№ 19-7016

United States Court of Appeals for the District of Columbia Circuit

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MATTHEW LEFANDE

Appellant

v.

CAROLYN MISCHE-HOEGES

Appellee

APPEAL OF A JUDGMENT OF THE DISTRICT COURT

APPELLANT'S OPENING BRIEF

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I. Statement of Parties and Counsel

There are no corporate parties to this appeal.

Appellant Carolyn Anne Mische-Hoeges is represented by Stephen Neal of DiMuroGinsberg PC of Alexandria, Virginia. DiMuroGinsberg has previously employed Hillary Jane Collyer as an attorney.

Appellee Matthew LeFande is represented by attorney Horace L. Bradshaw, Jr. of Washington DC.

II. Table of Authorities

Cases

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Statutes

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III. Introduction

In the eight years since this lawsuit was filed, no judge in this courthouse has expended more than a single breath addressing the merits of Appellant Matthew LeFande's arguments herein. The present award of attorney's fees without any mention or rebuttal of LeFande's authorities and evidence stands as another segment in an unbroken line of subversion of these courts' duties to justly apply controlling law to the evidence of record. Instead, LeFande has been deprived of a trial in violation of the Seventh Amendment, deprived of Equal Protection of the Law and deprived of any semblance of Due Process. The convenient co-incidence with the multitude of claims LeFande prosecutes on behalf of third parties in these same courts cannot be ignored as causation for the courts' conduct. This lawsuit and others have been corruptly employed to now silence a competent advocate on behalf of unpopular causes.

LeFande has no expectation of a different outcome herein. The record before this Court plainly demonstrates that LeFande's claims were well-documented, his injuries substantial, and the District Court's dismissal devoid of reasoning. Now, in violation of this Court's mandate, the District Court has made no analysis whatsoever of LeFande's authorities and evidence and simply perpetuates the Court's previous misconduct in this

regard. There being no showing whatsoever that LeFande's claims were not supported by competent authorities and ample evidence, the judgment of the District Court must be vacated and LeFande's claims reinstated for trial.

IV. Statement of Facts

Appellant Carolyn Mische-Hoeges is a District of Columbia Metropolitan Police Officer, now rewarded with a promotion to Detective Grade II. Appellee LeFande is a former uniformed officer of the Metropolitan Police Department, see *LeFande v. District of Columbia*, 612 F.3d 1155, 1156-1157 and n.1 (D.C. Cir. 2010). LeFande is a member of the District of Columbia Bar and United States Supreme Court Bar, and has been plaintiff's counsel in several highly contentious civil rights claims against various government agencies. See, *e.g.*, *Thorp v. District of Columbia*, 327 F. Supp. 3d 186 (D.D.C. 2018), 319 F. Supp. 3d 1 (D.D.C. 2018); *Mehari v. District of Columbia*, 268 F. Supp. 3d 73 (D.D.C. 2017); *Wilson v. Department of the Navy*, 843 F.3d 931 (Fed. Cir. 2016) *cert denied* 138 S. Ct. 107, 199 L. Ed. 2d 30 (2017); *Acott Ventures, LLC v. District of Columbia Alcoholic Beverage Control Board*, 135 A.3d 80 (D.C. 2016); *Finkle v. Howard County*, 12 F. Supp. 3d 780 (D. Md. 2014) *aff'd* 640 Fed. Appx. 245 (4th Cir. 2016); *Cannon v. District of Columbia*, 717

F.3d 200 (D.C. Cir. 2013); 783 F.3d 327 (D.C. Cir. 2015) *motion granted* 136 S. Ct. 285, 193 L. Ed. 2d 14 (2015) *petition denied* 136 S. Ct. 491, 193 L. Ed. 2d 361 (2015); *Thorne v. United States*, 55 A.3d 873 (D.C. 2012) *cert. denied* 134 S. Ct. 340; 187 L. Ed. 2d 158 (2013); *Ord v. District of Columbia*, 587 F.3d 1136 (D.C. Cir. 2009); 417 Fed. Appx. 1 (D.C. Cir. 2011) *cert. denied* 133 S. Ct. 545, 184 L. Ed. 2d 342 (2012); *Griffith v. Lanier*, 521 F.3d 398 (D.C. Cir. 2008); *Thorp v. District of Columbia*, 142 F. Supp. 3d 132 (D.D.C. 2015); *BEG Investments, LLC v. Alberti*, 144 F. Supp. 3d 16 (D.D.C. 2015); *MPAC, LLC v. District of Columbia*, 181 F. Supp. 3d 81 (D.D.C. 2014).

LeFande's practice is unconventional, and his cases are certainly unpopular with government officials. LeFande and his clients have routinely suffered retaliation for the filing and prosecution of these lawsuits as he has herein. See *LeFande*, 613 F.3d 1155 (retaliation by Metropolitan Police Department for LeFande's filing of class action lawsuit,"we conclude that LeFande's speech--alleging the Chief of Police violated District law and the Constitution by significantly altering the framework by which the Reserve Corps was governed, relying in part on an emergency procedure when there was no emergency--also implicates a 'matter of political, social, or other concern to the community.'" (quoting *Connick v. Myers*, 461 U.S. 138, 146

(1983); *Thorp*, 142 F. Supp. 3d at 135-136 (bizarre raid by Metropolitan Police Department on plaintiff's home over demonstrably fictitious animal cruelty charges the same morning the United States Marshal began execution of plaintiff's civil judgment against an Advisory Neighborhood Commissioner); *Thorp v. District of Columbia*, 317 F. Supp. 3d 74, 78 (D.D.C. 2018) (even more bizarre illegal investigation by District of Columbia tax authorities spurred by plaintiff's demonstration by police photographs that tens of thousands of dollars in postal money orders were stolen from his home during the raid and never recovered); *BEG Investments, LLC v. Alberti*, 85 F. Supp. 3d 13, 22 (D.D.C. 2015) (upon filing of lawsuit for illegal imposition of police overtime details targeting predominantly black District of Columbia nightclubs, District of Columbia Attorney General fabricated noise complaint against plaintiff and Alcoholic Beverage Control Board canceled plaintiff's liquor license in retaliation).

From August 2009 to April 2010, Appellee Mische-Hoeges was in a relationship with LeFande and lived in his home in Arlington, Virginia for most of that period. On February 17, 2010, Mische-Hoeges sustained a minor injury to her knee while skiing in Pennsylvania with LeFande. On the drive home, Mische-Hoeges stated to LeFande that she would "just make it POD"[1] as she needed more time to finish her master's thesis at George

[1]

Mason University. On February 24, 2010, while in a conversation with another MPD officer who had recently retired on disability, Mische-Hoeges stated that she would "make my second attempt" "to stick it to the man". J.A. 71. Seven hours later, while on duty for the first time since her ski accident, Mische-Hoeges claimed to police officials that she spontaneously injured her knee while running down the street to assist another officer. There were no witnesses to the alleged incident. For the remainder of February and throughout March, Mische-Hoeges remained in LeFande's house and worked on her thesis full-time. See http://www.worldcat.org/oclc/711437348 (accessed June 10, 2019).

On April 8, 2010, LeFande received a fax for Mische-Hoeges of a radiology exam report from March 12, 2010 showing that Mische-Hoeges had no actual knee injury, despite her claims of a performance of duty injury and ongoing disability to the Metropolitan Police Department. J.A. 172. As a result of the fax, Mische-Hoeges and LeFande began arguing about Mische-Hoeges's lengthy leave of absence from the Metropolitan Police

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"POD" refers to "performance of duty [injury]" in the Metropolitan Police Department. Ordinarily, an officer who sustains an injury while not at work would lose sick leave for any absence attributed to a non-POD injury, where an officer who sustains an injury in the performance of police duties is not charged sick leave and their salary, reimbursed as a disability benefit, becomes tax free during their absence. See *Pierce v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 882 A.2d 199 (D.C. 2005).

Department. Mische-Hoeges moved out of LeFande's house on April 19, 2010. In the process of moving out, Mische-Hoeges implicitly threatened LeFande and warned him not to talk about her injury claims. On May 1, 2010, she made a reference to her previous threat, stating publicly on LeFande's Facebook page, "Wrongful arrest is a normal part of daily life…" J.A. 72 (ellipsis in original). Mische-Hoeges had had no other contact with LeFande whatsoever since leaving him two weeks earlier. Her threats of a "[w]rongful arrest" ***predated all of her later criminal allegations.***

On May 31, 2010, Mische-Hoeges made a complaint to the City of Alexandria Police Department, claiming LeFande was stalking her. J.A. 57. In support of this allegation, Mische-Hoeges only claimed that LeFande had called her a "whore" in a single email exchange. J.A. 58. Mische-Hoeges admitted to the Alexandria Police that she had no fear of LeFande. J.A. 61. Mische-Hoeges was denied a warrant and a protection order by the Alexandria magistrate and the Alexandria Police Department reported the case as "unfounded". J.A. 60 (citing *Lofgren v. Commonwealth*, 684 S.E.2d 223 (Va. Ct. App. 2009)). On June 22, 2010, Mische-Hoeges made the

same allegations to the Arlington County Police Department and was again denied a warrant and a protection order.[2]

On that same date, Mische-Hoeges applied for and received a Temporary Protection Order from the District of Columbia Superior Court, again falsely claiming LeFande was stalking her. J.A. 33. In the process of testifying in support of her application, Mische-Hoeges repeatedly referred to herself as a police officer. J.A. 24. Mische-Hoeges offered no allegation that LeFande had ever threatened her in any manner. J.A. 23-31. Mische-Hoeges made no allegation that LeFande had assaulted her. *Id*. Mische-Hoeges made no allegation LeFande had ever tried to approach or otherwise be physically proximate to her since the end of their relationship. *Id.* Despite the complete lack of any allegation of a criminal offense committed or threatened by LeFande, the Superior Court granted Mische-Hoeges a Temporary Protection Order. J.A. 33.

Also on June 22, 2010, Mische-Hoeges went to the Metropolitan Police Department First District Headquarters, the very location where she was assigned as a police officer, and convinced several of her friends and co-workers to take yet another police report and apply for a warrant on her

[2] The Arlington County Police Department did not respond to LeFande's subpoena *dues tecum* prior to the dismissal of the original criminal case and he does not have a copy of this report.

behalf. J.A. 19. Within this police report, Mische-Hoeges used the report numbers from the Alexandria and Arlington County police reports to falsely claim a history of domestic violence between her and LeFande. J.A. 76. Contrary to this Court's prior assertion in affirming dismissal, Mische-Hoeges's signature appears on the face of this police report and was its obvious author. *Id*. Mische-Hoeges made no attempt to otherwise notify anyone that those report numbers actually demonstrated that she had been twice denied the same charges in two Virginia jurisdictions and was now forum shopping her claims to the very place where she worked as police officer.

Because of Mische-Hoeges's status as a police officer assigned to the same district as the reporting officers, no independent investigation of her claims was made prior to supervisory approval of her application for the arrest warrant. Mische-Hoeges then accompanied the officers to the United States Attorney's Office to present the warrant application. Mische-Hoeges used her position as a police officer to convince the otherwise skeptical prosecutor on duty to approve her warrant. ECF Docket # 16 at 29, n.13.[3] The Superior Court issued a warrant for LeFande's arrest on that date. J.A. 21.

[3] LeFande subsequently learned that Mische-Hoeges is apparently in an ongoing romantic relationship with this prosecutor.

LeFande turned himself in and was arrested, and was arraigned with the curious charge of "Attempted Stalking". Despite LeFande's motions for a Bill of Particulars and to Compel Discovery, the Government never produced any further evidence of any offense beyond the initial affidavit containing Mische-Hoeges's allegations. On September 10, 2010, the United States Attorney's Office formally abandoned prosecution of its criminal charges against LeFande. J.A. 53. The United States Attorney later asserted to the Superior Court that a review of the facts as recited herein indicated it was "in the interests of justice" to seal the records of LeFande's arrest. J.A. 232. The Superior Court subsequently sealed all such records.

In the Superior Court seal motion, LeFande disclosed to the Superior Court another instance where on April 30, 2011, Mische-Hoeges again caused the false arrest of another person, this time a complainant possessing a domestic violence protection order against another person. *United States v. Jorden*, 2011 DVM 924 (D.C. Sup. Ct. 2011). On April 29, 2011 Judge Brian Holeman issued an arrest warrant for Elijah Edwards, for violation of a protection order issued for Ulus Jorden, a resident of Virginia. *United States v. Edwards*, 2011 DVM 1232 (D.C. Sup. Ct. 2011). Jorden was instructed by the Superior Court to report to police if he knew the whereabouts of Edwards.

On the evening of April 30, 2011, Jorden called the Metropolitan Police Department and informed the dispatcher that Edwards was then present at 801 9th Street NW. Numerous Metropolitan Police officers responded to that location. Jorden was interviewed by Metropolitan Police Officer Leo Pennington. While Jorden was speaking to Pennington, Mische-Hoeges demanded that Pennington arrest Jorden. Mische-Hoeges made no effort to speak to Jorden, nor did she inquire of Pennington as to what he had learned from his conversation with Jorden. Pennington protested Jorden's arrest as Jorden was in possession of multiple court documents evidencing his restraining order against Edwards, but Mische-Hoeges instead ordered Pennington to arrest Jorden.[4] Without interviewing Jorden, Mische-Hoeges charged Jorden with three counts of Attempted Threats to Do Bodily Harm and one count of Simple Assault Domestic Violence. Despite the standing bench warrant against him, no action was taken against Edwards.

On May 2, 2011, Jorden was charged upon the sworn statement of Mische-Hoeges, who appeared before the United States Attorney on that date. Mische-Hoeges claims to have made no further effort prior to presenting the case to the United States Attorney to determine if the warrant

[4] While Mische-Hoeges did not hold a higher police rank than Pennington, she routinely was assigned as the "acting sergeant" for the unit in which Pennington was assigned.

against Edwards actually existed. J.A. 178. On the same date, Edwards, having apparently been tipped off by Mische-Hoeges to the existence of the bench warrant,[5] appeared before Judge Holeman to turn himself in. Edwards was arraigned on that day by Holeman for criminal contempt but was not arrested.

On June 15, 2011, the United States Attorney declared a *Nolle Prosequi* for each of the Attempt Threats charges against Jorden. On October 12, 2011, the United States Attorney filed a new charge of Stalking, and six new counts of Threats to Do Bodily Harm. On January 17, 2012, the Superior Court initiated a jury trial on the charges. During the course of this trial, Mische-Hoeges gave extensive factual testimony against Jorden in which she claimed to demonstrate a course of conduct requisite for the charge of Stalking under D.C. Code § 22-3133. During the course of this testimony, Jorden's counsel noted a peculiar bias against Jorden in Mische-Hoeges's testimony beyond that of a police officer's ordinary zeal to

[5] Miche-Hoeges testified that Yaharie Velez was present with her in the same courthouse while she papered the charges against Jorden. J.A. 175-176. As Elijah Edwards was Velez's boyfriend at the time, it would be a particularly incredulous proposition for Velez (and therefore, Mische-Hoeges) to be unaware Edwards was turning himself in for a warrant at the very same time Velez and Mische-Hoeges was alleging to the United States Attorney that there was no such warrant. Indeed, Mische-Hoeges did later admit that either Edwards or Velez told her as much. J.A. 182.

prosecute a suspect. At no time did Mische-Hoeges ever disclose to the Court the pending civil lawsuit against her for falsification of the charges in the criminal case against LeFande.

On January 14, 2013, Mische-Hoeges again testified for the government in an "Attempted Stalking" case, also before Judge Saddler. *United States v. Smith*, 2012 DVM 001932, 2012 DVM 002247 (D.C. Sup. Ct. 2012). Curiously, despite Judge Saddler's direct and ongoing participation in the criminal case against LeFande and subsequent record sealing proceedings with Mische-Hoeges's vociferous opposition, J.A. 62, upon inquiry by Smith's counsel, ***Saddler claimed not to know who Mische-Hoeges was***. "I don't even recognize her, the name or anything." J.A. 184-185. Smith was convicted of stalking upon Mische-Hoeges's testimony, without any disclosure by Mische-Hoeges, the United States Attorney, or Judge Saddler of the pendency of the civil charges against her.

On November 1, 2010, LeFande filed suit before the District Court in this case. On October 20, 2011, the District Court dismissed LeFande's § 1983 claims. J.A. 122. The Court issued no opinion, and the only "separate document" apart from the Court's oral ruling was the Court's ECF Minute Entry of the same date. LeFande made a timely appeal. ECF Docket # 20. This Court dismissed LeFande's appeal as unripe. For five years, the District

Court ignored the case, repeatedly reporting under the Criminal Justice Reform Act that a memorandum was in draft, and then later, that the pending motions required a hearing. J.A. 225-229. Not until LeFande mentioned the inaction in another appeal brief did the District Court schedule a hearing in this case. Such announcement of the first hearing in the case in five years was made just three days prior to LeFande's panel argument in *LeFande v. District of Columbia*, 841 F.3d 485 (D.C. Cir. 2016).

At the October 28, 2016 hearing, Senior Judge Scullin made gross misrepresentations to LeFande regarding the five year delay in the entry of any order of dismissal.

> THE COURT: Gentlemen, as you know, this matter has been hanging around for quite a bit. I dismissed the 1983 claim some time ago but just recently released the state claims and decided not to keep jurisdiction. I actually thought I had done that before, quite frankly. I didn't hear from either parties, and I just assumed this was already taken care of.

J.A. 210.

> THE COURT: There has been nothing done in the past few years since my oral decision. You didn't initiate anything.
>
> MR. LeFANDE: I would like to call the Court's attention to a series of Civil Justice Reform Act reports made by this Court over the last five years; that August 31st, 2012, this Court reported to the Department of Justice or the court system, the opinion or decision was in draft. That's from your court. You said that. That's your report to the courts, that the decision was in draft.
>
> THE COURT: All right.

> MR. LeFANDE: November 1st, 2013, this Court reported that three different motions have opinion decision in draft. And guess what? *Palmer* is right there on top of it, same thing. We had a mandamus action about the fact that you sat on *Palmer* for two years. The only reason I didn't do anything about it is because the D.C. Circuit came back and said, no, that's okay, two years waiting for a decision in *Palmer* is okay.

J.A. 220 (citing *Palmer v. District of Columbia*, 13-5317 (D.C. Cir. 2013)).

Not only did Senior Judge Scullin refuse to act on LeFande's claims for five years, the Court made repeated affirmative representations to the Court's administrators that a memorandum opinion in this case was pending in draft and then specifically misrepresented this fact to LeFande during the October 28, 2016 hearing. When confronted with the documents to the contrary, Scullin repeatedly cut LeFande off as he responded to Scullin's disingenuous allegations that it was LeFande's own inaction that was to blame for the delay. J.A. 220-221.

In response to Mische-Hoeges's demand for sanctions, Senior Judge Scullin admitted that he had done nothing in the course of five years to reach the merits of the case.

> I'm not going to grant your request for sanctions either under 1988 or, for that matter, under 28 U.S.C. 1927, because again I can't find it is unreasonably and vexatiously broad because I don't know the merits of the claims themselves, and I haven't at all gotten into that aspect of it given the fact that I am dismissing the case.

J.A. 214.

> [W]ith respect to awarding attorney's fees under 1988 to a defendant, prevailing defendant, it is more limited. You must find that your action was frivolous, unreasonable, and without foundation, or that you brought it in bad faith. It is not clear because I haven't decided the merits of the case yet. So I have an issue with that, too. You have a point there as far as my being able to award attorney's fees at this time. Later on I may be able to, it depends on what the merits of the case are. Let me give that some thought. I don't think I can award or should award attorney's fees at this time because I don't think it serves a purpose in 1988.

J.A. 219.

The District Court again granted Mische-Hoeges's motion to dismiss, offering no findings of fact and conclusions of law, and certainly no further elucidation of the Court's reasoning than it did in 2011. J.A. 207. LeFande again timely appealed. J.A. 231. Mische-Hoeges in turn appealed Judge Scullin's denial of her demand for sanctions.

Following dismissal of LeFande's claims, Mische-Hoeges was again embroiled in controversy regarding a bizarre and subsequently disproven allegation she made against a senior detective of the Metropolitan Police Department. Following the revelation of Mische-Hoeges's misconduct in this case, her false testimony in the *Jorden* case, her misconduct in the *Smith* case, the investigations of misconduct by both the Department of Justice and Internal Affairs of the Metropolitan Police Department, her untoward ongoing sexual relationship with an Assistant United States Attorney, and

her likely subsequent placement on the *Lewis* List, all disqualifying her from testifying in criminal cases as a government witness, Mische-Hoeges was essentially put out to pasture in the Financial Cyber Crimes Unit of the Metropolitan Police Department, where her contact with the public and her discretionary police activity would be intentionally limited.

Apparently unhappy with her new assignment, Mische-Hoeges set out on a new scheme to be transferred again by alleging that twenty four year Metropolitan Police Department veteran Detective Miguel Montanez had stolen a Metro Smart Trip fare card from her purse in the Financial Cyber Crimes Unit office and that she now felt frightened to continue to work in that office with him. See J.A. 194. Mische-Hoeges had found Metro video records showing Montanez to have used her missing fare card. *Id*. Despite immediately recognizing her co-worker in the video, Mische-Hoeges made a police report to Metro Police, falsely identifying the person in possession of her fare card as "unknown". J.A. 194-195, 200.

Montanez was administratively charged with conduct constituting a crime, making an untruthful statement to a superior officer, conduct unbecoming an officer, and failure to obey orders. J.A. 186-188. The case was characterized as a "big waste of time", J.A. 197, and Montanez was

subsequently exonerated of all allegations against him. J.A. 200-203. Montanez retired from the police department shortly thereafter.

On May 17, 2017, this Court denied Mische-Hoeges Motion for Summary Affirmance in appeal 16-7135, stating "[t]he merits of the parties' positions are not so clear as to warrant summary action." Document #1675506 (quoting *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987). Mische-Hoeges's attorneys then repeatedly demanded that LeFande include more than one hundred pages of her self-affirming legal memoranda as part of the Joint Appendix. LeFande rightfully refused, citing Circuit Rule 30 (b). Mische-Hoeges in turn demanded first, the dismissal of LeFande's appeal, and then to supplement the Appendix with the offending memoranda. This Court never granted Mische-Hoeges's motions or otherwise condoned her violations of the Court's Rules.

On November 8, 2017, this Court ordered oral argument on this appeal. On the day prior to argument, LeFande's attorney suffered a medical emergency and LeFande moved to continue the argument. See Document # 1711368. On February 1, 2018, this Court issued a *per curiam* judgment without any discussion of LeFande's evidence or authorities affirming the equally unexplained dismissal of his lawsuit. J.A. 230. The Court, contrary to the evidence of record and depriving LeFande of any

opportunity for discovery, incorrectly claimed that Mische-Hoeges "did not direct an officer to take her report, author the official report, or apply for the arrest warrant. J.A. 231. The Court remanded the case to determine if LeFande's claims were "frivolous, unreasonable, or groundless". *Id*. (citing *CRST Van Expedited, Inc. v. Equal Employment Opportunity Commission*, 136 S. Ct. 1642, 1646 (2016)). LeFande petitioned for an *en banc* rehearing, citing the complete lack of reasoning in the decision and the factual allegations made by the panel in direct conflict with the record evidence.

On remand, the District Court did not address a single argument made by LeFande, or rebut any of his authorities or evidence. Likewise, Mische-Hoeges's attorneys simply repeated their prior *ad hominem* attacks on LeFande and offered no argument supporting any finding that LeFande's theories of relief were in any way "frivolous, unreasonable, or groundless". LeFande timely appealed. Upon notice of the briefing schedule, Mische-Hoeges's attorneys repeatedly harassed LeFande's attorney to include the same improper memoranda of law as part of the Joint Appendix.

V. Summary of the Argument

In classic dystopian fashion, the District Court and Mische-Hoeges accuse LeFande of the very offense of which they themselves are guilty. LeFande has espoused multiple competent theories of liability for Mische-Hoeges's actions under color of state law. Unable to answer these arguments, the District Court made a cursory recital of the procedural history, quoted Judge Scullin's already defective ruling and then granted judgment to Mische-Hoeges, ***absolutely nothing more.***

Of course, the District Court was placed in an impossible position by this Court's prior mandate. To examine LeFande's arguments, for what would be the first time by any court herein, would lead to the affirmation that LeFande's lawsuit ***should never have been dismissed in the first place.*** The District Court wouldn't touch it. But by that process, there has been no fact intensive inquiry required to establish by any degree that LeFande's claims were "frivolous, unreasonable, or groundless". Absent any showing as such, the Judgment against LeFande must be reversed and his lawsuit reinstated.

VI. Argument

1. Standard of Review

"The statute involved here, 42 U.S.C. § 1988, allows the award of 'a reasonable attorney's fee' to 'the prevailing party' in various kinds of civil rights cases, including suits brought under § 1983." *Fox v. Vice*, 563 U.S. 826, 832 (2011).

> In [*Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978)], we held that § 1988 also authorizes a fee award to a prevailing defendant, but under a different standard reflecting the "quite different equitable considerations" at stake. *Id*., at 419. In enacting § 1988, we stated, Congress sought "to protect defendants from burdensome litigation having no legal or factual basis." *Id*., at 420. Accordingly, § 1988 authorizes a district court to award attorney's fees to a defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." *Id*., at 421; see also *Kentucky v. Graham*, 473 U.S. 159, 165, n. 9 (1985).

Id. (parallel citations omitted). Accord *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 390 (2011).

On October 20, 2011, the District Court dismissed LeFande's Section 1983 claims without explanation or opinion. The Court made no ruling on LeFande's remaining state law claims, which for the most part are alternative or parallel causes of action to the Section 1983 claims. This Court's affirmance was bereft of explanation, other than a single reference to Mische-Hoeges's entering police department facilities. As LeFande proceeds on such alternative causes of action without impediment, either in

this Court or before the Superior Court as noted by Mische-Hoeges's counsel, Mische-Hoeges fails to demonstrate that she is a prevailing party for the purposes of 42 U.S.C. § 1988.

> We have long held that the term "prevailing party" in fee statutes is a "term of art" that refers to the prevailing litigant. See, *e.g.*, *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 603 (2001). This treatment reflects the fact that statutes that award attorney's fees to a prevailing party are exceptions to the "'American Rule'" that each litigant "bear [his] own attorney's fees." *Id*., at 602 (citing *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994)).

Astrue v. Ratliff, 560 U.S. 586, 591 (2010) (parallel citations omitted).

> We began our analysis in [*District of Columbia v. Straus*, 590 F.3d 898 (D.C. Cir. 2010)] with the Supreme Court's teaching in [*Buckhannon*, 532 U.S. at 603-605], that to be a prevailing party "requires more than achieving the desired outcome." *Straus*, 590 F.3d at 901. Following *Buckhannon*, in *Thomas v. National Science Foundation*, 330 F.3d 486, 492-93 (2003), we had identified three requirements for prevailing party status: There must be (1) "a court-ordered change in the legal relationship of the parties"; (2) a "judgment ... in favor of the party seeking the fees"; and (3) "judicial relief" accompanying the "judicial pronouncement." *Straus*, 590 F.3d at 901 (citing *Thomas*, 330 F.3d at 492-93) (internal quotation marks omitted). Only the latter two of these requirements apply when the party seeking fees is a defendant. *Id*. at 901.

District of Columbia v. Ijeabuonwu, 642 F.3d 1191, 1194 (D.C. Cir. 2011) (parallel citations omitted).

Unlike a plaintiff, it is insufficient for Mische-Hoeges as a defendant in a Section 1983 action to simply be a "prevailing party" to implicate the fee-shifting provision of 42 U.S.C. § 1988. She must demonstrate that

LeFande's Complaint was "frivolous, unreasonable or without foundation". *Christiansburg*, *supra*. Again, as this statute is in derogation of the common law American Rule, it must be strictly construed against its application and Mische-Hoeges has the burden of demonstrating the elements required. She cannot.

> The brevity of [28 U.S.C. § 1915(d)] and the generality of its terms have left the judiciary with the not inconsiderable tasks of fashioning the procedures by which the statute operates and of giving content to § 1915(d)'s indefinite adjectives. Articulating the proper contours of the § 1915(d) term "frivolous," which neither the statute nor the accompanying congressional reports defines, presents one such task. The Courts of Appeals have, quite correctly in our view, generally adopted as formulae for evaluating frivolousness under § 1915(d) close variants of the definition of legal frivolousness which we articulated in the Sixth Amendment case of *Anders v. California*, 386 U.S. 738 (1967). There, we stated that an appeal on a matter of law is frivolous where "[none] of the legal points [are] arguable on their merits." *Id*., at 744. By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or in fact. As the Courts of Appeals have recognized, § 1915(d)'s term "frivolous," when applied to a complaint, embraces not only the inarguable legal conclusion, but also the fanciful factual allegation.

Neitzke v. Williams, 490 U.S. 319, 325 (1989) (footnotes omitted). See also *Butler v. DOJ*, 492 F.3d 440, 443 (D.C. Cir. 2007) (quoting *Tafari v. Hues*, 473 F.3d 440, 442 (2d Cir. 2007) ("A frivolous action advances 'inarguable legal conclusion[s]' or 'fanciful factual allegation[s].' Thus, the term 'frivolous' refers to the ultimate merits of the case.")).

LeFande's Section 1983 claims are by no means simple. LeFande alleges that after Mische-Hoeges was unable as an ordinary citizen to obtain an arrest warrant and restraining order in the respective Virginia jurisdictions where Mische-Hoeges and LeFande lived, she traveled to the police district headquarters in the District of Columbia where she is employed to obtain an arrest warrant which no ordinary citizen could have obtained given the facts presented. In each and every facet of the proceedings, Mische-Hoeges could not have accomplished what she did but for her position of authority within the Metropolitan Police Department. LeFande further alleges that Mische-Hoeges employed her co-workers as her proxies for the purpose of obtaining LeFande's arrest warrant so as to insulate her from the very allegations she faces now. Finally, LeFande alleges that Mische-Hoeges initiated the proceedings because she was demonstrably committing time and attendance fraud against the police department and needed to silence LeFande.

Where LeFande is still free to proceed upon parallel and alternative theories of relief for the same factual contentions, and conceivably obtain the same damages award for his injuries, there has been no substantive judicial relief afforded Mische-Hoeges necessary for her to be a "prevailing party" under 42 U.S.C. § 1988. See *Hardt v. Reliance Standard Life*

Insurance Co., 560 U.S. 242, 256 (2010) (Hardt considered a prevailing party where she "obtained a judicial order instructing Reliance 'to act on Ms. Hardt's application by adequately considering all the evidence' within 30 days", distinguishing this judgment from a "'purely procedural victory'"); *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (Wyner not a prevailing party where she "had gained no enduring 'chang[e] [in] the legal relationship' between herself and the state officials she sued."); *Ijeabuonwu*, 642 F.3d at 1196 ("The dismissal therefore 'protected the District from nothing at all.'" quoting *Straus*, 590 F.3d at 902 and citing *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002)); *Straus*, 590 F.3d at 902 ("Res judicata effect would certainly qualify as judicial relief where, for example, it protected the prevailing school district from having to pay damages or alter its conduct.")

> Under *Buckhannon* it is clear that a plaintiff "prevails" only upon obtaining a judicial remedy that vindicates its claim of right. See *Select Milk Producers, Inc. v. Johanns*, 400 F.3d 939, 948 (D.C. Cir. 2005) (plaintiff whose "claim was fully vindicated by the court-ordered" preliminary injunction, although not a final determination on merits, is "prevailing party" under *Buckhannon*). On the other hand, a defendant might be as much rewarded by a dispositive order that forever forecloses the suit on a procedural or remedial ground as by a favorable judgment on the merits. See *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (res judicata precludes relitigating issue whether amount in controversy exceeds minimum required for jurisdiction under 28 U.S.C. § 1332). A ruling on a jurisdictional ground, that the action fails either in law or in fact, might give the defendant all it could receive from a judgment on the merits. ***Be that as it may, this court has not addressed whether, in light of***

Buckhannon, a defendant "prevails" when the case against it is dismissed for want of jurisdiction.

District of Columbia v. Jeppsen, 514 F.3d 1287, 1290 (D.C. Cir. 2008) (parallel citations omitted, emphasis added).

Certainly none of this analysis supports a "prevailing party" finding for a dismissal which does not preclude the rebringing of essentially the same causes of action in a different venue or the same court later awarding the same kinds of damages under alternative theories of relief. See *Autor v. Blank*, 128 F. Supp. 3d 331, 339 (D.D.C. 2015). Mische-Hoeges is not a prevailing party. She has not achieved a dismissal and the case has not terminated. LeFande remains free to continue litigating his claims elsewhere.

While "decisions to impose sanctions under Rule 11 '[are] as much a subject of appellate review as any other'", *Confederate Memorial Association v. Hines*, 995 F.2d 295, 301 (D.C. Cir. 1993) (quoting *Weisberg v. Webster*, 749 F.2d 864, 873 (D.C. Cir. 1984)), any suggestion that this Court should permit sanctions under these circumstances is ludicrous. No court has ever engaged in the review required to discern if LeFande's claims were "frivolous, unreasonable, or groundless". See *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1179 (D.C. Cir. 2005) (applying the "substantially

justified" standard of 28 U.S.C. § 2412 (d)(1)(A) in *Pierce v. Underwood*, 487 U.S. 552 (1988)).

The District Court was mandated to discern if there was a reasonable basis for LeFande's claims, but never did. This demands that this Court again engage in *de novo* review where the District Court didn't do its job. "[T]his would be a poor use of court of appeals resources, because it 'will either fail to produce the normal law-clarifying benefits that come from an appellate decision on a question of law, or else will strangely distort the appellate process.'" *Taucher*, 396 F.3d at 1179 (quoting *Underwood*, 487 U.S. at 561).

> It was not "flatly at odds with the controlling case law," *Am. Wrecking Corp. v. Sec'y of Labor* [364 F.3d 321, 326-27 (D.C. Cir. 2004)] (internal quotation marks omitted), and the Secretary certainly did not press her position in "the face of an unbroken line of authority," *Precision Concrete v. NLRB*, 362 F.3d 847, 851-52 (D.C. Cir. 2004), or against a "string of losses," *Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 199 F.3d 1335, 1341 (D.C. Cir. 2000) (internal quotation marks omitted).

Hill v. Gould, 555 F.3d 1003, 1007-1008 (D.C. Cir. 2009) (parallel citations omitted).

The "American Rule" of civil litigation provides that each party is responsible for paying its own attorney's fees unless specifically provided by statutory authority, contractual agreement, or certain narrowly defined common law exceptions.

> What Congress has done, however, while fully recognizing and accepting the general rule, is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights... Under this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 260 (1975) (footnotes omitted).

Mische-Hoeges's repeated reference to the United States Attorney and the Metropolitan Police Department's failure to discipline her for LeFande's well-documented allegations, J.A. 116-117, underscores the very purpose of these "private attorney general" actions. *Perdue v. Kenny A.*, 559 U.S. 542, 566 (2010) (such a plaintiff is "filling an enforcement void in the State's own legal system") BREYER, J. concurring in part and dissenting in part; *Turner v. D.C. Board of Elections & Ethics*, 354 F.3d 890, 894 (D.C. Cir. 2004) (the purpose of 42 U.S.C. § 1988 is "to vindicate citizens' rights").

LeFande's personal experience dictates the opposite result of the Courts' dismissal of his Section 1983 claims. LeFande, as plaintiff's attorney prosecuting many of the same causes of action, has previously successfully defended against a Rule 12(b)(6) Motion to Dismiss, largely upon the notice pleading rule. As defendants seek to dismiss civil rights claims, this Court "must be especially solicitous of the wrongs alleged" and

"must not dismiss the claim unless it appears to a certainty that the plaintiff would not be entitled to relief *under any legal theory which might plausibly be suggested by the facts alleged*." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) (quoting *Harrison v. U.S. Postal Service*, 840 F.2d 1149, 1152 (4th Cir. 1988)) (emphasis in original); see also *Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006).

> Federal courts are "without power to entertain claims otherwise within their jurisdiction if [the claims] are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" *Hagans v. Lavine*, 415 U.S. 528, 536 (1974) (quoting *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 579 (1904)). To warrant dismissal for insubstantiality, "claims [must] be flimsier than 'doubtful or questionable'--they must be 'essentially fictitious.'" *Best v. Kelly*, 39 F.3d 328, 330 (D.C. Cir. 1994) (quoting *Hagans*, 415 U.S. at 536-37) (finding claim sufficiently substantial where plaintiffs had not "suggested any bizarre conspiracy theories, any fantastic government manipulations of their will or mind, any sort of supernatural intervention"). Although we have said that "[t]he Rule 12(b)(1) 'substantiality' doctrine is, as a general matter, reserved for complaints resting on truly fanciful factual allegations," *id*. at 331 n.5, a legal claim may be so insubstantial as to deprive federal courts of jurisdiction if "prior decisions inescapably render the claims frivolous." *Hagans*, 415 U.S. at 538. That said, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial." *Id*. Thus, to qualify as insubstantial, a claim's "unsoundness [must] so clearly result[] from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (internal quotation marks omitted).

Ord, 587 F.3d at 1144 (case in which LeFande, as appellant's counsel, obtained a reversal of a Fed. R. Civ. P. 12(b)(1) dismissal by this Court with authorities and argument no less frivolous than herein).

2. Each and all of LeFande's claims had thoroughly documented basis in law and fact.

The District Court's comment upon dismissing LeFande's § 1983 claims that "there's just nothing in the record to support your claim", J.A. 214, was simply extraordinary given the posture of the case, as LeFande's factual allegations must be accepted as true at this stage of the litigation and there has been no discovery to properly develop the factual record. The Court's written order barely memorialized the same lack of reasoning stated at the October 20, 2011 hearing. J.A. 207. No jurist in this courthouse has fared any better since in explaining why LeFande's claims have been dismissed, let alone that they are somehow frivolous.

"It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Noel Canning v. NLRB,* 705 F.3d 490, 506 (D.C. Cir. 2013) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). "This is of the very essence of judicial duty." *Marbury*, 5 U.S. at 177.

> Generally, "district courts should set out the reasons for their decisions with some specificity." *United States v. Woods*, 885 F.2d 352, 354 (6th Cir. 1989) (noting that "when a motion for summary judgment is granted,[] without any indication as to the specific facts and rules of law supporting the court's decision, it is difficult, except in the simplest of cases, for an appellate court to review such a decision."); see also *Bybee v. City of Paducah*, 22 Fed. Appx. 387 (6th Cir. 2001) (unpublished decision) (concluding that "the district court's order must be vacated. The district court's order is insufficient because it does not provide any indication as to the court's rationale for dismissing [plaintiff's § 1983] complaint …. Thus, a remand is necessary because the district court's order does not provide an adequate basis for appellate review"). Given the district court's lack of analysis, and, mere acknowledgment of Defendants' qualified immunity claim on the record during oral arguments, a remand would be more than appropriate.

Derfiny v. Pontiac Osteopathic Hosp., 106 Fed. Appx. 929, 936 (6th Cir. 2004) (unpublished). Accord, *Bowie v. Maddox*, 642 F.3d 1122, 1132 (D.C. Cir. 2011) ("Because the district court suggested no viable rationale for its order, we vacate the dismissal"); *Couveau v. American Airlines, Inc.*, 218 F.3d 1078, 1081 (9th Cir. 2000); *Vadino v. A. Valey Engineers*, 903 F.2d 253, 257-259 (3d Cir. 1990) (distinguishing FED. R. CIV. P. 52(a)).

> Such *ipse dixit* declarations give the impression of arbitrary and capricious decisionmaking of the type that appellate courts routinely invalidate on just such grounds when made by administrative agencies. Not only does such a process provide little or no enlightenment to the parties, the bar, and the public, or encouragement as to this Court's adherence to the rule of law and prudential notions of judicial restraint, but it is also precisely the kind of decisionmaking that this Court criticizes virtually every day when it vacates BVA decisions for failure to comply with the mandate of 38 U.S.C. § 7104(d)(1) that those decisions must "include . . . a written statement" not only "of the Board's findings and conclusions" but also of the

> "reasons or bases for those findings and conclusions, on all material issues of . . . law presented on the record." 38 U.S.C. § 7104(d)(1).
> ...
> Apparently, however, what is sauce for the reviewee is not sauce for the reviewer.

Meeks v. W., 13 Vet. App. 40, 43-44 (1999) STEINBERG, J. *dissenting* (citation omitted).

a. LeFande's color of law claims under 42 U.S.C. § 1983.

42 U.S.C. § 1983 creates a cause of action against individuals who violate federal law while acting "under color of state law". "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *Williams v. United States*, 396 F.3d 412, 414 (D.C. Cir. 2005) (quoting *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941))). See also *Williams*, 396 F.3d at 415 (the District of Columbia had control over Mische-Hoeges, and "D.C. officials... 'provided significant encouragement,' [and] participated in" LeFande's arrest and mistreatment).

"[M]anifestations of such pretended authority may include... identifying oneself as a police officer." *G'Sell v. Carven*, 724 F. Supp. 2d 101, 112 (D.D.C. 2010) (quoting *Barna v. City of Perth Amboy*, 42 F.3d

809, 816 (3d Cir. 1994)). See J.A. 24, 36, 51, 52. "[L]iability may be found where a police officer, albeit off-duty, nonetheless invokes the real or apparent power of the police department." *G'Sell*, 724 F. Supp. 2d at 113 (quoting *Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994)). Mische-Hoeges's use of her official access to the restricted areas of the Metropolitan Police Department and United States Attorney's Office facilities further implicated her state actor liability.

> Because Ms. West's status as a state employee enabled her to access the information, she invoked the powers of her office to accomplish the offensive act. Therefore, however improper Ms. West's actions were, they clearly related to the performance of her official duties.

McDade v. West, 223 F.3d 1135, 1140 (9th Cir. 2000) (citing *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 480 (9th Cir. 1991) ("For conduct to relate to state authority, it must bear some similarity to the nature of the powers and duties assigned...").

Mische-Hoeges took full advantage of her access to the restricted areas of the facilities of the Metropolitan Police Department and the United States Attorney's Office to seek out specific sympathetic police officials and prosecutors. Mische-Hoeges then exploited her professional relationships as police officer, and apparently some *other than professional* relationships, to accomplish what demonstrably she could not without such access, relationships and status. J.A. 54. This Court's affirmance is quick to

mention Mische-Hoeges's access, but not her undue influence on the investigative process and prosecutorial discretion. This Court does not have the luxury of relying on these kind of straw man fallacies in such rarefied air.

b. Mische-Hoeges's arrest of LeFande by proxy.

"[A]n otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest". *United States v. Southerland*, 486 F.3d 1355, 1361 (D.C. Cir. 2007) (quoting *Arizona v. Evans*, 514 U.S. 1, 13 (1995) (quoting *Whiteley v. Warden*, 401 U.S. 560, 568 (1971))). Accord, *United States v. Vasquez-Algarin*, 821 F.3d 467, 480-481 (3d Cir. 2016) (quoting same). After Mische-Hoeges was incapable of obtaining a criminal prosecution against LeFande on two occasions as a private citizen in Virginia, see J.A. 60, she returned to her own police station and employed her friends and co-workers as proxies to initiate an unfounded prosecution against LeFande. It is evident that Mische-Hoeges played a direct role in each part of the process and that certain ordinary elements of the process were eschewed because of her status as a police officer and her influence over the process. There was no independent investigation of any of Mische-Hoeges's claims; the detective prepared and presented the arrest warrant application to the

Superior Court immediately after receiving Mische-Hoeges's report. J.A. 19-20, 76. No attempt was made to interview LeFande or to gather evidence independently of Mische-Hoeges's bald claims. Mische-Hoeges was indeed filing out her own police reports and seeking out friends to sign them.

Had there been any independent investigation of Mische-Hoeges's claims, as there would have been for any ordinary citizen, such as obtaining the police reports of Mische-Hoeges's claimed history of domestic violence, J.A. 76, the detective would have discerned that Mische-Hoeges's claims of such history of domestic violence were false. The detective would have further learned of Mische-Hoeges's prior threats of prosecution to LeFande *which predated* the allegations which she employed in her criminal complaint. J.A. 72. The detective further would have discovered Mische-Hoeges's motivation for falsely prosecuting LeFande, her time and attendance fraud perpetrated against the police department. See J.A. 71 (the day before her purported injury discussing her "second attempt" to "stick it to the man"). See also J.A. 186-206 (a near repeat of this effort by Mische-Hoeges against an unwitting male co-worker, this time to transfer out of an undesirable assignment). But for Mische-Hoeges's position within the police department and her inappropriate influence over the process were

these ordinary procedural safeguards ignored. See, *e.g.*, D.C. CODE § 5-333.04.

Mische-Hoeges has formal state actor arrest authority granted by the District of Columbia. See, *e.g.*, D.C. CODE §§ 5-127.04, 5-127.05, 23-581. This type of arrest authority was exactly what was employed to accomplish the deprivation of LeFande's liberty as complained of herein. Mische-Hoeges was further granted nearly unlimited access to governmental buildings and offices and unfettered access to detectives, police supervisors and prosecutors only by virtue of her official position. Finally, Mische-Hoeges's sworn office afforded her credence beyond that of an ordinary citizen, such that she could proceed with LeFande's criminal prosecution on a complaint rife with insinuation, hyperbole and speculation. See *Monsky v. Moraghan*, 127 F.3d 243 (2d Cir. 1997) *as amended*, 1997 U.S. App. LEXIS 36158 at 9-10 ("courthouse staff tolerated the alleged conduct only because of the Judge's role and that the Judge implicitly invoked the power and prestige of his office") *cert. denied*, 525 U.S. 823 (1998).

Mische-Hoeges's experience with the two Virginia jurisdictions preceding her application for the warrant in the District of Columbia demonstrates that she simply could not have obtained a criminal prosecution of LeFande as an ordinary citizen. J.A. 60. That she employed other

persons as her proxies to perform the mechanics of the arrest is of little consequence where she accomplished that which could not be otherwise accomplished *but for* her position of authority within the police department. "[T]he conduct is such that the actor could not have behaved in that way but for the authority of his office." *Martinez v. Colon*, 54 F.3d 980, 986 (1st Cir. 1995). See also *West*, 487 U.S. at 50 ("a defendant in a § 1983 suit acts under color of state law when he abuses the position given him by the State.")

c. Mische-Hoeges's duty to intervene.

Because Mische-Hoeges participated in the entire arrest warrant process, by signing police forms, see J.A. 76, and meeting with the prosecuting attorney and influencing his approval of the arrest warrant, her position as a law enforcement officer in this jurisdiction necessarily implicated a duty to inform the other officials of the falsity of her allegations.

> A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers.

Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 54 (1st Cir. 2005) (quoting *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988)). Accord *Wieder v. City of New York*, 569 Fed. Appx. 28, 30 (2d Cir. 2014) (quoting same).

Mische-Hoeges alone was fully cognizant that her claims of prior history of domestic violence were completely false and that she had been refused prosecution for the same sparse allegations in two other jurisdictions. J.A. 76. There is no evidence that any of the other participants involved in the District of Columbia prosecution had any of this information. "If a police officer, whether supervisory or not, fails or refuses to intervene when a constitutional violation such as an unprovoked beating takes place in his presence, the officer is directly liable under Section 1983." *Wilkerson v. Seymour*, 736 F.3d 974, 979 (11th Cir. 2013) (quoting *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998)).

> [A]ll of the circuits that have spoken to the issue have held that a police officer may have a duty, in certain circumstances, to prevent another officer from violating an individual's constitutional rights. The leading case establishing that police officers, whether in a supervisory capacity or not, have a constitutionally based duty to intervene in certain circumstances when other officers are violating an individual's constitutional rights is *Byrd v. Brishke*, 466 F.2d 6 (7th Cir. 1972). In *Byrd*, plaintiff alleged that he was taken into a back room in the Little Egypt Tavern, surrounded by approximately a dozen Chicago police officers, and struck repeatedly. Because he could not identify which of the officers struck the blows, plaintiff's principal theory of liability under 42 U.S.C. § 1983 was that "even if [the officers] did not personally participate in the violation of plaintiff's civil rights by beating him, they are liable in law for negligently or intentionally failing to protect the plaintiff from others who did violate his rights by beating him in their presence." *Id*. at 10. Applying the principles of tort law to the developing area of constitutional torts, the Seventh Circuit held that an officer can be held liable for money damages for a constitutional tort based on

misfeasance or nonfeasance. See *id*.

Masel v. Barrett, 707 F. Supp. 4, 8 (D.D.C. 1989).

> We believe it is clear that one who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who summarily punish a third person in his presence or otherwise within his knowledge. *That responsibility obviously obtains when the nonfeasor is a supervisory officer to whose direction misfeasor officers are committed*. So, too, the same responsibility must exist as to nonsupervisory officers who are present at the scene of such summary punishment...

Id. (quoting *Byrd*, 466 F.2d at 11) (emphasis added in *Masel*).

It is Mische-Hoeges alone that was responsible for forwarding knowingly false information to the prosecutor.

> When a police officer creates false information likely to influence a jury's decision and forwards that information to prosecutors, he violates the accused's constitutional right to a fair trial, and the harm occasioned by such an unconscionable action is redressable in an action for damages under 42 U.S.C. § 1983.

Ricciuti v. New York City Transit Auth., 124 F.3d 123, 130 (2d Cir. 1997) (citing *United States ex rel Moore v. Koelzer*, 457 F.2d 892, 893-94 (3d Cir. 1972); *Smith v. Springer*, 859 F.2d 31, 34 (7th Cir. 1988); *Geter v. Fortenberry*, 849 F.2d 1550, 1559 (5th Cir. 1988)).

> [A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial--none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision.

Washington v. Wilmore, 407 F.3d 274, 283 (4th Cir. 2005) (quoting *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)).

d. Mische-Hoeges as a civilian participant.

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

Wilson v. Morgan, 477 F.3d 326, 337 (6th Cir. 2007) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970)).

> [T]he private party's joint participation with a state official in a conspiracy to discriminate would constitute both "state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights" and action "'under color' of law for purposes of the statute."

Lugar v. Edmondson Oil Co., 457 U.S. 922, 930-932 (1982) (quoting *Adickes, supra*).

e. Nexus with criticism of Mische-Hoeges's fitness for office.

Mische-Hoeges's motivation for her conduct also implicates her in LeFande's § 1983 claims. Mische-Hoeges sought to retaliate and silence LeFande for his complaints regarding her time and attendance fraud against the police department. See J.A. 72 (Mische-Hoeges's threat of "wrongful arrest" of LeFande predating her allegations against him). "Where the sole intention of a public official is to suppress speech critical of his conduct of

official duties or fitness for public office, his actions are more fairly attributable to the state." *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003). "The fact that these law enforcement officers acted after hours and after they had taken off their badges cannot immunize their efforts to shield themselves from adverse comment and to stifle public scrutiny of their performance." *Id*. at 523 (citing *Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989)). "To begin with, it is clear that if a defendant's purportedly private actions are linked to events which arose out of his official status, the nexus between the two can play a role in establishing that he acted under color of state law." *Id.*

> Ultimately, defendants were driven by a desire to retaliate against Rossignol's past criticism of their fitness for office and to censor future criticism along the same lines. This link between the seizure's purpose and defendants' official roles helps demonstrate that defendants' actions bore a "sufficiently close nexus" with the State to be "fairly treated as that of the State itself."

Id. at 525 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)).

3. The award of attorney's fees is not reasonable.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonably hourly rate." *Hensley v. Eckerhart*, 461 U.S.

424, 433 (1983). "The district court . . . should exclude from this initial fee calculation hours that were not 'reasonably expended'" on the litigation. *Id.* at 434. "The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances", *id.* at 429 (quoting H. R. REP. No. 94-1558, at 1 (1976)), not to unduly punish those persons for filing such grievances.

The record reflects the fee demand is not reasonable. LeFande certainly takes no exception to Mische-Hoeges's employment of the modified or "Kavanaugh" *Laffey* Matrix to demonstrate a reasonable billing rate. J.A. 164. LeFande himself regularly employs these rates and has been personally awarded *Laffey* Matrix rates in his litigation both by the local and Federal courts. What is not reasonable is the amount of time claimed necessarily expended in furtherance of defense of the Section 1983 claims. The record reflects that the entirety of Mische-Hoeges's defense in this case has consisted of essentially her attorneys filing the same document, her initial Motion to Dismiss, *four separate times* before the District Court. Docket # 5, 6, 12, 19. In each instance, Mische-Hoeges's attorneys have employed the identical factual recital wholly unsupported by any evidentiary foundation and which has been repeatedly disavowed by the United States Attorney in Superior Court proceedings. This recital has been invariably

accompanied by a pat recital of the applicable standard of review of the issue at hand but no substantive analysis of the application thereof.

LeFande's response in turn was more developed, more annotated, and certainly more compelling in each instance. LeFande's argument initially focused upon probable cause and not state actor liability, simply because Mische-Hoeges's *defense* focused upon probable cause and not state actor liability. As these issues developed, so did LeFande's argument. This Court cannot genuinely suggest that the pinnacle of that endeavor, LeFande's appeal briefing, is not supported by legitimate documentary evidence and competent authorities. LeFande refuses to be gaslighted to the contrary by anyone, regardless of the consequences.

It is particularly poignant that Mr. Neil's prior declaration repeatedly described the extent of LeFande's legal research and authority within his oppositions to Mische-Hoeges's motions, but in the same breath proceeds with a demand for attorney's fees on a basis that LeFande's claims are "frivolous, unreasonable, or without foundation". *Christiansburg, supra*.

> On December 1, 2010, LeFande filed his Opposition to the Motion to Dismiss. LeFande's Opposition was 30 pages long and cited dozens of cases.
>
> On December 13, 2020 [sic], Mische-Hoeges filed her Reply Memorandum in support of the Motion to Dismiss, which addressed arguments and authority raised in LeFande's Opposition.

J.A. 131 (paragraph enumeration omitted).

> On September 16, 2011, LeFande filed an Opposition to the Motion for Sanctions. This Opposition was 44 pages long and again cited dozens of cases.
>
> On September 26, 2011, Mische-Hoeges filed her Reply Memorandum in support of the Motion for Sanctions, which required additional research to address arguments raised in LeFande's Opposition.

J.A. 132 (paragraph enumeration omitted).

Mr. Neil acknowledged that LeFande's claims had some basis in the law that required his research to respond and his responses demonstrate he failed to refute any of it. He certainly failed to point to a specific instance where his efforts led to a rebuttal rendering LeFande's claims "frivolous, unreasonable, or without foundation". It is difficult to discern where such claims are actually addressed.

> We are also compelled to deduct… charges incurred when attorneys held conferences and teleconferences with persons referenced as "Geiser" and "Wells." The application fails to document who these individuals are or the nature of their relationship to the investigation; consequently, we cannot evaluate whether such fees were reasonably incurred.

Role Models America, Inc. v. Brownlee, 353 F.3d 962, 967 (D.C. Cir. 2004) (quoting *In re Donovan*, 877 F.2d 982, 995 (D.C. Cir. 1989) (per curiam)).

Mische-Hoeges relied solely upon factual allegations without evidentiary foundation supporting spurious legal conclusions without

developed argumentation. Her appeal brief simply denied LeFande's plainly worded allegations in the Compliant. The closest Mische-Hoeges ever came to addressing these factual allegations was a blanket assertion at the conclusion of her argument that they were "fabricated out of whole cloth". This kind of infantile pleading does not warrant even the reduced rates demanded from these purportedly experienced litigators. The seemingly endless repetition of Mische-Hoeges's filings do not reflect the extent of the hours expended now claimed by them. *Id*., at 972 (quoting *Davis County Solid Waste Mgmt. & Energy Recovery Special Serv. Dist. v. United States EPA*, 169 F.3d 755, 761 (D.C. Cir. 1999) (per curiam) ("Duplication of effort is another basis on which [the] hours seem excessive.")). The fees demanded are not reasonable for the amount of work actually performed.[6]

The attorneys' *ad hominem* attacks on LeFande claim he is a predator, yet the sole evidence they present, itself out of context, is that LeFande called Mische-Hoeges a name in a text message exchange nine years ago. LeFande did not seek out false charges in three different jurisdictions to silence criticism of a police officer's time and attendance fraud, that was Mische-Hoeges. LeFande did not invoke his position as a police officer to

[6] Despite LeFande's repeated demands for Mische-Hoeges's fee agreements under Federal Civil Rule 54 (d)(2)(B)(iv), they have never been produced to him.

make unfounded claims warranting a civil protection order, that was Mische-Hoeges. J.A.. 24. LeFande did not publicly threaten "wrongful arrest" to silence his critics, that was Mische-Hoeges. J.A. 72. LeFande did not make false claims to the Metropolitan Police Department that someone was armed and dangerous to spin out of control an already questionable criminal proceeding, that was Mische-Hoeges. J.A. 34. LeFande did not arrest a complainant whose only offense was to report to the police of the location of a wanted person while letting the wanted person free, that was Mische-Hoeges. J.A. 173. LeFande did not falsify claims of a performance of duty injury such that the police department could subsidize the drafting of a master's thesis, that was Mische-Hoeges. J.A. 172. LeFande did not sit idly by while knowing there was adverse *Brady* information requiring disclosure to the defendant before police testimony in a criminal case, that was Mische-Hoeges. J.A. 183. LeFande did not falsify a police report about a stolen Metro farecard to justify a transfer to a better position within the police department, that was Mische-Hoeges. J.A. 186.

There is indeed a serial predator in this lawsuit, and LeFande has been seriously injured by her illegal actions. Those actions have been facilitated and condoned by those in positions of authority who wish to silence LeFande's litigation against the government. LeFande has properly

endeavored to bring that to the Court's attention by documentary evidence and competent legal argument. This case's outcome is a disgraceful and dangerous moment for Due Process. The guilty are rewarded, and those who seek lawful recourse are hounded and destroyed for doing so.

VII. Conclusion

LeFande had an appropriate legal and factual foundation for his claims and the District Court erred as a matter of law in dismissing them. There has never been any basis for an award of sanctions against him. LeFande's claims should be REINSTATED and REMANDED to the District Court with instructions to proceed to discovery and trial. The District Court's original denial of sanctions should be AFFIRMED and the completely unfounded award of sanctions against him VACATED.

Respectfully submitted, this 17th day of June, 2019,

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Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32 (a)(7)(B) because this brief contains 10,517 words, 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 OpenOffice Writer in Times New Roman 14 point font.

Certificate of Service

I HEREBY CERTIFY that copies of the foregoing Opening Brief and Joint Appendix were served via ECF to the Appellee's counsel of record, this 17th day of June, 2019.

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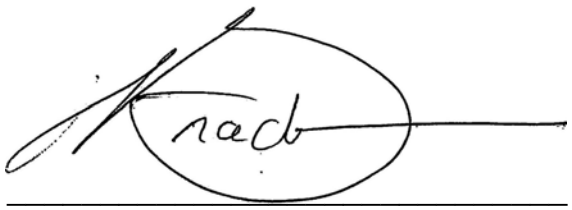

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