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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ABDULLAH AL-KIDD, Plaintiff, v. ALBERTO GONZALES, Attorney General of the United States; JOHN ASHCROFT, Former Attorney General of the United States; ROBERT MUELLER, Director of the Federal Bureau of Investigation; MICHAEL CHERTOFF, Secretary of the Department of Homeland Security; JAMES DUNNING, Sheriff for the City of Alexandria; DENNIS CALLAHAN, Former Warden, Oklahoma Federal Transfer Center; VAUGHN KILLEEN, Former Sheriff of Ada County; FBI Agents MICHAEL JAMES GNECKOW, SCOTT MACE; UNITED STATES DEPARTMENT OF JUSTICE; UNITED STATES DEPARTMENT OF HOMELAND SECURITY; FEDERAL BUREAU OF INVESTIGATION; TERRORIST SCREENING CENTER; DONNA BUCELLA, Director of the Terrorist Screening Center; UNITED STATES; JOHN DOES 1-25, Defendants.	Case No. 1:05-cv-093-EJL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS

Following September 11, 2001, the Federal Bureau of Investigation (FBI) conducted an anti-terrorism investigation in Idaho.[1] Am. Compl. ¶¶ 43-46. FBI agents engaged in surveillance of Abdullah al-Kidd, plaintiff in the instant civil action, during the course of this terrorism

[1] Defendants have accepted, as true for purposes of the instant motion only, all well-pleaded allegations in the amended complaint.

investigation. *Id.* ¶ 44. Sami Omar Al-Hussayen, a graduate student at the University of Idaho, was subsequently charged with visa fraud and making false statements. *Id.* ¶ 45.

On March 14, 2003, the U.S. Attorney's Office for the District of Idaho sought a material witness warrant in order to secure plaintiff's presence at Al-Hussayen's criminal proceedings. Am. Compl., Ex. A. U.S. Magistrate Judge Mikel H. Williams granted the warrant application, and, two days later, FBI agents arrested plaintiff at Dulles International Airport in Virginia as he prepared to leave for a flight that terminated in Saudi Arabia. Am. Compl. ¶¶ 47, 65. After his arrest, plaintiff was detained at the Alexandria Detention Center in Virginia, the Federal Transfer Center (FTC) in Oklahoma, and, finally, the Ada County Jail in Boise, Idaho. *Id.* ¶ 70.

Plaintiff made an initial appearance before this Court on March 25, 2003, and a subsequent appearance on March 31, 2003. *United States v. Al-Hussayen*, 3:03-cr-00048-EJL-ALL, Docket Nos. 41, 45. After plaintiff, represented by counsel, had an opportunity to present his concerns and "the government" proposed that plaintiff be released from custody, this Court entered an order on March 31, 2003 providing for plaintiff's release under certain conditions. *See id.*; Am. Compl. ¶¶ 9, 102, 103. The conditions of release included that plaintiff reside with his wife and her parents in Nevada, that he relinquish his passport, and that he limit his travel to Nevada and three other nearby states. *Id.* ¶ 103. These conditions were lifted approximately thirteen months after plaintiff's release from custody. *Id.* ¶ 104.

On March 15, 2005, al-Kidd filed the instant civil action, which he amended on November 18, 2005. Plaintiff alleges that his arrest, detention, and conditions of confinement violated the Fourth and Fifth Amendments to the United States Constitution; the Bail Reform Act, 18 U.S.C. § 3142; and the "material witness statute," 18 U.S.C. § 3144. He seeks

compensatory and punitive damages, the expungement of his arrest record, and a declaration that the federal defendants violated his rights. He names former Attorney General John Ashcroft, retired Bureau of Prisons (BOP) Warden Dennis Callahan, and FBI Special Agents Scott Mace and Michael Gneckow as defendants in their individual capacity. Plaintiff alleges that defendants Mace and Gneckow submitted a factually incorrect affidavit in support of the material witness warrant for his arrest and that defendant Callahan oversaw the imposition of unlawful conditions of confinement against him. Plaintiff sues defendant Ashcroft for allegedly adopting unspecified policies or practices that resulted in his unlawful arrest and confinement. Plaintiff seeks damages from these individuals under *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).[2]

The claims against the individual defendants should be dismissed for the following reasons: (1) this Court lacks personal jurisdiction to adjudicate any of the claims against Ashcroft and Callahan; (2) Ashcroft is entitled to absolute immunity as to his alleged actions in securing the material witness warrant against plaintiff because such conduct was part of his prosecutorial function as Attorney General; (3) Ashcroft, Mace, and Gneckow are entitled to qualified immunity as to their alleged actions in securing the warrant because it was properly issued based on probable cause or at least arguable probable cause; (4) Ashcroft is entitled to qualified immunity on the warrant claim for the additional reason that plaintiff has failed to properly allege his personal involvement in the decision to seek the warrant; (5) Ashcroft and Callahan are

[2] The claims asserted against the remaining defendants, who are either federal agencies or federal employees named in their official capacity, are addressed in a separately filed motion to dismiss or, in the alternative, for summary judgment submitted on behalf of the United States. *See generally Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (claim asserted against federal employee in his official capacity should be treated as a claim against the United States).

entitled to qualified immunity on plaintiff's unlawful conditions of confinement claim because plaintiff has failed to allege any personal involvement in the creation or enforcement of these purported conditions; (6) all of the defendants are entitled to dismissal of plaintiff's claims under 18 U.S.C. §§ 3142 and 3144 because neither provision creates a private right of action.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over Ashcroft and Callahan

Plaintiff bears the burden of demonstrating that personal jurisdiction exists over individually named defendants sued for damages in constitutional tort actions. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); *Lake v. Lake*, 817 F.2d 1416, 1420 (9th Cir. 1987); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir. 1985). He must show that the exercise of personal jurisdiction is consistent with the constitutional requirements of due process. *Schwarzenegger*, 374 F.3d at 800; *Lake*, 817 F.2d at 1420.[3] The amended complaint fails to make such a showing as to Ashcroft and Callahan in this case.

The Due Process Clause allows a court to exercise general or specific jurisdiction over a defendant. *Lake*, 817 F.2d at 1420. General jurisdiction is appropriate "[i]f the defendant's activities and contacts with the forum state are substantial, continuous, or systematic." *National Union Fire Ins. Co.*, 259 F. Supp. 2d at 1103; *accord Schwarzenegger*, 374 F.3d at 801. The amended complaint does not establish general jurisdiction as to Ashcroft or Callahan because

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[3] The assertion of jurisdiction over a non-resident defendant requires compliance with both the forum state's long-arm statute (Idaho Code § 5-514) and the Due Process Clause of the U.S. Constitution. *Lake*, 817 F.2d at 1420; *National Union Fire Ins. Co. v. Aerohawk Aviation, Inc.*, 259 F. Supp. 2d 1096, 1101 (D. Idaho 2003). In Idaho, these limits are coextensive, so any exercise of jurisdiction must be in accordance with constitutional principles of due process. *Lake*, 817 F.2d at 1420; *Schwarzenegger*, 374 F.3d at 801-02.

there is no allegation that either ever resided in Idaho or otherwise had any continuous or systematic contacts with this State.

To establish specific jurisdiction, plaintiff must show that the defendant had "minimum contacts" with the forum that are sufficiently related to his claim "such that the maintenance of the action does not offend the 'traditional notions of fair play and substantial justice.'" *Lake*, 817 F.2d at 1420 (citation omitted). To accomplish this, plaintiff must demonstrate that each defendant "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Schwarzenegger*, 374 F.3d at 805; *Lake*, 817 F.2d at 1421. Plaintiff cannot make that showing here.

The amended complaint does not allege that Ashcroft committed an intentional act that was directly aimed at plaintiff or Idaho. Instead, it alleges only that Ashcroft had "ultimate responsibility" for the Department of Justice. Am. Compl. ¶ 23. Service as a senior federal official, even when it includes authority over government employees acting in every state, does not create minimum contacts with each and every state. *See Wag-Aero, Inc. v. United States*, 837 F. Supp. 1479, 1485 (E.D. Wis. 1993) ("When federal agency heads are not alleged to have been directly and actively involved in activities in the forum state, many courts have refused to exercise personal jurisdiction over them."); *cf. Grove Press, Inc. v. Angleton*, 649 F.2d 121, 123 (2d Cir. 1981) (finding personal jurisdiction lacking over a former CIA Director where CIA agents in New York were "simply United States employees acting as agents for the United States government"); *Green v. McCall*, 710 F.2d 29, 33-34 (2d Cir. 1983) (holding that personal jurisdiction could not be established over U.S. Parole Commissioners where hearing examiners in Connecticut were merely acting as agents for the government). "If a federal agency head could

be sued personally in any district within his or her official authority merely for supervising acts of subordinates . . . , the minimum contacts requirement would be rendered meaningless." *Wag-Aero, Inc.*, 837 F. Supp. at 1485.

The allegation that Ashcroft was the "principal architect" of policies that he knew "would foreseeably result in the unlawful arrest and detention of material witnesses," Am. Compl. ¶¶ 137-38, is similarly unavailing. As an initial matter, there is no question that the decision to seek the material witness warrant was an independent judgment of Kim Lindquist, an Assistant United States Attorney in this district and the lead prosecutor in the Al-Hussayen case. AUSA Lindquist makes clear in his attached declaration that he decided to apply for the material witness warrant for plaintiff based solely upon his own assessment of the facts of the case and the applicable legal standard. Ex. 1, Lindquist Declaration, ¶ 5.[4] His decision was not made pursuant to any perceived instructions, policies, or practices of the Justice Department, let alone of former Attorney General Ashcroft personally. *Id.* ¶¶ 6, 7.

Even setting aside Lindquist's declaration and assuming for the purposes of this motion that Ashcroft formulated some general policy related to plaintiff's arrest, that would not be a sufficient basis for this Court to exercise personal jurisdiction over him. The mere promulgation of a general policy by a senior federal official does not create minimum contacts in every forum in which the policy is enforced. *See Vu v. Meese*, 755 F. Supp. 1375, 1377-78 (E.D. La. 1991) (recognizing that "the fact that federal government officials enforce federal laws and policies on

[4] Consideration of Lindquist's affidavit does not convert this motion to dismiss to a motion for summary judgment: "Motions to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(2) are speaking motions and it is appropriate to look beyond the pleadings to affidavits and other evidence when considering them." *National Union Fire Ins. Co.*, 259 F. Supp. 2d at 1101.

a nationwide basis is not sufficient in and of itself to maintain personal jurisdiction in a lawsuit which seeks money damages against those same government officials in their individual capacities"). To establish specific jurisdiction, a plaintiff must allege more than the mere occurrence of "a foreign act with foreseeable effects in the forum state." *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2004); *accord Schwarzenegger*, 374 F.3d at 805. There must be "express aiming" of the alleged action giving rise to the claim, either "at a plaintiff whom the defendant knows to be a resident of the forum state," *Bancroft & Masters, Inc.*, 223 F.3d at 1087, or at the forum state itself, *Schwarzenegger*, 374 F.3d at 806-07.

Here, the amended complaint asserts that Ashcroft "knew or reasonably should have known that the manner in which the material witness statute was being used would foreseeably result in the unlawful arrest and detention of material witnesses (such as Mr. al-Kidd)." Am. Compl. ¶ 138. It does not contend that Ashcroft directed federal officers to obtain a material witness warrant for plaintiff or that Ashcroft in any other way specifically targeted him for detention. Indeed, plaintiff does not maintain that Ashcroft even knew of his existence, much less of his residence in Idaho. The absence of any allegation that Ashcroft expressly aimed "his post-9/11 material witness policies and practices," *id.* ¶ 109, at plaintiff or the forum state confirms that the Court lacks personal jurisdiction over Ashcroft. *See Schwarzenegger*, 374 F.3d at 806-07; *Bancroft & Masters, Inc.*, 223 F.3d at 1087.

Plaintiff's allegations regarding his allegedly unlawful conditions of confinement are similarly incapable of establishing personal jurisdiction over Ashcroft and Callahan. Plaintiff has alleged no actions whatsoever by Ashcroft – related to this jurisdiction or otherwise – that could demonstrate his involvement in deciding how or where plaintiff would be confined after he was

taken into custody. Nor has plaintiff alleged any action by Callahan related to his conditions of confinement. The only allegation as to Callahan is that he once served as warden of the Federal Transfer Center in Oklahoma, a facility where plaintiff was briefly detained in March 2003. However, Callahan did not become the warden at the Oklahoma FTC until June 15, 2003, months after plaintiff had been transferred to Idaho. Ex. 2, Callahan Declaration ¶ 4. Callahan was serving as the warden at the Federal Correctional Institute in Loretto, Pennsylvania during plaintiff's alleged detention at the Oklahoma FTC. Even had Callahan been the warden at the Oklahoma FTC during plaintiff's stay there, that would not constitute any meaningful contact with this district. Since Callahan had no connection to plaintiff or his alleged injuries in this district, there is no basis for this Court to assert jurisdiction over him.

II. Ashcroft Is Entitled to Absolute Prosecutorial Immunity As To Plaintiff's Claim Based On His Arrest Under The Material Witness Warrant

Absolute immunity protects prosecutors and their supervisors for acts that are "intimately associated with the judicial phase of the criminal process." *Genzler v. Longanbach*, 410 F.3d 630, 643-44 (9th Cir.) (quotation and citation omitted), *cert. denied*, 128 S. Ct. 736 (2005). The primary purpose behind this immunity is to ensure independent prosecutorial decisionmaking. *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir. 1986). In order to serve that purpose, the Ninth Circuit broadly construes the scope of prosecutorial immunity. *Id.*

Absolute immunity is available based on the nature of the function performed by the prosecutor. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). "If the action was part of the judicial process, the prosecutor is entitled to the protection of absolute immunity whether or not he or she violated the . . . plaintiff's constitutional rights." *Broam v. Bogan*, 320 F.3d 1023, 1029 (9th Cir. 2003). In assessing whether conduct is part of the judicial process for immunity purposes, a

court should look at the prosecutor's "ultimate acts," without regard to his subjective intentions. *Ashelman*, 793 F.2d at 1078; *Genzler*, 410 F.3d at 637 (citing *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)) (a prosecutor acting as an advocate is absolutely immune even where he maliciously initiates a prosecution, uses perjured testimony at trial, and suppresses material evidence at trial). The doctrine also covers a wide range of prosecutorial activity. Provided that the individual was functioning as a prosecutor, he may claim prosecutorial immunity even for "'actions preliminary to the initiation of a prosecution and actions apart from the courtroom.'" *Buckley v. Fitzsimmons*, 509 U.S. 259, 272-73 (1993) (quoting *Imbler*, 424 U.S. at 431 n.33).

Against this backdrop, a prosecutor who seeks to guarantee the presence of a witness for trial through the use of a material witness warrant is entitled to absolute immunity. *Daniels v. Kieser*, 586 F.2d 64, 68 (7th Cir. 1978); *see also Betts v. Richard*, 726 F.2d 79, 81 (2d Cir. 1984) (finding state prosecutor absolutely immune for obtaining a *capias* to secure the presence of a witness at trial); *White v. Gerbitz*, 860 F.2d 661, 665 n.4 (6th Cir. 1988) (noting that if plaintiff had not waived his claims, the court would have afforded the prosecutors absolute immunity for arresting and incarcerating the plaintiff as a material witness); *DeBoer v. Martin*, 537 F. Supp. 1159, 1163 (N.D. Ill. 1982) (finding prosecutors absolutely immune for causing arrest warrant and subpoenas to be issued for trial witness); *cf. Hamilton v. Daley*, 777 F.2d 1207, 1212-13 (7th Cir. 1985) (recognizing in the attorney's fees context that a claim for securing the attendance of a witness for trial is barred under *Imbler*).[5]

In the present case, plaintiff alleges that the "United States Attorney's Office submitted

[5] The Ninth Circuit also has recognized in an unpublished opinion that prosecutors are entitled to absolute immunity for seeking to secure testimony through the arrest of a witness. *McBeth v. Novak*, 1999 WL 980481, at *1 (9th Cir. October 18, 1999).

an application" for his arrest as a material witness. Am. Compl. ¶ 46. However, plaintiff did not name any of the front-line prosecutors as defendants, apparently recognizing their entitlement to prosecutorial immunity. Plaintiff instead attempted to circumvent the immunity defense by naming former Attorney General Ashcroft as the allegedly responsible party. Plaintiff cannot defeat prosecutorial immunity through such a maneuver.

To the extent that plaintiff alleges that Ashcroft played any role whatsoever in either his arrest pursuant to the material witness warrant or the prosecution of Al-Hussayen, those actions would have been taken by him in his former prosecutorial capacity. There is no question that the Attorney General is protected by absolute immunity to the same extent as front-line prosecutors when he acts in a prosecutorial capacity. *See Dellums v. Powell*, 660 F.2d 802, 806 n.13 (D.C. Cir. 1981) ("So long as the Attorney General is initiating or instituting a prosecution, he is absolutely immune."); *accord Genzler*, 410 F.3d at 644 (concluding that supervisory prosecutors are entitled to absolute immunity for "advocacy intimately associated with the judicial phase of the criminal process") (quotation and citation omitted). Absolute immunity for prosecutors would be meaningless if plaintiffs could simply bypass its protections by recovering damages from the prosecutors' supervisors. *See, e.g., Bodie v. Morgenthau*, 342 F. Supp. 2d 193, 205 (S.D.N.Y. 2004) ("'To the extent the supervision or policies concern the prosecutorial decisions for which the [assistant district attorneys] have absolute immunity, then those derivative allegations against supervisors must also be dismissed on the ground that the supervising district attorneys have absolute immunity for the prosecution-related decisions of their subordinates").

Plaintiff cannot defeat prosecutorial immunity by casting Ashcroft as a policymaker rather than as a prosecutor. *See Eisenberg v. Dist. Attorney of the County of Kings*, 847 F. Supp.

1029, 1037 (E.D.N.Y. 1994) ("Plaintiff's mere characterization of the District Attorney's prosecutorial decision-making as 'policy' does not remove it from the ambit of absolute immunity."). An official is absolutely immune from claims originating out of his promulgation of a general prosecutorial policy. *Haynesworth v. Miller*, 820 F.2d 1245, 1268-69 (D.C. Cir. 1987); *Roe v. City & County of San Francisco*, 109 F.3d 578, 583-84 (9th Cir. 1997) (citing *Haynesworth* in finding prosecutor entitled to absolute immunity for decision not to prosecute "a whole line of cases"); *Bortello v. Gammick*, 413 F.3d 971, 976 (9th Cir. 2005) (citing *Roe* in finding prosecutors entitled to absolute immunity for decision not to prosecute "group of cases"); *Watson v. Sandpoint Police Dep't*, 2005 WL 2847441, at *2 (D. Idaho Oct. 3, 2005) (J. Lodge) ("Even a 'policy' that bears on whether to file or dismiss a charge falls within the absolute immunity protection.").[6] That rule makes sense, as any claim that the Attorney General created a policy that resulted in federal prosecutors seeking a material witness warrant in connection with an ongoing criminal prosecution clearly describes conduct that is intimately associated with the judicial process. *See, e.g., Haynesworth*, 820 F.2d at 1268-69; *Roe*, 109 F.3d at 583-84; *Bortello*, 413 F.3d at 976.[7] Accordingly, Ashcroft is entitled to absolute immunity as to plaintiff's *Bivens* claims as they relate to the decision to obtain the material witness warrant.

III. The Federal Defendants Are Entitled To Qualified Immunity

Government officials are "shielded from liability for civil damages if their actions did not

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[6] The Ninth Circuit does not recognize a "'meaningful distinction between a decision on prosecution in a single instance and decisions on prosecutions formulated as a policy for general application.'" *Roe*, 109 F.3d at 583 (quoting *Haynesworth*, 820 F.2d at 1269).

[7] At the time the material witness warrant was issued for plaintiff, the criminal defendant in the underlying case, Al-Hussayen, had been indicted and a trial date was set for April 15, 2003. *See United States v. Al-Hussayen*, 3:03-cr-00048-EJL-ALL, Docket Nos. 1 & 13.

violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The privilege is an immunity from suit rather than a mere defense to liability." *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (quotation and citation omitted). Qualified immunity protects government officials because individual capacity suits "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). To minimize those social costs, the Supreme Court has repeatedly stressed that courts should apply qualified immunity "at the earliest possible stage of litigation." *Saucier*, 533 U.S. at 201 (quotation and citation omitted). If a complaint fails to state a claim sufficient to overcome qualified immunity, the court should dismiss the action under Rule 12(b)(6) at the outset, without allowing discovery. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to a dismissal before the commencement of discovery."); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

"The threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation." *Hope*, 536 U.S. at 736. "[T]he next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739 (quotation and citation omitted). The Supreme Court has explained that the

standard of liability is so high that it protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *see also Hope*, 536 U.S. at 741 (noting that the "salient question" that a court must answer when making this inquiry is whether the state of the law at the time of the incident gave the officer "fair warning" that his alleged treatment of the plaintiff was unconstitutional). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in light of the pre-existing law the unlawfulness must be apparent." *Id.* at 739 (quotation and citation omitted). Also, the plaintiff bears the burden of showing that the law was clearly established at the time of the alleged constitutional violation. *Alford v. Haner*, 333 F.3d 972, 977 (9th Cir. 2003).

The gist of plaintiff's Fourth Amendment claim here is that he was arrested because Mace and Gneckow "submitted a facially invalid affidavit." Am. Compl. ¶ 59. Plaintiff offers three reasons why the warrant was invalid: (1) Mace and Gneckow knew or should have known that it was not supported by probable cause, *id.* ¶ 50; (2) Mace and Gneckow knew or should have known that the affidavit contained "false, material information," *id.* ¶ 52, and omitted other "material information," *id*., ¶ 59; and (3) Mace and Gneckow sought the material witness warrant "for the purpose of detaining [plaintiff] preventively and/ or for the purpose of further investigating [plaintiff] for possible criminal wrongdoing." *Id.* ¶ 56. None of these allegations,

which are addressed in turn below, is remotely sufficient to overcome qualified immunity.[8]

A. Affidavit, on its Face, Established Probable Cause for Plaintiff's Arrest Pursuant to a Material Witness Warrant

In *Illinois v. Gates*, 462 U.S. 213 (1983), the Supreme Court adopted a highly flexible "totality of the circumstances" analysis to determine whether probable cause existed to support the issuance of a warrant. At the core of this analysis is the rejection of "rigid legal rules" in favor of a "commonsense" perspective that is "practical [and] nontechnical." *Id.* at 230-36. In undertaking that analysis, the duty of the reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing] that probable cause existed." *Id.* at 238-39. This highly deferential standard of review begins with a "presumption of validity," *Franks v. Delaware*, 438 U.S. 154, 171 (1978), and requires that "doubtful or marginal cases" be resolved in favor of the magistrate's finding of probable cause. *Gates*, 462 U.S. at 236 & 237 n.10 (magistrate's finding of probable cause is entitled to "great deference").

The defendants are immune from liability if they acted with "arguable" probable cause in seeking the warrant. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*) (finding that qualified immunity protects defendants if they "'reasonably but mistakenly conclude[d] that probable cause [was] present'"); *Kephart v. City of Bakersfield*, 2005 WL 1704463, at *23 (E.D.

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[8] Plaintiff contends that he also can assert a Fifth Amendment due process claim based on the same allegations. *See* Am. Compl. ¶ 157. It is hornbook law, however, that "claims arising before or during arrest are to be analyzed exclusively under the fourth amendment's reasonableness standard rather than the substantive due process standard." *Fontana v. Haskin*, 262 F.3d 871, 881 (9th Cir. 2001); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989). Where "'a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.'" *Fontana*, 262 F.3d at 882 (citing *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998)).

Cal. July 16, 2005) ("The qualified immunity question does not depend on whether probable cause actually existed."). Thus, a court can find that an officer made an arrest without probable cause, but nevertheless decide that, since it is unclear whether an objectively reasonable officer could have believed probable cause existed, the arresting officer is still entitled to qualified immunity. *See Lombardi v. City of El Cajon*, 117 F.3d 1117, 1126 (9th Cir. 1997) (where "materiality may not have been clear at the time the officer decided what to include in, and what to exclude from, the affidavit . . . the shield of qualified immunity should not be lost").

Plaintiff here has challenged the probable cause determination based on the facts set forth in the affidavit filed in support of the material witness warrant application that resulted in his arrest. The material witness statute, 18 U.S.C. § 3144, authorizes the arrest of a potential witness to secure testimony in a criminal proceeding when two requirements are satisfied. First, the party seeking the warrant must show by affidavit that there is probable cause to conclude that the testimony of the witness will be "material in a criminal proceeding." *See United States v. Awadallah*, 349 F.3d 42, 66 (2d Cir. 2003) (citing 18 U.S.C. § 3144). Second, the party seeking the warrant must show that "it may become impracticable to secure the presence of the ... [witness] by subpoena." 18 U.S.C. § 3144. Both requirements were satisfied in this instance.

1. Materiality of plaintiff's testimony is beyond dispute.

Plaintiff alleges the affidavit was "facially unlawful" because it "wholly failed to establish probable cause to believe that Mr. al-Kidd had testimony that was germane to Al-Hussayen's criminal proceeding." Am. Compl. ¶ 58. That assertion is refuted by the documents submitted to the court in support of the material witness arrest warrant, which established probable cause to conclude that plaintiff could provide material testimony in the prosecution of

Al-Hussayen. Those documents included the materials referenced in the warrant application itself, namely the "Affidavit of Scott Mace . . . , the Indictment filed herein, and the warrant of arrest against the defendant herein." Am. Compl., Ex. A, Warrant Application (hereinafter "Application") at 2. It is appropriate, therefore, to consider those sources now.[9] *See* Wayne R. LaFave, *Search and Seizure*, § 3.2(d) at 49 (4th ed. 2004) (inquiry turns on the record that "was made available to the issuing magistrate before the warrant was issued, including reasonable inferences drawn by the affiant"); *United States v. Rubio*, 727 F.2d 786, 795 (9th Cir. 1984) (any fact unknown to the magistrate at the time of his decision is considered to be outside the "four corners of the warrant affidavit").[10]

The indictment charged Al-Hussayen with nine counts of visa fraud and making false statements. Ex. 3, Indictment of Sami Omar Al-Hussayen (hereinafter "Indictment") at 11-18. These charges arose out of allegations that Al-Hussayen had sought and obtained a student visa for the claimed purpose of pursuing a full course of study at the University of Idaho when in fact

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[9] As the amended complaint refers at length to the probable cause affidavit and even attaches a copy of the warrant application, those documents may be considered in assessing under Rule 12(b)(6) the facial sufficiency of the complaint. *See, e.g., Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), *overruled on other grounds, Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *see also Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06 (9th Cir. 1998).

[10] *See also Owens v. Lott*, 372 F.3d 267, 277 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 876 (2005) ("Our review of whether the search warrant was supported by probable cause – in other words, a review of the facts upon which the issuing magistrate relied – may not go beyond the information actually presented to the magistrate during the warrant application process."); *United States v. Serao*, 367 F.2d 347, 350 (2d Cir. 1966), *vacated on other grounds sub nom. Piccioli v. United States*, 390 U.S. 202 (1968) (holding that it would be "hypertechnical" for a magistrate not to act "upon an entire picture disclosed to him in interrelated affidavits"); *United States v. Taylor*, 716 F.2d 701, 705-06 (9th Cir. 1983) (finding that where "the agent's affidavit incorporated the previous affidavit made by the same agent" the facts set forth in these documents could be considered together to establish probable cause).

he intended to engage in, and later engaged in, unauthorized and undisclosed business activities in the United States. Those alleged activities included Al-Hussayen's service as "the formal registered agent" and "a business associate" for an Islamic organization. Indictment ¶ 17. While serving in that capacity, Al-Hussayen allegedly participated in a series of financial transactions and computer web-site activities with organizations linked to radical Islamic ideologues who advocated terrorism. *See id.* ¶¶ 17, 19, 20.

Plaintiff readily concedes in his complaint that he "worked for the same charitable Islamic organization as Mr. Al-Hussayen for a considerable period of time and received a salary for his work." Am. Compl. ¶ 60. That concession alone demonstrates that there was probable cause to believe that plaintiff could provide material testimony related to Al-Hussayen's involvement in business activities that violated the terms of his student visa.

Plaintiff's concession that he worked with Al-Hussayen parallels the statement in the warrant affidavit that "from March 2000 to November 2001, an individual identified as Abdullah Al-Kidd, a/k/a Lavoni T. Kidd, and/or his spouse, Nadine Zegura, received payments from Sami Omar Al-Hussayen and his associates in excess of $20,000.00." Am. Compl., Ex. A, Aff. ¶ 6. Al-Hussayen's transfer to plaintiff of such a significant sum of money over a limited period of time constituted substantial evidence that Al-Hussayen was not in the United States solely to pursue an academic degree as he had claimed when he obtained a visa. Indictment ¶ 4. It indicated instead that Al-Hussayen – in contravention of his previous certifications to U.S. officials – was involved in business activities, *see id.* ¶ 8; Aff. ¶ 6, and that plaintiff had direct knowledge of at least some of those activities. *See United States v. Feingold*, 416 F. Supp. 627, 628 (E.D.N.Y. 1976) (fact that material witness "signed checks totaling $50,000 to XYZ

Collection Company, of which [defendant] was sole proprietor" supported finding that his testimony would be material to defendant's trial on tax evasion charges).

The indictment also provided evidence that the transactions between Al-Hussayen and plaintiff were part of a larger, more complex financial arrangement. The $20,000 transferred to the plaintiff and/or his wife appeared to be part of Al-Hussayen's receipt and disbursement of "approximately $300,000.00" over a six-year period. Indictment ¶ 23. Al-Hussayen allegedly disbursed some of these funds to the Islamic Assembly of North America (IANA) and its officers. *Id.* ¶ 24. Plaintiff seemed to share at least some of Al-Hussayen's ties to the IANA. For instance, plaintiff had been observed cleaning out a storage locker in which he left behind a few relevant items, including a program for a previous IANA conference and telephone numbers for both the IANA and its former director, Basem Khafagi. Aff. ¶ 6.

The indictment also alleged that Al-Hussayen had disbursed some funds to pay for travel to Middle Eastern countries "for other individuals, including travel related to IANA." Indictment ¶ 27. That allegation presented another potential link between Al-Hussayen and plaintiff. Plaintiff had recently traveled to Sana'a, Yemen and, when he returned to Idaho, he met with Al-Hussayen's associates. Aff. at ¶ 6. Plaintiff also had scheduled expensive travel to Saudi Arabia. *Id.* ¶¶ 6, 7. Based on all those facts, there was probable cause to believe that plaintiff could offer testimony that would be material to at least some of Al-Hussayen's "business activities," most notably his disbursements of thousands of dollars to individuals affiliated with IANA. Those facts satisfied the materiality requirement in 18 U.S.C. § 3144.

2. Affidavit established probable cause to believe that plaintiff was a flight risk.

The other requirement under the material witness warrant statute – that parties seeking a

material witness warrant must "show probable cause to believe that it is or may be impracticable to rely on a subpoena to get the witness before the grand jury" – is also satisfied in this case. 18 U.S.C. § 3144. The courts have found that a material witness may be detained if the government establishes a "risk of flight" by a preponderance of the evidence. *United States v. Rosa-Ortiz*, 348 F.3d 33, 40 (1st Cir. 2003) (citing *United States v. Nai*, 949 F. Supp. 42, 45 (D. Mass. 1996) (collecting cases)); *cf. United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990) (government must establish, by a preponderance of the evidence, the risk of flight by the defendant). In *United States v. Benevolence Int'l Foundation, Inc.*, a case involving a perjury charge filed in connection with a terrorism financing investigation, the court outlined the appropriate framework for determining whether an individual presented a risk of flight. 222 F. Supp. 2d 1005, 1006 (N.D. Ill. 2002). Specifically, a court should "assess (A) the Defendant's mental state (including his motivation to flee) and (B) whether the Defendant has the physical means to flee." *Id*.

Turning first to plaintiff's "mental state," it reasonably appeared that he intended to flee because he had scheduled overseas travel in the aftermath of Al-Hussayen's indictment and arrest. *See* Indictment at 18 (dated February 13, 2003); *United States v. Al-Hussayen*, 3:03-cr-00048-EJL-ALL, Docket No. 11 (arrest warrant for Al-Hussayen executed on February 26, 2003); Aff. ¶ 7 (plaintiff attempted to travel to Saudi Arabia on March 16, 2003).[11] He also chose Saudi Arabia as his destination, a country that did not have an extradition treaty with the

[11] *See United States v. Wang*, 818 F. Supp. 156, 158-59 (E.D. Va. 1993) (based in part on purchase of "an airplane ticket for [defendant's] mother, it appears that defendant [ ] has flight on her mind"); *United States v. Vortis*, 785 F.2d 327, 330 (D.C. Cir. 1986) (relevant to flight risk assessment that defendant was "planning to travel to Liberia for a semi-permanent transfer").

United States.[12] Am. Compl. ¶ 5 (plaintiff was arrested in Virginia at Dulles International Airport, where he was prepared to depart for a flight that terminated in Saudi Arabia).

The nature and circumstances of the underlying investigation made the risk of flight much more significant in this case. Criminal investigations into conspiracies potentially related to international terrorism logically present special flight concerns regarding potential witnesses closely associated with the alleged conspiracy. *See Benevolence Int'l Found., Inc.*, 222 F. Supp. 2d at 1007 (discussing defendant's flight risk in light of "the post 9/11 climate in this country" and "the natural human tendency ... [for an individual under scrutiny for possible involvement in terrorist activities] to apprehensively feel he's in a difficult and opprobrious situation, from which flows an incentive and risk for flight"); *see also United States v. McVeigh*, 940 F. Supp. 1541, 1562 (D. Colo. 1996) (finding that the witness' "renunciation of his U.S. citizenship and his association with Tim McVeigh, a person involved in such a heinous crime, indicates that his testimony cannot be secured through the issuance of a subpoena"). The indictment alleged that Al-Hussayen provided "expert computer services" to a number of web sites, Indictment ¶ 15, some of which disseminated "radical Islamic ideology the purpose of which was indoctrination, recruitment of members, and the instigation of acts of violence and terrorism." *Id.* ¶ 17. Although Al-Hussayen was indicted for visa fraud, this alleged criminal act occurred in the context of alleged efforts to finance and support Islamic terrorism. Plaintiff was well aware at the time of both the nature of the investigation and the FBI's interest in him. He alleges that the FBI had spoken to him several times prior to Al-Hussayen's arrest, Am. Compl. ¶ 15, and that

[12] *United States v. Almohandis*, 297 F. Supp. 2d 404, 406 n.1 (D. Mass. 2004) ("[t]here is no extradition treaty in place between the United States and Saudi Arabia").

the FBI had conducted surveillance of him "as part of their broad terrorism investigation," *id.* ¶ 44. Considering plaintiff's travel plans, the timing of those plans, his intended destination, his connections to Al-Hussayen, and his knowledge of both the terrorism investigation and the FBI's interest in him, there was clear probable cause to believe that plaintiff had the requisite mental state for a flight risk.

As to plaintiff's physical means of flight, there is no issue in this instance. The warrant affidavit indicated that plaintiff had scheduled travel to Saudi Arabia, and he was arrested at Dulles International Airport as he prepared to leave the United States. Also, the warrant affidavit pointed out that plaintiff and his wife had received over $20,000 from Al-Hussayen and his associates. Aff. ¶ 6. A witness' "access to large sums of money" is relevant to the flight inquiry. *Bacon v. United States*, 449 F.2d 933, 944 (9th Cir. 1971). It also is relevant that Al-Hussayen, a Saudi national, appeared to have an extensive network of contacts in Saudi Arabia. *See* Indictment ¶ 20 (noting ties to a "radical Saudi sheikh"), ¶ 23 (receipt of a monthly stipend from the "Saudi Arabian Government"), ¶ 18 (service as "administrative point of contact" in Idaho for a Saudi Arabian company), ¶ 24 (receipt of wire transfers from Saudi Arabia). An objective officer consequently could conclude quite reasonably that Al-Hussayen would have associates in Saudi Arabia that might be willing to assist plaintiff. *See, e.g., Wang*, 818 F. Supp. at 158-59 (Finding that defendant presented a risk of flight in part because she "has connections with Chinese nationals in the United States who in the past have provided her with significant sums of money. Such connections and resources could easily facilitate defendant Wang's departure from the United States."). Plaintiff also had recently spent nine months in Sana'a, Yemen. Aff. ¶ 6. As an "experienced international traveler," he would have had "little difficulty" fleeing to

Yemen, Saudi Arabia, or any other country without an extradition treaty. *United States v. Seif*, 2001 WL 1415034, at *2 (D. Ariz. Nov. 8, 2001).

B. Plaintiff Cannot State a Claim under *Franks v. Delaware* because even his Redraft of the Affidavit Shows There Was Probable Cause for his Arrest

Plaintiff maintains that the warrant affidavit must be reconsidered now to address what he labels false statements and misleading omissions. In order to state a claim based on such allegations, plaintiff must satisfy two fundamental requirements. First, he must show that Mace and Gneckow either deliberately lied to the court or acted with reckless disregard for the truth in seeking the warrant. *Franks v. Delaware*, 438 U.S. 154, 171 (1978); *Hervey v. Estes*, 65 F.3d 784, 789 (9th Cir. 1995) (a civil rights claim alleging that law enforcement officers misled a magistrate into issuing a warrant must meet the same standards as a criminal defendant making such a claim under *Franks)*. That requirement cannot be satisfied by vague or conclusory assertions. The plaintiff must "point out specifically the portion of the warrant affidavit that is claimed to be false" and must provide "a statement of supporting reasons" for the challenge. *Franks*, 438 U.S. at 171. Only a substantial showing of deliberate falsehood or reckless disregard for the truth will overcome the "presumption of validity with respect to the affidavit supporting" the warrant. *Id*.

To establish reckless disregard for the truth, it must be shown that the law enforcement officer "in fact entertained serious doubts as to the truth of [the] allegations" or, at a minimum, omitted facts from the warrant affidavit that were "'clearly critical' to a finding of probable cause." *Bruning v. Pixler*, 949 F.2d 352, 357 (10th Cir. 1991); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). "Negligence or innocent mistake are insufficient" to challenge a warrant. *Franks*, 438 U.S. at 171. That precludes challenges to warrants based merely upon the

claim that law enforcement officers failed to properly verify essential information or otherwise conducted an inadequate investigation prior to seeking a warrant. *See, e.g., United States v. Miller*, 753 F.2d 1475 (9th Cir. 1985) (holding that failure to verify information provided by an informant does not invalidate a warrant); *United States v. Young Buffalo*, 591 F.2d 506 (9th Cir. 1979) (holding that the failure to determine that the defendant's motorcycle was destroyed before he allegedly used it in a robbery did not invalidate a warrant).

After satisfying the first step in the *Franks* inquiry, a plaintiff must then show that, but for the alleged inclusions or omissions he attacks, the warrant would not have issued. *Hervey*, 65 F.3d at 789; *see also Franks*, 438 U.S. at 171-72. To accomplish this, a plaintiff must prove that the alleged falsehoods and omissions were material to the court's probable cause determination in the sense that they were essential or indispensable to the finding. Once the alleged omissions are considered and the alleged falsehoods are discounted, if there still exists a substantial basis for the court's probable cause finding, the plaintiff cannot prevail on a *Franks* claim. *See Franks*, 438 U.S. at 171-72 (concluding that a challenge to a warrant will fail "if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause"); *Hervey*, 65 F.3d at 789 ("the plaintiff must establish that the remaining information in the affidavit is insufficient to establish probable cause").

1. The material witness warrant would have issued even with the inclusion of the information alleged in the amended complaint.

Plaintiff has identified information omitted from the affidavit that he believes should give rise to a *Franks* claim. *See* Am. Compl. ¶ 15. These alleged omissions have no bearing on the materiality of the testimony plaintiff could provide; rather, their relevance, if any, extends only to

the second prong of the material witness statute: the impracticability of securing plaintiff's testimony. Plaintiff argues, for example, that the affidavit was facially invalid because it did not mention that he was a graduate of the University of Idaho and a native-born U.S. citizen who had a wife, child, parents, and siblings who also were native-born U.S. citizens living in this country. *Id*. Plaintiff cannot rely on this omission to give rise to a claim under *Franks* because the information he has identified cannot be said to have been clearly critical to the probable cause determination. Nor is there any basis to argue that its inclusion in the warrant would have vitiated probable cause.

While citizenship and family ties may be relevant to the impracticability prong, they are not determinative. That is especially true here, where plaintiff's apparent access to the network of international contacts that he developed through his previous travels, Al-Hussayen, and the IANA could have enabled him to disregard subpoenas from U.S. officials. Since the material witness warrant sought only to guarantee plaintiff's availability at Al-Hussayen's criminal proceedings, the central issue was whether plaintiff would be able to temporarily absent himself from the United States and thereby avoid participation in Al-Hussayen's trial. Application at 2 ("There is a risk that unless the Court detains or imposes restrictions on the travel of said material witness, he will be unavailable at future proceedings in this case."). Plaintiff's international contacts consequently were of far greater significance than the possibility that he might eventually return to the United States to see his family and friends. After all, plaintiff had just recently returned from Yemen, where he had been able to set aside, from August 2001 to April 2002, his ties to his family and friends in the United States. Aff. ¶ 6. This indicated that he was capable of a similar stay in Saudi Arabia, which could have enabled him to avoid any

involvement in the Al-Hussayen proceedings.

Plaintiff also alleges that Mace and Gneckow should have mentioned that he had spoken with the FBI on several occasions prior to his arrest. Am. Compl. ¶ 15. However, plaintiff has alleged nothing about his prior contacts with the FBI that the agents should have recognized as clearly critical to the probable cause analysis, much less contacts that would have vitiated the Court's probable cause finding had it been included in the affidavit. He certainly does not claim that he disclosed any information to the FBI that demonstrated his willingness to voluntarily appear and testify against Al-Hussayen. Moreover, plaintiff's contacts with the FBI occurred before Al-Hussayen was indicted and plaintiff had arranged to travel to Saudi Arabia. This clear change of circumstances diminished the arguable significance of any prior contacts.

Lastly, plaintiff maintains that the affidavit should have stated that the FBI did not inform him that he might be needed as a witness or that he could not travel abroad. Am. Compl. ¶ 15. He further asserts that the affidavit should have noted that he was never asked if he would be willing to testify, voluntarily relinquish his passport, or otherwise postpone his trip to Saudi Arabia. *Id.* None of these alleged omissions is even relevant to the probable cause finding, let alone matters that the agents should have understood were clearly critical to the analysis. It cannot be rationally argued that the failure to disclose such information in the warrant affidavit somehow misled the Court into issuing an arrest warrant that it would otherwise have rejected. It is important to recognize that the warrant affidavit included no information that could have caused the Court to conclude incorrectly that plaintiff had been uncooperative with the FBI in any respect in the investigation. Because there were no such implications in the warrant affidavit, the issue did not demand clarification. Indeed, it is obvious that, had the FBI asked

plaintiff to assist it by such things as postponing foreign travel or relinquishing his passport, the agents would have made that clear in the affidavit to demonstrate that he was affirmatively uncooperative and had scheduled travel despite their contrary request. Consequently, the alleged omissions identified by plaintiff are facially inadequate to state a Fourth Amendment claim because there is no basis to conclude that the Court was misled on this matter.

2. Affidavit established probable cause even with the excision of information plaintiff alleges was inaccurate.

The same analysis applies to the one alleged misrepresentation in the warrant affidavit that plaintiff maintains establishes a *Franks* claim. Plaintiff asserts that the affidavit falsely stated that he was "scheduled to take a one-way, first-class flight (costing approximately $5,000) to Saudi Arabia," *see* Aff. ¶¶ 7, 8, when instead he was attempting to travel to Saudi Arabia on a round trip, "coach-class ticket costing less than $2,000." *See* Am. Compl. ¶¶ 14, 15. However, mere identification of an inaccuracy in a warrant affidavit is insufficient to present a *Franks* challenge to an arrest warrant because the error could be due to negligence or innocent mistake rather than an effort to mislead the court. Plaintiff's complaint is facially deficient because it contains no facts demonstrating that Mace and Gneckow either knew the information was false when they included it in the warrant affidavit or acted with reckless disregard for the truth. Moreover, even assuming for purposes of this motion that the agents intentionally or recklessly misrepresented the details of plaintiff's airfare arrangements to Saudi Arabia, his Fourth Amendment challenge to the warrant still fails under *Franks*.

It is immaterial whether the ticket plaintiff purchased for his intended travel was a $2,000 coach-class ticket or a $5,000 first-class ticket. Either way, there is no dispute that plaintiff purchased an expensive airline ticket to a foreign country with which the United States did not

have an extradition treaty. Similarly, the distinction between a one-way and a round-trip ticket is of little importance. The critical fact was that plaintiff had scheduled travel to Saudi Arabia shortly after Al-Hussayen's indictment and arrest, and it reasonably appeared he would be unavailable to testify if he was not detained. The Court's probable cause finding simply was not dependent on the details of plaintiff's flight arrangements.

3. Allegations regarding defendants' subjective purposes are irrelevant to the probable cause inquiry.

In his final challenge to the warrant, plaintiff argues that Mace and Gneckow should be held personally liable because they sought his arrest "for the purpose of detaining [him] preventively and/ or for the purpose of further investigating [him] for possible criminal wrongdoing." Am. Compl., ¶ 56. He asserts a similar claim against former Attorney General Ashcroft, who he maintains created the policy that established this unlawful purpose. *See id.* ¶¶ 112, 125. These allegations fail to state a claim because the defendants' alleged subjective intent is wholly irrelevant for Fourth Amendment purposes. The Supreme Court made clear in *Whren v. United States* that, where there is probable cause to arrest an individual pursuant to law, it is immaterial whether another, even unlawful, purpose exists. 517 U.S. 806, 813 (1996).

The Supreme Court in *Whren* approved the stop of a vehicle for a minor traffic violation even though the violation was allegedly a pretext to search for drugs without probable cause. *Id.*; *see also Devenpeck v. Alford*, 125 S.Ct. 588, 594 (2004) (rejecting challenges to arrests based on improper intent where there was objective probable cause); *United States v. Bookhardt*, 277 F.3d 558, 566 (D.C. Cir. 2002) (as long as officer had "objectively valid ground" upon which to make an arrest, the fact that he articulated an invalid one "does not render the arrest unlawful"). The same rule applies here to plaintiff's claim that he was arrested for pretextual reasons under the

material witness statute. *See In re De Jesus Berrios*, 706 F.2d 355, 357-58 (1st Cir. 1983) (satisfaction of test in material witness statute permitted arrest of individual even where he alleged that warrant for his "testimony" was a "subterfuge" for acquisition of non-testimonial evidence). Such allegations of unlawful purpose fail to state a Fourth Amendment claim.

C. Defendants are Entitled to Qualified Immunity because They Did Not Violate Any Clearly Established Constitutional Right

The above analysis demonstrates compelling probable cause for the issuance of the material witness warrant. Beyond question, it provides at least an arguable basis for the issuance of the warrant, which is all that is required for qualified immunity purposes. *See* discussion *supra* at 15-16 (explaining that officer who makes a reasonable mistake concerning the existence of probable cause or the materiality of an omission or a misstatement is entitled to qualified immunity). That Mace and Gneckow made, at worst, a reasonable mistake (and, thus, are entitled to qualified immunity) is especially clear given the circumstances underlying the issuance of the warrant and the later proceedings that were conducted. Mace and Gneckow did not act alone or independently in seeking the warrant. They instead acted in conjunction with the United States Attorney's Office for the District of Idaho, and an Assistant United States Attorney actually signed the warrant application. Subsequently, the court reviewed the warrant and determined that probable cause existed to detain plaintiff. Plaintiff was later provided a probable cause hearing, and although he was eventually released from custody, the court placed continuing restrictions on his freedom. *See* Am. Compl. §§ 102-04 (detailing conditions of release); *United States v. Al-Hussayen*, 3:03-cr-00048-EJL-ALL, Docket Nos. 41 (initial appearance of plaintiff on March 25, 2003), 45 (detention hearing held for plaintiff on March 31, 2003). These circumstances conclusively demonstrate that the United States Attorney's Office and this Court – both before

and after an adversarial hearing – determined that there was a legal basis to hold plaintiff as a witness in Al-Hussayen's prosecution. In light of those undisputed facts, it would be unreasonable now to find that Mace and Gneckow violated plaintiff's clearly established Fourth Amendment rights when they sought the material witness warrant. *See Arnsberg v. United States*, 757 F.2d 971, 981 (9th Cir. 1985) (finding that it would be "plainly unreasonable" to require law enforcement officers to second-guess, at their own risk, the legal assessments of trained lawyers).

D. Plaintiff Fails to Allege Facts Sufficient to Show Ashcroft and Callahan Personally Participated in a Constitutional Violation

Plaintiff's claims against Ashcroft and Callahan should be dismissed on qualified immunity grounds for the additional reason that plaintiff has failed to properly allege their personal participation in any unconstitutional conduct. Plaintiff sues Ashcroft for creating policies that allegedly resulted in his arrest in violation of the Fourth Amendment and his confinement in violation of the Fifth Amendment. Plaintiff's cause of action against Callahan is limited to his Fifth Amendment conditions of confinement claim.[13] Both claims rest exclusively on allegations of boilerplate legal conclusions that are devoid of any factual content regarding either Ashcroft's or Callahan's personal involvement in the alleged misconduct. Such insubstantial allegations are inadequate to overcome the qualified immunity defense.

Under the qualified immunity doctrine, federal officials are protected from the entirety of the litigation process unless they engaged in actions that violated a plaintiff's clearly established constitutional rights. High-level government officials may not be subjected to personal suits

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[13] Conversely, plaintiff's claims against Mace and Gneckow are based entirely on his allegedly unlawful arrest. He does not allege that they had any involvement in establishing his conditions of confinement.

based merely on the alleged misconduct of their subordinates. Vicarious liability in constitutional tort actions against government officials has been repeatedly rejected by the Ninth Circuit. *Bibeau v. Pacific Northwest Research Found. Inc.*, 188 F.3d 1105, 1114 (9th Cir. 1999); *Pellegrino v. United States*, 73 F.3d 934, 936 (9th Cir. 1996); *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir. 1991). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

In the present case, plaintiff contends that Ashcroft should be held personally liable for his arrest because he had "ultimate responsibility" for the agencies involved in obtaining the arrest warrant and because he was responsible "for administering the material witness statute." Am. Compl. ¶ 23. He also alleges that Ashcroft was the "principal architect" of unspecified policies related to the statute, *id.* ¶ 137, and that these policies resulted in "the unlawful arrest and detention of material witnesses (such as Mr. al-Kidd)." *Id.* ¶ 138. This attempted reliance on Ashcroft's former position as Attorney General is a transparent attempt to hold him liable for the acts of his subordinates. "*Bivens* liability[, however,] is premised on proof of direct personal responsibility." *Pellegrino*, 73 F.3d at 936. Plaintiff cannot make that showing here because he does not allege that Ashcroft either participated in or directed his arrest. If bypassing qualified immunity was as easy as alleging that a cabinet level official had ultimate responsibility and authority with regard to official acts performed by his subordinates, then the rule against vicarious liability in constitutional tort actions would be meaningless.

To be sure, high-ranking officials may be held liable for adopting or enforcing unconstitutional policies or practices that cause their subordinates to deprive others of clearly

established constitutional rights. To properly state such a claim, however, a plaintiff cannot rely on boilerplate assertions devoid of factual content. Plaintiff must instead allege facts sufficient to demonstrate a causal connection between the defendant's conduct and the alleged deprivation of his clearly established rights. *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991). As the Sixth Circuit explained in *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989):

> If a mere assertion that a former cabinet officer and two other officials 'acted to implement, approve, carry out, and otherwise facilitate' alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.

The Eleventh Circuit's recent decision in *Gonzalez v. Reno*, 325 F.3d 1228 (11th Cir. 2003), aptly illustrates the requirement of factual allegations of personal involvement. In that case, relatives of Elian Gonzalez sued the Attorney General and other senior-level federal officials based on alleged misconduct by agents who raided the relatives' home in Miami to obtain custody of Elian. *Id.* at 1231-33. The Gonzalez family alleged that the senior-level officials "'personally directed and caused a paramilitary raid upon [their] residence, and had actual knowledge of, and agreed to, and approved of, and acquiesced in, the raid.'" *Id.* at 1235.[14] The family further alleged that "the agents on the scene 'acted under the personal direction of [the supervisory defendants], and with the knowledge, agreement, approval, and acquiescence of [the supervisory defendants].'" *Id.* Finally, the family "allege[d] that these defendants 'personally participated in the constitutional violations, and there was clearly a causal connection between their actions and

[14] All internal citations in passages quoted from *Gonzalez* come directly from the plaintiffs' complaint in that case.

the constitutional deprivation.'" *Id.*

The Eleventh Circuit held that these allegations were too "vague and conclusory" to establish supervisory liability because, although the plaintiffs "state[d] that there [was] a causal connection between these defendants' acts and the excessive force used by the agents on the scene, . . . they d[id] not allege any facts to support this causal connection." *Id.* at 1235. The court further explained that, because of the presumption of legitimacy accorded official conduct, *see Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), no inference of personal complicity could arise based simply on the supervisory defendants' positions of authority. *Gonzalez*, 325 F.3d at 1235-36; *accord Dalrymple v. Reno*, 334 F.3d 991, 996-97 (11th Cir. 2003); *see also Bruns v. National Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997) ("Vague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.").

Plaintiff's allegations in this case are even less substantive than those rejected in *Gonzalez*. The policy claim against Ashcroft, to the extent it is discernable, seems to be that in his effort to use every available tool to arrest those suspected of terrorist activities, *see* Am. Compl. ¶ 114, he formulated a policy whereby law enforcement officers could "use the material witness statute" to detain terrorist suspects about "whom they did not have sufficient evidence to arrest on criminal charges." *Id.* ¶ 116. Although plaintiff's allegations certainly indicate that Ashcroft supported aggressive law enforcement to combat terrorism, there is no allegation that he ever authorized, approved, or condoned any remotely unlawful action with regard to plaintiff or anyone else. It is axiomatic that the material witness statute does not require evidence to support criminal charges against a reluctant witness in order to take that witness into custody. The purpose of 18 U.S.C. §

3144 is simply to allow the temporary detention of any person where reasonably necessary to secure his or her testimony in criminal proceedings. *See* 18 U.S.C. § 3144. Plaintiff's policy claim is facially deficient because he has alleged no facts demonstrating that Ashcroft caused or encouraged the arrest of persons under the material witness statute in the absence of probable cause to believe that the requirements of the statute were satisfied.

Plaintiff's allegations as to Ashcroft and Callahan in regard to his Fifth Amendment conditions of confinement claims are similarly deficient. Plaintiff alleges nothing whatsoever to establish that Ashcroft ever took any action that even indirectly impacted the manner, place, or circumstances in which he was held or that Ashcroft was even aware of his detention at the time. Although plaintiff alleges that Callahan "knew" he was being subjected to unlawful conditions of confinement, Am. Compl. ¶¶ 73, 74, he provides no factual foundation for the assertion. He does not claim that Callahan personally imposed any unlawful conditions on him, was ever present to observe any such conditions, or that he or anyone on his behalf ever communicated with Callahan about his conditions of confinement. Plaintiff merely relies on boilerplate assertions of personal knowledge and responsibility that are plainly unavailing. *See Wong v. United States,* 373 F.3d 952, 966-67 (9th Cir. 2004) (dismissing claim because plaintiff failed "to identify what role, if any, each individual defendant had in placing her in detention, much less whether any of the named INS officials knew or reasonably should have known of the detention conditions to which [she] would be subjected"); *see also Gaston v. Coughlin*, 249 F.3d 156, 161 (2d Cir. 2001) (dismissing constitutional tort claim against the Commissioner of the Department of Corrections for lack of personal involvement brought by an inmate who claimed he had been subjected to sub-freezing temperatures and raw sewage in his cell due to long-term maintenance problems);

Crowder v. Lash, 687 F.2d 996, 1006 (7th Cir. 1982) (rejecting attempt to hold Commissioner of Corrections personally liable based on fact that prisoner had corresponded with him regarding constitutional violations at jail within his statewide jurisdiction, because "such a broad theory of liability is inconsistent with the personal responsibility requirement").

IV. There Is No Private Right Of Action Under 18 U.S.C. §§ 3142, 3144

Plaintiff alleges in Count I that his arrest, detention, and conditions of release violated both the "Bail Reform Act," 18 U.S.C. § 3142, and the "material witness statute," 18 U.S.C. § 3144. Am. Compl. ¶ 151. Although it is unclear what relief he seeks for these alleged violations, there is no question that neither section creates a private right of action.

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). A statute can create a private right of action either expressly or by implication. *Opera Plaza Residential Parcel Homeowners Ass'n v. Hoang*, 376 F.3d 831, 834 (9th Cir. 2004). Congress's intent, found in the text and structure of the statute, is crucial in determining whether a private right of action exists. *Alexander*, 532 U.S. at 288-89. If the statute does not expressly include a cause of action, a plaintiff asserting such a right "bears the relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed the statute." *Casas v. American Airlines, Inc.*, 304 F.3d 517, 521-22 (5th Cir. 2002); *see also Hoang*, 376 F.3d at 834-35.

Neither 18 U.S.C. §§ 3142 nor 3144 expressly creates a private right of action. The legislative history offers no basis for establishing a congressional intent that runs contrary to the plain language of these two sections. The case law similarly offers no possibility of inferring an implied cause of action. Accordingly, these claims must be dismissed to the extent to which they

are asserted against the individual defendants.

CONCLUSION

For the foregoing reasons, the federal defendants respectfully submit that plaintiff's claims against them should be dismissed with prejudice.

Dated: January 23, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2006, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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