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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, et al., Plaintiffs, v. JAMES BUTTS, City of Santa Monica Chief of Police, et al., Defendants.	CASE NO. CV 95-8634-ER MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DATE: June 16, 1997 TIME: 10:00 a.m. DEPT: One

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INTRODUCTION

Plaintiffs James Johnson Bey and James McNally brought this lawsuit because they were interrogated by police officers who were determined to obtain incriminating statements, even at a substantial cost to the Constitution. In 1991, Mr. Bey was arrested and interrogated by defendants Raymond Bennett and Michael Crosby of the Los Angeles Police Department. In 1993, Mr. McNally was arrested in Arizona and interrogated by defendants Ray Cooper and Shane Talbot of the Santa Monica Police Department. Although both Mr. Bey and Mr. McNally repeatedly asserted their right to remain silent and their right to counsel, and although the defendant officers acknowledged that these rights were invoked, the defendants continued to question Mr. Bey and Mr. McNally. Officers continued their questioning because they have been trained that it is permissible to ignore the requirements of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the United States Constitution. As this Court ruled in denying the defendants' motions to dismiss, "[w]hen law-enforcement officials act this way, they invite redress under § 1983." CACJ v. Butts, 922 F.Supp. 327, 336 (C.D. Cal. 1996) (quoting Cooper v. Dupnik, 963 F.2d 1220 (9th. Cir. 1992) (en banc)). The essential facts of this case are not disputed by the parties. This Court should grant summary judgment against all defendants on the issue of liability.

STATEMENT OF FACTS

A full explication of the facts is contained in the plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law, filed with this motion. The most critical facts are set forth below.

For many years, officers in the Santa Monica Police Department ("SMPD") and the Los Angeles Police Department ("LAPD") have been trained that it is permissible to question a suspect in custody after that person has invoked the right to remain silent or the right to counsel. This practice of purposefully ignoring a suspect's invocations of his or her rights has been dubbed questioning "Outside Miranda." See e.g., Deposition of Rick Papke ("Papke") at 12-13; Exhibit E.

Defendants Ray Cooper and Shane Talbot, who interrogated plaintiff James McNally, have been trained through courses outside the SMPD that it is permissible to question suspects in custody after they have asserted their Miranda rights. Stipulation Between Plaintiffs and Santa Monica Defendants ("Stipulation") at ¶ 8. Defendants Cooper and Talbot have, themselves, regularly questioned suspects "Outside Miranda." Id. Their training is consistent with that in a videotape produced by Devallis Rutledge. Deposition of Ray Cooper ("Cooper") at 45-47; Deposition of Shane Talbot ("Talbot") at 62-67. While defendants Cooper and Talbot received training on "Outside Miranda" at courses conducted by non-SMPD employees, such questioning constitutes the custom and practice of the SMPD. For example, since 1991, defendant Cooper has been the detective in charge of the SMPD's Office of Criminal Investigations, which conducts virtually all of the SMPD's felony interrogations of suspects who are in custody. Stipulation at ¶ 5. He reviews other officers' reports on custodial interrogations that they conduct. Stipulation at ¶ 6. Moreover, defendant Butts -- the SMPD Chief -- has issued a Training Bulletin that encourages officers to question "Outside Miranda." Stipulation at ¶ 11; Exhibit E. Even though this Court issued its Memorandum Opinion, holding that the plaintiffs stated a cause of action against officers who allegedly questioned suspects "Outside Miranda," defendant Butts has never issued any revision to his Training Bulletin nor has he ever told officers not to question "Outside Miranda." Deposition of James Thurman Butts, Jr. ("Butts") at 144-145; CACJ v. Butts, 922 F.Supp. at 336-37. Further, Butts never disciplined defendants Cooper or Talbot as a result of their interrogations of Mr. McNally. Stipulation at ¶ 12.

With respect to the LAPD, as admitted in the Answer to the Complaint, LAPD officers are trained to question "Outside Miranda."[1] Since approximately 1979 or 1980, LAPD Lt. Rick Papke has trained officers about custodial interrogations. Papke at 13. Beginning in 1986 or 1987, he began to include questioning "Outside Miranda" in his training of officers. Papke at

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[1] The Los Angeles defendants admit that LAPD officers are trained that is permissible to continue questioning suspects after they invoke their right to counsel or their right to remain silent, though the defendants claim that officers are only trained to continue "non-coercive questioning." See Answer of Defendants City of Los Angeles, Raymond Bennett and Michael Crosby to Plaintiffs' Second Amended Complaint at ¶¶ 17, 27, 28, 32, 33, 37, 38.

15. Lt. Papke trains LAPD officers in class sizes ranging from 25 to 300 or 400. Papke at 15. As counsel for the Los Angeles defendants acknowledged during Papke's deposition, "I think it's quite evident from the questioning thus far that what [Officer Papke] teaches is that [questioning "Outside Miranda"] is legally permissible and that it's something that he, as a department instructor, is recommending that they do." Papke at 25. Defendants Bennett and Crosby, who interrogated Mr. Bey, both had received training on questioning "Outside Miranda" from Lt. Papke. Deposition of Raymond Bennett ("Bennett") at 33; Deposition of Michael Crosby ("Crosby") at 13, 15-16. Both defendants Bennett and Crosby have regularly questioned suspects "Outside Miranda." Bennett at 34-39; Crosby at 35-39, 57-58. Their training on "Outside Miranda" is consistent with that in Rutledge's videotape. Bennett at 65-70; Crosby at 56-60.

The plaintiffs in this lawsuit were both interrogated by officers who acted pursuant to a premeditated plan to deliberately ignore plaintiffs' invocations of their rights. In accordance with their training, the officers created an intimidating environment and coerced the plaintiffs into giving post-invocation, involuntary statements -- by telling plaintiffs that they had certain rights and that the officers nonetheless were going to ignore these rights; by repeatedly questioning plaintiffs despite their numerous assertions of their rights; as well as through false assurances that nothing the plaintiffs said could be used against them. The interrogations speak for themselves.

Plaintiff James McNally was interrogated in custody in Arizona by defendants Cooper and Talbot on March 2, 1993. The defendants attempted to convince Mr. McNally to waive extradition to California and to speak with them. Mr. McNally agreed to waive extradition. However, he attempted to assert his right to counsel and right to remain silent at least six separate times, as enumerated below. His assertions were repeatedly ignored and he was pressured to give a statement:

> McNally: How `bout we do this? How `bout I'll waive extradition. I'll go back with `you's.' [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...

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**.

Exhibit A at 57-58 (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, and they belittled his right to counsel:

Talbot: Okay, now, let me, let me explain to you what's happened. You've basically invoked your right to have an attorney ... ¶ At this point, nothing that you say can be used against you in Court ... because you have invoked your Right to have an attorney ... ¶ 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....

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....

Exhibit A at 58-59.

The high pressure tactics continued and the defendant officers repeatedly disparaged the role of counsel:

> Talbot: [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.... ¶ ... 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 ... ¶ 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.

Exhibit A at 60-61. After further grilling and promises by Cooper and Talbot that "absolutely" his statements couldn't be used against him, Mr. McNally gave in to the pressure and made a statement. Exhibit A at 58. Though the statement was not admitted at Mr. McNally's trial because he successfully moved to have it suppressed, the prosecutor used Mr. McNally's statements against him at his sentencing. Exhibit N at 77-78.

Plaintiff James Johnson Bey was interrogated by Los Angeles Police Detectives Bennett and Crosby. During the course of the interrogation, he invoked his right to remain silent and right to counsel at least five times. Despite his express invocations, officers questioned Mr. Bey until they obtained a statement:

> Bennett: Do you wish to give up the right to remain silent?
>
> Bey: Am I being charged with murder? [1] **If I'm being charged with murder, 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.**

Bennett: Okay? Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court.

Crosby: I think James is familiar with out ***[2] outside Miranda. Are you familiar with that, James?

Bey: 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** *** somebody to put me in jail.

Bennett: ... we got some very incriminating physical evidence, my friend.... ¶ Stuff that can't be explained away.

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

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

Exhibit G at 10-11 (emphases, brackets and numbers added).

The defendant officers did not relent. They continued to interrogate Mr. Bey until he gave into their pressure and gave a statement. Exhibit G at 12. The statement was later used by prosecutors to impeach Mr. Bey at trial. Exhibit H at 31-32; Exhibit I. On appeal, the California Court of Appeal held that Mr. Bey's statements were "coerced and compelled," though it upheld his conviction. People v. Bey, 21 Cal.App.4th 1623, 1628, 27 Cal.Rptr.2d (2d Dist. 1994).

ARGUMENT

The defendants' practice of continuing to question suspects held in custody after an invocation of the right to remain silent or the right to counsel violates the Constitution. The

[2]Designated as unintelligible in the transcript.

defendants are liable for this conduct under five separate causes of action. First, defendants deprived Mr. Bey and Mr. McNally of their Fifth Amendment right to remain silent when they ignored plaintiffs' repeated invocations. Second, defendants deprived Mr. Bey and Mr. McNally of their Fifth Amendment right to an attorney. Third, defendants violated Mr. Bey's and Mr. McNally's Fourteenth Amendment right to due process by obtaining involuntary statements. Fourth, the defendants' conduct shocks our basic notions of justice and fairness, which also violates the Fourteenth Amendment. Finally, the defendant cities are liable for these violations under Monell v. Dep't of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), because it is the custom, practice, and policy of the Santa Monica and Los Angeles Police Departments to continue to question suspects despite the suspects' assertion of their constitutional rights.

I. SUMMARY JUDGMENT SHOULD BE GRANTED BECAUSE DEFENDANTS HAVE DEPRIVED PLAINTIFFS OF THEIR FIFTH AMENDMENT RIGHTS.

A. 42 U.S.C. § 1983 Provides a Cause of Action for a Deprivation Under the Color of State Law of an Individual's Constitutional Rights.

Under 42 U.S.C. § 1983, persons are liable who, under the color of state law, deprive citizens of rights "secured by the Constitution and laws." Defendants are liable under section 1983 because they acted under the color of state law to deprive plaintiffs of their constitutionally protected privilege against self-incrimination, given under the Fifth Amendment to the United States Constitution. There is no dispute here that the plaintiffs are citizens and that all the defendants have acted under color of state law. The only question is whether their conduct has deprived the plaintiffs of their protected rights. As explained below, the defendants have deprived the plaintiffs of their rights under the Constitution, thereby subjecting the defendants to liability under § 1983.

1. Deliberately Continuing to Question An Individual After An Invocation of One's Miranda Rights Violates the Fifth Amendment Privilege Against Self-Incrimination.

Plaintiffs allege two independent causes of action under the Fifth Amendment. The first is a deprivation of plaintiffs' right to remain silent. The second is a deprivation of plaintiffs' right to the presence of an attorney during custodial interrogation. Because these two rights have evolved together as part of the privilege against self-incrimination, they will be treated together in this section.

The Fifth Amendment provides that: "No person shall be ... compelled in any criminal case to be a witness against himself." The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). This right embodies the "proper scope of governmental power over the citizen," Miranda v. Arizona, 384 U.S. at 460, and reflects our modern notions of human dignity. See Michigan v. Tucker, 417 U.S. 433, 439, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974) (restating that the "Court's decisions have referred to the right as ... `one of the great landmarks in man's struggle to make himself civilized.'" (quoting Ullmann v. United States, 350 U.S. 422, 426, 76 S. Ct. 497, 100 L.Ed. 511 (1956))).

In Miranda v. Arizona, the Supreme Court described two procedures to protect an individual's privilege against self-incrimination when he or she is held in police custody. The Court found that custodial police interrogation creates "inherently compelling 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." Miranda, 384 U.S. at 467. To off-set the coercive nature of custodial interrogations, the Court mandated that officers warn suspects of their right to remain silent and their right to have counsel present during questioning. See id. at 444-45. The Supreme Court elaborated in Edwards v. Arizona, 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), that an accused has a "Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation."

Second, the Supreme Court made clear that a mere reading of the warning is not sufficient. The Court, therefore, held that if a suspect indicates that he or she wishes to remain silent or to have counsel present, "the police may not question him." Miranda, 384 U.S. at 445.

As this Court stated, "Miranda is clear and unequivocal;" once either of these rights are invoked "interrogation must cease." CACJ v. Butts, 922 F.Supp. at 337.

The requirement that questioning cease after an invocation of Miranda rights follows logically from the Constitution and from the warning itself. Miranda seeks to balance the psychologically coercive environment with adequate knowledge of, and opportunity to exercise, one's constitutionally protected rights. Suspects who state that they do not wish to speak with police have asserted their Fifth Amendment privilege to be free from compulsory self-incrimination. A premeditated plan to deliberately ignore suspects' invocation of rights is a plan calculated to instill -- and which here succeeded in instilling -- a sense of hopelessness in the individuals questioned. By thus exacerbating the compulsion inherent in a custodial setting, the defendant officers obtained statements that were not the product of the plaintiffs' free wills. Clearly, the Supreme Court did not intend to create a perverse state of affairs in which persons must be apprised of their constitutionally secured rights, yet are prevented by officers from exercising those same rights.

In addition, there is no Supreme Court case law that gives law enforcement officers the option of either honoring a suspect's Miranda rights or deliberately proceeding to question in search of impeachment evidence. In Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971), the Supreme Court allowed a statement taken in violation of Miranda to be used for impeachment purposes. At his custodial interrogation, the suspect was warned of his right to remain silent and police proceeded to question the suspect without advising him of his right to counsel. The statement was used to impeach petitioner's testimony at trial. Id. at 223.

Although the Court allowed the statement to impeach petitioner's testimony, Harris did not lay out a blanket exception whereby police could deliberately continue to question suspects after an assertion of their constitutional rights. Instead, the Harris Court assumed that the exclusionary rule will have a deterrent effect on proscribed police conduct -- an assumption that officers will still attempt to comply with Miranda in good faith: "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Harris, 401

U.S. at 225. There could have been no claim of bad faith in Harris, as the interrogation predated the decision in Miranda. See 401 U.S. at 223.

Correspondingly, in Michigan v. Tucker, 417 U.S. 433, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), the Supreme Court refused to suppress the testimony of a witness whose identity was gained by questioning the respondent. Prior to the interrogation, the police advised the respondent of his rights but failed to inform him that he had the right to an attorney if he could not afford one. Id. at 436. The respondent waived his rights based on this advisement. Id. In declining to suppress the witness' testimony, the Court again explained that the exclusionary rule serves to deter unlawful police conduct. Id. at 446-67. By "refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers ... a greater degree of care toward the rights of an accused." Id. at 447. As in Harris, the Court in Tucker concentrated upon good faith violations of a suspect's rights. When officers act in good faith, the "deterrence rationale loses much of its force," id., and therefore statements obtained in these circumstances may be admitted under an exception to the exclusionary rule. But intentional deprivations of the Fifth Amendment privilege do not constitute good faith, and therefore do not fall under the rule of Tucker. Harris and Tucker do not establish a bad faith exception to the Miranda rule. To do so would allow the exception to swallow the rule.

This Court has rightly recognized that the doctrine established in Harris is limited to good faith violations of a suspect's Fifth Amendment privilege. The Harris doctrine, as this Court stated, "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." CACJ v. Butts, 922 F.Supp. at 336. This Court properly construed the nature of deliberate questioning in violation of Miranda: "It is unfortunate that this case accuses police officers of ignoring the Supreme Court's directive by twisting a rule designed not to punish good faith into another example of calculated evasion of the Constitution." Id.

Consequently, Miranda and its progeny are clear. Once an individual asserts his right to remain silent or the right to have an attorney present during questioning, he has certainly expressed his intent "to exercise his Fifth Amendment privilege." Miranda, 384 U.S. at 473-74.

Deliberately questioning a person after an invocation of these rights violates the Supreme Court's unwavering protection against compulsory self-incrimination.

2. 42 U.S.C. § 1983 Provides a Cause of Action for Deliberate Questioning in Violation of a Suspect's Constitutional Rights.

This Court has already found that plaintiffs have stated a cause of action under § 1983 for deliberate questioning in violation of Miranda v. Arizona: "[T]o conclude that Bey and McNally fail to state a cause of action on these allegations would be to condone the lawless actions that are charged in this case. [¶] The Court cannot do so." CACJ v. Butts, 922 F.Supp. at 337. As this Court noted, the Ninth Circuit in Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (en banc), stated that a section 1983 claim for intentional Miranda violations involves two key principles. First, "`Miranda's primary holding that the Fifth Amendment right not to be a compelled to be a witness against oneself applies in police stations as well as before grand juries and in courtrooms.'" CACJ v. Butts, 922 F.Supp. at 335 (quoting Cooper, 963 F.2d at 1238). In other words, the Fifth Amendment is not merely a "trial right."

The second element necessary to understand a cause of action for Miranda violations is that the interrogator's "`explicit purpose ... [is] to defy the invocation by an arrested suspect of his right to silence and to make him confess.'" Id. (quoting Cooper, 963 F.2d at 1238). The Ninth Circuit decision made plain that it is not permissible for officers to deliberately question custodial suspects after an invocation of Miranda rights.

This Court's finding that Mr. Bey and Mr. McNally have stated viable causes of action for deliberate violations of Miranda directly follows the Ninth Circuit's decision in Cooper. As here, the detectives in Cooper contrived a plan to "ignore the suspect's Constitutional right to remain silent as well as any request he might make to speak with an attorney." Cooper, 963 F.2d at 1224. As here, the detectives' scheme — "complying with Miranda's safeguards in form only, not in spirit or in substance" — was achieved when Cooper's repeated requests for an attorney were denied. Id. at 1228. Analogously, the defendants in this case pre-formulated a plan to inform plaintiffs of their constitutional rights, yet to announce to plaintiffs that their rights

would not be honored. This plan exacerbated the inherent coercion in their custodial interrogations and resulted in involuntary statements from both Mr. Bey and Mr. McNally.

B. Defendants Cooper and Talbot are Liable Under 42 U.S.C. § 1983 for Depriving Plaintiff Mr. McNally of His Fifth Amendment Privilege Against Self-Incrimination.[3]

Officers Cooper and Talbot possessed a pre-formulated plan, devised pursuant to their training, to deprive Mr. McNally of his Fifth Amendment privilege against self-incrimination by deliberately ignoring his invocations of his Fifth Amendment right against self-incrimination.[4] From about the late 1970s or the early 1980s to the present, Officers Cooper and Talbot have been trained that it is constitutional to intentionally continue to question custodial suspects "Outside Miranda." Talbot at 27-31, 37-38, 44-47, 50-52, 57-58, 64-65, 67; Cooper at 20-21, 30-31, 34-35, 41-42, 45-47, 50; Exh. E; Exh. K. During the same time period, both officers testified that, consistent with their training, a statement can be used for impeachment even if taken in deliberate violation of Miranda. Talbot at 25-27, 29-31, 58-59; Cooper at 19-22; Exh. E; Exh. K. Furthermore, Officers Cooper and Talbot have been trained that Miranda is not judicially mandated, only "recommended." Cooper at 27-28; Talbot at 46. Significantly, both officers have been trained that there is no civil liability for deliberately continuing to question custodial suspects after the suspects have invoked their rights. Talbot at 48, 52-53; Cooper at 33, 35.[5]

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[3]Because defendants Cooper and Talbot violated both Mr. McNally's rights (1) to remain silent, and (2) to the presence of an attorney during the same custodial interrogation, which violate the privilege against self-incrimination, this section will treat these claims together.

[4]Nor was there any effective oversight of the officers' actions: in March of 1993, when Mr. McNally was interrogated, Officer Talbot reported to Officer Cooper. Stipulation at ¶ 7; Talbot at 8; Butts at 22. As part of his duties, Officer Cooper reports on custodial interrogations conducted by other detectives. While the SMPD expects officers to take appropriate action when a report indicates that an officer has done something improper or illegal, no action was taken in this case. Stipulation at ¶¶ 6, 12; Cooper at 8-9; Butts at 24-28, 117.

[5]They have also been trained that it is not an implied promise of leniency to tell custodial suspects that, if the suspect cooperates, the officers will pass this information on to the district

Simply by looking to the transcript of Mr. McNally's interrogation, it becomes crystal clear that Officers Cooper and Talbot relied upon this training with the premeditated plan of ignoring Mr. McNally's invocations of rights. On March 2, 1993, defendants Cooper and Talbot interrogated Mr. McNally in Flagstaff, Arizona. Approximately thirty minutes into the interrogation, defendants were not satisfied with Mr. McNally's statements and they therefore increased the pressure on Mr. McNally. Defendant Cooper told Mr. McNally, "When we go back to the D.A., we lay all that out to him and tell him, 'Hey, this guy cooperated. Told us the true story.'" Exhibit A at 56. Mr. McNally then unequivocally invoked his right to an attorney, "Let me talk to a California lawyer and we'll get back together." Exhibit A at 57.

Upon hearing the invocation, the officers deliberately ignored Mr. McNally's assertion of the right to counsel and immediately sought to dissuade Mr. McNally from exercising this right: "[U]nderstand what happens when you get to California--when you get your attorney. No attorney [in] his right mind is gonna' let you talk with the police." Exhibit A at 57. Mr. McNally asserted his rights a second time, stating, "No, I, I understand. I, I just wanna' clarify a couple things in my mind," Exhibit A at 57-58, and a third, "Let me just talk to him about a couple.... I don't know California law." Exhibit A at 58. After each of Mr. McNally's six Miranda invocations, defendants Cooper and Talbot continued to pressure Mr. McNally to continue speaking. Despite Mr. McNally's continual entreaties to remain silent and to speak only with an attorney present, defendants Cooper and Talbot denied Mr. McNally his rights and deliberately continued the interrogation.

Defendants Cooper and Talbot acted intentionally to deprive Mr. McNally of his Fifth Amendment privilege against self-incrimination, consistent with their pre-formulated plan.[6] Defendants Cooper and Talbot were fully aware that Mr. McNally asserted his right to counsel. In fact, Defendant Talbot stated, "[L]et me explain to you what's happened. You've basically

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attorney. Talbot at 72-73; Cooper at 24, 59.

[6]Officers Cooper and Talbot have also deliberately continued to question other custodial suspects -- in addition to Mr. McNally -- after the suspects have invoked their rights to silence and/or counsel. Cooper at 47; Talbot at 64-65.

invoked your right to have an attorney." Exhibit A at 58. Instead of ceasing the interrogation, the officers twisted the Miranda rule to suit their own purpose of obtaining an incriminating statement. They falsely assured Mr. McNally that nothing he said could be used against him in court and denigrated his right to counsel. For example, Officer Talbot stated, "At this point, nothing that you say can be used against you in court ... I still would like to know what happened now because ... I don't trust anything that anybody tells me after they've talked to an attorney." Exhibit A at 59. Defendant Talbot further testified that he continued to question Mr. McNally after the request for counsel in order to ascertain facts about the case. Talbot at 70:8-14.

Because defendants Cooper and Talbot deprived Mr. McNally of his Fifth Amendment right against compulsory self-incrimination by purposefully ignoring Mr. McNally's invocations pursuant to a pre-formulated plan, these defendants are liable under § 1983.

C. Defendants Crosby and Bennett Are Liable Under 42 U.S.C. § 1983 for Depriving Mr. Bey of His Fifth Amendment Privilege Against Self-Incrimination.[7]

Officers Crosby and Bennett intentionally violated Mr. Bey's Fifth Amendment rights, pursuant to a premeditated plan that was based on their training. Like defendants Cooper and Talbot, defendants Crosby and Bennett have been trained that it is constitutional to deliberately continue to question custodial suspects after the suspects have invoked their rights. Bennett at 43, 56, 62, 67-69, 83; Crosby at 13-14, 24, 27-28, 41, 44-45, 49, 51, 55, 58-60; Papke at 23-25, 30-31, 36-39, 44-51, 54-55, 58, 64-65, 68; Exh. F; Exh. I; Exh. J; Exh. K; Exh. O; Exh. P. They have been trained that this is constitutional even when done for the purpose of impeaching the suspect should he or she take the stand. Bennett at 43, 62, 69, 83; Crosby at 41, 55, 58-60; Papke at 23-25, 30-31, 36-39, 47, 54-55, 58, 64-65, 68. In fact, Officer Papke, who has been the LAPD trainer on interrogation techniques for more than the past decade, stated that it is useful for an officer to routinely question suspects after they have asserted their rights. Papke at 34, 47-49.

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[7]Both of Mr. Bey's causes of action against defendants Bennett and Crosby under the Fifth Amendment will be treated together in this section.

In addition, LAPD officers have been trained that telling custodial suspects, who have invoked their rights to silence and/or counsel, that nothing the suspects say can be used against them in court, is not an implied promise of leniency that would render the statement involuntary. Bennett at 22, 51; Crosby at 31-34, 47; Papke at 51-52, 56-57; Exh. K; Exh. O; and Exh. P. They have been trained that there is no civil liability for deliberately continuing to question suspects "Outside Miranda." Bennett at 32-33, 57-58; Crosby at 51-52; Papke at 50, 59, 70. LAPD officers have further been trained that only the court violates a suspect's Miranda rights by improperly admitting a compelled statement, and that the officer who compelled the statement did not violate the suspect's rights. Bennett at 58-59; Crosby at 55; Papke at 60. Moreover, neither defendant Bennett nor defendant Crosby was given any training on the cases People v. Bey, 21 Cal.App.4th 1623, 27 Cal.Rptr.2d 28 (1994), and People v. Gilbert E., 32 Cal.App.4th 1598, 38 Cal.Rptr.2d 866 (1995), which hold that it is unconstitutional to deliberately continue to question custodial suspects after the suspects have asserted their rights. Bennett at 49-50; Crosby at 46.

Pursuant to their training, defendants Bennett and Crosby interrogated Mr. Bey with the premeditated plan of ignoring his invocation of rights. On March 8, 1991, at the Los Angeles Police Department South Bureau, defendants Crosby and Bennett interrogated Mr. Bey. After asking a series of questions without any Miranda admonishment, defendants finally advised Mr. Bey of his Miranda rights. When asked if he wished to waive his rights, Mr. Bey unequivocally invoked his rights at least five times. Exhibit G. Immediately after he was read his rights, Mr. Bey responded, "If I'm being charged with murder, then I won't have another word to say until I have an attorney." Id. at 10.

Despite this clear invocation of his right to remain silent and right to counsel, defendants Bennett and Crosby continued to interrogate Mr. Bey. Mr. Bey repeatedly attempted to invoke his rights: "you must gonna charge me with something. So I'll wait and see what happens. I won't say another word until I have an attorney." Exhibit G at 10. Though this statement needed no clarification, he repeated: "[i]f I'm being charged with something, I'd rather not have anything to say until I have an attorney." Id. at 10-11. Defendant Bennett recognized that Mr. Bey had

invoked his rights, but used this invocation to falsely assure Mr. Bey that nothing he said could be used against him: "Now, you realize that you didn't waive your rights. That means we can't use 'em in court." Id. at 11.

Defendant Bennett then set forth his plan: "Let me explain something to you, James. I'm going to continue to ask you questions." Id. Defendant Crosby, so familiar with the tactic of ignoring a suspect's invocations, stated, "I think James is familiar with out ... outside Miranda. Are you familiar with that, James?" Id. Despite Mr. Bey's response that he did not "know too much about the law," Officers Bennett and Crosby continued to hound Mr. Bey with questions. Id. During the interrogation, Mr. Bey attempted to invoke his Miranda rights a total of 5 times. Nevertheless, defendants Crosby and Bennett, just as the police officers in Cooper, ignored each request.

Defendants Crosby and Bennett did not inadvertently violate Mr. Bey's Miranda rights; rather, they purposely denied Mr. Bey's repeated requests for counsel and assertions of his right to remain silent. When asked while on the stand during Mr. Bey's criminal trial 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," Officer Bennett replied, "[S]o that if [Mr. Bey] did take the stand, his testimony could be impeached." Exh. F; see also Bennett at 39-42; Exh. G; Exh. I; Exh. J.

Defendant Crosby also admitted at his deposition that he deliberately ignored Mr. Bey's assertion of Miranda rights. Crosby at 38-39. Defendant Crosby testified that he was not surprised that Bennett proceeded to question Mr. Bey after Mr. Bey requested an attorney. Defendant Crosby stated that "[i]f the defendant did not want to give a statement inside Miranda, we attempted to get at statement outside Miranda." Crosby at 62-63. Furthermore, defendant Crosby noted that several questions that they asked Mr. Bey might go to show motive for the crime. Crosby at 65. Therefore, notwithstanding the fact that defendant Crosby testified that he believed the statements could not be used in court, these questions indicate the officers' intent to elicit an incriminating statement from Mr. Bey.

The defendants' deliberate failure to cease questioning had the desired effect: Mr. Bey gave the officers an incriminating statement, in violation of the Fifth Amendment.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST DEFENDANTS BECAUSE DEFENDANTS VIOLATED PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT.

Defendants violated Mr. McNally's and Mr. Bey's Fourteenth Amendment right to substantive due process because continuing to question plaintiffs after they invoked their Miranda rights (1) coerced plaintiffs to make involuntary statements, and (2) rose to a level of conduct that shocks the conscience.

A. Under the Fourteenth Amendment, Plaintiffs Have a Liberty Interest in Being Free from Coercive Police Conduct that Overbears One's Will or that Shocks the Conscience.

1. Coercive Police Conduct that Overbears One's Will.

The Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment prohibits police from obtaining statements from custodial suspects through coercion. See Brown v. Mississippi, 297 U.S. 278, 286-87, 56 S.Ct. 461, 80 L.Ed. 682 (1936). The Ninth Circuit, in Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1993) (en banc), noted that the Supreme Court "established clearly and beyond anyone's misapprehension ... that the Constitution, as a limit on the behavior of government officials, flatly prohibits coercion in the pursuit of a statement from a [suspect]." Cooper, 963 F.2d at 1244. The Fourteenth Amendment requires that statements taken from suspects be the product of a free will. See id. at 1248 (finding that exercise of a free will was "a right to which [the suspect] was entitled by the Due Process Clause of the Constitution"); see also Haynes v. Washington, 373 U.S. 503, 514, 83 S.Ct. 1336, 10 L.Ed.2d 513 (1963) (Fourteenth Amendment violated where statement was not "the voluntary product of a free and unconstrained will").

To determine when a statement violates a person's right to due process, courts apply the traditional test of voluntariness. See Culombe v. Connecticut, 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961) (using the traditional test for voluntariness with regard to statements); see also Haynes, 373 U.S. at 513-14. The Ninth Circuit articulated the test for

voluntariness as follows: "`Is the confession the product of an essentially free and unconstrained choice by its maker?'" Cooper, 963 F.2d at 1248 (quoting Culombe, 367 U.S. at 602).

Although an historical hallmark of coercive police conduct is physical violence, such as that addressed in Brown, supra, physical brutality is not necessary for a court to find unconstitutional police coercion. In Colorado v. Connelly, 479 U.S. 157, 167, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986), the Court stressed that since its decision in Brown, cases have focused upon "the crucial element of police overreaching." Connelly, 479 U.S. at 163. While there is no catalogue that details every form of police conduct that overreaches, the Cooper Court found relevant that Cooper's right to remain silent was ignored. Cooper, 963 F.2d at 1248. Also pertinent to its finding that Cooper's statements were involuntary was that Cooper was pressured, stressed, and infused with a sense of helplessness. Id.

Furthermore, courts have found that false promises or inducements will render a statement involuntary. See Malloy v. Hogan, 378 U.S. at 7 (a statement must not be "obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence") (citation omitted); see also United States v. Moreno, 891 F.2d 247, 249 (9th 1989) (remanding a case in which mother stated that "she would tell anything if her daughter could be released"); United States v. Eccles, 850 F.2d 1357, 1360-1361 (9th Cir. 1988) (finding involuntary statements made without advisement of constitutional rights and where pressure was exerted to instill fear); United States v. Tingle, 658 F.2d 1332, 1336-37 (9th. Cir. 1981) (finding statement involuntary where officers told Tingle she might not see her child for a while if she went to prison). In Brady v. United States, 397 U.S. 742, 754, 90 S.Ct. 1463, 27 L.Ed.2d. 747 (1970) (emphasis added), the Supreme Court described its holding in Bram v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 568 (1897): "Bram dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, even a **mild** promise of leniency was deemed sufficient to bar the confession ... because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore...." Significantly, following this well-established doctrine, the court of appeals in United States v.

Walton, 10 F.3d 1024, 1028-32 (3rd Cir. 1993), held that a statement was coerced by a federal agent's promise not to use the statements against the defendant.

A plaintiff may therefore state a claim under 42 U.S.C § 1983 for deprivation of the right to be free from coercive police conduct that abridges the exercise of a free and unrestrained will. Cooper, 963 F.2d at 1248.

2. Coercive Police Conduct that Shocks the Conscience.

Police conduct that "shocks the conscience" violates an individual's substantive due process rights under the Fourteenth Amendment. Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 96 L.Ed. 183 (1952) The Ninth Circuit stated that 'Rochin outlawed all police conduct that `offend[s] those canons of decency and fairness which express the notion of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" Cooper, 963 F.2d at 1248-49 (quoting Rochin, 342 U.S. at 169). As the Ninth Circuit has noted, Rochin does not state a specific test for substantive due process violations; rather, "it lies where government conduct `shocks the conscience'" Cooper, 963 F.2d at 1249 (citing Rutherford v. City of Berkeley, 780 F.2d 1444, 1446 (9th Cir. 1986)). Moreover, the Supreme Court has recognized that "while brutality ... is one paradigmatic example of a substantive due process violation, it does not exhaust the possibilities." Wood v. Ostrander, 879 F.2d 583, 589 (9th Cir. 1989).

In Cooper, the Court applied Rochin to a coercive police interrogation. The "primary aggravating circumstance" present in Cooper was the officers' "purpose of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense." Cooper, 963 F.2d at 1249. The aim of precluding defenses flouts the search for truth and distorts the process, especially when officers deny the suspect the right to have counsel present. The Cooper Court determined that the officers' attempt to preclude the suspect from asserting an insanity defense further demonstrated that their conduct violated Cooper's substantive due process rights. Cooper, 963 F.2d at 1250. What the Court in Cooper ultimately found shocking to the conscience was not the officer's desire to obtain a statement; rather, it was the unconstitutional methods that they used to pursue this goal. Cooper, 963 F.2d at 1250. Thus, "when the methods

chosen to gather such evidence and information are deliberately unlawful and flout the Constitution, the legitimacy is lost." Id.

B. Defendants Cooper and Talbot Are Liable Under 42 U.S.C. § 1983 for Deprivation of Mr. McNally's Right to the Exercise of His Free and Unconstrained Will, as well for as Conduct that Shocks the Conscience.

1. The Violation of Mr. McNally's Right to the Exercise of Free Will.

Defendants Cooper and Talbot never allowed Mr. McNally to exercise his constitutional rights. When Mr. McNally invoked his right to counsel and right to remain silent, the defendants did not cease the interrogation but instead pressured Mr. McNally to make a statement. Defendants Cooper and Talbot ignored six invocations and even acknowledged that Mr. McNally had unequivocally invoked his rights; nevertheless, these defendants persisted in their illegal interrogation. Exhibit A at 56-62.

From the first moment that Mr. McNally invoked his right to counsel, defendants Cooper and Talbot used coercive tactics — from applying high pressure to making false promises — to dissuade Mr. McNally from exercising this right. After defendant Talbot acknowledged that Mr. McNally had asserted his right to counsel, he made the false promise to Mr. McNally that "at this point, nothing that you say can be used against you in court ... because you have invoked your right to have an attorney." Exhibit A at 59. Defendant Talbot coupled this false promise with a statement that disparaged the right to counsel: "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 doesn't either." Id. Defendant Cooper reiterated the false promise that "Everything from this point on ... regarding this case cannot be used against you." Id. In fact, defendant Cooper went as far as to say, "We're, we're making you the guarantee. It won't." Exhibit A at 55. Defendant Talbot pursued his attack on the right to counsel, "[W]ould you trust something that somebody told you after they talked to an attorney?" Id. at 60. To this question, defendant Cooper stated, "It's like `black mail' with attorneys, man. We know that." Id.

Defendants Cooper and Talbot moved to more verbally aggressive tactics as Mr. McNally still refused to speak. Defendant Talbot exclaimed, "Okay, and fuck your attorney ... I don't care

about him anymore." Exhibit A at 61. He then added, "you know, they really mess up the system." Id. As defendants Cooper and Talbot grew more impatient with Mr. McNally, defendant Talbot reiterated the promise that any statement "can't be used against you." Id. Defendant Cooper also promised Mr. McNally, "it's not gonna' be used against you." Id. Finally, Mr. McNally gave in to defendants' promises and he asked, "Alright. I'll ... and this can't be used against me?" Exhibit A at 62. To this question defendant Cooper stated, "No, absolutely ... we're promising you[.]" Id.

By advising him of his rights, the defendant officers told Mr. McNally that he had the power to end the interrogation; when the defendant officers subsequently refused to allow Mr. McNally to cut off the questioning, the effect upon Mr. McNally, as the transcript shows, was devastating. Exhibit A at 62-79. In addition, the promises that the defendant officers made to Mr. McNally were false, improper, and further acted to overcome his will. The promise that any statement could not be used against Mr. McNally was clearly false: the interrogating officers were not prosecutors; they held no power to control the admission or exclusion of evidence at any later prosecution. Indeed, Mr. McNally was forced to file a motion at trial to suppress the statements. Exh. L. Had no such motion been filed, the prosecutor would have made full use of Mr. McNally's statements. In any event, the prosecutor did use Mr. McNally's statements against him at sentencing. See Exhibit N at 77-78.

The trickery employed by defendants Cooper and Talbot rendered Mr. McNally's statements involuntary. A confession cannot be obtained by "implied promises, however slight." Eccles, 850 F.2d at 1361 (citation omitted). In Walton, the defendant -- who was not in custody -- was invited by the police to talk to them "off the cuff." Walton, 10 F.3d at 1027. The court of appeals found that, under the totality of circumstances, the promise not to use Walton's statement against him rendered his statement involuntary. Id. at 1032. This case is far worse. Mr. McNally was in custody; he was not merely talking with officers on a park bench, as in Walton. The false promises were made to Mr. McNally immediately after the police unlawfully refused to cut off questioning.

The coercive tactics used by defendants Cooper and Talbot violated Mr. McNally's Fourteenth Amendment interest in being free from police conduct that denies him the free exercise of his will. Defendants' tactics ranged from pressure, to attacking the need for attorneys, to outright verbal aggression. The combination of these tactics led McNally to believe that having an attorney would not help him and that he had no choice but to speak with defendants Cooper and Talbot. It was his only way out of the interrogation room.

2. The Deprivation of Mr. McNally's Right to be Free from Conduct that Shocks the Conscience.

The conduct of defendants Cooper and Talbot strikes at the heart of our notions of justice and fair play. By continuing to question Mr. McNally despite his requests for counsel, defendants Cooper and Talbot intentionally circumvented the requirements of the Constitution and abused the power afforded to peace officers. This shocks the conscience.

Defendants Cooper and Talbot purposely deprived Mr. McNally of his right to counsel and his right to remain silent. Mr. McNally made many requests for an attorney. Exh. A. Nevertheless, the defendants failed to cease questioning as required by Miranda. Defendant Cooper did not mistakenly or inadvertently abridge Mr. McNally's Miranda rights; instead, he testified that an interrogation that does not comply with Miranda is not improper, unlawful or unconstitutional. Cooper at 20-21, 30-31, 34-35, 41-42, 45-47, 50. One reason for violating Miranda is that, according to defendant Cooper, a noncomplying statement can be used for impeachment. Id. at 19-22. Likewise, defendant Talbot did not mistakenly fail to cease the interrogation of Mr. McNally after plaintiff invoked his right to counsel. Defendant Talbot has been that if a suspect refuses to waive his or her Miranda rights, it is permissible to continue to question outside Miranda. Talbot at 28-29, 44, 46-47, 50-52, 57-58, 64-65, 67. Defendants Cooper and Talbot intentionally disregarded the requirements set forth by the Supreme Court in Miranda. Deliberate circumvention of an individual's rights shocks the conscience.

Defendants Cooper and Talbot also used false promises to coerce a statement from Mr. McNally. As discussed above, defendants promised Mr. McNally that if he spoke with them, nothing could be used against him in court. See e.g., Exh. A at 59-62. For example, defendant

Talbot stated, "At this point, nothing you say can be used against you in Court ... because you have invoked your right to have an attorney." Id. at 59. On the contrary, the successfully coerced statements of Mr. McNally were sought to be used at trial and were in fact used against him in sentencing. See Exhibit N at 77-78. The use of false promises by police officers offends the basic notions of fair play and decency.

C. Defendants Crosby and Bennett Are Liable Under 42 U.S.C. § 1983 For Deprivation of Mr. Bey's Right to the Exercise of His Free and Unconstrained Will, as well as for Conduct that Shocks the Conscience.

1. The Violation of Mr. Bey's Right to the Exercise of Free Will.

At the outset, defendants Crosby and Bennett advised Mr. Bey that he had the right to remain silent and the right to have counsel present, but then denied Mr. Bey any opportunity to exercise these rights. Exh. G. Mr. Bey attempted at six points during the interrogation to invoke his constitutional privilege against self-incrimination. Id. Nevertheless, defendants Crosby and Bennett deliberately ignored Mr. Bey's requests for counsel and his attempts to remain silent. Id.

Defendant Crosby's and Bennett's failure to cease their interrogation of Mr. Bey, as required by Miranda, pressured Mr. Bey into making statements. Even prior to warning Mr. Bey of his Miranda rights, the defendants pressured Mr. Bey into answering their questions, for instance, twice asking Mr Bey, "Why was she ... at your house?" Exhibit G at 9. After his Miranda warnings were given and Mr. Bey had invoked his rights repeatedly, defendants increased the pressure by stating that they had physical evidence against him: "[W]e got some very incriminating physical evidence, my friend ... Stuff that can't be explained away." Exhibit G at 11. Despite Mr. Bey's assertions that counsel be present, defendants did not cease their interrogation. Instead, they continued to seek inculpatory statements from Mr. Bey.

Further, and as importantly, defendants Crosby and Bennett made false promises to Mr. Bey concerning the legal effect of anything Mr. Bey might say after asserting his Miranda rights: "Now, you realize that you didn't waive your rights. That means we can't use 'em in court." Exhibit G at 11. Although he told Mr. Bey that his statement could not be used in court,

defendant Bennett testified that he expressly questioned Mr. Bey to obtain a statement that *could* be used in court to impeach Mr. Bey if Mr. Bey took the stand in his own defense. Bennett at 41-42; Exh. F; Exh. J. The defendants knew fully well that they were not prosecutors and did not have the power to make such a promise. Indeed, Mr. Bey's statement was used against him at his trial. Exh. H; Exh. J.

Defendants' trickery rendered Mr. Bey's statements involuntary under the Fourteenth Amendment. The California Court of Appeal was exactly right when it held that Mr. Bey's statements were "coerced and involuntary" due to a "deliberate police violation of Miranda coupled with a misrepresentation [to Mr. Bey] about the legal consequences of that violation." People v. Bey, 21 Cal. App. 4th 1623, 1628, 27 Cal. Rptr. 2d 28 (1993).[8]

2. The Deprivation of Mr. Bey's Right to Be Free from Conduct that Shocks the Conscience.

The deliberate acts of defendants Crosby and Bennett during their custodial interrogation of Mr. Bey shock the conscience, in precisely the same fashion as did the officers' conduct in Cooper. The constitutional rights secured by Miranda provide the fundamental balance between government authority and individual autonomy. It shocks the conscience for police officers and governmental agencies to intentionally avoid the requirements of our Constitution.

Defendants Crosby and Bennett sought the same end that Cooper identified as its "primary aggravating circumstance": Defendant Bennett testified that he questioned outside Miranda to prevent Mr. Bey from asserting defenses at trial. Bennett at 39-40; Exh. F; Exh. I. "I wanted Mr. Bey to make a statement, however vague that statement is ... that would tie his statement in, so to speak." Bennett at 40. Likewise, defendant Crosby testified that he was trained to question outside Miranda to force suspects to commit to a statement that "would prevent [a defendant] from pulling out some defense and using it at trial." Crosby 58-59. During the entire interrogation, defendant Crosby never attempted to cease the questioning. Exh. G.

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[8]In its Memorandum Opinion, this Court took judicial notice of the California Court of Appeal's decision, pursuant to Fed. R. Evid. 201. See CACJ v. Butts, 922 F.Supp. 330 n.1, 335 n.12.

Furthermore, defendant Crosby testified that he was not surprised that defendant Bennett continued to question Mr. Bey after he asserted his Miranda rights, because if Mr. Bey did not want to give a statement inside Miranda, "we attempted to get a statement outside Miranda." Crosby at 62-63. However, Mr. Bey clearly did not wish to make any statement — in light of his 5 Miranda invocations — regardless of whether they were "inside" or "outside" Miranda.

Intentionally denying Mr. Bey's rights in order to eliminate possible defenses and to obtain impeachment evidence shocks the conscience. Defendants are police officers and cannot violate the law in their enforcement of it. Defendants Crosby and Bennett thereby deprived Mr. Bey of his right to be free from conduct that shocks the conscience.

III. Defendant Butts is Liable Under 42 U.S.C. § 1983 for Depriving Plaintiff McNally of His Fifth and Fourteenth Amendment Rights.

Defendant Butts has promoted his department's policy of questioning outside Miranda, has failed to ensure that his officers are properly trained on the constitutional mandates of Miranda, and has ratified defendants Cooper's and Talbot's deprivation of Mr. McNally's Fifth and Fourteenth Amendment rights. As such, he is liable under § 1983.

An official with final policy-making authority -- which includes the Chief of Police -- is subject to § 1983 liability when the official subsequently ratifies a subordinate's unconstitutional action. Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991). For liability in both an official and individual capacity, subsequent ratification can occur through the supervisor's failure to reprimand his or her subordinates. Id. at 646-47. Moreover, a government official can be held liable in an official or individual capacity where the official ratifies even a course of action that was taken for the first time. Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); Larez, 946 F.2d at 646. In addition, a supervisor is held to have knowledge of public information about practices in his or her department. Hammond v. County of Madera, 859 F.2d 797, 803 (9th Cir. 1988).

Defendant Butts was, at the time of Mr. McNally's interrogation, and is currently, the Chief of Police for the SMPD. Butts at 13. He has overall responsibility for setting policy and for discipline in the SMPD. Id. at 13, 15, 27-28. The custom, practice, and policy of

questioning "Outside Miranda" has flourished in the SMPD while defendant Butts has served as Chief. Since the late 1970s or early 1980s, Officers Cooper and Talbot have been trained that deliberately continuing to question custodial suspects after the suspects have invoked their rights to silence and/or counsel does not violate the suspects' constitutional rights. Talbot at 27-31, 37-38, 44-47, 50-52, 57-58, 64-65, 67; Cooper at 20-21, 30-31, 34-35, 41-42, 45-47, 50.

Nor, as the head policymaker, has Chief Butts ensured that there is adequate oversight of his officers' training or conduct. For instance, the SMPD does not review the substantive content of the training provided in the advanced training courses, and there is no mechanism for SMPD officers in charge of training to review the materials from the external courses which the officers attend. Stipulation at ¶ 4; Butts at 51-52. Furthermore, unless an individual lodges a complaint with the SMPD, there in no method in place for the Department to be notified if a court holds that a SMPD officer's conduct violated a suspect's rights. Butts at 32. Additionally, Chief Butts failed to ensure adequate oversight of Detective Talbot's actions: in March of 1993, when Mr. McNally was interrogated, defendant Talbot reported to defendant Cooper. Stipulation at ¶ 7; Talbot at 8; Butts at 22. Moreover, defendant Cooper is in charge of the Office of Criminal Investigations, which conducts virtually all of the SMPD's interrogations of felony suspects. Stipulation at ¶¶ 5-6. Chief Butts testified that he did not think it was the job of lieutenants to review police reports. Butts at 120. Sergeant Cooper reviewed other detectives' reports of this interrogations. But no one reviewed defendant Cooper's reports of the custodial interrogations that he conducted.

Significantly, defendant Butts expressly ratified his department's custom and practice of questioning "Outside Miranda" when he signed and approved a Training Bulletin, entitled "Questioning `Outside Miranda.'" Stipulation at ¶ 11; Butts at 80; Exhibit E. Chief Butts' attitude towards his responsibilities in issuing Training Bulletins could almost be described as cavalier. He acknowledges that when he signs Training Bulletins, he does not review the

material upon which the bulletins are based. Butts at 95-96. And when asked whether he reads the Training Bulletins before he signs them, Chief Butts replied, "For the most part." Id. at 73.[9]

Chief Butts has also ratified Officer Cooper and Talbot's conduct by his failure to take any corrective action once the constitutional violations surfaced. Even since the Court's Memorandum Opinion in this case, CACJ v. Butts, 922 F. Supp. 327 (C.D. Cal. 1996), Chief Butts has not issued any materials to his officers advising them not to continue to question custodial suspects after they have asserted their rights to counsel and/or silence. Butts at 144. Moreover, neither Chief Butts nor any other member of the SMPD has made any revisions to the Training Bulletin, Exhibit E, that encourges SMPD officers to question "Outside Miranda." Id. at 144-45. Nor has Chief Butts even advised his officers of the existence of this Court's ruling. Id. at 145.

IV. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST THE MUNICIPAL DEFENDANTS.

The cities of Los Angeles and Santa Monica are liable under 42 U.S.C. §1983 for having a policy or custom which deprived plaintiffs of their constitutional rights. Monell v. Dep't. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Municipal liability is not predicated on a simple theory of *respondeat superior*, but instead attaches when plaintiffs are able to prove that their constitutional injuries were inflicted pursuant to either: (1) a municipal policy or (2) a custom. Id. at 690-91.

A policy is "a deliberate choice to follow a course of action ... made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). A custom exists where the plaintiffs can show that their "injury

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[9]It is worthy of note that Chief Butts' training bulletin encouraging officers to question "Outside Miranda," Exhibit E, tracks in general the language from an article by Devallis Rutledge, Exhibit K. The primary difference is that the Training Bulletin omits the case citations referenced in Exhibit K, including the parenthetical after the citation of People v. Bey, 21 Cal.App.4th 1623, 27 Cal.Rptr.2d 28 (1994), which described the holding of Bey as follows: "Statement involuntary because of officer's misguided promise that post-invocation statement was off the record and 'couldn't be used in court.'" Exh. K.

resulted from a `permanent and well-settled' practice[.]" Thompson v. City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir. 1989) (quoting City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988)). In contrast to a policy, municipal liability will attach to a custom "even though such a custom has not received formal approval through the body's official decisionmaking channels." Monell, 436 U.S. at 690-91. As a result, "a local government may be liable for its custom irrespective of whether official policymakers had actual knowledge of the practice at issue." Thompson, 885 F.2d at 1444.

The defendant municipalities here cannot reasonably dispute that they have a policy or custom that encourages officers to deliberately ignore suspects' invocations of their rights during custodial interrogations.[10]

The City of Los Angeles has admitted in its Answer to the Complaint that it trains officers to question "Outside Miranda." See footnote 1, supra. The LAPD's policy or custom has been taught to officers for over a decade by the LAPD's trainer on interrogation techniques, Lt. Rick Papke. Indeed, as the City's counsel stated during Papke's deposition, "I think it's quite evident from the questioning thus far that what [Officer Papke] teaches is that [questioning outside Miranda] is legally permissible and that it's something that he, as a department instructor, is recommending that they do." Papke at 25.

While the City of Santa Monica sends its officers out of the department to be trained on interrogation issues, officers in the department do receive training on questioning "Outside Miranda." Stipulation at ¶ 4. Critically, defendant Cooper -- who is in charge of the office of the SMPD that questions virtually all suspects in felony cases and who is the person who reviews other officers' reports -- has received this training and himself questions suspects after they have asserted their rights. Id. at ¶¶ 5-6, 8. And if there could ever be a question about whether this was the policy or custom of the SMPD, that question has been resolved by defendant Butts, the Chief of the SMPD. By issuing a Training Bulletin, Exhibit E, that encourages his officers to question "Outside Miranda," he has ratified the policy and custom. Although this Court issued

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[10]The existence of a custom or policy will be discussed together, since the underlying facts are the same.

a strong ruling in April 1996 decrying this practice, Chief Butts has never rescinded or revised his Training Bulletin. Butts at 144-45. Nor has Chief Butts ever sought to discipline defendants Cooper and Talbot for their conduct in this case. Stipulation at ¶ 12.

Defendants may argue that there is no municipal liability because officers are told to interrogate "Outside Miranda" in a "non-coercive" manner. Such reasoning is circular, and ignores entirely that a premeditated plan to question "Outside Miranda" is itself coercive. Having a pre-formulated intention to deliberately question suspects who have invoked their rights eviscerates Miranda's dictate that "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." Miranda, 384 U.S. at 458. The cities' deliberate plan that officers read suspects their rights -- with the intent of refusing to honor those rights -- is a plan calculated to instill a sense of hopelessness in the suspect, who is already in an environment that is inherently coercive. A vague, blanket admonition that officers not do anything "coercive" does nothing to transform the suspect's statement into one that is voluntary. Nor can such a blanket admonition serve to shield the cities from liability for this unconstitutional and wholly impermissible practice.

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IV. CONCLUSION.

Plaintiffs have shown through uncontrovertible facts that all defendants are liable for deprivations of plaintiffs' constitutionally secured rights. For these reasons, plaintiffs' motion for summary judgment on the question of liability should be granted.

DATED:

Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

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PROOF OF SERVICE BY MAIL

I, KAREN MIYAHARA, declare:

I am a resident of the County of Los Angeles, California; that I am over the age of eighteen (18) years of age and not a party to the within-entitled cause of action; that I am employed in the County of Los Angeles, California; and that my business address is 1616 Beverly Boulevard, Los Angeles, California 90026.

On October 1, 2004, I served a copy of the attached document(s) described as MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT on the parties of record in said cause by placing a true and correct copy thereof enclosed in a sealed envelope addressed as follows:

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I am readily familiar with the office's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed on October 1, 2004, at Los Angeles, California.

_____
KAREN MIYAHARA