No. 10-15980

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LOUDERMILK and TIFFANY LOUDERMILK, et al.,

Plaintiffs-Appellees,

v.

MICHAEL DANNER, et al.,

Defendants-Appellants.

D.C. CASE # 2:06-CV-00636-EHC
District of Arizona,
Phoenix

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellees John and Tiffany Loudermilk and their children (collectively "Loudermilks") brought an action in the district court pursuant to 42 U.S.C. § 1983 to redress the alleged deprivation of the Loudermilks' Fourth and Fourteenth Amendment constitutional rights. The district court has jurisdiction over the Loudermilks' claims pursuant to 28 U.S.C. § 1331, which provides for original jurisdiction in the district court over all civil actions arising under the Constitution, laws, or treaties of the United States, and pursuant to 28 U.S.C. § 1343(3) and 1343(4), which provide for original jurisdiction in the district court of suits brought pursuant to 42 U.S.C. § 1983.

Defendants-Appellants Maricopa County Sheriff's Deputies Joshua Ray, Joseph Sousa, Richard Gagnon, and Michael Danner's (collectively "Deputies") are appealing the district court's denial of their Motion for Summary Judgment, which asserted qualified immunity. While the district court's denial of the Deputies' Motion was not a final judgment in the case, the collateral-order doctrine allows for an interlocutory appeal of the district court's denial of qualified immunity where the issue appealed rests on a question of law. *Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S.Ct. 834, 839 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 2817 (1985). This is true primarily because a major

benefit of immunity would be lost if a case is erroneously permitted to continue through pre-trial litigation and trial. *Mitchell*, 472 U.S. at 526-27, 105 S.Ct. at 2815-16.

This Court has "jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts." *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997). The Deputies' appeal focuses on whether the facts adduced by the Loudermilks establish that the Deputies violated the Loudermilks' constitutional rights, and whether those rights were clearly established. Thus, the Deputies appeal two issues: (1) whether, as a matter of law, the facts show that there was no constitutional violation because the Loudermilks consented to the search of their home, and (2) even if the Loudermilks could prove that they believed that their consent to the Deputies' search of their home was somehow being coerced, it would not have been clear to a reasonable official in the Deputies' position that consent was not voluntary, or that the Deputies' conduct was otherwise unlawful in the specific situation they confronted. This Court has asked the parties to include in their briefs "a discussion of the jurisdictional issue." Accordingly, as explained in greater detail below, this Court has jurisdiction over the Deputies' appeal under the collateral-order doctrine.

In *Mitchell*, *supra*, the U.S. Supreme Court held that a district court's rejection of a defendant's qualified-immunity defense is a "final decision" subject to immediate appeal under the general appellate jurisdiction statute, 28 U.S.C. § 1291, pursuant to the "collateral order doctrine." 472 U.S. at 530, 105 S.Ct. at 2817. This Court, relying on the decision in *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151 (1995), initially questioned whether it might lack jurisdiction over the Deputies' interlocutory appeal because the district court found "disputed questions of fact" that led to the denial of the Deputies' summary judgment motion. However, a review of Supreme Court and Ninth Circuit cases decided subsequent to *Johnson* shows that the district court's ruling on the Deputies' qualified immunity defense is subject to immediate appeal.

In *Behrens*, 516 U.S. 299, 116 S.Ct. 834, petitioner had moved for summary judgment on qualified immunity grounds, contending that his actions had not violated any "clearly established" right of respondent. The District Court denied the motion, finding simply that "[m]aterial issues of fact remain as to defendant *Behrens* on the Bivens claim." *Pelletier v. Federal Home Loan Bank of San Francisco*, No. CV 89-0969 (CD Cal., Sept. 6, 1994). The Ninth Circuit rejected petitioner's interlocutory appeal, which then found its way to the Supreme Court. The Supreme Court framed the issue on review as "the extent to which orders

denying governmental officers' assertions of qualified immunity" are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," as set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221 (1949). *Behrens*, 516 U.S. at 305, 116 S.Ct. at 838.

Respondent in *Behrens* asserted that an immediate appeal of the lower court's denial of petitioner's summary judgment motion was not available because the denial rested on the ground that "[m]aterial issues of fact remain," which petitioner maintained rendered the denial unappealable under the Court's earlier decision in *Johnson*. The Court rejected this argument, finding that:

> That is a misreading of the [*Johnson*] case. Denial of summary judgment often includes a determination that there are controverted issues of material fact, see Fed. Rule Civ. Proc. 56, and Johnson surely does not mean that every such denial of summary judgment is nonappealable. *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case.
>
> . . . .
>
> *Johnson* reaffirmed that summary judgment determinations are appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, [citation]

> typically, the issue whether the federal right allegedly infringed was "clearly established" [citations].

Behrens, 506 U.S. at 312-13, 116 S.Ct. at 842. Thus, the Supreme Court found that the District Court's rejection of petitioner's qualified immunity defense was immediately appealable, even though the lower court's order simply found that "[m]aterial issues of fact remain as to defendant Behrens on the *Bivens* claim."

The Ninth Circuit has followed the holding in *Behrens* on numerous occasions. In *Knox*, 124 F.3d 1103, respondent also claimed a *Johnson* exception to the general rule that denials of qualified immunity are orders subject to interlocutory appeal because the district court in that case found that there were disputed issues of fact for trial. In finding that it had jurisdiction over an immediate appeal, the Ninth Circuit held:

> Thus, we have jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts, while we do not have jurisdiction over an interlocutory appeal that focuses on whether there is a genuine dispute about the underlying facts. . . . Even if disputed facts exist about what actually occurred, a defendant may still file an interlocutory appeal if the defendant's alleged conduct in any event met the standard of objective legal reasonableness under clearly established law regarding the right allegedly infringed [citing *Behrens*].

Knox, 124 F.3d at 1107. Here, as in *Knox*, and in contrast to *Johnson*, the Deputies' appeal presents the issues of, given the undisputed facts and/or the facts

proffered by the Loudermilks, whether the Deputies violated the Loudermilks' rights and whether those rights were "clearly established." The appeal does not merely challenge the sufficiency of the Loudermilks' evidence. Thus, as in *Knox*, this Court has jurisdiction to decide the interlocutory appeal.

The Ninth Circuit reached a similar result in *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006). There the district court found that material issues of fact remained and appellee challenged jurisdiction. The Court held that this did not deprive it of jurisdiction under *Johnson*. *Id*. at 1059. *Citing* to *Behrens* and *Knox*, the Court explained that:

> While the district court concluded that issues of fact remain, those disputed facts are not the basis of Shields's interlocutory appeal before this court. Rather, Shields contends that, even after resolving the issues of fact in Kennedy's favor, Kennedy will not have demonstrated that Shields violated her clearly established, constitutional right. Because this question represents an "abstract issue of law relating to qualified immunity," it falls within our jurisdiction on interlocutory appeal.

Id. at 1060.

Recently, the Ninth Circuit decided *Community House, Inc. v. City of Boise, Idaho*, 2010 WL 3895700 (9th Cir. 2010), which also strongly supports jurisdiction in the instant case. There, appellees argued that the appellate court lacked jurisdiction to consider appellants' appeal based on qualified immunity because,

although the district court found that there were genuine issues of material fact regarding whether there had been a constitutional violation, the court ended its analysis there and did not go on to determine the purely legal issue of whether the law was so clearly established that a reasonable official would have known his conduct violated that law. *Id*. at *18. Thus, appellees argued, the appellate court's review could not be separated from the merits of the case and jurisdiction was lacking. The Ninth Circuit rejected this argument, stating that:

> It is true that when reviewing a denial of qualified immunity, "our appellate jurisdiction is limited to questions of law." [citation]. However, we have power to consider qualified immunity even where facts are disputed, so long as we "assum[e] that the version of the material facts asserted by the non-moving party is correct." *Jeffers v. Gomez*, 267 F.3d 895, 903 (9th Cir.2001) (*per curiam*). We have made such an assumption and thus have jurisdiction to consider the second prong of *Saucier's* test. It would be quite incongruous if a public official's right to an immediate appeal from a denial of qualified immunity were to evaporate simply because the district court failed or chose not to complete the required *Saucier* analysis.

Id. at *19. The Deputies' case here is very similar in that the district court did not provide its analysis of the legal issue of whether the law was so clearly established that a reasonable official in the Deputies' situation would have known that his conduct violated that law.

The Deputies seek interlocutory appeal on the questions of whether, as a matter of law, the Deputies' alleged conduct unreasonably violated the Loudermilks' rights given the clearly established law. More specifically, the question on appeal is whether a constitutional violation occurred and, if so, would it have been clear to reasonable officials in the Deputies' situation that they were somehow violating the Loudermilks' rights when they entered the Loudermilks' home after being given consent to conduct a search. The Deputies raised these issues in their summary judgment motion and the district court ruled rejecting the Deputies' qualified immunity defense without an analysis of the "clearly established" question. It does not matter that the district court also found that there were "disputed issues of fact" because the Deputies are not appealing the merits or sufficiency of the Loudermilks' factual claims. The Ninth Circuit has jurisdiction over this appeal.

The Deputies filed this appeal on April 28, 2010 (Excerpt of Record ("ER") 100), which was within thirty days of the district court's March 31, 2010 Order (ER 97) denying the Deputies' qualified-immunity motion (Docket ("Dkt") 78). Accordingly, the appeal was timely under Rule 4(a)(1)(A), Federal Rules of Appellate Procedure.

ISSUES PRESENTED FOR REVIEW

1. Taking the facts in the light most favorable to the Loudermilks, and as a matter of law, did the Deputies violate the Loudermilks' constitutional rights when they searched the Loudermilks' home after the Loudermilks agreed to let them conduct the search following a lengthy consultation with their attorney? As such, did the district court err in not granting the Deputies qualified immunity?

2. Even if the Loudermilks can prove that they believed their consent to the search of their home was somehow coerced and that a constitutional right was thereby violated, are the Deputies nevertheless entitled to qualified immunity because the right allegedly violated was not clearly established? As such, did the district court err in not granting the Deputies qualified immunity?

3. Even if the right the Loudermilks allege was violated was clearly established, did the Deputies make a reasonable mistake in applying the relevant legal doctrine to the particular circumstances they faced such that they are still entitled to qualified immunity? As such, did the district court err in not granting the Deputies qualified immunity?

STATEMENT OF THE CASE

In this civil rights action brought pursuant to 42 U.S.C. § 1983, the Loudermilks alleged that Defendants in the case, including the Deputies, violated

the Loudermilks' Fourth and Fourteenth Amendment constitutional rights when the Defendants searched the Loudermilks' home, allegedly without lawful authority, in response to an anonymous complaint of child neglect. (ER 20) The Deputies filed a motion for summary judgment and accompanying Separate Statement of Facts ("SSOF") arguing that they were entitled to qualified immunity. (Dkt 78, ER 79) The Deputies argued (1) that there was no constitutional violation because the Loudermilks voluntarily consented to the search of their home, (2) that the Deputies did not violate a clearly established right in any event, and (3) that even if it could be argued there was a constitutional violation, the Deputies actions were objectively legally reasonable because it would not have been clear to a reasonable official in the Deputies' position that his conduct was unlawful. (Dkt 78) The Loudermilks responded in opposition to the Deputies' summary judgment motion, and filed their own SSOF (Dkt 83, ER 84) and the Deputies filed their reply and a controverting SSOF (Dkt 94, 95)

The district court denied the Deputies' motion. (ER 97) The court concluded that the question of whether the Loudermilks had voluntarily consented to the search of their home was "arguably for the jury to determine." (*Id*. at pp. 14-15) Significantly, the district court's ruling did not specifically address or include an analysis of the question of whether the Deputies' actions violated a clearly

established right, or whether the Deputies' actions were objectively legally reasonable thus entitling them to qualified immunity. The district court simply ruled that there were disputed questions of fact "underlying the qualified immunity analysis" and denied summary judgment. (*Id*.)

The Deputies timely appealed from the district court's order. (ER 100)

STATEMENT OF RELEVANT FACTS[1]

On March 9, 2005, Child Protective Services ("CPS") officers Rhonda Cash ("Cash") and Jenna Cramer ("Cramer") (collectively, the "CPS Agents") went to the Loudermilks' home to investigate an anonymous complaint that the Loudermilks were neglecting their children. (ER 79, ¶ 1, ER 84, ¶ 28) In connection with this investigation, the CPS Agents called the Maricopa County Sheriff's Office ("MCSO") and asked for an officer to accompany its agents to the Loudermilk home. (ER 79, ¶ 2, ER 84, ¶ 33) Deputy Joshua Ray ("Deputy Ray") was sent by the MCSO dispatch to meet the CPS Agents. (ER 79, ¶ 3, ER 84, ¶ 40) The CPS Agents told Deputy Ray they were investigating a case of child

[1] To the extent possible, this statement of facts is supported by references to the Loudermilks' version of the facts as set forth in their Separate Statement of Facts ("SSOF") in Opposition to the Deputies' summary judgment motion (ER 84), the Loudermilks' exhibits in support of their SSOF (ER 83-1, 83-2) and the Loudermilks' own deposition testimony. Certain other facts are supported by reference to the excerpts of the Deputies' deposition testimony that were included in the Loudermilks' SSOF.

neglect and that they needed to see the children and the inside of the Loudermilks' home to clear the allegations. (ER 79, ¶ 4, ER 84, ¶ 41) Neither Deputy Ray nor the CPS Agents had a court order to remove the Loudermilk children or a warrant to enter the Loudermilk home. (ER 84, ¶ 41)

Deputy Ray and the CPS Agents drove to the Loudermilks' home and knocked on the door. (ER 79, ¶ 6, ER 84, ¶ 56) The Loudermilks did not answer the door, but instead one or both of the Loudermilks came out onto the second story balcony of their home. (ER 79, ¶ 7, ER 84, ¶ 57) The CPS Agents and Deputy Ray asked to be allowed inside the home, but the Loudermilks refused. (ER 79, ¶ 8, ER 84, ¶ 65) At some point soon thereafter, one of the CPS Agents showed Deputy Ray a laminated card which contained excerpts of A.R.S. § 8-821, which statute gives CPS the authority to take children into temporary custody. (ER 79, ¶ 9, ER 83-1 at p. 36 – Ray Depo. 25:4-6) The card CPS provided to Deputy Ray states:

"To take a child into temporary custody if custody is clearly necessary to protect the child because probable cause exists to believe the child is either:

1. a victim or will imminently be a victim of abuse or neglect.

2. suffering serious physical or emotional injury requiring diagnosis.

3. physically injured from living where dangerous or narcotic drugs are

manufactured." (ER 79, ¶ 10)

After the Loudermilks refused to allow CPS access to either the home or the children, Cramer began filling out a petition for a Temporary Custody Notice. (ER 79, ¶ 11, ER 84, ¶ 80-83) A Temporary Custody Notice is a form that a CPS agent in the field gives to a parent when they decide to take a child into custody for up to 72 hours without prior judicial authorization. (ER 84, ¶ 81) No court order or other review is necessary to issue a TCN. *Id.* Once the parent is handed the TCN, the children are in CPS's care. (ER 84, ¶ 83) The CPS Agents stated that they had the authority and obligation, under A.R.S. § 8-821, to take the children into custody to determine whether the allegations of neglect were true. (ER 79, ¶ 12, ER 84, ¶ 67, 76-77)

Based solely on the card containing the excerpts of A.R.S. § 8-821, Deputy Ray initially believed he had the authority to arrest Mr. Loudermilk for obstructing CPS' investigation and/or preventing CPS from taking custody of the children. (ER 79, ¶ 13, ER 84, ¶ 88) However, Deputy Ray never removed his handcuffs or made any move whatsoever to enter the house and arrest Mr. Loudermilk. (ER 79, ¶ 14, ER 83-1 at p. 39 – Ray Depo. 36:5-12) Instead, Deputy Ray decided to wait until he had an opportunity to review the abridged version of the Arizona Revised Statutes he kept in his squad car so he could determine whether, in fact, A.R.S. § 8-

821 gave him authority to arrest the Loudermilks. (ER 79, ¶ 15, ER 83-1 at pp. 36-37 – Ray Depo. 25:23-26:19) While the CPS Agents and Deputy Ray were talking with the Loudermilks, three additional MCSO officers – Danner, Gagnon and Sousa (collectively the "MCSO Standby Officers") – began arriving at the Loudermilks' home because Deputy Ray had failed to respond to the MCSO dispatcher's attempt to contact him on his radio.2 (ER 79, ¶ 16, ER 84, ¶ 90)

Once the MCSO Standby Officers arrived, Deputy Ray had the opportunity to review A.R.S. § 8-821 in more depth. (ER 79, ¶ 18, ER 83-1 at p. 38 – Ray Depo. 32:3-23) After reviewing the various statutes, Deputy Ray was unsure as to exactly what he and the CPS Agents were authorized to do, and so he called his commanding officer, Sergeant Sousa, for further instruction. *Id.* As Mr. Loudermilk acknowledged in his deposition "the officers were trying to make sure they were doing the right thing at that point. So they were waiting for the Sergeant to show up to give us more information at that point." (ER 79, ¶ 19, ER 83-1 at p. 9 – J. Loudermilk Depo. 76:5-18).

After Sergeant Sousa arrived, he and Deputy Ray reviewed A.R.S. § 8-821 and determined that they could not arrest the Loudermilks. (ER 79, ¶ 20, ER 84, ¶

[2] When an officer fails to respond to a dispatcher's attempt to contact or "clear" him, other officers are directed to go to the officer's last known location to determine if the officer is safe. (ER 79, ¶ 17)

96) In addition, Sergeant Sousa did not believe they had exigent circumstances to enter the home. (ER 84, ¶ 97) Deputy Ray then went back to the front door of the Loudermilk home, by which time the Loudermilks had opened the door to talk to the CPS Agents, but were still refusing to allow them into their home. (ER 79, ¶ 21, ER 83-1 at p. 38 – Ray Depo. 32:24-33:24) Having reviewed A.R.S. § 8-821 with Sergeant Sousa, Deputy Ray told the Loudermilks that they did not have to consent to the search of their home, but that if they did not consent, CPS could seek a court order allowing them to enter the home. (ER 79, ¶ 22, ER 84, ¶ 100)

At some point soon after the CPS Agents and the Deputies arrived at the Loudermilk home, the Loudermilks called their attorney, T.J. Schmidt of the Home School Legal Defense Association. (ER 79, ¶ 23, ER 84, ¶ 101) As a result, and as admitted by Mr. Loudermilk in his deposition, the Loudermilks were on the phone with Mr. Schmidt nearly the entire time the officers were at their home. (ER 79, ¶ 24, ER 84 at ¶¶ 101-104, 110-117, 121-127, 134-137) The Loudermilks' attorney also spoke to both Ms. Cash and Deputy Ray. (ER 79, ¶ 25, ER 84, ¶ 104, 110) Ms. Cash reiterated to Mr. Schmidt that CPS could not force entry into the house, but could take the children into temporary custody for up to 72 hours. (ER 79, ¶ 26, ER 84, ¶ 111) Deputy Ray told Schmidt he was there to assist CPS and that if the Loudermilks did not allow them access to their home and the children,

they would seek a court order permitting them such access. (ER 79, ¶ 27, ER 84, ¶ 104)

Deputy Ray and Mr. Schmidt discussed whether CPS would be able to obtain a court order to search the house based on the complaint, specifically the probable cause standard for a search warrant. (ER 79, ¶ 28, ER 83-1 at p. 91 – Schmidt Depo. 22:11-24:5, ER 84, ¶ 127- Schmidt's Notes of Conversation with Deputy Ray) While Deputy Ray and Mr. Schmidt disagreed with respect to whether CPS ultimately had probable cause to obtain a search warrant based on an anonymous complaint, Mr. Schmidt admitted in his deposition that Deputy Ray correctly stated the legal standard for applying for a search warrant. (ER 79, ¶ 29, ER 83-1 at p. 91 – Schmidt Depo. 22:11-24:5)

Mr. Schmidt also acknowledged in deposition that Deputy Ray informed him that he would not seek entrance to the Loudermilk home without a court order or consent. (ER 79, ¶ 30, ER 83-1 at p. 91 – Schmidt Depo. 23:18-24:2, ER 84, ¶¶ 104, 127-Schmidt's Notes) Specifically, Schmidt testified that "I asked him [Ray] if he would be seeking entrance into the home without a court order, without the consent, and he said, no, he would not." (ER 79, ¶ 30, ER 83-1 at p. 91 – Schmidt Depo. 23:15-17), Thus, the parties had a mutual understanding at the time that if the Loudermilks refused to consent to a search of their home, the Deputies would

not be seeking entrance, but that the Deputies and CPS Agents could seek a warrant if they believed they had probable cause.

At some point, Mr. Schmidt also spoke with Assistant Attorney General Julie Rhodes regarding the CPS investigation of the Loudermilks and the welfare of their children. (ER 84, ¶¶ 121-130) After Mr. Schmidt had spoken to Deputy Ray, the CPS Agents and Ms. Rhodes, he advised the Loudermilks that it was CPS' position that they could obtain a court order based on the anonymous tip and take the children into temporary custody. (ER 79, ¶ 32, ER 84, ¶ 134) Mr. Schmidt also advised the Loudermilks that he disagreed with this determination and that he was very doubtful that CPS could meet the legal standard required to obtain a court order to take the children or search the home. (ER 79, ¶ 33, ER 84, ¶ 135) However, Mr. Schmidt told Mr. Loudermilk that if they wanted to avoid the possibility of their children being removed, they should simply allow CPS in their home. (ER 79, ¶ 34, 41) Specifically, Mr. Loudermilk testified that Mr. Schmidt told him that "I think you should let them in because of the fact that they are real serious and this could really not be good for you and the kids." (ER 79, ¶ 41, ER 83-1 at p. 11 – J. Loudermilk Depo. 83:8-14) Similarly, Tiffany Loudermilk testified that "he [Mr. Schmidt] advised us to let them in." (ER 79, ¶ 41, ER 83-1 at p. 26 – T. Loudermilk Depo. 64:2-12)

Following this conversation with his lawyer, Mr. Loudermilk consented to the CPS Agents and the Deputies looking around his home rather than forcing CPS to attempt to obtain temporary custody and/or a search warrant. (ER 79, ¶¶ 35-36) The Loudermilks claim that they only allowed the CPS Agents and the Deputies to enter their home because of the threats of arrest and removal of their children. (ER 84, ¶¶ 138-141) However, Mr. Loudermilk testified as follows:

Q: Okay so ultimately after the 40 minute interaction, you agreed to allow the CPS workers and the sheriff's deputies into the home; is that correct?

A: Yes.

Q. All right. You consented to them coming in; is that right?

A. Yes.

Q. All right. Even though you didn't have to, you agreed to it?

A. Yes.

(ER 79, ¶ 36 – J. Loudermilk Depo. at 90:1-10) Similarly, Mrs. Loudermilk testified as follows:

Q Okay. And after your attorney explained that to you, you and your husband decided to allow the search into your home; is that right?

A Yes.

Q All right. I mean, you understand that you and your husband had a choice.

It may not have been a pleasant choice, but it was a choice of either refusing entry or the officer would get a court order to allow them to enter the home. You understood that?

A I understood that.

Q And based upon what your lawyer told you, you agreed to, you know, waive your rights and allow them to enter the home; isn't that true?

A Yeah.

Q Yes?

A Yes.

(ER 83-1 at p. 29 – T. Loudermilk Depo. 76:7-23)

In addition, Deputy Ray recalled that he had spoken with the Loudermilks' attorney for several minutes, handed the phone back to Mr. Loudermilk and that, "a minute or two later he [Mr. Loudermilk] let us into the residence." (ER 83-1 at p. 39 – Ray Depo. 34:14-35:1) Finally, Mr. Loudermilk also testified that he would have actually preferred to have the Deputies come into the house alone and without the CPS Agents because he felt they "would be more objective" that he "trust[ed] the law enforcement officers" and that he "felt at peace with them [the Deputies] at that point." (ER 83-1 at p. 11 – J. Loudermilk Depo. 83:22-84:16)

Consequently, the CPS Agents, along with several of the Deputies went into

the Loudermilks' home for approximately five to ten minutes and determined the allegations in the complaint were false. (ER 79, ¶ 37, ER 84, ¶ 143) The officers and the CPS Agents then left the Loudermilks' home and the Loudermilks received a letter indicating the matter had been closed with CPS. (ER 79, ¶ 38, ER 84, ¶ 145)

SUMMARY OF APPELLANTS' ARGUMENT

The Deputies are entitled to qualified immunity because, even taking the facts in this case in the light most favorable to the Loudermilks, there was no violation of the Loudermilks' constitutional rights or, if a constitutional violation could be stated, the right that was allegedly violated was not clearly established such that a reasonable officer in the Deputies' position would have known that the search of the Loudermilks home was unlawful under the circumstances.

The record shows that the Deputies had no intention of entering the Loudermilks' home without a warrant, exigent circumstances or valid consent. The record also shows that the Deputies were aware that the Loudermilks were on the telephone with their attorney nearly the entire time that the Deputies were at the Loudermilks' home, and that the attorney himself spoke with Deputy Ray, the CPS Agents, and a representative from the Attorney General's Office. Within a minute or two after Deputy Ray got off the telephone with the Loudermilks'

attorney and handed the phone back to Mr. Loudermilk, the Loudermilks granted the Deputies and the CPS Agents access to their home. A reasonable officer in the Deputies' situation would have believed that consent was voluntary and that the search was lawful at that point.

Even if the Loudermilks could establish that their consent to the search was coerced and that a Fourth Amendment violation could be found to have occurred, they cannot establish that the law was "clearly established" such that a reasonable officer in the Deputies' position would have known that his actions were unlawful. This is true because, even though the law governing warrantless searches may have been clearly established, it was also clearly established that consent to a warrantless search makes the search constitutionally valid. Thus, the relevant question for qualified immunity purposes here is whether a reasonable officer in the Deputies' exact situation would have believed that the warrantless search was legal under the circumstances because the Loudermilks had given their consent after deliberation and lengthy consultation with their attorney.

Analyzing the issue from this perspective, qualified immunity will attach even if a Fourth Amendment violation could be found, if it is determined that a reasonable officer in the Deputies' situation could have believed that the search of the Loudermilks' home was lawful. Indeed, if reasonable officers could disagree

on whether the search was lawful under the circumstances, the Deputies are entitled to qualified immunity. Finally, even if it could be established that the Deputies made a mistake in believing that the search was lawful, if that mistake was reasonable, then the Deputies are entitled to qualified immunity.

In the alternative, not all of the Deputies present were involved in the situation at the same level. Specifically, Deputies Danner, Gagnon and Sousa did not "integrally participate" in any alleged violation of the Loudermilks' rights. As such, even if the Court finds that Deputy Ray is not entitled to qualified immunity, Deputies Danner, Gagnon and Sousa should nevertheless be dismissed because of their limited participation in the incident.

ARGUMENT

I. Standard of Review.

This Court reviews de novo a district court's decision denying summary judgment based on qualified immunity. *Community House*, 2010 WL 3895700*9. In so doing, the appellate court applies the same summary judgment standard as the district court, *i.e*, summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. *Id.*; Rule 56(c)(2), Fed.R.Civ.P.

In deciding whether a party is entitled as a matter of law to qualified immunity, the Court "must accept the facts in the light most favorable to [the Loudermilks] and then determine whether, in light of clearly established principles governing the conduct in question, [the Deputies] objectively could have believed that [their] conduct was lawful." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 945 (9th Cir. 2003). Stated another way, the Court, while assuming as true the facts adduced by the Loudermilks, must determine (1) whether the Deputies violated the Loudermilks' constitutional rights and (2) whether those rights were clearly established. Unless the Court resolves both issues in the affirmative, the Deputies are entitled to qualified immunity. *Kennedy*, 439 F.3d at 1060.

To determine whether a right was clearly established, this Court should consider Supreme Court and Ninth Circuit case law existing at the time of the alleged act, to the extent such cases are available. *Osolinski v. Kane*, 92 F.3d 934, 936 (9th Cir.1996). In the absence of binding precedent, the Court may look to available decisions of other circuits and district courts to ascertain whether the law is clearly established. *Id.*

II. The District Court Erred By Denying The Deputies' Summary Judgment Motion Based on Qualified Immunity.

A. Elements of the Qualified Immunity Defense.

"Qualified immunity balances two important interests-the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). Cases deciding on questions of qualified immunity have accommodated these interests by generally providing government officials performing discretionary functions with a qualified immunity as long as their actions, even if mistaken, could reasonably have been thought to be consistent with upholding the rights they are alleged to have violated. *Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 3038 (1987). "Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 599 (2004). In this regard, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

A two-part test controls the qualified immunity analysis. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 (2001); *Community House,* 2010 WL

3895700*18. In the first part, this Court must consider whether the facts establish that the Deputies violated the Loudermilks' constitutional right when they conducted a warrantless search of the Loudermilks' home after the Loudermilks had consented to that search. *Id.* Assuming a constitutional violation could be made out on a favorable view of the Loudermilks' facts, in the second part of the analysis this Court must determine whether the right the Loudermilks allege was violated was clearly established such that a reasonable officer in the Deputies' situation would have believed that the search was unlawful under the circumstances. *Id.* In *Saucier*, the Supreme Court insisted that courts undertake the qualified immunity analysis in the above order: violation first, then clearly established right. *Id.* The Court has since relaxed that rule, allowing the courts to consider the second question first if there is reason to do so. *Pearson*, 129 S. Ct. at 818.

Under the second part of the *Saucier* analysis, a public official is entitled to qualified immunity if a reasonable official in his position could have believed that his conduct was legal in light of clearly established law and the information that he possessed at the time that he acted. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040. "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was

unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156. The *Anderson* court elaborated on the level of specificity that is required in defining the meaning of "clearly established" law in light of the situation an officer confronted at the time he is alleged to have committed an unlawful act:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." [citation omitted].

Anderson, 483 U.S. at 639, 107 S.Ct. at 3038-39. Thus, the *Anderson* court found that it is not sufficient for a plaintiff to simply state, *e.g.*, that the

unconstitutionality of a warrantless search without consent is clearly established. That much is obvious. What is critical to the analysis is the question of what information a public official possessed at the time that he acted. In other words, was this particular warrantless search unconstitutional in light of the information possessed and the situation confronted by the public official.

Taking the clearly established law analysis yet a step further, courts conducting a qualified immunity inquiry must "acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct." *Saucier*, 533 U.S. at 205, 121 S.Ct. at 2158. As stated by the court in *Saucier*:

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.
>
> . . . .
>
> Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution. Yet, even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates

> to grant officers immunity for reasonable mistakes as to the legality of their actions

Id., 533 U.S. at 205-06, 121 S.Ct. at 2158-59. With regard to the question of the legality of warrantless searches, the court in *Anderson*, 483 U.S. 635, 107 S.Ct. 3034 had this to say:

> We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment. See, *e.g., Malley, supra*, 475 U.S., at 341, 106 S.Ct., at 1096. Law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should no more be held personally liable in damages than should officials making analogous determinations in other areas of law.

Id., 483 U.S. at 644, 107 S.Ct. at 3041. Thus, even if an officer makes a mistake in applying the relevant legal doctrine, he or she is not precluded from claiming qualified immunity so long as the mistake is reasonable. *Kennedy*, 439 F.3d at 1061. Similarly, if officers of reasonable competence could disagree on the issue of whether a particular action violated a constitutional right, immunity should be recognized. *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096.

Finally, with regard to the second prong of the *Saucier* analysis, when a plaintiff seeks to deprive a public official of qualified immunity, he has the burden of showing that the right he claims the official violated was clearly established at

the time of the alleged violation. *Sorrels v. McKee*, 290 F.3d 965, 969 (9th Cir. 2002); *Hufford v. McEnaney*, 249 F.3d 1142, 1148 (9th Cir. 2001).

B. The Deputies Are Entitled to Qualified Immunity Because, Under the First Part of the *Saucier* Analysis, the Loudermilks Have Not Established That There Was a Constitutional Violation.

Under the Fourth Amendment, warrantless searches are permitted if the occupant gives voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44 (1973). In determining the voluntariness of consent, courts typically look at the totality of the circumstances. *Id.*, 412 U.S. at 226, 93 S.Ct. at 2047. In addition, courts traditionally consider five factors in determining whether consent was voluntary: (1) whether defendant was in custody; (2) whether arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the defendant was notified that they had the right not to consent; and (5) whether the defendant had been told a search warrant could be obtained. *U.S. v. Patayan Soriano*, 361 F.3d 494, 502 (9th Cir. 2004). "These factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry." *Id.* Further, no one factor is determinative of the question of voluntariness, and it is not necessary that all five factors apply. *Id.*

Here, the facts established in the district court show that (1) the Loudermilks were on the telephone with their attorney, Thomas Schmidt, for nearly the entire

time that the Deputies were present at the Loudermilk home (ER 79 at ¶ 24, ER 84 at ¶ 101-104, 110-117, 121-127, 134-137), (2) the Loudermilks consented to the search of their home after lengthy consultation with, and with the advice of, their counsel (ER 84 at ¶ 138), (3) the Deputies never drew their guns or even removed their handcuffs (ER 79 at ¶ 14, ER 83-1 at p. 39 – Ray Depo. 36:5-12), (4) it is clear from the record that the Loudermilks were never taken into custody, and there is no evidence that Miranda warnings were given, (5) the Loudermilks were informed by the Deputies and their own attorney that they did not have to consent to the search of their home (ER 79 at ¶¶ 22, 40, ER 83-1 at p. 9 – J. Loudermilk Depo. 74:2-17, ER 83-1 at p. 29 – T. Loudermilk Depo. 74:20-75:13, 76:7-23), (6) although Deputy Ray initially told Mr. Loudermilk he could arrest him, after reviewing the applicable statutes with his supervising officer, Deputy Ray determined he was wrong and informed the Loudermilks' attorney that his earlier statement was incorrect (ER 79 at ¶ 31, ER 83-1 at p. 39 – Ray Depo. 34:14-23), (7) the Loudermilks' attorney acknowledged that the Deputies communicated a correct understanding of the Loudermilks' Fourth Amendment rights (ER 79 at ¶¶ 28-30, ER 83-1 at p. 91 – Schmidt Depo. 22:11-24:5). Under the totality of these facts and circumstances, the Loudermilks' consent was voluntary.

The Loudermilks attempt to avoid the consequences of their consent by

claiming that it was not voluntary because the CPS Agents and the Deputies intended to arrest Mr. Loudermilk and take the children into custody. (ER 20 at ¶¶ 57, 59) The Loudermilks make this claim despite the fact that they consulted at length with their counsel, despite the fact that the Deputies ultimately made it clear that they would not arrest Mr. Loudermilk, and despite the Loudermilks' admissions that they understood they had the right to refuse to allow the Deputies and the CPS Agents into their home but chose to anyway. (ER 79 at ¶¶ 24, 36, 39, 40) Further, on the question of coercion, the Loudermilks' own testimony is contradictory. Both Mr. and Mrs. Loudermilk testified, in a very general way at the end of their depositions, that they felt coerced into giving consent to the search of their home. (ER 84 at ¶¶ 139-140) But the Loudermilks also gave much more detailed testimony earlier in their depositions that they knew they had the right to refuse consent to the search but, on the advice of counsel, gave their consent anyway. (ER 84 at ¶ 138, 83-1 at p. 9 – J. Loudermilk Depo. 76:19-24, 83-1 at p. 29 – T. Loudermlk Depo. 76:3-23) Again, the totality of the circumstances strongly supports voluntary consent to the search following consultation with an attorney.

Two cases are particularly instructive on the question of the voluntariness of the Loudermilks' consent. The first is *United States v. Iglesias*, 881 F.2d 1519 (9th

Cir. 1989). There, the accused defendant, Iglesias, argued that the police's search of her sister's home was a violation of the Fourth Amendment because the sister's consent to the search was not voluntary. In support of this assertion, Iglesias argued that the police had obtained the consent through coercion by threatening to get a grand jury subpoena, threatening to separate the sister from her young son who was present, by using psychological manipulation, and because a substantial amount of time was required to overbear the sister's will. *Id.*, at 1522-23. Taking this into consideration, the court found that "none of these factors mentioned by Iglesias, either individually or in their totality, are sufficient to render [the sister's] consent involuntary." *Id.*

The second case of relevance is *McKeon v. Daley*, 101 F.Supp.2d 79 (N.D.N.Y. 2000). There, plaintiff claimed, among other things, that she was wrongfully arrested pursuant to invalid legal process and without legal authority, and unlawfully subjected to custodial interrogation. *Id.* at 84. Specifically, plaintiff alleged that a police investigator served her with an invalid, expired subpoena, then transported her to the courthouse where she was questioned by the District Attorney. *Id.* at 89. However, plaintiff testified in her deposition that she agreed to accompany the police investigator after conversing with her attorney on the telephone, that her attorney spoke with the investigator on the telephone and

thereafter advised her to go with him to the courthouse, and that she subsequently met her attorney at the courthouse and initially discussed the matter with him privately. *Id.* at 89-90. The court found that these facts precluded a finding that the plaintiff's constitutional rights had been violated. *Id.* at 91-92. Significant to this finding was the fact that plaintiff had consulted with her attorney prior to accompanying the investigator to the courthouse and speaking with the District Attorney. *Id.* The lower court's ruling was upheld on appeal in *McKeon v. Daley*, 8 Fed. Appx. 138, 2001 WL 533662 (2nd Cir. 2001), but that case was not selected for publication in the Federal Reporter.

It is undisputed that the Loudermilks were being advised of their rights by their attorney while the Deputies were there. (ER 79, ¶ 24, ER 84 at ¶¶ 101-104, 110-117, 121-127, 134-137) It is also undisputed that the Loudermilks' attorney advised them that they did not have to consent, that he did not believe that the CPS had probable cause to obtain custody of their children, and that he admitted the Deputies demonstrated a correct understanding of the Fourth Amendment. (ER 79 at ¶¶ 29, 30, 32-36, 39-40)

The argument that the Loudermilks' consent was somehow coerced by the threatening presence of the Deputies is not supported by the evidence. For example, the reason that there were four officers at the scene was because Deputy

Ray did not respond to the MCSO dispatcher's attempt to clear him on the radio. (ER 79 at ¶¶ 16-17) Additionally, Mr. Loudermilk testified that he thought the Deputies were "trying to do the right thing" and that he felt "at peace" with the Deputies. (ER 79 at ¶ 19, ER 83-1 at p. 9 – J. Loudermilk Depo. 76:13-18, ER 83-1 at p. 11 – J. Loudermilk Depo. 84:2-9) There is simply no evidence that the presence of the Deputies somehow threatened or coerced the Loudermilks into consenting to the search of their home. The mere presence of multiple officers does not invalidate the Loudermilks consent. *See, e.g. U.S. v. Lyons*, 510 F.3d 1225, 1239 (10th Cir. 2007) (holding that presence of multiple officers without evidence of coercion or threats did not invalidate consent.)

The Loudermilks consented to the search after their lawyer advised them that consenting would be in their best interests. (ER 79 at ¶ 33-35, ER 83-1 at p. 11 – J. Loudermilk Depo. 83:6-84:20) If the Court determines that the Loudermilks did not voluntarily consent to the search of their home, it will become all but impossible for a law enforcement officer to determine when consent could ever be considered voluntary. An officer would not be permitted to rely on the consent of an individual who had consulted, in depth, with their attorney, or tell a suspect of the potential legal ramifications of their refusal to consent. In essence, it would force all officers to seek a warrant or court order for every single case to

insure against the type of suit filed by the Loudermilks, which is not what the law requires. Based on the totality of the circumstances, particularly the fact that the Loudermilks' attorney was explaining their rights and options to them, the Loudermilks' consent was voluntary.

C. The Deputies Are Entitled to Qualified Immunity Because, Under the Second Part of the Saucier Analysis, the Right Allegedly Violated Was Not Clearly Established Such That a Reasonable Law Enforcement Officer Would Have Been Aware That His Conduct Was Unlawful in the Situation Confronted by the Deputies

If the Court determines that the Loudermilks' consent was not voluntary and that a constitutional violation thus occurred, the Deputies are still entitled to qualified immunity under the "clearly established" prong of the Saucier analysis. Under the Supreme Court's most recent decision on qualified immunity, "[a]n officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. This inquiry turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Pearson*, 129 S.Ct. at 822, *citing Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692 (1999).

"The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Id.* Stated another way, an officer is entitled to qualified immunity if a

reasonable officer in his position could have believed that his conduct was legal in light of clearly established law and the information that he possessed at the time that he acted. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3040. "The doctrine of qualified immunity assumes that police officers do not knowingly violate the law. An officer thus is presumed to be immune from any damages caused by his constitutional violation." *Gasho v. U.S.*, 39 F.3d 1420, 1438 (9th Cir. 1994), *citing Elder v. Holloway*, 975 F.2d 1388, 1392 (9th Cir.1991), rev'd on other grounds, 510 U.S. 510, 114 S.Ct. 1019, 127 L.Ed.2d 344 (1994) (emphasis added). "To overcome this presumption, a plaintiff must show that the officer's conduct was "so egregious that any reasonable person would have recognized a constitutional violation." *Id.*

The Loudermilks have attempted to simplify the legal question by arguing the general principle that it was clearly established law that coercing consent to search by threatening to take away children and by a threatening show of force violates the Fourth Amendment. Although in a vacuum this proposition may be correct, it does not answer the more appropriate and relevant question of whether a reasonable officer in the Deputies' situation would have known that his or her action was unlawful. Thus, the Loudermilks' argument is not in accord with the reasoning in, e.g., Saucier and Anderson, which instructs us that the right that an

officer is alleged to have violated must have been clearly established in a "more particularized, and hence more relevant sense." *Saucier*, 533 U.S. at 202, 121 S.Ct. at 2156, *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3039. This approach correctly emphasizes the question of whether reasonable public officials in particular, fact-specific situations would clearly understand that what they are doing is unlawful.

In addition, an officer might correctly perceive all of the relevant facts but have a mistaken understanding as to what is legal in those circumstances. In such situations, "if the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205, 121 S.Ct., at 2158. Similarly, "where officers of reasonable competence could disagree on [whether an act was permissible], immunity should be recognized." *Malley*, 475 U.S. at 341. The court in *Anderson* addressed this issue in connection with warrantless searches when it concluded that law enforcement officials will sometimes make mistakes, even though they act reasonably. *Anderson*, 483 U.S. at 641, 107 S.Ct. at 3039-40. However, because of the difficulty in determining whether particular searches or seizures comport with the Fourth Amendment, law enforcement officers whose judgments in making these difficult determinations are objectively legally reasonable should not be held

personally liable. *Id.*, 483 U.S. at 644, 107 S.Ct. at 3041. As such, even if a court were to hold that a law enforcement officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. *Saucier*, 533 U.S. at 206, 121 S.Ct. at 2158-59. This is the standard that should be used in determining if the Deputies' actions were objectively reasonable.

Here, if the Loudermilks seek to deprive the Deputies of qualified immunity, they bear the burden of showing that the rights that they claim were violated were clearly established at the time of the alleged violation. *Sorrels*, 290 F.3d at 969; *Hufford*, 249 F.3d at 1148. Thus, the Loudermilks must establish that no reasonable officer presented with the same situation would have acted in the same manner as the Deputies. Given Mr. Loudermilk's admission that the "officers were trying to make sure they were doing the right thing at that point," that he trusted and "felt at peace with" the Deputies, and the Loudermilks' counsel's acknowledgment that Deputy Ray exhibited a correct understanding of the Fourth Amendment, such a showing is impossible.

The Loudermilks simply cannot show that no reasonable officer would have acted as the Deputies did in the situation they faced. In fact, the Deputies exhibited exemplary conduct in (1) considering the statements of the CPS Agents that they

had probable cause to seek custody of the Loudermilk children, (2) consulting the Arizona Revised Statutes and consulting with one another on the issue of the right to arrest Mr. Loudermilk, (3) speaking at length with the Loudermilks and their counsel, and (4) ultimately stating correctly that, pursuant to the Fourth Amendment, the Loudermilks could either consent to a search or defendants could seek a warrant. Indeed, most if not all law enforcement officers would have acted exactly as the Deputies did.

Setting aside the question of whether the Loudermilks could meet their burden of showing that the right they allege was violated was clearly established, a purely objective analysis of the situation the Deputies' confronted shows that it was not clearly established that the search of the Loudermilks' home was unlawful under the circumstances. The Deputies were aware that the Loudermilks were on the telephone with their attorney for nearly the entire time that they were present at the Loudermilks' home. Deputies Ray and Gagnon even spoke with the attorney, with Deputy Ray discussing probable cause for a search of the home and the fact that the Deputies would not conduct the search without a warrant, exigent circumstances or the Loudermilks' consent. There is no evidence that any of the conversations between the Loudermilks and the Deputies was heated or threatening in any way. In fact, Mr. Loudermilk testified that he felt at peace with the

Deputies' presence. Deputy Ray testified that he was on the phone with the Loudermilks' attorney, that he handed the phone back to Mr. Loudermilk, and that a minute or two later, the Loudermilks consented to the search. Thus, the situation was one where the Loudermilks spoke with their attorney and then contemporaneously voluntarily allowed access to their home.

While there is a conspicuous absence of case law that might assist in answering the question of whether, under the foregoing circumstances, an objectively reasonable officer would have believed the consent to the search to be valid, the previously cited case of *McKeon v. Daley* comes close. There, the party claiming a constitutional violation based on service of an invalid subpoena and being improperly taken to the courthouse for interrogation admitted that she had the opportunity to consult with counsel before being taken to the courthouse, and that she voluntarily agreed to go after being so advised by her attorney. The court found that the plaintiff had failed to show a violation of her constitutional rights and dismissed her action, and the appellate court upheld the lower court's ruling. *McKeon*, 101 F.Supp.2d at 91-92.

Of course, there are a number of cases that have held that it is permissible for an officer to gain consent by telling a suspect that they could obtain a court order if the suspect did not consent. *See, e.g., Iglesias*, 881 F.2d at 1522-23; *U.S.*

v. Salvo, 133 F.3d 943 (6th Cir. 1998); *Eidson v. Owens*, 515 F.3d 1139 (10th Cir. 2008); *United States v. Duran*, 957 F.2d 499, 502 (7th Cir.1992); *United States v. Calvente*, 722 F.2d 1019 (2d Cir.) 1023, *cert. denied*, 471 U.S. 1021 (1983); *United States v. Faruolo*, 506 F.2d 490, 495 (2d Cir.1974). Accordingly, it would not have been clear to a reasonable officer that they were violating the Loudermilks' Fourth Amendment rights by representing that a search warrant could be obtained if they did not consent to the search of their home.

However, the issue here is more particularized than whether the Deputies appropriately informed the Loudermilks that a warrant could be obtained. The issue here is what a reasonable officer in the Deputies' situation would have considered lawful, given the fact that the Loudermilks had consulted at length with their attorney and then, immediately thereafter, allowed the Deputies and CPS Agents into their home. Under the circumstances faced by the Deputies here, the McKeon decision is more to the point and supports that the Deputies' actions were those of reasonable officers in similar circumstances. If nothing else, the law on this point was not so clearly established that a reasonable officer in the Deputies' situation would have considered the search unlawful.

Moreover, it is practically axiomatic that, when a person is faced with a decision based on a legal question, and that person has the opportunity to consult

with counsel and then makes the decision, the objectively reasonable observer would conclude that the decision was informed and made voluntarily. This is simply common sense. Stated another way, this is a reasonable conclusion made by a law enforcement officer exercising careful judgment. As the Supreme Court has stated:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government-whether the magistrate issuing a warrant, the police officer executing a warrant, *or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement*-is not that they always be correct, but that they always be reasonable. As we put it in *Brinegar v. United States*, 338 U.S. 160, 176, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879 (1949):
>
> > "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."
>
> We see no reason to depart from this general rule with respect to facts bearing upon *the authority to consent to a search*. Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.

Illinois v. Rodriguez, 497 U.S. 177, 185-86, 110 S.Ct. 2793, 2800 (1990) (emphasis added). The Deputies here were not mistaken in their actions. But, even if they were, the mistakes were "those of reasonable men" applying careful judgment in the situation they faced. Either way, the *Saucier* analysis leads to the inevitable conclusion that the Deputies are entitled to qualified immunity. The district court therefore erred in denying the Deputies' Motion for Summary Judgment.

D. The MCSO Standby Officers Are Entitled to Qualified Immunity in Any Event Because They Did Not Substantially Participate in the Alleged Constitutional Violation

Even if the Court determines that Deputy Ray is not entitled to qualified immunity, the MCSO Standby Officers – Deputies Gagnon, Danner and Sousa – are still entitled to summary judgment because they did not substantially participate in the alleged violation of the Loudermilks' Fourth Amendment Rights. "In order for a person acting under color of state law to be liable under section 1983 there must be a showing of personal participation in the alleged rights deprivation." *Aragonez v. County of San Bernadino*, 2008 WL 4948410 at * 5 (C.D. Cal. 2008), *citing Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). "To hold an officer liable for his participation as part of a team or group of officers, a plaintiff must show the officer 'integrally participated' via 'some fundamental

involvement in the conduct that allegedly caused the violation.'" *Id.*, *citing Blankenhorn v. City of Orange*, 485 F.3 463, 481 n. 12 (9th Cir. 2007).

In *Aragonez*, Officer Huff arrested the plaintiff for disorderly conduct, while his partner Officer Recatto was at the scene. *Id.* at *3. While on the way to the police precinct, plaintiff and another individual who was subsequently arrested by Officer Recatto kicked out the windows of the officers' squad car. *Id.* Officer Huff alone then sprayed plaintiff with a chemical irritant and placed him in a restraint. *Id.* Plaintiff subsequently filed false arrest and excessive detention claims against both officers. *Id.* The court, however, granted summary judgment in favor of Officer Recatto because he was not integrally involved in the alleged constitutional violations against the Plaintiff since it was his partner that had allegedly used improper force and falsely arrested the plaintiff. *Id.* at *8.

Based on this, in order to hold the MCSO Standby Officers liable, the Loudermilks must demonstrate either that the Deputies' individual actions constituted "integral participation" in the alleged violation of the Loudermilks' Fourth Amendment Rights, or that the MCSO Standby Officers failure to intervene was a violation of their constitutional duties. *Id.* Here, the Loudermilks allege that their consent to search their home was not voluntary because of threats made by Deputy Ray and the CPS Agents. There is no allegation that the MCSO Standby

Officers took any act that amounts to integral participation in the alleged violation of Loudermilks' Constitutional Rights.

For example, with respect to Deputy Gagnon, the Loudermilks make no reference that he either spoke to the Loudermilks, or went into their home. The Loudermilks only allegation is that he was at the scene and in uniform. (ER 84 at ¶¶ 90, 91) As such, they have failed to show any evidence that Deputy Gagnon "integrally participated" or had any role in the conduct that allegedly caused the violation of the Loudermilks Fourth Amendment rights. Similarly, the Loudermilks only allegations regarding Deputy Danner are that he initially came to the door and later accompanied Deputy Ray and Sergeant Sousa into their home. (ER 84 at ¶¶ 92, 143) Again, there is no allegation that Deputy Danner was "integrally involved" in the deprivation of the Loudermilks' rights. Finally, the sole allegations against Sergeant Sousa appear to be that he failed to tell the officers to immediately leave the Loudermilks' home after determining they could not arrest them under A.R.S. § 8-821, and that he was one of the officers who entered the Loudermilks' home. (ER 84 at ¶¶ 99, 143)

Accordingly, the Loudermilks can only maintain a claim if they can demonstrate that the MCSO Standby Officers knew of constitutional violations, but failed to intervene. Yet, there is no evidence that the MCSO Standby Officers

knew or were told of the substance of the allegations that had been made against the Loudermilks, or that any statement made by Deputy Ray or the CPS Agents was incorrect under the Fourth Amendment. (ER 79 at ¶ 42) For example, the Loudermilks' attorney has indicated that he spoke only with Deputy Ray. (ER 79 at ¶ 43) Accordingly, there was no reason for the MCSO Standby Officers to believe that it was improper for Deputy Ray to assert that CPS could take the Loudermilk children into custody, nor was there any reason for the MCSO Standby Officers to believe that there was something wrong with Deputy Ray's statement, which complied with the Fourth Amendment, that Plaintiffs could either consent to a search or defendants could seek a warrant. Consequently, regardless of whether Deputy Ray is entitled to qualified immunity, the Standby Officers are entitled to summary judgment for their limited role.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's Order denying the Deputies' Motion for Summary Judgment on qualified immunity grounds and remand with instructions to the district court to enter judgment for the Deputies. In the alternative, this Court should remand with instructions to the district court to enter judgment for the MCSO Standby Officers.

RESPECTFULLY SUBMITTED this 16th day of November, 2010.

MARICOPA COUNTY
OFFICE OF SPECIAL LITIGATION SERVICES

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants state that they are not aware of any related cases pending in the Ninth Circuit.

/s/ Peter Muthig
Peter Muthig
Assistant Litigation Counsel

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,738 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in fourteen-point Times New Roman type style.

/s/ Peter Muthig
Peter Muthig
Assistant Litigation Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

/s/ Tyna M. Garcia