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12 UNITED STATES DISTRICT COURT
13
14 NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

15 KIMBERLY MARIE CURIEL; FREDERICK
16 MICHAEL CURIEL; M.T.C., A MINOR, By And
17 Through Her Guardian Ad Litem Kimberly Marie
18 Curiel; T.A.C, A MINOR, By And Through Her
19 Guardian Ad Litem Kimberly Marie Curiel;
20 J.M.C., A MINOR, By And Through Her
21 Guardian Ad Litem Kimberly Marie Curiel;
22 HAZEL ANNE McCLURE, MICHAEL JASON
23 SIKKEMA, D.A.M.S, A MINOR, By And
24 Through His Guardian Ad Litem Hazel Anne
25 McClure; C.R.M.S., A MINOR, By And Through
26 Her Guardian Ad Litem Hazel Anne McClure,

27 Plaintiffs,

28 vs.

THE COUNTY OF CONTRA COSTA,
CALIFORNIA; SHERIFF WARREN RUPF, sued
in his individual capacity and as an employee of
Contra Costa County, et al.

Defendants.

CASE NO. C06-05751 WHA

**PLAINTIFFS' SUPPLEMENTAL
MEMORANDUM RE QUESTIONING OF
PLAINTIFFS AT FIELD OPERATIONS
BUREAU**

DATE: August 2, 2007
TIME: 4:00 p.m.
**JUDGE: Hon. William Alsup, Judge of the
United States District Court**

INTRODUCTION

The Court has asked the parties to submit a supplemental memorandum addressing whether the Plaintiffs who were taken to the Field Operations Bureau from the Curiel home on the night of October 19th-20th voluntarily accompanied the deputies. The Court requested both parties to search the record for evidence favoring the opposing parties. In consent to search

1 cases, “The existence of consent is not lightly to be inferred and the government always bears
 2 the burden of proof to establish the existence of effective consent.” *United States v. Reid*, 226
 3 F.3d 1020, 1025 (9th Cir. 2000). The same burden should apply to the Defendants’ claim that
 4 Plaintiffs consented to their questioning at the FOB. Plaintiffs are concerned that the Order
 5 requiring that Plaintiffs plumb the record for evidence favoring Defendants further attenuates
 6 Defendants’ burden on summary judgment. Notwithstanding these qualms, the record fails to
 7 support a finding that these Plaintiffs -- terrified by the deputies’ forcible entry, pointing of
 8 weapons, handcuffing of residents and profane threats to kill -- believed they were free to
 9 disregard the deputies’ request that Plaintiffs go the FOB for questioning. *See, United States v.*
 10 *Mendenhall*, 446 U.S. 544, 554 (1980); *Brendlin v. California*, 127 S.Ct. 2400, 2405-2406
 11 (6/18/2007); *United States v. Washington*, 490 F3d 765, 2007 WL 1746331 (9th Cir.
 12 6/19/2007).

13 Michael Sikkema testified, “I was ordered to go.” He was told, ““You’re going to
 14 police station with those people. Get into that car.”” Deposition of Michael Sikkema, Ex. 17 to
 15 Seaton Declaration, at 90:21-91:8.¹ Contradicting Defendants’ assertion that the deputies did
 16 not really constrain Plaintiffs, Hazel McClure testified that while she did not expressly ask to
 17 leave the home, she wanted to be “Anywhere but there.” Deposition of Hazel McClure, Ex. 16
 18 to Seaton Declaration, at 75:19-25.² Plaintiffs’ Opposition Memorandum detailed the restraints
 19 imposed on Plaintiffs in their home during the 13 hour detention: they could not leave the
 20

21 _____
 22 ¹ Because the parties must limit their evidence to that already before the Court, Plaintiffs cite to the
 23 Seaton Declaration and exhibits attached thereto filed with Plaintiffs Opposition on July 12, 2007.

24 ² Consistent with the Court’s Order to find evidence which may support summary judgment, Plaintiffs
 25 note that Defendants did attach Sgt. Daley’s report as Ex. 10 to the Hopkins Declaration. In that report,
 26 written on 12/24/2005, about two months after the detention, Daley states that during his interview with
 27 Ms. McClure, he “told Hazel that I would like to continue our interview at the Field Operations
 28 Building in Martinez. I asked Hazel if her children would be O.K. with Kim [Curiel] and she said that
 would be fine. I told her we would return her, with her husband, back to her home later.” This hearsay
 evidence of what Hazel McClure stated is not admissible as a business or government record. Fed.
 Evid. Code §§ 803(6), 803(8). *See, Colvin v. United States*, 479 F.2d 998 1003 (“Entries in a police
 report based on an officer’s observation and knowledge may be admitted, but statements attributed to
 other persons are clearly hearsay and inadmissible . . .”); *Higgins v. Adams*, 2007 WL 1813767 (S.D.
 Cal. 2007) (Citing and following *Colvin*). In any event, viewed in Plaintiffs’ favor, the report does not
 support an inference that Hazel McClure voluntarily consented to go to the FOB.

1 couch without permission; could not use the telephone; were accompanied partway to the
 2 bathroom, etc. *See* Plaintiffs' Opposition at 12:5-18. That prolonged detention followed a
 3 warrantless forcible entry; the pointing of weapons at adults, teenagers and toddlers; the
 4 handcuffing of Messrs. Curiel and Sikkema and repeated profane threats to kill the occupants.

5 *Finding that Plaintiffs consented to go to the FOB under these facts ignores reality.*

6 The Ninth Circuit has instructed lower courts to examine the "totality of the
 7 circumstances" in determining whether the consent was voluntary. *Reid*, supra, 226 F.3d at
 8 1026. Application of controlling law to the totality of the circumstances, viewed in Plaintiffs'
 9 favor, confirms that deputies improperly seized Plaintiffs, who were not suspected of any
 10 crime, when they took Plaintiffs to the FOB for questioning. *Ganwich v. Knapp*, 319 F.3d
 11 1115, 1120, n. 10 (9th Cir. 2003); *Bettin v. Maricopa County*, 2007 WL 1713319 (D. Ariz.
 12 6/12/2007) (taking resident to police station for questioning violated Fourth Amendment).

13 In determining whether Defendants have met their burden of establishing that Plaintiffs
 14 voluntarily accompanied deputies to the FOB, the Court must primarily consider Mr.
 15 Sikkema's uncontroverted testimony that deputies ordered him to go to the FOB and the
 16 totality of the factors which Plaintiffs confronted that night. *No evidence exists, moreover, that*
 17 *deputies informed Plaintiffs that they were free to refuse the deputies' order that they go to the*
 18 *FOB.*

19 ARGUMENT

20 I. **MICHIGAN V. SUMMERS DOES NOT PERMIT THE SHERIFF'S OFFICE 21 INTERROGATIONS TO WHICH DEPUTIES SUBJECTED PLAINTIFFS.**

22 Defendants have placed great reliance on *Michigan v. Summers*, 452 U.S. 692 (1981)
 23 which they read as permitting Plaintiffs' prolonged detention, including the questioning of
 24 Plaintiffs at the FOB. The Supreme Court, however, initially justified the much shorter
 25 detention in that case by noting, "Of prime importance in assessing the intrusion is the fact that
 26 the police had obtained a warrant to search respondent's house for contraband." 452 U.S. at
 27 701. There was no warrant here. Second, the Court doubted that a detention which occurred
 28 during a search would be used to obtain information from those detained. As the Court
 explained, "Furthermore, the type of detention imposed here is not likely to be exploited by the

1 officer or unduly prolonged in order to gain more information, because the information the
2 officers seek normally will be obtained through the search and not through the detention. 452
3 U.S. at 701. Here, deputies did exploit Plaintiffs' detention to gain additional information.

4 **II. THE DEPUTIES SEIZED PLAINTIFFS WHO DID NOT BELIEVE THEY**
5 **WERE FREE TO LEAVE OR DECLINE THE DEPUTIES' REQUESTS TO**
6 **GO TO THE FIELD OPERATIONS BUREAU.**

6 In *Brendlin, supra*, the Supreme Court set forth tests to determine whether officers had
7 seized an individual, prompting a Fourth Amendment inquiry:

8 When the actions of the police do not show an unambiguous intent to
9 restrain or when an individual's submission to a show of governmental
10 authority takes the form of passive acquiescence, there needs to be some test
11 for telling when a seizure occurs in response to authority, and when it does
12 not. The test was devised by Justice Stewart in *United States v. Mendenhall*,
13 446 U.S. 544 (1980), who wrote that a seizure occurs if "in view of all of the
14 circumstances surrounding the incident, a reasonable person would have
15 believed that he was not free to leave," *id.*, at 554, (principal opinion). Later
16 on, the Court adopted Justice Stewart's touchstone [citations omitted], but
17 added that when a person "has no desire to leave" for reasons unrelated to the
18 police presence, the "coercive effect of the encounter" can be measured better
19 by asking whether "a reasonable person would feel free to decline the officers'
20 requests or otherwise terminate the encounter."

17 127 S.Ct. at 2405-2406

18 **III. THE NINTH CIRCUIT'S GANWICH DECISION AND THE ARIZONA**
19 **FEDERAL DISTRICT COURT'S BETTIN DECISION PROHIBIT**
20 **DEPUTIES FROM TAKING INDIVIDUALS DETAINED DURING A**
21 **SEARCH TO THE SHERIFF'S OFFICE FOR QUESTIONING.**

21 In *Ganwich v. Knapp*, 319 F.3d 1115, 1120-1122 (9th Cir. 2003), cited in Plaintiffs'
22 Opposition, police officers executed a warrant on a hearing aid company and detained
23 employees during the search. "The officers told the plaintiffs that they were not under arrest,
24 but that they would be held in the waiting room until they submitted to individual interviews
25 with police investigators in a back room. The officers prevented the plaintiffs from leaving the
26 waiting room, from going to the restroom unattended, from retrieving their personal
27 possessions, from making telephone calls, and from answering the office telephone when it
28 rang. " 319 F.3d at 1118. The Ninth Circuit held that this questioning violated the Fourth
Amendment. We quote the Ninth Circuit's analysis at length:

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2 [T]he officers' holding the plaintiffs in the waiting room was precisely the
3 conduct the Supreme Court deemed reasonable in *Michigan v. Summers*, 452
4 U.S. 692, 705 (1981) (holding that police officers may temporarily seize the
5 occupants of a building, without probable cause, while the officers search that
6 building for evidence pursuant to a valid warrant).

7
8 But the officers did not merely require the plaintiffs to remain in the waiting
9 room during the search. Rather, the officers told the plaintiffs, who already had
10 been detained for more than an hour, that they would not be released until they
11 submitted to individual interrogations. The officers then brought each plaintiff
12 to a back room, where officers interrogated him or her. Although the defendants
13 offer little explanation of what law enforcement interests this procedure might
14 serve, it is plain that such questioning serves the government's proper interest in
15 gathering information about allegedly criminal activities. This government
16 interest may be important.^{FN10} But it is not so important as to outweigh the
17 plaintiffs' privacy rights, which the coerced interrogations severely invaded.

18
19 FN10. The Supreme Court in *Summers* implied that questioning
20 witnesses is not a legitimate justification for a *Summers*-type detention.
21 The Court stated that a *Summers*-type detention is not unreasonable
22 under the Fourth Amendment because it "is not likely to be exploited by
23 the officer or unduly prolonged in order to gain more information,
24 because the information the officers seek normally will be obtained
25 through the search and not through the detention." *Summers*, 452 U.S. at
26 701. This implies that any law enforcement interest in gaining
27 information from detainees during a *Summers*-type detention,
28 independent from the law enforcement interest in searching a premises,
does not justify their detention absent probable cause.

*The officers' conduct in the back room closely resembled the custodial
interrogation that might take place at a police station. We hold that this sort
of coerced interrogation is a serious intrusion upon the sanctity of the person.
It may inflict great indignity and arouse strong resentment. It may make the
subject feel the target of the government's vast machinery, in grave legal
peril, alone and without counsel. It may make the subject feel that dread
consequences hang on his or her words.* It may make the subject feel that
silence is not an option. The government surely has a legitimate interest in
seeking voluntary cooperation from all. But the government conduct in this case
intruded so severely on interests protected by the Fourth Amendment as to be
unreasonable and, therefore, unlawful. Given the severity of the intrusion and
the nature of the law enforcement interests at stake, the compelled
interrogations of the plaintiffs were impermissible.

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Here, the defendants argue that the underlying justifications for detaining the plaintiffs were to prevent flight in the event incriminating evidence was found, to minimize the risk of harm to the officers, and to further the orderly completion of the search-the same justifications that made reasonable the seizures in *Michigan v. Summers*. Although these considerations amply justified the officers' ordering the plaintiffs to remain in the waiting room during the search of the premises, they did not justify the officers' coercing the plaintiffs into submitting to interrogations. Therein the government's conduct went from fair to foul. The interrogations did not deter the plaintiffs' flight, did not reduce the risk of harm to officers, and did not assist the officers in the orderly completion of the search. Because the interrogations of the plaintiffs were not carefully tailored to the detention's underlying justification, the detention was more intrusive than necessary. This rendered the detentions unlawful.

319 F.3d at 1120-1122. [Emphasis added.]

A two-month old Arizona Federal District Court opinion further confirms the illegality of Defendants' conduct. In *Bettin v. Maricopa County*, 2007 WL 1713319, at 7 (D. Ariz. 2007), police served a warrant on the home of an individual suspected of involvement in stealing watercraft. Plaintiff resided in the home when the warrant was executed and was detained in a nightgown. Deputies took her outside, later provided her with a blanket and thereafter placed her in a patrol car. Shortly thereafter, they took her to the police station for questioning. Advised she was under "investigative detention" she was questioned at the station. She was informed that methamphetamine had been found in her purse.³

The District Court's analysis began with its reading of controlling law:

A person has been "seized" within the meaning of the Fourth Amendment "when, by means of physical force or a show of authority, [her] freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1878, 64 L.Ed.2d 497 (1980). Law enforcement officials may detain a building's occupants while officers execute a search warrant as long as the detention is reasonable.

2007 WL 1713319, at 10.

An investigative detention is a seizure under the Fourth Amendment, but contrary to an arrest, it need not be based upon probable cause. [citation] However, unlike the nightly fare presented on television, an officer may not

³ In *Bettin*, there was no issue of whether plaintiff consented to be transported to the sheriff's office.

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seize an individual, purportedly under the doctrine of "investigative detention," and take them downtown for interrogation based upon mere speculation or whim. The officer must have a reasonable suspicion supported by objective and articulable facts that criminal activity is occurring and the person seized is a suspect. *See Cortez*, 478 F.3d at 1115. *Compare Muehler*, 544 U.S. at 101, 125 S.Ct. at 1471-72 (holding reasonable suspicion was not required for the brief questioning of a dwelling's occupants regarding their identification and status during the execution of a search warrant). "The use of firearms, handcuffs, and other forceful techniques generally exceed the scope of an investigative detention and enter the realm of an arrest." *Cortez*, 478 F.3d at 1115-16 (internal quotations omitted).

Defendants did not continue to detain Plaintiff at the scene of the search. Defendants removed Plaintiff from her home and took her to the sheriff's office for questioning without placing Plaintiff under arrest and without having a reasonable belief that Plaintiff was suspected of criminal activity. At that time, any reliance defendants might have had upon a *Summers* detention evaporated. *Ganwich*, 319 F.3d at 1124.

2007 WL 1713319, at 10-11.

The Court concludes Defendants violated Plaintiff's Fourth Amendment right to be free of an unreasonable seizure by taking her into investigative custody without reasonable suspicion of her criminal conduct or probable cause to arrest her. Additionally, Plaintiff's detention was unnecessarily degrading, and prolonged, and it involved an undue invasion of Plaintiff's privacy.

2007 WL 1713319, at 11.

Defendant Hayman is not entitled to qualified immunity regarding this seizure as a matter of law because an objective officer would have known in February 2003 these actions violated Plaintiff's constitutional rights. *See Ganwich*, 319 F.3d at 1123-25.

2007 WL 1713319, at 12.

IV. THE TOTALITY OF EVENTS PRECEDING THE DECISION TO TAKE PLAINTIFFS TO THE FOB ARE IRRECONCILABLE WITH A FINDING THAT PLAINTIFFS VOLUNTARILY CONSENTED TO GO.

Nothing justified taking Plaintiffs to the FOB; Plaintiffs were not suspects and Dyleski was in custody. In assessing if Plaintiffs voluntarily agreed to go to the FOB, the Court's consideration of the totality of the circumstances must not be limited to the circumstances which immediately preceded the deputies' order that Plaintiffs' go to the FOB for further questioning. The transport of the Plaintiffs occurred after deputies had forcibly entered the

1 home; had pointed guns at adults, teenagers, children and infants; had threatened to blow
2 Michael Sikkema's head off; and had substantially restrained Plaintiffs' movements. Again, no
3 dispute exists that the deputies' actions terrified Plaintiffs, adults and children alike. Even
4 ignoring Mr. Sikkema's undisputed testimony that he was ordered to go to the FOB for
5 questioning, the Court cannot find, as a matter of law that under the terrifying circumstances
6 Plaintiffs experienced that night that they voluntarily consented to go to the FOB. When the
7 record, including the undisputed testimony of Mr. Sikkema, is read in light of the decisions in
8 *Ganwich* and *Bettin*, the Court must find both that the questioning at the FOB was
9 unconstitutional and that it rendered the entire 13 hour detention suspect.

10 **V. THE ILLEGALITY OF THE DEPUTIES' ENTRY AND THEIR USE OF**
11 **EXCESSIVE FORCE FURTHER PRECLUDES A FINDING THAT**
12 **PLAINTIFFS VOLUNTARILY CONSENTED TO GO TO THE FOB.**

13 In addition to the uncontradicted testimony of Mr. Sikkema, all the events prior to
14 transporting plaintiffs to the FOB, and the decisions in *Ganwich* and *Bettin*, the existence of
15 unconstitutional conduct preceding the alleged consent provides yet another, independent basis
16 for rejecting a claim that an individual voluntarily consented to the police.

17 On June 19, 2007, the Ninth Circuit decided *United States v. Washington*, 490 F.3^d 765
18 (9th Cir. 2007), which Plaintiffs cited in their Opposition at 20:26-28, n.4. An officer
19 approached Washington's car, asked if Washington possessed anything illegal and, receiving a
20 negative answer, asked whether he could search Washington, who consented to the search. The
21 officer walked Washington away from Washington's car and toward the officer's car. Arriving
22 at the officer's car, the officer searched Washington as another officer arrived. After searching
23 Washington, an officer asked if his fellow officer could search Washington's car. Washington
24 consented and the search revealed a weapon. Washington contended that he did not voluntarily
25 consent to the search of his car and the Ninth Circuit agreed, vacating his conviction.

26 The Court considered whether Washington was seized when he provided consent to the
27 search of his car. If so, the consent would be deemed coerced. The Ninth Circuit explained
28 that if the officers "actions exceeded the scope of Washington's consent to the search of his
person, such that a reasonable person in Washington's situation would not have felt free to

1 depart if he so chose, then [the officers] seized Washington.” 2007 WL 1746331, at 4.
2 Although the officer was “courteous and cordial when questioning Washington,” the Ninth
3 Circuit nonetheless found that “in the total circumstances a reasonable person in Washington's
4 shoes would not have felt at liberty to terminate the encounter with the police and leave.” *Id.*,
5 at 5. The Court held that the seizure of Washington, who had not suspected of committing a
6 crime, was unconstitutional. *Id.*, at 7. The seizure, “raises grave questions on whether his
7 consent to the car search can be considered voluntary.” *Id.*, at 8. “Given that it was late at
8 night on a dark street, that Washington had been led away from his car and seized by two
9 police officers, and the tension between the African-American community and police officers
10 in Portland in light of the prior shootings above-mentioned, we have no confidence that
11 Washington's assent to the car search was voluntary under the total circumstances.” *Id.*, at 8.
12 *See, also, United States v. Washington*, 387 F.3d 1060 (9th Cir. 2004) (Notwithstanding written
13 consent to search, the Ninth Circuit held that defendant had been seized by officers because
14 defendant had not felt free to leave the hallway when surrounded by officers, thereby vitiating
15 the written consent to search).

16 The Ninth Circuit's decision in *United States v. George*, 883 F.2d 1407 (9th Cir. 1989),
17 is particularly relevant here, particularly given the Court's hostility at oral argument to
18 Plaintiffs' contention that exigent circumstances did not exist because the deputies did not even
19 know if Dyleski was in the home. In *George*, officers surveilled the apartment of an armed
20 bank robber and, after learning defendant had returned, forcibly entered the apartment without
21 a warrant and shot the defendant. Later that day at the hospital, a federal agent obtained
22 defendant's consent to search the apartment. At the apartment George's wife also gave her
23 consent to search the apartment. Officers found substantial incriminating evidence.

24 The Ninth Circuit affirmed the conviction, finding that the wife had consented to the
25 search of the premises. The court also held, however, that although the defendant had
26 voluntarily consented to the search of his premises while he was in the hospital, that consent
27 nonetheless was invalid because the officers' initial entry into the apartment violated the Fourth
28 Amendment. Even though, unlike here, the officers knew defendant was in the apartment, the

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Attorneys for Plaintiffs