IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICAH JESSOP; BRITTAN ASHJIAN,

Plaintiffs - Appellants,

v.

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

Defendants-Appellees.

No. 17-16756

D.C. No. 1:13-cv-00316-DAD-SAB
Eastern District of California, Fresno

APPELLANTS' REPLY BRIEF

Kevin G. Little, Esq.
Law Office of Kevin G. Little
P.O. Box 8656
Fresno, California 93747
Tel. (559) 342-5800
Fax (559) 420-0839
E-Mail: kevin@kevinglittle.com

Attorney for Appellants Micah Jessop and Brittan Ashjian

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INTRODUCTION

Appellants Micah Jessop ("Jessop") and Brittan Ashjian ("Ashjian") hereby succinctly reply as follows to the opposition brief submitted by Appellees Derik Kumagai ("Kumagai"), Tomas Cantu ("Cantu"), Curt Chastain ("Chastain") (collectively "the officers").

ARGUMENT

The Opposition Brief is based upon erroneous premises. First, it repeatedly asserts that the $250,000 in currency and collectible coins were lawfully seized pursuant to the search warrant. *See* Opposition Brief, pp. 14, 45, 51, 71, 83, 86. However, the subject warrant specifically required anything seized be to be retained and held as evidence at the Fresno Police Department. Excerpts of Record ("ER") 273, 276, 286. The record before the Court shows – if construed as required in the light most favoring Jessop and Ashjian -- that this essential term of the warrant was disregarded. The search inventory shows that only $50,942 was booked in evidence, although $131,380 had been seized, and collectible coins and currency worth $125,000 had also been taken. ER 177, 217, 233, 241, 306-308. Flagrant disregard for the terms of a search warrant violates the Fourth Amendment. *See United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985); *United States v. Ewain*, 88 F.3d 689,

694 (9th Cir. 1996); *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982); *United States v. Chen*, 979 F.2d 714, 717 (9th Cir. 1992); *see also United States v. Medlin*, 842 F.2d 1194, 1198-99 (10th Cir. 1988) (officers' "flagrant disregard" for terms of warrant renders entire search illegal, even though the warrant was validly issued and some of evidence seized complied with the warrant). It is therefore absurd to contend that a theft under the guise of a search – in blatant disregard of the requirement that the evidence seized be booked in evidence rather than kept for personal gain – was "in accordance" with the issued warrant.

The Opposition Brief also contends that it is unsettled whether the theft of property by law enforcement under the guise of a warrant violates the Fourth Amendment. However, "[a]n officer's conduct in executing a search is subject to the Fourth Amendment's mandate of reasonableness from the moment of the officer's entry until the moment of departure." *San Jose Charter of Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 971 (9th Cir. 2005) (quoting *Lawmaster v. Ward*, 125 F.3d 1341, 1349 (10th Cir. 1997)); *see also United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) ("In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution." (emphasis added)). Thus, behavior or actions "beyond that necessary to execute [the] warrant[s] effectively,

violates the Fourth Amendment." *San Jose*, 402 F.3d at 971 (quoting *Liston v. Cnty. of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997)). What could be more unreasonable than stealing a citizen's property under color of law?

The theft of property pursuant to an ostensible warrant was in fact the very inspiration for the Fourth Amendment. The colonial writ of assistance, which frequently enabled public officials to engage in unsupervised general searches for their own enrichment, was the principal evil that the Fourth Amendment was intended to prevent. *See Stanford v. Texas*, 379 U.S. 476, 481 (1965) ("Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists."). Indeed, the very text of the Fourth Amendment, specifically its guarantee of the right of citizens to be "secure in their persons, houses, and papers," prohibits the misconduct that occurred in this case. Any seizure of property without a warrant — or, in this case, in flagrant disregard of the terms of a warrant — that meaningfully interferes with an individual's possessory interest is *per se* unconstitutional. *See Soldal v. Cook County, Ill.*, 506 U.S. 56, 61 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)); *Horton v. California*, 496 U.S. 128, 134 (1990); *Illinois v. McArthur*, 531 U.S. 326, 330 (2001).

The Opposition Brief also goes to great lengths to argue that the officers who

committed misconduct here are protected by qualified immunity. *See* Opposition Brief, pp. 52-86. The crucial question for qualified immunity purposes is if applicable law gave the officers fair warning that stealing during a search was unconstitutional or in violation of controlling federal statutory law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). As shown above, it was well established that officers could not blatantly disregard the terms of a warrant, execute a warrant in a manner that unreasonably infringed on a citizen's possessory interests, and could not use the guise of a warrant to steal from citizens. Additionally, government officials are also not entitled to qualified immunity if pertinent statutory law proscribes their misconduct, and 18 U.S.C. § 242 has frequently been used to prosecute theft by police officers. *See United States v. Sease*, 659 F.3d 519, 524–25 (6th Cir. 2011); *United States v. Alonso*, 740 F.2d 862, 872-873 & n.8 (11th Cir. 1984), *cert. denied*, 469 U.S. 1166 (1985); *United States v. Albert*, 595 F.2d 283, 285 (5th Cir. 1979); *United States v. McClean*, 528 F.2d 1250, 1255-1256 (2d Cir. 1976); *United States v. Ferguson*, 377 F. App'x 718, 718 (9th Cir. 2010) (All involving federal prosecutions of officers who stole from citizens under color of law). Because qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 343 (1986), the officers are clearly not entitled to qualified immunity for stealing more than $250,000 from Jessop and

Ashjian.

In sum, because no reasonable officer would think that stealing personal property while executing a search warrant was lawful, the district court's grant of qualified immunity was erroneous and requires reversal.

CONCLUSION

Based on the foregoing and the arguments set forth in Appellant's Opening Brief, and the record in the light most favoring Jessop and Ashjian, reversal is warranted. This matter should be remanded for trial.

Respectfully submitted,

Dated: April 29, 2018

KEVIN G. LITTLE
LAW OFFICE OF KEVIN G. LITTLE
Post Office Box 8656
Fresno, California 93747
Telephone: (559) 342-5800
Facsimile: (559) 420-0839
E-Mail: kevin@kevinglittle.com

By /s/ Kevin G. Little
Kevin G. Little

Attorneys for the Appellants Micah Jessop and Brittan Ashjian

BRIEF FORMAT CERTIFICATION

Pursuant to Circuit Rule 32(a)(7), I certify that the opening brief is proportionately spaced, has a typeface of 14 points or more and contains 1,227 words.

Date: April 29, 2018

/s/ Kevin G. Little
Kevin G. Little

STATEMENT OF RELATED CASES

There are no cases related to the present case now before this Court.

Date: April 29, 2018

/s/ Kevin G. Little
Kevin G. Little

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that this document has been served in accordance with the Federal Rules of Appellate Procedure and Local Rules of this Court to: Daniel P. Barer, Esq., Pollak, Vida & Barer, 11150 West Olympic Blvd., Suite 900, Los Angeles, California 90064.

Date: April 29, 2018

/s/ Kevin G. Little
Kevin G. Little

CERTIFICATION OF SAMENESS

I HEREBY CERTIFY that the foregoing brief is identical to that which was filed electronically on April 29, 2018.

Date: April 29, 2018

/s/ Kevin G. Little
Kevin G. Little