11, airplanes crashing into the Trade Center, and so on," *ibid.*, and that included "[a] lot of images of radical Saudi and middle eastern sheikhs." *Ibid.* The hearing also involved presentation of evidence showing al-Hussayen's involvement in "jihadist websites tied to the Islamic Assembly of North America . . . and to al-multaqa.com." *Ibid.* "There was widespread news coverage of these facts, and they were all laid out in the newspaper articles, [and] on TV." *Ibid.*

Given that information, along with plaintiff's substantial paid work for al-Hussayen in connection with al-Multaqa and the timing of plaintiff's arrangement to leave the country on what Agent Gneckow had been informed was a one-way ticket, Gneckow believed that plaintiff might be "fleeing from being called as a witness at the trial." Gneckow Dep. at 148 (ER 409). As Gneckow explained at his deposition:

> [W]e knew that Al-Kidd was an associate of Sami's, was involved with Al Multaqa, had knowledge about al-multaqa.com, had knowledge about these radical sheikhs; that, coupled with his failure to be forthright about the questions concerning Sami Omar Al-Hussayen, and the timing of his flight. I mean literally within hours of the completion of [al-Hussayen's] detention hearing, I received information that [plaintiff] is flying to Saudi Arabia.

Gneckow Dep. at 147-48 (ER 407-408). Agent Gneckow also was aware of the fact that the United States did not have an extradition treaty in place with Saudi Arabia at the time. See *id.* at 148 (ER 408).

b. Agent Gneckow initially consulted with Agent Cleary concerning the matter, and Agent Cleary agreed that it would be a good idea to seek a material witness warrant for plaintiff's arrest. See Gneckow Dep. at 142, 170-71 (ER 404, 422-423). Accordingly, after obtaining the approval of his supervisors, see *ibid.*, Agent Gneckow contacted Assistant United States Attorney Kim Lindquist, who was in charge of the al-Hussayen investigation. See *id.* at 170-71 (ER 422-423).

AUSA Lindquist instructed Agent Gneckow to make sure that plaintiff had in fact left his home in Kent, Washington. See Gneckow Dep. at 142-43, 171 (ER 404-405, 422). Agent Gneckow attempted to contact plaintiff at his Washington home, see *id.* at 143-44 (ER 405-406), but was unable to do so because, as plaintiff later explained at his deposition, he and his wife had packed their belongings and moved out of their apartment there, driving first to California and then to Las Vegas, where plaintiff's wife planned to reside with her parents until she could join plaintiff in Saudi Arabia. See al-Kidd Dep. at 30, 207-08 (ER 250, 264-265). Gneckow also called an FBI agent at Dulles International Airport and confirmed that plaintiff was in fact booked on a flight to Saudi Arabia. See Gneckow Dep. at 166-69, 73 (ER 418-421, 425).

Those tasks accomplished, Agent Gneckow then drafted an affidavit to support a warrant for plaintiff's arrest as a material witness. Gneckow submitted his draft affidavit for review and comment to Agent Cleary, to his supervisors, and finally to AUSA Lindquist. See Gneckow Dep. at 128-29, 139, 141-42, 144, 171-73 (ER 395-396, 401, 403-404, 406, 423-425); Lindquist Dep. at 29-30 (ER 451-452).

Agent Gneckow relied on AUSA Lindquist's judgment regarding whether his affidavit supplied probable cause for plaintiff's arrest. See Gneckow Dep. at 128, 187 (ER 395, 431). AUSA Lindquist advised Agent Gneckow to be sure his affidavit clearly showed plaintiff's connection with Sami al-Hussayen and the Islamic Assembly of North America, see Lindquist Dep. at 34 (ER 456), and Agent Gneckow followed up on that request. See Gneckow Dep. at 140-41 (ER 402-403). Thereafter, AUSA Lindquist signed off on the warrant affidavit. See Lindquist Dep. at 35 (ER 456).

c. Agent Gneckow then contacted FBI Special Agent Scott Mace, who was the FBI duty agent in Boise, Idaho. Because no magistrate was then available in Coeur d'Alene, where Agent Gneckow was stationed, Gneckow asked Agent Mace if he could present the affidavit to a magistrate in Boise. See Gneckow Dep. at 137-38 (ER 399-400); Mace Dep. at 10 (ER 479). Agents Gneckow and Mace conferred regarding the contents of the affidavit, and Agent Mace added an opening paragraph stating that the content of the affidavit was based on information Agent Mace received from Agent Gneckow. See Mace Dep. at 25-26 (ER 483-484).

In its final form, the warrant affidavit, which Agent Mace signed, explained that plaintiff would likely be able to provide material testimony at the al-Hussayen trial regarding al-Hussayen's substantial activities on behalf of organizations, including IANA, that were beyond the scope of plaintiff's student visa. See Affidavit at 1-3 (ER 174-176). The affidavit also explained that agents "believed that if Al-Kidd travels to Saudi Arabia, the United States Government will be unable to secure his presence at trial via subpoena." *Id.* at 3 (ER 176). In that regard, the affidavit noted that "Kidd is scheduled to take a one-way, first class flight (costing approximately $5,000.00) to Saudi Arabia on Sunday, March 16, 2003, at approximately 6:00 EST. He is scheduled to fly from Dulles International Airport to JFK International Airport in New York and then to Saudi Arabia." *Ibid*.

The affidavit did not mention that plaintiff was a U.S. citizen, that he had family ties to the U.S., and that he had voluntarily spoken with law enforcement in the past. When later asked at their depositions why this information was not included, Agent Gneckow, Agent Mace, and AUSA Lindquist testified that those facts did not alter their conclusion that plaintiff may have been unavailable to testify at the al-Hussayen trial without the issuance of a material witness arrest warrant. See Gneckow Dep. at 193-94

(ER 436-437); Mace Dep. at 47-48 (ER 487-488); Lindquist Dep. at 77-80 (ER 466-469).

At the time Agent Mace submitted the warrant affidavit, the FBI agents and AUSA Lindquist also did not know that plaintiff's ticket to Saudi Arabia was an open-ended ticket with no listed return date, rather than a one-way ticket; that it was for coach rather than first class; and that it cost $2000 rather than $5000. See Amended Complaint, ¶ 14 (ER 554). At his deposition in this matter, however, AUSA Lindquist -- who signed off on the warrant and who Agent Gneckow relied upon to determine whether the affidavit supplied probable cause for plaintiff's arrest -- testified that he would have approved seeking a warrant for plaintiff's arrest even if he had known the ticket was open-ended rather than one-way. See Lindquist Dep. at 73 (ER 464).

d. On March 14, 2003, Agent Mace and AUSA George Breitsameter presented an application for a warrant for plaintiff's arrest as a material witness to a magistrate judge in Boise. See Application (ER 172).[2] The judge issued a warrant for plaintiff's arrest that same day. See Arrest Warrant (ER 178). FBI agents executed the warrant two days later when

[2] AUSA Lindquist was unavailable to present the warrant application to the Court because he was attending to personal matters that day. See Lindquist Dep. at 32 (ER 453).

they arrested plaintiff at Dulles International Airport. See Amended Complaint, ¶ 65 (ER 567).

Plaintiff appeared before a magistrate judge the following morning in Virginia and agreed that the matter be continued so he could be transported to Idaho. See Second Amended Complaint, ¶ 77 (ER 569). Plaintiff arrived in Idaho on March 25, 2003, and appeared in court that day. See Minute Entry (ER 182). The court granted a continuance at the request of both parties until March 27, 2003, see *ibid.*, and AUSA Lindquist then worked with plaintiff's counsel to determine conditions on which plaintiff could be released. See Minute Entry (ER 183). Plaintiff agreed to be released to the custody of his wife, to surrender his passport, and not to travel outside the states of Idaho, Washington, Nevada, and California. The court approved those conditions on March 31, 2003, and plaintiff was released from custody that day. See Order (ER 184).

The original April 15, 2003 date of the al-Hussayen trial was later vacated, see Order of April 15, 2003 (ER 201), and reset for January 13, 2004. See Order of July 30, 2003 (ER 204). The al-Hussayen trial date was later vacated again after the United States filed a superseding indictment against al-Hussayen. See Order of Jan. 23, 2004 (ER 232). The trial began on April 13, 2004, but AUSA Lindquist did not end up calling plaintiff as a

witness because al-Hussayen decided not to contest that he had engaged in business activities on behalf of IANA. See Lindquist Dep. at 35 (ER 456).

On June 3, 2004, plaintiff moved to dismiss his release conditions. See ER 188. The government did not oppose the motion, and the court granted it on June 16, 2004. See Order (ER 191). The jury in the al-Hussayen trial found him not guilty on some counts, but could not reach a verdict on others. See Order of June 10, 2004 (ER 236). The government dismissed the remaining counts upon al-Hussayen's agreement to be deported from the United States. See Motion to Dismiss and Order (ER 239-242).

B. Procedural History

Plaintiff filed his complaint in this action in March 2005, and an amended complaint several months later. The amended complaint asserts *Bivens* claims for damages against several federal officials in their individual capacities, including former Attorney General John Ashcroft; FBI agents Scott Mace and Michael Gneckow; and the Warden for the Oklahoma Federal Transfer Center, Dennis Callahan. See Amended Complaint, pp. 9-11, ¶¶ 23, 26, 27, 29 (ER 557-559).

The first amended complaint also asserted official capacity claims for injunctive relief against several federal officials; damages claims against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671, *et. seq.*; individual capacity damages claims against two local officials, James Dunning and Vaughn Killeen, pursuant to 42 U.S.C. 1983; and requests for injunctive relief against various federal agencies. See First Amended Complaint, pp. 9-12 (ER 557-560).

Plaintiff's claims against former Attorney General Ashcroft were eventually considered, and rejected, by the Supreme Court, see *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074 (2011), and the district court dismissed those claims upon the Supreme Court's and the Ninth Circuit's directions. See Ninth Circuit Order (ER 82); District Court Order Dismissing Plaintiff's Claim Against Former Attorney General Ashcroft (ER 81).[3]

After the Supreme Court issued its decision rejecting plaintiff's claims against former Attorney General Ashcroft, the remaining individual federal defendants (Michael Gneckow and Scott Mace) and plaintiff cross-moved

[3] Plaintiff and the United States filed cross-motions for summary judgment regarding plaintiff's FTCA claims. On September 27, 2012, the district court held that plaintiff is entitled to summary judgment on his FTCA false imprisonment claim, but that plaintiff's FTCA abuse of process claim must proceed to trial. See Order (ER 1). Those claims remain pending before the district court as of this time. Plaintiff's claims against the other defendants in the suit have all been resolved.

moved for summary judgment regarding plaintiff's *Bivens* claims against those defendants. The matter was assigned to a United States Magistrate Judge, who issued a report recommending that the district court grant plaintiff's motion for summary judgment against Agent Gneckow and that the court resolve the cross-motions regarding Agent Mace following *de novo* review. See Report and Recommendation (ER 38).[4]

Plaintiff and defendants Gneckow and Mace filed objections to the Magistrate Judge's Recommendation and Report, and he district court granted Agent Mace's motion for summary judgment. See Order at 21-24 (ER 34-37). The court denied Agent Gneckow's motion, however, and granted summary judgment for plaintiff regarding plaintiff's claim that Gneckow violated *Franks* v. *Delaware*, 438 U.S. 154 (1978), by submitting an affidavit that, intentionally or with reckless disregard for the truth, included a false statement or material omission that was necessary to the finding of probable cause for plaintiff's arrest. See Order at 12 (ER 25).

[4] The magistrate judge declined to make a recommendation regarding plaintiff's Fourth Amendment claim against Agent Mace under *Malley* v. *Briggs* because the magistrate judge was the same judge who had found probable cause for plaintiff's arrest as a material witness, and because plaintiff's *Malley* claim against Agent Mace would have required the magistrate judge to review his own determination in that regard. See Report and Recommendation at 32-33 (ER 69-70).

The district court recognized that it was reasonable for Agent Gneckow, after verifying certain facts concerning plaintiff's flight, to rely upon the information he was provided concerning the price and class of plaintiff's ticket and the report that it was a one-way ticket, even though that information turned out to be incorrect. See Order at 7 (ER 20). The court nevertheless concluded that Agent Gneckow had violated *Franks* because his warrant affidavit should have mentioned that plaintiff is a United States citizen with familial and community ties to the United States and that he had previously cooperated with law enforcement. The court held that these facts were material and necessary to the district court's probable cause determination; that these facts were known to Agent Gneckow; and that it was reckless for him not to have included them in his warrant affidavit. See Order at 6 (ER 19).[5] Agent Gneckow filed a timely notice of appeal from the district court's order granting summary judgment for plaintiff on his *Franks* claim against Gneckow on November 19, 2002. See ER 83.

[5] Because the district court granted summary judgment for plaintiff against Agent Gneckow regarding plaintiff's *Franks* claim against Gneckow, the court did not consider plaintiff's alternative claim that Gneckow violated plaintiff's Fourth Amendment rights under *Malley* v. *Briggs*, 475 U.S. 335 (1986). See Order at 15 (ER 28).

SUMMARY OF ARGUMENT

The district court erred by denying FBI Agent Michael Gneckow's qualified immunity-based motion for summary judgment regarding plaintiff's Fourth Amendment *Bivens* claim against him for damages in his individual capacity, and by concluding that the affidavit Agent Gneckow prepared for plaintiff's arrest as a material witness recklessly omitted facts that were necessary to support probable cause for plaintiff's arrest.

1. To begin, plaintiff's Fourth Amendment claim against Agent Gneckow fails as a matter of law because Agent Gneckow's affidavit would have shown probable cause for plaintiff's arrest even if it had mentioned plaintiff's U.S. citizenship and family ties and his past cooperation with law enforcement. Probable cause for the issuance of a material witness arrest warrant turns on whether the individual "may" be unavailable to testify without the issuance of a warrant. Agent Gneckow's affidavit easily met that standard, since it is undisputed that plaintiff purchased an open-ended airplane ticket with no return date to Saudi Arabia that was scheduled to depart shortly prior to the trial of an individual, Sami Amir al-Hussayen, who was suspected of aiding terrorist organizations, and with whom plaintiff had substantial contacts.

Given those undisputed facts, plaintiff's U.S. citizenship, family ties, and his past cooperation with law enforcement did not guarantee that plaintiff would have been available to testify at the trial in question without the issuance of a material witness arrest warrant. As Agent Gneckow and Mace both explained in their depositions, it is not uncommon for individuals to flee the United States despite their U.S. citizenship and family ties, and case law recognizes that an individual's past cooperation with law enforcement does not guarantee that the individual will agree to testify at a criminal trial. The latter point was of particular concern here, because plaintiff's expected testimony at the al-Hussayen trial would have publicly revealed plaintiff's own substantial ties to an individual who was suspected of having provided substantial aid to terrorist organizations.

2. Even if Agent Gneckow's affidavit did not establish probable cause for plaintiff's arrest, Agent Gneckow would still be entitled to qualified immunity because plaintiff failed to make the requisite "substantial showing" that Agent Gneckow acted recklessly by failing to mention plaintiff's U.S. citizenship, family ties, and prior cooperation with authorities, or that he violated any clearly established law in that regard.

Law enforcement officers are immune from suit where they reasonably believe probable cause exists, given that they "'cannot be expected to predict what federal judges have considerable difficulty in deciding and about which they frequently differ among themselves.'" *Crowe* v. *County of San Diego*, 608 F.3d 406, 436 (9th Cir. 2010) (citation omitted). Moreover, it is "particularly" true that "materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit." *Lombardi* v. *City of El-Cajon*, 117 F.3d 1117, 1127 (9th Cir. 1997). Those principles are controlling here, given the strength of the information in Agent Gneckow's warrant affidavit showing that plaintiff may have been unavailable to testify at the al-Hussayen trial without the issuance of a warrant.

In addition, Agent Gneckow consulted with his superiors and with two other FBI Agents regarding the content of his affidavit; took steps to confirm whether plaintiff could be located at his Washington state home before submitting his affidavit; and called the FBI agent assigned to Dulles Airport to confirm that plaintiff was in fact scheduled to leave for Saudi Arabia. These actions are inconsistent with a "substantial showing" of recklessness, which a plaintiff must make to avoid summary judgment in this Circuit. See, *e.g.*, *Hervey* v. *Estes*, 65 F.3d 784, 789 (9th Cir. 2011).

Agent Gneckow also submitted a draft of his affidavit for review by an Assistant United States Attorney (Kim Lindquist). It is settled law in this Circuit that consultation with a prosecutor regarding whether the facts in an affidavit establish probable cause establishes objectively reasonable behavior, and AUSA Lindquist testified at his deposition that he assumed plaintiff was a U.S. citizen and knew plaintiff had a wife in the U.S. and that he (Lindquist) did not believe those facts or plaintiff's prior cooperation with law enforcement negated probable cause for plaintiff's arrest.

Finally, Agent Gneckow also is entitled to qualified immunity because he did not violate any clearly established law. At the time Agent Gneckow prepared his warrant affidavit, no case would have put him on notice that he needed to mention plaintiff's U.S. citizenship, family ties, and prior cooperation with law enforcement in his warrant affidavit. The district court did not identify any such case, or acknowledge the existence of this bedrock requirement of qualified immunity law.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews a district court's denial of a qualified immunity-based motion for summary judgment *de novo*. See, *e.g.*, *KRL* v. *Estate of Moore*, 512 F.3d 1184, 1188-89 (9th Cir. 2008).

ARGUMENT

I. Agent Gneckow Is Entitled To Summary Judgment With Respect To Plaintiff's Fourth Amendment Claim.

The District Court held that plaintiff is entitled to summary judgment regarding his Fourth Amendment claim against Agent Gneckow under *Franks* v. *Delaware*, 438 U.S. 154 (1978). *Franks* held that an individual who is arrested pursuant to a warrant may challenge the constitutionality of the arrest under the Fourth Amendment by showing that the affidavit on which the warrant was based failed to set out facts providing probable cause for the arrest and "contain[ed] a deliberately or reckless false statement." *Id.* at 165.

A deliberate or reckless falsehood can include the omission of material information. See *Mendocino Envtl. Ctr.* v. *Mendocino City*, 192 F.3d 1283, 1295 (9th Cir. 1999). If the individual can prove that a warrant affidavit contains a deliberate or reckless false statement or material omission, the court must disregard any such false statement, and take into consideration any such material omission, in determining whether the affidavit supported a finding of probable cause. See *Franks*, 438 U.S. at 171-72; *Mendocino*, 192 F.3d at 1295.

As we demonstrate below, the district court should have granted summary judgment for Agent Gneckow on plaintiff's *Franks* claim for two reasons. First, Agent Gneckow's affidavit would have established probable cause for plaintiff's arrest as a material witness even if it had mentioned plaintiff's U.S. citizenship, family ties, and the fact that he had voluntarily spoken with law enforcement in the past. Second, even if that were not so, plaintiff did not make the requisite substantial showing necessary to resist summary judgment that Agent Gneckow acted recklessly in omitting those facts from his affidavit, or prove that Agent Gneckow violated any law that was clearly established at the time he prepared the affidavit.

A. Plaintiff's Fourth Amendment Claim Fails Because There Was Probable Cause to Believe it May Have Been Impracticable to Secure Plaintiff's Testimony at the al-Hussayen Trial Without the Issuance of a Material Witness Warrant.

Congress has provided that a judicial officer may order the arrest of a person "[i]f it appears from an affidavit filed by a party that the testimony of [the] person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena." 18 U.S.C. 3144.

Accordingly, this Court has held that "[b]efore a material witness arrest warrant may issue, the judicial officer must have probable cause to believe (1) 'that the testimony of a person is material,' and (2) 'that it may become impracticable to secure his presence by subpoena.'" *Bacon* v. *United States*, 449 F.2d 933, 943 (9th Cir. 1971) (quoting 18 U.S.C. 3149, a predecessor to 18 U.S.C. 3142).

"Probable cause" does not require "certainty," *United States* v. *Gourde*, 440 F.3d 1065, 1070 (9th Cir. 2006) (en banc), or even a "preponderance of [] evidence." *Ibid.* Rather, probable cause is satisfied where there is a "'fair probability,'" *id.* at 1069 (citation omitted), or a "'substantial chance,'" *Ewing* v. *City of Stockton*, 588 F.3d 1218, 1223 (9th Cir. 2009) (citation omitted), that the event in question will occur. See also *United States* v. *Castillo*, 866 F.2d 1071, 1076 (9th Cir. 1989); *Aguilar-Ayala* v. *Ruiz*, 973 F.2d 411, 418 (5th Cir. 1992) ("government was not patently unreasonable in concluding that the detention of alien-witnesses was the only means of *guaranteeing* the admissibility of their testimony") (emphasis in original).

Both of the probable cause elements necessary to support a material witness warrant under 18 U.S.C. 3144 were satisfied here. First, the record shows there was probable cause to believe plaintiff could have provided

material testimony in the al-Hussayen trial, given plaintiff's close association with al-Hussayen and his knowledge of al-Hussayen's financial dealings. See pp. 6-16, *supra*. The district court did not conclude otherwise. Second, as we demonstrate below, the record also shows that (1) there was probable cause to believe plaintiff may not have been available for the al-Hussayen trial without a material witness warrant even if plaintiff's U.S. citizenship and family ties and his past cooperation with law enforcement had been considered, and (2) plaintiff failed to make the requisite substantial showing that Agent Gneckow acted recklessly in preparing the affidavit, or prove that Agent Gneckow violated any clearly established law by not including those facts in his affidavit.

1. Evidence Supporting Probable Cause

As the Supreme Court noted in *Franks*, there is a "presumption of validity" with respect to an affidavit supporting a warrant. 438 U.S. at 171. Here, it is undisputed that plaintiff purchased an airplane ticket to Saudi Arabia with no scheduled return date; that he traveled to Dulles International Airport to board that flight; that the al-Hussayen trial was scheduled to begin shortly thereafter; and that plaintiff had substantial ties to al-Hussayen, who was suspected of substantially aiding terrorist organizations. See pp. 6-16, *supra*.

Those facts established probable cause to conclude that it "may" have been "impracticable" to secure plaintiff's appearance at the al-Hussayen trial without the issuance of a material witness warrant under 18 U.S.C. 3144. See *United States* v. *Awadallah*, 349 F.3d 42, 69-70 (2d Cir. 2003) (material witness arrest warrant supported by probable cause where witness had connections to one or more of the September 11, 2001 hijackers, and thus "an incentive to avoid appearing before the grand jury" investigating those attacks); *cf. Aguilar-Ayala* v. *Ruiz*, 973 F.2d 411 (5th Cir. 1992) (detention of aliens proper where the government "might reasonably doubt that [they] would remain within the reach of judicial process during the pendency of trial"); *United States* v. *Nai Fook Li*, 949 F. Supp. 42 (D. Mass. 1996) (concluding that individuals from the People's Republic of China could be detained as witnesses because if they were released, they would likely be unavailable as witnesses at the time of trial).[6]

[6] The above facts also distinguish this case from *Bacon*, *supra*, where this Court held that the government lacked probable cause to believe that an individual might be unavailable to testify at a criminal trial without a material-witness arrest warrant. There, the government's evidence merely showed that "*if* Bacon wished to flee, she might be able to do so successfully." 449 F.3d at 944 (emphasis in original). Here, by contrast, plaintiff did not just have the means to flee, but took concrete steps to leave the country by leaving home, buying an open-ended airline ticket to Saudi Arabia, and traveling to Washington, D.C. to board that flight.

2. Immaterial Omissions

The district court held that Agent Gneckow's warrant affidavit failed to demonstrate probable cause for plaintiff's arrest because it did not mention that plaintiff was a U.S. citizen with community and family ties to the United States and because plaintiff had previously cooperated with law enforcement. Respectfully, the district court erred in so holding. A law enforcement officer "'cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation,'" *Lombardi* v. *City of El Cajon*, 117 F.3d 1117, 1124 (9th Cir. 1997) (citation omitted), and Gneckow's affidavit would still have set forth probable cause for plaintiff's arrest even if it had included the information noted above.

a. To begin, plaintiff's U.S. citizenship and family ties do not prove that he would have been available for the al-Hussayen trial without the issuance of an arrest warrant. It is undisputed that plaintiff was leaving the country shortly before the al-Hussayen trial, on a ticket with an open-ended return date, and that plaintiff had substantial ties with al-Hussayen, who was suspected of having provided substantial assistance to terrorist organizations. Plaintiff's citizenship and family ties do not change those facts, which support the conclusion that plaintiff may have been unavailable to testify at the al-Hussayen trial without the issuance of a material witness warrant. See

generally *Ewing* v. *City of Stockton*, 588 F.3d 1218, 1224-26 (9th Cir. 2009) (fact that arrest warrant affidavit did not mention plaintiff's non-identification by a witness who viewed various photographs did not defeat probable cause for plaintiff's arrest because of plaintiff's identification by another witness, which was the "key" part of the affidavit); *Smith* v. *Almada*, 640 F.3d 931, 938 (9th Cir. 2011) (even if officer omitted certain exculpatory information, warrant application "would still have contained facts sufficient to establish probable cause to arrest [defendant]").

Moreover, as Agent Gneckow explained in his deposition, "we have people that flee the country all the time that are U.S. citizens" and "who leave [their] wife and family behind and never come back." Gneckow Dep. at 194 (ER 437). Agent Mace testified similarly at his deposition, noting that "I've seen people walk away from their children to avoid court." Mace Dep. at 47 (ER 487). Likewise, AUSA Kim Lindquist, who made the decision to seek the arrest warrant, see Lindquist Decl., ¶ 5 (ER 149); Lindquist Dep. at 35 (ER 456), Gneckow Dep. at 128-129, 187 (ER 396-396, 431), testified at his deposition that he assumed plaintiff was a U.S. citizen and that he knew plaintiff was married, and that he concluded there was probable cause to seek the warrant notwithstanding those facts. See Lindquist Dep. at 77-81 (ER 466-470).

The opinions of those officials fully explain why plaintiff's U.S. citizenship and family ties did not guarantee that plaintiff would voluntarily return from Saudi Arabia to testify at the al-Hussayen trial, and are entitled to substantial deference. See *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975) ("officers are entitled to draw reasonable inferences from these facts in light of their knowledge of the area and their prior experience"); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 885 (1975) ("the officer is entitled to assess the facts in light of his experience"). Moreover, the key issue was not whether plaintiff would *never* return to his family in the United States if he were allowed to leave for Saudi Arabia, but only whether he may have chosen to remain in Saudi Arabia during the pendency of the al-Hussayen trial.

The district court also failed to note that a witness's community and family ties are factors that a court must promptly consider in determining whether an individual who is arrested on a material witness warrant should be released on appropriate conditions. See 18 U.S.C. 3142(g)(3)(A). The fact that Congress mentioned those considerations in the context of determining conditions of release, rather than in the context of determining whether a warrant should issue, further confirms that those considerations do not undermine probable cause for plaintiff's arrest.

b. The fact that plaintiff had voluntarily spoken with government officials in the past also does not demonstrate that Agent Gneckow's affidavit was not supported by probable cause. Numerous cases have upheld arrests of witnesses despite prior cooperation with authorities, see, *e.g.*, *United States* v. *Awadallah*, 349 F.3d 42, 45-46, 66-67 (2d Cir. 2003); *United States* v. *McVeigh*, 940 F. Supp. 1541, 1562 (D. Col. 1996); *White* v. *Gerbitz*, 892 F.2d 457, 461 (6th Cir. 1989), and Agent Gneckow's affidavit specified good reasons to believe plaintiff may not have returned to the United States voluntarily to testify at the al-Hussayen trial.

Moreover, the circumstances in which plaintiff voluntarily spoke with law enforcement officials in the past differed significantly from those that relate to whether there was probable cause for his arrest as a material witness. Plaintiff's earlier communications occurred in the context of plaintiff's own non-criminal intelligence investigation. See p. 7, *supra*. By contrast, in determining whether to seek a warrant for plaintiff's arrest, the government was faced with deciding whether plaintiff would willingly return from Saudi Arabia, shortly after going there, to provide material testimony against an individual who allegedly provided aid and assistance to an organization that had supported terrorism, and with whom plaintiff had substantial ties. See pp. 6-14, *supra*.

That question raised issues of a completely different order. As AUSA Lindquist explained at his deposition, Lindquist believed plaintiff would not honor a subpoena and return to the United States "[b]ecause of his affiliation with Sami Al-Hussayen, the Islamic Assembly of North America, and the activities they were involved in." Lindquist Dep. at 115 (ER 473). See also Gneckow Dep. at 147 (ER 407) (noting that it had been "[w]ell publicized . . . that Al-Hussayen was being investigated for terrorism charges," even though he hadn't been charged with engaging in terrorist activity as of that time). For all the above reasons, therefore, Agent Gneckow is entitled to summary judgment regarding plaintiff's *Franks* claim because Gneckow's affidavit fully demonstrated probable cause to believe that a warrant was necessary for plaintiff's arrest as a material witness.

B. Agent Gneckow Also Is Entitled to Summary Judgment Because His Conduct Did Not Violate Any Clearly Established Law.

Even if this Court were to conclude that Agent Gneckow's affidavit failed to show probable cause to believe plaintiff may have been unavailable to testify at the al-Hussayen trial without a material witness warrant, Gneckow would still be entitled to qualified immunity because a reasonable officer would not have known that the warrant was supposedly unsupported by probable cause.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009), *quoting Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Ashcroft* v. *al-Kidd*, 131 S. Ct. at 2085 (citation omitted).

In cases involving claims that an officer has omitted material information from a warrant application, this Court has held that whether a law enforcement official acted recklessly is merged with the issue of whether the official is entitled to qualified immunity. See, *e.g.*, *Chism* v. *Washington State*, 661 F.3d 380, 393 & n.15 (9th Cir. 2011) (citations omitted). That principle is based upon the notion that "no reasonable officer would believe it is constitutional to act dishonestly or recklessly," but also that if the officer "did not act dishonestly or recklessly, the officer's conduct would not have violated any clearly established constitutional rights." *Butler* v. *Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) (per curiam).

Applying these principles, this Court has recognized that a law enforcement officer is entitled to qualified immunity regarding a Fourth Amendment claim challenging the constitutionality of an arrest or an arrest warrant if it was "reasonably arguable that there was probable cause for arrest." *Rosenbaum* v. *Washoe Cnty.*, 663 F.3d 1071, 1076 (9th Cir. 2011). See also *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (officer may not be denied qualified immunity merely because he failed to draw "another reasonable, or more reasonable, interpretation of the events" than what led the officer to conclude that probable cause existed). Consequently, "officers are immune from suit 'when they reasonably believe that probable cause existed,'" even where a court later concludes that probable cause was lacking, because they "'cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves.'" *Crowe*, 608 F.3d at 433 (*quoting Smiddy* v. *Varney*, 665 F.2d 261, 266 (9th Cir. 1981) (additional citation omitted). Accord *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) (recognizing that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present," and that in such cases, the officials "should not be held personally liable").

These qualified immunity principles mirror the principles that govern a Fourth Amendment *Franks* v. *Delaware* claim. See, *e.g.*, *Ewing* v. *City of Stockton*, 588 F.3d 1218, 1224 (9th Cir. 2009) (noting that "'omissions or misstatements resulting from negligence or good faith mistakes'" cannot support a *Franks* claim) (citation omitted).

Pursuant to the above principles, Agent Gneckow is entitled to summary judgment regarding plaintiff's *Franks* v. *Delaware* claim because a reasonable officer in Gneckow's position would not have known that the warrant omitted information material to probable cause for plaintiff's arrest; because Gneckow reasonably relied on Assistant United States Attorney Kim Lindquist's legal judgment regarding the facts he needed to include to demonstrate probable cause; and because Gneckow did not violate any clearly established law regarding the required contents of a material witness warrant affidavit.

1. Reasonable Minds Could Differ Regarding Whether Agent Gneckow's Affidavit Provided Probable Cause to Believe that Plaintiff May Have Been Unavailable to Testify at the al-Hussayen Trial Without the Issuance of a Material Witness Arrest Warrant.

As this Court has correctly observed, "the existence of probable cause is often a difficult determination." *KRL* v. *Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir. 2008), *citing Ortiz* v. *Van Auken*, 887 F.2d 1366, 1370-71 (9th

Cir. 1989). Questions of probable cause require an analysis of "'probabilities,'" which "'are not technical,'" but instead involve the "'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975), *quoting Brinegar* v. *United States*, 338 U.S. 160, 174-75 (1949). Accordingly, the Supreme Court has noted that "reasonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." *United States* v. *Leon*, 468 U.S. 897, 914 (1984).

In the context of alleged omissions, it is "particularly" the case that "materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit." *Lombardi* v. *City of El Cajon*, 117 F.3d 1117, 1127 (9th Cir. 1997). Accord *Crowe*, 608 F.3d at 436 (quoting *Lombardi*). Thus, in *Lombardi*, this Court held that an officer was entitled to qualified immunity regarding a *Franks* claim because "a reasonable officer in [his] position could have failed to recognize that the facts he decided not to disclose would have an effect on the probable cause determination." *Id.* at 1127.

Similarly, in the present case, a reasonable officer in Agent Gneckow's position could have failed to recognize that plaintiff's U.S. citizenship, family ties, and past cooperation with law enforcement precluded a finding of probable cause for plaintiff's arrest (assuming *arguendo* that those facts were necessary to a finding of probable cause). Gneckow's affidavit set out the key facts that supported probable cause for plaintiff's arrest, which included plaintiff's scheduled departure for Saudi Arabia on an open-ended ticket only days before the al-Hussayen trial was to begin, combined with plaintiff's substantial ties to al-Hussayen, who was suspected of providing aid to organizations that supported terrorism. Given those key facts, a reasonable officer in Agent Gneckow's position could have concluded that the additional information noted above did not assure that plaintiff would have been available to testify at the al-Hussayen trial without a warrant. *Cf. Crowe*, 608 F.3d at 436 ("while not deciding whether the omissions in the affidavit were sufficiently material misrepresentations to constitute a violation of the Fourth Amendment," the defendants were entitled to qualified immunity because "[t]here appears to be enough uncertainty . . . that given the information known to the police at that time, it would not have been plain that *any* magistrate would not have issued the warrant").

It also is important to remember that Agent Gneckow learned about plaintiff's planned departure for Saudi Arabia only days before plaintiff was scheduled to leave. As the Supreme Court noted in *Franks*, probable cause "may be founded" upon information that "must be garnered hastily." 438 U.S. at 171. Likewise, the district court noted that to "view [a] case with twenty-twenty hindsight" would be "unfair to those involved at the time who were not afforded such clarity or had the ability to see into the future." Order at 11 (ER 24). These considerations further confirm that Agent Genckow did not act recklessly in preparing his affidavit for plaintiff's arrest as a material witness.

Finally, conduct is considered reckless for purposes of *Franks* v. *Delaware* only if it is so lacking in respect for legal requirements that it is appropriate to assume the law enforcement officer acted in bad faith, with the intent of depriving an individual of his legal rights. See *Franks*, 438 U.S. at 165 (noting that key element in proving a *Franks* claim is whether the affidavit is "truthful," "in the sense that the information put forth is believed or appropriately accepted by the affiant as true"); *Ewing*, 588 F.3d at 1224 ("good faith mistakes" do not support a *Franks* claim).

This aspect of *Franks* also further confirms plaintiff's inability to make the requisite "substantial showing," see *Hervey*, *supra*, that Agent Gneckow acted recklessly in preparing his warrant affidavit. The record shows that Genckow was fully acting within the scope of his employment in making a judgment call regarding how much detail should be provided in the affidavit, see pp. 10-15, *supra*, and that kind of judgment call does not come close to supporting a finding of reckless behavior under *Franks*.

Likewise, it is undisputed that Agent Gneckow took steps to confirm whether plaintiff could be located at his Washington state home before submitting his affidavit; consulted with Agent Mace and other law enforcement officials regarding the contents of his affidavit; and called the FBI agent assigned to Dulles Airport to confirm that plaintiff was in fact scheduled to leave for Saudi Arabia. See pp. 12-15, *supra*. These actions further confirm Agent Gneckow's use of due care. For all the above reasons, therefore, this Court should hold that plaintiff's *Franks* claim against Agent Gncknow fails as a matter of law because Genckow reasonably concluded that his warrant affidavit provided probable cause for plaintiff's arrest.

2. Agent Gneckow Also is Entitled to Qualified Immunity Because He Reasonably Relied On AUSA Kim Lindquist's Legal Judgment Regarding Whether Gneckow's Affidavit Established Probable Cause for Plaintiff's Arrest.

This Court has held that consultation with a prosecutor regarding whether the facts in an affidavit are sufficient to establish probable cause is "'sufficient to establish objectively reasonable behavior.'" *Ortiz*, 887 F.2d at 1371 (citation omitted). Accord *KRL*, 512 F.3d at 1191 (9th Cir. 2008); *Los Angeles Police Protective League* v. *Gates*, 907 F.2d 879, 888 (9th Cir. 1990); *Ortiz* v. *Van Auken*, 887 F.2d 1366, 1369-71 (9th Cir. 1989); *United States* v. *Luk*, 859 F.2d 667, 676-78, 680 (9th Cir. 1988); *United States* v. *Freitas*, 856 F.2d 1425 (9th Cir. 1988); *Arnsberg* v. *United States*, 757 F.2d 971, 981 (9th Cir. 1984).

As this Court explained in *Ortiz*, the Constitution does "not require officers 'to second-guess the legal assessments of trained lawyers.'" 887 F.2d at 1371, *quoting Arnsberg*, 757 F.2d at 981. Accord *KLR*, 512 F.3d at 1189. Moreover, "[i]t would be counterproductive and even oppressive" if law enforcement officers who have sought legal advice regarding whether there is probable cause for seeking a warrant and follow that advice can later "be held liable in damages for their actions." *Los Angeles Police Protective League*, 907 F.2d at 888.

Thus, as this Court has consistently recognized, for a law enforcement officer to seek and follow the legal advice of a prosecutor with respect to whether certain facts support probable cause is the hallmark of "responsible behavior." *Ibid.* See also *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012) ("fact that officers sought and obtained approval of the warrant application from a superior and a deputy district attorney before submitting it to the magistrate provides further support for the conclusion that an officer could reasonably have believed that the scope of the warrant was supported by probable cause").

These principles preclude plaintiff from making the requisite "substantial showing," *Hervey*, 65 F.3d at 789, of reckless behavior that is necessary to avoid summary judgment for Gneckow regarding plaintiff's *Franks* claim. As explained above, Gneckow relied on AUSA Lindquist's legal judgment regarding whether the affidavit established probable cause for plaintiff's arrest. See p. 14, *supra*.

Significantly, AUSA Lindquist testified at his deposition that he knew plaintiff had a wife in the U.S., see Lindquist Dep. at 77-78 (ER 466-467); that he assumed plaintiff was a U.S. citizen when Lindquist signed off on Agent Gneckow's warrant affidavit, see *ibid.*; and that he believed the affidavit would still have provided probable cause even if it had mentioned

plaintiff's U.S. citizenship, family ties, and prior cooperation with law enforcement. See *id.* at 76-81 (ER 465-470). Given those facts, plaintiff cannot make a substantial showing that Agent Genckow acted recklessly in preparing his affidavit for plaintiff's arrest.

3. Agent Gneckow Also Is Entitled to Qualified Immunity Regarding Plaintiff's *Franks* Claim Because He Did Not Violate any Clearly Established Law.

Finally, as noted above, this Court treats the question of whether a law enforcement officer acted recklessly under *Franks* as being merged with the issue of whether the officer is entitled to qualified immunity. See p. 36, *supra*. As a result, the district court should have asked whether it was clearly established at the time Agent Gneckow prepared his affidavit that plaintiff's U.S. citizenship, family ties, and past cooperation with law enforcement precluded a finding of probable cause to believe that plaintiff may have been unavailable to testify at the al-Hussayen trial without the issuance of a material witness arrest warrant. See *Saucier* v. *Katz*, 533 U.S. 194 (2001) (noting that even where the Fourth Amendment violation alleged requires proof that the defendant acted unreasonably, "[t]he qualified immunity inquiry [adds] a further dimension:" the concern "that reasonable mistakes can be made as to the legal constraints on particular [law enforcement] conduct").

At the time Agent Gneckow prepared his warrant affidavit, no clearly established law would have put him on notice that plaintiff's U.S. citizenship and family ties his past cooperation with law enforcement supposedly negated probable cause for plaintiff's arrest as a material witness, given the other facts in Gneckow's affidavit that demonstrated the need for a warrant. That is no surprise, among other reasons because this Court has "not drawn clear lines for when omissions are material." *Lombardi*, 117 F.3d at 1126. See also *Illinois* v. *Gates*, 462 U.S. 213, 232 (1983) (probable cause "is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules"). Indeed, as we have shown, the relevant case law that did exist at the time indicated that plaintiff's past cooperation with authorities does *not* negate probable cause to believe that a witness may not be available to testify without the issuance of a material witness warrant. See p. 34, *supra*.

Agent Gneckow was on notice, of course, that he had a duty not to include any knowing or reckless misstatements or omissions in his warrant affidavit. That, however, is merely to recite one of the elements of the *Franks* v. *Delaware* claim plaintiff is asserting here. That sort of generalized allegation is insufficient to provide clearly established law for purposes of the qualified immunity doctrine.

As this Court explained in *Los Angeles Police Protective League*, "the operation of the standard of reasonableness depends . . . on the level of generality at which the relevant legal rule is identified." 907 F.2d at 887. "Stated broadly enough, the whole concept of qualified immunity would be . . . little more than a will-o-the-wisp and would disappear as quickly." *Ibid.*, *citing Anderson* v. *Creighton*, 483 U.S. at 639. See also *Saucier*, 533 U.S. at 202 (noting that "clearly established law" exists for qualified immunity purposes where "various courts have agreed that certain conduct is a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand").

Thus, in *Los Angeles Police Protective League*, this Court held that the district court in that case erred by focusing "on the broad right to privacy in one's home," rather than focusing on "discern[ing] the actual state of the law with sufficient particularity" to the Fourth Amendment claim at issue there. 907 F.2d at 887 (noting the district court's failure to ask whether, at the relevant time there, the law clearly established what privacy rights *police officers* in particular have with respect to their homes).

The district court here likewise operated at too high a level of generality, by failing to ask whether any Ninth Circuit precedent clearly established that plaintiff's U.S. citizenship, family ties, and past cooperation with authorities are necessary to a finding of probable cause in the context of a material arrest warrant affidavit, particularly given plaintiff's planned departure from the United States only days before the trial of a suspected supporter of terrorism at which plaintiff could have provided material testimony. If the court had asked the appropriate question, it would have concluded that no such clearly established law existed.

Moreover, as noted above, the statutory scheme that governs federal material witness warrants requires consideration of an individual's family and community ties at the *post-arrest hearing* stage of the process, rather than at the stage where the court is considering whether to issue a warrant for the individual's arrest. See p. 5, *supra*. Plaintiff was released on conditions to which he agreed shortly after his post-arrest hearing, see p. 17, *supra*, and a reasonable law enforcement official could have concluded from this statutory scheme that Congress did not view an individual's family and community ties as sufficient to defeat probable cause to believe that an individual may be unavailable to testify without the issuance of a material witness warrant.

For all the above reasons, therefore, this Court should conclude that Agent Gneckow is entitled to summary judgment regarding plaintiffs' Fourth Amendment claim against him.

II. Even if Agent Gneckow is Not Entitled to Summary Judgment Regarding Plaintiff's *Franks* Claim, The District Court Erred By Granting Summary Judgment For Plaintiff Regarding that Claim.

Even if this Court were to conclude that Agent Genckow is not entitled to summary judgment regarding plaintiff's Fourth Amendment claim against him, plaintiff would only be entitled to a trial on that claim, rather than summary judgment.

This Court has imported to the civil context the approach outlined in *Franks*, which grants a criminal defendant a hearing on his claim of judicial deception if the defendant makes a substantial showing of deliberate falsehood or reckless disregard for the truth. *See Hervey*, 65 F.3d at 789 ("The showing necessary to get to a jury in a section 1983 action is the same as the showing necessary to get an evidentiary hearing under *Franks*."). As this Court has explained, "[w]hile the materiality issue is one 'reserved to the court,' if the [plaintiffs] make the required "substantial showing," the question of intent or recklessness is 'a factual determination for the trier of fact.'" *Liston v. County of Riverside*, 120 F.3d 965, 974 (9th Cir. 1997) (quoting *Hervey*, 65 F.3d at 789-91).

Pursuant to these cases, this Court should conclude that even if the record makes out the substantial showing of recklessness that is necessary for plaintiff to avoid summary judgment on his Fourth Amendment *Franks* claim against Agent Gneckow, the proper result would be a trial on that claim, as opposed to summary judgment for plaintiff.

The district court also erred in granting summary judgment against Agent Gneckow by failing to view the evidence in the light most favorable to him. *See High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (on cross-motions for summary judgment, the facts are viewed most favorably to each non-moving party). While Agent Gneckow may prevail on summary judgment by showing that plaintiff cannot satisfy his burden of proof on an essential element of his claim, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), plaintiff is entitled to summary judgment only if he "produces evidence that would conclusively support [his] right to a judgment after trial should [Gneckow] fail to rebut the evidence. In other words, the evidence in [Plaintiff's] favor must be so powerful that no reasonable jury would be free to disbelieve it. Anything less should result in denial of summary judgment." 11 James William Moore et al., Moore's Federal Practice § 56.40[1][c], at 56-110 (3d ed. 2012).

The record in this case, viewed in the light most favorable to Agent Gneckow, does not support concluding that a reasonable fact finder would be required to find that Gneckow engaged in deliberate or reckless disregard for the truth. For all the above reasons, therefore, even if the district court did not err in refusing to grant summary judgment for Agent Gneckow on plaintiff's Fourth Amendment *Franks* claim, this Court should hold that summary judgment for plaintiff was improper.[7]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and plaintiff's *Franks* claim against Agent Gneckow dismissed.

[7] This Court has jurisdiction to consider this argument under *Mueller* v. *Auker*, 576 F.3d 979, 989-991 (9th Cir. 2009) (court of appeals had jurisdiction to consider grant of summary judgment for plaintiff as well as denial of defendant's qualified immunity-based motion for summary judgment because summary judgment in favor of plaintiff not only conclusively and finally decided issue of liability and imposed continuing burdens of litigation on detective, but also effectively foreclosed detective's potential entitlement not to stand trial on damages).

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STATEMENT OF RELATED CASES

Counsel is not aware of any related cases to this case within the meaning of Ninth Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,707 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2013, I electronically filed the foregoing Brief for Appellant Michael Gneckow with the Clerk of the Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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STATUTORY ADDENDUM

1. 18 U.S.C. 3142

2. 18 U.S.C. 3144

Effective: December 23, 2008

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 207. Release and Detention Pending Judicial Proceedings (Refs & Annos)
→→ § 3142. Release or detention of a defendant pending trial

(a) In general.--Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be--

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on personal recognizance or unsecured appearance bond.--The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on conditions.--(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person--

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimina-

tion Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person--

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A, 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary detention to permit revocation of conditional release, deportation, or exclusion.--If the judicial officer determines that--

(1) such person--

(A) is, and was at the time the offense was committed, on--

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.--(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that--

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed--

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(B) an offense under section 924(c), 956(a), or 2332b of this title;

(C) an offense listed in section 2332b(g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244(a)(1), 2245, 2251, 2251A , 2252(a)(1), 2252(a)(2), 2252(a)(3), 2252A(a)(1), 2252A(a)(2), 2252A(a)(3), 2252A(a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) Detention hearing.--The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community--

(1) upon motion of the attorney for the Government, in a case that involves--

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) Upon motion of the attorney for the Government or upon the judicial officer's own motion, in a case that involves--

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors to be considered.--The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning--

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including--

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or

local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of release order.--In a release order issued under subsection (b) or (c) of this section, the judicial officer shall--

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of--

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of detention order.--In a detention order issued under subsection (e) of this section, the judicial officer shall--

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the

person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of innocence.--Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1976; amended Pub.L. 99-646, §§ 55(a), (c), 72, Nov. 10, 1986, 100 Stat. 3607, 3617; Pub.L. 100-690, Title VII, § 7073, Nov. 18, 1988, 102 Stat. 4405; Pub.L. 101-647, Title X, § 1001(b), Title XXXVI, §§ 3622-3624, Nov. 29, 1990, 104 Stat. 4827, 4965; Pub.L. 104-132, Title VII, §§ 702(d), 729, Apr. 24, 1996, 110 Stat. 1294, 1302; Pub.L. 108-21, Title II, § 203, Apr. 30, 2003, 117 Stat. 660; Pub.L. 108-458, Title VI, § 6952, Dec. 17, 2004, 118 Stat. 3775; Pub.L. 109-162, Title X, § 1004(b), Jan. 5, 2006, 119 Stat. 3085; Pub.L. 109-248, Title II, § 216, July 27, 2006, 120 Stat. 617; Pub.L. 109-304, § 17(d)(7), Oct. 6, 2006, 120 Stat. 1707; Pub.L. 110-457, Title II, §§ 222(a), 224(a), Dec. 23, 2008, 122 Stat. 5067, 5072.)

Current through P.L. 113-13 approved 6-3-13

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Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 207. Release and Detention Pending Judicial Proceedings (Refs & Annos)
→→ § 3144. Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 203(a), Oct. 12, 1984, 98 Stat. 1982; amended Pub.L. 99-646, § 55(e), Nov. 10, 1986, 100 Stat. 3609.)

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