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DIVISION II

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COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

SARA MONTE and CAMERON MONTE, husband and wife and the marital community comprised thereof, CLARA MONTE, a minor child, and GRACE MONTE, a minor child through their guardians ad litem, Sara Monte and Cameron Monte.

Plaintiffs/Appellants

vs.

CLARK COUNTY, WASHINGTON, a political subdivision of the STATE of WASHINGTON and ANTHONY GOLIK, elected Prosecuting Attorney for Clark County,

Defendants/Respondents

OPENING BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants, Sara and Cameron Monte and their two minor children, seek reversal of the trial court's granting of Defendants' Motion for Summary Judgment, and the resulting Judgment of Dismissal, based upon the granting of said motion, of Plaintiffs' tort claims for False Arrest, False Imprisonment, and Outrage.

II. ASSIGNMENTS OF ERROR AND ISSUES

Assignments of Error

Assignment Number 1: The trial court erred in granting Defendants' Motion for Summary Judgment, and dismissing Plaintiffs' claims, based upon the theory that an unlawful, warrantless arrest by police acting at the direction of the Clark County Prosecuting Attorney is a "prosecutorial function," thereby shielding the Prosecuting Attorney from liability under the doctrine of Prosecutorial Immunity.

Issues Relating to Assignments of Error

Issue Number 1: Where a Prosecuting Attorney directs a police officer to arrest a suspect for a crime, without an arrest warrant, almost three and a half years after commission of the alleged

crime, and five months after prosecution and arrest is barred by lapse of the three year statute of limitations, has the Prosecuting Attorney engaged in a police function, rather than a prosecutorial function, such that the doctrine of Prosecutorial Immunity does not apply?

III. STATEMENT OF THE CASE

The facts in this case are relatively simple, and tragic.

It is undeniable that in November, 2010, Sara Monte was the unfortunate victim of an extreme, acute episode of mental illness. She suffered a psychotic break in which she was delusional and hallucinating. Her thought processes were irrational and her ability to perceive reality was clearly diminished. (**CP 51**, Declaration of Roger A. Bennett, Medical Report, **Exhibit 1,** slightly redacted so as to remove irrelevant gastro-intestinal and gynecological issues.)

On the morning of November 27, 2010 Sara delusionally perceived that all of her family was dead. She went wandering around outside naked in the snow, looking for her husband.

At some point, for an unknown brief period, perhaps a few seconds, she placed her hand over her daughter's mouth and pinched the daughter's nose.

Statements attributed to her were themselves were internally contradictory and nonsensical. For example, the heart of the state's criminal case was based upon Sara allegedly telling a social worker that in order for Sara's daughter to live, the daughter had to die.

Sara's condition was apparent to everyone. Clark County Sheriff's Deputies Hamilton and Blysma were called to a neighbor's house, where Sara had wandered to, and recognized that she was confused and in an extreme medical emergency. They had her transported to Legacy Salmon Creek Hospital on a "Mental Transport" for an "involuntary mental evaluation." (**CP 51**, Declaration of Roger A. Bennett, Report of Hamilton, **Exhibit 2**). Sara was hospitalized with a diagnosis of psychosis, not otherwise specified.

In February, 2011, Detective Barry Folsom sent a report of the incident to the Prosecuting Attorney's office. Despite serious deficiencies in proof, Detective Folsom described the incident as "Attempted Murder in the First Degree." (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 3**, pages 1 and 12 of Folsom report showing referral date).

No action was taken by the Prosecuting Attorney on the case.

Child Protective Services quickly intervened and removed Sara's two children from her home. CPS commenced a Dependency action under Clark County Superior Court cause numbers 10-7-01158-9 and 10-7-01159-7, in which Sara stipulated to the Dependency and was required to undergo extensive services, monitored by the Department of Social and Health Services, Division of Children and Family Services (DCFS) including psychiatric treatment. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 4)**

Over the next year and a half, Sara addressed her mental illness in spectacular fashion, and the children were returned to her care, with the knowledge of the Prosecuting Attorney's Office, **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 5,** letter from DCFS caseworker Don Watson, dated April 10, 2012).

The Prosecutor's Office, through Deputy Prosecuting Attorney Dustin Richardson, was given clear and unequivocal notice that the children had been returned to the home with Sara and that the Dependency action was being dismissed **(CP 51**,

Declaration of Roger A. Bennett, **Exhibit 6).** The Prosecutor's Office elected to do nothing to prevent this.

On April 10, 2012, the Superior Court dismissed the Dependency, with the concurrence of the assigned caseworker, Don Watson, and the Attorney General's Office. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 7).**

The Prosecuting Attorney's Office raised no objection to the dismissal. Commissioner Schienberg's order was premised upon the determination of DCFS that the return of the Monte children to their home and mother was in their best interests **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 5.)**

The Prosecuting Attorney's Office had access to, and possession of Sara Monte's CPS /DCFS records. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 8.)**

In July, 2013, Chief Criminal Deputy Prosecuting Attorney Scott Jackson took over as team leader of the "CJC" and began reviewing "cold cases," including the Sara Monte report from Detective Folsom (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 9).**

The CJC is actually titled the "Arthur D. Curtis Children's Justice Center." Arthur D. Curtis is the former Prosecuting

Attorney for Clark County who created the CJC as a consortium of the Prosecutor's Office, law enforcement agencies, and Social Service agencies which specializes in investigating and prosecuting crimes against children. The Washington DCFS, employer of Don Watson, is a member of the CJC.

In September, 2013, Chief Criminal Deputy Jackson attended a multidisciplinary team (MDT) meeting of CJC law enforcement investigators, to determine what action to take on the Monte case. (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 10**).

As team leader of the CJC, Mr. Jackson apparently had the authority to dictate who could participate in the meeting. Mr. Jackson intentionally and knowing that it was "not fair" (his words, see **CP 51**, Declaration of Roger A. Bennett, **Exhibit 10)** excluded from the MDT meeting the person with the most relevant knowledge: Don Watson, Sara's DCFS caseworker, who had worked with her diligently for over a year to ensure that her children were safe and that her family could be reunited.

Following the MDT meeting, Mr. Jackson failed to initiate any prosecution until after the Statute of Limitations expired, which occurred on November 27, 2013. The Washington Statute of Limitations for a felony which is a lesser included offense, such

as an attempt to commit another felony, is three years, RCW 9A.04.080, State v. N.S., 98 Wn. App. 910, 912, 991 P.2d 133 (2000).

On November 27, 2013, the three year period of limitations on the Monte case elapsed. The controlling statute (with one exception that has no applicability in this case) expressly prohibits commencement and prosecution of any charge after that period elapses.

"RCW 9A.04.080

Limitation of actions.

(1) Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.

...

(h) No other felony may be prosecuted more than three years after its commission..."

On April 1, 2014, four months after the statutory period of limitations had elapsed, Mr. Jackson requested that Investigator Barbara Kipp, who was not the investigating officer on the Monte case, prepare an affidavit of probable cause to support a warrantless arrest. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit1.)**

The request was made to Barbara Kipp because the actual

investigating officer, Barry Folsom, who presumably knew more about the case than anyone else except Don Watson, was unwilling to arrest Sara, and was unwilling to swear to the existence of probable cause. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 11.)**

On April 22, 2014, Detective Spencer Harris of the Vancouver Police Department was directed to arrest Sara Monte.

Detective Harris questioned whether Sara Monte should be arrested or summoned to court, and sought clarification from Barbara Kipp **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 12.)** Barbara Kipp inquired of the Prosecuting Attorney's Office as to how to proceed, (**CP 51**, Declaration of Roger A. Bennett, **Exhibit 13**) and was directed by the Prosecutor's Office that Scott Jackson wanted Sara to be arrested, because of "fear with summonsing her in." Apparently, this fear was humorous to the prosecutors, as the email addressing the "fears" is festooned with a "Smiley Face" **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 13.)**

Detective Spencer Harris arrested Sara Monte on April 24, 2014, roughly three and a half years after the incident. His name appears nowhere in the investigative reports, until April 24, 2014

when he made the arrest. He did so without the approval of an arrest warrant, or any other type of judicial process.

Harris's arrest report recites that "Clark County CJC issued a PC arrest for the person of Sara Monte..." **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 14.)** His report states: "Monte was booked into the Clark County Jail on the above listed charge and PC statement." The police report does not list nor include such a document, so it is unknown whether or not he was relying on the unsigned document submitted as Exhibit A to Defendants" Motion for Summary Judgment, **(CP 16)** but that is possible.

On March 4, 2016, Defendants filed a motion for Summary Judgment, **(CP 16)** claiming that the warrantless arrest was a "prosecutorial function" for which the Prosecuting Attorney had absolute prosecutorial immunity form a damages suit.

Oral argument on the motion was heard on April 15, 2016 by the superior court, the Honorable David Gregerson presiding, and the court granted the Motion for Summary Judgment by order (CP 218), followed on May 9, 2016 by a General Judgment of Dismissal. (CP 220).

IV. ARGUMENT

1. ARGUMENT ON ASSIGNMENT OF ERROR NUMBER ONE

Issue Number 1

The trial court erred grievously when it granted the Motion for Summary Judgment on the sole issue presented: whether or not a prosecutor who directs the police to make a warrantless, unlawful arrest is performing a prosecutorial function. (The original Motion for Summary Judgment (CP 16) incorrectly phrased the issue as whether or not a prosecutor who initiates a criminal charge is performing a prosecutorial function. In fact, the causes of action set out in the complaint, CP 1, are premised upon the tortious arrest, rather than the statutorily prohibited filing of charges.)

Because the only issue presented to the court is a claim of immunity, the allegations of the Complaint, **(CP 1**), are accepted as true. Kalina v. Fletcher, 522 U.S. 118, 122, 118 S.Ct. 502, 139 L.Ed.2d 471 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 261, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993).

Further, because this matter came before the trial court, and comes to the appellate court in the posture of a Motion for Summary Judgment, all facts, and all reasonable inferences form the facts are interpreted in a light most favorable to the Plaintiffs, the non-moving parties.

The allegations of the complaint are found in **CP 1**.

Those reasonable inferences indicate that as far back as November, 2010, the investigating Sheriff's deputy, Hamilton, recognized that his was a case of mental illness, and the best resolution was hospitalization.

The investigating detective, Barry Folsom, did not see any reason for a custodial arrest, and referred the matter to the Prosecuting Attorney's Office.

The assigned deputy prosecuting attorney, Dustin Richardson, saw no reason to take any action, even with full knowledge that the Monte children were being returned to their home with no further CPs or court oversight in April, 2012.

Later, Scott Jackson, the CJC "team leader" chose to stack the deck of the MDT meeting by intentionally and unfairly excluding Sara Monte's case worker, Don Watson, from providing input as to the safety of the children in the Monte home for the preceding two years.

In April, 2014, the investigating detective, Barry Folsom, again declined to arrest Sara Monte on the allegations, and further declined to even author a "probable cause' affidavit. **(CP 51**, Declaration of Roger A. Bennett, **Exhibit 11.)**

To cap things off, Spencer Harris, a stranger to the case who

was called upon to arrest Sara Monte without any judicial oversight or review, three and a half years after the incident, questioned the wisdom and necessity of such a drastic step, and sought clarification from Officer Barbara Kipp.

Barbara Kipp, a supervisor in the CJC, declined to direct Harris to arrest Sara Monte, and instead sought guidance from Scott Jackson in the Prosecuting Attorney's Office.

That guidance came back in an e-mail to the effect that Scott Jackson wanted her arrested because of fear about "summonsing" her in.

Scott Jackson, the Chief Criminal Deputy Prosecuting Attorney, claims that he was on vacation, and did not give the direct order to police to arrest Sara Monte; however, in doing so, he admits that the directive came from his own assistant. **(CP 131** Declaration of Scott Jackson.**)**

The Prosecuting Attorney, Mr. Golik, is liable for the tortious conduct of all his employees, not just the Chief Deputies.

Given these facts and reasonable inferences, the defense of prosecutorial Immunity fails.

The law is very clear that prosecutors have no absolute immunity when they step out of their prosecutorial role and "play

police officer." When prosecutors essay to perform investigative functions in a criminal case, they are no longer entitled to the luxury of complete immunity.

In Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965), the Court of Appeals declined to uphold a prosecutor's claim of immunity from suit. In an action against a county attorney under 42 U.S.C. 1983, a juvenile alleged she had been charged with murder in the first degree without probable cause, been harassed in jail, and been held without bail by the prosecutor or at his direction. The prosecuting attorney argued that he was immune from suit. The Robichaud court acknowledged that a prosecuting attorney has been held to be immune from liability for damages under 42 U.S.C. 1983.

The court went on to state, however, that when a prosecuting attorney acts in some capacity other than his quasi-judicial capacity, then the integral relationship between his acts and the judicial process ceases to exist. The court stated:

"If [the prosecutor] acts in the role of a policeman, then why should he not be liable, as is the policeman, if, in so acting, he has

deprived the plaintiff of rights, privileges, or immunities secured by the Federal Constitution and laws? Robichaud, at 536. Thus, the court held the nature of the acts complained of must be determined, and if they are acts ordinarily related to police activity, then they should not be protected by prosecutorial immunity.

> "The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process. Robichaud, at 537-38.

In Burns v. Reed, 500 U.S. 478, 111 S.Ct. 1934, 114 L.Ed.2d (1991), the United States Supreme Court clearly limited the doctrine of Absolute Prosecutorial Immunity, and further explained that the doctrine is disfavored, such that the person asserting the immunity bears the burden of establishing its applicability, that is, the prosecutor must prove that he or she was engaged in an function intimately associated with the judicial phase of the criminal process. This makes eminent sense, because the font of prosecutorial immunity is judicial immunity.

In the Burns case, police had consulted with a prosecutor, Reed, who advised them that they could interview an attempted Murder suspect by hypnosis. After they did so, the prosecutor

advised them that they had probable cause to arrest her with no arrest warrant, and she was arrested and prosecuted.

All charges were dismissed and the former defendant sued the police and the prosecutor

A lengthy quote from Burns v. Reed is set out below, because it clearly decides the issue before this court:

> "A state prosecuting attorney is absolutely immune from liability for damages under 1983 for participating in a probable-cause hearing, but not for giving legal advice to the police. Pp. 484-496.
>
> (a) Imbler v. Pachtman, 424 U.S. 409, held that, in light of the immunity historically accorded prosecutors at common law and the interests supporting that immunity, state prosecutors are absolutely immune from liability under 1983 for their conduct in "initiating a prosecution and in presenting the State's case," id., at 431, insofar as that conduct is "intimately associated with the judicial phase of the criminal process," id., at 430. Subsequent decisions are consistent with this functional approach, and have emphasized that the official seeking absolute immunity bears the burden of showing that it is justified by the function in question. See, e.g., Forrester v. White, 484 U.S. 219, 224. Pp. 484-487. [500 U.S. 478, 479]
>
> (b) The absolute immunity recognized in Imbler is applicable to Reed's appearance in court to support the search warrant application and his presentation of evidence at that hearing. Burns claims only that Reed presented false evidence to the county court, and thereby facilitated the issuance of the warrant. Such conduct was clearly addressed by the common law, which immunized a prosecutor, like other lawyers, from civil liability for making, or for eliciting from witnesses,

false or defamatory statements in judicial proceedings, at least so long as the statements were related to the proceedings. See, e.g., Yaselli v. Goff, 12 F.2d 396, 401-402, summarily aff'd, 275 U.S. 503....

(c) However, Reed has not met his burden of showing that the relevant factors justify an extension of absolute immunity to the prosecutorial function of giving legal advice to the police. Neither he nor the court below has identified any historical or common-law support for such an extension. American common law was aware of the office of public prosecutor, and must guide this Court, which does not have a license to establish immunities from 1983 actions in the interests of what it judges to be sound public policy. Nor do other factors authorize absolute immunity in these circumstances. The risk of vexatious litigation is unavailing, since a suspect or defendant is not likely to be as aware of a prosecutor's role in giving advice as his role in initiating and conducting a prosecution, and since absolute immunity is designed to free the judicial process, rather than every litigation-inducing conduct, from harassment and intimidation. The qualified immunity standard, which is today more protective of officials than it was at the time Imbler was decided, [500 U.S. 478, 480] provides ample support to all but the plainly incompetent or those who knowingly violate the law. **The argument that giving legal advice is related to a prosecutor's role in screening cases for prosecution and in safeguarding the fairness of the criminal judicial process proves too much, since almost any action by a prosecutor could be said to be in some way related to the ultimate decision whether to prosecute. Moreover, that argument was implicitly rejected in Mitchell v. Forsyth, 472 U.S. 511.** Furthermore, although there are several checks other than civil litigation to prevent abuses of authority by prosecutors, one of the most important of those checks, the judicial process, will not necessarily restrain a prosecutor's out-of-court activities that occur prior to the initiation of a prosecution, particularly if the suspect is

> not eventually prosecuted. **Advising the police in the investigative phase of a criminal case is not so "intimately associated with the judicial phase of the criminal process" that it qualifies for absolute prosecutorial immunity. Pp. 492-496." (emphasis added.)"**

Prosecutorial immunity does not apply to all prosecutorial conduct. Rather, the reviewing court looks to "the nature of the function performed, not the identity of the actor who performed it." Forrester v. White, 484 U. S. 219, 229 (1988). This is called the "functional test" of immunities. When a prosecutor performs "advocative" conduct, that is, he "act[s] within the scope of his duties in initiating and pursuing a criminal prosecution," Imbler v. Pachtman, 424 U. S. 409, 410 (1976), he is absolutely immune from suit.

Under the functional test, *supra,* a prosecutor is not entitled to absolute immunity unless he is performing an "advocative" function. In Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976), the Court noted the significant difference between "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate."

In Kalina v. Fletcher, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997), a unanimous Supreme Court held that a prosecutor who perjured herself when certifying certain facts necessary to obtain an arrest warrant was not absolutely immune from suit. Applying the functional approach to immunities, i.e., looking to "the nature of the function performed, not the identity of the actor who performed it," Forrester v. White, 484 U. S. 219, 229 (1988), the Court asked "whether the prosecutor was acting as a complaining witness rather than a lawyer when she executed the certification]." Id. at 129. The Court rejected the prosecutor's argument "that the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution." Id. at 130. Because "[t]estifying about facts is the function of the witness, not of the lawyer," the prosecutor was not entitled to absolute immunity.

Supreme Court precedent thus clearly establishes that a prosecutor is not entitled to absolute immunity unless he is performing advocative conduct. The challenge is

distinguishing between "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate." Imbler v. Pachtman, 424 U.S. at 430-31 (1976).

The "advocative" function or "advocative" conduct" includes that which is "intimately associated with the judicial phase of the criminal process. Imbler v. Pachtman, 424 U.S. at 430-31, *supra*. In Bernard v. County of Suffolk, 356 F.3d 495, 503 (2d Cir. 2004) a unanimous three-judge panel wrote that advocative conduct is that which "lie[s] at the very core of a prosecutor's role as an advocate engaged in the judicial phase of the criminal process." These "core" functions include:

- Filing criminal charges, Imbler v. Pachtman, 424 U. S. 409 (1976); Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995), even when done in bad faith. Shmueli v. New York, 424 F.3d 231 (2d Cir. 2005).

- Presenting evidence before a grand jury, Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995);

- Advocacy at a preliminary hearing, Burns v. Reed, 500 U.S. 478 (1991);

- Accepting a plea bargain, Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981);

- Retaining evidence pending a direct appeal, Parkinson v. Cozzolino, 238 F.3d 148 (2d Cir. 2001);
- Advocating increased bail at a bail hearing, Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995).

Even if a prosecutor is performing an advocative function, he will nonetheless be denied absolute immunity if he intertwines the exercise of his advocative function with impermissible conduct; or if he acts in excess of his statutorily-conferred jurisdiction.

Thus, absolute immunity will not shield him if he "has intertwined his exercise of prosecutorial discretion with other, unauthorized conduct." Bernard v. County of Suffolk, 356 F.3d 495, 504. A prosecutor also does not have absolute immunity "for acts that are manifestly or palpably beyond his authority" or are "performed in the clear absence of all jurisdiction." Schloss v. Bouse, 876 F.2d 287, 291 (2d Cir. 1989). To determine whether a prosecutor has authority to take some act, "a court will begin by considering whether relevant statutes authorize prosecution for the charged conduct." Bernard v. County of Suffolk, 356 F.3d 495 (2d Cir. 2004).

In this case, the arrest and prosecution of Sara Monte was affected in clear violation of the relevant statute, RCW 9A.04.080,

which prohibits prosecution after the Statute of Limitations has elapsed.

Despite having Prosecutorial Immunity for filing charges against Sara Monte, the Prosecuting Attorney had no such immunity for causing her warrantless arrest. In the absence of authority to prosecute, there certainly can be no authority to arrest.

As can be seen from the above discussion, the Prosecuting Attorney's Office, either in the person of Scott Jackson, Chief Criminal Deputy, or his legal assistant, whom he apparently left in charge of the office, when directing the warrantless arrest of Sara Monte without any judicial involvement or imprimatur, enjoyed no quasi-judicial immunity. As in Burns v. Reed, supra, the Prosecuting Attorney of Clark County advised law enforcement that they had probable cause to arrest Sara Monte without an arrest warrant, an investigative function not covered by prosecutorial immunity, *see also*, Broam and Manning v. Bogan 320 F.3d 1023 (2003).

Further, as in Kalina v. Fletcher, *supra*, the Prosecuting Attorney procured the arrest itself by directing that it occur. If a prosecutor has no absolute immunity for presenting a probable

cause affidavit to a judge, then certainly he has no Absolute Immunity for by-passing the judge and issuing his own "verbal (or e-mail) arrest warrant."

Mr. Jackson's conduct in convening (and sabotaging, by excluding Don Watson) a meeting to investigate the Monte case falls squarely into the investigative function discussed in Broam and Manning v. Bogan, *supra.*

The Supreme Court decisions in Burns unequivocally established a functional exception to Absolute Prosecutorial Immunity, an exception that the lower courts have consistently utilized both before and after those decisions were rendered, most often when prosecutors participated in interrogations and other witness contacts during the early stages of an investigation. See, e.g., Kulwicki v. Dawson, 969 F.2d 1454 (3d Cir. 1992) (fabricating false witness statements during early stages of the case are investigative); Rex v. Peoples, 753 F.2d 840 (10th Cir. 1985) (prosecutor who participated in coercive and deceptive interrogation of suspect which resulted in suspect saying "what the police wanted him to say" acted as an investigator); Moore v. Valder, 65 F.3d 189, 194 (D.C. Cir. 1995) ("intimidating and

coercing witnesses into changing their testimony is not advocatory. It is a misuse of investigative techniques"); Barbera v. Smith, 836 F.2d 96, 99 (2d Cir. 1987) (distinguishing the investigative role in acquiring evidence and the advocacy role in evaluating that evidence); Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) (immunity does not protect efforts to manufacture evidence that occur during the investigatory phase); Zahrey v. Coffey, 221 F. 3d 342 (2d Cir. 2000) (coercing false testimony in early stages of case is investigative); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993); Prince v. Hicks, 198 F.3d 607 (6th Cir. 1999) (a prosecutor who conducts an inadequate investigation into allegations of criminal misconduct is not immune); Orange v. Burge, 451 F.Supp.2d 957 (2006) (prosecutor who participates in fabricating a confession is acting in an investigative manner).

The authorities cited above demonstrate that when Scott Jackson controlled the meeting of investigators to discuss the Sara Monte case and whether she should be arrested without any resort to judicial process, and intentionally chose to exclude the most valuable and necessary potential contributor to that decision, he abandoned on behalf of his boss Tony Golik, the shield of Absolute Immunity. Then, when the Prosecuting Attorney's Office directed

law enforcement to arrest Sara Monte, the office continued to "work without a net", that is, with no shield of Absolute Immunity.

Arresting suspects without judicial process is not a quasi-judicial function, nor a prosecutorial function. It is a police function, and the Prosecuting Attorney's participation, through his employees, abandoned the claim of immunity.

Defendants may argue that it is customary for Clark County deputy prosecutors to advise police as to probable cause, or to order warrantless arrests, and therefore, the prosecutor's conduct was part of "official duties."

This may be true. It was true in Kalina, the United States Supreme Court case from the State of Washington also; however, the court rejected that argument. The test for immunity is not whether the prosecutor was engaged in "official duties" whatever that means, but rather, the test is whether the prosecutor's conduct was intimately associated with the judicial phase of the criminal process. Arresting someone without an arrest warrant is the antithesis of invoking judicial authority. Arresting without a warrant, three and a half years after a crime is committed and under the rubric of a "probable cause" arrest, is nothing more than a subterfuge to circumnavigate the judicial process.

Where a prosecutor elects to eschew the judicial process which is readily available, he or she should not be allowed to conversely claim the benefit of quasi-judicial immunity.

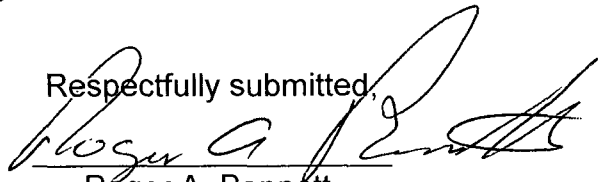
V. CONCLUSION

Prosecuting attorneys are not law enforcement officers. See RCW 10.93.020, which defines that term. Prosecuting Attorneys have no statutory authority to arrest suspects with or without an arrest warrant. When, as here, the Prosecuting Attorney orders that a suspect be unlawfully arrested without a judicially authorized arrest warrant, he or she is not engaged in a prosecutorial, nor advocative function, and therefore cannot escape accountability behind the shield of Prosecutorial Immunity.

Appellant respectfully requests that the Court of Appeals reverse the trial court's grant of summary judgment which dismissed Plaintiffs' claims, and remand the matter for trial.

Dated the 20 day of June, 2016

Respectfully submitted,



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CERTIFICATE OF SERVICE

I declare, under penalty of perjury and RCW 9A.72.085 that I served a copy of this Opening Brief of Appellants on the above named attoneys, by US Mail and e-mail transmission on June 20, 2016.

6/20/2016

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