RECORD NO. 14-1277

In The
United States Court of Appeals
For The Fourth Circuit

BRANDON RAUB,

Plaintiff – Appellant,

v.

MICHAEL CAMPBELL,

Defendant – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT RICHMOND**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

INTRODUCTION

As a threshold matter, Campbell fails to address in any meaningful way the central evidence in this case: the expert report of Dr. Catherine Martin. *See* Pet. Br. 13-30, JA-830-54. As explained in Raub's opening brief, Dr. Martin is an experienced psychologist who reviewed Campbell's evaluation – and the facts on which he supposedly relied – and condemned his actions in exceedingly strong terms. She did not suggest that this case is a "gray area" where reasonable professionals might differ, nor did she simply say that she "disagreed" with Campbell. Dr. Martin's testimony was far more emphatic. She explained that, with respect to both the initial detention of Raub and the later procurement of a temporary detention order, there was a "lack of evidence of mental illness" and that Campbell's actions were a "violation of professional standards." JA-835, JA-850.

This expert testimony dovetails precisely with the standard by which the district court said a case like this one must be judged: "whether a reasonable person, exercising *professional judgment* and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others." JA-963 (emphasis added). In other words, *so long as* a mental health evaluator stays *within the bounds* of reasonable professional judgment, he cannot be held liable for making a decision, even if that decision later turns out to

be wrong. But, there are limits to what even this generous standard will tolerate or excuse. And, as shown by the testimony of Dr. Martin, Campbell went beyond those limits. Thus, he is not entitled to qualified immunity.

Unable to argue with this logic, Campbell asks the Court to play the role of armchair psychologist and conclude that he acted reasonably. Campbell seeks to bolster that effort with exaggerated and slanted renditions of the evidence, as well as impermissible after-the-fact evidence. *See infra* at 3-13. But, even if the facts were exactly as he describes them, this is simply not a case where lay judgments come into play. Campbell is not a layman. He is not a policeman on the beat, forced to make a decision without the benefit of any mental health expertise. Campbell is supposedly a trained mental health professional, skilled in recognizing mental illness. He must be judged by the standards applicable to mental health professionals. And, to make such a judgment, the Court must look to *expert testimony* about whether Campbell complied with those standards. *See Olivier v. Robert L. Yeager Mental Health Ctr.*, 398 F.3d 183, 190 (2d Cir. 2005) ("[The] decision to commit a person involuntarily . . . does not ordinarily involve matters within the layman's realm of knowledge." (Internal quotation omitted)). The expert testimony of Dr. Martin – the *only* expert testimony in this case – is that Campbell violated those standards in his actions against Raub. Summary judgment was improper and must be overturned.

STATEMENT OF FACTS

In his opening brief, Raub provided a full description of the facts relevant to this appeal. In contrast, Campbell's response brief misstates numerous pertinent facts, dwells on facts that have no bearing on the qualified immunity analysis and fails to address other critical facts.

A. Inaccuracies in Campbell's Version of the Facts

- Campbell claims that "Raub did not submit any factual evidence of his own or challenge any of the facts established by Campbell" during the summary judgment proceedings in the district court. Resp. Br. at 4. This is not true. For example, Raub submitted into evidence the report of Dr. Martin, which included a description of the closed-circuit video of Raub at the jail. That video showed his "complete compliance and behavioral self-control" throughout the five hours he was "handcuffed (hands behind his back) tethered to a bench," thus rebutting Campbell's claim about Raub's behaviors. JA-842. Additionally, Raub disputed and pointed out the inaccuracies, flaws and omissions in the "facts" asserted below by Campbell. *See* JA-763-73.

1. The Initial Seizure

- Campbell's recitation of the facts begins with a description of phone calls between two former acquaintances of Raub and law enforcement personnel.

Resp. Br. at 4-5. Campbell was not involved in these conversations, and they could not provide a basis for Campbell to have probable cause either to call for Raub's seizure at his home or to seek his temporary detention following the initial seizure. *See United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995) ("To determine whether probable cause existed, courts look to the totality of the circumstances *known to the officers at the time of the arrest.*" (emphasis added)). For the same reason, other later evaluations of Raub and an Inspector General's report took place after the fact, and do not have any bearing on whether Campbell had probable cause to order Raub's seizure or detention. *See* Resp. Br. at 19-20.

- Throughout Campbell's recitation of the facts, he repeatedly characterizes Raub's postings on Facebook as "threats," "threats of violence," "homicidal threats," "specific threats," and assorted variations on this theme. *See*, *e.g.*, Resp. Br. at 5, 6, 9, 10, 12, 13, 17, 18. These characterizations of Raub's postings are unsupported legal conclusions. In fact, both state and federal prosecutors determined that Raub's postings, many of which were song lyrics, were not threats at all, for purposes of the probable cause analysis. JA-192. Nor are they "specific," in that they do not include a "who," "what," "when," "where," "why," or "how."

- Campbell suggests that he is somehow more qualified to diagnose mental illness than Raub's expert, Dr. Martin, because Campbell is a "certified prescreener." Resp. Br. at 8 n.6. The fact is, however, that Dr. Martin has a Ph.D. in clinical psychology and is licensed by the Virginia Board of Psychology. JA-830. Campbell, on the other hand, is not licensed by the Board of Psychology. JA-783. In fact, Campbell's crisis stabilization decisions must be reviewed and approved by a licensed mental health professional like Dr. Martin. 12 VAC 30-50-226(B)(5); *see also*, *e.g.*, Va. Code § 37.2-815 (expressing preference, at mental health commitment hearing, for opinion of licensed psychologist over opinion of individual who has "completed a certification program"). Thus, Dr. Martin's professional credentials are *superior* to those of Campbell. Moreover, the term, "certified prescreener," is limited to "employee[s] of the local community services board." 12 VAC 30-50-226(A). But, the government is not the only source – or even the best source – of expertise on mental health, and Dr. Martin is fully qualified to provide a professional opinion on the quality of Campbell's evaluation.
- Campbell describes his conversation with Paris as follows: "Paris described the language of the threats to Campbell, who agreed that they were specific threats of violence against human beings." Resp. Br. at 13. For this

proposition, Defendants have cited Campbell's sworn statement, in which Campbell said, "Although I do not remember the specific wording of any of the threats now, they were specific threats of violent action against human beings." *See* JA-573-74. When Campbell was confronted with this statement during his deposition, however, and was asked whether Paris "characterize[d] Raub's statements as specific threats or [if] that [was] a conclusion that [Campbell] came to based on the statements [Paris] told to [Campbell]," Campbell responded, "I can't recall what was – what was said specifically." JA-667-68.

- Campbell claims Paris told him that, "Raub was preoccupied and distracted during [Paris'] interview [with Raub]. . . ." Resp. Br. at 13 (citing JA-574). Campbell says these were "signs" that "Raub might have been reacting to an internal stimulus, an indication of psychosis." *Id.* As Dr. Martin explains, however, what Paris described is actually *socially appropriate* eye contact, since he was neither trying to "stare down" Paris with constant eye contact nor was he "staring into space" as he spoke. Contrary to Campbell's statement, such eye contact is not "evidence of psychosis." Moreover, to appear "preoccupied and distracted" is a *normal* reaction when a person is placed in a stressful situation, such as being confronted at one's home by a number of law enforcement officers. JA-834.

- Campbell also reports that, according to Paris, "Mr. Raub had rapid mood swings during their conversation." Resp. Br. at 13. But, according to Dr. Martin, this statement by Paris is not descriptive enough to allow any conclusions to be drawn. JA-834. Moreover, this "mood swing" observation is contradicted by another observation reported by Paris in the very next sentence, in which he told Campbell "that Mr. Raub was extremely serious and intense during the *entirety* of the conversation, and that he never joked or expressed any kind of light-heartedness." *Id.* (citing JA-687 (emphasis added)). Again, according to Dr. Martin, Raub's reported response – seriousness when questioned by a team of law enforcement – is entirely appropriate. A failure to joke with investigators is not a sign of mental illness. *Id.*
- Campbell continues to maintain that Raub's espousal of conspiracy theories about the U.S. government being responsible for the 9/11 attacks and Thorium being dropped from airplanes means that he is "delusional." Resp. Br. at 14 n.12. As Dr. Martin explains, while these conspiracy theories may be eccentric, they are shared by many conspiracy theorists, and "*they are not delusional beliefs in a psychological sense*." JA-844-45 (emphasis added). Campbell seeks to counter this assessment by treating any belief that is "ill-grounded" in fact as "delusional" in the psychological sense. Resp. Br. at

14, n.12. But, Campbell merely digs himself deeper in the hole. There are many people who believe many things that are "ill-grounded in fact" and Campbell's apparent desire to treat them all as mentally ill underscores both his incompetence and the continuing danger to Raub's liberty (as well as the liberty of many others).

- Campbell quotes an excerpt from Paris' deposition to claim that it was Paris and Granger, not Campbell, who decided to detain Raub. Resp. Br. at 15. A careful comparison between Campbell's brief and the transcript of Paris' deposition testimony shows that Campbell has misread that testimony. For example, at one point, Paris is asked this question:

> Well, weren't you the person who indicated that he [Raub] should be brought in – should be detained, seized, and brought in?

JA-419. Instead of answering in the affirmative, Paris describes his role quite differently:

> I was the person – one of the persons who talked to him at his front door.
>
> * * * * *
>
> Okay. After talking to him and discussing it with Agent Granger, we decided *we needed to call* and have him evaluated.

JA-419 (emphasis added). The italicized words (along with most of this exchange) are left out of Campbell's discussion (Resp. Br. at 34), but those italicized words are important because they show that Paris did *not* decide to

seize Raub; he decided to make a phone call. And the "evaluation" that Paris had in mind was a conversation with Campbell over the phone, a practice that is fairly routine for Campbell. *See* JA-657-58 (Campbell estimates that he conducts phone evaluations in 60 percent of the cases where he receives a call from the field.).[1] Such a reading of Paris' testimony is not only permissible, it is the *only* way to square that statement with his written police report that *Campbell* made the "decision" to bring Raub in for an evaluation. *See* Pet. Br. at 41 (citing JA-193).

- As Campbell points out, Granger said to Paris: "We need to get this guy evaluated. You know we can't leave here without doing something." Resp. Br. at 34 (quoting JA-452-53).[2] But, contrary to what Campbell's brief implies, Paris' response was *not* to seize Raub. It was to call Campbell (JA-453), who said "bring him in." JA-454. And, as explained by Paris in his written report, Paris then "handed the phone to another officer" and asked Campbell to repeat "his decision" to have Raub brought in. *See* Pet. Br. at 41 (quoting JA-193).
- Campbell claims that after talking with Paris (but without asking to speak with Raub (JA-575) – a fact not acknowledged in Campbell's version of the

[1] Campbell's unwillingness to speak with Raub over the phone was one point on which Dr. Martin faulted him. JA-835.

[2] Campbell also cites JA-419 for that comment. But that citation is in error. The quoted testimony appears only at JA-452-53.

facts), he had "ample justification" to warrant "a mental evaluation." Resp. Br. at 14. But, this is the wrong standard. The question is not whether there was enough evidence to warrant an *evaluation*, but whether there was enough evidence to warrant the *seizure* of Raub. In fact, as explained in Dr. Martin's report, there was not enough evidence to warrant such a seizure under Virginia Code § 37.2-808(A) and (G). JA-835.

2. The Rudimentary Jailhouse "Evaluation"

- Campbell claims that when he interviewed Raub at the jail, he observed "preoccupation, distractedness, and [a] roving gaze." Resp. Br. at 16. Campbell fails to discuss the setting in which the interview took place, which fully explains any preoccupation, distraction and stray glances that he may have observed.
- As described by Dr. Martin, who viewed the video of Raub's booking, preliminary detention and interview with Campbell, Raub was shirtless and barefoot, with his hands cuffed behind his back. The cuffs were tethered to a bench, on which Raub was seated. Throughout the interview, Campbell was standing, leaning against a wall a few feet away from Raub. JA-840. The interview took place in a roomful of strangers, with officers coming and going during the interview. The presence of strangers during a psychological interview can make a client uncomfortable speaking freely. *Id.*

- Campbell claims that Raub looked at him with "a blank, kind of a blank stare." Resp. Br. at 17 (quoting JA-633). Of course, this is inconsistent with Campbell's claim that Raub simultaneously had a "roving gaze." Resp. Br. at 16 (citing JA-576, 632-33). Moreover, when questioned about what he meant by a "blank stare," Campbell went on to explain that he meant Raub was "distractable," and had to "hav[e] questions repeated for him." JA-633-34. This is hardly noteworthy, considering Raub was being interviewed in a busy jail intake room with strangers coming and going.

3. Campbell's Petition for Involuntary Detention

- Campbell claims that "it was *undisputed* that Campbell's decision to petition Magistrate Znotens was based on threats Raub was making, not on 'political speech.'" Resp. Br. at 26. Again, this is not true. Raub has argued throughout the litigation that Campbell petitioned the magistrate for Raub's detention because of his vehement disagreement with Raub's conspiratorial and revolutionary beliefs. *See*, *e.g.*, JA-816; JA-826-27 (explaining that Campbell misrepresented to the magistrate that Raub was delusional because of Campbell's disagreement with Raub's views); *see also* JA-863 (Campbell's explanation of why he found Raub "delusional").

4. Raub's Release

- Campbell asserts that Raub was released "because the mental health professionals at John Randolph Hospital had failed to check some boxes on the petition form they filed with the General District Court." Resp. Br. at 20. In fact, the Circuit Court of the City of Hopewell, found that "the petition [for involuntary confinement] is so devoid of any factual allegations that it could not be reasonably expected to give rise to a case or controversy." JA-879.

B. Critical Omissions from Campbell's Version of the Facts

Apart from the numerous inaccuracies and flaws in Campbell's recitation of the facts, he also omits a number of critical pieces of evidence, including the following:

- Howard Bullen, the Marine acquaintance who contacted law enforcement regarding Raub, had not been in touch with Raub for years and had had no direct contact with him. JA-989.
- Both the United States Attorney and the Commonwealth's Attorney had been approached by law enforcement about Raub's postings, and both had advised that there was no probable cause to arrest him. JA-192.
- Raub's mother "shares Raub's beliefs," which is an indication that Raub's views are not a byproduct of mental illness. JA-625.

- Campbell had spoken to "Raub's mother, with whom he resides," and she reported that she "has not seen any changes or psychotic behavior in Raub," JA-705, yet Campbell failed to mention this important fact to the magistrate.
- Raub made no threats to harm himself or any other person in any of his conversations with law enforcement officers or Campbell. JA-198; JA-645-46.
- Campbell did not ask to speak on the phone with Raub when he was on the phone with Paris, relying only on second-hand information when he instructed that Raub should be seized. JA-575.
- Raub had no history of mental illness before or after the events that are the subject of the lawsuit. JA-851.
- Perhaps most egregiously, Campbell largely ignores the report by Dr. Martin, including her point-by-point rebuttal of Campbell's findings and conclusions.

ARGUMENT

I. Campbell's Attempt to Portray Raub as "Actually Ill" and "Actually Dangerous" is Unavailing.

Woven throughout Campbell's brief is an apparent effort to eclipse the probable cause issue by what might be termed an "actual illness/actual dangerousness" defense. While entirely misplaced here, the attempted defense seems roughly analogous to the "actual guilt" defense that a police office can raise when he is sued for making a seizure without probable cause in a criminal matter. Under the "actual guilt" defense, if the officer lacked probable cause, he can still escape liability if he can show by a preponderance of the evidence that the defendant was "actually guilty" of the crime for which he was arrested and acquitted. *See, e.g.*, *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000). Similarly, at times, Campbell seems to be suggesting that he should be excused for lacking probable cause on the theory that Raub actually was mentally ill and actually was dangerous to others.

There are several problems with this approach. First, the policy reason that undergirds the "actual guilt" defense – not allowing those choosing to commit crimes to benefit from attempts to bring them to justice – does not apply where there is only mental illness, an involuntary state, not criminal wrongdoing. Second, the burden of proof on the "actual guilt" question lies with the defendant in the civil case, and it must be pled as an affirmative defense. Campbell never

pled an "actual illness/actual dangerousness" defense, and never sought summary judgment based on that theory. Third, given Dr. Martin's report, the record contains strong evidence both as to Campbell's lack of probable cause and as to Raub's actual sanity. Thus, even if "actual illness/actual dangerousness" were a proper issue in this case, it is not an issue on which Campbell can be granted summary judgment.

II. Campbell Cannot Avoid Responsibility for Raub's Initial Seizure.

Campbell tries to avoid responsibility for the seizure of Raub at his home on the theory that the seizure was carried out by two uniformed policemen, Officer Bowen and Sergeant Granderson, who were acting in response to a command from Agent Paris. *See* Resp. Br. at 34. But, Campbell stops the chain of causation too soon. The evidence shows that Paris gave his command because of the decision made by Campbell. *See* Pet. Br. at 40-43 (reviewing evidence). Thus, Campbell is still the responsible party, even though he was not physically there and gave his direction by phone.

Campbell next tries to avoid responsibility by citing the Virginia statute dealing with warrantless mental health seizures. *See* Resp. Br. at 34. While that statute does not list mental health evaluators as having authority to conduct warrantless seizures, the framing of the state statute cannot absolve Campbell of liability for a *constitutional* violation if, as the facts show, he acted under color of

state law to instigate that seizure. In his opening brief, Raub pointed out that even *private* persons may be held liable under § 1983 if they willfully participate in joint action with state agents. *See* Pet. Br. at 42 (citing *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980)). The same reasoning applies *a fortiori* when a *state actor*, who happens to work for a different state agency, instigates a seizure without probable cause. Moreover, as Raub also noted, Campbell's purpose was not just to have the police seize and detain him, it was to have the police seize Raub and bring him *to Campbell* so that Campbell could continue to confine him for purposes of an "evaluation" conducted under color of state law. *See* Pet. Br. at 42. Thus, any argument that Campbell had no formal authority to "order" Raub's seizure is simply irrelevant in the context of Raub's federal law claim. Campbell never responds to these points. He has no answer for them.

Campbell denies that it was his decision to seize Raub, and he cites selected evidence to support his theory that "Paris and Granger had already decided to detain Raub before Paris called Campbell." Resp. Br. at 34. But, on Campbell's motion for summary judgment, the question is not what can be found in Campbell's evidence. The question is what can be found in the evidence favoring Raub. That evidence shows that it was *Campbell* who made the seizure decision, and that Paris was relying on Campbell when he signaled the uniformed officers to seize Raub. *See* Pet. Br. at 40-43 (reviewing evidence). For Campbell to look for

snippets of testimony that might suggest a different conclusion is a search properly left for trial. On a motion for summary judgment, it is entirely unavailing.

Moreover, as previously noted, there is a substantial discrepancy between Campbell's reading of the record and what the record actually says about Campbell's role in initiating the seizure of Raub at his home. *See supra* at 7-9. The facts and inferences favoring Raub point directly to Campbell as the person responsible for that seizure. Summary judgment on that issue should not have been granted.

III. Campbell Cannot Escape Liability for His Role in Procuring the Temporary Detention Order.

Campbell also seeks to avoid responsibility for his role in procuring the Temporary Detention Order ("TDO") following his evaluation of Raub at the police station. Campbell argues that, because the TDO was issued by a magistrate, he can be held liable only if he "intentionally lied" to the magistrate. Resp. Br. at 35. He says that there is no evidence of any such lies. *Id.* Campbell is wrong on both counts.

A. Campbell Attempts to Avoid Liability by Applying the Wrong Standard to His Interactions with the Magistrate.

To begin, it is not necessary for Campbell to have "intentionally lied" in order to find him liable for his inaccurate report to the magistrate. By making such an argument, Campbell is, in effect, challenging the "reasonable professional

judgment" standard articulated by the district court. Indeed, Campbell is contending that, no matter how grossly incompetent he may be – and no matter how inaccurate his reports may be – he is completely off the hook so long as he did not "intentionally lie."

In support of this standard, Campbell cites *Davis v. Bacigalupi*, 711 F. Supp. 2d 609, 720 (E.D. Va. 2010); however, the central point of *Davis* helps Raub, not Campbell. As the court explains in *Davis*: "Qualified immunity thus provides a 'safe-harbor' from tort damages for police officers performing *objectively reasonable actions* in furtherance of their duties." *Id.* at 619 (emphasis added) (quoting *Porterfield v. Lott*, 156 F.3d 563, 568 (4th Cir. 1998)). When a mental health evaluator causes the detention of a citizen despite the "lack of evidence of mental illness" and in "violation of professional standards" (as Dr. Martin explains happened here), then the evaluator's actions are not "objectively reasonable." Thus, there is no qualified immunity.

More appropriate to this case is this Court's approach to qualified immunity in *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (*en banc*), a case cited by Raub (Pet. Br. at 39) but ignored by Campbell. In *Henry*, the Court held a police officer liable for negligently causing an unreasonable seizure even though he thought he was acting reasonably at the time. Campbell not only acted negligently, he acted with *gross* negligence. JA-835, JA-850 (Dr. Martin's Report). Another

case cited by Raub (Pet. Br. at 39-40) and ignored by Campbell, is *Miller v. Prince George's County*, 475 F.3d 621, 632 (4th Cir. 2007). There, the Court said that "qualified immunity does *not* protect an officer who seeks a warrant on the basis of an affidavit that a *reasonably well-trained officer* would have known failed to demonstrate probable cause – even if the magistrate erroneously issues the warrant." *Miller*, 475 F.3d at 632 (citation omitted, first emphasis in original, second emphasis added). A reasonably well-trained mental health evaluator – *i.e.*, one exercising reasonable professional judgment – would have known that Campbell's report to the magistrate was deeply flawed and not an appropriate basis for a TDO. The fact that the magistrate relied on what Campbell told him does not exonerate Campbell.

Mental health evaluators exercise tremendous power over the lives of those citizens who come before them. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 491-92 (1980) ("It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and . . . [whether] we label this phenomena stigma or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual.") (quotation marks omitted). And, magistrates sitting to review petitions for TDO's do not conduct their own evaluations; they depend heavily on what they are told by mental health evaluators like Campbell. To adopt the extremely permissive

standard advocated by Campbell would invite a degree of incompetence in the profession that would lead to the improper confinement of some individuals (as we see in this case) as well as the improper release of others (as we have seen in some recent tragic events in the news). Such pernicious incompetence should not be encouraged.

At one point, even Campbell appears to recognize that his "intentional lie" standard goes too far. He claims that he performed his task as a mental health evaluator "within the range of reasonable judgment" (Resp. Br. at 36), suggesting that this is the standard against which he should be measured. It is, of course, not reasonable *lay* judgment, but reasonable *professional* judgment that is key when measuring the performance of a mental health professional. And, it is precisely that standard that Dr. Martin's report shows Campbell violated.

Moreover, even if intentional lying were necessary to impose liability, that standard is met here. Under the facts of this case, a jury could reasonably conclude that Campbell conveyed "false and intentionally deceptive information to [the Magistrate] to obtain the [TDO]." Resp. Br. at 35 (quoting *Davis*, 711 F. Supp. 2d at 620). For example, Campbell withheld from the magistrate the fact that Raub's mother, with whom Raub lived, reported that there had been no changes in Raub's behavior. *Compare* JA-625 ("Prescreening Report") *with* JA-705 ("Progress Note"). This was very important information for the magistrate to know because it

contrasted sharply with the comments from Howard Bullen, who had neither seen nor talked with Raub for years and whose concerns were based on perceived changes in Raub's *political views* posted on the internet, not any observation of Raub's *psychological* condition, which Bullen was not in a position to make. Campbell had reliable, first-hand and current information from Raub's mother when he sought the TDO. Yet, he deliberately withheld it.

There is more. Campbell is a "Senior Clinician" in Emergency Services at Chesterfield Mental Health. JA-656. Supposedly, he is trained and knows how to conduct an evaluation. Yet, he gave the magistrate a damning report on Raub, telling him, for example, that Raub was "delusional" and "paranoid." And, he did so even though there was a "lack of evidence of mental illness" and even though it was a "violation of professional standards" for Campbell to assess Raub as mentally ill. JA-850 (Dr. Martin's Report). Based on this evidence, a jury might conclude that Campbell was well-meaning but incompetent, or it could conclude that this senior clinician knew exactly what he was doing and deliberately distorted his report in order to mislead the magistrate into issuing the TDO. Even on the cold pages of Campbell's deposition transcript, Campbell's animosity toward Raub because of his negative views toward the United States government is almost palpable. And, whether this animosity was the motivating factor for Campbell to lie, or whether it was Campbell's desire to "play ball" with the federal agents who

apparently wanted Raub committed, or whether it was some other motive yet to be uncovered through discovery (which the district court did not allow),[3] a jury could reasonably conclude that Campbell "intentionally lied" to the magistrate. Thus, even under the overly-indulgent standard advocated by Campbell, this case should not have been dismissed on summary judgment.

B. Campbell Must Be Judged as a Mental Health Professional, not as a Layman.

Although Campbell is a Senior Clinician at Chesterfield Mental Health, he apparently does not wish to be judged based on his performance as a mental health professional. He wishes to be judged as if he were a police officer with no mental health training. *See* Resp. Br. at 36. He claims that this was the standard used by the district court and that, under that standard, he is entitled to qualified immunity. *See* Resp. Br. at 36. Campbell is mistaken.

To begin, in framing the applicable standard, the district court said the issue is "whether a reasonable person, exercising *professional judgment* and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others." JA-963 (emphasis added). This

[3] *See* JA-143 ("strictly limit[ing] discovery to the qualified immunity issue").

articulation of the standard is essentially correct.[4] By referring to the exercise of "professional judgment," the district court clearly had in mind the fact that Campbell is a *mental health professional*, not some imaginary world in which he is a police officer.

Consistent with this approach, Raub has focused on the evidence showing that "there was a "lack of evidence of mental illness" and that it was a "violation of professional standards" for Campbell to assess Raub as mentally ill. *See*, *e.g.*, Pet. Br. at 13-30; JA-830-52 (Dr. Martin's Report). Strikingly, Campbell has essentially declined to argue the point. Indeed, he has nothing to say because the record contains no expert testimony – absolutely none – suggesting that Campbell's actions were consistent with professional standards or professional judgment. And, as previously noted, the validity of commitment decisions requires expert evidence. *See* Pet. Br. at 45-46 (citing *Olivier v. Robert L. Yeager Mental Health Ctr.*, 398 F.3d 183, 190 (2d Cir. 2005)). Of course, even if there had been a conflict in the expert evidence, Raub's evidence would entitle him to prevail on Campbell's motion for summary judgment. The fact that there is no expert

[4] As explained in Raub's opening brief, this articulation of the applicable standard should be clarified to read: "Whether a reasonable person, exercising professional judgment, *including a reasonable evaluation interview (where possible)*, and possessing the information at hand, would have concluded that Raub, as a result of mental illness, posed an imminent threat to others." *See* Pet. Br at 35.

evidence supporting Campbell makes the grant of summary judgment in his favor all the more erroneous.

The two cases on which Campbell principally relies, *S.P. v. City of Takoma Park*, 123 F.3d 260 (4th Cir. 1998) and *Gooden v. Howard County*, 959 F.2d 960 (4th Cir. 1992) (*en banc*) are inapplicable here. The defendants in those lawsuits were police officers, who were called to the scene of disturbances and who had to make on-the-spot decisions without the benefit of mental health expertise. In sharp contrast, Campbell is a mental health professional, who was unwilling to talk with Raub over the phone before calling for him to be seized, and whose conduct, in connection with both the initial seizure and the TDO, violated professional standards.

Takoma Park and *Gooden* suggest that the actions of police officers cannot be condemned based on subsequent evaluations by mental health professionals. But the latitude given to police officers is based on the fact that they are "lay persons" and not trained mental health professionals. *See Gooden*, 954 F.2d 968-69 ("It is sufficient if the officer, *as a lay person*, can articulate behavioral symptoms of mental disorder, either temporary or prolonged. . . .") (emphasis added) (citation omitted). It is entirely something else to claim – as Campbell does – that the action of a government mental health evaluator cannot be condemned based on subsequent review by another mental health professional.

The appropriateness of such a review is especially pronounced where, as here, the reviewer not merely *disagrees* with the result reached by the government evaluator, but condemns that evaluation in the strong terms found in Dr. Martin's report. JA-830, 855 (finding a "lack of evidence of mental illness" and a "violation of professional standards"). If such a harsh assessment of a government evaluator is not sufficient to place this case before a jury, it is difficult to see how any government evaluator could ever be held accountable in a court of law.

Finally, even if this Court were to give Campbell the standard he seeks, and hold him to no higher standard than the one applied to police officers, the judgment below should still be reversed and the case remanded for trial. Police officers are not entitled to lie. An ordinary police officer might not be expected to know a particular fact; but, if an officer does happen to know it, perhaps by virtue of special training or observation, he is not entitled to lie about it. A jury could conclude that, because of his special training and his evaluation of Raub, Campbell knew that Raub was not mentally ill. Yet, Campbell lied by withholding from the magistrate the critical information from Raub's mother (*supra* at 12) and by telling the magistrate, for example, that Raub was "delusional" and "paranoid." And, as Campbell has conceded, he can be held liable if he "intentionally lied" to the magistrate. *See* Resp. Br. at 35. Thus, even under Campbell's misplaced "police officer" standard, Campbell is not entitled to summary judgment.

IV. The District Court Erred by Granting Campbell's Motion for Summary Judgment on Raub's Claim of a First Amendment Violation.

Like the district court, Campbell never mentions the landmark First Amendment case of *Brandenburg v. Ohio*, 395 U.S. 444, 444-45 (1969), under which Raub's politically incendiary speech is constitutionally protected. *See* Pet. Br. at 53-54. Nor does Campbell come to the defense of the district court where it mistakenly relied on *United States v. Hassan*, 742 F.3d 104 (4th Cir. 2014) and *United States v. Amawi*, 695 F.3d 457, 482 (6th Cir. 2012). *See* Pet. Br. at 54-55 (distinguishing *Hassan* and *Amawi* from the case at bar).

Indeed, Campbell's argument about the First Amendment does no more than repeat his invalid argument that there was probable to seize and detain Raub. But, as Raub has explained, his claim under the First Amendment is based on the fact – shown by the report of Dr. Martin – that there was *no probable cause* to seize and detain him. *See*, *e.g.*, Pet. Br. at 56. And, where there is no probable cause, a seizure based on disagreement with a citizen's political views certainly states a well-established First Amendment claim (a point that Campbell does not contest). For the reasons already explained, the probable cause issue survives summary judgment. Thus, the First Amendment issue must survive summary judgment as well. It was error for the district court to dismiss that claim.

V. The District Court Abused Its Discretion by Dismissing Raub's Narrowly-Drawn Request for Injunctive Relief, Especially Given Its Order Preventing Discovery on Injunction-Related Issues.

In seeking to defend the district court's dismissal of Raub's request for a permanent injunction, Campbell begins by repeating his tired argument that he never violated any of Raub's constitutional rights. That argument about Campbell's past actions is invalid for all the reasons previously given.

Campbell then goes on to say that there is not "any evidence which would indicate the likelihood of Campbell violating his constitutional rights in the *future*." Resp. Br. at 48 (emphasis added). But, he totally ignores everything Raub had to say on the subject of future violations. Raub pointed out the attitude taken by Campbell in the briefs he filed in the district court, where he essentially reaffirmed his belief that Raub is mentally ill, notwithstanding the advantages of hindsight. *See* Pet. Br. at 59. Campbell does not deny the point. On the contrary, in the brief filed with this Court, Campbell again repeats his views that Raub's political views constitute mental illness. *See, e.g.* Resp. Br. at 14, n. 12, discussed *supra* at 7. This alone is enough to make Campbell a menace to Raub's liberty.

Raub also has pointed out that he was precluded by the district court from taking any discovery with respect to what he might expect in the future from Campbell. *See* Pet. Br. at 59. It was, of course, Campbell's opposition to discovery that led the district court to severely limit the discovery Raub could take,

confining discovery to questions about qualified immunity in connection with the *past* seizure and detention of Raub. Now, having precluded Raub from asking him any questions about the future, Campbell claims that the shortage of such evidence is a reason to dismiss Raub's claim for prospective relief. As Raub has pointed out, this is unfair. *See* Pet. Br. at 57. Campbell does not deny this.

Campbell also fails to address Raub's points about the narrowness of the injunction he seeks. *See* Pet. Br. at 58. Chesterfield has ten mental health clinicians in addition to Campbell. JA-657. Raub does not seek injunctive relief against any of those ten, nor does Raub even attempt to preclude *Campbell* from evaluating him (though there is no reason why Campbell should). Instead, what Raub seeks is an injunction prohibiting Campbell from violating his constitutional rights by seizing or retaliating against him because of his political views.[5] Campbell suggests such an injunction requiring fidelity to the Constitution would be "contrary to the public interest." Resp. Br. at 48. He is simply wrong.

[5] *See* JA-817 (Complaint) (seeking an injunction "prohibiting Defendant and/or agents acting on behalf of or in conjunction with Defendant from unreasonably seizing Plaintiff and/or retaliating against Plaintiff because of Plaintiffs exercise of rights and privileges protected by the Constitution and laws of the United States.").

CONCLUSION

Plaintiff-Appellant Brandon Raub, respectfully asks this Court to (i) vacate the decision of the district court granting summary judgment to Defendant-Appellee Michael Campbell, (ii) order that summary judgment be denied, and (iii) remand the case to the district court for the taking of full discovery and trial.

Respectfully submitted,

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Dated: October 9, 2014

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 9th day of October, 2014, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 9th day of October, 2014, I caused the required copies of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

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