

FILED

JUN 25 2018

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAVIER TORRES; LIA
RIVADENEYRA, individually and on
behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

TERRY GODDARD, in his individual
capacity; CAMERON H. HOLMES, AKA
Kip Holmes, in his individual capacity;
THOMAS C. HORNE, Attorney General,
Attorney General of the State of Arizona,

Defendants-Appellees.

No. 16-16315

D.C. No. 2:06-cv-02482-SMM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Argued and Submitted July 27, 2017
Pasadena, California

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

Before: BYBEE, NGUYEN,** and OWENS,*** Circuit Judges.

Named plaintiffs Javier Torres and Lia Rivadeneyra brought this putative class action under 42 U.S.C. § 1983 against the Attorney General and Assistant Attorney General of the State of Arizona. They allege that two warrants issued by the Maricopa County Superior Court against plaintiffs' money orders with Western Union Financial Services ("Western Union") violated their Fourth and Fourteenth Amendment rights. The district court denied class certification and granted defendants' motion for summary judgment, holding that defendants were entitled to absolute immunity for their actions. On appeal we held that although defendants were absolutely immune for the preparation and application of the warrants, they could not claim the same absolute immunity as to their execution and service, and so we affirmed in part and reversed in part for further proceedings on the question of qualified immunity. *Torres v. Goddard*, 793 F.3d 1046, 1053–59 (9th Cir. 2015). On remand, the court again denied class certification, and granted

** This case was submitted to a panel that included Judge Kozinski. Following Judge Kozinski's retirement, Judge Nguyen was drawn by lot to replace him. Ninth Circuit General Order 3.2h. Judge Nguyen has reviewed all case materials.

*** This case was submitted to a panel that included Judge Reinhardt. Following Judge Reinhardt's passing, Judge Owens was drawn by lot to replace him. Ninth Circuit General Order 3.2h. Judge Owens has reviewed all case materials.

defendants’ motion for summary judgment, holding that qualified immunity protected defendants against these claims. The court reasoned that there was no violation in that defendants “acted reasonably in service and execution . . . believing that the warrants were supported by probable cause,” and that even if a violation had been committed, no clearly established law gave them fair notice of liability. Torres and Rivadeneyra appeal.

We have appellate jurisdiction under 28 U.S.C. § 1291. We review de novo whether qualified immunity protects government officers from liability. *Prison Legal News v. Lehman*, 397 F.3d 692, 698 (9th Cir. 2005). We review the denial of class certification for an abuse of discretion. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 712 (9th Cir. 2010).

We presume the parties’ familiarity with the facts of this case as set forth in our published opinion, *see Torres*, 793 F.3d at 1048–50, and as set forth in the district court’s order. After consideration of the briefs, record, and argument, we affirm.

1. Torres and Rivadeneyra first argue that defendants are not entitled to qualified immunity for the execution and service of the warrants, because the warrants were insufficiently particularized. They argue that the Attorney General’s use and issuance of “criteria-based” warrants violates the requirement of

particularized probable cause, *see Ybarra v. Illinois*, 444 U.S. 85, 91 (1979), and the prohibition on using profile evidence as probable cause, *see United States v. \$49,576.00 U.S. Currency*, 116 F.3d 425, 427–28 (9th Cir. 1997), and that both propositions were clearly established.

Even assuming plaintiffs’ Fourth Amendment rights were violated, such a violation was not clearly established at the time. This second prong of the qualified immunity analysis requires us to examine the “contours” of the plaintiffs’ Fourth Amendment rights to determine whether those particular rights were “clearly established,” *Hope v. Pelzer*, 536 U.S. 730, 739 (2002), and ask whether a “reasonable official” would have known that “what he [was] doing violate[d] that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Plaintiffs carry the burden of showing that the law was clearly established at the time of the alleged violation, *see Davis v. Scherer*, 468 U.S. 183, 197 (1984), and we define “clearly established law” not at a high level of generality, but with a fair degree of granularity, *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted).

We agree with the district court’s analysis, and we find that the cases cited by plaintiffs would not have provided defendants with notice in 2006 that their conduct constituted an unconstitutional seizure in violation of plaintiffs’ Fourth Amendment rights. The cases they cite are simply too general to have done so.

See, e.g., Ybarra, 444 U.S. at 90 & n.2 (warrant that broadly directed the police to search “the following person or place: . . . the Aurora Tap Tavern. . . . [a]lso the person of ‘Greg’” was not supported by probable cause); *\$49,576.00*, 116 F.3d at 427–28 (affidavit by arresting officer noting merely that “appellant fits a drug courier profile” was insufficient for probable cause). “[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity,” and “innocent behavior frequently will provide the basis for [it].” *Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983). Although “profile” evidence that “describe[s] a very large category of presumably innocent [persons]” does not alone establish probable cause, *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam), the program at issue here identified transfers with an extremely high statistical likelihood of a criminal nexus. Whether or not the warrants were properly issued, we agree with the district court that defendants are entitled to qualified immunity as to their service and execution.

2. Torres and Rivadeneyra argue that the district court ignored our remand of their Due Process and Commerce Clause claims, and that the district court erred in refusing to certify their class claims. As to the former argument, even if those claims survived our remand, they are nonetheless meritless because the claimed violations of the Due Process and Commerce Clauses are even less

“clearly established” than the claimed violations of the Fourth Amendment for which defendants are entitled to qualified immunity. As to the latter argument, “the district court need not inquire as to whether [a] meritless claim should form the basis of a class action.” *Corbin v. Time Warner Entm’t-Advance/Newhouse P’ship*, 821 F.3d 1069, 1085 (9th Cir. 2016).

The judgment of the district court is **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED <i>(Each Column Must Be Completed)</i>				ALLOWED <i>(To Be Completed by the Clerk)</i>			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
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Opening Brief	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>	<input type="text"/>	<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
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* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

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Attorneys' fees **cannot** be requested on this form.

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Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk