No. _____

In the Supreme Court Of The United States

MARK BURDETT,

Petitioner,

v.

RAMON REYNOSO, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
IN APPEAL NO. 08-15159

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court should revisit its rulings in a series of civil rights cases, including *Whren v. United States*, *Atwater v. Lago Vista*, and *Devenpeck v. Alford*, which permit the full custodial arrest of people for petty offenses, but which the Ninth Circuit has carried to an absurd extreme by finding that police had absolute probable cause to arrest Petitioner, a credentialed reporter, for jaywalking, merely because he was standing just off the curb in a parking turnout, on a street blocked off to traffic and filled with other people during an antiwar march, filming the violent and injurious arrest of a demonstrator.

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On November 22, 2010, the Ninth Circuit denied Mr. Burdett's Petition for Rehearing En Banc. (Appendix A, *Burdett v. Reynoso, et al.*, Appeal No. 08-15159).

On October 12, 2010, the Ninth Circuit affirmed the district court's order dismissing Mr. Burdett's federal and state false arrest claims against San Francisco police officers. Appendix B, *Burdett v. Reynoso, et al.*, Appeal No. 08-15159).

On December 19, 2007, the United States District Court for the Northern District of California issued judgment against Plaintiff-Petitioner Mark Burdett following a jury trial, except for a nominal damage award against one defendant officer. (Appendix C, *Burdett v. Reynoso, et al.*, Case No. C-06-00720 JCS).

JURISDICTION

Petitioner Mark Burdett has timely invoked this Court's jurisdiction by petitioning for a writ of certiorari within 90 days of the Ninth Circuit's decision denying his Petition For Rehearing En Banc, entered on November 22, 2010. 28 U.S.C. § 1254(1); Supreme Court Rule 13.

RELEVANT STATUTORY PROVISIONS

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Constitution, Article 1, Section 13:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

California Penal Code § 836(a):

> A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur:
>
> (1) The officer has probable cause to believe that the person to be arrested has committed a public offense in the officer's presence.
>
> (2) The person arrested has committed a felony, although not in the officer's presence.
>
> (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.

California Vehicle Code § 21955:

> Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk.

STATEMENT OF THE CASE

A. Summary of Facts and Procedural History

On March 20, 2004, Petitioner Mark Burdett, a reporter for Indybay, was covering the mass march in San Francisco against the U.S. led war in Iraq on the one year anniversary of the invasion. Burdett was wearing a valid, San Francisco Police-issued press pass in plain view on a chain around his neck. He carried a

camera on a shoulder strap in one hand, and a microphone, connected by cable to the camera, in the other hand. Burdett understood his responsibility to include documenting incidents involving the police. Indybay is an independent, web-based news outlet, and part of the national Indymedia network.

A large, permitted march started in San Francisco's Dolores Park and ended at the Civic Center. A secondary, unpermitted march split off from the original march and continued, with police escort, through the streets.

As the secondary march, numbering somewhere between 50 and 300 people, proceeded south on Jones Street toward Market Street, a young man named Noah Shepardson-Brewster periodically danced alongside the march in Jones Street, to the consternation of police. When the march reached the bottom of Jones Street, where it intersects with Market Street, the marchers bunched up on the pedestrian island. There, according to witnesses, an officer repeatedly prodded Mr. Shepardson-Brewster in the back with his baton. Shepardson-Brewster exclaimed "f--- you" to the officer. The officer then grabbed at him, but he ran away, into Market Street. The officer chased him, joined by other officers. The rest of the marchers then flowed into and across Market Street to witness the events. Officials had already blocked traffic in both directions on Market Street, on either side of the protest. Market was the ostensible route along which the march would have continued at that point, there being no continuation of Jones Street passed

Market Street.

Petitioner Burdett crossed Market Street in a sea of people, after it had been blocked off. There is no reliable evidence any officer saw Mr. Burdett cross the street. At about the same time, the police tackled Mr. Shepardson-Brewster, and broke his arm in the course of arresting him. Police also arrested two other protesters in the group, whom they accused of interfering.

After crossing Market Street, Petitioner Burdett found a spot from which to try to videotape the arrest of Shepardson-Brewster, in a parking turnout, just off the curb, about 33' away. (A photo below shows exactly where he stood.) Burdett stood near to a police motorcycle (although not the one depicted in the photo below).

A moment later, someone unknown ran past Mr. Burdett (in a direction away from the arrests) and knocked over the police motorcycle, so that it fell toward Burdett. Burdett's video shows that Officer Mark Shea, who was not looking at Burdett at the time, snapped his attention to the *sound* of the motorcycle falling over, then charged Burdett, riot stick out, assuming Burdett had knocked over the motorcycle. This despite the fact that Burdett's hands were occupied with a camera and a microphone, as one can also tell from his shadow, as seen in his video, and despite the fact that the motorcycle fell toward not away from Burdett.

Officer Shea charged Burdett, yelling "You knocked the bike over!" He did not order Burdett to stop, or put his hands behind his back, or tell him he was under arrest. He simply charged at him, riot stick out, yelling. Burdett stepped backward and into the street, repeating several times, "I didn't do it." Others in the crowd yelled, "you've got the wrong guy," and words to that effect. All of this audio was recorded by Mr. Burdett.

Mr. Burdett surrendered to Officer Shea, who, assisted by another officer, tugged Burdett over to the sidewalk where police were making the other arrests. Officer Shea swept Burdett's legs out from under him, so that Burdett collapsed into a crouching position on the sidewalk, tangled up in his camera strap. Officer Michael Cesari joined in, gratuitously flipping Burdett onto his face, which raised up a big welt on Burdett's forehead. (See photo, below.) Officers Cesari, Stephen Smalley, and Ramon Reynoso then violently handcuffed Burdett using flexcuffs. Burdett still had various equipment cables in his hands and around his fingers. Officer Smalley bent Burdett's right thumb back, asking him, "Do you want me to break your thumb?" But by the time Smalley made this thread, he had already broken Burdett's thumb.

At no stage did Burdett resist the officers in any way, or interfere in anyone else's arrest. All of this was captured on video by two different police videographers, as well as on Burdett's video, until one of the officers picked up

Burdett's camera and slammed it against the pavement, ending the recording and damaging the camera.

The officers then sat Burdett, dazed, up on the curb, and huddled to discuss what to do with them. A witness—presumably one of the people who had yelled that police were arresting the wrong guy—positioned himself in front of one of the police videographers and repeated his account to the officer on camera. The same witness can also be seen in other video and photographs, taken by others at the scene, apparently remonstrating with officers. The police, however, made no effort to record the witness' identity.

Nevertheless, the officers evidently did come to understand that Burdett had not knocked over the police motorcycle, because they did not charge him for doing so. But rather than release Burdett, they arrested him on a raft of cover charges, in an apparent effort to justify the beating the administered, including resisting/delaying/interfering, disobeying a police order, and jaywalking. There is no evidence anywhere in the video-documented record that Burdett received, much less disobeyed, any police order, or that he in anyway interfered in anyone's arrest or resisted his own arrest.

Numerous record photographs (including some of those selected below) show that police accepted the presence of numerous other reporters and witnesses who observed and documented the arrests from a much closer distance than

Mr. Burdett. It was a crowded scene, and the police action occurred in the middle of it. Police did not try to clear the area.

On the parties' cross-motions for summary judgment, the district court dismissed Burdett's federal and California false arrest claims on qualified immunity (and by extension, California state immunity). Mr. Burdett went to trial on his excessive force case, left to try to persuade a jury that the force used was excessive despite the instruction that the arrest was reasonable. In the end, Burdett won one claim, against one Officer (Shea) for one dollar.

On appeal, Mr. Burdett assigned error, *inter alia*, based on the fact that the district court had granted the officers qualified immunity for arresting Burdett based on the same disputed facts which the court recognized prevented it from concluding, as a matter of law, that the officers had probable cause—notwithstanding the rule that if the facts are disputed, qualified immunity drops out of the case. *Collins v. Jordan*, 110 F.3d 1363, 1369-70 (9th Cir. 1997) ; *Mahoney v. Kesery*, 976 F.2d 1054, 1058 (7th Cir. 1992).

The Ninth Circuit affirmed, reasoning that because it was undisputed Burdett stood neither on the curb nor in a crosswalk at the time of his arrest, the police had probable cause to arrest him for jaywalking as a matter of law. Burdett in fact stood just off the curb, in a parking turnout, on a blocked off street, negating any pretense of jaywalking.

Burdett Petitioned for Rehearing En Banc, but his Petition was denied.

B. Original Bases for Federal Jurisdiction

The district court had jurisdiction of Mr. Burdett's federal claims under 42 U.S.C. § 1983, 28 U.S.C. § 1331, and 28 U.S.C. § 1343, and supplemental jurisdiction of Mr. Burdett's state law claims under 28 U.S.C. § 1367. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291.

REASONS FOR GRANTING THIS PETITION

I. A SERIES OF DECISIONS BY THIS COURT HAS EFFECTIVELY PRECLUDED FEDERAL REDRESS OF FALSE ARREST CLAIMS AND HELPED TO OCCASION THE "EPIDEMIC OF UNNECESSARY MINOR-OFFENSE ARRESTS" WHICH THIS COURT SOUGHT TO ASSURE PEOPLE, IN *ATWATER V. LAGO VISTA*, WAS NOT OCCURRING; THE COURT SHOULD REVISIT THE DECISIONS AND ADJUST THE REMEDIES, IN ACCORDANCE WITH ITS ADVICE IN THE SEMINOL CIVIL RIGHTS DECISION OF *BIVENS V. SIX UNKNOWN DEFENDANTS*

The Ninth Circuit's decision to affirm the district court's dismissal of Mr. Burdett's false arrest claims was at once outrageous, and also unsurprising in the wake of a series of decisions by this Court, giving ever more latitude, excuse, and immunity to the police, and ever less standing or margin to people in trying to go about their lives free from police abuse, or redress it when it occurs.

The Ninth Circuit held:

> There are factual disputes as to whether Officers Reynoso, Smalley, Brown, Shea, Cesari, Hamilton, and Lazar (the "Arresting Officers") had probable cause to arrest Burdett. It is undisputed, however, that

> Burdett was neither on the sidewalk nor in a crosswalk when he entered the 'parking turnout' on Market Street. Viewing the evidence in the light most favorable to Burdett, the Arresting Officers had probable cause, or at least a reasonable belief that probable cause existed, to arrest Burdett for jaywalking under Cal. Veh. Code. § 21955. See *Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049 (9th Cir. 2002). Accordingly, the district court properly found that the Arresting Officers were entitled to qualified immunity on the federal false arrest claim. See *Saucier v. Katz*, 533 U.S. 194, 205–07 (2001); *Edgerly v. City and Cty. of San Francisco*, 599 F.3d 946, 954 (9th Cir. 2010) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004)) (probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest.).

(Appendix B at 2.)

In 2001, in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), this Court shocked the civil rights community by holding that no offense is too petty to support a full blown custodial arrest under the Fourth Amendment—even infractions which prescribe only fines, but not jail time. The Court sought to assuage people that "the country is not confronting anything like an epidemic of unnecessary minor-offense arrests." *Id*. at 353. Dissenting, Justice O'Connor, joined by Justices Stevens, Ginsburg, and Breyer, observed:

> A full custodial arrest, such as the one to which Ms. Atwater was subjected, is the quintessential seizure. [Citation]. When a full custodial arrest is effected without a warrant, the plain language of the Fourth Amendment requires that the arrest be reasonable. [Citation.] It is beyond cavil that the touchstone of our analysis under the Fourth Amendment is always the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.

Id. at 360-61 (internal quotes and citations omitted). Whether or not the Court was

correct at the time that the country was not facing an "epidemic of unnecessary minor-offense arrests," such an epidemic has at least since set in. This case is a prime illustration.

Most members of this society who have had basic high school civics, or just read the Bill of Rights, would know upon witnessing Mr. Burdett's arrest that it was vile and wrong—as witnesses at the scene knew and shouted out). *Even if reasonably mistaken in the moment*, the officers gratuitously brutalized Burdett, then heaped false charges on him after the fact. And they got away with it, because courts robbed Burdett of the conscience of the community. Most regular people would find the judicial laundering of Burdett's false arrest to be a wretched thing, and anathema, in its symbolic significance and predictive capacity, to the vitality and continuing growth of our democracy.

People believe that a concerned person, to say nothing of a credentialed reporter, may witness and document domestic police violence during a protest against an illegal and unspeakably costly war, without being arrested on overtly trumped up charges. Our leaders intone about the inherent rights of other people struggling for self-determination, like Egyptians, to demonstrate and bear witness against corruption in their countries, free of government reprisal and crackdown, even while we do not remotely guarantee such free expression, in any practical sense, to our own people on our own streets.

A right which cannot be redressed when it is trespassed is a figment. In the wake of this Court's decisions in *Atwater v. Lago Vista*, *supra*, , together with such cases as *Whren v. United States*, 517 U.S. 806 (1996), *Devenpeck v. Alford*, 543 U.S. 146 (2004), *Saucier v. Katz*, 533 U.S. 194 (2001), and *Pearson v. Callahan*, 555 U.S. 223 (2009), it has become nearly impossible to gain federal redress of the wrong of false arrest.

In *Whren v. U.S.*, the Court held that a Fourth Amendment intrusion must always be analyzed objectively. A bad motive cannot make a good stop bad. Thus, it matters not that officers singled out Burdett, among the scores of people in the streets, to arrest him for jaywalking, in plain cover-up of the fact that they falsely accused him of knocking over a police motorcycle and beat him gratuitously.

In *Atwater v. Lago Vista*, the Court held that no offense is too petty to subject a suspect to full-blown custodial arrest—and with it, all of the further intrusions, hardships and stigmas which arrest entails. With *Atwater*, the Court effectively reduced civil liberties to a game of inches, our rights forfeit if weso much as step slightly out of bounds. The Ninth Circuit found that Burdett was subject to full-blown arrest because he stood neither on the sidewalk nor in a crosswalk. True. Where he stood was in a parking turnout, just off the curb, on a blocked off street, filled with other people, during a facilitated march which had

progressed through the streets all day, . Evidently, everyone who steps into the street to open his/her car door is free only at the mercy of police. This is a police state lite—getting heavier. *See also*, *Virginia v. Moore*, 553 U.S. 164 (2008)).

In *Devenpeck v. Alford*, the Court held that even if police fail to think of a good reason to arrest someone, their lawyers, or the judge, can supply that reason for them after the fact, and find probable cause based on any ground appearing in the record. Various courts, including the Ninth Circuit, have begun to extend *Devenpeck*, unwittingly, by construing it to furnish *qualified immunity*, not just probable cause, even though qualified immunity contains a quasi-subjective element, to wit the officer's reasonable belief as to whether his/her conduct was lawful.

In *Saucier v. Katz*, the Court held that trial courts must consider qualified immunity in force cases, not just other civil rights cases, even though the question a judge is asked to consider is essentially the same question supposedly reserved to the jury, i.e. whether the officer used reasonable or excessive force in the circumstances. Befuddled by the illogic of this task, lower courts now routinely apply *Saucier* by throwing out what they consider to be cases involving only *de minimis* force, even though that should raise a question of damages, not of liability. "[W]here there is no need for force, any force used is constitutionally unreasonable." *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir. 2001). "The force

which was applied must be balanced against the need for that force: it is the need for force which is at the heart of the *Graham* factors." *Liston v. County of Riverside*, 120 F.3d 965, 976 (9th Cir. 1997), quoting *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367 (9th Cir. 1994).

Probable cause means a reasonable if mistaken belief that a suspect committed a crime. Qualified immunity attaches to a reasonable if mistaken belief that an officer acted legally. Therefore, the qualified immunity analysis, as invented by this Court, invited the district court to find in this case that even if officers did not reasonably believe Burdett jaywalked, they might reasonably have thought he jaywalked. This makes no rational sense.

In *Pearson v. Callahan*, the Court dispensed with the two-part qualified immunity analysis which it had prescribed in *Saucier v. Katz*. That analysis used to require lower courts first to wrestle with whether the alleged wrong was of constitutional magnitude. Next, courts were instructed to evaluate whether the constitutional right was clearly established at the time of injury, such that a reasonable officer should have known to conform his/her conduct to it. Many civil rights cases were dismissed on the grounds that the right sought to be vindicated had not been clearly established. But the silver lining used to be that even if a case were dismissed on this ground, it would add to the body of clearly established law and benefit future victims of government misconduct. No longer, after *Pearson*,

which now instructs lower courts that they need not resolve constitutional questions in federal civil rights cases. They may simply find that the right in question was not clearly established at the time, grant qualified immunity, and be done with it. The public may have to wait an even longer time before courts even bother trying to resolve their qualified-immunity-addled splits of authority.

If the courts can just vaporize Mr. Burdett's glaring false arrest by subjecting it to these legal cross rays, there is no meaningful holism to the notion of civil rights safeguards. This Court once sagely advised: "Where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Bivens v. Six Unknown Defendants*, 403 U.S. 388, 392 (1971), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946). Petitioner respectfully requests that this Honorable Court revisit the cases cited above, and the combined effect they have had in precluding federal redress of false arrest claims, and adjust the remedies accordingly.

II. THE NINTH CIRCUIT PANEL IGNORED PLAINTIFF'S FACTS, AND FUNDAMENTAL CONSTITUTIONAL PRINCIPLE, TO HOLD THAT STANDING JUST OFF THE CURB IN A PARKING TURNOUT SUBJECTS A PERSON TO FULL CUSTODIAL ARREST FOR JAYWALKING

The Ninth Circuit Panel blatantly maligned the record in order to hold:

> It is undisputed ... that Burdett was neither on the sidewalk nor in a crosswalk when he entered the 'parking turnout' on Market Street. Viewing the evidence in the light most favorable to Burdett, the Arresting Officers had probable cause, or at least a reasonable belief

> that probable cause existed, to arrest Burdett for jaywalking under Cal. Veh. Code. § 21955. [Citation] Accordingly, the district court properly found that the Arresting Officers were entitled to qualified immunity on the federal false arrest claim. [Citations]

(Appendix B at 2). In fact, every aspect of Mr. Burdett's so-called "jaywalking" was strenuously and materially contested. The indisputable and thoroughly well-presented facts of this case are:

- a credentialed, independent reporter,
- who was prominently displaying a valid press pass issued by the very agency that arrested him,
- while standing just off the curb,
- in a parking turnout, not a lane for traffic,
- on a street blocked off to traffic in both directions,
- and filled with marchers, police, onlookers, and other reporters,
- during a protest which was facilitated by police and had been in the streets all day,
- filming police pile on a man and break his arm,
- from a safe and unobtrusive 33 feet away,
- was gratuitously assaulted by police,
- and subjected to a full custodial arrest and removal to jail.

The photos printed below—each part of the record—prove beyond cavil the facts listed above. The Panel chose to ignore and thereby suppress these facts. If this does not reflect mere carelessness and error, it reveals true bias, and a will to exonerate police at all costs.

Obviously, not every person who stands "neither on the sidewalk nor in a crosswalk" is a jaywalker. A person who enters the street to get into a parked car to drive away is not a jaywalker. A person who enters the street to go around an obstruction, or for safety reasons, is not a jaywalker. California Vehicle Code § 21956(b). A person who walks along the shoulder of a street is not a jaywalker. *Kovacs v. Sturgeon*, 274 Cal.App.2d 478, 482 (1969) (citations omitted); *see also*, Cal. Veh. Code § 21956(a). A person chased or pushed into the street may not be a jaywalker. And California Vehicle Code § 21955 itself, on which the Panel relied, does not prohibit standing in the street, but *crossing* a street controlled by signals outside a crosswalk.

Therefore, to say Mr. Burdett jaywalked in the circumstances of this case (while performing the sacred function of a reporter, no less) ignores his evidence and establishes a terrible new general rule, in derogation of all pre-existing law and principle to the contrary, that police have "probable cause, or at least a reasonable belief that probable cause existed," to arrest any pedestrian who is "neither on the sidewalk nor in a crosswalk." (Although the Ninth Circuit designated its memorandum as unpublished, every federal decision is now citable and therefore precedent-setting. Federal Rule of Appellate Procedure 32.1.)

The following record photographs (consisting of both still camera shots and video frames) establish Burdett's factual allegations above:

Burdett, standing just off the curb in a parking turnout, filming just before his arrest. (Burdett is in the background, between the two officers depicted in the foreground; the motorcycle shown is not the motorcycle which was knocked over.)

The parking turnout.

What Burdett was filming from 33 feet away: police piling on Mr. Shepardson-Brewster and breaking his arm. This photo also shows a photographer and a legal observer, both much closer, neither arrested.

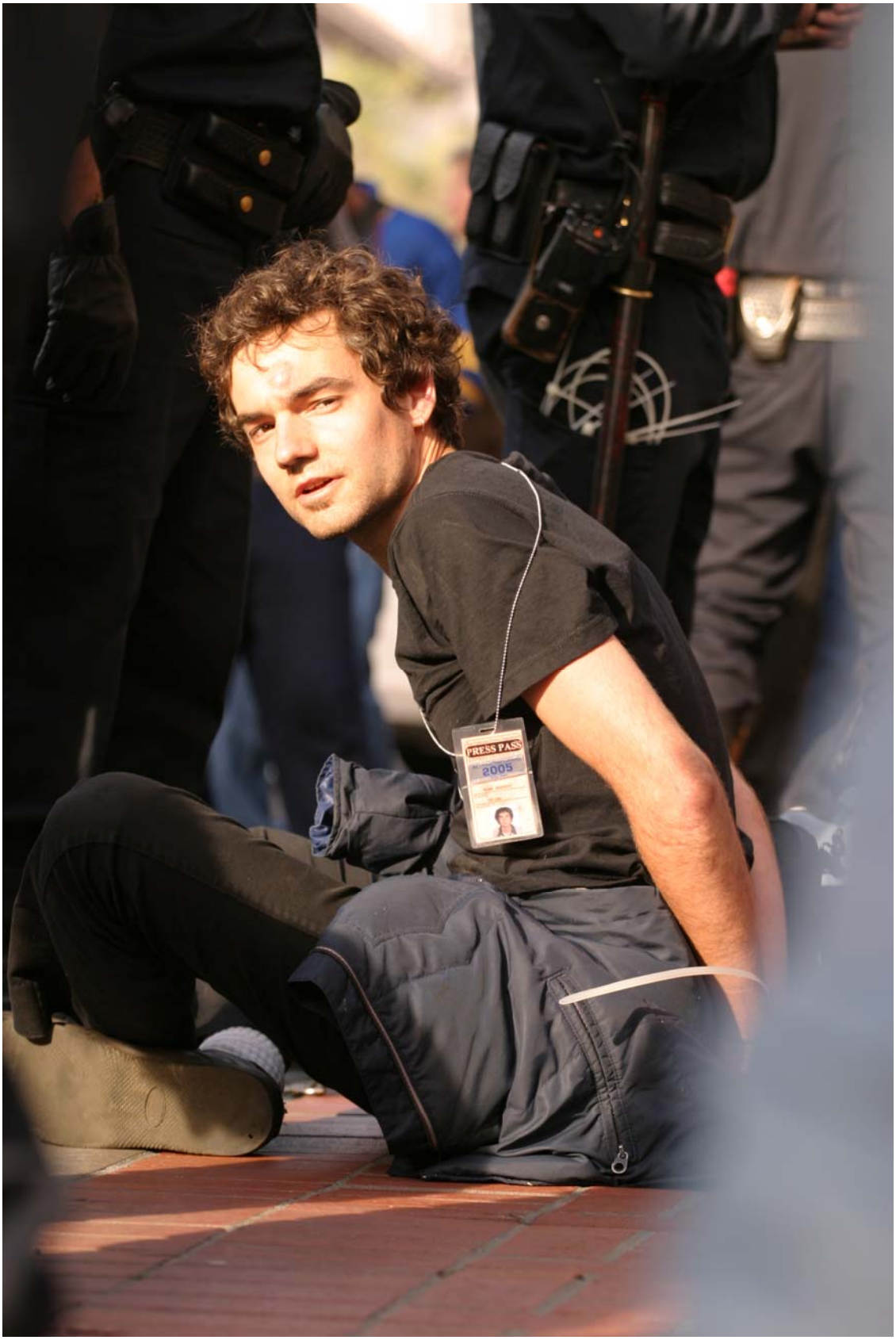
Arrest of Shepardson-Brewster;
same photographer, right in with the action, not arrested.

Same photographer, among bystanders, not arrested.

Police forcing Burdett down.

Another photographer, closer than Burdett, not arrested.

Another photographer, closer than Burdett, not arrested.



Burdett after arrest, welt on his forehead, press pass prominently displayed.

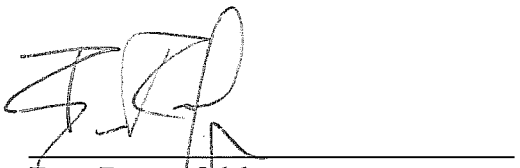
Another photographer, not arrested; standing in Market Street.
Market Street is clearly blocked off to traffic.

Market Street from the opposite angle,
clearly blocked off from that direction too.

CONCLUSION

WHEREFORE, Petitioner Mark Burdett respectfully requests that this Honorable Court grant his Petition for a Writ of Certiorari to the Ninth Circuit.

Respectfully submitted,

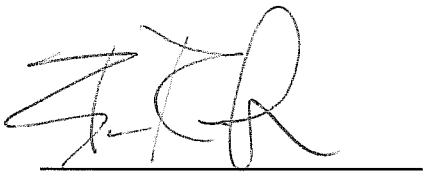


Dated: February 22, 2011

Ben Rosenfeld
Counsel for Petitioner
MARK BURDETT

CERTIFICATE OF SERVICE

I certify that on the date set forth below, I personally served the within Petition, on respondents by mailing true and correct copies to their counsel of record, Deputy City Attorneys Ronald P. Flynn and Kimberly Bliss, first class U.S. postage prepaid, and addressed to them at the City Attorney's Office, 1390 Market Street, San Francisco, CA 94102.



Dated February 22, 2011

Ben Rosenfeld, Attorney

APPENDIX A

Ninth Circuit's denial of Petitioner Burdett's Petition for Rehearing En Banc

FILED

NOV 22 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK BURDETT, Plaintiff - Appellant, v. RAMON REYNOSO; MARK SHEA; SAN FRANCISCO SHERIFF'S DEPARTMENT; CITY AND COUNTY OF SAN FRANCISCO; STEPHEN SMALLEY; MELVIN BAUTISTA; MICHAEL CESARI; DAVID HAMILTON; DAVID LAZAR; JOHN DELPHIN, Defendants - Appellees.	No. 08-15159 D.C. No. CV-06-00720-JCS Northern District of California, San Francisco ORDER

Before: FERNANDEZ and SILVERMAN, Circuit Judges, and DUFFY, District Judge. *

Judge Silverman has voted to reject appellant's petition for rehearing en banc and Judges Fernandez and Duffy so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

APPENDIX B

Ninth Circuit's decision affirming district court's dismissal of Petitioner's false arrest claims

FILED

OCT 12 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK BURDETT, Plaintiff - Appellant, v. RAMON REYNOSO, et. al., Defendants - Appellees.	No. 08-15159 MEMORANDUM *

Appeal from the United States District Court
for the Northern District of California
Joseph S. Spero, Magistrate Judge, Presiding

Submitted October 4, 2010 **
San Francisco, California

Before: FERNANDEZ and SILVERMAN, Circuit Judges, and DUFFY, *** District Judge.

Appellant Mark Burdett appeals from the district court's order entering

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Kevin Thomas Duffy, United States District Judge for the Southern District of New York, sitting by designation.

summary judgment against him in his 42 U.S.C. § 1983 action. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

We review a grant of summary judgment de novo. Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004). We review a denial of leave to amend a complaint and a denial of attorney's fees for abuse of discretion. Griggs v. Pace Am. Group, Inc., 170 F.3d 877, 879 (9th Cir. 1999); Corder v. Brown, 25 F.3d 833, 836 (9th Cir. 1994).

I. Federal False Arrest Claim

There are factual disputes as to whether Officers Reynoso, Smalley, Brown, Shea, Cesari, Hamilton, and Lazar (the "Arresting Officers") had probable cause to arrest Burdett. It is undisputed, however, that Burdett was neither on the sidewalk nor in a crosswalk when he entered the 'parking turnout' on Market Street. Viewing the evidence in the light most favorable to Burdett, the Arresting Officers had probable cause, or at least a reasonable belief that probable cause existed, to arrest Burdett for jaywalking under Cal. Veh. Code. § 21955. See Estate of Ford v. Ramirez-Palmer, 301 F.3d 1043, 1049 (9th Cir. 2002). Accordingly, the district court properly found that the Arresting Officers were entitled to qualified immunity on the federal false arrest claim. See Saucier v. Katz, 533 U.S. 194, 205–07 (2001); Edgerly v. City and Cty. of San Francisco, 599 F.3d 946, 954 (9th

Cir. 2010) (citing Devenpeck v. Alford, 543 U.S. 146, 153–55 (2004)) (probable cause supports an arrest so long as the arresting officers had probable cause to arrest the suspect for any criminal offense, regardless of their stated reason for the arrest.).

II. State False Arrest Claim

It is well established that "governmental immunity under California law is governed by statute." Ogborn v. City of Lancaster, 101 Cal. App. 4th 448, 460 (Cal. Ct. App. 2002). As stated above, the Arresting Officers could have reasonably believed that there was probable cause to arrest Burdett. See Cal. Penal Code § 836.5 (providing immunity if the officer reasonably believed the person to be arrested violated a statute or ordinances in his or her presence). Accordingly, the district court properly found that the Arresting Officers were entitled to statutory immunity on the state false arrest claim.

III. Federal Excessive Force Claim

Burdett was not seized in any way when Officer Bautista swung his baton at Burdett without touching him. See Robins v. Harum, 773 F.2d 1004, 1009 (9th Cir. 1985) (holding that a seizure occurs "whenever [an officer] restrains the individual's freedom to walk away"). Therefore, the district court properly granted summary judgment of Burdett's excessive force claim in favor of Officer Bautista.

IV. Request for Leave to Amend

Burdett requested leave to amend *only if* the court dismissed his federal excessive force claim as to Officer Bautista. See Schlacter-Jones v. Gen. Tel., 936 F.2d 435, 443 (9th Cir. 1991) (a motion for leave to amend "is not a vehicle to circumvent summary judgment") (overturned on other grounds). Further, Burdett has already filed three complaints, so he has had ample opportunity to address any perceived deficiencies. See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1007 (9th Cir. 2009). And he failed to provide new facts to justify the amendment or offer an explanation for the delay. See Nunes v. Ashcroft, 375 F.3d 805, 808 (9th Cir. 2004). Therefore, the district court did not abuse its discretion by denying Burdett's request to amend his second amended complaint.

V. Motion for Attorney's Fees

We lack jurisdiction to review the district court's order denying Burdett's motion for attorney's fees. Burdett's original notice of appeal was premature, and he failed to file a second notice of appeal once the district court's order was rendered. See Whitaker v. Garcetti, 486 F.3d 572, 585 (9th Cir. 2007).

AFFIRMED.

APPENDIX C

Judgment issued by the district court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK BURDETT,

Plaintiff,

v.

RAMON REYNOSO, ET AL.,

Defendant.

_____/

No. C 06-00720 JCS

JUDGMENT IN A CIVIL CASE

(X) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

() Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED that judgment is entered in favor of Defendants except as to Defendant Mark Shea. Judgment is entered in favor of Plaintiff in the amount of $1.00 against Defendant Mark Shea.

Dated: December 19, 2007

Richard W. Wieking, Clerk

Karen L. Hom

By: Karen L. Hom, Deputy Clerk