UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-15931

TERRENCE HARRY BRESSI,

Plaintiff-Appellant,

v.

MICHAEL FORD, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV-04-264-JMR
Honorable John M. Roll, United States District Court Judge

CONSOLIDATED REPLY BRIEF OF APPELLANT TERRENCE BRESSI

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I. INTRODUCTION

Through their counsel, Appellees Michael Ford, Richard Saunders, George Traviolia and Eric O'Dell (individually by their last names, collectively by "the Appellees") filed a response brief on October 18, 2007. The Appellees argue that they had authority under tribal law to conduct the checkpoint in this case and they cite numerous provisions of tribal and federal law for support of their position. The Appellant does not dispute that these legal authorities grant authority for the establishment of a tribal police force and that this police force may conduct checkpoints without running afoul of the United States and Arizona Constitutions.

Where the Appellees are mistaken, and where the District Court mistakenly agreed, is that the simple fact that it is *conceivable and possible* for these Appellees to conduct a legal suspicionless checkpoint does not convert the checkpoint that was *actually conducted* into a legal checkpoint.

In particular, these Appellees were authorized by tribal law to conduct suspicionless checkpoints to check for drunken drivers. They are not authorized by tribal or any other law to stop all traffic for general law enforcement purposes. The tribal ordinance that permits police officers to check for driver's licenses, which is similar in purpose and scope to Arizona's statute, does not extend to illegal stops of drivers. Regarding the substantive law, the difference between the scope of tribal law and the scope of state and federal law is insignificant.

The District Court's grant of summary judgment to the Appellees rests primarily upon its erroneous ruling that the roadblock in this case was conducted entirely under color of tribal law. The Appellees have provided no evidence, other

than bald and unsupported assertions in affidavits and depositions and conclusory statements in pleadings, to show that they were acting solely under color of tribal law. Rather, the facts as stated in Appellant's opening brief clearly show that the Appellees were acting under color of state law and under color of federal law. Because the District Court improperly resolved factual disputes in favor of the Defendants-Appellees and ignored other facts that materially supported Mr. Bressi's complaint, the granting of summary judgment to all parties in this case was consequently in error and should be reversed.

The United States filed its response brief claiming that the malicious prosecution claim was waived by the Appellant for failure to argue the issue and that it should be dismissed on appeal. This argument is in error. The District Court granted summary judgment to the United States in an opinion based exclusively on the facts and law argued and decided in the case of the individually-named Appellees. The United States argued in the District Court that probable cause is an absolute defense to the claim of malicious prosecution, and the Appellant did not dispute the legal position taken in that argument. The issue turned on whether the Appellees actually had probable cause to arrest Mr. Bressi, and since the District Court had already resolved this issue in favor of the Appellees in their motion for summary judgment on the Constitutional claims, there was no additional argument required. If this Court agrees with Appellant that there was no probable cause to arrest Mr. Bressi, then it necessarily follows that the District Court erred in granting summary judgment to the United States.

II. BRIEF STATEMENT OF FACTS ON REPLY

The Statement of Facts submitted by the Appellees derives its content primarily from the affidavits and depositions of the Appellees. In many places as cited in the Appellant's Statement of Facts, these statements by the individual Appellees are contradicted by their own documents, or by documents received from the Department of Homeland Security, or by the affidavits and depositions of Mr. Bressi and other civilian witnesses.

The Appellees claim that Tohono O'odham Police Department ("TOPD") officers determine need to get identification from drivers in order to determine whether a driver is a tribal member or not. (Appellees Brief at 8). However an Arizona driver's license, which is used by tribal members as well as nontribal Arizona residents, does not contain this information. Tribal criminal law applies to members of other tribes, and members of the Tohono O'odham Nation or other tribes are permitted to reside on nontribal lands. Therefore, the Arizona driver's license is a poor way of identifying whether a driver is a tribal member or not.

This argument in this case is specious for two reasons. First, Lt. Ford admitted to Marc Victor (Mr. Bressi's attorney in the criminal proceedings) that he could recognize tribal members on sight, and he knew Mr. Bressi was not a tribal member. (ER 50). Second, TOPD officers confirmed Mr. Bressi's identity and lawful possession of the truck he was driving through Mr. Bressi's employer by telephone prior to the arrest. (Appellees Brief at 13). The Appellees claim this was done at some unspecified time, but Andrew Tubbiolo specifically remembers – and testified to such in his affidavit – that the phone call from the police came into the

office while his call to Mr. Bressi was still connected. (ER 7, ¶4).

The issue of who said that this roadblock was operated by a "joint task force" is disputed by the parties. Mr. Bressi specifically remembers that Lt. Ford said "joint task force" or "multijurisdictional task force," whereas Lt. Ford denies making this statement. Customs Agent William Dreeland testified that he might have made the "task force" statement, and Andrew Tubbiolo clearly heard the statement through the telephone made by someone. (Appellees' Brief at 11). Because there is substantial evidence to show that this operation was conducted by a joint task force, this is an issue that must be resolved by a jury.

The Appellees focus on several irrelevant facts. First, they describe what Mr. Bressi testified he was thinking related to what it means to be detained (Appellees Brief at 11), instead of what Mr. Bressi – and the individual Appellees – were saying and doing. Second, Mr. Bressi was carried out of the truck and dragged to the side of the road (Appellees Brief at 12); but this did not occur until after the decision to arrest him was made, and Mr. Bressi is not making an excessive use of force or police brutality claim.

The Appellees' Statement of Facts is very concerned with whether Mr. Bressi and Mr. Tubbiolo specifically remember that trafficking of drugs, stolen cars, or illegal immigrants was discussed by police officers on the scene or if it is possible that they remember only being told by Lt. Ford and Ofc. Traviolia that they were concerned with illegal trafficking in general. Regardless of what any particular officer said, there is substantial evidence in the record, including internal TOPD documents, to prove that this roadblock was concerned with stemming

illegal trafficking. And the Appellees subvert their own argument that a purpose of the roadblock was not detecting evidence of illegal trafficking when they defend Ofc. Traviolia's trunk searches as being consensual. (Appellees Brief at 17).

The Appellees falsely claimed that federal officers were not at the scene of the roadblock until after TOPD officers discovered a violation of federal law under the jurisdiction of Border Patrol or Customs. (ER 55-56; ER 62; ER 66-68). In the face of overwhelming contradictory information, they are now modifying their position to state that federal officers may have been present, but they were not involved in the operation of the roadblock until a federal violation was discovered. (Appellees Brief at 15).

There are many documents that would potentially support Mr. Bressi's statements if the Appellees had properly preserved evidence, as they are legally required to do under Rules 26-37 of the Federal Rules of Civil Procedure. Their claim of accidentally losing documents (Appellees Brief at 18) is implausible on its face since the Notice of Claim in this case was served on the parties on June 16, 2003 (ER 104, 69:2-13) and Lt. Ford represented to Mr. Victor on December 5, 2003 and to the State's prosecutor in the criminal case on December 9, 2003 that he would not produce these documents because of sovereign immunity (ER 65, ER 36). The fact that Lt. Ford continues to deny making these statements speaks volumes of his credibility. The operational plan for the roadblock in question, for which there were originally several copies, should still exist someplace within the office of the Tohono O'odham Police Department. The Appellees' claim reads as if there is only one copy of the plan and it got lost in the mail, and this Court is not

required to accept such a preposterous claim of accidental loss.

Even though the Appellees have failed to produce documents, this fact has not stopped them from referring to the lost documents in support of their own position. (Appellees Brief at 15).

As the Appellees correctly point out, former TOPD Ofc. Joseph Patterson was not a witness to the roadblock in this case and was not working for the TOPD at the time. But he testified to several facts regarding how the TOPD operated roadblocks during his period of employment, and his testimony contradicts some of the statements made by the Appellees and supports some of the statements made by Mr. Bressi.

The Appellees claim that certain evidence should not be considered because it is hearsay. At page 18, claims that "the county attorney's statements in the justice court transcript regarding Ford are hearsay not subject to an exception." But the statement is not hearsay, because it is not offered to prove the truth of the matter asserted. It is offered to show the effect on the listeners. Ofc. Traviolia claims he did not hear the statement, but Lt. Ford admitted that he heard the statement. The purpose of introducing the statement is to show that Lt. Ford took no corrective action to clear the record. If the State's prosecutor was incorrect in stating in open court that Lt. Ford informed him that he and/or his agency refused to comply with a lawful subpoena, then Lt. Ford could reasonably be expected to signal to the prosecutor that this statement was incorrect. His inaction, on the other hand, signals that he agreed with what was being said.

At page 17, the Appellees argue that Det. Nick Romero's report (ER 12) is

inadmissible hearsay. However, this report is admissible under the business record exception to hearsay in Federal Rule of Evidence 803(6). His statement in the report that the purpose of the roadblock was to check for stolen vehicles and smugglers may not be the TOPD policy, but the fact that at least one officer committed this purpose of the roadblock to writing in a report shows at the least that unconstitutional searches and seizures were being conducted and that Chief Saunders and Lt. Ford were grossly derelict in their responsibilities to train the officers under their command.

It is irrelevant that the memorandum of Lt. Kevin Shonk (ER 132-133) was published prior to the publication of the Supreme Court's opinion in *City of Indianapolis v. Edmond*, 531 U.S. 32, 120 S.Ct. 447 (2000). What is relevant is that Chief Saunders acknowledged that this memorandum continues to be policy in his department to this day. (ER 78-79, 40:12 – 43:13). The Appellees may be saying the "magic words" that this checkpoint is for sobriety, but their actions described in the Appellant's opening brief demonstrate clearly that this roadblock was for the purpose of general crime control.

III. ARGUMENT

A. The District Court Erred as a Matter of Law by Not Relying on the Appellant's Statements of Facts as True, by Resolving Disputed Facts in Favor of the Moving Party, and by Ignoring Material Facts that were Beneficial to the Appellant

There is no dispute as to the legal standards which the Court must apply when determining whether to grant or deny summary judgment. The question is

whether the evidence provided by the Appellant is sufficient, if believed by the jury, to win at trial.

The District Court was correct (ER 152-153) in stating that whether the roadblock in this case was conducted under tribal authority or state or federal authority is a mixed question of fact and law, and that in certain cases, under *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989), tribal police officers can be found to be acting under color of state law. The Appellant laid out a compelling set of facts to demonstrate that the tribal officers were acting under color of state law and federal law as well as tribal law, based on the methods by which the TOPD officers were employing their state authority as well as their implementation of federal officers on the line checking for violations of law.

The Appellees continue to claim that federal agents were only at the scene upon the discovery of violations of federal law. This ignores the fact that both Mr. Bressi (ER 1 ¶6-7) and Mr. Tubbiolo (ER 5, ¶2; ER 6, ¶8) observed considerably more Border Patrol vehicles than those that would be justified by two violations of immigration law discovered at the roadblock, and both observed that Customs and Border Patrol agents were working in the line of traffic inspecting vehicles rather than waiting for violations to be discovered by TOPD officers. The only reason why Border Patrol agents would be looking into vehicles on the line is for the purpose of inspecting the vehicles and their contents prior to or during their contact with the TOPD officers. Drivers who failed to produce identification were not still in the line, for the TOPD officers already directs those vehicles to move to the side of the road for a secondary inspection. The District Court not only failed to draw

the only reasonable inference from the actions of the Border Patrol agents observed by Mr. Tubbiolo, but in the process the District Court also created facts concerning Mr. Tubbiolo's knowledge. (ER 162-163).

In the absence of a full confession from the Appellees, the District Court was obligated to resolve the material factual disputes by looking at reasonable inferences that could be drawn from the conduct of the participants at the roadblock. It was improper for the District Court to frame Agent Dreeland's action as "a Customs Agent at one point helped direct traffic" (ER 162), when the totality of the evidence shows that Customs Agents, including but not limited to Agent Dreeland, were active participants to the point of "substantial coordination" with federal authorities. The Appellees' sworn statements that Customs Agents were not on the scene until violations of federal law were discovered are clearly false given the overwhelming documentary evidence, as well as the testimony of Agent Dreeland, to the contrary.

These facts, in conjunction with other facts ignored by the District Court as described in the Appellant's Opening Brief, support Mr. Bressi's claims and raise genuine issues of material fact that can only be resolved by a jury.

B. The District Court Has Subject Matter Jurisdiction Over the Constitutional Claims Because the Officers Were Acting Under Color of State and Federal Law

1. Effect of AZ-POST Certification on TOPD Officers

The Appellees state at page 24 of their brief that the officers in this case "were neither employed by the State nor under its control or supervision." This is incorrect. The Arizona Peace Officers Standards and Training Board certifies

police officers in the State of Arizona and requires officers to regularly renew their certification through continuing education and other practices. AZ-POST functions similarly to licensure of lawyers in that the state bar does not employ lawyers but it certainly is true that lawyers are under the control and supervision of the state bar. It is not required for the State of Arizona or any of its agencies to employ these TOPD officers for state action to be taken by the TOPD officers.

The Appellees continue to argue in hypotheticals, rather than focus on their actual conduct at the scene of this roadblock. Hypothetically, these officers could have conducted a sobriety checkpoint that was purely under color of tribal law and violated no Constitutional provisions. In reality, they did not.

The Appellees are arguing that they do not know which drivers are tribal and which are not until the drivers identify themselves. However, for the Appellees to be correct, they would have to show that the measures they are taking are designed in part to result in the identification of tribal membership. An Arizona driver's license can only identify those tribal members who live within the boundaries of the reservation; it cannot identify tribal members who live outside the Tohono O'odham Nation, and it cannot identify non-tribal members. The least intrusive and most reliable method of identifying tribal members would be simply to ask the driver; but the record shows that the Appellees do not ask this. If the Appellees made a good-faith attempt to identify tribal members, as opposed to what they were doing in this case, then there might be stronger support for the Appellees' claim that they were acting purely under color of tribal law.

The moment any TOPD officer looks for a violation of a state law that is not

also a violation of tribal law (e.g., insurance, seatbelts), that officer is engaging in the enforcement of state law. Enforcement is an action taken against offenders and non-offenders alike; the difference is simply that non-offenders are not punished for violations they did not commit. The Shonk memorandum, which Chief Saunders acknowledged is still TOPD policy, explicitly instructs officers to look for violations of state and federal law as well as tribal law.

2. "Symbiotic Relationship" Test

The Appellees fail to distinguish *Brunette v. Humane Society of Ventura County*, 294 F.3d 1205, 1211 (9th Cir. 2002), in suggesting that a symbiotic relationship cannot occur when the state action is alleged to be committed by persons holding authority from a separate, non-state sovereign. *Evans* addresses this point precisely; if tribal police officers take action that could not be taken but for their state police power, then the officers may be liable for those actions under 42 U.S.C. §1983. It is irrelevant what kind of authority may be mixed with the state authority; what is relevant is whether state authority is employed at all in the actions.

There is also substantial evidence to show that the Appellees acted in concert with federal officers to such an extent that joint action can be inferred. The original briefing memorandum was not produced, but other operational plans were disclosed that show that federal agencies are asked to participate in their roadblocks. Mr. Bressi and Mr. Tubbiolo both observed officers working actively on the line enforcing law (it is clear that they were not directing traffic). The Shonk memorandum tells TOPD officers to look for violations of federal law. Enough

circumstantial evidence exists to state a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), that the question must be submitted to a jury.

3. The Lost Paperwork Requires an Adverse Inference

The Appellees claim that they were acting in good faith when they failed to produce to their counsel (and in turn to opposing counsel) several critical documents related to this litigation. If only one document or one recording was lost, an innocent error could be claimed. But here, the lost evidence consists of documents that were in the possession of the Appellees and/or others in their department when a Notice of Claim was filed by Mr. Bressi and when the Justice Court hearing was held six months later. Those records were reported disappeared only when discovery was ordered to be commenced by the District Court in February 2005, nearly two years after Mr. Bressi filed his Notice of Claim. The suggestion by the Appellees that the loss and/or destruction of all this evidence was an innocent mistake is simply not plausible.

The recordings that were destroyed pursuant to a retention policy should have been preserved because the Notice of Claim was filed well in advance of the scheduled destruction of the recordings. The discovery schedule is controlled by the Local Rules of the Federal Rules of Civil Procedure, and Mr. Bressi was not permitted to commence discovery in this case until the District Court allowed it to commence. Mr. Bressi certainly made every effort to obtain these records in 2003 through issuance of subpoenas during the criminal case.

4. The *Tuscarora* Rule Affects This Case

The Appellees are incorrect to claim that the Appellant waived his ability to

cite new case law that supports the same proposition that was raised in the District Court. It is expected that the parties will cite to new cases on appeal, as the Appellees did in their response brief. However, it is particularly suitable for this issue to be raised on appeal because of the substantial change in the case law since the District Court ruled on the immunity issues. *See San Manuel Indian Bingo and Casino v. N.L.R.B.*, 475 F.3d 1306 (D.C. Cir. 2007).

C. The Appellant's Right to Travel Argument is Not Waived.

The Appellant did not specifically cite the First Amendment or a right to travel before the District Court. However, the right to move freely is implicit within the claims of the right to privacy and right not to be unreasonably seized, which were raised and fully litigated in the District Court. This argument is not a wholly new issue raised for the first time on appeal; rather it is citation to additional case law that helps to clarify the issues. In fact, some of the same case law controls both issues. *See, e.g., Michigan Dept. of Public Safety v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481 (1990). This element of the argument involves no new evidentiary issues, contrary to the assertion of the Appellees, and as such this is wholly distinguishable from those newly-raised issues that require consideration of evidence and as such are prohibited under *Jovanovich v. United States*, 813 F.2d 1035 (9th Cir. 1987).

At page 33, the Appellees continue to argue that if the Appellant had just done what he was told to do, then he could have been on his way and none of this would ever have happened. This argument is completely meritless. What is at issue

in this case is the reasonableness of the actions of the Appellees, for they are the ones entrusted with governmental authority and as such have a duty to uphold the law. The Appellant has not argued that the Appellees are responsible for Mr. Bressi's decision to delay signing the citation. (However, Mr. Bressi's decision gave him the opportunity to observe roadblock operations that he would not have had if he simply signed the citation).

As for the delay of only one to three minutes, that is a misstatement of the evidence. Lt. Ford said that the wants and warrants check alone could take that long, but he also said that this time estimate applied to the computerized checks. He did not include the time for checking paper files. This does not take into account the amount of time it takes for a driver to come to a complete stop and accelerate from the stop. This does not take into account the amount of time it takes to produce a license and registration, which often involves fumbling through a glove box. This does not take into account that Ofc. Traviolia asks drivers for permission to search their trunks. This does not take into account any other investigation of general law enforcement that occurs at the stop as a primary purpose (as opposed to enforcement that occurs after a violation is discovered), such as Border Patrol agents looking into cars. As all the parties agreed, traffic built up pretty quickly on the road, which means that the delay for each driver is longer than one to three minutes.

Even if the duration of the stop is short, that is only one consideration for testing the reasonableness of a stop. See Section III-D, *infra*.

D. The Roadblock in this Case Violated the Arizona and United States Constitutions.

1. New Defenses Raised for First Time on Appeal

For the first time on appeal, the Appellees raise the issue that the Appellant is not entitled to relief because the "fruit of the poisonous tree" doctrine does not apply to claims arising under 42 U.S.C. §1983 and cite *Townes v. City of New York*, 147 F.3d 138 (2d Cir. 1999), in support of that claim. It is ironic that the Appellees should do this in the same brief where they asked for some of Appellant's arguments to be struck (and in a related filing, where they asked for sanctions). But unlike Appellant's arguments, which do not create any additional claims but rather elaborate on existing claims, this issue raised by the Appellees is an entirely new theory of defense to the case that has never been suggested in any pleading in the District Court.

Regardless, the Appellees' argument is without merit. *Townes* does not say that there is no "fruit of the poisonous tree" relief for a §1983 claimant who was illegally seized, rather it says that the chain of causation was broken between the act of the police and the injuries suffered when the trial court in the criminal matter refused to suppress the evidence. *Id*. at 147. In this case, the criminal matter never made it to trial because the Appellees and/or other agents of the Tohono O'odham Nation refused to comply with a lawful subpoena. Here, the chain of causation is undisturbed. And even the holding in *Townes*, a Second Circuit case which is not binding precedent before this Court, has been criticized by other courts. *See, e.g. Carter v. Georgevich*, 78 F.Supp.2d 332 (D.N.J. 2000).

The claim that the Appellant "has never disputed that probable cause existed

to cite and arrest him under state law" is patently false. The Appellant has argued from the beginning, and at every opportunity, that the citation for failure to obey a lawful order was without probable cause because the order he was given to produce a license was not lawful. The Appellant has also argued that the citation for failure to produce a driver's license was the result of an unlawful demand for identification, and it was additionally without probable cause because Ofc. Traviolia had proof that the Appellant was a licensed driver at the time he pulled the Appellant's wallet out of his pocket and ran a check on his license. *See* A.R.S. §28-1595(E) (Appellees' Brief, Addendum p12).

2. General Crime Control was a Primary Purpose of the Roadblock in Question

The Appellees are mistaken in suggesting that the holding in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391 (1979), is that license and registration checks at fixed checkpoints are permissible. That case was decided on the issue of whether a police officer on patrol could pull over a single vehicle for the purpose of checking for license and registration. The language from *Prouse* regarding the potential permissibility of a license and registration check at a fixed checkpoint was purely dicta, and it has never been cited as anything but dicta, including in *Sitz* and *Edmond*.

However, the roadblock in this case was not merely to check for sobriety, licenses and registrations. Another primary purpose was to check for wants and warrants of the drivers and anyone else that produced identification for the officers.

And yet another primary purpose was detection of ordinary criminal wrongdoing.

The individual Appellees try to analogize this case to the recent decision in *United States v. Faulkner*, 450 F.3d 466, 471 (9th Cir. 2006), in which this Court held that a park ranger working at an information booth was not primarily interested in general crime control. *Faulkner* could not be more inapposite from this case; in that case, a park ranger stopped drivers entering Bureau of Land Management land for 20 seconds to tell them about new fire regulations and to hand them a litter bag. In this case, TOPD officers were demanding driver's licenses from people on the road so that they could check for wants and warrants and other violations of law, and in some cases trunks were subsequently searched.

Furthermore, contrary to the Appellees' claims, discretion of individual officers was hardly circumscribed in this case. No written guidelines for conducting roadblocks existed at all until August 17, 2005. Operational plans do not provide much guidance for the individual officers in terms of what kinds of questions they should ask. Even Lt. Ford claims he has not seen the Shonk memorandum that outlines what kinds of questions should be asked of drivers who come through the roadblock. And contrary to the Appellees' claim, all drivers were not being treated the same; the Appellant witnessed many cars waved through without being stopped while other vehicles were subjected to intensive searches.

The Appellees cite several cases from other state jurisdictions that have no similarity to the facts in this case. In *State v. Rubio*, 136 P.3d 1022 (N.M.App. 2006), an officer had reasonable suspicion that a traffic violation occurred when he asked for license, registration and proof of insurance. In *State v. Ellenbecker*, 464

N.W.2d 427 (Wis.App. 1990), the court found that a seizure for Fourth Amendment purposes had not even occurred, but that even had a seizure occurred then the police were acting as community caretaker in assisting the owner of a disabled vehicle. Finally, in *Commonwealth v. Bolton*, 831 A.2d 734 (Pa.Super. 2003), the police officer used the "NCIC computer" to run a license plate of a vehicle that was driving; the stop of the vehicle occurred *after* the officer determined that the vehicle lacked proof of financial responsibility. None of these cases speak to (much less support) the proposition that police officers can run a roadblock and stop all traffic for the purpose of checking for licenses and registrations and warrants.

3. Appellees Acted Unreasonably When They Violated Mr. Bressi's Clearly Established Rights

The arguments in the Appellant's Opening Brief lay out a complete cause of action showing that the Appellees knew or should have known that actions they took were violating Mr. Bressi's clearly established rights. Lt. Ford, Ofc. Traviolia and Ofc. O'Dell were all involved in Mr. Bressi's arrest, and Chief Saunders is responsible in his capacity as a policymaker. (Appellant has never argued that Chief Saunders is liable for the actions of his officers under a *respondeat superior* theory, rather he is liable for his own failures in training and making policy.)

The Appellees misstate the opinions of the District Court in claiming that the District Court agreed with the propriety of the Appellees' actions. The District Court first ruled that it had no jurisdiction to consider certain parts of the claim

because the Appellees were acting under color of tribal law (ER 152-166). Then, in its opinion granting summary judgment, the District Court had to assume the propriety of the stop, questioning and detention of Mr. Bressi (ER 167-181). The District Court never resolved the question whether the roadblock satisfied Constitutional muster because it erroneously found that it had no jurisdiction to do so.

The Appellees also justify the decision to re-file the case by relying on hearsay statements made by Ofc. Traviolia and attributed to Philip Perkins, the same Deputy County Attorney who later asked the Justice Court to dismiss the case. This particular hearsay statement has no basis of reliability whatsoever, unlike the statement by Mr. Perkins that was transcribed and which Ford admitted having heard. Even if Mr. Perkins told Traviolia that he still had a viable case, it is completely unknown what information Traviolia gave in order to solicit the opinion.

Then, the Appellees argue that state law, which might be more restrictive than federal law, does not control in a §1983 case. However, as the Appellees point out, Article 2, §8 of the Arizona Constitution provides the same protections to motorists as those provided by the Fourth Amendment to the United States Constitution. *State v. Jeney*, 163 Ariz. 293, 295-97, 787 P.2d 1089, 1091-93 (App. 1989). Furthermore, the Appellant has claimed a violation of his state constitutional rights as well; therefore, to the extent that Arizona law provides greater protection for motorists than does federal law, the Appellees may be found liable under §1983 for violating Mr. Bressi's state constitutional rights.

4. Appellees are Not Entitled to Qualified Immunity Against Mr. Bressi's Claims for Injunctive Relief

In response to the Appellant's claim that injunctive relief is appropriate in this case, the Appellees argue simply that there was no violation of state or federal law. The District Court's opinion related to the claim for injunctive relief was dependent on its earlier findings that the roadblock was conducted under color of tribal law. If this Court reverses the District Court as to the other claims in this case, then it seems that the Appellees acknowledge that this Court must also restore the claim for injunctive relief.

E. The District Court Erred in Granting Summary Judgment as to the Malicious Prosecution Claim, and the Appellant Did Not Waive This Argument or Fail to Argue It in the Opening Brief.

The facts and law supporting the malicious prosecution claim are exactly the same as those supporting the Appellant's Constitutional claims. i.e. that the Appellees had no probable cause to arrest Mr. Bressi or to re-file the charges six months later. The United States' motion for summary judgment below relied solely on the argument that these officers had probable cause to arrest Mr. Bressi and that probable cause is an absolute defense to the claim of malicious prosecution.

The Appellant's Opening Brief asked for relief as to the malicious prosecution claim, and the Appellant also briefed this Court in the Statement of the Case section as to the history of that claim. Then the Appellant argued at length why there was no probable cause to arrest Mr. Bressi. Quite simply, there was nothing left to argue as to the malicious prosecution claim against the United States without being overly repetitious. The only thing missing was a separate heading.

Fed. R. App. P. 28(a)(9) states that for each issue there must be a separate

argument. However, neither the rule nor the case law cited by the United States holds that any argument that fails to comport with the strict language of the rule is automatically waived. Rather, the case law states that issues that are not argued at all are waived. *See National Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1049 n.3 (9th Cir. 2000). The purpose of Rule 28(a)(9), that the Court of Appeals be briefed on the facts and law governing the argument on each issue, was satisfied in the Opening Brief.

Even the brief submitted by the individual Appellees, at pages 42-43, acknowledges that the Appellant's Opening Brief argued this issue. For these reasons, this Court should not consider the argument on the malicious prosecution claim to be waived.

The facts raised by the Appellant demonstrate that this prosecution was malicious. At the scene of the roadblock, Ofc. Traviolia walked away because he needed to get away from Mr. Bressi and cool off, and Ofc. O'Dell said "Don't give me that Fourth Amendment crap!" and belligerently referred to Mr. Bressi as a "green freak." (Opening Brief at 8-9). These officers were clearly upset with Mr. Bressi, who did nothing to raise their ire but rather simply talked about Constitutional law on the side of the road. The re-filing of the case was conducted immediately upon the receipt by the Appellees of Mr. Bressi's Notice of Claim. In the absence of any probable cause for the arrest and citation and subsequent re-filing of charges, this evidence is enough to establish a prima facie case for malicious prosecution.

As stated in the Appellant's Opening Brief and earlier in this Reply Brief,

there was no probable cause to arrest Mr. Bressi. The case law involving the statutory requirement under A.R.S. §28-1595(B) that a motorist produce a driver's license upon request by law enforcement applies to drivers who are stopped in connection with a violation of law, and none of the case law cited by the United States pertains to stops at suspicionless checkpoints. Because there was no basis to stop the Appellant, the basis for the request for his identification is similar to that in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637 (1979).

Furthermore, there is no evidence that would be admissible at a trial that shows that there was an independent decision to proceed with the criminal case against Mr. Bressi by the prosecutor. The United States argues that Ofc. Traviolia spoke with Mr. Perkins and that Mr. Perkins advised Ofc. Traviolia that the case was viable. But neither the United States nor the individual Appellees have submitted a sworn statement by Mr. Perkins, and the statement attributed to Mr. Perkins by Ofc. Traviolia is self-serving hearsay and is not subject to any exception to the bar against admission of hearsay evidence.

Finally, though this is a case where an unconstitutional seizure of Mr. Bressi occurred that violated his Fourth Amendment rights, there is no attempt in this case to exclude evidence from consideration. The case law cited by the United States describes §1983 cases in which Plaintiffs wished to apply the exclusionary rule in order to keep unfavorable evidence from consideration. *See, e.g., Wren v. Towe*, 130 F.3d 1154 (5th Cir. 1997). The issues under consideration in this case are entirely different in that the Appellant seeks redress for the violation of the right of all drivers who have a right to be free from unreasonable seizure of the police.

IV. CONCLUSION

For the reasons stated herein and in the Appellant's Opening Brief, Appellant asks this Court to reverse and vacate the opinions and orders of the District Court dismissing some claims and granting summary judgment on others as to the Appellees Ford, Saunders, Traviolia and O'Dell, and to reverse and vacate the opinion and order of the District Court granting summary judgment to the United States of America, and to remand this case to the District Court for further proceedings.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,364 words and 519 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 SP2 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I certify that on November 5, 2007, an original and fifteen (15) copies of Appellant Terrence Bressi's Consolidated Reply Brief were sent, via Federal Express, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies were sent, via United States mail, postage prepaid to:

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