No. 17-16756

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MICAH JESSOP, BRITTAN ASHJIAN,
Plaintiffs and Appellants,

v.

CITY OF FRESNO; DERIK KUMANGAI; CURT CHASTAIN; TOMAS CANTU,

Defendants and Appellees.

On Appeal from the United States District Court,
Eastern District of California, Fresno, Case 1:15-cv-00316-DAD-SAB
The Honorable Dale A. Drozd, presiding

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1.0. Introduction

1.1. Jurisdictional Statement

Plaintiffs/appellants Micah Jessop and Brittan Ashjian are pursuing this action under 42 U.S.C. § 1983. (3ER:522.) The United States District Court therefore had jurisdiction over this matter under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3).

The alleged events giving rise to Jessop and Ashjian's complaint occurred in the County of Fresno, California. (3ER:527.) The defendants include the City of Fresno and Fresno police officers. (3ER:524.) Therefore, under 28 U.S.C. § 1391, the case was properly venued in the United States District Court for the Eastern District of California.

This is an appeal from a final judgment entered on August 1, 2017 (1ER:27) after an order granting the defendants' motion for summary judgment (1ER:1-24). Appeal was filed on August 30, 2017. (ER:25.) This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

1.2. Statement of Issues

1.2.1. Qualified Immunity: Lack of Clearly-Established Law

Micah Jessop and Brittan Ashjian allege that City of Fresno police officers Derik Kumagai, Curt Chastain, and Tomas Cantu (collectively, "the Officers"), in the course of lawfully seizing monies and valuables while executing a search warrant, stole currency and collectible coins. (The Officers deny any theft.) Jessop and Ashjian contend the theft violated their Fourth Amendment and substantive due process rights. No binding precedent

establishes that police officer theft or retention of lawfully-seized property violates any constitutional provision. Case law in the district courts and in other circuits is in conflict. *Did the District Court correctly rule that the Officers are entitled to qualified immunity based on lack of clearly-established law?*

1.2.2. Qualified Immunity: No Violation of Fourth Amendment or Substantive Due Process

Among circuits that have addressed the question, the majority rule is that alleged police officer theft of property lawfully seized under a search warrant does not violate the United States Constitution, and is properly addressed through state law claims such as conversion. *Are the Officers Entitled to Qualified Immunity Because the Misconduct Alleged Did Not Violate Any Constitutional Right?*

1.3. Statutory Addendum

The statutes cited in this brief (apart from 42 U.S.C. § 1983) are set forth in an addendum at the end of this brief.

2.0. Statement of the Case

2.1. Facts

2.1.1. Preface

Most of the facts summarized below are undisputed. (*See* 1ER:2 [Order Granting Summary Judgment]; Dkt #58 [Plaintiffs' Response to Defendants' Statement of Uncontroverted Facts].) Where the facts are controverted, the summary sets forth the facts in the light most favorable to plaintiffs Micah Jessop and Brittan Ashjian. (*See* standard of review set forth under Heading 4.0.) By doing so, the defendants do not

concede the truth of any of Jessop or Ashjian's accusations against them.

2.1.2. The Officers

As discussed in the Procedural History set forth at Heading 2.2, of the multiple defendants originally named in the lawsuit, the remaining defendants are the City of Fresno and the following City of Fresno police officers (collectively, "the Officers"):

- Sergeant Curt Chastain. As of 2013, when the events giving rise to the lawsuit took place, Chastain had been with the City of Fresno for approximately 27 years. (3ER:485.) He had held the rank of Sergeant for approximately 12 years. (*Ibid.*) He was a supervisor of the Fresno police's Vice Criminal Intelligence Unit. (*Ibid.*) When an

officer comes into Vice and is under Chastain's supervision, Chastain makes a point of determining whether the officer is a trustworthy, reliable individual. (2ER:99.)

- Officer Derik Kumagai. As of 2013, Kumagai had been an officer with the Fresno Police Department for approximately 13 years. (2ER:265.) During that time, he was assigned to a number of units within the Department. (2ER:265-266.) In 2013, his assignment was the Special Investigations Bureau Vice/Intel Unit. (2ER:266.)

When Kumagai came into Vice, Chastain had information that, years before, Kumagai's name had "popped up on a narcotic wire" concerning a marijuana grove, and that Kumagai may potentially

have involvement in the marijuana business or had known somebody involved in it. (2ER:99-100.) Chastain investigated the matter by interviewing current and ex-employees who were involved, and Kumagai's then-current supervisors. (2ER:100.) He also looked at Kumagai's job performance over the previous several years. (*Ibid.*) Chastain concluded that none of those past or present officers could say that Kumagai had anything to do with it. (*Ibid.*) Although Chastain still had questions on it, Kumagai had all the appearances of being a great officer in the department. (*Ibid.*) Chastain asked Kumagai how his name might have come up. Kumagai assured him that he had relatives who had been in marijuana, and that Kumagai had no involvement. Chastain then selected him for the unit. (*Ibid.*)

> As of 2013, Kumagai's duties included investigation of illegal gambling activities. (2ER:266.)

- Detective Tomas Cantu. As of 2013, Cantu had been employed by Fresno for approximately 13 years. Cantu joined the Vice unit in 2012, and was working with Vice in 2013. (2ER:268; 3ER:488.)

2.1.3. Investigation

Before the investigation discussed below began, the Officers became aware of an influx of gambling machines in and around Fresno. (3ER:368, 485, 488.) As a proactive measure, Vice attempted to locate the distributors and manufacturers of gambling machines that used local stores for their illegal operation. (*Ibid.*)

In February 2013, Kumagai received information from a state agency about a possible illegal gambling machine, a "Coin Pusher," located in a Fresno liquor store. (2ER:266.) A "Coin Pusher" is a device that awards coins or prizes to a player as a result of an element of hazard or chance. (*Ibid.*) Under Cal. Penal Code §§ 330a, 330b, and 330.1, operating Coin Pushers is illegal. (*Ibid.*) An investigation into the matter began, with Kumagai assigned as lead investigator. (2ER:266; 3ER:485, 336-337.)

The investigation expanded and spanned several months. It included background investigations, undercover operations, surveillance operations, seizure of illegal gambling devices, and a search warrant for a GPS tracking device. (2ER:266.) Several members of vice, including Chastain and Cantu, assisted in the investigation. (2ER:266; 3ER:387-388, 488.)

During the investigation surveillance, Vice members observed, among other things, Brittan Ashjian emptying coin currency from a Coin Pusher located in a store; Ashjian transporting a Coin Pusher at the business address in Fresno for "ATM Online Services, LLC"; a Google Map image showing a Coin Pusher in the garage of Ashjian's residence; Ashjian servicing ATMs in locations where Coin Pushers were located; and Ashjian, accompanied by Micah Jessop, entering a bank, leaving with bank bags, and driving to and entering various stores. (2ER:266.)

Vice members received information from various store owners that either Ashjian or Jessop were the people responsible for Coin Pushers located in their stores. (2ER:266.) They also received information from another law enforcement agency that a Coin Pusher had

been seized from a store in the Central Valley, with Jessop as the responsible person. (2ER:266-267.)

The investigation led to Jessop and Ashjian as the owners and operators of the illegal machines. (3ER:485.) Vice members learned that Jessop and Ashjian operated ATM Online Services, which operated ATMs in the local area. (3ER:485, 488.) In many instances, the ATMs and the gambling machines were at the same locations, and Jessop and Ashjian serviced both machines. (*Ibid.*)

In monitoring Kumagai's investigation, Chastain became aware that Ashjian and Jessop were picking up the money collected from the Coin Pushers, and the quarters collected were eventually exchanged for cash at the banks where the ATM business did its banking. (3ER:485.) This information led Chastain and Kumagai to believe that the money received from the illegal

business was being commingled with legitimate monies, as a way to hide the illegal proceeds. (2ER:265; 3ER:485.) To Chastain and Kumagai, that evidenced an illegal purpose to launder money, in violation of Cal. Penal Code § 186.10. (*Ibid.*)

2.1.4. Search Warrants Issued

On about September 3, 2013, Kumagai authored a Search Warrant and Affidavit based on the investigation the illegal gambling operation. (2ER:267, 273-295.) The warrant covered Ashjian, Jessop, their vehicles, and the three locations in Fresno associated with the two men developed during the course of the several month investigation:

- The address for ATM Online Services, LLC, on Simpson Avenue;

- Ashjian's residence, on Pinedale Avenue; and

- Jessop's residence, on Stuart Avenue. (2ER:267, 273-277.)

The warrant included these instructions:

> To seize all monies, negotiable instruments, securities, or things of value furnished or intended to be furnished by any person in connection to illegal gambling or money laundering that may be found on the premises, said items being subject to seizure and forfeiture . . . .
>
> [¶] [M]onies . . . derived from the sale and or control of said machines.

(2ER:276-277.)

On September 9, 2013, the Honorable Dale Ikeda, judge of the Fresno County Superior Court, reviewed and signed the search warrant and affidavit. (2ER:267, 273.)

2.1.5. Jessop's Coins

According to Micah Jessop, Jessop kept a collection of solid gold collectible coins in his residence, in a grayish-brownish Tupperware-type tub sitting on the floor of his master bedroom's closet. (2ER:216-217.) He kept an inventory list of the coins in the tub with the coins. (2ER:217.)

The coins were not insured. (3ER:441.) He never had the coins appraised. (2ER:217.) But after the events described below, he recreated the list, looked the coins up on the Internet, and estimated the value of the coins at $125,000-$130,000. (2ER:217-218.)

2.1.6. Execution of Warrants

2.1.6.1. Pre-Briefing

On September 10, 2013, at approximately 8:00 a.m., Kumagai conducted a search warrant pre-briefing at the Fresno Police Department Special Investigations Bureau. (2ER:267.) Three teams of Fresno officers (approximately 16 officers) and members of other law enforcement agencies attended the briefing. (2ER:267-268; 3ER:342.)

Three search teams were formed. Each team was assigned to one of the three locations listed in the warrant. (2ER:268.) A Case Agent was assigned to lead each team: Cantu for the Simpson Avenue location of ATM Online Services; Detective Belinda Anaya for Ashjian's residence on Pinedale; and Detective Annette

Arellanes for Jessop's residence on Stuart. (2ER:268; 3ER:486.)

Cantu was assigned as the scribe of the evidence at the Simpson location. (3ER:488.) When property was found, the detective finding the item was to be listed, along with the location where the item was found. In the case of money, two officers were to be used in collecting and then counting the money. The information was then to be confirmed with Cantu and placed on the evidence sheet. (*Ibid.*)

After the pre-briefing, at approximately 9:45 a.m., the search warrant was simultaneously served at the three locations. (2ER:268.)

2.1.6.2. Simpson Avenue Location (Business)

After service of the search warrant began, Kumagai, as lead investigator, first went to the Simpson Avenue location of ATM Online Services, a house. (2ER:268.) He got there sometime after 9:00 a.m. (3ER:344.) Chastain, other officers, and an assistant District Attorney also went there. (3ER:347, 425.)

He spoke to an employee of the business who was there. (3ER:344-345.) She said she was working there part-time bookkeeping, and was being paid under the table. (3ER:345-346.)

While Kumagai was speaking with the employee, Micah Jessop arrived there in a black Dodge Charger. (3ER:346.) Kumagai, accompanied by Chastain and an assistant District Attorney, met with Jessop. Kumagai

read Jessop his Miranda rights, and Jessop waived them. (3ER:346-347.) When confronted with evidence of the Coin Pushers, Jessop made a statement in the nature of, "You got us red-handed." (3ER:348.) Jessop provided Kumagai with information about the coin-pusher operation. (3ER:348-349.)

As Kumagai was interviewing Jessop, Ashjian arrived. (3ER:349.)

Kumagai spent most of his time at the Simpson location interviewing Jessop and Ashjian. (2ER:268.) During the search, some officers pointed out to Kumagai some of the currency discovered during the search. (2ER:268.) Kumagai denies physically searching the premises or vehicles there, or seizing, counting, removing, or transporting any currency or coins from the

location. (2ER:268.) Jessop, however, testified he saw Kumagai counting money inside the house. (2ER:209.)

During the search of evidence at the location, Chastain oversaw where monies and property were located, and oversaw the counting of monies. (3ER:427, 486.) Most of the money was collected from the back seat and trunk of the car Jessop drove. (3ER:350, 353, 426-427, 469, 371-372, 427, 486.) The money included a bank bag of quarters, which Jessop said came from cleaning out one of the machines. (3ER:350.)

Officer Ken Dodd counted the money located during the search, with Cantu on his left and Chastain on his right, and Cantu serving as scribe. (3ER:372-373, 427, 488.)

Cantu also participated in the search. Whenever he found money, and whenever money was counted, another detective was present. (3ER:488.)

Cantu was writing a list—a "Search Warrant Evidence and Receipt List"—as Chastain kept his own mental notes about the amount of money located. (2ER:297; 3ER:351-352, 373-374, 488, 491-492.)

As the items to be seized and collected as evidence, Kumagai was being contacted by Case Agents at the other warrant locations about what needed to be done next. (3ER:350.)

Jessop testified that the money at the Simpson address—including that in the office, Jessop's car, and Ashjian's Dodge Charger—on the day the warrant was executed totaled $131,380. (2ER:205, 233-234.)

Kumagai left a search warrant receipt with Ashjian or Jessop. (3ER:353.) Jessop looked at the property inventory receipt for the paper currency taken from the Charger, the office, and Ashjian's truck, and did not agree with the amounts. (2ER:205-206.) The difference between the amount in the receipt and the amount he claims was taken is money he is claiming is missing in this lawsuit. (2ER:206.)

Photographs were taken at the Simpson location. Neither Chastain nor Officer Dodd were able to locate them in preparation for their deposition testimony in this case. (2ER:103-105, 121-122.)

Chastain testified that Cantu and other officers helped Chastain load the seized monies into his car, and

locked them in. Chastain then drove, with the money, to the Stuart location (Jessop's residence). (3ER:374.)

2.1.6.3. Stuart Location (Jessop's Residence)

Jessop's wife, Kristine Jessop, was present when the Fresno Police came to their home at approximately 9:00 a.m. (2ER:43.) The officers had her sit in the living room while they searched the home. (2ER:43.)

Detective Annette Arellanes was part of the team that searched Jessop's residence on Stuart. (3ER:414.) The team located coins in the house. (3ER:415.) Arellanes decided to seize them. She wrote them down on her property form. Then, while thinking about it, she decided to call and ask if the coins needed to be taken. (3ER:415-416.)

While Kumagai was still at the Simpson location, Arellanes called Kumagai and advised him that her search team had located a coin collection. She asked him whether the collection should be seized under the warrant. He told her the collection should not be seized, and should be left at the location. She agreed to do so. (2ER:268-269; 3ER:355.) Another officer at the Stuart location, Sergeant Reynolds, called Chastain about the coins. (3ER:403-404.) Chastain also instructed the officers to leave the coins. (*Ibid.*) Arrellanes crossed the coins off the inventory, and the Fresno officers put the coins in a small suitcase that was outside the door. (2ER:111-112; 3ER:404-405, 415-416.) The officers used the plastic tub they had been in to hold items seized. (2ER:112.)

Arrellanes prepared a Search Warrant Evidence and Receipt List identifying the evidence seized at the property, including any currency. (2ER:269, 300-301)

When Kumagai arrived at the Stuart location, the search team for that location had finished its search. (2ER:43, 111, 269, The property that was going to be taken was in the living room. (2ER:111.) The collectible coins and currency were left in the master bedroom, in the suitcase, next to the bed. (2ER:111-112; 3ER:406, 416.)

At the house, Kumagai spoke with Kristine Jessop. (2ER:43, 269.) Kumagai explained the investigation and search to her. (2ER:269.) According to Kristine[1],

[1] Because this brief refers to plaintiff Micah Jessop by his last name, it will refer to his wife by her first name, to avoid confusion. No disrespect is intended.

Kumagai showed her a piece of paper and said that it was a receipt for all of the property that they were taking from the home. (2ER:43.) Although she was not able to verify what items were actually being removed from the house, she signed the paper. (2ER:43.)

Kristine then saw Kumagai walk to the rear of the interior of the house, where the bedrooms are located, while she sat in the living room. (2ER:43.) He returned in a few minutes and asked her to show him around the house. She accompanied him throughout the house, showing him the various rooms. They got to the master bedroom, and took two steps into the room. He then asked her if there were any coin machines on the property. (2ER:43.)

Kristine told Kumagai that there were some coin machines located near the wall of the garage of the

residence. He asked her to show him where, and she led him to them. (2ER:43, 269.) The police seized machines. (*Ibid.*) Kumagai and Kristine returned to the living room. (2ER:43.) Sitting in the living room, Kristine saw Kumagai return, alone, to the rear of the house. (*Ibid.*) After several minutes at the rear of the house, he returned to the living room and told Kristine they were done and leaving. (*Ibid.*) Kumagai was the last officer to leave. (*Ibid.*)

Kumagai declares that he did not physically participate in the search or seizure at the Stuart location, other than assisting in moving the coin machines Kristine identified; and did not seize, count, remove, or transport any currency or coins from the location. (2ER:269.)

According to the Jessops, after Kumagai left and Jessop went to his house, the Jessops searched for the coin collection. They could not find it. (2ER:44, 216-217.)

2.1.6.4. Pinedale Location (Ashjian Residence

Kumagai left the Stuart location and proceeded to the Pinedale location. When he arrived there, the search of that location had concluded. (2ER:269.) Kumagai interviewed Ashjian's wife there. (2ER:269.) He did not participate in the search there. (2ER:270.)

The Case Agent for the Pinedale location search prepared a Search Warrant Evidence and Receipt List identifying all of the evidence seized at that location. (2ER:270, 303-304.)

$400 in cash was seized from Ashjian's house. (3ER:470.)

2.1.7. Events After Warrants Executed

The evidence seized as a result of the search warrant's service was transported from the searched locations to the Vice Unit's office. (2ER:270.) Kumagai did not participate in the transportation. (2ER:270.) After all of the money was counted and marked on the receipt, Chastain collected and transported all the monies seized at the three locations. (2ER:110; 3ER: 374-375, 392-393, 486, 489.)

At the Vice Unit's office, the money was again counted and documented, and then submitted to the property unit. (3ER:373, 393, 486.) The counts were

performed in the presence of witness detectives. They were not by any one single detective. (2ER:270.)

According to the Officers, the total amount of money they seized was approximately $50,000. (2ER:270; 3ER:357-359.) Chastain locked the currency in a Vice Unit office for safe-keeping. (2ER:270.) Kumagai believes that the $50,000 was connected with the investigation for money laundering, the commingling of funds with a legitimate business, and the operation of illegal gambling machines. (3ER:357.)

All three Officers declare that they do not know of any theft of property or money at any of the locations. (2ER:271; 3ER:486, 489.)

Kumagai prepared the police report of the investigation and the warrant service. (2ER:271, 310-326.)

The day after the seizure, members of the Vice Unit transported the items seized during the search warrant's service (including currency) from the Vice Unit office to the Fresno Police Department Property room for booking. Detective Belinda Anaya oversaw the transportation and booking process. Fresno Police Department Property and Evidence Forms were prepared for the booked evidence. (2ER:270, 306-308.)

According to Jessop, in subsequent meetings with the Fresno officers, Jessop, Ashjian, and their attorney stated that the amount of currency listed in the inventories of seized property was not accurate. (2ER:221-222.) At one of the meetings, Jessop asked

whether the officers had taken the coin collection. Kumagai said no. (2ER:221.)

A week or two after the warrant was served, Jessop and Ashjian, with their attorney, were taken to the Fresno Police Department and shown the seized items. Kumagai, Chastain, and a deputy Fresno City Attorney were also present. According to Jessop, he stated that the money they saw was not all the money they had on that day. (2ER:223-224.) (Kumagai disputes this. (2ER:270-271.)) Per Jessop, Kumagai responded, "I don't know what to tell you," and shrugged. (2ER:223.) Kumagai told them they could file claims with the City. (2ER:224.)

Later, Jessop and Ashjian entered into a contract with the City of Fresno to become informants, in exchange for not being charged. (2ER:224, 271;

3ER:486, 472-473.) The contract contained a clause stating that $50,000 collected from the searches would be forfeited to the City. Jessop and Ashjian agreed to the forfeiture. (3ER:474-475, 486.)

Jessop received ten boxes of property back from the Fresno Police Department. According to Jessop, the items returned included some of his collectible coins. (3ER:438, 441.) Items were also returned to Ashjian, including the $400 in currency taken from his house. (3ER:470, 476.) Ashjian did not itemize the returned items. (3ER:476.) One of Ashjian's returned items, a computer, was damaged. Kumagai told him to file a claim with the City for the computer. He did so, and the City paid the claim. (3ER:476-477.)

In March 2014, Kumagai was arrested. (2ER:37.) In April 2014, Kumagai separated from the City of Fresno's

employment, because he was indicted for conspiracy to commit bribery. (3ER:336.) After the arrest, Jessop and Ashjian met with the FBI, and discussed the search warrant's execution. (3ER:449-450.) They told the FBI that they believed the Fresno Police Department took money or coins from them. They did not specifically blame Kumagai. (3ER:449.) In 2015, Kumagai pleaded guilty to felony conspiracy. (2ER:37.)

When asked whether he believes each of the Officers took money and collectible coins from him, Jessop replied, "I do not know what has happened behind closed doors." (2ER:231.)

2.2. Procedural History

In February 2015, Michah Jessop and Brittan Ashjian sued the City of Fresno, Kumagai, Cantu,

Chastain, and other Fresno police officers in the United States District Court for the Eastern District of California. (3ER:522.) The complaint alleged that the Fresno police officers seized approximately $131,380 in currency from the plaintiffs' business location, and an additional $20,000 in currency and rare coins valued at $125,000 from Jessop's residence. (3ER:528.) They further alleged that after an accounting, $81,380 seized from the business, along with the $20,000 and rare coins seized from Jessop's residence, was missing. (ER:529.) The complaint alleged that in March 2014, Kumagai was indicted. (ER:529.) The complaint alleged that the police officer defendants unlawfully seized and stole the money and coins. (ER:529-532.)

The complaint asserted four counts under 42 U.S.C. § 1983: unreasonable search and seizure of property, in violation of the Fourth Amendment (3ER: 529-530);

deprivation of property without procedural due process, in violation of the Fourteenth Amendment (3ER:530-531); violation of substantive due process rights under the Fourteenth Amendment (3ER:531-532); and a municipal liability claim against Fresno for unconstitutional custom or policy (3ER:532-535).

The named defendants answered the complaint. (3ER:495-504 [defendants except Kumagai]); 3ER:506-520.) The defendants denied the allegations of theft or unlawful seizure. (3ER:498-500, 510-513). The defendants pleaded qualified immunity as a defense. (3ER:502, 517, 518.)

All of the defendants except the City of Fresno, Kumagai, Chastain, and Cantu were dismissed from the action. (3ER:542, Dkt #s 49, 50.)

The remaining defendants moved for summary judgment. (3ER:541-542, Dkt #s 51-55.) The District Court, the Honorable Dale A. Drozd presiding, heard the motion on January 19, 2017. (3ER:541, Dkt. #63.) Jessop and Ashjian did not order the transcript of the hearing for inclusion in the record on their appeal. (*See* ER:540 [docket].)

On August 1, 2017, the District Court issued an order granting the summary judgment motion in full. (1ER:1-24.) The District Court gave the following grounds for granting summary judgment:

- On the Fourth Amendment claim, the District Court rejected the contention that the defendant Officers exceeded the scope of the search warrant in executing the search. It found the argument

unsupported by the evidence and unpersuasive. It concluded that, assuming the truth of the complaint's allegations, the property the complaint alleged the officers stole consisted of money and valuables, and that the warrant directed the officers to seize all money and valuables. (1ER:9-10.) To the extent Jessop and Ashjian allege the Officers engaged in subsequent theft of property lawfully seized under the warrant, the District Court continued, the conduct did not violate any Fourth Amendment right that was clearly established at the time in question. (1ER:10-14.) The District Court therefore concluded that the Officers were entitled to summary judgment both on the merits and on qualified immunity grounds on the claim that the officers exceeded the scope of the warrant; and qualified immunity on the claim of alleged theft of

property lawfully seized under the warrant. (1ER:14-15.)

- On the substantive due process claim, the District Court concluded that the Officers were entitled to summary judgment because the Fourth Amendment preempted any substantive due process claim arising out of the complaint's allegations. (1ER:15-18.)

- On the procedural due process claim, the District Court granted summary judgment because the Officers argued that Jessop and Ashjian were afforded an adequate post-deprivation remedy, and Jessop and Ashjian did not dispute that argument. (1ER:18.)

- On the municipal liability claim, the District Court concluded that Jessop and Ashjian failed to point to any evidence supporting their allegations that Fresno could be held liable under 42 U.S.C. § 1983. (1ER:18-24.)

Judgment for all defendants was entered on August 1, 2017.

3.0. Summary of Argument

The Officers adamantly deny that they stole anything. (Unlike Jessop and Ashjian, who do not deny guilt for the crimes that triggered the search of their residences.) But for purposes of this appeal, that does not matter. Even taking the facts in the light most favorable to Jessop and Ashjian—and assuming, for purposes of the appeal only, that their theft allegations

could be proven—the District Court correctly ruled the Officers entitled to summary judgment on the Fourth Amendment and substantive due process claims, based on qualified immunity. And Jessop and Ashjian have waived their other claims.

Jessop and Ashjian contend that qualified immunity does not protect those who knowingly violate the law; and that an officer who allegedly steals lawfully-seized property knowingly violates the law. But the "law" at issue here is the United States Constitution. Regardless of whether alleged officer theft gives rise to a state law claim, such as conversion, the Officers are entitled to qualified immunity unless in September 2013, either binding precedent or a robust consensus of persuasive authority established that theft or retention of properly-seized property violated either the Fourth Amendment or

substantive due process rights under the Fourteenth Amendment.

As the District Court properly ruled, there is no such binding precedent or consensus. Instead, as of September 2013, neither the Supreme Court nor the Ninth Circuit had addressed the issue. And the federal circuits were split—with a majority ruling that theft or improper retention of property lawfully seized under warrant does not violate the Fourth Amendment or substantive due process. Instead, it is actionable only under state law. That situation remains true today.

Therefore, the law did not (and does not) clearly establish that the officer misconduct alleged here violated the Fourth Amendment or substantive due process. That entitles the Officers to qualified immunity.

Jessop and Ashjian fail to show otherwise. They point to an unpublished California district court decision issued *after* September 2013, which conflicts with another California district court decision issued before September 2013. That does not clearly establish the law. They point to Supreme Court and Ninth Circuit opinions in which officers exceeded the scope of search warrants by other acts. They argue those cases imply the acts here would violate the Fourth Amendment. But implication does not clearly establish the law.

Jessop and Ashjian have the burden of showing that as of September 2013, the law so clearly established that the Officers' alleged acts violated the Fourth or Fourteenth Amendments that no reasonable officer would have thought otherwise. They have not met that burden. This Court should therefore uphold summary judgment as to all defendants.

4.0. Standard of Review

This Court reviews the grant of summary judgment *de novo*. Its review is governed by the same standard the District Court uses under Fed. R. Civ. P. 56(c). The Court must determine whether there are any genuine issues of material fact, and whether the District Court correctly applied the substantive law. In doing so, it views the evidence in the light most favorable to the non-movants. *Frudden v. Pilling*, 877 F.3d 821, 828 (9th Cir. 2017).

Where the underlying facts are undisputed, the Court's only function is to determine whether the District Court correctly applied the law. *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011).

Where, as here, the issue is qualified immunity, a conflict in the evidence will not defeat summary judgment. Even if evidence conflicts on whether a defendant actually violated a plaintiff's constitutional rights, the defendant is entitled to qualified immunity unless, resolving factual disputes in the light most favorable to the plaintiff, the law so clearly established the unconstitutionality of the defendant's action that no reasonable officer in the defendant's position could have believed the action constitutional. *See S.B. v. Cty. of San Diego*, 864 F.3d 1010, 1015–16 (9th Cir. 2017); *Marquez v. Gutierrez*, 322 F.3d 689, 693 (9th Cir. 2003).

Discussion

4.1. Jessop and Ashjian Have Waived Appeal from Summary Adjudication of Their Procedural Due Process and *Monell* Claims

Jessop and Ashjian focus the arguments in their Appellants' Opening Brief only on the District Court's rulings granting summary judgment to the defendant officers on the plaintiffs' claims under the Fourth Amendment (AOB:8-9) and substantive due process (AOB:10). The opening brief does not address the summary judgment granted to the defendants on Jessop and Ashjian's procedural due process claim. (1ER:18.) (Indeed, they did not contest summary adjudication of this claim in the District Court. (1ER:18.)) The opening brief does not address the summary judgment granted the City on the *Monell* claim. (1ER:18-23.)

Jessop and Ashjian have therefore waived any appellate challenge to those rulings. *Classic Concepts, Inc. v. Linen Source, Inc.*, 716 F.3d 1282, 1285 (9th Cir. 2013). Further, the judgment in favor of the City of Fresno (1ER:27) is final.

The only questions remaining in this appeal are whether the District Court properly granted the individual officer defendants—Curt Chastain, Tomas Cantu, and Derik Kumagai—summary judgment on the Fourth Amendment and substantive due process claims, based on qualified immunity. As explained below, it did.

4.2. The Defendant Officers Are Entitled to Qualified Immunity

4.2.1. Standards for Qualified Immunity

Police officers are entitled to qualified immunity under 42 U.S.C. § 1983 unless (1) they violated a federal

statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time. *District of Columbia v. Wesby*, __ U.S.__, 138 S. Ct. 577, 589 (2018).

"Clearly established" means that, when the officers took the action that is the subject of the lawsuit, the law was "sufficiently clear that every reasonable official would understand that what he is doing is unlawful." *Wesby*, *supra*, 138 S. Ct. at 589 (internal quotation marks omitted). Existing law must have placed the constitutionality of the officer's conduct "beyond debate." (*Ibid* [internal quotation marks omitted].)

This is a "demanding standard . . . ." (*Wesby*, *supra*, 138 S. Ct. at 589.

Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.*, quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). "[T]he law" to which *Malley*'s familiar phrase refers is the *statutory or constitutional protection* that a particular claim alleges the officer violated. "[E]xisting precedent must have placed *the statutory or constitutional question* beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011) (emphasis added).

For instance, if the plaintiff claims that the defendant officer violated the plaintiff's rights under the Fourth Amendment, it is not enough that an officer should have recognized his act "was a tort, a crime, and even a sin . . . ." *Mom's Inc. v. Willman* , unpub'd, 109 Fed.Appx. 629, 637 (4th Cir. 2004). The law must have clearly established, beyond debate, that the officer's acts

violated the Fourth Amendment. *See Wesby*, *supra*, 138 S. Ct. at 590.

To be "clearly established," a legal principle must be "settled law," which means it is dictated by "controlling authority" or "a robust consensus of cases of persuasive authority." *Wesby*, *supra*, 138 S. Ct. at 589-590 (internal quotation marks omitted). In this Circuit, "controlling authority" is binding precedent—Supreme Court and Ninth Circuit published case law. *See Entler v. Gregoire*, 872 F.3d 1031, 1041 (9th Cir. 2017). Absent such law, the courts may look to persuasive authority from other circuits, district courts, and state law to determine whether a robust consensus of cases exists. *See Moonin v. Tice*, 868 F.3d 853, 868 (9th Cir. 2017).

"It is not enough that the rule is suggested by then-existing precedent." *Wesby*, *supra* 138 S. Ct. at 590.

Instead, "[t]he precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Ibid.* Further, the legal principle must "clearly prohibit the officer's conduct in the particular circumstances before him." *Ibid.* The rules's contours must be so well-defined that it is clear to a reasonable officer that his conduct, in the situation he confronted, "was unlawful . . . ." *Ibid.* As explained above, in this context, "unlawful" means that the conduct violates the constitutional or federal statutory right that the plaintiff alleges the officer violated. *See Shafer v. County of Santa Barbara,* 868 F.3d 1110, 1117 (9th Cir. 2017) [must be obvious to the officer "that what he is doing violates federal law"].)

The Supreme Court has therefore "stressed the need" to identify a case where an officer acting under similar circumstances was held to have violated the

constitutional protection at issue. *Wesby*, *supra* 138 S. Ct. at 590. This specificity requirement is especially important in the Fourth Amendment context, due to its imprecise nature. *Ibid*. But the same requirement applies to other constitutional protections. *See*, *e.g.*, *Reichle v. Howards* , 566 U.S. 658, 664-665, 132 S. Ct. 2088, 182 L. Ed.2d 985 (2012) (First Amendment right to be free from a retaliatory arrest).

There are "rare 'obvious case[s]'" where the unlawfulness of the officer's conduct is sufficiently clear without existing precedent that qualified immunity is unavailable. *Wesby*, *supra* 138 S. Ct. at 590. But a body of relevant case law is usually necessary. *Id.* at 589-590.

The corollary to the requirement that either binding precedent or a robust *consensus* of persuasive authority establish the right is that if Federal Circuits are split on

whether a right exists, the officer should be entitled to qualified immunity. "If judges thus disagree on a constitutional question," the Supreme Court has reasoned, "it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 1701, 143 L. Ed. 2d 818 (1999).

The burden of showing that the law is clearly established falls on the plaintiff. *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993).

Finally, the Court may address the two prongs of qualified immunity in any order. *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

As explained below, applying these rules here establishes that the District Court correctly ruled each of the officer defendants entitled to qualified immunity.

4.2.2. The Officers Are Entitled to Qualified Immunity to the Fourth Amendment Claim

Jessop and Ashjian contend that when an officer seizes property under a proper search warrant, but then fails to return it, the officer violates the Fourth Amendment. (AOB:7-9.) They contend that an officer's theft of seized property—like the one they argue "the record suggests" here (AOB:7)—therefore violates the Fourth Amendment. (*Ibid.*)

The Officers categorically deny that they stole anything. There is no evidence in the record that any of

those Officers stole anything, apart from innuendo based on character evidence.

But even assuming, just for purposes of the qualified immunity argument, that theft took place, the officers would be entitled to qualified immunity, under both prongs.

4.2.2.1. Because Neither Binding Precedent Nor a Robust Consensus of Courts Establishes That Alleged Theft after a Lawful Search Violates the Fourth Amendment, The Officers Did Not Violate Clearly-Established Law

In their Appellants' Opening Brief, Jessop and Ashjian fail to identify any precedent binding in this Circuit—let alone any binding precedent that existed in September 2013, when the challenged conduct took place (3ER:528-529)—holding that a police officer violated a

plaintiff's Fourth Amendment rights by seizing property under a valid search warrant, but then failing to return it. They also fail to identify any consensus—robust or otherwise—on that issue. (AOB:7-9.) That is because, as the District Court correctly observed,

> The Ninth Circuit . . . has offered no direct guidance as to whether the Fourth Amendment protects against the subsequent theft of lawfully seized items, and the circuit courts that have addressed this issue appear to be divided.

(1ER:11.)

Lack of binding precedent and division in the courts that have addressed the issue establish qualified immunity. *Wesby*, *supra*, 138 S. Ct. at 589-590; *Wilson*, *supra*, 526 U.S. 603, 618.

Jessop and Ashjian appear to contend that *Collins v. Guerin*, No. 14-CV-00545-BAS BLM, 2014 WL 7205669, at *6 (S.D. Cal. Dec. 17, 2014) is binding precedent that establishes that a Fourth Amendment claim lies for alleged theft of property during a home search under a search warrant. (AOB:8-9.) The *Collins* decision did indeed allow such a claim to proceed. But it is not binding precedent. It is a district court decision. District Court decisions do not clearly establish the law. *S.B. v. County of San Diego*, *supra*, 864 F.3d 1010, 1016.

That is especially true for *Collins*. *Collins* is an *unpublished* district court decision. It was decided in 2014—*after* the events at issue took place. And as the opening brief acknowledges, another district court case decided in California—also unpublished, but one decided in 2010, before the subject events took place—ruled that theft following a proper search as seizure was not a

constitutional violation, but rather the state law tort of conversion. *Slider v. City of Oakland*, No. C 08-4847 SI, 2010 WL 2867807, at *4 (N.D. Cal. July 19, 2010).

Jessop and Ashjian argue that *Collins* is better-reasoned than *Slider*. (AOB:8-9.) Whether it is or not, that is not the point. An unpublished district court decision issued after the officers acted—one that expressly disagrees with another district court's decision—does not establish the law, clearly or otherwise, for purposes of qualified immunity. *See Wesby*, *supra*, 138 S. Ct. at 589-590.

Jessop and Ashjian also cite Supreme Court and Ninth Circuit cases in which officers engaging in other types of misconduct during searches were ruled to have

violated the Fourth Amendment.[2] They appear to contend that these holdings are analogous, and thus

[2] AOB:8-9, citing *U.S. v. Ramirez*, 523 U.S. 65, 71, 118 S.Ct. 992, 140 L. Ed.2d 191 (1998) (dictum: excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment even though the entry itself is lawful); *Florida v. Royer*, 460 U.S. 491, 504, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983) (conduct more intrusive than necessary for a *Terry* stop is not authorized by *Terry* line of cases); *Wilson v. Lane*, 526 U.S. 603, 611, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (marshals entitled to enter house based on warrant violated Fourth Amendment by bringing newspaper reporter and photographer; but marshals entitled to qualified immunity); *Arizona v. Hicks*, 480 U.S.321, 325, 107 S.Ct. 1149, 94 L.Ed.2d 347 (moving contents of apartment while officer was validly in apartment was separate search that required probable cause); *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005) (destructive search and excessive seizure of personal property of non-suspect witness was unreasonable execution of search warrant); *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (misrepresentation to judge who issued search warrant vitiated warrant); *Liston v. Cnty. of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997) (unnecessarily destructive behavior beyond that necessary to execute search warrant violates Fourth Amendment); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000) (damaging property while executing a search warrant, in a way not reasonably necessary to execute the warrant, violates the Fourth Amendment).

clearly established a rule that failure to return property after a lawful search violates the Fourth Amendment. (AOB:8-9.)

That argument fails. As explained above, it is not enough that case law suggests a rule. The contours of the rule must be so clearly defined that any reasonable officer would have realized that the conduct would have violated the Fourth Amendment. *Wesby*, *supra* 138 S. Ct. at 590. As the conflicting district court decisions in *Slider* and *Collins* show, the above cases did not clearly establish the rule plaintiffs attempt to establish.

Since no binding precedent clearly established the rule in September 2013 (or now), the next step is to ask whether there was a robust consensus of persuasive authority that clearly establishes the rule. *Wesby*, *supra* 138 S. Ct. at 590.

As the District Court correctly pointed out (1ER:11-13), there is no consensus, robust or otherwise, on whether alleged theft or retention of lawfully seized property violates the Fourth Amendment, as opposed to merely a conversion or trespass of property under state law. Indeed, the majority of circuits have ruled that theft or retention does not give to a Fourth Amendment claim.

Before the events at issue, the Fourth and Fifth circuits held that a police officer's retention or theft of property lawfully seized from a suspect during a search violated the Fourth Amendment. *Barker v. Norman*, 651 F.2d 1107, 1131(5th Cir. 1981) (denying qualified immunity, but under an outdated standard); *Mom's Inc. v. Willman* (unpub'd), 109 Fed. Appx. 629, 636–637 (4th Cir. 2004) (finding violation, but also holding defendant entitled to qualified immunity because the law was not

clearly established). *Swales v. Township of Ravenna*, 989 F. Supp. 925, 940–41 (N.D. Ohio 1997) also ruled that failure to return properly-seized property violated the Fourth Amendment; but the circuit in which that decision was issued later rejected that decision. *Fox v. Van Oosterum,* 176 F.3d 342, 350, n.5 (6th Cir. 1999).

On the other hand, before the events at issue, the Second, Sixth, Seventh, Eighth, and Eleventh circuits (in addition to, as discussed above, the California district court in *Slider*, *supra*, 2010 WL 2867807) had ruled that theft or retention of property lawfully seized under the Fourth Amendment does *not* violate the Fourth Amendment. *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177, 187 (2d Cir. 2004) (any right as to retention of lawfully-seized property is under procedural due process, not the Fourth Amendment); *Fox*, *supra*, 176 F.3d at 350-351 ("the Fourth

Amendment protects an individual's interest in retaining possession of property but not the interest in regaining possession of property"); *Lee v. City of Chicago*, 330 F.3d 456, 466 (7th Cir. 2003) (following *Fox*); *Ali v. Ramsdell*, 423 F.3d 810, 811–815 (8th Cir. 2005) (expressing "considerable doubt" that claim stated under Fourth Amendment for property appropriately seized under search warrant but not inventoried and stored as state law requires, but interpreting the majority opinion and Justice O'Connor's concurrence in *Hudson v. Palmer*, 486 U.S. 517, 536, 539 104 S.Ct. 3194, 82 L.Ed.2d 393 as establishing that availability of an adequate state law remedy preempted any Fourth Amendment claim); *Case v. Eslinger*, 555 F.3d 1317, 1330-1331 (11th Cir. 2009) (complaint of continued retention of legally seized property raises issue of procedural due process under the Fourteenth Amendment, and not under the Fourth Amendment).

Accordingly, as noted above, although the Fourth Circuit ruled in *Mom's Inc.*, *supra*, 109 Fed.Appx. 629 637 that an officer's theft of lawfully-seized property violates the Fourth Amendment, that circuit held that the conflicting law on that issue entitled the defendant officer to qualified immunity:

> "[Q]ualified immunity exists to protect those officers who reasonably believe that their actions do not violate federal law." *Doe v. Broderick*, 225 F.3d 440, 453 (4th Cir.2000). If either Appellant stole Colaprete's watch, he or she should have recognized that this was a tort, a crime, and even a sin, but he had no clear notice that this action violated the United States Constitution.

Id., 109 Fed.Appx. at 637.

Mom's Inc. was decided in 2004. The case law above shows that the same was true in September 2013.

The rule Jessop and Ashjian advocate was not clearly established.

Jessop and Ashjian contend that the cases that hold theft during execution of a search warrant are on point, and that the contrary cases are "inapposite" and "clearly distinguishable" because they "dealt with situations other than the intentional theft or destruction of property . . . ." (AOB:7-8.) But the plaintiffs fail to develop that point. They do not even cite, let alone analyze, the cases that have rejected the Fourth Amendment claim. A review of the facts of the cases discussed above rebuts the argument that they are distinguishable. By failing to develop this argument in their opening brief, they have waived it. "A bare assertion does not preserve a claim, particularly when, as here, a host of other issues are presented for review." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994).

The rule Jessop and Ashjian urge—that theft or retention of properly-seized material violates the Fourth Amendment—was not clearly established in September 2013. It is not clearly established now. The District Court properly granted summary judgment on the Fourth Amendment claim, based on qualified immunity.

4.2.2.2. Alleged Theft or Failure to Return Property after a Lawful Search Is a Matter for State Law, not the Fourth Amendment

Because officers Kumagai, Chastain, and Cantu are entitled to qualified immunity based on the "clearly established" prong, this Court need not reach the other prong of qualified immunity: whether, viewing the facts in the light most favorable to Jessop and Ashjian, the defendant Officers violated those plaintiffs' rights by allegedly stealing or retaining properly-seized property.

Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

But if the Court were to reach the issue of whether the defendant Officers would have violated the Fourth Amendment by engaging in the alleged misconduct, it should side with the Second, Sixth, Seventh, Eighth, and Eleventh Circuits, and rule that alleged failure to return properly-seized property is an issue for state law claims such as conversion, rather than the Fourth Amendment.

The cases cited under Heading 4.2.1. set forth a variety of explanations for ruling that the Fourth Amendment provides no right to the return of properly-seized personal property. Perhaps the most compelling, however, is that whether officers return properly-seized property is a subject for procedural due process under the Fourteenth Amendment. The Fourth Amendment

protects against unreasonable searches and seizures. It does not describe any rights concerning return of property that has been properly searched for and seized. The issue is instead whether the defendants followed proper procedure for return of seized items. *See Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, *supra*, 363 F.3d 177, 187; *Case v. Eslinger*, *supra*, 555 F.3d at 1330–1331; *Lee v. City of Chicago*, *supra*, 330 F.3d 456, 465–466. That is a procedural due process issue.

Further, no claim for violation of procedural due process lies for retention of property where there is an adequate post-deprivation remedy—such as that provided by state law tort claims. *Case*, *supra*, 555 F.3d at 1331, citing *Hudson*, *supra*, 468 U.S. 517 and *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981).

Accordingly, the proper remedy for a plaintiff who contends that a police officer stole property that was properly seized under a warrant is not a claim under 42 U.S.C. § 1983 for violation of the United States Constitution. It is a state law tort claim for conversion.

4.2.2.3. Jessop and Ashjian's Argument That the Allegedly Stolen Property Was Not Properly Seized under the Warrant Fails

Jessop and Ashjian also argue that the District Court's qualified immunity analysis fails because the District Court "assum[ed], without any supporting evidence, that the missing cash was seized in compliance with the warrant and then only subsequently was stolen." (AOB:9, citing 1ER:15.)

This argument disregards the District Court's careful analysis at 1ER:9-10, explaining that the search warrant expressly authorized the executing officers "[t]o seize all monies . . . or things of value furnished or intended to be furnished by any person in connection to illegal gambling or money laundering that may be found on the premises, said items being subject to seizure and forfeiture," as well as "monies . . . derived from the sale and or control of said [gambling] machines." (ER:9, citing Dkt. # 52-1 at 5-6 [actually 4-5], in the record at 2ER:276-277.)

The District Court noted that the property Jessop and Ashjian alleged stolen consisted of money ($131,380 from plaintiffs' business location, and another $20,000 in currency from the Jessop's residence) and valuables (rare coins valued at $125,000 from Jessop's residence).

(1ER:9, citing Dkt. #1 at 7, ¶ 24, in the record at 3ER:528.)

As the District Court correctly concluded, the warrant's language directed the Officers to seize the monies and valuables that Jessop and Ashjian allege the Officers seized. (1ER:9-10.) Search warrant terms, including the list of items to be seized, are to be read in a common-sense, non-technical manner when the warrant is executed. *U.S. v. Marques*, 600 F.2d 742, 751. A common-sense interpretation of "monies" and "things of value" includes currency and collectable coins.

Jessop and Ashjian argue that "the record suggests a more likely inference that the initial seizure of the great majority of the money failed to comply with the warrant . . ." (AOB:9.) They do not state what in the record supports this inference. They cite no law to support their

argument. The District Court commented that their similar argument in that court was conclusory. (1ER:10.) Their appellate argument is the same. It is therefore waived. *See Greenwood*, *supra*, 28 F.3d 971, 977.

4.2.3. The Officers Are Entitled to Qualified Immunity to the Substantive Due Process Claim

Jessop and Ashjian also argue that they stated a claim against the officers under the substantive due process protection of the Fourteenth Amendment, and that the Officers are not entitled to qualified immunity against that claim. (AOB:10.) Both contentions are incorrect.

4.2.3.1. Because Neither Binding Precedent Nor a Robust Consensus of Courts Establishes That Alleged Theft after a Lawful Search Violates Substantive Due Process, The Officers Did Not Violate Clearly-Established Law

As explained above, the Officers are entitled to qualified immunity on this claim under the clearly-established law prong unless Jessop and Ashjian can identify binding precedent or a robust body of persuasive authority holding that officers who allegedly stole or improperly retained lawfully-seized property violated substantive due process. *See Wesby*, *supra*, 138 S.Ct. at 590.

The opening brief does not identify any such authority. The sole case Jessop and Ashjian cite on the subject is *United States v. James Daniel Good Real*

Property, 510 U.S. 43, 49, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993). *Good* held that in one specific situation—where a property owner has pleaded guilty to a crime, and the government seeks forfeiture of the property as a result—the government must comply with both the Fourth Amendment and *procedural* due process. *Id.* at 52. *Good* specifically noted that in that case—unlike here—"the Government seized property not to preserve evidence of wrongdoing . . . ." *Ibid.*

This Court has characterized *Good*'s holding as "relatively limited . . . ." *United States v. $129,727.00 U.S. Currency*, 129 F.3d 486, 493 (9th Cir. 1997). It has recently rejected an argument that *Good* "clearly established" a rule for qualified immunity purposes in a different context. *Burgan v. Nixon* (unpub'd), __Fed. Appx.__, 2017 WL 4712499 at *1 (9th Cir. 2017) (*Good* did not clearly establish that a trespass citation

temporarily preventing access to an easement was a taking or a property deprivation lacking due process). Nothing in *Good* clearly establishes anything in regard to substantive due process. It certainly does not establish the rule Jessop and Ashjian urge.

More important, Jessop and Ashjian ignore the binding case precedent, cited in the District Court's decision (1ER:17), holding that the Fourth Amendment's protections preempt substantive due process in regard to law enforcement search and seizure. *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (Fourth Amendment preempts substantive due process in claims arising out of use of excessive force); *Armendariz v. Penman*, 75 F.3d 1311, 1320 (9th Cir. 1996), *overruled in part on other grounds* by *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th

Cir. 2007) (Fourth Amendment and Takings Clause preempt substantive due process where applicable).

See also U.S. v. Tamura, 694 F.2d 591, 597 (9th Cir. 1982) (government's seizure of property not covered by the warrant, and retention of the property to coerce authentication of the retained documents unconstitutional, but did not violate due process).

Binding law therefore did not clearly establish that theft or retention of lawfully-seized property violated substantive due process. If anything, it established the opposite.

Resort to non-binding persuasive authority would not help Jessop and Ashjian's argument. Courts have repeatedly held that theft or retention of properly-seized property does *not* raise a substantive due process claim.

Slider v. City of Oakland, No. C 08-4847 SI, 2010 WL 2867807, at *7 (N.D. Cal. July 19, 2010) (Fourth Amendment preempts substantive due process claim); *Lee*, *supra*, 330 F.3d at 467-468 (availability of state court remedies for refusal to return car preempts substantive due process claim); *Ali*, *supra*, 423 F.3d at 814 (same for property seized under search warrant but not properly inventorying and storing it).

Therefore, no robust consensus of persuasive authority in favor of Jessop and Ashjian's position exists here. "If anything, the opposite may be true." *City and County of San Francisco v. Sheehan*, __U.S.__, 135 S.Ct. 1765, 1772, 191 L.Ed.2d 856 (2015). Under the clearly-established prong, that entitles the Officers to qualified immunity. *Ibid.*

Finally, Jessop and Ashjian argue that the law was clearly established "[b]ecause no reasonable officer would think that stealing personal property while executing a search warrant was *lawful* . . . ." (AOB:10 [emphasis added].)

But as explained under Heading 4.2.1, above, the qualified immunity issue is not whether the officer should know that the alleged misconduct violates the law generally, or violates state law. It is whether a reasonable officer would know that the conduct violates the specific constitutional or federal statutory right the plaintiff alleges the officer violated. *Ashcroft v. al-Kidd*, *supra*, 563 U.S. 731, 741.

The brief cites no authority that would put a reasonable officer on notice that the misconduct alleged here would violate substantive due process. The District

Court therefore properly granted the Officers qualified immunity.

4.2.3.2. The Officers Did Not Violate Jessop and Ashjian's Substantive Due Process Rights

The case law from the Supreme Court and the Ninth Circuit discussed under Heading 4.2.3.1 above also establishes that the Officers are entitled to qualified immunity under the other prong: They did not violate Jessop or Ashjian's substantive due process rights. Any such rights were preempted by the Fourth Amendment. *See Graham*, *supra*, 490 U.S. 386, 395; *Armendariz*, *supra*, 75 F.3d 1311, 1320.

4.3. A Final Note on the Flimsiness of Jessop's and Ashjian's Accusations

As explained above, this Court need not determine whether Jessop and Ashjian's accusations against the Officers are true to affirm summary judgment for the Officers. Qualified immunity applies whether or not the accusations are founded. But because the accusations are so serious, defendants point out that the evidence supporting those accusations are weak.

Jessop's and Ashjian's accusations that the amount of money seized exceeded the amount disclosed as seized stem mostly from Jessop's after-the-fact reconstruction of the amount of currency that he believes was in the Dodge Charger. (2ER:207-209.) Jessop contends that the coin collection he kept in a plastic tub (rather than his safe)—unappraised and uninsured—consisted of solid gold coins and was worth six figures. (2ER:216-218.) He

based this valuation on an Internet search he performed after he was unable to find the coins and recreated the list of coins from memory and a piece of paper containing some of the items. (2ER:217-218.)

There is no evidence that anyone saw any of the Officers steal anything. Kristine Jessop declares that after Kumagai ordered coin machines at the Jessop residence seized, he walked toward the rear of the house and returned after several minutes. (2ER:43-44.) That was in the course of executing a search warrant. (*Ibid.*)

Jessop declined to testify that he believed the defendant Officers stole money or coins. (2ER:231.) When the FBI and DEA interviewed them after Kumagai's arrest, Jessop blamed the Fresno Police Department for taking money and coins, but did not blame Kumagai personally for the alleged theft. (3ER:449.)

Ashjian and Jessop allegedly discovered the missing currency and coins in September 2013. (2ER:164-165, 232.) They had legal representation. (2ER:165.) Yet they did not file this suit until February 26, 2015. (3ER:522.) That was after Kumagai was arrested for an unrelated incident. (2ER:37.)

This Court need not reach the questions of whether a theft actually took place, or, if it did, whether the Officers committed it. But when analyzing the qualified immunity issues, it may keep in mind that the evidence the alleged misconduct took place is, at best, questionable.

5.0. Conclusion

Jessop and Ashjian's brief fails to establish that the Officers violated clearly-established Constitutional rights. If their accusations of wrongdoing were true (which the Officers deny), they might state a claim under California law. But the existence of a Fourth Amendment or substantive due process claim is, at best, controverted. The opening brief fails to show binding precedent or a robust consensus clearly establishing the rules they advocate. The District Court's grant of summary judgment, based on qualified immunity, should therefore be affirmed.

DATED: March 9, 2018

POLLAK, VIDA & BARER

By: s/Daniel P. Barer
Daniel P. Barer
Counsel for Defendants and Appellees City of Fresno; Curt Chastain; Tomas Cantu; Derik Kumangai;

6.0. Statement of Related Cases

There are no related cases.

7.0. Certificate of Compliance

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 9,763 words.

DATED: March 9, 2018

POLLAK, VIDA & BARER

By: s/Daniel P. Barer
Daniel P. Barer
Counsel for Defendants and Appellees City of Fresno; Derik Kumangai; Curt Chastain; Tomas Cantu

8.0. Addendum to Brief

State Statutes

8.1. Cal. Penal Code § 186.10
Money laundering; elements; violations; punishment; pleadings

(a) Any person who conducts or attempts to conduct a transaction or more than one transaction within a seven-day period involving a monetary instrument or instruments of a total value exceeding five thousand dollars ($5,000), or a total value exceeding twenty-five thousand dollars ($25,000) within a 30-day period, through one or more financial institutions (1) with the specific intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any criminal activity, or (2) knowing that the monetary instrument represents the proceeds of, or is derived directly or indirectly from the proceeds of, criminal activity, is guilty of the crime of money laundering. The aggregation periods do not create an obligation for financial institutions to record, report, create, or implement tracking systems or otherwise monitor transactions involving monetary instruments in any time period. In consideration of the constitutional right to counsel afforded by the Sixth Amendment to the United States Constitution and Section 15 of Article I of the California Constitution, when a case involves an attorney who accepts a fee for representing a client in a criminal investigation or proceeding, the prosecution shall additionally be required to prove that the monetary instrument was accepted by the attorney with the

intent to disguise or aid in disguising the source of the funds or the nature of the criminal activity.
A violation of this section shall be punished by imprisonment in a county jail for not more than one year or pursuant tosubdivision (h) of Section 1170, by a fine of not more than two hundred fifty thousand dollars ($250,000) or twice the value of the property transacted, whichever is greater, or by both that imprisonment and fine. However, for a second or subsequent conviction for a violation of this section, the maximum fine that may be imposed is five hundred thousand dollars ($500,000) or five times the value of the property transacted, whichever is greater.
(b) Notwithstanding any other law, for purposes of this section, each individual transaction conducted in excess of five thousand dollars ($5,000), each series of transactions conducted within a seven-day period that total in excess of five thousand dollars ($5,000), or each series of transactions conducted within a 30-day period that total in excess of twenty-five thousand dollars ($25,000), shall constitute a separate, punishable offense.
(c)(1) Any person who is punished under subdivision (a) by imprisonment pursuant to subdivision (h) of Section 1170shall also be subject to an additional term of imprisonment pursuant to subdivision (h) of Section 1170 as follows:
(A) If the value of the transaction or transactions exceeds fifty thousand dollars ($50,000) but is less than one hundred fifty thousand dollars ($150,000), the court, in addition to and consecutive to the felony punishment otherwise imposed pursuant to this section, shall impose an additional term of imprisonment of one year.

(B) If the value of the transaction or transactions exceeds one hundred fifty thousand dollars ($150,000) but is less than one million dollars ($1,000,000), the court, in addition to and consecutive to the felony punishment otherwise imposed pursuant to this section, shall impose an additional term of imprisonment of two years.
(C) If the value of the transaction or transactions exceeds one million dollars ($1,000,000), but is less than two million five hundred thousand dollars ($2,500,000), the court, in addition to and consecutive to the felony punishment otherwise imposed pursuant to this section, shall impose an additional term of imprisonment of three years.
(D) If the value of the transaction or transactions exceeds two million five hundred thousand dollars ($2,500,000), the court, in addition to and consecutive to the felony punishment otherwise prescribed by this section, shall impose an additional term of imprisonment of four years.
(2)(A) An additional term of imprisonment as provided for in this subdivision shall not be imposed unless the facts of a transaction or transactions, or attempted transaction or transactions, of a value described in paragraph (1), are charged in the accusatory pleading, and are either admitted to by the defendant or are found to be true by the trier of fact.
(B) An additional term of imprisonment as provided for in this subdivision may be imposed with respect to an accusatory pleading charging multiple violations of this section, regardless of whether any single violation charged in that pleading involves a transaction or attempted transaction of a value covered by paragraph (1), if the violations charged

in that pleading arise from a common scheme or plan and the aggregate value of the alleged transactions or attempted transactions is of a value covered by paragraph (1).
(d) All pleadings under this section shall remain subject to the rules of joinder and severance stated in Section 954.

8.2. Cal. Penal Code § 330a

Slot machines; card dice; dice of more than six faces; possession or permitting within building; punishment; subsequent offenses; offenses involving multiple machines or locations

(a) Every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any slot or card machine, contrivance, appliance or mechanical device, upon the result of action of which money or other valuable thing is staked or hazarded, and which is operated, or played, by placing or depositing therein any coins, checks, slugs, balls, or other articles or device, or in any other manner and by means whereof, or as a result of the operation of which any merchandise, money, representative or articles of value, checks, or tokens, redeemable in or exchangeable for money or any other thing of value, is won or lost, or taken from or obtained from the machine, when the result of action or

operation of the machine, contrivance, appliance, or mechanical device is dependent upon hazard or chance, and every person, who has in his or her possession or under his or her control, either as owner, lessee, agent, employee, mortgagee, or otherwise, or who permits to be placed, maintained, or kept in any room, space, inclosure, or building owned, leased, or occupied by him or her, or under his or her management or control, any card dice, or any dice having more than six faces or bases each, upon the result of action of which any money or other valuable thing is staked or hazarded, or as a result of the operation of which any merchandise, money, representative or article of value, check or token, redeemable in or exchangeable for money or any other thing of value, is won or lost or taken, when the result of action or operation of the dice is dependent upon hazard or chance, is guilty of a misdemeanor.

(b) A first violation of this section shall be punishable by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(c) A second offense shall be punishable by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(d) A third or subsequent offense shall be punishable by a fine of not less than ten thousand dollars ($10,000) nor more than twenty-five thousand dollars ($25,000), or by imprisonment in

a county jail not exceeding one year, or by both that fine and imprisonment.
(e) If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) shall be imposed per machine and per location.

8.3. Cal. Penal Code § 330b

Slot machines or devices; manufacture, repair, ownership, possession, sale, transportation, etc. prohibited; interstate commerce; tribal gaming; definition; punishment; subsequent offenses; offenses involving multiple machines or locations
(a) It is unlawful for any person to manufacture, repair, own, store, possess, sell, rent, lease, let on shares, lend or give away, transport, or expose for sale or lease, or to offer to repair, sell, rent, lease, let on shares, lend or give away, or permit the operation, placement, maintenance, or keeping of, in any place, room, space, or building owned, leased, or occupied, managed, or controlled by that person, any slot machine or device, as defined in this section.
It is unlawful for any person to make or to permit the making of an agreement with another person regarding any slot machine or device, by which the user of the slot machine or device, as a result of the element of hazard or chance or other unpredictable outcome, may become entitled to receive money, credit, allowance, or other thing of value or additional chance or right to use the slot machine or device, or to receive any check, slug, token, or

memorandum entitling the holder to receive money, credit, allowance, or other thing of value.
(b) The limitations of subdivision (a), insofar as they relate to owning, storing, possessing, or transporting any slot machine or device, do not apply to any slot machine or device located upon or being transported by any vessel regularly operated and engaged in interstate or foreign commerce, so long as the slot machine or device is located in a locked compartment of the vessel, is not accessible for use, and is not used or operated within the territorial jurisdiction of this state.
(c) The limitations of subdivision (a) do not apply to a manufacturer's business activities that are conducted in accordance with the terms of a license issued by a tribal gaming agency pursuant to the tribal-state gaming compacts entered into in accordance with the Indian Gaming Regulatory Act (18 U.S.C. Sec. 1166 to 1168, inclusive, and 25 U.S.C. Sec. 2701 et seq.).
(d) For purposes of this section, “slot machine or device” means a machine, apparatus, or device that is adapted, or may readily be converted, for use in a way that, as a result of the insertion of any piece of money or coin or other object, or by any other means, the machine or device is caused to operate or may be operated, and by reason of any element of hazard or chance or of other outcome of operation unpredictable by him or her, the user may receive or become entitled to receive any piece of money, credit, allowance, or thing of value, or additional chance or right to use the slot machine or device, or any check, slug, token, or memorandum, whether of value or otherwise, which may be exchanged for any money, credit, allowance, or thing of value, or which

may be given in trade, irrespective of whether it may, apart from any element of hazard or chance or unpredictable outcome of operation, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.
(e) Every person who violates this section is guilty of a misdemeanor.
(1) A first violation of this section shall be punishable by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.
(2) A second offense shall be punishable by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.
(3) A third or subsequent offense shall be punishable by a fine of not less than ten thousand dollars ($10,000) nor more than twenty-five thousand dollars ($25,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.
(4) If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) shall be imposed per machine and per location.
(f) Pinball and other amusement machines or devices, which are predominantly games of skill, whether affording the opportunity of additional chances or free plays or not, are not included within the term slot machine or device, as defined in this section.

8.4. Cal. Penal Code § 330.1

Slot machines or devices; manufacture, ownership, possession, sale, transportation, etc. prohibited; punishment; subsequent offenses; offenses involving multiple machines or locations; definition

(a) Every person who manufactures, owns, stores, keeps, possesses, sells, rents, leases, lets on shares, lends or gives away, transports, or exposes for sale or lease, or offers to sell, rent, lease, let on shares, lend or give away or who permits the operation of or permits to be placed, maintained, used, or kept in any room, space, or building owned, leased, or occupied by him or her or under his or her management or control, any slot machine or device as hereinafter defined, and every person who makes or permits to be made with any person any agreement with reference to any slot machine or device as hereinafter defined, pursuant to which agreement the user thereof, as a result of any element of hazard or chance, may become entitled to receive anything of value or additional chance or right to use that slot machine or device, or to receive any check, slug, token, or memorandum, whether of value or otherwise, entitling the holder to receive anything of value, is guilty of a misdemeanor.
(b) A first violation of this section shall be punishable by a fine of not more than one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.

(c) A second offense shall be punishable by a fine of not less than one thousand dollars ($1,000) nor more than ten thousand dollars ($10,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment.
(d) A third or subsequent offense shall be punishable by a fine of not less than ten thousand dollars ($10,000) nor more than twenty-five thousand dollars ($25,000), or by imprisonment in a county jail not exceeding one year, or by both that fine and imprisonment.
(e) If the offense involved more than one machine or more than one location, an additional fine of not less than one thousand dollars ($1,000) nor more than five thousand dollars ($5,000) shall be imposed per machine and per location.
(f) A slot machine or device within the meaning of Sections 330.1 to 330.5, inclusive, of this code is one that is, or may be, used or operated in such a way that, as a result of the insertion of any piece of money or coin or other object the machine or device is caused to operate or may be operated or played, mechanically, electrically, automatically, or manually, and by reason of any element of hazard or chance, the user may receive or become entitled to receive anything of value or any check, slug, token, or memorandum, whether of value or otherwise, which may be given in trade, or the user may secure additional chances or rights to use such machine or device, irrespective of whether it may, apart from any element of hazard or chance, also sell, deliver, or present some merchandise, indication of weight, entertainment, or other thing of value.

9th Circuit Case Number(s) 17-16756

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Signature (use "s/" format) s/ Daniel P. Barer