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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 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SANTA MONICA AND LOS ANGELES DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT; DECLARATION OF TAYLOR FLYNN AND ATTACHED EXHIBIT DATE: June 16, 1997 TIME: 10:00 a.m. DEPT: One

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INTRODUCTION

This Memorandum of Points and Authorities is filed by plaintiffs James McNally and James Johnson Bey as their consolidated opposition to the motions for summary judgment filed by the Santa Monica defendants (James Butts, Ray Cooper, Shane Talbot and the City of Santa Monica) and the Los Angeles defendants (Raymond Bennett, Michael Crosby and the City of Los Angeles). The plaintiffs filed their own motion for summary judgment on May 5, 1997 (hereinafter "Plaintiffs' Motion"), and incorporate their motion into this Memorandum.[1]

As set forth below, the defendants' motions for summary judgment should be denied. The uncontroverted facts show that both Mr. McNally and Mr. Bey were interrogated by officers bent on obtaining incriminating statements, regardless of the requirements of the law. These officers, and the cities that have encouraged them to act in this fashion, are liable under 42 U.S.C. § 1983.

ARGUMENT

I. THIS COURT HAS ALREADY RULED THAT OFFICERS WHO DELIBERATELY QUESTION IN VIOLATION OF MIRANDA ARE SUBJECT TO LIABILITY UNDER 42 U.S.C. SECTION 1983, AND THIS COURT'S RULING IS THE LAW OF THIS CASE.

The Santa Monica and Los Angeles defendants argue that a deliberate plan to intentionally violate a suspect's invocation of rights pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), is not cognizable under 42 U.S.C. § 1983. These claims have already been raised and decided against the defendants. This Court's rulings are the law of the case and there is no reason to reconsider them.

More specifically, the Santa Monica defendants assert that: 1) there can be no violation of the Fourteenth Amendment because Mr. McNally's post-invocation statement was not used

[1]Because plaintiffs' May 5, 1997 Motion for Summary Judgment, as well as the accompanying exhibits and Statement of Uncontroverted Facts contain full recitations of the relevant facts, this Memorandum does not include its own Statement of Facts. Instead, the relevant facts are discussed in context in the legal arguments.

at trial;[2] 2) a plan to deliberately question in violation of Miranda cannot, itself, shock the conscience; and 3) Miranda does not set forth rights derived from the Constitution, so there can be no Fifth Amendment violation for deliberate questioning "Outside Miranda" absent some additional form of actual coercion. See Motion for Summary Judgment filed by Santa Monica defendants ("SM Motion") at 12, 17-21, and 21-24. The Los Angeles defendants make substantially the same claims, though they assert that Mr. Bey's statements were properly used to impeach his testimony at trial. See Motion for Summary Judgment filed by Los Angeles defendants ("LA Motion") at 16-22 and 28-35. The SM Motion and the LA Motion do not include any reference to this Court's previous order, entered on April 10, 1996, addressing these same claims.

In the April 10, 1996 order, published as CACJ v. Butts, 922 F.Supp. 327 (C.D. Cal. 1996), this Court firmly rejected the legal arguments that the defendants make in their present motions. This Court held that the plaintiffs had properly pleaded causes of action under the Fifth and Fourteenth Amendments. In addition, former defendant Devallis Rutledge again raised these arguments in his own motion to dismiss, and this Court again rejected them, relying upon the April 10, 1996 decision:

> [T]he conduct in the present case was alleged not merely to be a simple departure from Miranda's prophylactic standards, but instead a purposeful effort by the police to ignore the Plaintiffs' assertion of their Miranda rights. 922 F.Supp. at 336. This Court noted that, as in Cooper [v. Dupnik], the allegations were that police officers acted pursuant to a deliberate, premeditated policy of ignoring suspects' assertions of Miranda rights, and that in both cases the suspects were deceived so as to make the interrogations more effective. This ruling is the law of the case, and Defendant Rutledge's Fifth Amendment argument must be rejected.

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[2]This claim is factually incorrect. The statement was used against Mr. McNally at sentencing. See Plaintiffs' Exhibit N at 76-77; Plaintiffs' Motion at 22.

Order Granting Defendant Devallis Rutledge's Motion to Dismiss or For Summary Judgment, entered March 17, 1997 ("March 17 Order") at 3 (emphasis added). This Court also rejected, citing Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (en banc), the argument "that there can be no involuntariness claim where the coerced statements are never used at trial." March 17 Order at 4; see also CACJ v. Butts, 922 F.Supp. at 335-36 (noting Cooper's recognition that Miranda applies in police stations). Finally, this Court reaffirmed that officers' conduct "shocks the conscience" where "police interrogators purposefully and deliberately transgress[] Miranda by continuing to interrogate" after suspects invoke their right to silence and their right to counsel. March 17 Order at 4; see also CACJ v. Butts, 922 F.Supp. at 334-37 (denying motion to dismiss Fourteenth Amendment claims).

This Court's two previous legal rulings are law of the case. "[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." Arizona v. California, 460 U.S. 605, 619, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983). Under the "law of the case" doctrine, a court should not generally reconsider a prior ruling unless one of three exceptions is met. The three exceptions are:

> (1) the [prior] decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a [subsequent proceeding].

United States v. Garcia, 77 F.3d 274, 276 (9th Cir. 1996) (quoting Hegler v. Borg, 50 F.3d 1472, 1475 (9th Cir.), cert. denied, 116 S.Ct. 675, 133 L.Ed.2d 524 (1995)); see also Merritt v. Mackey, 932 F.2d 1317, 1320-22 (9th Cir. 1991) (setting forth these same principles). The law of the case doctrine applies to a district court's interlocutory orders, including rulings on motions to dismiss. See Pit River Home and Agricultural Cooperative Ass'n v. United States, 30 F.3d 1088, 1097 (9th Cir. 1994) (the "argument that the law of the case doctrine does not apply to interlocutory orders which are not immediately appealable is meritless"); In re National Mortgage Equity Corporation Mortgage Pool Certificates Securities Litigation, 682 F.Supp.

1073, 1082 (C.D. Cal. 1987) (holding that legal conclusions made on a previous motion to dismiss are the law of the case).

This Court has ruled on the defendants' legal arguments not once but twice. These legal rulings are the law of the case. Indeed, in rejecting Devallis Rutledge's legal points, this Court has already acknowledged that its prior ruling on the motion to dismiss is the law of the case. See March 17 Order at 3. The defendants cannot plausibly argue that they meet any of the three exceptions to the application of this doctrine. First, this Court's prior ruling is not clearly erroneous. This Court directly followed the Ninth Circuit's decision in Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (en banc).[3] Second, there has been no intervening controlling authority. In their moving papers, defendants make the very same arguments with the same authorities as they made in their previous motions to dismiss. Third, what amounts to the law of the case here are the legal rulings made on the motion to dismiss; those rulings did not contain any factual findings, and thus they are necessarily unaffected by any evidence presented with these summary judgment motions. Moreover, as discussed below, the factual assertions made by defendants in their motions for summary judgment do not affect defendants' legal arguments — and hence the law of this case — one whit.

II. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE MR. McNALLY AND MR. BEY WERE DENIED THEIR FIFTH AMENDMENT RIGHTS.

Both the Santa Monica and the Los Angeles defendants have moved for summary judgment, claiming that the uncontroverted facts establish that there was no violation of the plaintiffs' Fifth Amendment right to counsel or right to remain silent. SM Motion at 21-26; LA Motion at 16-20, 23-28. In the preceding section of this Memorandum, Mr. McNally and Mr. Bey have already explained that to the extent that the defendants' motions are based upon a reargument of their legal claims, this Court has already ruled against them. In this section, Mr. McNally and Mr. Bey respond to the defendants' application of the law to the facts. The facts

[3]For a complete explication of the way in which this Court has adhered to the Miranda line of cases, including Cooper, see Plaintiffs' Motion at 8-12.

are uncontroverted, and they demonstrate that the plaintiffs' summary judgment motions should be granted and the defendants' motions should be denied.

A. Mr. McNally Was Questioned in Violation of the Fifth Amendment.

During his custodial interrogation, Mr. McNally invoked his Fifth Amendment privilege six times. See Plaintiffs' Motion at 3-5, 12-15; Plaintiffs' Exhibit A.[4] Pursuant to their training, defendants Cooper and Talbot continued to question Mr. McNally deliberately, even acknowledging that he had properly asserted his Fifth Amendment rights. Id. The Santa Monica defendants have moved for summary judgment, claiming that "no unlawful coercion" occurred and, hence, that there was no Fifth Amendment violation. These defendants also attempt to distinguish this case from Cooper on the facts. See SM Motion at 24-27. Their efforts are unavailing.

While the interrogation in this case was shorter in duration than that experienced by Mr. Cooper, it was similarly unconstitutional. Relying on the interrogation transcript, the Santa Monica defendants somehow conclude that "[a]t all times [Mr. McNally] expressed a willingness to talk to the detectives." SM Motion at 26. The uncontroverted facts demonstrate otherwise. Through his six invocations of his Fifth Amendment rights, Mr. McNally repeatedly and unequivocally stated that he did not wish to speak with officers. Nevertheless, the interrogation continued, with officers dissuading Mr. McNally from remaining silent by their wholly improper efforts to disparage counsel and convince Mr. McNally that he needed to speak with them right then, before counsel became involved.

Under very similar circumstances, the Ninth Circuit held a statement to be coerced, in violation of the Fifth Amendment. In Collazo v. Estelle, 940 F.2d 411 (9th Cir. 1991) (en banc), the 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

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[4]Because plaintiffs discussed the interrogations of Mr. McNally and Mr. Bey at length in their motion for summary judgment, the facts will simply be summarized briefly in this Memorandum.

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.

Just as in Collazo, the uncontroverted facts of this case show that there was indeed a Fifth Amendment violation.

B. Mr. Bey Was Questioned in Violation of the Fifth Amendment.

Similar to Mr. McNally, Mr. Bey invoked his Fifth Amendment rights during his custodial interrogation at least five times, yet officers continued to question him pursuant to a prearranged plan. See Plaintiffs' Motion at 5-7, 15-17; Plaintiffs' Exhibits F, G, and J. The Los Angeles defendants have moved for summary judgment, also attempting to distinguish this case factually from Cooper. See LA Motion at 25-28. As with Santa Monica's efforts, their claims should be rejected.

In their motion, the Los Angeles defendants argue that "[t]here is no evidence that Bennett and Crosby had any preconceived interrogation plan to deny Bey of any of his constitutional rights." See LA Motion at 26. Perhaps the defendants only make this claim because they argue that Miranda is not "constitutional." The record is uncontroverted that LAPD officers in general, and defendants Bennett and Crosby in particular, have been trained to continue to question suspects who have asserted their Fifth Amendment rights.[5] In fact, in the next sentence in their motion, the defendants admit as much. They concede that the "purpose for continuing the interrogation was to possibly obtain a statement that could be used for impeachment." LA Motion at 26. Whether or not defendants Bennett and Crosby talked between themselves before they interrogated Mr. Bey and explicitly agreed that they would continue questioning in the face of an assertion of his rights, their continued questioning was in no way a spontaneous occurrence. They questioned Mr. Bey in violation of his rights as they had been

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[5]See, e.g., Depositions of Raymond Bennett at 43, 56, 62, 67-69, 83; Michael Crosby at 13-14, 24, 27-28, 41, 44, 49, 51, 55, 58-60; and Rick Papke at 23-25, 30-31, 36-39, 44-51, 54-55, 58, 64-65, 68. All three depositions were lodged concurrently with Plaintiffs' Motion. See also Plaintiffs' Exhibits F, G, J, K, O and P.

trained to do, and as they had done with other suspects on previous occasions. See Depositions of Bennett, Crosby and Papke, supra, note 5; Plaintiffs' Exhibits F, G, J, K, O and P.

The Los Angeles defendants also argue that the questioning of Mr. Bey was not done in such a way as to instill fear and break down his resistance. The uncontroverted facts show otherwise. The record establishes that Mr. Bey was handcuffed to a bench for four hours prior to the interrogation. See Deposition of James Johnson Bey at 61-65, lodged concurrently with Plaintiffs' Motion. During the interrogation, after Mr. Bey asserted his rights, defendants Bennett and Talbot falsely told him that his statements could not be used against him. See Plaintiffs' Exhibit G at 11. They also told him that they had "some very incriminating physical evidence" against him, "[s]tuff that can't be explained away." Id. The record of the interrogation speaks for itself. Moreover, defendant Bennett admitted at Mr. Bey's criminal trial that he had purposefully ignored Mr. Bey's invocations in order to dissuade him from testifying in his own defense, stating that he questioned Mr. Bey "[s]o that if he did take the stand, his testimony could be impeached." Plaintiffs' Exhibits F and J.

These uncontroverted facts demonstrate as a matter of law that the questioning was not "benign." The defendant officers interrogated Mr. Bey pursuant to a premeditated plan to coerce an involuntary statement from him, in violation of the Fifth Amendment.

III. THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED BECAUSE MR. MCNALLY AND MR. BEY WERE DENIED THEIR FOURTEENTH AMENDMENT RIGHTS.

As with the defendants' Fifth Amendment claims, the plaintiffs will not respond to those legal arguments concerning the Fourteenth Amendment that have already been decided and that are the law of the case.

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A. The Uncontroverted Facts Show That Mr. McNally's Statement Was Involuntary.

In his moving papers, Mr. McNally explained how his statements were coerced by defendant Cooper's and defendant Talbot's continued questioning of him, by their statements denigrating the role of counsel, by their strongly worded comments that he should talk at that very moment, and by their false and unauthorized promises that his statements could not be used against him. See Plaintiffs' Motion at 3-5, 21-23; Plaintiffs' Exhibit A. The Santa Monica defendants argue that there was no violation because defendants Cooper and Talbot gave Mr. McNally "de facto use immunity." This inventive argument is dealt with separately (see Section V, infra). Interestingly, other portions of the Santa Monica defendants' motion show even more clearly that Mr. McNally's statement was obtained against his will.

The transcript of Mr. McNally's interrogation shows, undisputedly, that officers told Mr. McNally that he would be better off talking with them before he got an attorney. See Plaintiffs' Exhibit A at 59-61. They told him that they did not trust what someone said after they talked with a lawyer. Id. at 59-60. Significantly, they told him that "the deal is here" in the interrogation room, and if they didn't hear anything from Mr. McNally they would investigate in a certain direction "and we're going to push it." Id. at 61. Any possible ambiguity about the power of that statement has now been clarified by defendant Talbot's own declaration, submitted with his motion. Defendant Talbot affirms that:

> This interchange was also intended to communicate to McNally that the evidence collected so far, including his incredible story of self-defense, was consistent with a special circumstances charge; therefore, unless he could provide a credible statement, consistent with the physical evidence, of some lesser intent, he was facing a special circumstances charge of life without possibility of parole.

Declaration of Shane Talbot, submitted with SM Motion, at ¶ 40. Thus, even defendant Talbot admits that he intended to convey to Mr. McNally that if Mr. McNally could not provide a statement, he would face life without parole.

The interrogation speaks for itself. It shows an accused who desperately sought to remain silent and to seek the advice of counsel. It shows two defendant officers who relentlessly questioned in the face of clear assertions of constitutional rights, who sought to dissuade the accused from consulting with counsel, and who made false promises to obtain a statement. Id. In Collazo, the Ninth Circuit also determined that the officer's conduct violated the Fourteenth Amendment, and that the officer's "words and tactics share much in common with other psychological ploys that have been scrutinized and found wanting." 940 F.2d at 418. In Collazo, as in this case, the officer's "inquisitorial stratagem was calculated to break Collazo's will." Id. at 419.

B. The Uncontroverted Facts Show That the Conduct of the Santa Monica Defendants Shocks the Conscience.

Mr. McNally's moving papers show that the conduct of the Santa Monica defendants' shocks the conscience. See Plaintiffs' Motion at 23-24. Stunningly, in their own motion, the Santa Monica defendants make light of the officers' comments, using lawyer jokes to argue that the officers' denigration of a custodial suspect's right to counsel was not shocking. See SM Motion at 17-18. It is distressing to read the papers of the Santa Monica defendants, which was written by their counsel. The motion seems to justify the officers' disparagement of attorneys. If, indeed, "[d]islike and disrespect of lawyers are sentiments echoed by a large percentage of the population," SM Motion at 17, their motion fuels such sentiments.[6]

What the Santa Monica defendants fail to grasp is that, whatever the public thinks of lawyers, the defendant officers had a duty to uphold Mr. McNally's constitutional rights, not disparage his constitutional right to counsel at the moment he needed it most and when he was most vulnerable: during a custodial interrogation for suspicion of murder. In Collazo, where the investigating officer similarly demeaned the role of counsel during an interrogation, the Court

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[6]Nowhere in their motion do the Santa Monica defendants even admit that the comments that by defendants Cooper and Talbot were wrong. The closest the defendants come to any such acknowledgment is the statement that "[w]hile these comments may have been inappropriate, they hardly amount to a 14th Amendment substantive due process violation." SM Motion at 18 (emphasis added).

noted that the officer "has a First Amendment right to have any opinion he wishes of Miranda and lawyers, but he is not free to express it in this context." Collazo, 940 F.2d at 418 n.8. Defendants Cooper and Talbot may have a low opinion of lawyers. Nevertheless, they were not free to demean Mr. McNally's right to counsel in the interrogation room.

The Santa Monica defendants also focus on defendant Talbot's use of the word "fuck,"[7] erroneously characterizing Mr. McNally's cause of action as one that seeks damages simply due to the use of that expletive. That the defendant also has this word in his lexicon is not shocking. What is shocking is the entire effort by the defendant officers to force a statement, in direct and knowing violation of the Constitution, and which included this strongly-worded disparagement of Mr. McNally's constitutional right to counsel.

Finally, the Santa Monica defendants attempt to assign only pure motives to the questioning. See SM Motion at 20-21. The uncontroverted evidence shows otherwise, as both defendants Talbot and Cooper admitted that they believed that an "Outside Miranda" statement could be used for a variety of purposes, including impeachment. Depositions of Shane Talbot ("Talbot") at 25-27, 29-31, 58-59, and Ray Cooper ("Cooper") at 19-22, lodged concurrently with Plaintiffs' Motion. Further, even defendant Talbot realizes that obtaining a statement "Outside Miranda" generally forces a defendant to stay off the stand at trial. In his declaration, he notes that, in his experience, either an "Outside Miranda" statement is exculpatory **or a defendant does not testify**. Declaration of Shane Talbot (filed with SM Motion) at ¶ 27. Questioning a custodial suspect with a premeditated plan to ignore the suspect's invocations, to disparage his right to counsel, and to coerce an involuntary statement to be used for impeachment purposes — and thus to keep him or her off the stand indisputably shocks the conscience.

C. The Uncontroverted Facts Demonstrate That Mr. Bey's Statement Was Involuntary.

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[7]As part of his disparagement of counsel, defendant Talbot said "[F]uck your attorney." Plaintiffs' Exhibit A at 61.

Mr. Bey's moving papers contain a full explanation about the involuntariness of his statement. See Plaintiffs' Motion at 5-7, 24-25. While the Los Angeles defendants assert that Mr. Bey's statement was not involuntary, the same uncontroverted facts that establish a Fifth Amendment violation also show that there was a Fourteenth Amendment violation here. Officers deprived Mr. Bey of counsel and pressured him to speak. In addition, they also repeatedly made the false promise to Mr. Bey that because he asked for counsel his statement could not be used against him. See Plaintiffs' Exhibit G at 10-11.

The California Court of Appeal held that the officers' questioning made Mr. Bey's statement involuntary within the meaning of the Fourteenth Amendment. See People v. Bey, 21 Cal.App.4th 1623, 1628, 27 Cal.Rptr.2d 28 (2d Dist. 1993). Though the Los Angeles defendants attempt to characterize this conclusion as dicta, see LA Motion at 32-34, it is difficult to understand that characterization given the language of the decision. The Court of Appeal first called this "a very troubling case, presenting a deliberate police violation of Miranda coupled with a misrepresentation to appellant about the legal consequences of that violation." Bey, 21 Cal.App.4th at 1628. The Court then reviewed the law on coerced statements, and found that the Court was "compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony. The fact that he did not actually confess to the crime does not change the result. His statements were the product of illegal police coercion." Id. The Los Angeles defendants argue that the holding is "unreliable dicta," claiming that the Court of Appeal did not analyze whether Mr. Bey's statements were caused by the officers' false promises and improper tactics. See LA Motion at 34. However, given the Court's conclusion that Mr. Bey's statements were the **"coerced and involuntary . . . the product of illegal police coercion,"** the defendants' argument must be rejected. The California Court of Appeal unequivocally held that the defendant officers violated Mr. Bey's Fourteenth Amendment rights, and this Court should hold so too.

D. The Uncontroverted Facts Demonstrate That the Conduct of the Los Angeles Defendants Shocks the Conscience.

As with the Santa Monica defendants, the Los Angeles officers argue that the interrogation of Mr. Bey does not shock the conscience. See LA Motion at 30-36. Here the defendants merely reargue what they have already lost. This Court has, following Cooper, determined that a Fourteenth Amendment "shocks the conscience" claim is proper where "police interrogators purposefully and deliberately transgressed Miranda by continuing to interrogate McNally and Bey after they had invoked their right to silence and their right to counsel." March 17 Order at ¶8. The officers' premeditated plan to deliberately ignore Mr. Bey's invocations and instead to force him to give an involuntary statement "[s]o that if he did take the stand, his testimony could be impeached" — thereby dramatically reducing the likelihood that Mr. Bey would take the stand in his own defense — is conduct that shocks the conscience.

VI. MR. BEY AND MR. MCNALLY WERE NOT AFFORDED "DE FACTO USE IMMUNITY."

In their motions, the Santa Monica and Los Angeles defendants claim that Mr. McNally and Mr. Bey were somehow granted "de facto use immunity," and thus, that their statements were not coerced or involuntary. The defendants' creative attempt to portray the officers' false promises as "de facto use immunity" is an after-the-fact characterization, wholly without basis in law or fact. There is no creature in our laws called "de facto use immunity": an assertion of Fifth Amendment privilege may be overcome when a **prosecutor secures an order** granting a person immunity that is co-extensive with the privilege. Further, the defendants' use of Mr. McNally and Mr. Bey's statements is inimical to any claim that plaintiffs were protected by some form of immunity. The defendants' arguments must be rejected.

A. Mr. Bey and Mr. McNally Never Received Orders of Immunity Pursuant to Cal. Penal Code § 1324, Nor Were the Defendant Officers Authorized to Grant Immunity.

Mr. McNally and Mr. Bey were prosecuted in the state courts of California. Immunity in the California courts is governed by statute. In their motions, the defendants do not identify the applicable code section under which a promise of "use immunity" was theoretically made, but California Penal Code § 1324 is the only California Penal Code provision relating to immunity. Pursuant to § 1324, immunity is 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, 114 Cal. Rptr. 429, 440 (1974) (upholding "the power of the legislature to make the grant of immunity conditional on a request of the district attorney of the county or the Attorney General"). The defendant 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 orders of immunity. Defendant Talbot, in his own declaration, expressly concedes this fact. Talbot admits: "I do not have the power or duty to determine which, if any[,] statements are admissible in a court of law. That is up to the trial judge." Talbot Declaration at ¶31.

Nor have the defendants produced any actual applications for orders of immunity on plaintiffs' behalf, or even any documents indicating that a deputy district attorney or deputy attorney general had intended to seek such immunity. It is difficult to understand the defendants' allegations that an unauthorized promise of what they now choose to call "de facto use immunity" makes the interrogations constitutional as a matter of law. If anything, the defendants' claims about immunity merely demonstrate that the statements by Mr. Bey and Mr. McNally were induced by false, unauthorized, and unfulfillable promises, which shows beyond a doubt that the resulting statements were involuntary.

Interestingly, it is not clear that use immunity even existed in California at the time of the interrogations of Mr. Bey and Mr. McNally. Prior to 1996, § 1324 provided only for transactional and not use immunity. The version of § 1324 in effect at that time stated that after testifying pursuant to a grant of immunity, that person "shall not be prosecuted or subjected to penalty or forfeiture for or on account of any fact or act concerning which . . . he was required to answer or produce evidence." 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. Bey and Mr. McNally, they could not have been prosecuted for murder.

B. The Prosecution's Use and Attempted Use of Mr. McNally's Involuntary Statement Refutes Any Possible Claim of Immunity.

The Supreme Court has held that to overcome a Fifth Amendment claim of privilege, "use" immunity must also include "derivative use" or "use-fruits" immunity. Counselman v. Hitchcock, 142 U.S. 547, 564, 12 S.Ct. 195, 35 L.Ed. 1110 (1892). In Kastigar v. United States, 406 U.S. 441, 452-53, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), the Court upheld the federal use immunity statute, 18 U.S.C. § 6002, precisely because it protects from the derivative as well as the direct use of immunized testimony. When the government prosecutes a person to whom it has granted use immunity, the prosecution has "the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." Kastigar, 406 U.S. at 460. 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, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979). That is because, as the Court held in Portash, "[t]estimony given in response to a grant of . . . immunity is the essence of coerced testimony." Under these principles, it is apparent that no immunity of any type was afforded to Mr. McNally.

The Santa Monica defendants argue that "once the officers told him the statement could not be used against him, [Mr.] McNally was free to `make a clean breast of the whole affair', and of his own free will tell the police about the crime without threat that the statement or derivative evidence could ever be used against him." SM Motion at 16. Even if one believes that there exists — in theory — something called "de facto use immunity," the prosecution's actual use of Mr. McNally's statement at his sentencing, as well as its attempt to use the statement at trial, refutes the notion that Mr. McNally was granted any such protection. At trial, the prosecution never came forward and indicated that it would not use his statement because it was obtained pursuant to a grant of immunity. Instead, Mr. McNally was forced to file a motion in the trial court to suppress his own statement. See Plaintiffs' Exhibit L; Plaintiffs' Motion at 22. The deputy district attorney in fact opposed the motion to suppress, arguing that he could, at the very least, use the statement to impeach. Plaintiffs' Exhibit M. Of course, as set out in Portash, immunized testimony may not be used, even for impeachment. Furthermore, Mr. McNally's forced statements were in fact used against him at sentencing. Plaintiffs' Exhibit N at 76-77;

Plaintiffs' Motion at 22. These facts conclusively refute any notion that Mr. McNally was somehow granted "de facto use immunity."

C. The Prosecution's Use of Mr. Bey's Involuntary Statement Refutes Any Possible Claim of Immunity.

Similarly, it is equally impossible that Mr. Bey was granted any sort of "de facto" use immunity. Incredibly, the Los Angeles defendants argue that even though Mr. Bey's statement **was used at trial to impeach him**, his statements "were in essence never used against him because the jury had overwhelming evidence of Bey's guilt." LA Motion at 23. It is true that the Court of Appeal concluded that, given other evidence, the use of Mr. Bey's involuntary statement at trial was harmless error. People v. Bey, 21 Cal.App.4th 1623, 1629, 27 Cal. Rptr. 28 (2d Dist. 1993). Crucially, however, a finding of harmless error does not mean that the constitutional violation never occurred; the finding means solely that the violation is not sufficient to require the appellate court to reverse the conviction.

The actual use of Mr. Bey's statement for impeachment refutes any possible claim that there was no constitutional violation: had Mr. Bey been granted use immunity, then under Portash, his immunized statement could not have been introduced for impeachment. As the Court of Appeal recognized, Mr. Bey's statement was indeed unconstitutionally coerced and was used for impeachment. Bey, 21 Cal.App. 4th at 31. There is no factual basis for any claim that Mr. McNally was given so-called "de facto use immunity."

D. The Garrity Line of Cases, Cited By the Santa Monica Defendants, Does Not Support the Concept of "De Facto Use Immunity."

The Santa Monica defendants cite to Garrity v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967) and its progeny to argue that officers effectively conferred "de facto use immunity" on Mr. McNally. See SM Motion at 12-17. The Garrity line of cases do not support this claim.

In Garrity, police officers were forced to give statements or forfeit their jobs. Garrity, 385 U.S. at 497. No immunity was given to the officers. Id. at 495. The Supreme Court ruled that the statements were coerced and involuntary. Id. at 497. Because the statements were

obtained in violation of the Constitution, the Court ruled that the statements could not be used against the accused in subsequent criminal proceedings. Id. at 500. In so holding, the Court did not create some new legal fiction called "de facto immunity," nor did the Court determine that the exclusion of the coerced testimony meant that the Constitutional violation had never occurred in the first place. Rather, the Court merely determined that full exclusion of the testimony was the appropriate remedy for the Constitutional violation that had already taken place.

Furthermore, the remaining cases relied upon by the Santa Monica defendants do not even address the situation, like Mr. McNally's, in which a person was forced to relinquish his or her Fifth Amendment right and make a statement. Instead, the remaining cases hold that individuals may not suffer adverse consequences for their refusal to waive their Fifth Amendment rights. See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973) (architect could not be disqualified from public contracting for asserting his Fifth Amendment rights); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) (police officer cannot be fired for refusing to waive his Fifth Amendment rights); Lybarger v. City of Los Angeles, 40 Cal.3d 822, 221 Cal.Rptr. 529 (1985) (officer may not be terminated for failure to answer questions, where the officer was not first advised of all of his rights). These cases hold that an individual may not be required to waive his or her Fifth Amendment rights unless that person is given immunity that is co-extensive with the privilege. But these cases hardly stand for the proposition, urged by the Santa Monica defendants, that an individual who has been forced to make a statement over the assertion of a privilege automatically receives some kind of "de facto use immunity" that wholly erases the violation itself.

There is no status or process in our jurisprudence called "de facto use immunity." Courts may well try to fashion a remedy to protect an individual who has already suffered a constitutional violation. But an exclusionary rule designed to lessen the harm does not mean that the violation never occurred at all.

V. DEFENDANTS BENNETT, CROSBY, COOPER, AND TALBOT ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY HAVE VIOLATED PLAINTIFFS' CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

Government officials are shielded from liability for civil damages under the theory of qualified immunity only if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); Pierce v. Multnomah County, 76 F.3d 1032, 1037 (9th Cir. 1996).

Defendants Bennett, Crosby, Cooper, and Talbot argue that they are entitled to qualified immunity because at the time of the plaintiffs' interrogations, no reasonable officer could have known that the continued interrogation of a suspect — after the suspect has made a clear invocation of his or her rights to remain silent and to counsel — would violate the suspect's rights. LA Motion at 40-43; SM Motion at 30-31. This claim, however, flies in the face of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), in which the U.S. Supreme Court held *thirty years ago* that the Fifth Amendment privilege against self-incrimination extends to custodial interrogations by the police, and that when a person in custody asserts his or her rights, interrogation must cease:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he [or she] wishes to remain silent, the interrogation must cease. If the individual states that he [or she] wants an attorney, the interrogation must cease until an attorney is present.

Id. at 474 (emphasis added).

Though the defendants seem uncertain on this point, no reasonable officer could misunderstand these words. "Interrogation" means "the act of interrogating," or "a question put." Webster's Third New International Dictionary (Unabridged) at 1182 (1993). "Must" means "is commanded or required to." Id. at 1492. "Cease" means "to leave off," "bring to an end," or "to put a stop to." Id. at 358. Hence, since 1966, the law has plainly required officers to stop asking questions when a suspect asks for counsel. Moreover, the Supreme Court has reiterated this plain and unambiguous command, time and time again. See, e.g., Edwards v. Arizona, 451 U.S.

477, 484-85, 101 S.Ct. 1880, 69 L.Ed.2d 378 (1981) (an accused who asks for counsel "is not subject to further interrogation by the authorities until counsel has been made available"); Fare v. Michael C., 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979) (request for counsel "is a per se invocation of the Fifth Amendment, requiring that all interrogation cease").

The defendants' primary qualified immunity argument is the same one that they have made and lost before. The defendants contend that the law was not established until relatively recently that officers could be subjected to liability under § 1983 for deliberately questioning in violation of Miranda, and so the law was not "clearly established" when the plaintiffs were interrogated. LA Motion at 38-40; SM Motion at 28-30. This argument was squarely rejected by this Court in denying the defendants' motion to dismiss. In rejecting this argument, this Court held that "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." CACJ v. Butts, 922 F.Supp. at 338. This ruling is the law of the case. The defendants have not put forth any reason to reconsider this ruling under any of the three narrow exceptions to the doctrine. See, e.g., United States v. Garcia, 77 F.3d 274, 276 (9th Cir. 1996). Nor can the "expert" declarations attached to the defendants' motion provide any reason for this Court to reconsider its position. As the Supreme Court held in Harlow v. Fitzgerald, 457 U.S. 800, 819, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the standard is "objective legal reasonableness." The expert declarations are wholly irrelevant — what is objectively reasonable should be determined by examining the plain language of Miranda, Edwards, and their progeny.

Further, while defendants contend that a Miranda violation amounts to nothing more than a violation of procedural safeguards, Miranda made clear that the Fifth Amendment privilege against self-incrimination is jeopardized once an individual is taken into custody and subjected to questioning. Id. at 478. "The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." Id. at 476 (emphasis added).

In Cooper v. Dupnik, 963 F.2d 1220 (9th Cir. 1992) (en banc), the Ninth Circuit dismissed the argument, identical to the one defendants make here, that the defendants' conduct

involved merely a violation of prophylactic safeguards and not of constitutional rights. The Ninth Circuit stated that such an argument ignores the fundamental aspect of Miranda, which extends the Fifth Amendment into police stations. Id. at 1239. The Court held that to focus exclusively on the second part of the Miranda opinion, which articulates safeguards designed to protect the substantive constitutional right to remain silent, would be to discount the violation of that right itself. Id. at 1239. The Court went on to state:

> This warning is required as a procedural safeguard, but more importantly it expresses a substantive constitutional right. . . . It is wrong, therefore, to relegate this part of the advisement to the status of "only a prophylactic device": It is a prophylactic device, but it expresses a substantive right.

Id. at 1240 (emphasis original and added). While the specific *language* of the Miranda warnings is not constitutionally required and hence is "prophylactic," defendants have not suggested — nor can they — that California's criminal justice system has adopted equally effective safeguards that may relieve a state of its obligations to give Miranda warnings. See Miranda, 384 U.S. at 476.

Defendants have likewise ignored this Court's Memorandum Opinion in which the Court acknowledged that the Supreme Court's rationale behind Miranda was "to deter — to compel respect for the constitutional guaranty" and that this deterrent purpose was applicable where there was "willful, or at the very least negligent, conduct which has deprived the defendant of some right." CACJ v. Butts, 922 F. Supp. at 336 (quoting Michigan v. Tucker, 417 U.S. 433, 446, 94 S.Ct. 2357 (1974)). As this Court further stated, it has long been clearly established law that the impeachment exception is exactly that — an exception and not the rule:

> 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.

Id. (citing Cooper, supra). This ruling is, of course, the law of this case.

Rather than acknowledge this Court's and the Ninth Circuit's unequivocal analysis, defendants rely on the Third Circuit case, Giuffre v. Bissell, 31 F.3d 1241 (3rd Cir. 1994). LA

Motion at 38-40; SM Motion at 28-30. Not only is Giuffre non-binding, its reasoning is directly counter to the *en banc* Ninth Circuit opinion in Cooper. The Third Circuit attempted to distinguish Giuffre from Cooper in part by asserting that Giuffre's interrogation in May 1990 occurred prior to the 1992 *en banc* holding of Cooper. Giuffre, 31 F.3d at 1256. The Los Angeles defendants would like this Court to follow this same flawed reasoning, stating that Mr. Bey's interrogation took place in March, 1991. LA Motion at 39-40. To do so, however, would require this Court to ignore the Ninth Circuit's unequivocal conclusion in Cooper that "**the relevant legal standards were 'clearly established' in 1986,**" when Mr. Cooper was interrogated. Cooper, 963 F.2d at 1251 (emphasis added). The defendants in this case thus should have fully understood these same legal standards in 1991 and in 1993 when the plaintiffs here were interrogated.

Both the Santa Monica and Los Angeles defendants argue that, even if a custodial suspect's right to have the interrogation cease when he or she requests counsel was "clearly established" at the time of plaintiffs' interrogations, the officers reasonably believed they were acting appropriately. SM Motion at 30-31; LA Motion at 39-43. As proof, defendants argue that training on questioning "Outside Miranda" is widespread. Id. This is a mere tautology: defendants cannot simply bootstrap their officers out of personal liability by training even more officers to conduct unconstitutional interrogations.

The defendant officers — like anyone who has ever watched television — have heard innumerable times that a suspect has the right to remain silent during questioning, to have an attorney present, and that if the suspect cannot afford an attorney, one will be provided at no charge. It is undisputed, moreover, that both the Santa Monica and Los Angeles defendant officers informed plaintiffs of these rights during the interrogations. Plaintiffs' Exhibits A and G.. Given the unequivocal requirements of Miranda, it is clear that, as a matter of law, no officer could reasonably believe that a premeditated plan calculated precisely to evade Miranda's dictates could possibly be permissible.

The existence of a premeditated plan also serves to distinguish this case from Giuffre. In Giuffre, there were no allegations nor admissions of a premeditated plan to interrogate the

suspect "Outside Miranda." Id. at 1256. In contrast, the defendant officers here, as in Cooper, acted pursuant to a preexisting interrogation plan whereby they purposefully ignored plaintiffs' repeated invocations for counsel and to remain silent. As discussed at length in plaintiffs' motion to dismiss, it is evident that the defendant officers relied upon their "questioning 'Outside Miranda'" training with the premeditated plan of ignoring plaintiffs' invocations. See, e.g., Plaintiffs' Motion at 12-17, 21-26; Exhibits A and G attached thereto. For example, after each of Mr. McNally's six invocations and each of Mr. Bey's five invocations, the defendant officers continued to pressure plaintiffs into speaking. Id. In both interrogations, the officers informed plaintiffs that they had the right to remain silent and to counsel, yet then informed plaintiffs that the officers did not intend to honor these rights. Id. In addition, the officers in both instances falsely assured plaintiffs that nothing they said could be used against them. Plaintiffs' Motion at 21-26; Exh. A; Exh. G.

The case before this Court is not one in which the police violations of Miranda were benign so as to shield the officers from liability. Benign violations do not include deliberate and premeditated decisions by officers to acquire statements from suspects once the suspect has made clear that he or she wishes to speak with an attorney or to remain silent. Cooper, 963 F.2d at 1244. The prophylactic characteristic of the Miranda warnings is no longer at play when the suspect invokes constitutional rights which officers, without batting an eye, choose to ignore. Cooper, 963 F.2d at 1240. Once the plaintiffs here invoked their Fifth Amendment rights, the defendant officers' decision to ignore the invocations was a decision to ignore the rights themselves. This is precisely what Miranda sought to prevent.

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

Relying primarily on Canton v. Harris, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), and Board of County Cmmrs. of Bryan County v. Brown, 1997 U.S. LEXIS 2793 (April 28, 1997), defendants make two arguments in an attempt to deny municipal liability: (1) that the cities of Santa Monica and Los Angeles did not evidence "deliberate indifference" in training officers to intentionally question suspects after the suspects have invoked their constitutional

rights; and (2) that there was no causal link between the deprivation of plaintiffs' rights and the municipal action. SM Motion at 31-35; LA Motion at 44-45. Defendants are wrong on both counts.

In its recent decision in Bryan County, the Supreme Court determined that the county was not liable for a sheriff's isolated decision to hire one individual based on an inadequate screening. Bryan County, 1997 U.S. LEXIS 2793 at *33. The Court contrasted that situation from a situation — like the one at bar and in Canton — in which there is a failure to train. Id. at *23-26. In fact, the Supreme Court stated that in a training case there may be liability even for the failure to adequately train a **single** officer: "[P]redicting the consequence of a single hiring decision . . . is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties." Id. at *25. The Court reasoned that there is a lack of causation in a hiring situation because an official could unwittingly hire an errant officer even after a thorough background check. Id. at *26. However, when — as here — there is "a pattern of tortious conduct by inadequately trained employees[,] [this] may tend to show that the lack of proper training ... is the 'moving force,'" or causal link, behind the plaintiff's injury. Id. at *21 (citing Canton, 489 U.S. at 390-91).

In addition to stating that there may be sufficient causation in the failure to train even a single officer, the Supreme Court ruled that the fact that the officer's conduct flows predictably from his or her training can be sufficient to establish a finding of deliberate indifference:

> [A] violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations. The likelihood that the situation will recur and the predictability . . . could justify a finding that policymakers' decision not to train the officer reflected 'deliberate indifference[.]'

Id. at *24.

In the case at bar, the requirements of causation and "deliberate indifference" are easily met. The defendant municipalities have not only failed to equip their officers with the tools necessary to handle the recurring situation of custodial interrogations, they in fact train their

officers to question "outside Miranda," with the predictable — and inevitable — result that suspects' constitutional rights are violated.

A. The City of Santa Monica is Liable.

The City of Santa Monica supports its claim that there is no municipal liability with the disingenuous assertion that the City somehow "does not have a policy or practice of deliberately disregarding Miranda requirements." SM Motion at 33. The City backs this claim solely with a single sentence from the declaration of Marianne Fullove. Ms. Fullove is an SMPD officer in charge of training whose identity the City failed to disclose, even after plaintiff McNally had noticed the deposition of "the person(s) most knowledgeable . . . who . . . have lectured, taught, trained, and/or made presentations . . . to [SMPD] officers or those training to be SMPD officers, concerning questioning custodial suspects outside Miranda." Exhibit A, attached to the Declaration of Taylor Flynn, filed concurrently with Plaintiff McNally's Motion to Strike (May 16, 1997). Because of the City's noncompliance with the rules of discovery, plaintiff McNally has moved this Court to strike Ms. Fullove's declaration. See generally Motion to Strike Declarations (May 16, 1997).

Moreover, Ms. Fullove's statement — that officers who attend the P.O.S.T. certified basic academy are trained to discontinue questioning upon an invocation of rights — is irrelevant to the question of the City's policy and practice in felony cases. As the City stipulated, detectives in the SMPD's Office of Criminal Investigations conduct "virtually all" of the custodial interrogations in felony cases. Stip. at ¶5. That Office is supervised by defendant Cooper. Stip. at ¶6. In its motion for summary judgment, the City states that "**[t]he officers . . . received training that it was permissible to question outside of Miranda.**" Id. at 31 (emphasis added). Defendant Cooper, the head of the Office of Criminal Investigations, has questioned other suspects "Outside Miranda," as well. Stip. at ¶¶6, 8. Finally, Chief Butts has, himself, issued a Training Bulletin that encourages officers to question "Outside Miranda." See Plaintiffs' Exhibit E. All the evidence indisputably demonstrates that, as a matter of law, the City of Santa Monica was "deliberately indifferent" to the practice of questioning "Outside Miranda."

B. The City of Los Angeles is Liable.

The City of Los Angeles argues that it is not liable because its officers are trained to question "outside Miranda" in a "non-coercive" manner. LA Motion at 44. The City, however, does not deny that LAPD officers are trained that it is permissible to read suspects their rights with the intention of refusing to honor those rights. Defendant officers Bennett and Crosby, as well as the LAPD interrogation trainer, Rick Papke, have all consistently testified that LAPD officers are so trained. See e.g., 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; Plaintiffs' Exhibits F, I, and J.

In addition, the City itself has admitted in its Answer that, although LAPD officers are told to engage in "non-coercive" questioning, they are in fact trained to deliberately question suspects who have invoked their rights. Answer of Los Angeles Defendants to Second Amended Complaint at ¶¶17, 27, 28, 32, 33, 37, and 38. Moreover, counsel for the City acknowledged that in Rick Papke's training sessions, Mr. Papke actively *recommends* that LAPD officers question "Outside Miranda." Papke at 25.

The premeditated plan to interrogate suspects with every intention of continuing to question those who invoke their rights is a plan calculated to instill hopelessness into the suspects, who are already in an environment that is inherently coercive. Miranda, 384 U.S. at 458. The City of Los Angeles does not shield itself from liability for instituting such a plan simply by giving officers a vague, blanket admonition to carry out their plan "non-coercively."

VII. DEFENDANT BUTTS IS LIABLE UNDER 42 U.S.C. §1983.

Relying largely upon Judge Taylor's recent opinion in Luke v. Abbott, 97 Daily Journal D.A.R. 4391 (C.D. Cal., April 3, 1997), the Santa Monica defendants assert that Chief Butts is not liable in his official capacity under 42 U.S.C. §1983. SM Motion at 35. The Santa Monica defendants, however, overstate the scope of Judge Taylor's holding. In Luke, the Court addressed the issue of when a plaintiff has filed suit against a government official **not** in the person's individual **and** official capacity, but in his or her **official capacity only**: "[When] the officer is

named in official capacity **only**, the officer is a redundant defendant and **may** be dismissed." Luke, 97 D.A.R. 4391 at 4392 (emphasis added)(citation omitted).

Defendant Butts cannot escape liability for his own actions simply because the municipality, too, is liable. He is more than a mere figurehead for the City: he has been an active participant in setting the City's unconstitutional policy. In his Training Bulletin, defendant Butts actively encourages officers to question "Outside Miranda" by stating, for example: (1) "Did you know that a voluntary statement **deliberately** taken by police **without following the procedure recommended in Miranda** can legitimately be used for impeachment"; and (2) "Since Miranda is not of constitutional dimension, **officers risk no civil liability** for 'benign' questioning outside Miranda." Plaintiffs' Exhibit E (emphasis added).

Furthermore, defendant Butts is liable in his individual capacity as well. The Santa Monica defendants assert that Chief Butts did not "set[] in motion a series of acts by others which the actor knows or reasonably should know would cause another to inflict the constitutional injury." SM Motion at 36 (quoting Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978)). However, defendant Butts failed to ensure adequate oversight of his officers' training or conduct, including the fact that **no one** reviewed defendant Cooper's reports of the custodial interrogations that he conducted. Stip. at ¶¶4-7; Deposition of James Butts (March 6, 1997) ("Butts"), lodged concurrently with Plaintiffs' Motion for Summary Judgment, at 22, 32, 51-52, 120; Talbot at 8; Plaintiffs' Motion at 27.

Defendant Butts is also liable in his individual capacity for expressly ratifying his department's custom and policy. Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991). He never disciplined, or requested that Officers Cooper and Talbot be disciplined, for their unconstitutional interrogation of Mr. McNally. Butts at 37, 136; Stip. at ¶12. Defendant Butts put the policy in writing in 1995, Exh. E, and the policy continues unchanged to this day. See, e.g., 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 has defendant Butts taken any corrective action even after he was put on notice by this Court's Memorandum Opinion that it is unconstitutional for officers to have

a premeditated plan to disregard a suspect's invocation of rights. Butts at 144-45; Plaintiffs' Motion at 28.

VIII. MR. MCNALLY'S INVOCATION OF HIS FIFTH AMENDMENT PRIVILEGE IS NOT A PROPER BASIS FOR DISMISSAL OF HIS SUIT.

James McNally may exercise his privilege against self-incrimination whenever he is confronted with the real threat of incrimination. Contrary to the Santa Monica defendants' assertion, SM Motion at 7-11, dismissing this lawsuit simply because of Mr. McNally's invocation of the privilege would be inappropriate because the Santa Monica defendants are neither prejudiced nor unduly burdened. In fact, as their reliance upon Mr. McNally's interrogation transcript and trial proceedings demonstrate, the Santa Monica defendants have not been hindered in any way in arguing either that they should prevail on liability as a matter of law, or that Mr. McNally's damages claim should be dismissed. Santa Monica Motion at 11-26, 36-39. The Santa Monica defendants cannot at this late date import an untimely motion to compel into this motion for summary judgment, nor have this Court in effect re-try the underlying criminal action.[8]

A. Mr. McNally May Assert his Fifth Amendment Privilege in This Proceeding.

A person may seek the protection of the Fifth Amendment in either a criminal or a civil proceeding. Lefkowitz v. Cunningham, 431 U.S. 801, 805, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

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[8]The Santa Monica defendants place great emphasis on the facts of Mr. McNally's underlying criminal conviction. For instance, beginning with Mr. McNally's arrival in California, defendants describe in detail the crime scene, SM Motion at 2-3, the contents of Mr. McNally's "Outside Miranda" statement, id. at 6, and even include photos of the murder victim, Santa Monica's Exhibit G. Plaintiffs can only surmise that the Santa Monica defendants, like their declarant Raymond Hill, would like this Court to be influenced by the claim that "[Mr.] Bey and [Mr.] McNally are convicted murderers where [Mr.] Cooper was in fact an innocent person[.]" See Declaration of Raymond Hill (May 2, 1997) at ¶ 16, which plaintiffs have moved to strike from the record.

As the Santa Monica defendants and declarant Hill should be aware, however, it is a fundamental precept that a criminal defendant's constitutional rights do not depend on the ultimate determination of guilt or innocence.

The validity of the privilege's exercise is simply whether the claimant is "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." United States v. Apfelbaum, 445 U.S. 115, 128, 100 S.Ct. 948, 63 L.Ed.2d 250 (1980) (citations omitted). Under this standard, the Ninth Circuit has held that a party may claim the privilege even if the risk of prosecution is remote. In re Master Key Litigation, 507 F.2d 292, 293 (9th Cir. 1974).

Mr. McNally easily satisfies this standard. Santa Monica seeks answers concerning the factual predicate of Mr. McNally's conviction.[9] Mr. McNally previously testified about these facts during his criminal trial. He successfully reduced the charge from first degree murder to voluntary manslaughter. As such, he is concerned that even the slightest (and even immaterial) variation in his deposition statements may be used against him in a criminal proceeding charging him with committing perjury at his prior trial. Mr. McNally does not forget that SMPD officers questioned him in violation of the Constitution, and he fears future prosecution by these same officers, who have already shown that they do not respect the law. Therefore, Mr. McNally can properly invoke his Fifth Amendment privilege as to questions involving the facts underlying his conviction.

B. The Santa Monica Defendants Incorrectly Claim that Invocation of the Fifth Amendment Privilege Estops Mr. McNally from Proceeding in This Action.

The Santa Monica defendants use Lyons v. Johnson, 415 F.2d 540 (9th Cir. 1969), cert. denied 397 U.S. 1027, 90 S.Ct. 1273, 25 L.Ed.2d 538 (1970), for the proposition that an invocation of a plaintiff's Fifth Amendment right in a civil case should lead to dismissal of the

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[9]In its Motion, the Santa Monica defendants assert that Mr. McNally invoked the Fifth Amendment privilege concerning the facts surrounding his sentencing as well as his underlying conviction. SM Motion at 9. Concerning the facts of his sentencing, however, counsel for Mr. McNally told defendants' counsel that plaintiff's only objection to the questions concerning sentencing was that Mr. McNally could not read the sentencing judge's mind and on that judge's basis could not answer questions about the basis for the sentencing. Declaration of Taylor Flynn (May 19, 1997) at ¶ 6. Instead, counsel for both parties agreed that plaintiff McNally would stipulate to the authenticity of the sentencing hearing transcript and that the Santa Monica defendants would not make a motion to compel on questions concerning Mr. McNally's sentencing . Id.

action. They are wrong. Initially, *Lyons*, as well as almost all the cases dealing with the sanction of dismissal after invocation of a privilege, involved a party's invocation of a privilege after an order by the court to answer the offending questions. Id. Another case cited by the defendants demonstrates that the harsh sanction of dismissal must first be preceded by a judge's determination of the merits of the claimed privilege and an order to compel, if appropriate. See Black Panther Party v. Smith, 661 F.2d 1243, 1256 (D.C. Cir. 1981).[10]

Furthermore, defendants' reliance on Lyons is misplaced. Lyons represents a rare and unusual situation. See Campbell v. Gerrans, 592 F.2d 1054, 1057 (9th Cir. 1979) (noting the unique facts in Lyons). In Lyons, the court described the attitude of the plaintiff as one of an "unyielding refusal." Id. The plaintiff refused to answer *any* interrogatories and the court believed that the plaintiff improperly pled the Fifth Amendment to at least some of the questions propounded. Id. In contrast, the plaintiff in Campbell answered most of the interrogatories sought and properly asserted the Fifth Amendment privilege to the remaining questions. Id. Therefore, the Ninth Circuit held that the Campbell trial court abused its discretion when it dismissed the action based on the plaintiff's invocation of the Fifth Amendment. Id. at 1058.

Indeed, it is erroneous to view the valid assertion of the Fifth Amendment in the discovery stage as improper. Campbell, 592 F.2d. at 1057. In Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1964), the Supreme Court addressed the problems associated with the prosecution's ability to comment on an accused's silence. The Court expressed that a party should suffer no penalty for exercising the Fifth Amendment privilege. Id. at 614. Such a penalty includes the imposition of any sanction that makes asserting the privilege "costly." Id. Dismissing an action is "costly" and does not survive the Griffin test. Campbell, 592 F.2d at 1058. Only "upon a serious showing of willful default," should a court

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[10]While counsel for the Santa Monica defendants and Mr. McNally conducted a "meet and confer," once in person and once via phone, to discuss potential cross-motions to compel, the deadline for filing such motions passed without a filing from either party. Flynn Dec. at ¶¶ 3, 7.

impose the severe sanction of dismissal. Id. (quoting Gill v. Stolow, 240 F.2d 669, 670 (2d Cir. 1957)).

In the present case, the Santa Monica defendants have not made a showing of willful default on the part of Mr. McNally. They have not because they cannot; Mr. McNally has fulfilled his discovery obligations in this case. Far from asserting his Fifth Amendment privilege to block all discovery requests as in Lyons, Mr. McNally was forthcoming and cooperative with defendants: he complied with requests for production of documents, and he answered most of the questions propounded during his 5-1/2 hour deposition, in the interrogatories, and in the request for admissions without asserting his Fifth Amendment privilege. Flynn Dec. at ¶ 5. He invoked his privilege only for one category of questions, those dealing with the underlying facts of the crime: facts which are already available to defendants via the transcripts of Mr. McNally's interrogation and criminal trial. Under these circumstances, it would be an abuse of discretion to impose the severe sanction of dismissal.[11]

C. Mr. McNally's Invocation of the Privilege Does Not in Any Way Prejudice or Unduly Burden the Santa Monica Defendants.

Instead of summarily dismissing an action for the assertion of a privilege, a "court should . . . measure[] the relative weights of the parties' competing interests with a view toward accommodating those interests, if possible." Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1088 (5th Cir. 1979). If less burdensome remedies would prevent unfairness to the defendant, dismissal when a plaintiff invokes the Fifth Amendment would be inappropriate. Id. at 1089. Holding that the defendant must establish prejudice before any remedies are appropriate, the Wehling court found that, though the questions asked were relevant to the defense, imposing a three-year hiatus on further discovery until the statute of limitations expired

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[11]The defendants incorrectly characterize Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, (1st Cir. 1989) as supporting dismissal of Mr. McNally's claim. In that case, a defendant invoked his Fifth Amendment privilege during discovery, and the First Circuit simply decided that it would be unfair for the defendant to take the stand since he did not answer questions during discovery. In contrast to defendants' request here, the court did not enter a judgment on behalf of the plaintiff, nor did the court consider the invocation to be equivalent to an admission.

would not impose an undue hardship on the defendant. Id. at 1088-89. Hence, the Fifth Circuit reversed the lower court's dismissal of the lawsuit. Id. at 1089.[12]

Mr. McNally's invocation of his Fifth Amendment privilege likewise should not result in dismissal of the lawsuit, nor should it result in any other sanctions because the invocation does not prejudice the defendants. The Santa Monica defendants already have the information through alternate sources: the transcript of Mr. McNally's interrogation and the transcript of his criminal trial. These sources are equivalent to deposition answers because Mr. McNally described the factual predicate under oath and in an adversarial court proceeding. In fact, the Santa Monica defendants' motion for summary judgment stands as proof of the lack of prejudice: by relying on Mr. McNally's interrogation transcript, deposition transcript, and the transcript of his criminal trial, the defendants argue that they should win on liability as a matter of law and that Mr. McNally's damages claim should be dismissed. Santa Monica Motion at 11-26, 36-39.[13]

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[12]Wehling demonstrates that the defendants' reliance on Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975) is also misplaced. Hearn, like Wehling, requires a showing of prejudice: a finding that the assertion of the privilege would deny the party access to information vital to the defense. Hearn 68 F.R.D. at 581. In addition, Hearn is distinguishable because it addressed the waiver of the attorney-client privilege upon a claim of qualified immunity and was decided before the binding case of Campbell, 592 F.2d 1054, which directly addressed the Fifth Amendment privilege.

[13]In the event that this Court were to find that the Santa Monica defendants are unduly prejudiced, the Court must first look to "other, less burdensome remedies." Wheling, 608 F.2d at 1089. The defendants argue that having to rely on the transcripts of Mr. McNally's interrogation and criminal trial regarding the facts of the underlying crime make it difficult to defend against his damages claim. SM Motion at 10. There are two aspects to Mr. McNally's claim for damages: the months spent researching the motion to suppress his "Outside Miranda" statement, for which he was not credited, and emotional distress.

The defendants do not — and cannot — explain how the underlying facts of the crime are in any way relevant to Mr. McNally's claim for lost time. Thus, if the Court were to find that the Santa Monica defendants were prejudiced, as a "less burdensome remedy," Mr. McNally would agree to drop his claim for emotional distress damages.

D. The Santa Monica Defendants Erroneously Assert that this Court Can Draw Adverse Conclusions Solely from Mr. McNally's Assertion of His Fifth Amendment Privilege.

The Santa Monica defendants invoke Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct 1551, 47 L.Ed.2d 810 (1976), for the proposition that the Court is entitled to draw adverse inferences from Mr. McNally's Fifth Amendment invocation. Santa Monica Motion at 11. This is misleading Baxter specifically states that in a civil trial inferences may be drawn against a party who invokes the Fifth Amendment privilege "**in response to probative evidence offered against [that party]**." Id. at 318 (emphasis added). Mr. McNally has invoked his privilege not in response to relevant, affirmative evidence offered by the defendant, but to prevent a hostile adversary — who has already questions him in violation of the Constitution — from initiating another prosecution. Additionally, the Supreme Court emphasized that the respondent was "not in consequence of [his] silence, automatically found guilty of the infraction with which he has been charged." Id. at 317. Instead, a finding based on "substantial evidence manifested in the record" is required. Id (citation omitted). Only with these limitations did the Court in Baxter uphold the penalty assessed against the respondent.

Here, the Santa Monica defendants' allegation that Mr. McNally perjured himself is simply that: an allegation. The Santa Monica defendants fail to offer any probative evidence against Mr. McNally to support a legal or factual finding that Mr. McNally perjured himself. Without an independent evidentiary foundation upon which to base their claim, and without a showing that Mr. McNally's invocation is in response to the defendants' relevant evidence, no adverse inference against Mr. McNally can be sustained.

IX. MR. MCNALLY IS ENTITLED TO RECOVER DAMAGES UNDER 42 U.S.C. SECTION 1983.

There are two aspects to Mr. McNally's damages claim: the months spent researching his motion to suppress his "Outside Miranda" statement, for which he was not credited, and for emotional distress. Deposition of James McNally ("McNally"), at 119-121, 126-130, lodged concurrently with Plaintiffs' Motion for Summary Judgment. Contrary to the assertion of the Santa Monica defendants, SM Motion at 36-38, Mr. McNally is entitled as a matter of law to

bring a claim for damages under 42 U.S.C. §1983.[14] Further, the degree to which a damage award should be offset by emotional distress due to factors other than the interrogation is not, as the Santa Monica defendants suggest, id. at 38-39, a question of uncontroverted fact that can be determined on a motion for summary judgment.[15]

At the underlying criminal proceeding, Mr. McNally elected to represent himself, as provided under Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Because defendants Cooper and Talbot had obtained a statement from Mr. McNally in violation of law, he was obliged to have the trial court suppress its use as evidence. Unschooled in the law, Mr. McNally required several months to research the "Outside Miranda" issue in preparing his motion to suppress. McNally at 119-121. At sentencing, the Superior Court did not grant Mr. McNally credit for his pre-sentence confinement solely because Mr. McNally had a parole hold lodged against him by Pennsylvania authorities. Plaintiffs' Exhibit N at 85. The result, in Mr. McNally's words, was that "the time that I spent researching [the motion to suppress] is time that I have totally lost in my life." McNally at 119-121.

Defendants contend that, because the trial court failed to credit Mr. McNally for the pre-trial incarceration, he is barred from bringing forth this claim pursuant to Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). In Heck the Supreme Court held that, when a plaintiff moves to recover damages for unconstitutional conviction or sentence under § 1983, a court may review the claim only when a favorable judgment will not necessarily imply the invalidity of the conviction or sentence. See Heck, 129 L.Ed.2d at 394; see also Trimble v. City of Santa Rosa, 49 F.3d 583 (9th Cir. 1995) (per curiam) (finding that plaintiff's claim necessarily implied the invalidity of plaintiff's conviction and thus was premature). Defendants

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[14]The Ninth Circuit has long held that damages may be recovered for mental and emotional distress in a § 1983 case. See, e.g., Donovan v. Reinbold, 433 F.2d 738, 743 (9th Cir. 1970).

[15]As discussed above, if this Court determines that Mr. McNally's invocation of his Fifth Amendment privilege concerning the facts of his underlying conviction subjected the Santa Monica defendants to an undue burden or prejudice, Mr. McNally would agree to drop his claim for emotional distress damages.

further contend that Mr. McNally is required to invalidate his conviction before bringing this claim. SM Motion at 37-38.

The Santa Monica defendants, however, fail to recognize the limits expressed in Heck, which does not bar any recovery of damages here. In Heck, the Court held that when a claim for damages will not demonstrate invalidity of the plaintiff's conviction or sentence, and there is no other bar to the suit, it should be allowed to proceed. Heck, 129 L.Ed.2d at 394 (footnote omitted). The Ninth Circuit elaborated upon this point in Smithart v. Towery, 79 F.3d 951 (9th Cir. 1996)(per curiam), in which the plaintiff brought a civil rights action for excessive force used by defendant officers in the course of the plaintiff's arrest. The Ninth Circuit held that the plaintiff's claim would not necessarily imply the invalidity of his arrest or conviction, so he could bring a § 1983 claim. Id. at 952. Further, the Court held that a § 1983 claim may be brought — despite plaintiff's valid conviction — **so long as the civil rights claim would not call plaintiff's conviction or sentence into question**. Id. at 953. [16]

At Mr. McNally's sentencing hearing, the Superior Court did not grant Mr. McNally pre-trial sentence custody credits because the State of Pennsylvania had filed a detainer against Mr. McNally. Plaintiffs' Exhibit N at 85. Id. Because time Mr. McNally spent researching the "Outside Miranda" issue for his suppression motion occurred during this period, defendants' unlawful interrogation had the net result of increasing Mr. McNally's overall period of confinement by several months. The trial court's refusal to grant Mr. McNally's pre-sentence credit was based solely on the Pennsylvania detainer, and not on the Miranda violation. Thus, awarding Mr. McNally damages for his added efforts in preparing the motion to suppress does not imply the invalidity of the conviction or sentence. Rather, an award will merely compensate

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[16]The Ninth Circuit's Smithart decision is also in accord with its decision in Trimble, supra. In Trimble, the plaintiff alleged that during a criminal investigation and prosecution, defendants violated his constitutional and statutory rights, resulting in his murder conviction. While the Circuit Court barred all claims, basing its decision on either Heck or the statute limitations, the Court noted that a § 1983 action is permitted when success would not necessarily imply the invalidity of his conviction or sentence. Trimble, 49 F.3d at 585.

Mr. McNally's loss of time spent preparing the motion to suppress, time expended only because of defendants' premeditated questioning outside Miranda.

The Santa Monica defendants additionally attempt to dispense with Mr. McNally's emotional distress claim, making — without any citation to the record — the bald assertion that "any distress he suffered resulted from his own criminal act." SM Motion at 39. The determination of the extent to which the plaintiff suffered emotional distress, not attributable to an act of the defendant, which should offset the damages owed by defendant, is a classic example of an issue to be determined by the trier of fact. See e.g., Murphy v. Allstate Ins. Co., 83 Cal.App.3d 38, 51, 147 Cal.Rptr. 565 (1978). Thus, concerning both aspects of Mr. McNally's damages claim, the Santa Monica defendants must hold their arguments for another day.

CONCLUSION

For the reasons set forth in this Memorandum, as well as for the reasons contained in the plaintiffs' own motion for summary judgment and supporting pleadings and exhibits, the defendants' motions for summary judgment should be denied.

DATED: Respectfully submitted,

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

JAMES N. BIANCO
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On the memorandum:
Jorge deNeve
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Law Student Interns

POST-CONVICTION JUSTICE PROJECT
UNIVERSITY OF SOUTHERN
CALIFORNIA LAW SCHOOL

By_____
TAYLOR FLYNN
Attorneys for Plaintiffs

DECLARATION OF TAYLOR FLYNN

I, TAYLOR FLYNN, declare as follows:

1. I have personal knowledge of the within stated facts and if called to testify could and would do so competently. I am co-counsel for plaintiffs in the above-captioned matter.

2. Mr. McNally asserted his Fifth Amendment privilege against self-incrimination for questions asked by the Santa Monica defendants concerning the underlying facts of his criminal conviction. Particularly because he had successfully reduced his criminal sentence from a charge of murder to manslaughter, and because he has filed this civil action, Mr. McNally feared that the SMPD and the District Attorney's office would comb through his statements in order to bring a perjury charge against him for any little discrepancy, real or imagined, between the statements made at his criminal trial and here. Moreover, Mr. McNally knew that defendants Cooper and Talbot had violated the law in order to obtain an involuntary statement from him. Mr. McNally's concern increased when SMPD Detective Talbot flew to Northern California to attend Mr. McNally's deposition.

3. Counsel for plaintiff and the Santa Monica defendants conducted a "meet and confer," once in person and once via telephone to discuss possible cross motions to compel (the Santa Monica defendants were considering filing a motion to compel against Mr. McNally and plaintiff was considering filing one against defendant Butts).

4. Counsel for defendants wanted to bring a motion to compel against Mr. McNally in two areas: the facts concerning his underlying criminal conviction and those concerning the basis for the trial court's imposition of Mr. McNally's criminal sentence at the sentencing hearing.

5. Regarding the former, Mr. McNally asserted his Fifth Amendment privilege based on his reasonable belief that the Santa Monica defendants would use his testimony as a basis to bring a perjury charge against him for any variation from his testimony at trial, however slight. Mr. McNally believed the assertion of his privilege to be justified also because the defendants already had the information concerning the facts of the underlying conviction: via the transcripts of his interrogation and via the transcript of the criminal proceeding, where Mr. McNally

testified under oath. Moreover, far from "wilfully defaulting" on his discovery obligations, Mr. McNally had cooperated fully: he complied with the defendants' request for documents; and he answered most of the questions during his 5½ hour deposition, in the interrogatories, and in the request for admissions without asserting his Fifth Amendment privilege.

6. Regarding the latter, defendants' questions on this issue consisted of Requests for Admissions, numbers 81-88, presented in the following form: "Admit that Judge Fujisaki considered ... [specified facts] ... when imposing sentence for the homicide of James Jones." A true and correct copy of a portion of the Santa Monica Defendants' Request for Admissions is attached hereto as Exhibit A. In our "meet and confer," I explained to defendants' counsel that Mr. McNally's objection to these questions was not based on the Fifth Amendment privilege so much as on the fact that Mr. McNally could not read the sentencing judge's mind. As a compromise, plaintiffs' counsel agreed to stipulate to the authenticity of the sentencing hearing transcript, and defendants' counsel agreed that they would not bring a motion to compel concerning the issue of sentencing.

7. At the conclusion of our second "meet and confer," which took place over the phone, defendants' counsel stated that they intended to file a motion to compel regarding the issue of the facts underlying Mr. McNally's conviction, and plaintiffs' counsel stated that they intended to file a cross-motion to compel defendant Butts to answer specified questions from his deposition. However, a few days before our agreed upon filing date, I called defendants' counsel and informed them that, based upon my reading of this Court's Order Setting Discovery Cutoff (July 11, 1996) — which states that "[d]iscovery motions must be filed and heard prior to the discovery cutoff date" — both parties had missed the filing date for motions to compel. Counsel for defendants agreed, and neither party filed a motion to compel.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 19th day of May, 1996 at Los Angeles, California.

_____

TAYLOR FLYNN

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 PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SANTA MONICA AND LOS ANGELES DEFENDANTS' MOTIONS 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:

JAMES K. HAHN, CITY ATTORNEY
FREDERICK N. MERKIN, SENIOR ASSISTANT CITY ATTORNEY
DEBRA L. GONZALES, DEPUTY CITY ATTORNEY
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(Attorneys for Defendants City of Santa Monica, James Butts, Ray Cooper and Shane Talbot)

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