NOS. 97-56499 & 97-56510

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, CRIMINAL COURTS BAR ASSOCIATION, JAMES MCNALLY, JAMES JOHNSON BEY,

Plaintiffs/Appellees,

v.

JAMES BUTTS, City of Santa Monica Chief of Police, individually and in his official capacity, THE CITY OF SANTA MONICA, a municipal corporation, RAY COOPER, SHANE TALBOT, WILLIE L. WILLIAMS, City of Los Angeles Chief of Police, individually and in their official capacities, THE CITY OF LOS ANGELES, a municipal corporation, RAYMOND BENNETT, MICHAEL CROSBY, individually and in their official capacities,

Defendants/Appellants.

Appeal from the United States District Court
Central District of California
Honorable Edward Rafeedie, Judge Presiding

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INTRODUCTION

Over sixty years ago, the United States Supreme Court held, in Brown v. Mississippi, 297 U.S. 278 (1936), that the Due Process Clause prohibits police officers from forcing a suspect to give a statement. Thirty-two years ago, in Miranda v. Arizona, 384 U.S. 436 (1966), the Court determined that the Fifth Amendment privilege against self-incrimination is available in the stationhouse. To protect the privilege, and to prevent coercion, the Court fashioned its justly-famous rules of warnings and waiver. When a suspect invokes the privilege, "the interrogation must cease." Id. at 473-74. This Court, in Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992), reiterated Miranda's rule, and determined that a suspect may bring a civil rights action where officers determine to disregard Miranda's command and to question a suspect until a statement is made.

For those who believe in the rule of law, this must be a distressing case. Police officers, the very people upon whom we rely to enforce the law, have decided instead to break it. Indeed, officers now have a nickname for interrogating over the express invocation of the Fifth Amendment privilege. They call it questioning "outside Miranda."

In this case, the four defendant officers determined to

continue questioning two suspects in custody, even though they unambiguously asserted their Fifth Amendment privilege. And not only did the officers disregard the invocation of the privilege, they made improper promises to the two men and applied other coercive tactics.

Although the defendant officers' actions violate decades of clear rulings from the Supreme Court and this Court, they seek qualified or "good faith" immunity from liability. This Court should roundly reject their claim, for the officers' actions were the very antithesis of good faith.

STATEMENT OF JURISDICTION

Appellees agree with Appellants' Statement of Jurisdiction, contained on page 1 of Appellants' [Opening] Brief ("AOB"), except to the extent it implies that defendant James T. Butts, Jr., the Chief of the Santa Monica Police Department, appeals an order denying him qualified immunity. As he did not seek qualified immunity in the district court, there is no ruling from which he may seek an interlocutory appeal.[1]

---

[1] Defendant Butts did not ask to be granted qualified immunity in the district court. See Supplemental Excerpt of Record ("SER") 110-118 (summary judgment papers of Santa Monica defendants). The district court did not include defendant Butts in the court's rulings on qualified immunity. See ER 536 (denying motion to dismiss by Cooper, Talbot,

(continued...)

ISSUES PRESENTED

1. Whether officers are entitled to qualified immunity when they deliberately question over the invocation of the Fifth Amendment privilege and force statements from suspects in custody?
2. Whether the actions of law enforcement trainers, who instruct police officers throughout California that it is permissible to violate clearly established rights, may immunize individual officers from liability when officers ignore a suspect's invocation of the Fifth Amendment privilege and engage in coercive conduct?

STATEMENT OF REVIEWABILITY AND STANDARD OF REVIEW

The district court denied the motions of defendant officers Talbot, Cooper, Bennett and Crosby, seeking qualified immunity. ER 536-37, 627. As to these four officers, the issue is properly before this Court. Defendant Butts did not

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[1](...continued)
Bennett, and Crosby, seeking qualified immunity); ER 627 (denying the defendant **detectives'** motions for summary judgment on the basis of qualified immunity).

Though defendant Butts did not seek immunity in the district court, he filed a notice of appeal. ER 630-31. The Appellants' Brief is not entirely clear on this point, but it is possible that he asks this Court to grant him qualified immunity. See AOB at 24 n.4. But as the district court did not include defendant Butts in its order regarding qualified immunity, there is no ruling from which he may take an appeal. His appeal is therefore not properly before this Court.

ask the district court for qualified immunity, and there is no district court ruling as to him that this Court may review.

Appellees agree with the Appellants' statement that the qualified immunity issue is reviewed de novo. See AOB at 16. This appeal is limited to pure questions of law related to the denial of immunity. See Johnson v. Jones, 515 U.S. 304, 313-18 (1995). Questions of law are reviewed de novo.

STATEMENT OF THE CASE

I. THE PARTIES AND THE PROCEDURAL HISTORY

Appellees agree with the Appellants' statement regarding the parties and procedural history, contained on pages 2-4 of Appellants' [Opening] Brief, except to the extent that they may imply that defendant James T. Butts, Jr., the Chief of Police for the City of Santa Monica, sought qualified immunity in the district court. He did not move the district court for summary judgment on the basis of qualified immunity, and there is no qualified immunity ruling from which he may appeal.

II. STATEMENT OF FACTS

A. The Interrogation of Mr. McNally

On March 2, 1993, defendant Santa Monica police officers Ray Cooper and Shane Talbot interrogated Mr. McNally for several hours. ER 33-107. During his interrogation, Mr. McNally attempted to assert his right to counsel and right to remain silent six separate times:[2]

McNally: ....**[1] Let me talk to a California lawyer and we'll get back together**....

Talbot: ... understand what happens when you get to California —— when you get your attorney. No attorney in his right mind is gonna' tell you talk with the police....

McNally: ... No, I, I understand. **[2] I, I just wanna' clarify a couple things in my mind.** I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

Talbot: Right.

McNally: I know that. **[3] Let me just talk to him** about a couple —— you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't ... **[4] let me talk to him a little bit** and we'll get back —— I promise I'll get back together with "you's"....

Cooper: You're not gonna' tell us ...

Talbot: ... you don't wanna' tell us what happened ...

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[2] The night before his interrogation, Mr. McNally was given a cell with only a mattress on the floor, with no blankets, which made him very cold and which deprived him of sleep. SER 90-91.

McNally: **[5] No.... ¶ Not at this time. It's, it's too scary for me right now. [6] I'd, I'd rather talk to a lawyer.**

ER 85-86 (emphases, brackets and numbers added).

After Mr. McNally unequivocally invoked his rights six times, defendants Cooper and Talbot acknowledged the invocations, yet nevertheless continued to pressure him to talk. They falsely assured Mr. McNally that nothing he said could be used against him:

Talbot: ... At this point, **nothing that you say can be used against you in Court** ... because you have invoked your Right to have an attorney....

Cooper: You've invoked your Rights. Everything from this point on ... ¶ ... regarding this case cannot be used against you. We're, **we're making you the guarantee**[.]

Talbot: **...If you want, you can write it out** and start with "The Detective told me this statement cannot be used against me[.]" I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not tryin' to trick you here.

McNally: Alright. I'll ... and this can't be used against me.

Cooper: No, absolutely ....

ER 87, 90 (emphasis added).

In addition, officers Cooper and Talbot repeatedly disparaged Mr. McNally's right to counsel, stating that anything he told them after consulting with his attorney would

not be believed:

> Talbot: ... **No attorney in his right mind is gonna' tell you talk with the police** .... ¶ I would still like to know what happened now because ... **I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either**.... ¶[I]f you were in our place, **would you trust something that somebody told you after they talked to an attorney**?
>
> Cooper: **It's like "black mail" with attorneys**, Man.
>
> Talbot: I mean, I mean, first of all, **if you could trust the attorney** that you're working with.... ¶ ... Okay, and **fuck your attorney** ... I don't care about him anymore.... ¶ As far as I'm concerned, you know, **they really mess up the system.**

ER 87-89 (emphasis added).

The defendant officers persisted in their attempt to convince Mr. McNally that resistance to speaking was hopeless. The officers clearly conveyed to Mr. McNally that things would go much worse for him unless have gave them a statement:

> Talbot: The only thing is, everything that falls after this —— we'll go in one direction based on the physical evidence and the statements that we have. **If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it** ...

ER 89. (emphasis added). Mr. McNally reasonably believed that Officers Cooper and Talbot would help him with his case if he talked and, also, that there would be adverse consequences if

he declined to speak. SER 83-88, 94-96.[3]

In a final effort, defendant Cooper renewed his "promise" that Mr. McNally's statement would not be used against him, noting —— in passing and without explanation or clarification —— that it would not be used against Mr. McNally "in the case in chief." ER 90. At the time of the interrogation, Mr. McNally did not know what the term "case-in-chief" meant. SER 97. He gave in to the pressure and made a statement. ER 90. Though the statement was not admitted at Mr. McNally's trial because he successfully moved to have it suppressed (ER 134, 141; SER 134-53), Mr. McNally was convicted of manslaughter and the prosecutor used his post-invocation statement against him at his sentencing. ER 141.

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[3] Officers Cooper and Talbot gave Mr. McNally an assessment of the expected charge against him. Officer Cooper told Mr. McNally, "This is not a Death Penalty case," and Officer Talbot concurred, stating, "It's, it's a second —— the most it would be is a second or a voluntary." ER 81. In so doing, Officers Cooper and Talbot gave Mr. McNally the impression that they had some role in determining the charges and that they would charge him with first degree murder, whereas if he continued to talk to them, there was the possibility of a lesser charge. SER 92-93. The officers also said this to Mr. McNally after the interrogation, during their flight to California. Id. at 92.

B. The Interrogation of Mr. Bey

Plaintiff James Johnson Bey was interrogated on March 8, 1991 by Los Angeles police officers Raymond Bennett and Michael Crosby. For more than four hours prior to his interrogation, Mr. Bey was handcuffed to a bench inside the South Bureau Homicide Division of the LAPD. SER 17. Defendant Bennett testified that he has never known of a suspect to be handcuffed to a bench longer than Mr. Bey. Id. Mr. Bey was physically uncomfortable: his hands were handcuffed behind him to a metal ring, placing stress on his shoulders and wrists. SER 71, 74. Mr. Bey was not given Miranda warnings until after he was asked whether he knew what the charges were against him and the officers had already begun asking him details about the case. ER 281-82.

During his interrogation, Mr. Bey invoked his Fifth Amendment privilege five times, as follows:

> Bennett: Do you wish to give up the right to remain silent?
>
> Bey: Am I being charged with murder? If I'm being charged with murder, **[1] then I won't have another word to say until I have an attorney .... ¶** ... if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. **[2] I won't say another word until I have an attorney.**
>
> Bennett: Well, like you say yourself, James, you're a suspect.

Bey: Well, if I'm being charged with something, **[3] I'd rather not have anything to say until I have an attorney....** ¶ I don't —— I don't know too much about the law. **[4] I'm just telling you I know to keep my mouth shut ***[4] somebody to put me in jail.**

Bennett: ...we got some very incriminating physical evidence, my friend....

Bey: **...[5] But I'm not gonna say nothing *** an attorney ***.**

ER 282-283 (emphases, brackets and numbers added).

Despite Mr. Bey's unambiguous invocations, defendant officer Bennett informed Mr. Bey that his invocations were for naught: "Let me explain something to you, James. **I'm going to continue to ask you questions.**" ER 283 (emphasis added). To that officer Bennett added the false assurance that because Mr. Bey had invoked his Fifth Amendment privilege, "**we can't use 'em [the post-invocation statements] in court**." Id. (emphasis added). As Mr. Bey later explained, he understood defendant Bennett's assurance to mean that anything that Mr. Bey said, after he had asserted his right to have an attorney present during questioning, could not be used in any way against him in a court of law. SER 81.

During the interrogation, Officer Crosby reinforced his colleague's attempt to convince Mr. Bey that speaking in spite

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[4] Designated as unintelligible in the transcript.

of his invocations would have no legal ramifications: "**I think James is familiar with out *** outside Miranda.** Are you familiar with that, James?" ER 283 (emphasis added).[5] When Mr. Bey replied that he did not "know too much about the law," and again invoked his rights, id., officer Bennett renewed his attempted to convince Mr. Bey that resistance to speaking was hopeless:

> Well James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James. Do you know why we were so long before we got here to talk to you?... We were at your apartment ... and we got some very incriminating physical evidence, my friend ... Stuff that can't be explained away.

ER 283.

After Mr. Bey invoked his rights for the fifth time, the pressure continued to mount:

Bennett: **Why don't you tell me what happened that night?**

Bey: Didn't nothing happen in my apartment.

Bennett: **Why don't you tell me what happened that night?**

ER 283-284 (emphasis added).

During the interview, defendant officer Bennett at times

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[5] Defendants' statement that Mr. Bey "was well-acquainted with the criminal justice system" (AOB at 13) is misleading because it omits that Mr. Bey had never before been read his Miranda rights: his prior arrests occurred in the late 1950s and early 1960s, prior to the Supreme Court's decision in Miranda. SER 72-73.

raised his voice, appeared to be angry, and used threatening gestures. ER 75-80. As Mr. Bey stated, “He would come up at me . . . almost like he was getting ready to take a shot at me.” SER 80. At times, officer Bennett was “grimacing” and to Mr. Bey his tone was “condemning” and “sinister”. SER 80. Mr. Bey testified that officer Bennett threatened him with the death penalty, stating, “We’re going to drop the pill on you.” SER 75, 78.

At Mr. Bey’s criminal trial, officer Bennett was asked why he “continue[d] to ask Mr. Bey questions after [Mr. Bey] so clearly [had] invoked his rights to speak only with an attorney present.” He replied, “[S]o that if [Mr. Bey] did take the stand, his testimony could be impeached.” ER 306; see also SER 10-11, 15. Likewise, officer Crosby testified, “If the defendant did not want to give a statement inside Miranda, we attempted to get a statement outside Miranda.” SER 32.

Mr. Bey testified at his criminal trial and was cross-examined with his statement. He was convicted of first-degree murder. On direct appeal, the California Court of Appeal held that the statement was “coerced and involuntary,” but that the error was harmless. People v. Bey, 21 Cal. App. 4th 1623, 1628-29 (2d Dist. 1994).

C. The Defendant Officers' Training

All four defendant officers are highly experienced, having served in law enforcement for fifteen years or more by the time of the two interrogations. SER 2, 20, 40, 60. All have been trained that once suspects invoke their rights to silence and/or counsel, questioning must cease. See, e.g., ER 78 (noting LAPD form); SER 156-70 (training materials), 171 (SMPD policy). As defendants unabashedly acknowledge, LAPD and SMPD officers have been trained that it is permissible —— although not required —— to deliberately ignore a suspect's invocation of rights and to continue questioning him or her. ER 255, 577-81.[6] The officers are also informed that the law concerning questioning "outside Miranda" is unclear and controversial. See, e.g., SER 101, 105, 127, 132, 172.[7]

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[6] The Santa Monica defendants improperly attempt to rely on the declarations of Richard Stone, Jeffrey Semow, Marianne Fullove, Toby Tyler, Raymond Hill, and Joel Carey, persons whom the defendants allege are knowledgeable about the training which SMPD officers receive. However, plaintiffs had specifically requested to depose the persons most knowledgeable with respect to training and were told that no such persons existed. Defendants then submitted these declarations with their summary judgment motions, without giving plaintiffs the opportunity to depose these persons. When plaintiffs objected, **the district court specifically stated in its opinion on cross-motions for summary judgment that "the Court did not rely on these materials in reaching its ruling**." ER 629 (emphasis added).

[7] While the officers could not recall the exact (continued...)

While defendant officers have at some point during their careers discussed the issue of questioning "outside Miranda" with prosecutors, not a single officer consulted with a prosecutor or anyone else regarding whether to question Mr. Bey and Mr. McNally "outside Miranda." SER 16, 30-31, 51, 66-67. All four defendants have deliberately questioned suspects, in addition to Mr. Bey and Mr. McNally, "outside Miranda." ER 255; SER 6-8, 23-25.

D. The Rulings Below.

The four defendant officers appeal from the district court's order on the parties' cross-motions for summary judgment, in which the court denied qualified immunity to the four interrogating officers. The court initially denied the officers' efforts to seek qualified immunity on their motions

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[7](...continued)
content of their training, they testified in deposition that it was generally consistent with a videotape featuring Devallis Rutledge, which was produced by the Los Angeles defendants during discovery in this case. SER 14, 27-32, 47-49, 62-67, 69. (The videotape itself is included at SER 172. The transcript of the videotape is at SER 127-32). Mr. Rutledge opens and closes his presentation by urging caution:

> You guys wake up out there cuz **we got something a little controversial** this week. In fact, I'm gonna preface this one by suggesting that **before you do anything based on what we're gonna talk about . . . you check with your command personnel** and see what they wanna do. And **they may wanna check with their civil legal advisor** or your local prosecutor.

SER 127 (emphasis added); see also SER 132.

to dismiss. See ER 536-37. At the summary judgment stage, the district court reaffirmed its earlier immunity decision. ER 627.

Viewing the evidence in the light most favorable to the non-moving party on each issue, the court below specifically found that "the detectives **purposely** continued to question Plaintiffs after they had invoked their rights[.]" ER 625 (emphasis added). Further, "In each case, the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them." Id.; see also ER 534 (stating that the officers' assurances "are at best ambiguous deception and at worst outright prevarication").

The district court next found that "in each case . . . Plaintiffs' statements were ultimately used against them" —— in Mr. Bey's case, during cross-examination at trial, and in Mr. McNally's case, during sentencing. ER 625 and at n.1; see also ER 535 (stating that because plaintiffs went to trial, "in at least one respect, this case is even more egregious than that in Cooper [v. Dupnik]"). The court also held that "[t]he detectives interrogating McNally explicitly demeaned the role of defense counsel when McNally invoked his right to an attorney." ER 625. The judge concluded that "[t]hese facts raise a genuine issue of material fact as to whether or

not the detectives' questioning was coercive or merely benign[.]" Id.[8]

The court below denied qualified immunity to the four interrogating officers, stating, "The law that police officers may not coerce criminal suspects into making incriminating statements . . . is 'clearly enough established to alert a reasonable officer to its constitutional parameters.'" ER 627 (citations omitted). While concluding that "benign" questioning does not violate the Fifth Amendment, the court stated that, in a case such as this, where "Miranda measures are ignored," ER 624, "a suspect's Constitutional rights are 'directly affected,'" id. (citation omitted); see also ER 535 (stating that "[t]he impeachment exception was certainly not intended to provide the police with the option of either ceasing questioning or continuing onward in the hopes of acquiring impeachment evidence") (citation omitted).

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[8] Denying the motions to dismiss, the court also commented, "In light of the Court of Appeals ruling in Bey, the Court finds the City Attorney's insistence that the questioning of Bey was "benign" and "noncoercive" to be troubling." ER 539 n.13.

SUMMARY OF ARGUMENT

The district court's decision, denying qualified immunity to the four defendant officers, should be affirmed under the clear holdings of Miranda v. Arizona, 384 U.S. 436 (1966) and Cooper v. Dupnik, 922 F.2d 1220 (9th Cir.) (en banc), cert. denied, 506 U.S. 953 (1992).

The Supreme Court held in Miranda that the Fifth Amendment privilege against self-incrimination is available in the stationhouse. Part I of the argument, below, details how Miranda's rules protect the privilege, and explains that the district court correctly found that this case involves coercion. In seeking qualified immunity here, the officers ask to be relieved of liability for conduct that violates the heart of the Fifth Amendment.

The request for qualified immunity should be denied. Part II of the argument describes that the right violated by the officers is the Fifth Amendment privilege against self-incrimination and that the contours of the privilege during a custodial interrogation are clearly established. An objectively reasonable officer would know that it is forbidden to question a suspect who has invoked the privilege. Also, clear rulings prevent officers from making unauthorized promises to suspects, and from demeaning the role of counsel.

Moreover, in arguing that Miranda's rules are not themselves "rights," officers provide the wrong answer to the wrong question. Qualified immunity should be denied because the "right" violated is the Fifth Amendment privilege, and because Miranda and its progeny establish that the officers should have known that their conduct was wrong. And, in any event, the Supreme Court has again and again reaffirmed the constitutional status of Miranda.

Nor are there, as the officers assert, "extraordinary circumstances" that support immunity here. As explained in Part III of the argument, purported reliance upon training cannot place the officers' clearly impermissible conduct beyond the reach of our civil rights laws.

Finally, the policy arguments advanced by the officers must be rejected. Part IV of the argument notes that the officers' policy claims are illogical and, of course, this Court cannot overturn Miranda.

ARGUMENT

I. THE DEFENDANT OFFICERS ARE SEEKING IMMUNITY FROM LIABILITY FOR CONDUCT THAT VIOLATES THE HEART OF THE FIFTH AMENDMENT.

A. Miranda's Rules Protect the Fifth Amendment Privilege Against Self-Incrimination.

The Fifth Amendment to the Constitution of the United States provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself." In Miranda v. Arizona, 384 U.S. 436 (1966), the Supreme Court ruled that the Fifth Amendment extends into the stationhouse: the privilege "is available outside of criminal court proceedings and serves to protect persons in [custodial] settings . . . from being compelled to incriminate themselves." Id. at 467. The Supreme Court acknowledged the "inherently compelling pressures" extant during incommunicado interrogation, pressures "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." Id. The Court noted that even non-extreme interrogation techniques exact "heavy tolls on individual liberty and trades on the weakness of individuals." Id. at 455 (footnote omitted). Thus, in order to protect a suspect from overbearing interrogation tactics, the Court compelled officers to follow certain procedures, or forego questioning a suspect in custody.

Miranda's procedures serve to protect a suspect's substantive Fifth Amendment rights. By admonishing a suspect of the right to remain silent, officers provide notice "that his interrogators are prepared to recognize his privilege should he choose to exercise it." Id. at 468. The Court also required officers to inform a suspect of his or her right to confer with counsel prior to continued questioning, see id. at 444-45, a right "**indispensable to the protection of the Fifth Amendment privilege**." Id. at 469 (emphasis added). Only after officers inform a suspect of his or her constitutional rights may the suspect intelligently exercise the privilege. See id. at 469.

While Miranda's safeguards were designed to **inform** a suspect of his or her substantive rights, the holding went further to compel officers to **fully honor** the assertion of Fifth Amendment rights, to prevent coercion:

> **If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.** At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. **If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.**

Id. at 473-474 (emphasis added; footnote omitted). Miranda's rules are expressly tied to, and protect, the Fifth Amendment privilege against self-incrimination.

B. As The District Court Held, This Lawsuit Is About Coercive Conduct That Violates Both Miranda and The Fifth Amendment Privilege.

In Cooper v. Dupnik, 963 F.2d 1220 (9th Cir.) (en banc), cert. denied, 502 U.S. 868 (1992), this Court reiterated Miranda's holding that the Fifth Amendment extends into the stationhouse, and may be violated during a custodial interrogation. Id. at 1239-42. While stating that its decision did not establish a cause of action under 42 U.S.C. § 1983 for "benign" questioning (id. at 1244), this Court held that Mr. Cooper could bring an action where officers made a deliberate decision "to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed." Id. at 1242. Such conduct, this Court held, violates the Fifth Amendment. Id.

Mr. McNally and Mr. Bey have brought this lawsuit squarely under the holding of Cooper. They alleged that deliberately questioning a suspect after a request for counsel, for the purpose of gathering evidence to be used against the suspect, is not "benign" and may itself support a cause of action under

§ 1983. ER 534-35. As in Cooper, the violations of Miranda were deliberate, and the officers intended to continue questioning until they obtained statements. But Mr. McNally and Mr. Bey also alleged and established that the defendant officers engaged in other kinds of coercive behavior that follows naturally when police decide to disobey Miranda's commands.

James McNally repeatedly invoked his right to counsel and said that it was "too scary" for him to talk to the interrogators without a lawyer. ER 86. Officers then belittled his right to counsel and resorted to a disturbing tactic. They repeatedly assured Mr. McNally that because he had asserted his rights, his statements could not be used against him. ER 87-90. In the complaint, Mr. McNally alleges that the officers "told Mr. McNally that because he had invoked his rights, nothing that he said could be used against him" (ER 552) and that he gave a statement "as a result of the unlawful interrogation." ER 553. At his deposition, Mr. McNally explained that he felt intimidated, fearful, and concerned that things would be worse for him if he did not give a statement. SER 83-88, 95. Indeed, the state trial judge determined that Mr. McNally's statement was involuntary and could not be admitted at trial. See ER 134, 141.

James Johnson Bey also repeatedly asserted his right to counsel and right to remain silent during his custodial interrogation. Just as with Mr. McNally, the officers who questioned Mr. Bey acknowledged that because he did not waive his rights, no statement could be used against him in court. ER 283. As alleged in the complaint, "Mr. Bey answered the [officers'] questions after being assured by the officers that what he said could not be used against him." ER 553. The statements were nevertheless used in cross-examination at trial. On direct appeal, the state court "conclude[d] that under these circumstances, [Mr. Bey's] statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." People v. Bey, 21 Cal. App. 4th 1623, 1628 (2d Dist. 1994).[9] Further, at his deposition, Mr. Bey testified that he felt threatened. SER 76.

While Mr. McNally's and Mr. Bey's lawsuit alleges that there is a Fifth Amendment cause of action because the defendant officers deliberately ignored the invocation of Fifth Amendment rights, and that this questioning was not

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[9] The court of appeal affirmed the conviction, however, because it found the use of the statements to be harmless. Id. at 1628-29. Oddly, the defendant officers claim that the court of appeal "did not find any violation of the United States Constitution." AOB at 15. Not so. A finding of harmless error does not mean that no error ever occurred.

"benign," the record shows that officers engaged in the sort of coercive conduct that inevitably results from the practice of questioning "outside Miranda."

Where, as here, the police determine not to adhere to Miranda's bright-line rules, they are left without meaningful guidance. Once a suspect asserts the right to remain silent or the right to counsel, and an officer decides to violate Miranda's commands, just how will the officer get the suspect to talk? The most natural way for police to attempt to overcome the invocation and obtain a statement is to do what the defendant officers did here: demean the right to counsel or somehow try to engender the false belief that there is no harm to talking with police.[10] That is why this Court has held that pressuring a suspect to give a statement over the assertion of the Fifth Amendment privilege is "improper and likely to produce involuntary statements." Collazo v. Estelle, 940 F.2d 411, 417 (9th Cir. 1991) (en banc), cert. denied, 502 U.S. 1031 (1992).

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[10] Even if the officer decides to forego these tactics, and instead simply continues to ask questions, how will the interrogator know at what point the questioning has become coercive? After the fifth invocation, as in Mr. Bey's case? After the sixth invocation, as in Mr. McNally's? Whatever tactic is chosen by the interrogating officer, the message to the suspect will be clear: there is no other way out of the interrogation room; you have no choice but to talk with us.

For the purposes of an interlocutory appeal from the denial of qualified immunity, this Court must view the facts in a light most favorable to Mr. McNally and Mr. Bey, the nonmoving parties. Behrens v. Pelletier, 516 U.S. 299, 313 (1996); V-1 Oil Co. v. Smith, 114 F.3d 854, 856-57 (9th Cir. 1997); Kelley v. Borg, 60 F.3d 664, 666 n.1 (9th Cir. 1995). Viewed in this light, and contrary to any implications in the Appellants' Brief, the plaintiffs established in the district court that the defendant officers "determined to defy any assertion of the Constitution's Fifth Amendment substantive right to silence" (Cooper, 963 F.2d at 1242), that they relentlessly questioned both Mr. McNally and Mr. Bey until they talked and, critically, that officers made false and unauthorized promises to compel Mr. McNally and Mr. Bey to speak.

The district court accepted these allegations, and understood that this case is all about coercion. Although the district court did not define what might constitute "benign" questioning within the meaning of Cooper, the court viewed the tactic of questioning "outside Miranda" as bound up with the question of whether Mr. McNally's and Mr. Bey's statements were coerced. As the district court held, in denying the cross motions for summary judgment,

> **there is a genuine issue of material fact as to whether or not Plaintiffs McNally and Bey were coerced** into speaking by police officers during custodial interrogation, **in violation of Plaintiffs' Fifth Amendment right against self-incrimination**.

ER 624 (emphasis added). Further, "when Miranda measures are ignored, a suspect's Constitutional rights are 'directly affected.'" Id. (citation omitted). According to the district court, "A failure to comply with Miranda can be viewed as an aggravation of other coercive tactics." Id. The district court expressly noted that officers "purposely continued to question Plaintiffs after they had invoked their rights" and had, in Mr. McNally's case, "demeaned the role of defense counsel." ER 625. Significantly, "the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them." Id. These facts, the district court ruled, raise a genuine issue whether the questioning was coercive. Id.

Moreover, the final ruling below reinforces this point. Mr. McNally and Mr. Bey alleged several causes of action in the district court. In addition to violations of the Fifth Amendment (ER 519-20, 556-57), they complained that the defendant officers' conduct led to involuntary statements, in violation of the Fourteenth Amendment Due Process Clause. ER 521-22, 558-59. In assessing the actions of the police under

the Fourteenth Amendment, the Supreme Court has equated Fifth Amendment "coercion" with Fourteenth Amendment "involuntariness."[11] The district court's final order dismissed Mr. McNally's and Mr. Bey's Fourteenth Amendment "involuntariness" claim under the authority of Albright v. Oliver, 510 U.S. 266 (1994). ER 657-661. The district judge ruled that Albright permits a court to dismiss a generalized substantive due process claim where a cause of action might be brought under a more specific guarantee. ER 658-59. According to the district court in this case, the Fifth Amendment provides the same protection as the Fourteenth Amendment in preventing officers from coercing or compelling a suspect from giving a statement. ER 660-61.

By denying summary judgment and by ruling that the Fifth Amendment cause of action is equivalent to an allegation that the plaintiffs' statements were "involuntary" under traditional Fourteenth Amendment standards, the district court again demonstrated that there were sufficient facts that the

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[11] That the Court combined the Fifth and Fourteenth Amendment standards is apparent in decisions that apply Bram v. United States, 168 U.S. 532 (1897) —— a Fifth Amendment "coercion" case —— to voluntariness determinations. See, e.g., Malloy v. Hogan, 378 U.S. 1, 6-7 (1964) (expressly holding that Bram applies in state and federal prosecutions); Ashcraft v. Tennessee, 322 U.S. 143, 154 n.9 (1944) (applying Bram).

defendant officers coerced statements from suspects in custody.

Though the defendant officers seek to characterize the Fifth Amendment cause of action as alleging only some kind of hyper-technical Miranda error, the district court did not agree. As alleged by Mr. McNally and Mr. Bey below, and as determined by the district court, the issue for the jury is whether the statements were coerced, in violation of the Fifth Amendment.

C. The Defendant Officers Are Seeking Immunity For Conduct That Violates Core Fifth Amendment Rights, Or Are Seeking Review Of A Ruling Not Properly Before This Court.

In their brief, the defendant officers argue that they should receive qualified immunity whenever they question suspects over the unambiguous assertion of the Fifth Amendment privilege. See generally AOB at 20-44. But the district court found that a jury should decide whether the officers had actually coerced statements from Mr. McNally and Mr. Bey, and the court ruled that the tactic of questioning "outside Miranda" is relevant to the jury's ultimate determination of coercion. By seeking immunity on this record, the interrogating officers are —— in truth —— asking to be relieved of liability for conduct that includes the sort of coercive tactics that are naturally included in the practice

of questioning "outside Miranda." In other words, the defendants want this Court to afford them immunity even when prolonged interrogation in the face of repeated requests for counsel leads to a statement that would be deemed compelled or involuntary under traditional Fourteenth Amendment standards.

Alternatively, if this is not so —— that is, if the Appellants declaim any intent to seek immunity for conduct that results in a forced confession —— then it appears that Appellants are requesting a ruling on an issue not properly before this Court. The interrogating officers may be asking this Court to overturn the district court's finding that there are genuine issues of material fact on the allegation of actual coercion. This the Court cannot do.

This case is here on the officers' interlocutory appeal from the denial of qualified immunity. Mr. McNally and Mr. Bey had asked the district court to certify the other summary judgment issues for an interlocutory appeal pursuant to 28 U.S.C. § 1292(b), but the district court denied that request. ER 661-662. The issues before this Court are, therefore, limited. The defendant officers may not, under the guise of raising an immunity issue, seek a reversal of the decision that there are genuine issues of material fact that officers forced statements from Mr. McNally and Mr. Bey. As the

Supreme Court ruled in Johnson v. Jones, 515 U.S. 304 (1995), defendants "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." Id. at 319-20; see also Behrens v. Pelletier, 516 U.S. at 312-13 (reaffirming Johnson, but noting that court may, as part of appeal from immunity decision, assume facts in the light most favorable to the nonmoving party).

This is a case about coercion and the coercive consequences of disobeying Miranda. In arguing for qualified immunity on this record, the defendant officers seek either to obtain blanket immunity for conduct within the heart of the Fifth Amendment, or they seek a ruling on an issue not properly before this Court.

II. DEFENDANT OFFICERS ARE NOT ENTITLED TO IMMUNITY FROM LIABILITY FOR COERCING STATEMENTS FROM SUSPECTS IN CUSTODY.

This Court applies a three-step analysis to determine whether an individual may receive qualified immunity:

> (1) identifying the specific right allegedly violated; (2) determining whether that right was so "clearly established" as to alert a reasonable officer to its constitutional parameters; and (3) determining whether a reasonable officer could have believed that the particular conduct at issue was lawful.

Gabbert v. Conn, 131 F.3d 793, 799 (9th Cir. 1997); see also Newell v. Sauser, 79 F.3d 115, 117 (9th Cir. 1996) (citations

omitted). Under this test, the defendant officers may not receive immunity for their actions in forcing statements from suspects in custody.

A. The Fifth Amendment Right Not To Be Forced To Speak During A Custodial Interrogation Is Clearly Established.

The specific right violated here is the Fifth Amendment privilege against self-incrimination. As discussed above, this right attached to Mr. McNally and Mr. Bey in the stationhouse. See Miranda, 384 U.S. at 467; Cooper, 963 F.2d at 1238-39.[12]

Although the contours of the Fifth Amendment right must

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[12] Devallis Rutledge and Joel Carey, active trainers on "outside Miranda" tactics (see ER 226-31, 244-49), argue that the right against self-incrimination may only be violated in court, and not in the stationhouse. Putting aside the difficulty that the forced statements of both Mr. McNally and Mr. Bey were in fact used in court (at sentencing for Mr. McNally (ER 141), and for cross-examination of Mr. Bey (Bey, 21 Cal. App. 4th at 1628)), amici's argument is flatly foreclosed by Miranda and Cooper. As amici both know, a panel of this Court may not overrule Miranda or the clear holding of the en banc panel in Cooper.

In addition, these arguments are contrary to a series of decisions finding Fifth Amendment violations where there was no criminal trial. See, e.g., Lefkowitz v. Cunningham, 431 U.S. 801, 804-08 (1977) (grand jury witness cannot be divested of political office as a penalty for exercising Fifth Amendment privilege); Lefkowitz v. Turley, 414 U.S. 70, 77-84 (1973) (architects called before grand jury cannot lose the right to enter into public contracts due to exercise of their Fifth Amendment privilege); Gardner v. Broderick, 392 U.S. 273, 276-79 (1968) (police officer may not be discharged due to assertion of Fifth Amendment privilege before grand jury).

be adequately described, they should not be narrowly defined. Newell v. Sauser, 79 F.3d at 117. For example, in Kelley v. Borg, 60 F.3d 664 (9th Cir. 1995), a prisoner brought a civil rights action because officials failed to provide prompt medical care after he was overcome by fumes in his cell. The defendants sought to narrowly define the right by characterizing it in great detail —— whether the plaintiff had a right to be released from his cell during a lockdown for a medical emergency. Id. at 667. Instead, this Court held that the question should be more broadly defined —— whether "Eighth Amendment rights in the prison medical context are clearly established." Id. Similarly, in Newell, a prisoner sued after he was disciplined for possessing legal material belonging to another inmate, when he did not know that possessing these materials was prohibited. Newell, 79 F.3d at 116. This Court rejected the officials' attempt to define the right narrowly in reference to legal materials. Agreeing with Mr. Newell, the Court held that the right was the due process right to receive fair notice of what conduct is prohibited. Id. at 117.

The defendants officers here, like the defendants in Kelley and in Newell, are attempting to define the right too narrowly —— as whether "the individual defendants in this case

had any notice that their conduct might subject them to civil liability under

§ 1983." AOB at 19. By asking whether they knew that their conduct under the specific facts of this case might subject them to civil liability, the defendants are attempting to "defin[e] away all potential claims." Kelley 60 F.3d at 667. The Fifth Amendment right in this case should be identified in the same fashion as in the qualified immunity portion of the Cooper decision: under the Fifth Amendment, "police officers may not attempt to compel or coerce a suspect into confessing by disregarding his clearly established civil rights." Cooper, 963 F.2d at 1251.

This right is clearly established. In rejecting the defendant officers' claim of immunity in Cooper v. Dupnik, this Court found the Fifth Amendment right it defined to be "bedrock Constitutional law." Cooper, 963 F.2d at 1251. And, as yet another en banc panel of this Court has ruled, "[t]he use of coercive tactics by state law enforcement officers to pressure an arrestee into talking has been prohibited since 1936." Collazo v. Estelle, 940 F.2d 411, 416 (9th Cir. 1991) (en banc).[13]

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[13] In stating this holding, the Collazo Court relied upon Brown v. Mississippi, 297 U.S. 278 (1936), which provides (continued...)

The defendant officers make two primary claims that the law was not clearly established. First, they argue that the officers had to be "on clear notice, at the time of the interrogations, that their **particular conduct** rose to the level of unconstitutional coercion." AOB at 24 (emphasis added). Second, they assert that the law was not clearly established because there was arguably no clear civil cause of action under § 1983 for this sort of conduct at the time of at least one of the two interrogations at issue. Both of these claims must fail.

With respect to the first point, the law does not require that there have been a previous decision finding the officers' precise conduct unconstitutional: requiring that a right be clearly established "is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Anderson v. Creighton, 483 U.S. 635, 640 (1987) (citation omitted). As held by the Supreme Court just last term in United States v. Lanier, 117 S.Ct. 1219 (1997), comparing notice requirements under both immunity doctrine and the criminal law,

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[13](...continued)
that the Fourteenth Amendment prohibits police from coercing a confession. As the district court ruled in this case, the plaintiffs' Fifth Amendment claims subsume their Fourteenth Amendment "involuntariness" causes of action. ER 660-61.

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful[.]"

Id. at 1227 (quoting Anderson, 483 U.S. at 640).

Following Miranda, Cooper, and their progeny, the right must be considered to be clearly established.

With respect to the second point, the defendant officers ask and answer the wrong question; they confuse the right with the remedy. As the court below correctly ruled, "the test for qualified immunity is whether the government official realizes that his actions violate a constitutional or statutory right, not whether his actions subject him to civil liability." ER 536. Indeed, if the "clearly established" test is a "cause of action" test, officers will **always** receive qualified immunity because there will **never** be that very first case allowing plaintiffs to bring a cause of action.

Cooper held that the relevant legal standards were clearly established in 1986, when Mr. Cooper was interrogated by officers in Arizona. Cooper, 963 F.2d at 1250-51. If the standards were clearly established in 1986, they were certainly clearly established in 1991 and 1993, when Mr. Bey and Mr. McNally were interrogated.

Finally, the doctrine of "good faith immunity" protects officers who do just what the label implies: act in good faith. That the officers here have failed to act in good faith is apparent both from their arguments about Cooper and from the actions of the officers and their supporters following Cooper and the district court's early decision in this case.

The Los Angeles officers claim that they should not be held accountable under Cooper, inasmuch as they interrogated Mr. Bey in 1991, prior to the en banc ruling in Cooper. These officers ignore that this Court in Cooper held that the law was clearly established in 1986. The Santa Monica defendants do not even appear to accept Cooper at all. They argue that Cooper does not indicate that the interrogation of Mr. McNally was improper. See AOB at 28-31. Nor do they appear ready to concede that Cooper might govern their conduct today. The Santa Monica Police Chief, James Butts, issued a training bulletin post-dating Cooper in which he tells officers that they may continue to question a suspect who has invoked the Fifth Amendment. SER 107-109. Significantly, **even after the district court issued its published decision in this case in April 1996**, holding that officers who deliberately question in violation of Miranda may be sued under § 1983 (ER 527-39),

Chief Butts did not rescind or revise his training bulletin. SER 120-121.[14]

B. No Objectively Reasonable Officer Could Believe That The Conduct Here Was Appropriate.

For thirty-two years, the Supreme Court has held time and again that when a suspect in custody asks for an attorney, "all questioning must cease." This rule is crystal clear, and no objectively reasonable officer could think otherwise. Harris v. New York, 401 U.S. 222 (1971) and its progeny do not impliedly overrule these clear decisions. In addition, the officers' actions in both interrogations were unreasonable because of other coercive tactics they employed. These tactics come hand-in-hand with the practice of questioning "outside Miranda."

1. The Supreme Court and this Court have consistently held that when a suspect in custody asks for counsel, "all interrogation must cease".

It is difficult to understand how the defendant officers might reasonably believe that they are authorized to continue to question a suspect in custody who has unambiguously invoked the Fifth Amendment privilege. Time and again, the Supreme

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[14] Amicus author and police trainer Devallis Rutledge is also defiant. He has asserted that he would not alter his training were punitive damages to be awarded in this lawsuit, or were the California Supreme Court to hold that questioning "outside Miranda" is impermissible. SER 124-126.

Court has reinforced the rule that upon invocation, questioning must cease.[15] This Circuit has also been steadfast in reiterating Miranda's clear command.[16]

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[15] See e.g., Davis v. United States, 512 U.S. 452, 458 (1994) ("if a suspect requests counsel at any time during the interview, he is not subject to further questioning"); McNeil v. Wisconsin, 501 U.S. 171, 176-177 (1991) ("[o]nce a suspect asserts the right [to counsel], . . . the current interrogation [must] cease"); Minnick v. Mississippi, 498 U.S. 146, 153 (1990) ("when counsel is requested, interrogation must cease"); Arizona v. Roberson, 486 U.S. 675, 680 (1988) ("after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation'") (citation omitted); Connecticut v. Barrett, 479 U.S. 523, 528 (1987) ("once the accused 'states he wants an attorney, the interrogation must cease'") (citation omitted); Moran v. Burbine, 475 U.S. 412, 420 (1986) ("[b]eyond this duty to inform, Miranda requires that the police respect the accused's decision to exercise the rights outlined in the warnings"); Smith v. Illinois, 469 U.S. 91, 98 (1984) (per curiam) ("[w]here nothing about the request for counsel or the circumstances leading up to the request would render it ambiguous, all questioning must cease"); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) (plurality opinion) ("having expressed his desire to deal with the police only through counsel, [a custodial suspect] is not subject to further interrogation by the authorities until counsel has been made available to him") (citation omitted); Edwards v. Arizona, 451 U.S. 477, 485 (1980) (once the right to counsel is "exercised by the accused, 'the interrogation must cease'") (citation omitted); Fare v. Michael C., 442 U.S. 707, 719 (1979) ("an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease").

[16] The Ninth Circuit has repeatedly held that when a suspect invokes his or her Fifth Amendment privilege, questioning "must cease." See, e.g., United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994); United States v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992); Cooper, 963 F.2d at 1240; United States v. Lucas, 963 F.2d 243, 245 (9th Cir.

(continued...)

These cases are legion. Indeed, a primary purpose of Miranda, and its corollary —— Edwards v. Arizona, 451 U.S. 477 (1980) —— is to leave officers with no doubt about their duty, as the Court itself has stated over and over again. See, e.g., Arizona v. Roberson, 486 U.S. 675, 682 (1988) ("The Edwards ruling serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession"); Fare v. Michael C., 442 U.S. 707, 718 (1979) ("Miranda's holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation").[17] The Supreme Court's requirements could not be more clear: upon the invocation of Fifth Amendment rights, all questioning must cease.

2. Harris, Hass and Tucker do not establish a bad-faith exception to the Miranda rule.

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[16](...continued)
1992); Robinson v. Borg, 918 F.2d 1387, 1390 (9th Cir. 1990)(as amended), cert. denied, 502 U.S. 868 (1991); Shedelbower v. Estelle, 885 F.2d 570, 573 (9th Cir. 1989), cert. denied, 498 U.S. 1092 (1991); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987), cert. denied, 486 U.S. 1017 (1988); United States v. Thierman, 678 F.2d 1331, 1334 (9th Cir. 1982); Sample v. Eyman, 469 F.2d 819, 821 (9th Cir. 1972).

[17] See also Minnick v. Mississippi, 498 U.S. at 151 ("The merits of the Edwards decision lies in the clarity of its command and the certainty of its application"); Moran v. Burbine, 475 U.S. at 425 ("As we have stressed on numerous occasions, '[o]ne of the principal advantages' of Miranda is the ease and clarity of its application") (citation omitted).

In Harris v. New York, 401 U.S. 222 (1971), police officers had failed to inform a suspect, Viven Harris, of his right to counsel. Subsequently, the statement was used to impeach Mr. Harris' testimony at trial, id. at 223, and the Supreme Court upheld such use. Id. at 225-26. Nonetheless, Harris does not give officers a license to ignore a suspect's invocations and deliberately continue the interrogation. Rather, the Court based its decision on the belief that excluding the evidence from the prosecution's in case-in-chief would sufficiently deter officers from proscribed conduct, meaning that officers would comply with Miranda in good faith. Id. at 225. It is clear that the officers in Harris acted in good faith because Viven Harris was arrested and interrogated on January 7, 1966, five months before Miranda was announced. Id. at 223.

In Michigan v. Tucker, 417 U.S. 433 (1974), the Court allowed the fruits of a Miranda violation —— testimony from a witness identified by a suspect —— to be used for impeachment. The officers had failed to inform Thomas Tucker of his right to an attorney. Yet again, as in Harris, the Court based its ruling upon the apparent good faith of the officers: "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much force." Id. at

447. And there could have been no claim of bad faith. Thomas Tucker was arrested and interrogated on April 19, 1966, prior to the decision in Miranda. Id. at 435-36.

The Court applied the Harris rule in Oregon v. Hass, 420 U.S. 714 (1975). The suspect, Robert Hass, was accused of theft and initially waived his rights. Later, on the way to the station, Mr. Hass stated his wish to call his attorney. Id. at 715. The officer replied that Mr. Hass could call a lawyer once they reached the police station. Id. at 715-16. Despite this advice, Mr. Hass reinitiated discussion with the police and pointed out the location of a stolen bicycle. Id. at 716.[18] The Court permitted the use of this evidence for purpose of impeachment. While Hass presents a closer question than Harris or Tucker, it is not clear that the officer in Hass acted in bad faith or even that his conduct would today be considered a violation of Miranda, following the decisions in Duckworth v. Eagan, 492 U.S. 195 (1993) and Edwards v. Arizona, 451 U.S. 477 (1980).[19]

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[18] See also Appendix at 21-23, Oregon v. Hass, No. 73-1452 (Oct. Term, 1974) (Mr. Hass **asked** the officer if he had to point out where the bicycle was located. The officer told Mr. Hass that he was not required to do so).

[19] Under Duckworth, 492 U.S. at 203-04, the officer's statement that Mr. Hass could telephone an attorney would be considered a perfectly appropriate response to Mr. Hass'

(continued...)

Unlike the police who acted in good faith in Harris, Tucker and Hass, the officers in this case intentionally chose to disregard repeated requests by Mr. Bey and Mr. McNally to speak with an attorney prior to continued interrogation. As the district court held in this case,

> The impeachment exception was certainly not intended to provide the police with the option of either ceasing questioning or continuing onward in the hopes of acquiring impeachment evidence.

ER 535 (citing Cooper). It is true, as the defendant officers contend, that the dissenting justices in Harris worried that the police might disobey Miranda. See AOB at 32; Harris, 401 U.S. at 232. But it is surely a stretch to take the dissenting justices' fear that officers **might** violate the law as some sort of green light for the police to engage in forbidden conduct. Rather, the holding of the majority in Harris should properly be viewed as a **rejection** of the dissent's then-speculative concerns. That is, the justices in the majority refused to believe that police would deliberately violate Miranda. They never thought that this day would come to pass.

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[19](...continued)
request, while in a car, to call his lawyer. And, under Edwards, 451 U.S. at 484-85, officers are free to talk with a suspect, like Mr. Hass, who reinitiates further communication with the police.

There is no other reasonable way to interpret Harris, Hass and Tucker. For decades, the Court has clearly ruled that, upon invocation of the Fifth Amendment, all questioning must cease. In the wake of these **express** holdings, Harris, Tucker and Hass cannot be read to **implicitly** create a bad-faith exception to the Miranda rule.

3. False, misleading, or unauthorized promises have long been held to be coercive.

When both Mr. McNally and Mr. Bey asserted their Fifth Amendment rights, officers assured them that their statements could not be used against them. ER 87-90, 283. These assurances were misleading and unauthorized. Police officers are not prosecutors and have no authority to control the admission of evidence at trial. Indeed, despite these assurances, both Mr. McNally and Mr. Bey were required to file suppression motions prior to their trials; the prosecutors did not step forward to honor the officers' promises. SER at 134-153; ER 295-96, 307-320. And the evidence was in fact used at trial against Mr. Bey and also surfaced at Mr. McNally's sentencing. Thus, the officers' unauthorized promises also turned out to be false.

The federal courts have long held that statements may not be induced by improper promises. See Malloy v. Hogan, 378

U.S. 1, 7 (1964) (noting early holdings that statements may not be obtained by "direct or implied promises" or by "the exertion of any improper influence") (citation omitted).[20] Thus, the court of appeals in United States v. Walton, 10 F.3d 1024 (3d Cir. 1993), held that a statement was coerced by a federal agent's promise not to use the statements against the defendant. Although the defendant in Walton was not in custody, her statement was improperly obtained by the agent's promise that their conversation would be "off the cuff," meaning off the record. Walton, 10 F.3d at 1030-31.

One of the supporters of the defendant officers, Devallis Rutledge, argues that the officers' promises should be treated as "self-executing" agreements for use immunity. See Brief of Amicus Curiae, California Coalition of Law Enforcement Associations, at 27-36. The defendant officers made this argument below, though they did not renew it on appeal. The district court found this "after-the-fact" immunity argument "to be without merit." ER 626 n.2. This argument actually underscores the wholly improper nature of the officers'

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[20] See also United States v. Moreno, 891 F.2d 247, 249 (9th 1989) (remanding a case where agents implied a mother should cooperate so that her juvenile daughter might be released); United States v. Tingle, 658 F.2d 1332, 1336-37 (9th. Cir. 1981) (finding statement involuntary where officers communicated that a mother might not see her child for a while if she failed to cooperate and went to prison).

promises.

Immunity in the California courts is governed by a statute, California Penal Code § 1324, and may be granted by order of court, upon the written request of the district attorney or attorney general. See In re Weber, 11 Cal.3d 703, 720 (1974) (upholding the statutory requirement that immunity be requested by the District Attorney or Attorney General). The police officers who interrogated Mr. Bey and Mr. McNally were not authorized to make any offers of immunity because they were not the governmental actors who could obtain these orders. Moreover, it is not even certain that use immunity existed in California at the time of the interrogations of Mr. Bey and Mr. McNally. Prior to 1996, § 1324 provided only for **transactional** immunity.[21]

Further, here the state prosecutors and trial courts did not consider the defendant officers' promises to be binding immunity agreements. To overcome a Fifth Amendment claim of privilege, "use" immunity must also include "derivative use" or "use-fruits" immunity. Kastigar v. United States, 406 U.S. 441, 452-53 (1972); Counselman v. Hitchcock, 142 U.S. 547,

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[21] The statute was amended in 1996 to allow prosecutors to seek an order granting either use or transactional immunity. See 1996 Cal. Stat., ch. 302, § 1. Had transactional immunity been obtained for Mr. McNally and Mr. Bey, they could not have been prosecuted.

564-65 (1892). In fact, testimony obtained pursuant to a grant of use immunity **may not even be employed for impeachment**. New Jersey v. Portash, 440 U.S. 450, 459-60 (1979).

Under these principles, it is apparent that no immunity of any type was afforded to Mr. McNally or Mr. Bey. Mr. McNally's statement was used against him at sentencing (ER 141), and Mr. Bey's statement was used to examine him at trial. Bey, 21 Cal. App. 4th at 1628-29.

4. Suggestions that matters may be worse if no statement is made, and comments denigrating the role of counsel, are coercive.

The defendant officers who interrogated Mr. McNally demeaned the role of counsel. They told Mr. McNally that "I don't trust anything that anyone tells me after they've talked to an attorney and the D.A. . . . doesn't either. ER 87. They also indicated that matters would be worse if Mr. McNally remained silent: unless officers had a statement from Mr. McNally contradicting the purported physical evidence, "that's the direction we're gonna' go, and we're gonna' push it . . . and fuck your attorney." ER 89. No objectively reasonable officer could believe that these comments were appropriate.

Statements to a suspect that he or she will suffer because of the exercise of the Fifth Amendment privilege have

long been held to be improper. In Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en banc), this Court reversed the denial of a habeas corpus petition where an accused was questioned after he asked for counsel during a custodial interrogation. The officer who questioned Collazo said, among other things, that "it might be worse" for Collazo if he consulted with an attorney. Id. at 414. The Ninth Circuit found that the officer's ploy, telling Collazo that he might be penalized if he sought counsel and demeaning the role of counsel, "amounts to a serious infringement of Collazo's Fifth Amendment right." Id. at 417; see also United States v. Harrison, 34 F.3d 886, 891-92 (9th Cir. 1994) ("there are **no** circumstances in which law enforcement officers may suggest that a suspect's exercise of the right to remain silent may result in harsher treatment by a court or prosecutor") (emphasis in original); United States v. Leon Guerrero, 847 F.2d 1363, 1366 n.2 (9th Cir. 1988)(improper to threaten to inform the prosecutor of refusal to cooperate); United States v. Tingle, 658 F.2d 1332, 1336 n.5 (9th Cir. 1981) (same).

The defendant officers are not entitled to qualified immunity because they violated Fifth Amendment rights that were clearly established, and because their conduct was not objectively reasonable.

C. Miranda's Rules Are Constitutionally-Based; However, The Question of Qualified Immunity Does Not Turn On This Determination.

The defendant officers' primary assertion on appeal is that Miranda's rules are not constitutional "rights" and therefore, they contend, officers should receive qualified immunity for violating Miranda. In making this claim, the officers give the wrong answer to the wrong question.

First, as already shown, the defendant officers err in characterizing the "right" too narrowly. This case is all about coercion in violation of the Fifth Amendment. The "right" at issue here is the right not to be forced to give a statement during an interrogation, in violation of the Fifth Amendment. That is the way in which the Cooper Court framed the right for immunity purposes and, given Miranda's role in protecting the Fifth Amendment privilege, this characterization makes sense.

Second, as noted, the last part of the test for qualified immunity asks whether the officers could have believed that their **conduct** was appropriate. It does not matter whether officers believe that Miranda's rules are rights themselves or merely serve to protect rights. The point is that no reasonable officer could believe that he or she is free to violate Miranda and to compel a statement from a suspect in

custody.

Finally, the defendant officers provide the wrong answer to the question that they do pose. The Supreme Court has established that Miranda's procedures are constitutionally-based. This is clear from the express language in Miranda itself. Perhaps even more significantly, however, Miranda's constitutional status has been reaffirmed each time the Supreme Court has overturned a state conviction on the basis of a Miranda violation, a point demonstrated most notably and recently by Withrow v. Williams, 507 U.S. 680 (1993).

In Withrow, the Supreme Court was asked to review a state prisoner's federal petition for writ of habeas corpus. The inmate, Robert Williams, brought his petition because officers failed to administer Miranda warnings. Id. at 683-85. Mr. Williams did not claim that his statement was coerced or involuntary under traditional due process standards. Id. at 695-96. Under the federal habeas corpus statute, a federal court may grant relief only if a conviction was obtained "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Nevertheless, in Withrow, the Supreme Court held that the inmate's claim could be raised on federal habeas corpus, ruling that although Miranda's procedures have sometimes been termed

"prophylactic," they protect the Fifth Amendment privilege, which is a fundamental right. Withrow, 507 U.S. at 691 (citations omitted); see also Cooper v. Dupnik, 963 F.2d at 1240 (Miranda acts not only as "a **procedural** safeguard, but more importantly it expresses a **substantive** constitutional right") (emphasis in original).

By keeping Miranda claims within the scope of federal habeas corpus, the Supreme Court in Withrow reaffirmed that Miranda's procedures are firmly rooted in the Constitution. If Miranda is truly non-constitutional, as the defendant officers argue in this appeal, the Supreme Court could not have refused the request to take "mere" Miranda violations out of the reach of the federal habeas corpus statute.[22] Withrow is a rejection of the precise argument made by the officers here. The Court in Withrow acknowledged the line of cases characterizing Miranda as "prophylactic" but, nonetheless, determined that violations of Miranda's rules are violations of the Constitution. There is no other way to read Withrow.

The constitutional footing of Miranda is also demonstrated by the Supreme Court's treatment of Miranda

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[22] This Circuit has also provided habeas corpus relief for "mere" Miranda violations. See, e.g., Robinson v. Borg, 918 F.2d 1387 (9th Cir. 1990), cert. denied, 502 U.S. 868 (1991).

violations on direct review. Just as with cases involving petitions for writs of habeas corpus, the Supreme Court is limited on the direct review of state convictions. The Supreme Court has no general supervisory authority over state criminal prosecutions. See, e.g., Mu'Min v. Virginia, 500 U.S. 415, 422 (1991) (the Supreme Court is "limited to enforcing the commands of the United States Constitution" in deciding voir dire issues in state criminal cases); Spencer v. Texas, 385 U.S. 554, 564 (1967) (the Supreme Court is not "a rule-making organ" for state criminal trials). If Miranda truly is a non-constitutional rule of evidence, as argued by the officers here, the Supreme Court would be powerless to overturn state-court criminal convictions on the basis of Miranda violations. But that, of course, is not the law. The Supreme Court has not hesitated to overturn state convictions on direct review where officers have failed to comply with Miranda's strictures, and where there is no claim of involuntariness or coercion that would satisfy traditional due process standards. See, e.g., Arizona v. Roberson, 486 U.S. 675 (1988) (conviction reversed because of reinterrogation after invocation); Minnick v. Mississippi, 498 U.S. 146 (1990) (conviction reversed because of reinterrogation after invocation, even though the suspect actually met with

counsel).

In this case, the defendant officers argue that Miranda's procedures are only technical and non-constitutional rules of evidence that need not be followed by police. They rely primarily upon language in a series of decisions beginning with Michigan v. Tucker, 417 U.S. 433 (1974). There the Supreme Court remarked that the Miranda decision enumerated a list of "procedural safeguards [that] were not themselves rights protected by the Constitution but were measures to insure that the right against compulsory self-incrimination was protected." Tucker, 417 U.S. at 444; see also Davis v. United States, 512 U.S. 452, 457 (1994) (quoting Tucker); New York v. Quarles, 467 U.S. 649, 654 (1984) (same). Yet, while these cases occasionally describe Miranda's procedures as "prophylactic," they do not undermine the conclusion that Miranda's rules are grounded in the Constitution. In other words, "prophylactic" does not mean "non-constitutional."

In Tucker, Justice Rehnquist merely restated Miranda when he wrote that the warnings "themselves" are not rights protected by the Constitution. The Court in Miranda described **the minimum procedures necessary to preserve substantive Fifth Amendment rights** but, at the same time, allowed Congress and the states the flexibility to craft alternative procedures, so

long as the new procedures were "**fully as effective**" in protecting Fifth Amendment rights. Miranda, 384 U.S. at 490. That is why the justices ruled that the Constitution does not require "adherence to any particular solution" to cure inherently compelling pressures extant in custodial settings. Id. at 467; see also Withrow, 507 U.S. at 690. Of course, granting states the freedom to promulgate other equally effective procedures does not mean, as the defendant officers here suggest, that Miranda's procedures are merely optional and may be abandoned without propounding any substitute measures.[23]

The rulings of the Supreme Court, reversing state convictions on the basis of Miranda violations, make clear that Tucker and its progeny did not strip Miranda of its constitutional basis. Despite imprecise "prophylactic" language contained in Tucker and other cases, written primarily by justices then struggling with the scope of Miranda's exclusionary rule (and not the legitimacy of the warnings and waiver requirements themselves), Miranda remains rooted in the Fifth Amendment. The Supreme Court's continued

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[23] For a fuller discussion of this point, see Stephen Schulhofer, "Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs," 90 Nw. U. L. Rev. 500, 553-56 (1996).

application of Miranda to the states cannot be explained any other way. And Withrow v. Williams expressly rejects the defendants' claim that "prophylactic" means "non-constitutional."[24]

III. THE DEFENDANT OFFICERS HAVE NOT ESTABLISHED THAT "EXTRAORDINARY CIRCUMSTANCES" MERIT IMMUNITY FOR QUESTIONING IN VIOLATION OF CLEARLY ESTABLISHED LAW.

As a general matter, government officials are not entitled to "good faith" immunity when they violate clearly

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[24] Nor is it inconsistent for the Court to allow the limited impeachment use of evidence that is unconstitutionally obtained. In allowing statements taken in good-faith violation of Miranda to be used for impeachment, the Court in Harris v. New York, 401 U.S. 222, 224-25 (1971), relied upon Walder v. United States, 347 U.S. 62 (1954). Walder permits the impeachment use of evidence gathered in violation of the Fourth Amendment. Walder, 347 U.S. at 65. But Walder does not stand for the proposition that when evidence taken in violation of the Fourth Amendment is used for impeachment, the Fourth Amendment violation is itself somehow erased.

Finally, it should be noted that Miranda's rule is fully consistent with the use of other preventative or "prophylactic" rules in constitutional law. For example, the Supreme Court has held that sentencing an individual more harshly following a retrial generally violates the Due Process Clause, even without any proof of actual vindictiveness. See North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969). The reason for this rule is clear: defendants must be permitted to appeal their convictions without worrying that they will be punished if resentenced following a remand. Id. In New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the Court created a federal rule that requires public officials to prove "actual malice" before recovering damages in a state libel action. As the Court held, the First and Fourteenth Amendments safeguard a private citizen's right to criticize public officials, and the "actual malice" rule is necessary to protect those rights. Id. at 269-273.

established law. The defendant officers argue that their conduct falls within the "extraordinary circumstances" exception to this doctrine. That exception affords immunity in the highly unusual circumstance where the law clearly **is** established and an officer could **not** have believed her conduct to be reasonable. See Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). The exception applies "only rarely," V-1 Oil Co. v. Wyoming, 902 F.2d 1482, 1488 (10th Cir.) (citation omitted), cert. denied, 498 U.S. 920 (1990), in circumstances which are "perilous" or "unique." Watertown Equipment Co. v. Norwest Bank Watertown, 830 F.2d 1487, 1495 (8th Cir. 1987), appeal dismissed and cert. denied sub. nom. Green v. Watertown Equipment Co., 486 U.S. 1001 (1988).

The defendant officers' claim must fail. As an initial matter, defendants' training in no way required officers to question outside Miranda and instead affirmatively cautioned officers that this tactic is controversial. In addition, reliance on training or upon the advice of counsel, without more, does not constitute "extraordinary circumstances." An officer must always exercise independent judgment and cannot escape liability by pointing to the incompetence of others, including that of trainer, an attorney or even a magistrate.

A. Defendants' Training in No Way Required Officers to

Question Outside Miranda and In Fact Warned Officers That Use of This Tactic Was Controversial.

All four of the interrogating officers were trained, at one time, to discontinue questioning when a suspect invokes Fifth Amendment rights. See, e.g., ER 78 (discussing LAPD form); SER 156-70 (training materials); SER 171 (SMPD policy). While it is true that the interrogating officers were told that it is permissible —— although never required —— to question "outside Miranda," the record also shows that officers were warned that the practice was subject to dispute.

In deposition, all four interrogating officers testified that a videotape lecture by trainer Devallis Rutledge was generally consistent with the training that they had received. SER 14, 27-32, 47-49, 62-67, 69. Fairly viewed, the videotape instructs that it is permissible to question a suspect over the assertion of the Fifth Amendment privilege, but also warns that the practice is "controversial" and that officers should take additional actions before relying upon the videotape. In his videotape, Rutledge opens and closes his presentation by urging caution:

> You guys wake up out there cuz **we got something a little controversial** this week. In fact, I'm gonna preface this one by suggesting that **before you do anything based on what we're gonna talk about ... you check with your command personnel** and see what they wanna do. And **they may wanna check with their civil legal advisor** or your

local prosecutor.

SER 127 (emphasis added), 132; see also SER 105 (warning officers that "you should consider this whole topic [questioning outside Miranda] as '**unsettled' at best**" (emphasis added)); SER 101 (telling officers to be prepared to "stress" legitimate reason for questioning "outside Miranda" and to be prepared to help prosecutor argue the law). These training materials expressly alert officers that questioning "outside Miranda" is on the edge of the law.

Moreover, in both interrogations, the defendant officers promised Mr. McNally and Mr. Bey that their statements could not be used against them, and defendants Talbot and Cooper also demeaned the role of counsel. ER 87-90, 282-84. None of the training materials supplied by the defendant officers authorizes or even suggests that such promises are permissible, nor do the materials tell police that is permissible to demean the role of counsel.

Viewing the facts and these training materials in a light most favorable to Mr. McNally and Mr. Bey, as this Court must, the record does not clearly establish that the officers reasonably followed their training.

B. Reliance On Advice of Counsel Or Departmental Training, Without More, Does Not Constitute Extraordinary Circumstances.

Even if this Court were to hold that the record unequivocally supports the conclusion that the defendant officers acted pursuant to their training, general reliance on training does not constitute "exceptional circumstances." Citing cases where an officer has claimed immunity based on advice of counsel, the defendants here assert that there is a per se grant of qualified immunity when officers act in accordance with the general advice of counsel. See AOB at 40. This claim is directly contrary to well-settled law. As the Supreme Court stated in Malley v. Briggs, 475 U.S. 335 (1985), an officer must —— independent from receiving approval from counsel or even a magistrate —— "exercis[e] reasonable professional judgment[.]" Id. at 346. The Court flatly rejected the officer's argument that he was, per se, entitled to qualified immunity for executing a warrant because the warrant had been approved by a magistrate: "The officer . . . cannot excuse his own default by pointing to the greater incompetence of the magistrate." Id. at 346 n.9.

Nor does acting in accordance with departmental training or policy, without more, immunize officers from liability. This Court stated in Grossman v. City of Portland, 33 F.3d 1200, 1209 (9th Cir. 1994), "[I]ndividuals cannot always be held immune for the results of their official conduct simply

because they were enforcing policies or orders promulgated by those with superior authority." Absent this rule, a department could train officers, for example, that no warrant is ever required for the search of a home and this would insulate officers from liability. As a case relied on by defendants unambiguously states, "Of course, reliance [upon advice of counsel] is not inherently extraordinary, for few things in government are more common than the receipt of legal advice." V-1 Oil Co. v. Wyoming, 902 F.2d at 1488.

This Court has consistently held that reliance on advice of counsel does not in itself shield an officer from liability. In Marks v. Clarke, 102 F.3d 1012 (9th Cir. 1996), cert. denied sub. nom. Allen v. Gypsy Church of the Northwest, 118 S.Ct. 264 (1997), this Court rejected the officers' claim of qualified immunity, **even though** the officers had relied on the approval of an affidavit and warrant by a prosecutor, and **even though** the warrant was signed by a magistrate. Id. at 1026-28. Likewise, in United States v. Kow, 58 F.3d 423, 429 (9th Cir. 1995), this Court affirmed the suppression of evidence in a criminal case, stating, "The mere fact that the warrant was reviewed by two [prosecutors] and signed by a magistrate does not amount to 'exceptional circumstances.'" Contrary to the defendant officers' argument, there is no rule

that advice of counsel, per se, amounts to extraordinary circumstances.

C. There is a Complete Absence of Any Additional Factors Which Would Permit A Finding of Extraordinary Circumstances.

Because reliance on one's training or on the advice of counsel is not sufficient in itself to constitute "extraordinary circumstances," courts look to other factors. One important factor is how "specifically tailored [the advice or training is] to the particular facts giving rise to the controversy." V-1 Oil, 902 F.2d at 1489 (footnote omitted); see also Marks, 102 F.3d at 1028 (emphasis in original)(stating that qualified immunity defense fails "absent **specific assurances**" from attorney or magistrate); Johnston v. Koppes, 850 F.2d 594, 596 (9th Cir. 1988) (rejecting qualified immunity defense where defendant's consultation with attorney was directed to assessment under Government Code rather than under Constitution).

Here, the advice upon which defendants claim to rely completely lacks specificity. Not only did the defendant officers fail to seek advice from counsel, they failed to seek **any** advice regarding the interrogations of Mr. Bey and Mr. McNally. No defendant officer asked anyone, much less an attorney or judge, whether it was permissible to continue the

interrogations of the plaintiffs after they had repeatedly and unambiguously invoked their rights. Not one of the four interrogating officers ceased the interrogation, even momentarily, to place a phone call to counsel.[25]

Another factor which courts consider is "how unequivocal" is the attorney's advice. V-1 Oil, 902 F.2d at 1489. If the advice contains warnings, or if the officer could choose between advice that is clearly constitutional and that which is riskier, the "extraordinary circumstances exception" would not apply. For instance, in Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996), this Court upheld the denial of qualified immunity to police officers who had arrested protestors during a time of civil unrest, pursuant to an Emergency Order issued by the mayor of San Francisco. The Court reasoned that there was no direct conflict between the Executive Order and the Constitution: "The officers were not forced to choose between complying with one or the other." Id. at 1378 n.12.

So here there is no necessary conflict between the defendants' training and the Constitution. The interrogating officers had been trained that if a suspect "states that he

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[25] These facts likewise serve to distinguish this case from Arnsberg v. United States, 757 F.2d 971 (9th Cir. 1984), cert. denied, 475 U.S. 1010 (1986) (holding that officers acted constitutionally in executing a warrant whose invalidity was not obvious).

wants an attorney, the interrogation must cease[.]" Miranda, 384 U.S. at 473. The "outside Miranda" training materials tell officers that they may, but are not required to, interrogate over the assertion of the Fifth Amendment privilege. Thus, as in Collins, the defendants here were not forced to choose between complying with their training or acting in accordance with Constitution. They could easily have complied with their earlier training and ceased questioning. In fact, when asked whether questioning "outside Miranda was encouraged or discouraged within the LAPD, defendant Bennett responded, "Neither." SER 3. Moreover, because their "outside Miranda" training clearly warns that the practice is controversial, the interrogating officers could and should have followed the course of action which their earlier training clearly stated was constitutional: to cease questioning upon invocation of the right to counsel.

There are three other factors which a court considers when determining whether the "extraordinary circumstances" exception applies: "how soon after the advice was received the disputed action was taken"; the consulted attorneys' prominence; and "whether complete information had been provided to the advising attorneys." V-1 Oil, 902 F.2d at 1489 (citations omitted). None of these factors helps the

officers here. First, the defendants' training preceded the interrogations at issue by several years or more.[26] Second, when Mr. McNally and Mr. Bey invoked their rights, the officers consulted with no one before intentionally questioning them "outside Miranda." In addition, much of the training was communicated by fellow officers, such as Officer Rick Papke of the LAPD.[27] Third, prior to questioning plaintiffs "outside Miranda," the interrogating officers provided **no** information to **any** attorneys (or anyone else, for that matter).

As the Supreme Court has repeatedly stated, "Where an official could be expected to know that his conduct would violate statutory or constitutional rights, he **should** be made to hesitate." Mitchell v. Forsyth, 472 U.S. 511, 524 (1985) (quoting Harlow, 457 U.S. at 819)(emphasis in original). The officers here did not hesitate and, in fact, they never even consulted with counsel before continuing their interrogations

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[26] SER 61a-b (Talbot's latest training session concerning Miranda occurred "in the 80's"; interrogation took place in 1993); Id. at 43a-c (Cooper's latest training session 4 or 5 years prior); Id. at 20a-f (Crosby's latest training session 2 or 3 years); Id. at 2a-c (Bennett, 2 or 3 years).

[27] Even though the officers' training was frequently accredited by Peace Officers Standards and Training ("POST"), the defendants cannot claim to rely on POST's training and simultaneously ignore the warnings set forth in that training.

in the face of plaintiffs' unambiguous invocations. Defendants' claim for qualified immunity, including their claim of "extraordinary circumstances," must fail.

IV. DEFENDANTS' POLICY ARGUMENTS ARE FLAWED AND, IN ANY EVENT, ARE FLATLY FORECLOSED BY MIRANDA.

Defendants and their amici advance several policy reasons to support their practice of questioning "outside Miranda." Their arguments either lack logical coherence or ask this Court to overturn Miranda.

Most remarkable is the claim that questioning over the invocation of the Fifth Amendment privilege "ensures fairness" to the suspect because it allows officers to "properly and fairly formulate the case." AOB at 43; see also Amicus Curiae Brief of Peace Officers' Legal Research Assoc., et al, at 28 (arguing that one purpose of "outside Miranda" statements is "to obtain confirmation of the right suspect"). The defendant officers claim that Mr. McNally benefitted from his coerced statement, as it allegedly helped prosecutors decide not to bring capital charges. AOB at 43. This cynical argument is unsupported by the evidence, and cannot stand. Even if the coerced statement helped Mr. McNally avoid capital charges, which is denied,[28] the officers cannot plausibly claim that an

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[28] Viewed in a light favorable to Mr. McNally, the (continued...)

attorney representing Mr. McNally would have been incapable of presenting mitigating factors to prosecutors. The reason why police want to question in violation of Miranda is not to help suspects but, rather, to bolster their cases against criminal defendants. It is insincere to argue that officers needed an involuntary statement to exculpate Mr. McNally, when the prosecutor attempted to introduce the statement at trial and he relied on the statement at sentencing. ER 141.

The defendants' policy argument that "outside Miranda" statements may be of assistance in sexual abuse and rape cases[29] is likewise flawed. While crimes involving sexual coercion may have a particularly devastating impact on victims, the Supreme Court has not made the validity of the Fifth Amendment privilege turn on the category of the alleged crime.[30]

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[28](...continued)
evidence does not support the officers' claims. Even before the officers coerced the statement from Mr. McNally, they told him, "This is not a Death Penalty case. You know that. Alright?" ER 81.

[29] See AOB at 43-44; Letter of Amicus Curiae "Toby" Tyler (March 2, 1998).

[30] And in the examples given by defendants and their amici —— particularly custody and child abuse investigations, where the primary concern may be to remove the child from danger —— the state has other options at its disposal, besides questioning in violation of the Fifth Amendment. For
(continued...)

Further, in arguing for permission to question suspects who unambiguously state that they do not wish to talk with the police, the defendant officers overlook that Miranda's bright-line rules help avoid involuntary statements. In the overwhelming majority of cases, a suspect who receives proper warnings and waives his or her Fifth Amendment rights will have made a voluntary statement. By the same token, the failure to comply with Miranda is a significant factor in the Fourteenth Amendment "totality of the circumstances" analysis. See, e.g., Mincey v. Arizona, 437 U.S. 385, 399-401 (1978).

Where, as here, the police determine not to adhere to Miranda's bright-line rules, they are left without meaningful guidance. The poverty of the defendant officers' position on appeal is that they do not admit to any clear limitations to interrogation practices, other than the vague admonition that

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[30](...continued)
instance, prosecutors may arrange an order of use immunity, pursuant to California Penal Code § 1324. The other principal claim, that an "outside Miranda" statement is "often the only way to confirm the identity of the rapist and learn whether or not he is HIV-positive" (Letter of Amicus Curiae, "Toby" Tyler), is simply wrong: California law provides that, upon a rape victim's request and upon a showing of probable cause, the court "shall order" that the defendant be tested for HIV. Cal. H. & S. Code § 121055. This allows the alleged victim to know with far greater certainty whether the suspect has HIV than would the suspect's mere affirmation or denial in a coerced "outside Miranda" statement.

they should not coerce a statement.[31] Yet the defendants' own crabbed conception of "coercion" is exemplified by the coercive tactics they employed here. Miranda affords a clear rule that protects the Fifth Amendment and prevents the police from coercing a statement from a suspect in custody. Unless this Court firmly instructs the police to adhere to Miranda, officers will be permitted to embark on an adventure without a guide, at great peril to the Fifth and Fourteenth Amendments.

Finally, the Supreme Court's holding in Miranda flatly forecloses the policy arguments advanced by the officers here. Of course, this Court cannot accept Appellants' invitation to overrule Miranda. In Miranda, the Court stated,

> A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court.

Miranda, 384 U.S. at 479 (citation omitted). While mindful of "the burdens which law enforcement officials must bear, often

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[31] It may be that the defendant officers and their supporters do not believe that there is any such thing as psychological coercion. They may agree with trainer (and amicus author) Devallis Rutledge, who implies, in his training video, that only brute force may make a statement involuntary:

> **I mean we can't use them for any purpose if you beat it out of him,** but if they're voluntary statements, the fact that they weren't mirandized will mean we can't use them in the case in chief.

SER 130 (emphasis added). The problem with this view is that there are other forms of coercion besides physical abuse, as the Supreme Court has recognized in Miranda and a myriad of other decisions.

under trying circumstances," id. at 481, the Court emphasized the constitutional command of the Fifth Amendment:

> The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself.

Id. at 479. Balancing the burden on law enforcement with the guarantee of the Fifth Amendment, the Court concluded, "The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement." Id. at 481.

The balance between the needs of law enforcement and the rights of the citizen was struck in Miranda. The defendant officers may disagree with the holding in Miranda, but they are not at liberty to disregard it.

Defendants and their amici argue that "outside Miranda" statements further the search for truth. AOB at 44-45. Putting aside the serious question whether coercing statements from unwilling suspects furthers the truth or, instead, increases the likelihood of receiving false and unreliable information, the search for truth must occur within constitutional limits. Even the Supreme Court passage quoted by defendants in their brief acknowledges that officers must obey the law: "We are, after all, always engaged in a search

for truth in a criminal case **so long as the search is surrounded with the safeguards provided by our Constitution.**" See AOB at 44 (quoting Oregon v. Hass, 420 U.S. at 722; emphasis added).

The enduring hallmark of our system of justice is that officers must obey the law while enforcing the law. Unless and until the Supreme Court alters the balance it struck in Miranda, that upon invocation of counsel "the interrogation must cease," the defendant officers are not free to disobey the Supreme Court's clear commands.

CONCLUSION

The decisions of the district court, denying the four interrogating officers' motions for summary judgment on the basis of qualified immunity, should be affirmed. The appeal of defendant James T. Butts, Jr. should be dismissed.

Respectfully submitted,

_____	_____
Taylor Flynn	Charles D. Weisselberg

Dated: April 14, 1998

On the Brief:
Jack R. Scharringhausen
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STATEMENT OF RELATED CASES

Pursuant to Rule 28-2.6 of the United States Court of Appeals for the Ninth Circuit, the undersigned counsel for Appellees is not aware of any related cases pending in this Court.

Dated: April 14, 1998

_____
Charles D. Weisselberg

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(e)(4) of the Rules of the United States Court of Appeals for the Ninth Circuit, the undersigned, preparing the Appellees' Brief, certifies that the Brief is double-spaced, printed with monospaced typeface of no more than 10.5 characters per inch, and contains 15,247 words, excluding the cover, tables of contents and authorities, certificate of service, certificate of compliance and statement of related cases.

By order dated January 6, 1998, this Court granted Appellees leave to file an oversized brief not to exceed 15,400 words.

Dated: April 14, 1998

_____
Charles D. Weisselberg

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is Post-Conviction Justice Project, University of Southern California Law School, University Park, Los Angeles, California 90089-0071.

On April 14, 1998, I served the foregoing document described as Appellees' Brief and Supplemental Excerpts of Record on the parties in this action by placing two (2) true copies of the Appellees' Brief and one (1) true copy of the Supplemental Excerpts enclosed in a sealed envelope with the United States Mail, postage fee prepaid, addressed as follows:

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I declare that I am a law student intern in the office of a member of the bar of this Court at whose direction the service was made.

EXECUTED on April 14, 1998, at Los Angeles, California.

_____
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