No. 04-55099

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RODRIGO IMPORTANTE,

Plaintiff and Appellant,

vs.

COUNTY OF LOS ANGELES, et al.,

Defendants and Appellees.

Appeal From The United States District Court
For The Central District of California
Honorable S. James Otero, Judge Presiding
No. CV 02-8365 SJO (JTLx)

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STATEMENT OF JURISDICTION

(9th Cir. Rule 28-2.2.)

Defendants/Appellees County of Los Angeles, Thomas J. Garcia and Joseph Carrillo (collectively, "defendants") concur in the position of Plaintiff/Appellant Rodrigo Importante ("plaintiff") with respect to the jurisdiction of this Court and the district court. (Appellant's Opening Brief ("AOB") 1.)

ISSUES PRESENTED

1. With respect to Deputy Joseph Carrillo, (a) has plaintiff waived any right to contest summary judgment in Carrillo's favor by failing to raise the issue in his opening brief, and if not, (b) did the district court properly grant summary judgment in Carrillo's favor on the ground that he had been erroneously named as a defendant in this action?

2. Did the district court correctly conclude the search warrant for plaintiff's residence was supported by probable cause so that the individual defendants, (specifically, Deputy Thomas Garcia) were entitled to summary judgment on plaintiff's Fourth Amendment claim alleging an unlawful search?

3. Did the district court properly grant summary judgment in favor of the individual defendants on plaintiff's Fourth Amendment claims for unlawful detention and property destruction during the search of his residence?

4. Assuming a constitutional violation occurred, is Deputy Garcia entitled to qualified immunity?

5. With respect to plaintiff's claim against the County under 42 U.S.C. § 1983, (a) did plaintiff waive the right to contest summary judgment in his favor by failing to raise the issue specifically and distinctly in his opening brief, and if not, (b) should summary judgment be affirmed because no constitutional violation occurred?

6. With respect to plaintiff's supplemental state law claims for unlawful detention and property damage, (a) did plaintiff waive any right to contest summary judgment on those claims by failing to raise the issue specifically and distinctly in his opening brief, and if not, (b) was summary judgment proper?

STATEMENT OF THE CASE

On October 30, 2002, plaintiff Rodrigo Importante filed a complaint naming the County of Los Angeles and two deputies in the Sheriff's Department, Thomas J. Garcia ("Garcia") and Joseph Carrillo ("Carrillo"). (Excerpts of Record ("ER") 1-10.) The complaint sought damages under 42 U.S.C. § 1983 and alleged these deputies violated plaintiff's rights under the Fourth Amendment to be free of unreasonable searches and seizures. (*Id.*) The complaint further alleged the violations were caused by the County's custom or policy of deliberate indifference

to the rights of citizens insofar as the County failed to adequately supervise and train its officers. (*Id.* at 7-8.) The complaint also alleged a supplemental claim under state law for unlawful arrest and imprisonment and property damage. (*Id.* at 7.) Plaintiff sought compensatory and punitive damages in an unspecified amount, as well as attorneys' fees. (*Id.* at 9.) Defendants filed an answer on January 13, 2003. (*Id.* at 11-25.)

On October 21, 2003, defendants filed a motion for summary judgment. (ER 26-29.) Plaintiff opposed the motion and filed a counter motion for summary judgment on his federal claims against the individual defendants. (*Id.* at 254; *see also id.* at 5-7.)

The district court granted defendants' motion on December 15, 2003 and entered judgment in defendants' favor on all claims the same date. (ER 270-283; *see also* CR 61, 62.) This appeal followed on January 12, 2004. (ER 268; *see also* CR 63.)

STATEMENT OF FACTS

Except where otherwise indicated below, the facts of this case are undisputed.

On June 27, 2002, deputies from the Los Angeles County Sheriff's Department, led by defendant Thomas J. Garcia, conducted a search of a residence located at 1420 West 22nd Street in Los Angeles. (ER 194.) Plaintiff Rodrigo Importante, a man in his seventies, lived there. (ER 232.)

The search was conducted pursuant to a search warrant issued by a superior court judge; the warrant was based on information provided by a confidential, reliable informant (the "CRI"). (ER 214-16.) The unsealed, redacted portion of Deputy Garcia's Statement of Probable Cause (Affidavit) accompanying the application for the search warrant and pertaining to the information provided by the CRI stated as follows:

> "On 06-24-02, Det. Debets and I met with * * * hereinafter referred to as CRI, to assist us with our investigation of the sales of rock cocaine at a 1120 Hanover Avenue, in the City of East Los Angeles.
>
> "The CRI told us the following regarding the sales of rock cocaine at the indicated location: * * *
>
> "The CRI told us that a main source to the Rosas Sosa family resides at 1420 22nd Street in City of Los Angeles. * * * knows this person as 'Negro' (John Doe 2). 'Negro' is further described as a male Hispanic, mid-20's, 5'2" tall, 200 lbs., shaved head, dark complexion.

"The CRI has accompanied * * * to this location where they have done business with 'Negro'. The CRI has not been inside the location but has seen 'Negro' exit the location. Each time the CRI has gone to this location, 'Negro' has sold them cocaine, rock cocaine, and/or heroin. * * *

"On this same date, the CRI, Det. Debets and I, drove to 22nd Street in the City of Los Angeles. The CRI then directed us to and identified to [*sic*] 1420 West 22nd Street and positively identified the location as where 'Negro' lives. The numbers '1420' were affixed to the stairs leading to the front door of the location.

"We also drove to 1120 Hanover Avenue in the City of East Los Angeles on this same day. The CRI also identified the house on the northeast corner of Hanover Avenue and Olympic Boulevard as the location where Antonia Rosas Sosa lives. The numbers '1120' were affixed to the front wall in black.

* * *

"* * * I also believe that all information * * * has told me is true. I base this on conferring with Det. Debets * * * Each of these detectives have received information from * * * On each occasion, the information provided by * * * was true and accurate. The information has led to the arrest of several individuals for various crimes including narcotic violations. The cases have been adjudicated and/or are pending in various superior courts in the County of Los Angeles." (ER 247-51.)

The Statement of Probable Cause also stated that Deputy Garcia had "questioned the CRI regarding various aspects dealing with rock cocaine and other dangerous drugs; use, effect, price, packaging, transportation, and sale. Based on my training and experience in the field of narcotic distributors, the CRI

demonstrated a strong and thorough knowledge regarding rock cocaine and other dangerous drugs." (ER 150.)

The search of 1420 West 22nd Street lasted about an hour and was videotaped.[1/] (ER 71-6, 168, 172.) When the deputies arrived at the property, they conducted a brief surveillance and determined that an elderly male (plaintiff Importante) was alone inside and there did not appear to be any activity otherwise. (ER 167, 206.) Garcia determined under the circumstances "to conduct a soft knock of the location." (*Id.*)

Plaintiff's deposition testimony confirms that the deputies knocked on the door, explained they had a search warrant, and requested admission. (ER 238-40; *see also* ER 167.) He let them in. (ER 207; *see also* ER 167-68.) About eight deputies and a dog entered. (ER 238.)

When he opened the door, plaintiff observed two deputies with guns drawn, but they holstered their guns before entering. (ER 242.) One deputy took plaintiff by the shoulders and told him to sit down on the couch. (ER 242.) This was the only deputy about whom plaintiff complained for treating him "badly" and with "disrespect." (ER 244.)

[1/] The videotape was Exhibit H to defendants' summary judgment motion (ER 172) and is lodged in the District Court. Defendants will provide a copy to the Court if, for some reason, the District Court's copy is not available.

Another deputy sat down with plaintiff on the couch and talked with him in a "polite" manner. (ER 107:23-25, 207.) Plaintiff told the deputy that he had undergone heart bypass surgery, and the deputy who talked with him understood that medical condition because he had a father who had also had bypass surgery. (ER 107:23-25.) The two men conversed on the couch while the deputies conducted their search. (ER 207, 107:23-25; *see also* ER 172 [videotape].)

The deputies searched all the rooms, including one that plaintiff rented out to a couple and for which he provided the deputies a key. (ER 240; *see also* ER 95-96.) According to the Incident Report, plaintiff told the deputies the couple were occasionally visited for short periods of time by a person he could not describe. (ER 168.) Plaintiff also conceded that his daughter and her boyfriend sometimes stayed at the property. (ER 95, 97.) The parties dispute whether he also told them he rented a room to his niece who was often visited for short periods of time by a boyfriend. (*Compare* ER 168 *to* ER 234.)

Plaintiff testified the deputies moved some items around in the course of the search but did not break anything. (ER 108-09.) He conceded that his property was neither seized nor destroyed or damaged in any way. (ER 208.) He testified he was not handcuffed or made to lie down or physically or verbally abused. (ER 111-13.) The deputies found no drug-related contraband and departed after about an hour. (ER 168, 208.)

Deputies conducted three additional searches on the same day as the search of plaintiff's residence. The search warrants for those searches were also based on information provided by the CRI. (ER 211.) Those searches resulted in the recovery of illicit narcotics and multiple arrests at two of the three locations. (ER 211-12.)

Deputy Joseph Carrillo did not participate in the search of 1420 West 22nd Street because he was conducting another search at 825 South Herbert Avenue, some six and a half miles away. (ER 212-13.) He was not an affiant for the search warrant application pertaining to the location at 1420 West 22nd Street. (*Id.*) The district court dismissed Deputy Carrillo and plaintiff has not challenged that ruling on appeal. (ER 281-82; *see also* § I.A, *infra*.)

SUMMARY OF THE ARGUMENT

This case arises out of a search conducted by the Los Angeles County Sheriff's Department pursuant to a search warrant issued by a superior court judge. Behind plaintiff's Fourth Amendment arguments is a simple assumption—that a tip based on the personal knowledge of an informant with a track record of providing reliable tips cannot support a probable cause determination without independent corroborating evidence (e.g., phone bills proving the suspect actually lived at the residence identified by the CRI). Such a requirement is not mandated by the Constitution.

On the undisputed facts of this case, the search was reasonable and within constitutional parameters. Summary judgment on all of plaintiff's federal and state law claims was proper and should be affirmed for the following reasons:

- By failing to raise it in his opening brief, plaintiff has waived any claim that the district court erroneously dismissed Deputy Joseph Carrillo. In any event, the undisputed evidence established that Deputy Carrillo was incorrectly named as a defendant in this action; indeed, plaintiff concedes that Deputy Carrillo was not present at the search, did not sign the affidavit, and did not participate in the execution of the search in any way.

- In his opening brief, Plaintiff has failed to specifically and distinctly raise any issue regarding either his supplemental state law claims or his federal

claim under *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690-93, 98 S. Ct. 2018, 2035-37, 56 L. Ed. 611 (1978) ("*Monell*"). Accordingly, plaintiff has waived any argument regarding the propriety of the summary judgment ruling in favor of defendants on those claims.

- Probable cause supported the search because there was a fair probability based on the totality of the circumstances for concluding that the search would uncover evidence of wrongdoing at 1420 West 22nd Street, where the search warrant affidavit was based on the tip of a CRI with a track record of providing reliable tips who stated that a known drug dealer resided at the residence and the CRI had personally witnessed the drug dealer exiting the residence to sell drugs.

- There were no Fourth Amendment violations predicated on the execution of the search warrant or the detention of plaintiff during the search. Since the deputies had reasonable grounds for believing the suspect resided at 1420 West 22nd Street and that he was dealing drugs from that location, the deputies possessed authority to enter in order to execute the search warrant. During the detention, plaintiff was not made to lie down on the floor, handcuffed or physically or verbally abused. Rather, during the hour-long search, plaintiff sat on his couch while deputies conversed with him, called him "sir," and thanked him for his cooperation. Furthermore, in light of plaintiff's own deposition admission that the deputies "did

not break anything," plaintiff's contention that police damaged his property is patently frivolous. (*See* ER 108-09.)

- Deputy Garcia—the affiant on the search warrant—is at least entitled to qualified immunity. A reasonable well-trained officer under the facts presented would not know the affidavit fell short of establishing probable cause.

- Even if plaintiff had not waived his *Monell* claim, in the absence of any constitutional violation, plaintiff obviously cannot establish county policy or custom caused a violation.

- Even if plaintiff had not waived his supplemental claims alleging illegal detention and property damage, those claims have no merit for the same reasons his Fourth Amendment claims have no merit, and summary judgment was therefore proper.

STANDARD OF REVIEW AND LEGAL PRINCIPLES GOVERNING SUMMARY JUDGMENT

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56. If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986). To meet this burden, the nonmoving party must offer more than a mere scintilla of evidence; he must show that the evidence "is such that a reasonable jury could return a verdict in his or her favor." *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998); *see also Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997) ("Summary judgment may be granted if 'the evidence is merely colorable . . . or is not significantly probative.'").

The Ninth Circuit reviews the grant of summary judgment *de novo* and "must determine whether the district court correctly applied the law and if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact." *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). The Court may affirm on any grounds supported by the record, whether or not that

ground was relied upon by the district court. *First Pac. Bank v. Gilleran*, 40 F.3d 1023, 1024-25 (9th Cir. 1994).

Although the Ninth Circuit's review of the district court's decision is *de novo*, "[a] magistrate judge's finding of probable cause is entitled to great deference." *United States v. Reeves*, 210 F.3d 1041, 1046 (9th Cir. 2000); *see also Greenstreet v. County of San Bernardino*, 41 F.3d 1306, 1309 (9th Cir. 1994) ("[w]e exercise a deferential review of the initial probable cause determination"). Reversal of a magistrate's finding of probable cause is appropriate only where that finding is clearly erroneous. *United States v. Alvarez*, 358 F.3d 1194, 1203 (9th Cir. 2004); *see also United States v. Stanert*, 762 F.2d 775, 779 (9th Cir. 1985) ("We apply a narrow standard of review to a magistrate's decision to issue a search warrant . . . . We may not reverse such a conclusion unless the magistrate's decision is clearly erroneous").

A review of the record here reveals the district court properly granted summary judgment in defendants' favor on all of plaintiff's claims.

ARGUMENT

I. AS A THRESHOLD MATTER, PLAINTIFF WAIVED SEVERAL CLAIMS BY FAILING TO RAISE THEM "SPECIFICALLY AND DISTINCTLY" IN HIS OPENING BRIEF.

This Court has made clear that it reviews "only issues which are argued specifically and distinctly in a party's opening brief." *Greenwood v. FAA,* 28 F.3d 971, 977 (9th Cir. 1994); *Miller v. Fairchild Indus. Inc.,* 797 F.2d 727, 738 (9th Cir 1986). Further, it is well-settled that "on appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999); *see also Zukle v. Regents of University of California*, 166 F.3d 1041, 1045 n.10 (9th Cir. 1999) (where plaintiff failed to raise claims in his opening brief, plaintiff "waived any appeal from the district court's grant of summary judgment on these claims").

Here, plaintiff failed to "specifically and distinctly" raise any issue or argument in his opening brief regarding any of his claims against Deputy Carrillo, his *Monell* claim against the County, and his state law claims against any defendant. Accordingly, summary judgment should be affirmed as to those claims.

A. Plaintiff Has Never Disputed That He Erroneously Named Deputy Carrillo As A Defendant In This Action.

The district court concluded Deputy Carrillo had been erroneously named as a defendant in this action, given the evidence that "he was not the affiant involved in the preparation of the search warrant application or in the search of the residence" and that plaintiff "denies knowing or ever having seen Deputy Carrillo at any time." (ER 281-82.)

In opposing the summary judgment motion, plaintiff did not dispute that Deputy Carrillo was not present at the search, did not sign the affidavit, and did not participate in the execution of the search in any way. (ER 212-13.) That alone entitled Deputy Carrillo to summary judgment.

Moreover, plaintiff has not taken issue with the district court's ruling respecting Deputy Carrillo's involvement in the search of plaintiff's residence. Other than in the first sentence of the opening brief—where the plaintiff describes the nature of the action—Deputy Carrillo's name is never mentioned. The only reasonable inference stemming from his absence from plaintiff's arguments is that plaintiff agrees with the district court and has abandoned any claim against Deputy Carrillo. On that basis, judgment in his favor should be affirmed.

B. Plaintiff Has Waived Any Section 1983 Claim Against The County And His State Law Claims Against All Parties.

In his opening brief, plaintiff raises arguments regarding his Fourth Amendment claims *only* against Deputy Garcia. (*See* AOB 7 ["Garcia knew or should have known prior to delivering the application for the warrant . . . that the search warrant application regarding Plaintiff's residence was defective"]; 17 ["Garcia's use of the CRI's superficial observations to somehow connect Negro to the plaintiff's residence fails" to support a probable cause finding]; 19 ["Defendant Garcia's probable cause affidavit is a house of cards"].)

The full extent of plaintiff's discussion of any other claim—namely, his § 1983 claim against the County and his state law claims against any party—is his introductory statement in the summary of argument that "[t]he court should remand the remaining counts to the district court for trial by jury." (AOB 7.) That reference may not even be intended to refer to plaintiff's state law claims or his claims against the County. Indeed, plaintiff's "Summary of Argument" section addresses only the issue of probable cause (as does most of the brief). (AOB 6-7.) Significantly, plaintiff asks this Court to grant him summary judgment, but only on Counts 1 and 3 of his complaint, *excluding* Count 4 (his *Monell* claim) and Count 5 (his supplemental claims). (AOB 7; ER 7-8.)

Because plaintiff fails to "specifically and distinctly" raise any issues regarding his § 1983 claim against the County and his state law claims against all defendants and, indeed, appears to have deliberately abandoned them, judgment in favor of defendants on those claims for relief should be affirmed on the ground that they have been waived.

II. THE DISTRICT COURT CORRECTLY FOUND THE SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE.

Courts "determine the existence of probable cause by looking at 'the totality of the circumstances known to the officers at the time.'" *United States v. Alaimalo*, 313 F.3d 1188, 1193 (9th Cir. 2002). Absolute certainty is not required. "Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence useful in formal trials, have no place in the magistrate's decision." *Illinois v. Gates*, 462 U.S. 213, 235, 103 S. Ct. 2317, 2330, 76 L. Ed. 2d 527 (1983). Rather, "[t]he task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is *a fair probability* that contraband or evidence of a crime will be found in a particular place." *Id.* at 238-39 (emphasis added).

Echoing the Supreme Court, this Court has stated: "Probable cause requires only a fair probability or substantial chance of criminal activity." *United States v.*

Alaimalo, 313 F.3d at 1193; *see also United States v. Elliot*, 322 F.3d 710, 715 (9th Cir. 2003) (probable cause exists when there is a "substantial basis," based on the "totality of the circumstances," for concluding that the search will uncover evidence of wrongdoing).

Where, as here, a search warrant is based primarily on an informant's tip, the proper analysis is "whether probable cause exists from the totality of the circumstances to determine a sufficient level of reliability and basis of knowledge for the tip." *United States v. Elliot*, 322 F.3d at 715.

Here, the district court concurred with the superior court's finding of probable cause based on the information provided by the CRI. Noting that the search warrant affidavit recited that the CRI stated that "a main source [of drugs] to the Rosas Sosa family resides at 1420 22nd St.," that the CRI had personally "seen 'Negro' exit the location" on more than one occasion to deal drugs, that the CRI had accompanied police to "positively identif[y] the location where Negro lives," and that the CRI had a past track record of providing accurate tips, the district court rejected plaintiff's argument that the facts alleged in the search warrant affidavit could not establish probable cause. (ER 277-78.)

On appeal, plaintiff contends that the affidavit cannot support a probable cause finding because it did not contain certain specific facts that corroborated the CRI's information that Negro lived at the residence, or that established drug

transactions had been observed inside the residence, or that established a time reference for suspected criminal activity inside the residence. (AOB 15-16.) Plaintiff's contentions about material omissions have no merit. The affidavit contained sufficient information to establish probable cause.

A. Given His Past Track Record Of Providing Accurate Tips, The CRI Was Sufficiently Reliable.

An informant's reliability may be established by averments that an informant has provided reliable tips in the past. *See United States v. Shipstead*, 433 F.2d 368, 372 (9th Cir. 1970) (informant's reliability may be established by averment that he supplied officers "with information over the last five or six months which has resulted in three arrests"). Indeed, courts have consistently held that an informant's track record plays a significant role in dictating whether his tip can support a probable cause determination. *See, e.g., Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960) (probable cause was established by affidavit based on informant's tip where informant had given correct information on a prior occasion); *United States v. Reeves*, 210 F.3d 1041, 1045 (9th Cir. 2000) (informant's information was sufficient to support a search warrant where there had been three previous, successful searches based on his information); *United States v.*

McCain, 2003 U.S. Dist. LEXIS 12305, pp. 9-10 (N.D. Cal. 2003) (past reliability of a CRI goes to the existence of probable cause).

Here, plaintiff concedes that the CRI had a past track record for providing reliable tips to police. (ER 211 [undisputed that "[t]his CRI had, on several previous occasions, provided officers of the Sheriff's Department with information resulting in numerous successful searches for cocaine and related paraphernalia as well as arrests of several persons for possession for sale of cocaine"].)[2/] The CRI's track record suffices to establish a sufficient level of reliability for the tip upon which the search warrant affidavit was, in part, based.

B. The Search Warrant Affidavit Stated That The CRI's Knowledge Connecting Drug Deals To Plaintiff's Residence Was First-Hand.

The search warrant affidavit also provided a sufficient basis for the CRI's knowledge of the drug dealing at the location. In particular, the CRI stated that he had *personally witnessed* drug dealing from the property on multiple occasions. (ER 248.) To this end, the search warrant affidavit stated: "The CRI has accompanied * * * to this location where they have done business with 'Negro'.

[2/] In addition to these previous successful searches and arrests, the CRI's tips led to arrests and confiscations of contraband at two other searches conducted on the same day as the search of plaintiff's residence. (ER 211; *see also* ER 141-42, 145-57, 161-71, 175, 178-87.)

The CRI has not been inside the location but has seen 'Negro' exit the location. Each time the CRI has gone to this location, 'Negro' has sold them cocaine, rock cocaine, and/or heroin." (*Id.*)

Further, the affidavit established that Garcia had determined through interviews with the CRI that he was sufficiently knowledgeable about drugs to know what was going on during the transactions, including the identity of the products being bought and sold. (ER 150.)

C. The Search Warrant Affidavit Contained Sufficient Additional Information Establishing There Was A "Fair Probability" That The Search Would Uncover Evidence Of Drug-Dealing At The Location.

The CRI also provided additional facts establishing there was a "fair probability or substantial chance" that a search would uncover evidence of wrongdoing at 1420 West 22nd Street. This additional information included the identity of the suspect, his connection to a known drug-dealing family, and a positive identification of the premises to be searched.

For example, the search warrant application recited that according to the CRI, a main source of rock cocaine to the Rosas Sosa family—a family known to be

involved in the sale of cocaine—"resides" at 1420 West 22nd Street. (ER 248.) It is reasonable to expect that a prolific drug dealer would have drugs in his home.

The search warrant also adequately identified the residence to be searched. The CRI accompanied Deputy Garcia and Detective Debets to the residence and positively identified 1420 West 22nd Street in Los Angeles, California as Negro's residence. (ER 249.) Deputy Garcia noted the numbers "1420" were affixed to the stairs leading to the front door of the location. (*Id.*) In his deposition, plaintiff provided a description of his house that sufficiently matched that in the search warrant. (*Compare* ER 146 [search warrant describes a single story structure with light olive green exterior, detached garage, cement stairs, iron fencing, numbers 1420 affixed to the right of the front security door] *to* ER 99:17-103:21, 104:17-105:16 [plaintiff describes single story structure with light green exterior, detached garage, six steps to front door, numbers 1420 affixed to the right side of the gate].)

The CRI's track record of reliability, coupled with his first-hand observations, established there was a "fair probability" based on the totality of the circumstances that a search of 1420 West 22nd Street would uncover evidence of drug dealing. None of plaintiff's arguments to the contrary hold water.

D. Plaintiff's Attempt To Refute Probable Cause By Emphasizing What The Affidavit Did Not Say Is Meritless.

1. The law does not set a rigid factual standard governing probable cause determinations.

Plaintiff argues that without the presence of certain specific pieces of information, the search warrant affidavit cannot, as a matter of law, support a probable cause determination. In particular, he contends that "the search warrant affidavit fails to establish probable cause necessary to meet the standard of objective reasonableness" because the CRI's tip had not been corroborated by "objective, non-speculative corroborating evidence" connecting "drug activity with the plaintiff's residence," including objective "facts showing that Negro lived at the residence" (e.g., phone bills with Negro's name on them). (AOB 6-7, 14.) Likewise, plaintiff contends that the affidavit is insufficient because there were no "facts showing the time of the information," and there was no evidence of what Negro did *inside* the residence. (*Id.* at 6-7.)

But, the Supreme Court had expressly repudiated the rigid analysis plaintiff suggests. Because "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules," the Supreme Court has opted instead for a "flexible, common-sense standard" evaluating the "totality of the circumstances." *Illinois v.*

Gates, 462 U.S. at 232, 240. Under this governing standard, no single factor must be present before an informant's tip can support a probable cause determination; rather, the magistrate judge must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Id.* at 238.

In *Gates,* the defendants were indicted for drug offenses after police, executing a search warrant based on an anonymous informant's tip, discovered marijuana in their home. The defendants successfully moved to suppress evidence seized during this search. The Illinois Supreme Court affirmed, holding that the affidavit submitted in support of the search warrant application was inadequate under the "two-pronged test" described in *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969) which required the anonymous tip to contain certain specific facts showing "the particular means by which [the informant] came by the information given in his report" and "facts sufficiently establishing the 'veracity' of the affiant's information, or, alternatively, the 'reliability' of the informant's report." *Gates*, 462 U.S. at 228.

The *Gates* court rejected this formalistic approach, holding instead that although "an informant's 'veracity,' 'reliability' and 'basis of knowledge' are all

highly relevant in determining the value of his report," "these elements should [not] be understood as entirely separate and independent requirements to be rigidly exacted in every case." *Id.* at 230. This meant that a deficiency in an informant's "veracity" or "reliability" or "basis of knowledge" "may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other [elements], or by some other indicia of reliability." *Id.* at 232-33. For instance, if "a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip." *Id.* at 233.

In the years since *Gates* was decided, the Supreme Court has scolded courts for continuing to apply a formulaic, rigid standard. For instance, in *Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984), the Supreme Court held that the trial court had erred by failing to consider the search warrant affidavit "in its entirety, giving significance to each relevant piece of information and balancing the relative weights of all the various indicia of reliability (and unreliability) attending the tip. Instead, the [trial] court [had] insisted on judging bits and pieces of information in isolation." *Id.* at 732.

Here, plaintiff ignores the Supreme Court's repeated instruction in this area, relying instead on a number of cases predating *Gates*. (*See* AOB 11-12 [*citing*

United States v. Bailey, 458 F.2d 408 (9th Cir. 1972); *Alexander v. Superior Court*, 9 Cal. 3d 387, 390, 107 Cal. Rptr. 483 (1973)].) This leads him to insist that, as a matter of law, there is no probable cause unless the affidavit contains "bits and pieces" of very specific information—such as information that drug transactions were occurring inside the residence itself. This approach presumably is the rationale supporting plaintiff's request for summary judgment in *his* favor, but it is the wrong approach.

The proper question is whether the facts in the affidavit—*in their totality*—give rise to a fair probability that evidence of criminal activity would be found at the residence. The answer here is yes.

In light of the CRI's track record and his first-hand observations, the issuing judge had a substantial basis for making a common-sense decision, based on the totality of the circumstances, including the veracity and basis of knowledge of the CRI, that there was a fair probability that contraband or evidence of drug trafficking would be found in the residence. The district court concurred and plaintiff's arguments to the contrary lack merit.

2. The affidavit connected the property to the criminal activity.

Plaintiff also argues the search violated his constitutional rights because "[t]here are no facts [in the affidavit] showing that Negro lived at the residence."

(*See* AOB 14.) The undisputed facts belie this claim. First, the affidavit unequivocally stated that the suspect "*resides* at 1420 22nd St. in the City of Los Angeles." (ER 248, emphasis added.) Second, the CRI told police that he had personally witnessed the suspect—a known drug dealer—*exiting* the residence and dealing drugs *from* the residence. (*Id.*) This supports a determination "that the property which is the object of the search is probably on the premises to be searched at the time the warrant is issued." *United States v. Greany*, 929 F.2d 523, 524-25 (9th Cir. 1991).

Plaintiff wrongly characterizes the CRI's first-hand observations of Negro exiting the residence to deal drugs on multiple occasions as mere "indirect evidence of drug activity or the mere presence of a house guest or acquaintance suspected of drug activity." (AOB 3 [*citing Greenstreet. v. County of San Bernardino*, 41 F.3d 1306].) The cases plaintiff cites involving house guests with tenuous connections to the subject properties are inapposite. (*See* AOB 11-12.) For instance, in *United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1992), the only circumstances "supporting an inference that the residence housed narcotics or evidence of narcotics trafficking" was the fact that the residents "were acquaintances of acquaintances of individuals involved in the narcotics trade." This case is different: Here, the affidavit recited that an informant with a history of providing reliable tips

had personally witnessed drug dealing from the residence and had stated that a known drug dealer *lived there.*

Likewise, the affidavit here differs decisively from that in *Greenstreet. v. County of San Bernardino*, 41 F.3d 1306, the case upon which plaintiff primarily relies, where virtually nothing connected the suspect to the property searched. (*See* AOB 12-13.) In *Greenstreet,*, the affidavit contained no suggestion that the suspect *lived* at the property. Rather, the search warrant affidavit recited only the suspect *had been seen at the property on a single occasion*. *Greenstreet*, 41 F.3d at 1309. Specifically, the affidavit stated only that "Richard Greenstreet, a man with a history of drug offenses, was seen at the alleged locus of the drug ring and then, at some point, went to Plaintiffs' home. That is all." *Id.* Because the *Greenstreet* affidavit "provided next to nothing" to tie the suspect to the property, there was no reasonable basis for believing that either the suspect or drugs would be found there. *Id.* at 1310.

Here, the district court properly rejected plaintiff's attempts to analogize to *Greenstreet*, noting that "the affidavit in this case was more detailed and specific" because, among other things, it recited that the CRI told police that the suspect resided at 1420 West 22nd Street, that the CRI had seen the suspect exit and deal drugs from the location, and that the CRI had positively identified the location for police. (ER 278.)

On appeal, plaintiff does not dispute that the CRI told police that the suspect resided at 1420 West 22nd Street. Nor does plaintiff dispute that the CRI told police that he had personally witnessed the suspect dealing drugs from the property. Instead, plaintiff asserts that in order to rely upon the CRI's tip, the police needed to independently corroborate it by procuring utility bills, driver's license information or property tax records showing that "Negro" owned the property. (AOB 15.) There are two problems with this argument: The law and the facts.

a. The law does not require corroboration of a tip based on the first-hand observation of a reliable informant.

First, "'[a] detailed eye-witness report of a crime is self-corroborating; it supplies its own indicia of reliability.'" *United States v. Elliot*, 893 F.2d at 223 (*quoting United States v. Estrada*, 733 F.2d 683, 686 (9th Cir. 1984)).[3/] Here, the CRI personally observed Negro dealing drugs from 1420 West 22nd Street. Accordingly, no further corroboration was necessary.

Second, the law does not require corroboration where, as here, an informant has provided reliable information to police in the past. Indeed, numerous cases

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[3/] *See also United States v Barnes* 195 F. 3d 1027 (8th Cir. 1999) (first hand knowledge of the CRI, his own observations sufficient to meet "basis of knowledge" element of probable cause; veracity element established by track record).

establish that corroboration is necessary *only* where an informant is untested. *See, e.g., United States v. Evans*, 481 F.2d 990, 992 (9th Cir. 1973) ("The tip of an untested, unreliable informant is not sufficient for probable cause" by itself without some corroboration); *United States v. Prueitt*, 540 F.2d 995, 1005 (9th Cir. 1976) ("although the informant in this case was previously untested, the law is clear that an informant's reliability can be verified on reasons other than past reliability," including "the reasonableness of the informant's access to accurate information regarding the suspect, independent corroboration of the informant's tip, and independent investigation"); *United States v. Fluker*, 543 F.2d 709, 714 (9th Cir. 1976) (where affidavit fails to establish basis for informant's belief or informant's reliability, "probable cause may still be established if the affidavit also recites corroborative evidence").

b. Under the facts of this case, no corroboration was necessary.

The second problem with requiring corroboration here is a factual one: The CRI only knew the suspect's *nickname*, "Negro." It is unreasonable to expect that utility bills would be made out in "Negro's" name. Moreover, the type of documentation plaintiff contends is mandatory is of dubious value in any event: A check of utility bills might establish plaintiff lived at or owned the residence, but it

would not establish that Negro or anyone else did not. There is undisputed evidence that other individuals did, in fact, stay at the house from time to time. For example, it is undisputed plaintiff's daughter and her boyfriend sometimes stayed at the residence and plaintiff rented a room to another couple. (ER 95:24-96:4, 97:10-25, 107:14-18.) The names of these residents likely would not turn up on the type of documents plaintiff contends should have been checked.

Thus, under the circumstances of this case, corroboration was neither possible, nor necessary.

3. The fact that the CRI did not observe drug dealing *inside* the residence is immaterial.

Plaintiff argues that the search warrant affidavit cannot support a probable cause determination because "[t]here is no mention of illegal drugs or related contraband being observed within the residence or being transferred from the residence into a vehicle at any point during the time the CRI was observing the residence." (AOB 15.)

The fact that the CRI had not been inside the residence is irrelevant in light of his repeated first-hand observations of Negro exiting the residence to deal drugs from that location. (ER 248.)

Plaintiff's attempt to add a requirement that informants must witness drug dealing *inside* a residence before it can be searched contravenes the governing standard mandated by *Illinois v. Gates*. (*See* § II.D.1, *supra* [affidavits should be interpreted in a commonsense manner].) Common sense dictates that where a suspect deals drugs from the same house on multiple occasions, there is a fair probability that drugs will be found inside the house. The search warrant affidavit supported the judge's finding of probable cause.

4. The information in the affidavit was sufficiently timely to justify the search.

Plaintiff argues that the affidavit cannot support a probable cause determination because it "fails to make any time references to any criminal activity taking place inside the" residence. (AOB 16.) Thus, plaintiff argues that the judge "could [not] reasonably conclude that illegal activities were taking place on or near the time the warrant was presented for signature." (*Id.*) Again, plaintiff misperceives what the law requires.

Where, as here, an informant describes an ongoing criminal activity, the absence of a particular time reference does not automatically render an affidavit infirm. Indeed, the mere lapse of time is not controlling in the question of staleness. *See United States v. Greany*, 929 F.2d 523, 525 (9th Cir.1991) (two-year-old

information on a marijuana grow operation was not stale); *see also United States v. Alvarez*, 358 F.3d 1194, 1203 (9th Cir. 2004) (search of residence more than one year after surveillance was permissible); *see also United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1566 (9th Cir.1989) (upholding warrant based in part on information almost two years old regarding defendant's involvement in widespread narcotics conspiracy). This is because the "general rule" is that "affidavits for search warrants must be tested and interpreted in a common sense and realistic, rather than a hypertechnical, manner." *United States v. Turner*, 770 F.2d 1508, 1510 (9th Cir. 1985).

Thus, the question is whether "'there is sufficient basis to believe, based on a continuing pattern or other good reasons, that the items to be seized are still on the premises.'" *United States v. Lacy*, 119 F.3d 742, 746 (9th Cir. 1997) (*quoting United States v. Gann*, 732 F.2d 714, 722 (9th Cir. 1984)); *United States v. Dozier*, 844 F.2d 701, 707 (9th Cir. 1988) ("The mere lapse of substantial amounts of time is not controlling" where "the ongoing nature of a crime . . . might lead to the maintenance of tools of the trade"); *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993) (courts evaluate staleness "'in light of the particular facts of the case and the nature of the criminal activity and property sought'").

Here, given the context for the CRI's tips, the judge had a reasonable basis for concluding that a search would uncover evidence of drug dealing. The CRI

described an *ongoing* conspiracy between Negro and the Rosas Sosa family; indeed, the search warrant affidavit stated that Negro was a "main source" of drugs for the Rosas Sosa family. (ER 248.) Such an ongoing criminal business suggests that drugs were passing with regularity between the Rosas Sosa family and their major supplier, Negro.

Furthermore, the affidavit stated that according to the CRI, the Rosas Sosa family had been dealing drugs *within five days* of the affidavit. (ER 150.) And, the CRI reported that the Rosas Sosa family had been dealing drugs regularly from the same location *for the past six months*. (ER 153-54.) Given the CRI's statement that Negro was a "main source" of drugs for the Rosas Sosa family, the judge had a reasonable basis for determining that there was a fair probability that drugs would be found at Negro's purported residence.

In any event, plaintiff raises his "lack of time reference" argument too late. Indeed, this Court need not consider it, as he failed to reference it in his separate statement of facts opposing the summary judgment motion. *See Chale v. Allstate Life Ins. Co.*, 353 F.3d 742, 750 (9th Cir. 2003) (On motion for summary judgment, exclusion of facts that were not referenced in plaintiff's "Concise Statements of the Facts" was not abuse of discretion). As in the *Chale* case, the Local Rules of the Central District of California provide that the movant's rendition of the facts will be deemed admitted to exist unless such controverting facts are included in the

nonmovant's separate statement and are controverted by declaration or other evidence filed in opposition to the motion for summary judgment. Local Rule 56-3.[4/] Plaintiff's argument is too little too late. It should be rejected.

This Court should affirm the district court's conclusion that the information provided by the CRI formed a substantial basis upon which to base its finding of probable cause, and that defendants were entitled to summary judgment on plaintiff's Fourth Amendment claim predicated on an allegedly unlawful search.

III. THE DISTRICT COURT CORRECTLY FOUND THE MANNER IN WHICH THE SEARCH WARRANT WAS EXECUTED DID NOT VIOLATE PLAINTIFF'S FOURTH AMENDMENT RIGHTS.

In his opening brief, plaintiff contends that defendants caused him to be unlawfully detained during the search and that his property was destroyed. (AOB 17-18.) Significantly, he makes no reference to the record to support his contentions because, in fact, the record belies them; the undisputed facts, including

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[4/] Local Rule 56-3 provides as follows: "In determining any motion for summary judgment, the Court will assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the 'Statement of Genuine Issues' and (b) controverted by declaration or other written evidence filed in opposition to the motion."

plaintiff's own testimony, demonstrate that defendants neither illegally detained plaintiff nor destroyed his property.

A. Plaintiff's Deposition Testimony Compels The Conclusion That His Detention Pending The Search Was Lawful.

The law is well-established that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705, 101 S. Ct. 2587, 2594, 69 L. Ed. 2d 340 (1981). In *Summers*, as here, the police were executing a search warrant for a house and, as here, there was no warrant or probable cause to search the individual at issue. Also, as here, the individual was detained while the house was searched. That detention was held to be a "reasonable" seizure of the person under the Fourth Amendment even though the record contained "no evidence whatsoever that the police feared any threat to their safety or that of others from the conduct of the respondent." *Id.* at 705, 708 n.1.

While "a detention conducted in connection with a search may be unreasonable if it is unnecessarily painful, degrading, or prolonged," the search in the instant case was none of those things. *Meredith v. Erath*, 342 F.3d 1057, 1062 (9th Cir. 2003). Here, plaintiff's own admissions establish that—contrary to his

initial allegations—he *was not* made to lie down on the floor, handcuffed or physically or verbally abused. (ER 4 to ER 110:19-22; 111:8-112:1; 113:9-22; *see also* ER 172, 207.) Rather, during the hour-long search, plaintiff sat on his couch drinking water while police officers conversed with him, called him "sir" and thanked him for his cooperation. (ER 110:19-22; 111:8-112:1; 113:9-22.) A review of the videotape of the search demonstrates that this is so. (*See* ER 72, 172.)

In his opening brief, plaintiff has scaled back his allegations, but still contends that deputies pointed guns at him and pushed him down on the couch. (AOB 17-18.) However, a review of plaintiff's deposition testimony reveals that, although one of the officers did point a gun at plaintiff, that incident occurred while defendants *were still outside his front door*, as plaintiff was opening the door for the deputies. (ER 242:11-21.) Before the deputies were inside plaintiff's residence, the deputy who had pointed his gun at plaintiff had placed his gun back in his holster; as plaintiff conceded, he saw "no more gun in [the deputies'] hands when they came in . . . . [the gun is] in the gun holster now when they were inside the house." (ER 242:15-16, 20-21.) That the deputy had a gun drawn and was pointing it when plaintiff answered the door was a reasonable response to the potential danger surrounding the officers' entry of the residence, as the district court concluded. (ER 279.)

There is also no triable issue of fact with regard to plaintiff's allegations that a constitutional violation occurred when a deputy put his hands on plaintiff's shoulders and told him sit down on the couch. (*See* ER 240.) Plaintiff equates his situation to that of the plaintiff in *Franklin v. Foxworth*, 31 F.3d 873 (9th Cir. 1994), a case in which this Court found a detention was unreasonable. (AOB 17.) But the deputies' conduct here does not come close to that disapproved in *Franklin v. Foxworth*, 31 F.3d 873, where officers removed a sick, half-naked man from bed, forced him to sit handcuffed and exposed for two hours, and failed to return him to bed after the search. *Franklin*, 31 F.3d at 876-77. Here, the videotape establishes that plaintiff was subjected to no abuse during the search. (*See* ER 172; *see also* ER 70-77, 110:20-111:22, 113:9-22, 207.) Plaintiff conceded that other than the deputy who put his hands on his shoulders and seated him on the couch, none of the deputies treated him in a manner he considered "disrespectful." (ER 111:23-112:1.)

This court has recognized that "detentions of occupants during the period of a search will under most circumstances prove to have been reasonable." *Franklin*, 31 F.3d at 876. As a matter of law, the detention here was reasonable: There is no evidence of abusive behavior and the detention lasted only as long as it took the officers to search the residence. The district court's grant of summary judgement on plaintiff's Fourth Amendment claim predicated on unlawful detention should be affirmed.

B. Plaintiff Conceded In His Deposition That There Was No Property Damage.

In light of plaintiff's own admissions, plaintiff's contention in his opening brief that his property was damaged is patently frivolous. (AOB 17.) Plaintiff admitted under oath that police "did not break anything." (ER 108:20-23 [police only "scattered some of the chairs and boxes"]; *see also* ER 208 at ¶ 32 [undisputed that plaintiff's property "was not destroyed or damaged in any way"].) Moreover, plaintiff conceded that police did not seize any of his property. (ER 109:11-15.)

Nonetheless, in his opening brief, plaintiff alleges that police "toss[ed] some of his items out of the bathroom window." (AOB 18.) This bare assertion, unsupported by reference to the record, is baseless. Plaintiff testified that "[t]he only damage to the property is they moved properties from the room, threw it out from the bathroom, coming from the room of my daughter, physical other damage, there was none." (ER 109:19-22.) That is, the deputies may have moved things out of a room during the course of a search, but there is no reference to police throwing anything from a window.

Plaintiff's testimony, coupled with the videotape, conclusively establishes that police did not destroy any property, but conducted the search in a reasonable manner. Accordingly, the Court should affirm the grant of summary judgment on this aspect of plaintiff's Fourth Amendment claim.

IV. IN THE UNLIKELY EVENT THIS COURT CONCLUDES THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT THERE WAS NO CONSTITUTIONAL VIOLATION, IT SHOULD NONETHELESS AFFIRM JUDGMENT FOR GARCIA ON QUALIFIED IMMUNITY GROUNDS.

The district court did not reach the issue of qualified immunity because it found that there was no constitutional violation. If this Court disagrees, Garcia is nonetheless entitled to summary judgment on qualified immunity grounds.

The Supreme Court has made clear that even where conduct of an officer is deemed unreasonable under an objective standard of reasonableness and, hence, to be a Fourth Amendment violation, the officer may yet be entitled to qualified immunity also under an objective reasonableness standard. *Saucier v. Katz,* 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (analyzing the issue in the context of an excessive force claim).

Assuming a constitutional violation, the question becomes whether the right at issue was clearly established "'in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 202, (*citing Anderson v. Creighton,* 483 U.S. 635, 640, 107 S. Ct. 3034, 3039, 97 L. Ed. 2d 523

(1987)). The dispositive inquiry is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.*

Applying *Saucier* to the context of a search warrant, the officer seeking the warrant may still be entitled to qualified immunity from a § 1983 action even where probable cause does not exist to issue the warrant. As this Court has explained: "The lack of probable cause notwithstanding, [the officer] is entitled to immunity from suit for his seeking the issuance of the search warrant unless 'a reasonable well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant." *Greenstreet*, 41 F.3d at 1310 (*citing Malley v. Briggs*, 475 U.S. 335, 345, 106 S. Ct. 1092, 1097, 89 L. Ed. 2d 271 (1986)). "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." *Malley v. Briggs*, 475 U.S. at 345.

That is not the case here. A reasonable officer in Deputy Garcia's position would *not* have known his affidavit failed to establish probable cause given that, for example, the informant had "on several previous occasions, provided [him] and [his] colleagues with information resulting in numerous successful searches for cocaine, rock cocaine, methamphetamine and related paraphernalia as well as arrests of several persons for the possession for sale of rock cocaine." (ER 141.) The search

warrant affidavit, which was based on this informant's first-hand observations of drug dealing from the residence, was not "so lacking in indicia of probable cause" as to render belief in its existence unreasonable.

Deputy Garcia is also entitled to qualified immunity for the manner in which the search warrant was executed.[5/] As discussed above, the search did not entail any abuse of plaintiff or destruction of his property such that it would be clear to a reasonable officer that the manner in which the warrant was executed was unlawful.

[5/] Although Deputy Garcia did not raise the defense of qualified immunity with respect to the execution of the search in his motion for summary judgment, he did raise it in his Answer. (ER 22.) Accordingly, this Court may reach the issue on appeal. *See Graves v. City of Coeur D'Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003) (Court of Appeals would address issue of qualified immunity defense sua sponte, after determining that the evidence did not support jury verdict finding that officer's search was supported by probable cause, given that defendants raised defense in answer to complaint, issue was one of law, and the record had been fully developed below; held, "Qualified immunity is an issue of law and, to the extent that it depends on the factual record, that record has been fully developed below, as it is the same record that relates to whether there was probable cause to search . . . . [W]e think it appropriate sua sponte to consider the issue of qualified immunity on this appeal").

V. EVEN IF THIS COURT DETERMINES PLAINTIFF HAS NOT WAIVED HIS *MONELL* CLAIM AGAINST THE COUNTY, IT SHOULD AFFIRM JUDGMENT FOR THE COUNTY ON THE GROUND THERE WAS NO CONSTITUTIONAL VIOLATION.

As discussed above (§ I.B), plaintiff waived any argument relating to the dismissal of his *Monell* claim. But, if this Court decides otherwise, summary judgment would still be appropriate because, as demonstrated, there was no constitutional violation here. *See Huskey v. City of San Jose*, 204 F.3d 893 (9th Cir. 2000) (plaintiff must show that he suffered a deprivation of constitutional rights pursuant to an official policy or custom of the County); *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S. Ct. 1571, 1573, 89 L. Ed. 2d 806 (1986) (where there is no constitutional violation, the local government cannot be liable for a civil rights violation on a *Monell* theory).

Thus, this Court should affirm the grant of summary judgment in favor of the County.

VI. PLAINTIFF'S CLAIMS UNDER STATE LAW FAIL FOR THE SAME REASON HIS FEDERAL CLAIMS FAIL.

As discussed above, the district court rightly concluded there was no merit to plaintiff's federal claims regarding detention and property destruction. Similarly,

there is no merit to his supplemental claims. Even if he has not waived his state law claims for unlawful detention and property destruction (*see* § I.B, *supra*), the Court should affirm summary judgment of these claims, as the standard for them is essentially the same as that under federal law.

Indeed, *citing Michigan v. Summers*, 452 U.S. 692, for the proposition that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted," the California Supreme Court has held that a brief detention incident to a warranted search is reasonable. *People v. Glaser*, 11 Cal. 4th 354, 45 Cal. Rptr. 2d 425 (1985). Under state law—like federal law—a detention is lawful if it lasts a reasonable amount of time (i.e., no longer than is necessary to determine whether there is evidence of criminal activity) and is supported by probable cause. *See People v. Gorak*, 196 Cal. App. 3d 1032, 1037-38, 242 Cal. Rptr. 307 (1987); *Pendergraft v. Superior Court*, 15 Cal. App. 3d 237, 241, 93 Cal. Rptr. 155 (1971); *cf. People v. Camacho*, 23 Cal. 4th 824, 829-30, 98 Cal. Rptr. 2d 232 (2000) ("state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard"). Thus, the detention of plaintiff was lawful under state law for the same reason it was lawful under federal law.

As to plaintiff's state law claim for property destruction, there simply is no evidence any property was destroyed. Thus, there is no merit to plaintiff's claim under any law.

CONCLUSION

The district court implicitly denied plaintiff's counter motion for summary judgment on Fourth Amendment claims by granting summary judgment for defendants. For all the reasons stated above, defendants ask this Court to affirm summary judgment in their favor and against plaintiff.

DATED: June 29, 2004

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STATEMENT OF RELATED CASES

(9th Cir. Rule 28-2.6)

Appellees know of no pending cases related to this case.

CERTIFICATE OF COMPLIANCE—PROPORTIONATE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this Appellees' Brief is proportionately spaced, has a typeface of 14 points or more, and contains 9,660 words.

DATED: June 29, 2004

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