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

REPLY BRIEF FOR DEFENDANT MICHAEL GNECKOW

STUART F. DELERY
Acting Assistant Attorney General
WENDY OLSON
United States Attorney
DOUGLAS N. LETTER
Director, Appellate Staff, Civil Division
MATTHEW M. COLLETTE
(202) 514-4214
LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Civil Division, Appellate Staff
Department of Justice, Room 7241
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Constitution:

Statutes:

INTRODUCTION

The district court should have granted FBI Special Agent Michael Gneckow summary judgment regarding plaintiff's Fourth Amendment *Bivens* claim against him. In order to prove a *Franks* v. *Delaware* claim, a plaintiff must show that a government affiant failed to state facts showing probable cause for plaintiff's arrest and that the affiant either intentionally or recklessly misstated or omitted facts that would have been material to a finding of probable cause.

Plaintiff can make neither showing. To begin, Gneckow's warrant affidavit demonstrated probable cause for plaintiff's arrest. The affidavit noted, among other things, that plaintiff had purchased an airline ticket to Saudi Arabia for a flight that was scheduled to leave shortly before the al-Hussayen trial was expected to begin, and that plaintiff had substantial ties to al-Hussayen and the activities of an entity (the Islamic Assembly of North America) that was suspected of having provided aid to terrorist organizations. Those facts provided ample reason to believe it may have been impracticable to secure plaintiff's testimony at the al-Hussayen trial without a warrant for his arrest. The Fourth Amendment requires nothing more. See, *e.g.*, *Bacon* v. *United States*, 449 F.2d 933, 943 (9th Cir. 1971).

Plaintiff argues that he was arrested without probable cause because the government did not attempt to obtain his testimony by subpoena. It has long been the law, however, that an arrest warrant may constitutionally issue even if a witness has not been issued and disobeyed a subpoena, as long as there is "good reason to believe that otherwise the witness will not be forthcoming." *Barry* v. *United States*, 279 U.S. 597, 616 (1929). The warrant affidavit for plaintiff's arrest clearly satisfied that standard.

Plaintiff also cannot show that Special Agent Gneckow's warrant affidavit recklessly omitted any material information. The district court held that Gneckow recklessly failed to mention plaintiff's U.S. citizenship and family ties and his past cooperation with law enforcement, but no case would have given Gneckow fair notice that those facts would have negated probable cause for plaintiff's arrest. Indeed, in *United States* v. *Awadallah*, 349 F.3d 42 (2d Cir. 2003), the Second Circuit held that those same facts did *not* negate probable cause for a plaintiff's arrest, under facts similar to those at issue here. Moreover, Gneckow learned about plaintiff's ticket to Saudi Arabia only days before plaintiff was scheduled to leave. Gneckow did as much as any agent reasonably could have done in that short time frame, including taking steps to confirm plaintiff's planned departure and the fact that plaintiff actually had left his home.

Special Agent Gneckow also is entitled to qualified immunity because he reasonably relied on AUSA Kim Lindquist's judgment regarding whether the warrant affidavit for plaintiff's arrest was supported by probable cause. See, *e.g.*, *Arnsberg* v. *United States*, 757 F.2d 971, 981 (9th Cir. 1984) (noting that it would be "plainly unreasonable" to require officers to "take issue with the considered judgment of an assistant United States Attorney" that an affidavit states facts sufficient to support probable cause). AUSA Lindquist testified that he believed that the affidavit would have provided probable cause even if it had mentioned plaintiff's U.S. citizenship and family ties and past cooperation with law enforcement.

Plaintiff's responsive brief fails to come to grips with these points, relying instead on generic accusations that Special Agent Gneckow's warrant affidavit failed to "tell the whole story." That effort falls short because, as noted above, law enforcement officials are only required to include facts that are material to probable cause, and Gneckow fully satisfied that responsibility. See *Lombardi* v. *City of El Cajon*, 117 F.3d 1117, 1124 (9th Cir. 1997) (noting that government officials are not expected "to include in an affidavit every piece of information gathered in the course of an investigation")(citation omitted).

Plaintiff also criticizes the process by which he was arrested, as well as the conditions the magistrate judge imposed in order to assure plaintiff's presence at the al-Hussayen trial. Those allegations are not pertinent here because plaintiff does not allege that Special Agent Gneckow played any role in carrying out his arrest or in establishing the conditions of his release. In *Bivens* actions, Government officials are responsible only for their own actions, and not those of others. See, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 667 (2009).

ARGUMENT

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

Pursuant to *Franks* v. *Delaware*, 438 U.S. 154 (1978), a plaintiff may prove a Fourth Amendment violation by showing that a warrant affidavit contained a deliberate or reckless false statement that rendered the affidavit lacking in probable cause. *Id.* at 165. As our opening brief explained, Special Agent Gneckow is entitled to summary judgment regarding plaintiff's *Franks* claim because Gneckow's warrant affidavit provided probable cause for plaintiff's arrest, and because Gneckow did not recklessly omit any material information. The appellee brief fails to rebut these points – both of which independently warrant the entry of summary judgment for Gneckow.

A. Special Agent Gneckow's Affidavit Provided Probable Cause for Plaintiff's Arrest as a Material Witness.

1. As our opening brief demonstrated, Special Agent Gneckow's warrant affidavit satisfied the Fourth Amendment by showing that it "may have been impracticable" to secure plaintiff's presence at the al-Hussayen trial by the issuance of a subpoena. See Brief for Appellant at 27-29; 18 U.S.C. 3142; *Bacon* v. *United States*, 449 F.2d 933, 943 (9th Cir. 1971) (affirming the above standard).

Gneckow's warrant affidavit established probable cause for plaintiff's arrest by noting that plaintiff had purchased an airplane ticket to Saudi Arabia for a flight that was scheduled to depart shortly before the al-Hussayen trial was to begin, and by reciting plaintiff's ties to al-Hussayen and the Islamic Assembly of North America, who were suspected of having provided aid to terrorist organizations. See Brief for Appellant at 29. Given those facts, there was at the very least a "substantial chance" that plaintiff would not have returned from Saudi Arabia to testify at the al-Hussayen trial without his arrest as a material witness, even considering his U.S. citizenship and family ties and his past cooperation with law enforcement. That showing was sufficient to establish probable cause for plaintiff's arrest as a material witness. *Ewing* v. *City of Stockton*, 588 F.3d 1218, 1223 (9th Cir. 2009) (citation omitted).

2. The case law confirms that probable cause existed for plaintiff's arrest. In *United States* v. *Awadallah*, 349 F.3d 42 (2d Cir. 2003), for example, the Second Circuit held that a warrant affidavit provided probable cause where the 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. *Id.* at 69-70. The Second Circuit so held even though the individual arrested had previously cooperated with law enforcement and had family ties in the United States. See *id.* at 46, 66.

Similarly, the government had ample reason to be concerned that plaintiff may have been acting on an incentive to avoid appearing at the al-Hussayen trial. The government became aware of the airplane ticket plaintiff had purchased to Saudi Arabia at a time in which al-Hussayen's detention hearing had led to widespread press coverage of the fact that al-Hussayen was being investigated for terrorism-related charges related to his activities on behalf of IANA. Special Agent Gneckow's affidavit set out facts that substantially linked plaintiff to al-Hussayen and to IANA, see Warrant Affidavit, ¶ 6 (ER 176), including plaintiff's apparent attendance at an IANA conference and his receipt of payments exceeding $20,000 from al-Hussayen and his associates. See *id.* (ER 175-176).

The above facts, coupled with plaintiff's purchase of an airline ticket that did not list any return date, clearly showed that it may have been impracticable to secure plaintiff's presence at the al-Hussayen trial, even considering plaintiff's U.S. citizenship and family ties and past cooperation with law enforcement. See *Awadallah*; *Ewing* v. *City of Stockton*, 588 F.3d 1218, 1226-27 (9th Cir. 2009) (omission of one individual's failure to identify suspect did not "cast doubt on probable cause," given the strength of another individual's identification of the suspect).

In addition, plaintiff's cooperation with law enforcement occurred in a very different context than the government faced in determining whether to seek plaintiff's arrest as a material witness. Plaintiff's earlier cooperation occurred in connection with plaintiff's own, non-criminal intelligence investigation, prior to the indictment of al-Hussayen and the widespread publicity that occurred in connection with al-Hussayen's detention hearing. See Brief for Appellant at 34-35. By contrast, in determining whether to seek plaintiff's arrest as a material witness, the government had to decide whether plaintiff would return from Saudi Arabia to testify at a trial that would have publicly revealed plaintiff's own substantial connections to an individual (al-Hussayen) who was thought to have provided aid to an organization that supported terrorism. See *id.* at 34.

With respect to plaintiff's U.S. citizenship and family ties, Special Agent Gneckow and Agent Mace also explained at their depositions that individuals frequently flee the United States to avoid appearing in court despite their U.S. citizenship and family ties. See Brief for Appellant at 32. Plaintiff argues that this Court should disregard the experience of these veteran law enforcement officials in this regard, see Appellee Brief at 35, but as our opening brief notes, the law is clear that "officers are entitled to draw reasonable inferences . . . in light of their knowledge of the area and their prior experience." See Brief for Appellant at 33 (quoting *United States* v. *Ortiz*, 422 U.S. 891, 897 (1975)).[1]

3. Plaintiff repeatedly asserts that his U.S. citizenship and family ties and past cooperation with law enforcement negated probable cause for his arrest. Plaintiff fails to offer any explanation for *why* that is so, however, and as demonstrated above, the weight of the evidence showed probable cause for plaintiff's arrest even considering those additional facts. Accordingly, nothing in the Fourth Amendment required the government to serve plaintiff with a subpoena at the airport and hope he would return to the United States shortly thereafter for the al-Hussayen trial.

[1] Plaintiff contends that *Ortiz* is inapposite because that case involved a warrantless search, but the Supreme Court did not rely on that fact in *Ortiz* in noting the importance of law enforcement officials' experience in assessing probable cause.

For similar reasons, plaintiff misses the mark by contending that Special Agent Gneckow's warrant affidavit failed to "tell the whole story." As this Court emphasized in *Lombardi*, *supra*, a law enforcement officer "'cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation.'" 117 F.3d at 1124 (citation omitted). Thus, the "whole story" refers to all the *material* information related to probable cause. See *id.* As explained above, plaintiff's U.S. citizenship and family ties and past cooperation were not material because they did not negate probable cause for plaintiff's arrest.

Bacon v. *United States*, 449 F.2d 933 (9th Cir. 1971), on which plaintiff relies, is not to the contrary. There, the government sought to justify the plaintiff's arrest as a material witness on the ground that she had personal contact with fugitives from justice and access to large sums of money. See *id.* at 944. This Court held that those facts only showed that the witness *could* flee if she had wished to do, see *id.*, and thus did not provide "probable cause to believe that [she] could not practicably be brought before the grand jury by a subpoena." *Id.* at 945. Here, by contrast, plaintiff had taken concrete steps to leave the United States shortly prior to the expected commencement of the al-Hussayen trial, by purchasing a flight to Saudi

Arabia and by leaving his home and traveling to Dulles Airport to board that flight and by not scheduling a return trip back to the United States.

Plaintiff also relies on the fact that in *Bacon*, this Court noted that the government had made "no showing of past attempts by Bacon to evade judicial process." 449 F.2d at 944. *Bacon* did not hold that such proof is necessary to a showing of probable cause, however, and we are unaware of any decision that so holds. To the contrary, it has long been the law that a court may "issue a warrant of arrest without a previous subpoena, when there is good reason to believe that otherwise the witness will not be forthcoming." *Barry* v. *United States*, 279 U.S. 597, 616 (1929). Accord *Bacon*, 449 F.2d at 936-938. Special Agent Gneckow's affidavit made out that showing.

Arnsberg v. *United States*, 757 F.2d 971 (9th Cir. 1985), also does not demonstrate that plaintiff's arrest was lacking in probable cause. In *Arnsberg*, the facts merely showed "a man somewhat obstinately insisting on his right to refuse to appear before a grand jury until personally served" with a subpoena. *Id.* at 976. Here, as explained, plaintiff appeared to have a substantial incentive not to return to the United States to testify at the al-Hussayen trial, and took affirmative steps consistent with fleeing the United States to avoid having to testify.

Plaintiff's appeal brief also string-cites a number of other cases related to an affiant's obligation to tell the "whole story," but several of those cases held that the omitted information at issue there was *not* material to a finding of probable cause, and thus could not support a *Franks* claim. See *Cameron* v. *Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013); *Wilson* v. *Russo*, 212 F.3d 781, 791-92 (3d Cir. 2000). If anything, then, those cases actually support Special Agent Gneckow's position here. Likewise, with respect to *Peet* v. *City of Detroit*, 502 F.3d 557 (6th Cir. 2007), plaintiff cites what actually was a dissenting opinion. The majority in *Peet* held that the police *had* probable cause to search the plaintiff. *See id.* at 563-64.

The other cases in plaintiff's string-cite are readily distinguishable. For example, in *Bravo* v. *City of Santa Maria*, 665 F.3d 1076 (9th Cir. 2011), law enforcement officers knew, but failed to disclose, that the individual they were ostensibly searching for was in fact incarcerated at the time. See *id.* at 1084. In *United States* v. *Jacobs*, 986 F.2d 1231 (9th Cir. 1993), officers reported that a drug dog had showed "interest" in the plaintiff, but failed to report that the dog had not actually "alerted" to the presence of drugs on that individual. See *id.* at 1234. In *Liston* v. *County of Riverside*, 120 F.3d 965 (9th Cir. 1997), law enforcement officials failed to disclose that they had seen a "sold" sign in the yard of a house where they supposedly

hoped to find the plaintiff still living. See *id.* at 974. Finally, *United States* v. *Stanert*, 762 F.2d 775 (9th Cir. 1985), merely held that plaintiff made a strong enough showing regarding alleged omissions to require a hearing on his *Franks* claim, see *id.* at 782, not that the plaintiff was entitled to summary judgment, as the district court ordered here.

For all these reasons, plaintiff's *Franks* v. *Delaware* claim against Special Agent Gneckow fails because plaintiff's arrest was fully supported by probable cause.

B. Plaintiff's *Franks* Claim Against Special Agent Gneckow Also Fails Because Gneckow Did Not Act Recklessly In Preparing His Warrant Affidavit.

Even if this Court were to hold that Special Agent Gneckow's affidavit failed to provide probable cause for plaintiff's arrest, Gneckow would still be entitled to summary judgment because the case law did not provide fair notice that his affidavit would have lacked probable cause, and because Gneckow reasonably relied on AUSA Lindquist's legal judgment to the contrary. Both points independently show that Gneckow's actions were reasonable, not reckless, and plaintiff's arguments lack merit and conflict with controlling Ninth Circuit precedent.

1. Special Agent Gneckow Did Not Have Fair Notice that Plaintiff's U.S. Citizenship and Family Ties and Past Cooperation With Law Enforcement Would Be Thought to Negate Probable Cause For Plaintiff's Arrest.

As this Court has recognized, even where a court later concludes that probable cause was lacking, "officers are immune from suit 'when they reasonably believe that probable cause existed,'" 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* v. *County of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010) (citation omitted). This Court also has emphasized that with respect to alleged omissions, 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) (noting that courts "have not drawn clear lines for when omissions are material"). Judged by those controlling standards, Special Agent Gneckow did not recklessly omit any material information from his warrant affidavit for plaintiff's arrest.

a. Plaintiff has cited no case (and we are aware of none) holding that an individual's past cooperation with law enforcement defeats probable cause to believe that it may be impracticable to secure an individual's presence at trial without a material-witness arrest warrant. Indeed, as

explained above, courts have held that past cooperation does *not* defeat a finding of probable cause for a material-witness warrant, and one of those cases (*United States* v. *Awadallah*) is particularly on point in that regard because the circumstances that principally supported probable cause in that case also are present here. See pp. 6-7, *supra*.

Plaintiff also has cited no case that would have given Special Agent Gneckow fair notice that plaintiff's U.S. citizenship and family ties would have negated probable cause for his arrest. Indeed, again, the case law suggests the exact opposite. For example, in *Awadallah*, the Second Circuit held that a law enforcement official did not act recklessly by failing to mention in an affidavit that the witness "had three brothers in San Diego, one of them a citizen." 349 F.3d at 66.[2]

Under these circumstances, Special Agent Gneckow is clearly entitled to qualified immunity regarding plaintiff's *Franks* claim. See, *e.g.*, *Stanton* v. *Sims*, 134 S. Ct. 3, 4-7 (2013) (per curiam) (law enforcement officers entitled to qualified immunity where courts were divided on whether an

[2] 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).

officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect).

b. Plaintiff contends that because there is no separate qualified immunity inquiry in a *Franks* v. *Delaware* case, it is immaterial whether Special Agent Gneckow had fair notice of whether the omissions discussed above would have negated probable cause for plaintiff's arrest. See Appellee Brief at 44. Plaintiff's argument misunderstands the law.

As our opening brief explained, this Court merges consideration of the issue of recklessness under *Franks* with the issue of fair notice under qualified immunity principles. See Brief for Appellant at 36-38. In undertaking that mode of analysis, however, this Court does not ignore qualified immunity's fair-notice requirement. That would be inconsistent with Supreme Court precedent. See Brief for Appellant at 36-37 (citing cases). Instead, this Court treats qualified immunity's fair-notice requirement as an essential element in determining whether the officer's conduct was intentional or reckless.

Thus, for example, in *Lombardi*, this Court held that because no Ninth Circuit case had found a *Franks* violation where the information at issue had been omitted from a warrant affidavit, the plaintiff's *Franks* claim failed on the ground that "a reasonable officer . . . could have failed to realize that the

facts he decided not to disclose would have an effect on the probable cause determination." 117 F.3d at 1127.

It is true that a court need not find a case with identical facts in order to conclude that a government official was on fair notice of what the Constitution requires. See Appellee Brief at 46. But that proposition is of no help to plaintiff here. As noted above, the case law, at the very least, would not have made it obvious to a reasonable official that probable cause would have been lacking for plaintiff's arrest. This Court could conclude otherwise only by addressing the fair notice question at far too high a level of generality. See Brief for Appellant at 45-46; *Los Angeles Police Protective League* v. *Gates*, 907 F.2d 879, 887 (9th Cir. 1990) (noting that "[s]tated broadly enough, the whole concept of qualified immunity would be . . . little more than a will-o-the-wisp and would disappear as quickly'") (citation omitted)).

Plaintiff also fails to account for the fact that Special Agent Gneckow learned about plaintiff's planned departure for Saudi Arabia only days before plaintiff was scheduled to leave. See Brief for Appellant at 9-10. Probable cause "may be founded" upon information that "must be garnered hastily," *Franks*, 438 U.S. at 171, and Gneckow did everything a reasonable

law enforcement official could have done in the short time he had to respond to the information he was provided about plaintiff's circumstances.[3]

For all the above reasons, therefore, Special Agent Gneckow is entitled to summary judgment regarding plaintiff's *Franks* claim because Gneckow was not on fair notice that he had supposedly omitted any material information from his warrant affidavit.

2. Special Agent Gneckow Also Is Entitled to Summary Judgment Because He Reasonably Relied on AUSA Lindquist's Legal Judgment that the Warrant Affidavit for Plaintiff's Arrest Was Supported by Probable Cause.

As this Court has recognized, "[i]t would be plainly unreasonable" to hold that officers "must take issue with the considered judgment of an assistant United States Attorney" that an affidavit states facts sufficient to show probable cause. *Arnsberg*, 757 F.2d at 981. Otherwise, officers would be required "[to] second-guess the legal assessments of trained lawyers," *id.*, which "[t]he Constitution does not require." *Id.* (citation omitted). *Accord Ortiz* v. *Van Auken*, 887 F.2d 1366, 1371 (9th Cir. 1989); *Los Angeles Protective League* v. *Gates*, 907 F.2d 879, 888 (9th Cir. 1990). See also *Messerschmitt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012) ("that officers sought and obtained approval of the warrant application from a * * * deputy

[3] As our opening brief noted, 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 Brief for Appellant at 12.

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").

a. Pursuant to the above cases, Special Agent Gneckow is entitled to qualified immunity with respect to plaintiff's *Franks* claim against him. As our opening brief explained, Gneckow submitted a draft of his warrant affidavit to AUSA Kim Lindquist for review and comment. See Brief for Appellant at 13. AUSA Lindquist advised Gneckow to make sure his affidavit clearly showed plaintiff's connection with Sami al-Hussayen and the Islamic Assembly of North America, and Gneckow did so. See *id.* At that point, AUSA Lindquist signed off on the warrant affidavit, concluding that it demonstrated probable cause for plaintiff's arrest because of plaintiff's "affiliation with Sami Al-Hussayen, the Islamic Assembly of North America, and the activities they were involved in." Lindquist Dep. at 115 (ER 473). Gneckow relied on AUSA Lindquist's judgment that the affidavit showed probable cause for plaintiff's arrest, see Gneckow Dep. at 128, 187 (ER 395, 431), and under the controlling Ninth Circuit cases cited above, Gneckow is entitled to qualified immunity on that ground.

b. Plaintiff argues that Special Agent Gneckow was not entitled to rely on AUSA Lindquist's judgment regarding probable cause because Gneckow failed to tell Lindquist that plaintiff is a U.S. citizen with family ties to the United States who had previously cooperated with law enforcement. AUSA Lindquist, however, testified that he considered none of that information material to the issue of probable cause. See Brief for Appellant at 44-45. Pursuant to this Court's decisions in *Arnsberg*, *Ortiz*, and *Los Angeles Protective League*, *supra*, a law enforcement official cannot be deemed to have acted unreasonably by failing to disclose facts that the AUSA considered immaterial, any more than a law enforcement official can be held personally liable for failing to include facts in a warrant affidavit that are not material to a finding of probable cause. See pp. 9-10, *supra* (citing cases). See also Brief for Appellant at 32 (noting that AUSA Lindquist assumed plaintiff was a U.S. citizen and knew that plaintiff had family ties to the United States).

Plaintiff has no effective response to these points. For all the above reasons, therefore, Special Agent Gneckow is independently entitled to summary judgment because he was entitled to rely on AUSA Lindquist's legal judgment regarding probable cause for plaintiff's arrest.

II. In The Alternative, This Court Should Order a Remand With Respect To Plaintiff's *Franks* Claim Because Material Issues Of Fact Preclude Summary Judgment For Plaintiff.

As our opening brief explained, even if this Court were to hold that Special Agent Gneckow is not entitled to summary judgment regarding plaintiff's *Franks* claim, plaintiff is entitled at most to a trial on that claim because a reasonable fact finder could conclude, based on the facts discussed above, that Gneckow did not act recklessly in preparing the affidavit for plaintiff's arrest. Summary judgment for plaintiff is inappropriate under those circumstances. See Brief for Appellant at 49-51. Plaintiff's appeal brief fails to demonstrate otherwise, and contrary to what plaintiff suggests, see Brief for Appellee at 47, we are not arguing that summary judgment is never appropriate for a plaintiff in a *Franks* case.

III. Plaintiff's Reliance On Arguments The District Court Rejected And On A Claim The District Court Chose Not To Address Is Unavailing.

Plaintiff also attempts to support the district court's decision by citing facts that the district court held do *not* support a *Franks* claim, and by urging this Court to affirm based on another Fourth Amendment claim that the district court did not address. Neither of those suggestions has any merit.

A. A Reasonable Fact Finder Would Not Conclude that Special Agent Gneckow's Warrant Affidavit Contained Any Reckless Misstatements or Omissions Based on the Additional Facts Plaintiff Discusses on Appeal.

Unable to successfully defend the district court's reasons for granting summary judgment on his behalf, plaintiff argues that *other* grounds, some of which the district court held are *not* sufficient to hold Special Agent Gneckow liable, support the court's summary judgment for plaintiff on his *Franks* claim. That effort fails.

1. As our opening brief noted, Special Agent Gneckow's warrant affidavit for plaintiff's arrest recited that plaintiff had purchased a one-way, first-class airplane ticket to Saudi Arabia for $5000. See Brief for Appellant at 10. In so doing, Gneckow relied on information that was provided to him by U.S. Customs and Immigration Agent Robert Alvarez. In reality, the ticket was a coach-class, open-ended ticket with no listed return date, which cost approximately $2,000. See *id.* at 16.

The district court correctly ruled that Special Agent Gneckow cannot properly be held liable for including in his affidavit the incorrect information Agent Alvarez had provided to him. As the court noted, Gneckow "verified certain of the facts concerning the flight – date, time, and destination – [and] thus it seems reasonable for him to have believed all of the information given to him by Agent Alvarez was correct." Order at 8 (ER 21).

Plaintiff fails to provide any reason to question the district court's ruling on this point. Special Agent Gneckow verified the aspects of the ticket (date, time, and destination) that were most critical to whether probable cause existed for plaintiff's arrest. With those key facts substantiated, the district court correctly concluded that it was reasonable for Gneckow to stop there. See Order at 8-9 (ER 21-22).

Beier v. *City of Lewiston*, 354 F.3d 1058 (9th Cir. 2004), on which plaintiff relies in this context, is inapposite. *Beier* held that officers violated the Fourth Amendment by arresting an individual for violating a protective order because they failed to make *any* effort to ascertain what the protective order, which was available for their review, said. Nothing like that happened here.

Moreover, *Beier* noted that the officers in that case also could have relied on another officer's description of what the protective order stated. See 354 F.3d at 1069. That observation supports the district court's holding that Special Agent Gneckow was lawfully entitled to rely on Agent Alvarez's description of the airplane ticket plaintiff purchased.

In addition, the district court found that while plaintiff had in fact not purchased a one-way ticket, the ticket he did purchase did not list a return date. See Order at 3 (ER 16). Officer Jaime Alvarado, who informed

Officer Alvarez that the ticket was one-way, testified at his deposition 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." Brief for Appellant at 10 (citing Alvarado Dep. at 194 (ER 293)). Thus, in this respect plaintiff's airplane ticket helps *confirm* the existence of probable cause to conclude that he might not have returned for the al-Hussayen trial.

2. Plaintiff also suggests that Special Agent Gneckow's affidavit recklessly failed to mention that the FBI did not contact him prior to seeking his arrest to ask whether he would be willing to return from Saudi Arabia to testify at the al-Hussayen trial. As our opening brief explained, however, Agent Gneckow in fact did attempt to contact plaintiff prior to seeking his arrest as a material witness, to ensure that he had left his home in Washington state. See Brief for Appellant at 13. Plaintiff challenges the probative value of this evidence because Gneckow could not recall exactly *how* he attempted to contact plaintiff, see Appellee Brief at 11 n.7, but Gneckow's failure of memory on that point, years after the events in question occurred, does not change the fact that the record shows that Gneckow in fact did attempt to contact plaintiff prior to seeking his arrest.

Moreover, the government's decision not to contact plaintiff prior to that time reasonably reflected concerns that such contact might jeopardize the ongoing investigation of al-Hussayen. See Brief for Appellant at 8. The government's concern was that if plaintiff were to report such contact to the press, as he had with respect to the government's prior discussions with him, al-Hussayen might have been tipped off that the government "was interested in doing something" with him, and that as a result evidence could be destroyed before the government had the chance to execute search warrants. Gneckow Dep. at 195 (JA 438). Plaintiff takes issue with the judgments of the responsible government officials who had those concerns, see Appellee Brief at 11 n.6, but the record contains no evidence suggesting that those concerns were not well-founded and honestly held.

In addition, no case of which we are aware holds that the government must ask a prospective witness whether he or she would honor a subpoena before seeking an arrest under the material-witness statute. To the contrary, as explained above, the law is clear that the government may lawfully seek an individual's arrest as a material witness without having served that individual with a subpoena, as long as there is "good reason to believe that otherwise the witness will not be forthcoming." *Barry*, 279 U.S. at 616.

Special Agent Gneckow's warrant affidavit satisfied that standard, and where there is good reason to believe a witness will not be forthcoming, that individual's stated intent to honor a subpoena does not necessarily mean the individual is in fact likely to appear. Thus, to make a material-witness arrest available only where an individual has disobeyed or expressed an unwillingness to comply with a subpoena would radically undermine the operation of the material-witness statute. As a result, the decided cases have upheld the issuance of material-witness warrants without requiring proof that the government has asked the witness whether he or she is willing to honor a subpoena. See pp. 2, 6-7, 24, *supra*. For the same reasons, it follows that a lawful material-witness arrest warrant affidavit need not recite whether the individual has in fact disobeyed a subpoena or indicated that he or she would refuse to obey a subpoena. There is, at the very least, no case of which we are aware that holds otherwise, and for that reason principles of qualified immunity preclude the affirmance of the judgment below against Special Agent Gneckow on this alternative ground. See generally *Hunter* v. *Bryant*, 502 U.S. 224, 228 (1991) (noting that an officer may not be denied qualified immunity simply because he failed to draw "another reasonable, or more reasonable interpretation of the events" that led the officer to conclude that probable cause existed).

3. Plaintiff also argues that Special Agent Gneckow's warrant affidavit was reckless because Gneckow testified at his deposition that a "cooperative businessman" would not have been arrested on a material-witness warrant merely because he had purchased a ticket to Saudi Arabia. Appellee Brief at 29. It is not surprising that the district court did not adopt this argument, since Gneckow demonstrated that plaintiff had misquoted his testimony. See Defendants Michael Gneckow and Scott Mace's Opposition to Plaintiff's Motion for Summary Judgment, R325, p. 5 n.1. As Gneckow explained, his testimony actually was that "a businessman cooperating in an investigation who plans to travel to Saudi Arabia on a business trip and return a week later [] does not concern me." Gneckow Dep. at 216-17 (ER 120-21). In answer to a follow-up question asking whether a warrant could be sought for the same "cooperative businessman" who is going to Saudi Arabia for one week with "an open-ended return ticket," such as plaintiff purchased, Gneckow explained that "it boils down to the cooperative nature of the traveler." *Id.* at 220 (SER 23). For the reasons explained above, Gneckow and ASUA Lindquist reasonably believed plaintiff was unlikely to cooperate and voluntarily return to the United States to testify at the al-Hussayen trial.

Plaintiff further argues that Special Agent Gneckow's warrant affidavit was misleading because it did not mention that the $20,000 plaintiff received from al-Hussayen was a salary payment. That fact, however, *supports* the existence of probable cause for plaintiff's arrest, given that plaintiff was paid by al-Hussayen for work done on behalf of an organization (al-Multaqa) that supported radical Islamic ideology. See Report and Recommendation at 27 (JA 64); Martin Affidavit, ¶ 6, Plaintiff's Summary Judgment Exhibit 12 (R308-5) (copy provided in Appellant's Supplemental Excerpts of Record).[4]

4. Finally, plaintiff contends that his *Franks* claim against Special Agent Gneckow has merit because the government chose not to arrest another prospective witness for the al-Hussayen trial (Saleh Abdulaziz Al-Kraida) who also had plans to travel to Saudi Arabia. The district court did not draw any such conclusion, however, and plaintiff fails to explain how this argument relates to a *Franks* v. *Delaware* claim rather than to a selective prosecution claim, which plaintiff is not making here. Moreover, plaintiff

[4] Plaintiff also faults Special Agent Gneckow's affidavit for noting that plaintiff had changed his name at one point to his current Muslim name, but the district court did not find that Gneckow's inclusion of this innocuous fact was somehow reckless or ill-intentioned, and there is no reason this Court should draw that conclusion either. Similarly, Gneckow's use of the common acronym "aka" to describe plaintiff's name-change is not remotely indicative of any ill-intent on Gneckow's part.

fails to allege that Special Agent Gneckow had any role in the government's decision not to seek an arrest warrant for Al-Kraida. As noted above, qualified immunity principles preclude Gneckow's being held liable in his individual capacity for the actions of other officials.[5]

B. Plaintiff's *Malley* v. *Briggs* Claim, Which the District Court Did not Reach, is Without Merit.

Plaintiff argues that if this Court is unwilling to affirm the grant of summary judgment for plaintiff on his *Franks* v. *Delaware* claim, the Court should hold that he is entitled to summary judgment based on *Malley* v. *Briggs*, a claim the district court did not reach. Plaintiff's *Malley* claim is that Special Agent Gneckow's affidavit failed to state facts sufficient to establish probable cause for plaintiff's arrest on its face, even if this Court were not to consider plaintiff's U.S. citizenship and family ties and his past cooperation with law enforcement.

---

[5] The circumstances relating to Al-Kraida also materially differ from those the government faced with respect to plaintiff. Unlike plaintiff, Al-Kraida had not yet purchased a ticket to leave the country at the relevant time. See Martin Affidavit, Plaintiff's Exhibit 12, R308-5 (copy provided in Appellant's Supplemental Excerpts of Record). Additionally, the decision not to seek the arrest of Al-Kraida as a material witness occurred substantially after the government decided to seek plaintiff's arrest, and in a context in which Al-Kraida was not expected to leave the country for another month at the time the government sought a summons for his appearance before a magistrate to set release conditions that would assure his presence at the al-Hussayen trial. See *id.*

This argument fails for reasons already demonstrated. As shown above, the affidavit contains facts sufficient to support probable cause even if this Court were to consider the information the district court believed should have been included. It follows, *a fortiori*, that the affidavit would show probable cause if that information were not considered.

For all the above reasons, therefore, this Court should direct the district court to dismiss both plaintiff's *Franks* and *Malley* claims against Special Agent Gneckow.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and summary judgment granted for Special Agent Gneckow with respect to each of plaintiff's *Bivens* claims against him.

Respectfully submitted,

STUART F. DELERY
Acting Assistant Attorney General

WENDY OLSON
United States Attorney

DOUGLAS N. LETTER
Director, Appellate Staff
Civil Division

MATTHEW M. COLLETTE
(202) 514-4214
s/LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Civil Division
Appellate Staff, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

December 2013

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 6360 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.

s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2013, I electronically filed the foregoing Reply 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.

Esha Bhandari
Katherine Desmoreau
Dror Ladin
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Lee P. Gelernt
ACLU-American Civil Liberties Union Foundation
18th Floor, 125 Broad Street
New York, NY 10004

Michael Joel Wishnie
Yale Law School
Professor of Clinical Law
P.O. Box 209090
New Haven, CT 06520-9090

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

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'S SUPPLEMENTAL EXCERPTS OF RECORD

STUART F. DELERY
Acting Assistant Attorney General
WENDY OLSON
United States Attorney
DOUGLAS N. LETTER
Director, Appellate Staff, Civil Division
MATTHEW M. COLLETTE
(202) 514-4214
LOWELL V. STURGILL JR.
(202) 514-3427
Attorneys, Civil Division, Appellate Staff
Department of Justice, Room 7241
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

INDEX

STATE AND DISTRICT OF IDAHO

BOISE, IDAHO

UNITED STATES OF AMERICA v. SAMI OMAR AL-HUSSAYEN	Case No. 03-048-C-EJL

AFFIDAVIT

I, Mary Martin, the undersigned, being duly sworn, depose and state as follows:

I am a Special Agent of the FBI for fifteen (15) years and have been involved in multiple investigations involving crimes under Title 18 of the United States Code. This Affidavit is based upon facts acquired by fellow FBI Special Agent William R. Long and other law enforcement officials pertaining to this investigation. On October 17, 2003, Special Agent William R. Long advised your affiant of the following:

1) Long is a Special Agent with the Federal Bureau of Investigation (FBI) currently assigned to the Coeur d'Alene, Idaho Resident Agency, within the FBI's Salt Lake City Division. He has been a Special Agent with the FBI for over 14 years. Special Agent Long is experienced and has received

SER 1 205

training in the investigation of violations of federal law, including but not limited to, Title 18, United States Code, and Title 21, United States Code. Special Agent Long has extensive experience in the use of standard investigative techniques including, but not limited to, the interviewing of witnesses, obtaining and review of business, financial, and communication records, execution of search warrants, visual surveillance, court ordered electronic surveillance, development and use of informants and cooperating witnesses, grand jury investigations, and the making of arrests. Special Agent Long has testified in state and federal court on numerous occasions during his career.

2) Since 1998, Special Agent Long has specialized in the investigation of domestic terrorism matters.

3) Since 2001, Special Agent Long has become experienced and received specialized training in the areas of international terrorism and counterterrorism. This experience includes receiving specialized training in these areas offered by the United States Department of Justice, the FBI, and other agencies.

4) Special Agent Long is currently a member of the Inland Northwest Joint Terrorism Task Force (INJTTF) and as such, works alongside other federal, state, and local law enforcement officers, including agents of the United States Bureau of Immigration and Customs Enforcement.

5) On February 13, 2003, an indictment was filed in the United States District Court for the District of Idaho against Sami Omar Al-Hussayen alleging violations of Title 18,

United States Code, §§ 1001(a)(1) and (2), and 3238 - False Statements to the United States; and Title 18, United States Code, §§ 1546(a), 3237 and 3238 - Visa Fraud. Currently, Special Agent Long and other agents are involved in a continuing investigation of Sami Omar Al-Hussayen and his associates regarding matters related to international terrorism. During the course of this investigation, Special Agent Long and other agents have developed information regarding the close association between AL-Hussayen and Saleh Abdulaziz Al-Kraida.

6) On February 26, 2003, Special Agent Long, Joint Terrorism Task Force Detective L. Richard Fairbanks, and Immigration and Naturalization Service Special Agent James I. Sheperd interviewed Saleh Abdulaziz Al-Kraida at his residence in Moscow, Idaho. During the interview, Al-Kraida provided significant information regarding the AL-Hussayen investigation to the agents, including the following:

a) That Al-Kraida is a citizen of Saudi Arabia and has entered the United States for the purpose of obtaining his Masters Degree in Agricultural Engineering at the University of Idaho.

b) That Al-Kraida is personally acquainted with Sami Omar Al-Hussayen and has almost daily contact with Al-Hussayen.

c) That Al-Hussayen, Al-Kraida, and other associates regularly meet at an apartment in Moscow, Idaho, known as "Almultaqa." In Arabic, Almultaqa means "the gathering

SER 3

place." Almultaqa is normally used for dinners and social events among associates of Al-Hussayen.

d) That there is a computer and a credit card sales machine located at Almultaqa.

e) That Al-Hussayen used to sell books, tapes, magazines, and other items via the computer or telephone from the Almultaqa location.

f) That the profits from these sales were for Islamic charities, including the Islamic Assembly of North America.

g) That the sales of these items stopped shortly after September 11, 2001.

h) That many of these books, tapes, and magazines contained Islamic extremist messages. He stated that extremist Islamic views include the use of violence against those who do not convert to Islam.

i) That Sheikhs Safar Al-Hawali and Salman Al-Ouda wrote, published, and recorded many of the tapes, books, and magazines containing extremist messages, sold by Al-Hussayen at Almultaqa.

j) That no gatherings occurred at Almultaqa for three or four months after September 11, 2001. The meetings prior to September 11, 2001, involved discussions which Al-Kraida now considers to be extremist. Al-Kraida believed that the meetings and the items sold at Almultaqa would have invited suspicion by the FBI or other law enforcement authorities, due to the extreme nature of the content. Many of the extremist ideas discussed at Almultaqa

originated with Sheikhs Al-Hawali and Al-Ouda. When asked to rate how extreme Sheikhs Al-Hawali and Al-Ouda are, Al-Kraida rated them a "B-plus," with an "A" being the most extreme.

k) That Sami Omar Al-Hussayen was involved personally with the Islamic Assembly in North America (IANA) and attended IANA conferences in the past.

l) That Al-Hussayen then spoke about those conferences to members of the mosque in Moscow, Idaho during lectures and meetings.

m) That in the past, representatives from the Global Relief Foundation (GRF), including persons from Iraq, Saudi Arabia, and Kuwait, had visited the mosque in Moscow, Idaho to collect donations.

n) That this visit by GRF representatives was arranged by Abduhl Rahman Al-Jugheman, a close associate of Sami Omar Al-Hussayen.

o) That donations had also been collected at the mosque in Moscow, Idaho for the "Help the Needy" organization.

p) Al-Kraida also provided other information about Sami Omar Al-Hussayen, his associates, and personal information about himself.

q) During the interview of Al-Kraida, Al-Kraida told investigating agents that he intended to return to Saudi Arabia upon his graduation from the University of Idaho.

7) The FBI is currently investigating the Islamic Assembly of North America (IANA) regarding suspected ties to international terrorism.

SER 5

8) On February 26, 2003, the FBI executed a search warrant on the offices of the "Help the Needy" (HTN) organization in Syracuse, New York. That continuing investigation involves, in part, alleged violations of the Iraqi Embargo by members of HTN.

9) The Global Relief Foundation has been designated by the US Department of Treasury, Office of Foreign Asset Control, as an organization supporting international terrorism.

10) The investigation of Sami Omar Al-Hussayen has revealed that Sheikhs Al-Ouda and Al-Hawali have direct association with Usama Bin Laden. Suspected ties to the Al Qaida terrorist organization are being investigated by the FBI.

11) On October 16, 2003, United States Bureau of Immigration and Customs Enforcement Special Agent Jeffrey L. Wolstenholme, acting in his official capacity as an Immigration officer, contacted the University of Idaho concerning the student status of Al-Kraida. He learned that Al-Kraida has completed his masters degree requirements. He has requested and received from the University a "letter of completion" regarding his degree requirements. Al-Kraida appeared in person at University offices during the past week to request this letter. Al-Kraida told University officials that he intends to leave the United States prior to graduation ceremonies scheduled in December, 2003. Further, University officials confirmed that Al-Kraida vacated his apartment in University housing on September 30, 2003. He left a forwarding address of Post Office Box 3103, Moscow, Idaho.

The records of the United States Bureau of Immigration and Customs Enforcement do not reflect that Al-Kraida has yet left the United States on an international commercial flight.

12) Due to Al-Kraida's admitted involvement with the defendant, Sami Omar Al-Hussayen, Al-Kraida is believed to be in possession of information germane to this matter which will be crucial to the prosecution. It is believed that if Al-Kraida travels to Saudi Arabia the United States government will be unable to secure his presence at trial via subpoena.

Respectfully submitted,

Mary B. Martin

Mary Martin
Federal Bureau of Investigation
Boise, Idaho

Subscribed and sworn to before me this 17 day of October, 2003.

Mikel H. Williams

Mikel H. Williams
United States Magistrate Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 13, 2013, I electronically filed the foregoing Appellant's Supplemental Excerpts of Record 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.

Esha Bhandari
Katherine Desmoreau
Dror Ladin
ACLU Immigrants' Rights Project
125 Broad Street, 18th Floor
New York, NY 10004

Lee P. Gelernt
ACLU-American Civil Liberties Union Foundation
18th Floor, 125 Broad Street
New York, NY 10004

Michael Joel Wishnie
Yale Law School
Professor of Clinical Law
P.O. Box 209090
New Haven, CT 06520-9090

/s/ Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.