RECORD NO. 10-15980

In The

United States Court of Appeals

For The Ninth Circuit

JOHN LOUDERMILK; TIFFANY LOUDERMILK, individually and as parents and next friends of Brittany Renee Nash, Dakota James Loudermilk, Kristin Grace Loudermilk, Faith Rose Loudermilk, and Montana Vaughn Loudermilk, minor children,

Plaintiffs – Appellees,

v.

MICHAEL DANNER; RICHARD GAGNON; JOSHUA RAY; JOSEPH SOUSA, Maricopa County Deputy Sheriffs, individually and in their official capacity,

Defendants – Appellants,

and

JOSEPH M. ARPAIO; JULIE RHODES; RHONDA CASH; JENNA CRAMER,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR ARIZONA AT PHOENIX

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

Appellees ("the Loudermilks") agree with the Appellants' ("Deputies") jurisdictional statement as it relates to the jurisdiction of the district court.

As this Court recognized in its order to show cause dated May 18, 2010, however, there is a substantial question regarding this Court's appellate jurisdiction. As we will address more thoroughly in the argument section of this brief, this appeal from the denial of the Deputies' summary-judgment motion on the qualified-immunity issue turns entirely on factual issues, which is insufficient grounds to invoke the appellate jurisdiction of this Court to review the district court's interlocutory order.

ISSUES PRESENTED FOR REVIEW

1. Does this Court lack appellate jurisdiction because the issues on appeal are not abstract questions of law concerning qualified immunity but exclusively involve questions of fact concerning voluntariness of consent?
2. Is it a violation of the Fourth Amendment for police officers and social workers who lack a warrant, lack exigent circumstances, and lack valid consent, to enter and search a private home during a child-neglect investigation?

3. Was the law clearly established on March 9, 2005, that it is a violation of the Fourth Amendment for police officers and social workers who lack a warrant, lack exigent circumstance, and lack valid consent, to enter and search a private home during a child-neglect investigation?

4. In light of the totality of circumstances, was it objectively reasonable for these Deputies to mistakenly conclude that consent to search was freely given and not made out of fear or in response to threats?

STATEMENT OF THE CASE

The Section 1983 complaint in this case alleges that two separately-represented groups of government agents violated John and Tiffany Loudermilk's right under the Fourth Amendment to be free from the unreasonable search of their home—the Appellants, employed by the Maricopa County, Arizona, Sheriff's Office as deputy sheriffs ("Deputies"); and State employees: two social workers and a deputy attorney general.[1] Both sets of defendants moved for summary judgment in the district court, arguing that they were eligible for qualified immunity. The district court

[1] The only cause of action alleged against the Deputies involved the search of the home. The complaint also alleged that the social workers violated the Loudermilks' Fourteenth Amendment right to family integrity, which is awaiting trial. After discovery was completed, the Loudermilks agreed that a failure-to-train claim against Maricopa County Sheriff Joseph Arpaio should be dismissed.

denied both motions, holding that when the facts in the summary-judgment record are viewed in the Loudermilks' favor, a finder of fact could conclude that the Deputies and social workers coerced the Loudermilks into allowing them into the home. The Deputies alone have pursued this interlocutory appeal from the district court's denial of their motion for summary judgment, and the district court has stayed further proceedings against all defendants until this appeal has been decided.

After the Deputies filed their notice of appeal, this Court issued a "show-cause" order instructing the Deputies to either voluntarily dismiss the appeal or show cause why it should not be dismissed for lack of jurisdiction. Appellants and Appellees responded to the Court's order, and on August 12, 2010, this Court issued a ruling that "[t]he jurisdictional issues do not appear suitable for summary disposition" and set a briefing schedule.

STATEMENT OF FACTS

On January 7, 2005, at 12:56 a.m., Child Protective Services ("CPS") received an anonymous telephone call alleging, among other things, that "Dad is a handy man and he built the home the family is living in. The home has not been completed. There is exposed wiring and wall sockets throughout the home." (ER-84, ¶ 3, 4). The CPS Summary Report notes that the on-call investigator was *not* contacted; the police were *not*

contacted; there had been no previous report involving either the parents or the children; and there were "[n]o known worker safety issues although dad owns a gun for protection." (ER-84, ¶ 5).

The Field Investigation was assigned to CPS Agent Brenda Cagle at 2:25 p.m. that same day. (ER-84, ¶ 6). Three days later, on January 10, 2005, the Loudermilks discovered Cagle's business card on their front door. (ER-84, ¶ 1). It can be inferred that Cagle had been to the home and seen the exterior of the home when she left her card.[2] Tiffany Loudermilk called Cagle on January 11, 2005, and was told that CPS had received an anonymous report that the home was not completed and was unsafe for children. (ER-84, ¶ 2). Cagle wished to privately interview the children and search the interior of the home. (ER-84, ¶ 8). Tiffany initially agreed but no appointment was made. (ER-84, ¶ 9). Weeks went by before Cagle called back to schedule an appointment, and a meeting was scheduled to take place on or about March 2, 2005. (ER-84, ¶ 20, 21).

In the meantime, the Loudermilks joined the Home School Legal Defense Association ("HSLDA"). (ER-84, ¶ 10). Thomas J. Schmidt, an HSLDA staff attorney, wrote a letter dated February 7, 2005, to Ms. Cagle notifying her that the Maricopa County Planning and Development

[2] Ms. Cagle left the employment of the CPS Agency and could not be located for deposition.

Department had given the Loudermilks an occupancy permit before allowing them to move into the home. (ER-84, ¶ 14, 15). It is not clear from the record that a document called "occupancy permit" exists, but occupancy is not allowed and the electricity will not be turned on until the house passes a final safety inspection. (ER-84, ¶ 16). There is no evidence in the summary-judgment record suggesting that any CPS agent ever followed up to verify that the home had passed the final safety inspection. Indeed, they considered that information to be irrelevant. (State Defendants' ER-84, ¶ 17).

In his letter, Schmidt also requested to know *all* of the allegations against the Loudermilks. (ER-84, ¶ 14). Schmidt relied on the federal "Keeping Children and Families Safe Act of 2003," which requires that "a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse investigation, advise the individual of the complaints or allegations made against the individual." 42 U.S.C. § 5106a(b)(2)(A)(xviii). (ER-84, ¶ 18). Only during discovery did the Loudermilks learn that the anonymous report included additional allegations unrelated to the safety of the home, such as having no food in the refrigerator, and "the parents claim the children are home schooled all

though (sic) there were no books, paper, pens, or pencils in the home." (ER-84, ¶ 7).

Cagle refused to provide all of the allegations. Accordingly, Mrs. Loudermilk decided to cancel the meeting. (ER-84, ¶ 23). A few days prior to the meeting date, Schmidt informed Cagle that the meeting was off. (ER-84, ¶ 25).

Rhonda Cash, Cagle's supervisor, had been kept appraised of the status of the investigation for the two-month period since the anonymous report had been received. (ER-84, ¶ 27). On March 9, 2005, Brenda Cagle called in sick. (ER-84, ¶ 31). That same day, Cash decided to accompany another subordinate, CPS Agent Jenna Cramer, on an unrelated "dissolution" matter. Cramer had never done that particular task before and Cash wanted to "kind of show her the ropes." (ER-84, ¶ 29, 30).

This other unrelated matter happened to be in the same general area as the Loudermilks' home. (ER-84, ¶ 29). Cash told Cramer that since they were going to be in the area anyway, "I want to go and hit this report of Brenda's." (ER-84, ¶ 31). Cash decided to "take the lead" at the Loudermilks' home. (ER-84, ¶ 32).

On the way to the Loudermilks' home Ms. Cramer called the Maricopa County Sheriff's Office to request an officer to accompany them.

(ER-84, ¶ 33). Cramer told the dispatcher that a CPS worker had been unable to get into the home. (ER-84, ¶ 34).

The dispatch report notes that CPS claimed that two weeks earlier, the Loudermilks had "refused to let CPS look inside." (ER-84, ¶ 35). There is no mention in the dispatch report of any worker safety issues. However, deputies are often asked to accompany CPS workers when a family is "uncooperative." (ER-84, ¶ 13). According to Defendant Assistant Attorney General Rhodes, "It's necessary at times to call in law enforcement if you have *an uncooperative family*. They can assist in removing, if necessary, the children from the home." (ER-84, ¶ 37)(emphasis added).

Cash and Cramer were joined at the Loudermilks' home by Defendant MCSO Deputy Ray and another man, since determined to be a volunteer member of the "posse." (ER-84, ¶ 46, 47). Both Ray and the posse member were in MCSO uniforms. (ER-84, ¶ 47, 48). Both pairs parked their cars in the Loudermilk's driveway. (ER-84, ¶ 46).

Ray, Cash, and Cramer went to the front door, where Ray and Cash took turns knocking on the door. (ER-84, ¶ 56). When John and Tiffany came to the balcony above the front door, Ray told them, "We need to see the inside of the house." (ER-84, ¶ 57). Mr. Loudermilk responded, "You're not allowed to come into my house." (ER-84, ¶ 65).

Ray looked at the social workers and one of them said, "We have got to get into that house so we can see the conditions—the living conditions." (ER-84, ¶ 85). Ray repeated his demand that he needed to get inside. (ER-84, ¶ 86). When Mr. Loudermilk again declined to allow them inside, Ray said to Mr. Loudermilk that "I would arrest him for obstructing us from getting to see the people inside the house to make sure they were okay." (ER-84, ¶ 88).

CPS Agent Cash told Tiffany, "We're from CPS, and we need to come into your house and look around." (ER-84, ¶ 60). Tiffany asked what it was about and Cash responded, "We just need to talk to you. We need to come in." (ER-84, ¶ 59). When Tiffany again asked what it was about, Cash became a little upset and said, "We've got a warrant to take your kids." (ER-84, ¶ 66). There was no such warrant. She also told Tiffany that if they weren't allowed inside the home "to get to the bottom of this," they would have to take the children for up to 72 hours. (ER-84, ¶ 67). Cash told John that she had the authority to take the children if she could not determine their safety and "If you let us inside the house we can get this over quickly but we have to see inside the house." (ER-84, ¶ 76, 105).

After Cash, Cramer, and Ray spoke to John and Tiffany, MCSO Officers Gagnon and Danner arrived in separate police vehicles. (ER-84, ¶

90, 91). Gagnon was in uniform and was also accompanied by an armed, uniformed posse member whose identity has not been determined. (ER-84, ¶ 90). Danner, who is a D.A.R.E. officer, was wearing "training" gear, which consisted of an MCSO polo shirt and badge. (ER-84, ¶ 93). Danner spoke with Ray on the porch.

Officer Ray contacted his patrol sergeant, Sergeant Sousa, by radio and asked him to come to the Loudermilks' home. (ER-84, ¶ 95). After Sergeant Sousa arrived and conferred with Ray, he concluded that they had no authority to arrest Mr. Loudermilk, there were no exigent circumstances to justify a warrantless search of the Loudermilks' home, and that they would need a warrant to enter the home over the Loudermilks' objection. (ER-84, ¶ 96, 97, 98). However, he never communicated his conclusions to either the Loudermilks or his deputies at the door. (ER-84, ¶ 99)

Sousa and Ray nevertheless remained on the scene along with the other four uniformed deputies. Sousa, a sergeant, never directed his subordinates to leave the Loudermilks' home. Nor did he inform them of their lack of authority to enter the home. (ER-84, ¶ 99). MCSO officers and posse members receive training about the "use of force continuum." (ER-84, ¶ 55). They are also trained to use the lowest level of force necessary in the circumstances. (ER-84, ¶ 54). In addressing "consent searches," the

written policy of the Maricopa County Sheriff's Office says, "[a]ny consent to search must be voluntary, *without fear, threats or promises*." (ER-84, Exhibit M, MCSO 0051 a ¶ 14.A) (emphasis added). The written policy also says that "reliance upon the supposed consent of the defendant is risky," *id*. at ¶ 14.D., and that it can be "unwise." *Id*. at ¶ H.

The Loudermilks called Attorney Schmidt and Ms. Cash called then-Assistant Attorney General Rhodes. (ER-84, ¶ 101, 106). Cash, Cramer, and Rhodes claim privilege with respect to their conversations. (ER-84, ¶ 107). But CPS Agent Cramer began filling out a Temporary Custody Notice ("TCN") to remove the children because they "couldn't gain access" to the home. (ER-84, ¶ 80). 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. No court order or other review is necessary to issue a TCN (ER-84, ¶ 81). Before taking a child into temporary custody, CPS agents are trained to consult with their Attorney General, because after removal the AG will need to prepare a dependency petition to be filed with the court within 72. (ER-84, ¶ 82).

Schmidt spoke with Deputy Ray, who told him he was there to assist CPS and that if the Loudermilks did not allow them access to their home and the children, they had enough evidence to obtain a court order "in five

minutes." (ER-84, ¶ 104). After speaking with Deputy Ray, Schmidt spoke to Mrs. Loudermilk and recommended that she bring the children to the front porch so that the deputy and CPS workers could see them and verify that they were healthy and happy, which she did. (ER-84, ¶ 117, 118). However, the CPS defendants conceded in their memorandum to the district court that their main purpose for going to the Loudermilks' home was to search the interior. "Indeed, the parties spent forty minutes to an hour discussing the reasons CPS needed to inspect the interior of the home to verify that there was not a serious hazard. Merely observing the children to confirm that they appeared healthy and happy would not alleviate the safety concern." (CPS Motion for Summary Judgment (Docket #76) at 7).

Schmidt also spoke to Cash. (ER-84, ¶ 110). Cash told Schmidt that she had spoken with her lawyer, and if they were not permitted to enter the home, she would take the children into temporary custody for up to 72 hours. (ER-84, ¶ 111). She told Schmidt that CPS agents had authority to take children into temporary custody under Arizona law and that if he disagreed with that he should take it up with the Legislature. (ER-84, ¶ 112, 113). She then repeated that if she was not allowed into the home, CPS policy required her to remove the children into temporary custody, handcuffing the parents if they did not let her in. (ER-84, ¶ 114, 115). Cash

ended her conversation by telling Schmidt that he should talk to AG Rhodes. (ER-84, ¶ 116).

Schmidt then called Rhodes and attempted to persuade her that there was no justification for entering the home without a warrant or for taking the children into custody. Rhodes disagreed. Rhodes told Schmidt that the Loudermilks were required by law to let CPS search their home. (ER-84, ¶ 121, 122). Rhodes told Schmidt that CPS has "greater leniency" than police when conducting investigations. (ER-84, ¶ 123). Rhodes reiterated to Schmidt several times that the CPS agents must enter the home. (ER-84, ¶ 125).

The two attorneys discussed federal and state cases and Arizona statutes relating to CPS investigations. Schmidt pointed out that this Court in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), had ruled that CPS investigations were subject to the normal rules of the Fourth Amendment. Rhodes responded that Arizona statutes had been upheld by state courts. (ER-84, ¶ 124).

Rhodes told Schmidt that if the Loudermilks did not allow the CPS agents into the home they had legal authority to take the children into temporary custody under Arizona statutes. (ER-84, ¶ 125). After some discussion about the Arizona statute and the factual predicate necessary for

taking temporary custody of a child, Rhodes told Schmidt that "we could argue those facts at the 48 hour hearing." (ER-84, ¶ 130). Rhodes again said that if the Loudermilks persisted in refusing to allow CPS agents into the home they would be able to take the children into custody. Schmidt said he would relay her position to the Loudermilks and Rhodes hung up abruptly. (ER-84, ¶ 130).

Attorney Schmidt then spoke to Mr. Loudermilk about his conversations with CPS Agent Cash and Assistant Attorney General Rhodes. He told Mr. Loudermilk that he did not agree with Cash and Rhodes that they had adequate legal grounds to either enter their home or take their children into temporary custody. He told Mr. Loudermilk that they were, however, insistent that if they were not allowed into the home they could take the children. (ER-84, ¶ 134, 136).

Schmidt told Mr. Loudermilk that he believed their Fourth Amendment rights were being violated, but that Mr. Loudermilk would have to decide for himself what course of action to follow next. (ER-84, ¶ 135, 137). Mr. Loudermilk said that he didn't want his children to be taken into custody and that he felt that he had no other option than allowing the search of his home. (ER-84, ¶ 138). Mrs. Loudermilk believed that the children would be immediately removed if she did not allow them to search her

home. (ER-84, ¶ 140). Mr. Loudermilk believed that he would be arrested and the children removed if he did not allow them to search his home. (ER-84, ¶ 139).

There was no further communication to the Loudermilks from any CPS worker or deputy subsequent to Assistant Attorney General Rhodes' statement to Schmidt that the children would be immediately removed without a court order if the CPS workers were not allowed in the home.

In response to Rhodes' repetition of the prior demands, Mr. Loudermilk told the assembled CPS agents and MCSO deputies that they could come into his house. The two CPS agents and Ray, Danner, and Sousa entered, searched the entire house, and also verified that the family had food. They left about five to ten minutes later. (ER-84, ¶ 143). Before leaving, Cash told the Loudermilks that the report was false and that they would be receiving a letter saying the case had been closed because the allegations were unfounded. (ER-84, ¶ 145).

As they drove away, CPS Agents Cash and Cramer had a conversation about their search of the Loudermilks' home. Cramer testified, "Really our discussion was we couldn't understand why they made such a big deal out of such a very small thing in the sense we could have been in and out of the

home quickly, seen the allegations weren't true, and instead of that, it turned into a drawn out affair." (ER-84, ¶ 146).

SUMMARY OF THE ARGUMENT

The district court held that there was a factual issue in dispute regarding whether the Loudermilks' consent was voluntary. This Court does not have appellate jurisdiction over the Deputies' interlocutory appeal. The Deputies' dispute with the District Court is not over an abstract issue of law, because the law in the Ninth Circuit has been clearly established for over 20 years – a fact the Deputies never mention in their opening brief. Instead, the deputies are trying to refight in this Court the voluntariness of consent, which is a factual issue. They should not be allowed to make this argument, which as the district court held is more properly dealt with in a trial context.

Even if this Court holds that it has jurisdiction, it is clear that the Deputies violated Mr. and Mrs. Loudermilk's Fourth Amendment protection against unreasonable searches and seizures. As the district court ruled, a rational trier of fact could conclude that the Loudermilks did not give voluntary consent when they allowed the Deputies to search their home. The Deputies made a lengthy argument (albeit without any controlling legal authority) that because the Loudermilks consulted with their attorney, their consent was voluntary. However, this is not the law in the Ninth Circuit or

indeed around the United States. The chance to speak with a lawyer is only one of many factors that courts must consider in determining whether consent was in fact voluntary.

The most important factor for this Court to consider in the context of voluntary consent is the unabated threat to remove the Loudermilks' children. When the Deputies threatened to arrest Mr. Loudermilk and then later threatened to obtain a search warrant (although there was no probable cause for such a warrant), the Loudermilks still refused to allow them in. However, when the threat turned to removal of the Loudermilks' children, Mr. and Mrs. Loudermilk decided that rather than lose their children, they would allow the defendants to enter. The Deputies never discuss the import of this threat in their opening brief, even though their codefendants had begun filling out a form to immediately take custody of the children.

The senior law enforcement official on the scene, Sgt. Sousa, determined that the Deputies did not have the legal right to either arrest the Loudermilks or enter their home. But he and the other Deputies stayed around as "standby officers" until the Loudermilks allowed them and the social workers in.

Another important factor to be considered in the voluntariness of consent analysis is that the Loudermilks had been seized, because a

reasonable person in their circumstances would have believed that they were not free to go about their own business. And because they were seized, when they finally relented, their "consent" was not voluntary. This seizure and the threat to remove the children were completely unauthorized under both federal and state law. In fact, Arizona law specifically says that "Refusal to cooperate in the investigation or to participate in the offered services does not constitute grounds for temporary custody of a child…" A.R.S. Section 8-803(D).

The Deputies try to paint themselves as non-participatory bystanders. This Court should reject this characterization. The Deputies were specifically called out to provide backup for an "uncooperative" family. They did exactly that, and then went on to increase the pressure on the Loudermilks by threatening arrest, threatening to get a warrant that was unsupported by probable cause, and then participating as "standby officers" while CPS threatened to take the Loudermilks' children away. In defiance of the Sheriff's office's own policy on consent, they engaged in numerous coercive activities in an attempt to override the Loudermilks' decision not to allow them in.

The law in the Ninth Circuit that individuals are protected by the Fourth Amendment in child protective service investigations has been

clearly established since 1986. No reasonably competent officer would have concluded in this case that the Loudermilks' consent was voluntary, and the Deputies are not eligible for qualified immunity. This case is almost exactly the same as *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), and the result should be the same: the defendants should stand trial for their violation of the Loudermilks' constitutional rights.

ARGUMENT

I. Standard of Review.

When a district court denies summary judgment on qualified immunity grounds, its decision is reviewed *de novo*. *Knox v. Southwest Airlines*, 124 F.3d 1103, 1105 (9th Cir. 1997). In so doing, the appellate court applies the same summary judgment standard as the district court, *i.e*, summary judgment is appropriate if, viewing the evidence in the light most favorable to the nonmoving party, no genuine issues of material fact remain and the moving party is entitled to judgment as matter of law. *State Farm Mutual Auto Insurance Company v. Davis*, 7 F.3d 180, 182 (9th Cir. 1993); Fed. R. Civ. P. 56(c)(2).

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). The Deputies are not entitled to qualified immunity unless the Court, while assuming as true the facts in the light most favorable to the Loudermilks, determines that the Deputies did not violate the Loudermilks' constitutional rights or that those rights were not clearly established. *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1060 (9th Cir. 2006).

To establish the validity of consent to search, "the government bears the heavy burden of demonstrating that the consent was freely and voluntarily given." *U.S. v. Reid*, 226 F.3d 1020, 1026 (9th Cir. 2000) (internal citations omitted). The government must show that there was no duress or coercion, express or implied and that the consent was unequivocal and specific and freely and intelligently given. *Id.*

In a recent case very similar to this one, *Crowe v. County of San Diego*, 608 F.3d 406 (9th Cir. 2010), this Court held that the "district court properly denied summary judgment" when there was a factual issue of whether the plaintiffs' consent was voluntary. *Id.* at 438. In *Crowe*, the plaintiffs brought several Fourth Amendment claims against police officers, including a claim of improper search due to lack of consent. The district

court ruled that there was a genuine issue of material fact preventing summary judgment, since there was not sufficient evidence

> to meet the government's burden of proving that any consent from the Crowes was freely and voluntarily given, nor [is the evidence] sufficient to demonstrate that a reasonable officer would have thought that the Crowes freely and voluntarily consented to the searches.

Id.

In another recent Fourth Amendment § 1983 case, this Court held similarly:

> In this case, the district court properly denied the summary judgment motion because there are genuine issues of fact regarding whether the officers violated Asa Sullivan's Fourth Amendment rights. Those unresolved issues of fact are also material to a proper determination of the reasonableness of the officers' belief in the legality of their actions.

Espinosa v. City and County of San Franciso, 598 F.3d 528, 532 (9th Cir. 2010).

This Court also stated in *Santos v. Gates*, 287 F.3d 846, 855 n.12 (9th Cir. 2002), that it was premature to decide the qualified immunity issue "because whether the officers may be said to have made a 'reasonable mistake' of fact or law may depend on the jury's resolution of disputed facts and the inferences it draws therefrom…." (internal cite omitted).

II. Since All of the Disputed Issues in This Case are Factual, This Court Lacks Appellate Jurisdiction.

In an interlocutory appeal from the denial of qualified immunity, this Court has jurisdiction only "where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts…." *Knox v. Southwest Airlines*, *supra*, 124 F.3d at 1107. Appellate jurisdiction may be extended even if disputed facts about what actually occurred exist if, after resolving the issues of fact in the favor of the nonmoving party, the case still presents an "abstract issue of law relating to qualified immunity." *Kennedy v. City of Ridgefield*, 439 F.3d at 1060. Appellate jurisdiction is appropriate if "the issue appealed concerned *not which facts* the parties might be able to prove, but, rather, whether or not *certain given facts showed a violation of 'clearly established' law*." *Johnson v. Jones*, 515 U.S. 304, 307 (1995) (emphasis added).

The only triable issue in this case is whether the consent to enter the Loudermilk home was voluntary. This is a pure question of fact. The Loudermilks have asserted that these Deputies (along with other defendants) coerced them into consenting to a search of their home contrary to their right to be free from such intrusions during a child-neglect investigation. Accordingly, interlocutory appeal is inappropriate.

a. Appellants Ignored the Controlling Clearly Established Law of this Circuit.

While the facts regarding the voluntariness of consent are in dispute, the Fourth Amendment *law* in this regard has been clearly established in this circuit for many years. The district court correctly stated, "The Ninth Circuit has held that traditional Fourth Amendment protections apply to child abuse investigations and that the family's right to be free of warrantless searches and seizures in their home, even within the context of child abuse investigations, has been clearly established at least since the decision in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999)." *Order Denying Motion for Summary Judgment* (*District Court Decision*) at 11. The district court further relied on *Calabretta* and held that "entry of social workers or police officers into a home to inspect or remove a child requires a warrant. *Calabretta*, 189 F.3d at 813. However, a search conducted with voluntary consent is constitutionally permissible. See *U.S. v. Brown*, 563 F.3d 410, 415 (9th Cir. 2009)." *Id*. And most critical for the appellate-jurisdiction question, "Whether consent to search was voluntarily given is to be determined from the totality of all the circumstances." *Id*. The only dispute here is factual, not legal.

Calabretta is this Court's seminal case in which this Court rejected the qualified-immunity defense of a social worker and a police officer who

had unconstitutionally entered and searched a family's home weeks after the social worker received an anonymous tip of alleged child abuse. It held that this legal principle was already clearly established by this Court's prior decision of *White by White v. Pierce County*, 797 F.2d 812 (9th Cir. 1986). *Calabretta*, 189 F.3d at 813. *Calabretta* was the case most heavily relied on by the district court in deciding that the Loudermilks had a constitutional right to be free from this search of their home. And even more importantly the district court specifically noted that the law relative to the central legal issues in this case has been clearly established at least since 1999 because of *Calabretta*.

Yet the Deputies' brief to this Court does not cite *Calabretta* even once. The Deputies' omission speaks volumes. It is difficult to imagine how these Deputies can plausibly claim that the Loudermilks' Fourth Amendment right to exclude them from their home during a child-neglect investigation had not been clearly established without discussing and at least attempting to distinguish *Calabretta*. The Deputies' failure to discuss this controlling precedent in their opening brief may by itself justify summary dismissal of their appeal. See, *e.g.*, *Amoco Oil Co. v. U.S.*, 234 F.3d 1374,

1378 (Fed. Cir. 2000) ("This appeal is deficient in another respect. In its opening brief, appellant's counsel failed to cite, much less distinguish, clearly governing case law (*viz.*, *Carnival* and *Princess*), with which counsel was intimately acquainted.")

Calabretta with vivid clarity discusses and decides all of the abstract issues of law at issue in this case. *Calabretta* makes it clear that the normal rules of the Fourth Amendment control CPS investigations of child abuse. This means that a search is only valid if there is one of the following in place:

- a warrant issued by a neutral magistrate supported by probable cause;
- evidence rising to the level of probable cause that reveals exigent circumstances; or
- consent to search that is given freely and voluntarily.

Additionally, this Court has specifically held dozens of times that "[t]he Fourth Amendment test for valid consent to search is that the consent be voluntary, and voluntariness is a *question of fact* to be determined from

all the circumstances." *Bailey v. Newland*, 263 F.3d 1022, 1031 (9th Cir. 2001) (internal quotations omitted)(emphasis added).[3]

b. Appellants Do Not Argue That the District Court Committed Legal Error.

To properly invoke the appellate jurisdiction of this Court in this interlocutory appeal, the Appellant Deputies would be required to make a good-faith argument that the district court committed *legal error* when it concluded that the *law* regarding the search of a home during a social services investigation was clearly established at the time. This they have not done in their discussion of this Court's jurisdiction – nor could they because the Loudermilks' Fourth Amendment claim was not in any sense novel.

The appellants in *Calabretta* argued that traditional Fourth Amendment rules do not apply to social-services investigations. While that argument did not prevail in *Calabretta*, it was a non-frivolous *legal* argument about what the correct *legal* standard should be, and this Court correctly exercised appellate jurisdiction over that interlocutory appeal to

[3] See, e.g., *U.S. v. Marshall*, 488 F.2d 1169, 1186 (9th Cir. 1973); *U.S. v. Agosto*, 502 F.2d 612, 613-614 (9th Cir. 1974); *U.S. v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985); *U.S. v. Al-Azzawy*, 784 F.2d 890, 895 (9th Cir. 1985); *U.S. v. Vasquez*, 858 F.2d 1387, 1389 (9th Cir. 1988); *U.S. v. Delgadillo-Velasquez*, 856 F.2d 1292, 1299 (9th Cir. 1988); *U.S. v. Gomez*, 846 F.2d 557, 559 (9th Cir. 1988); *U.S. v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990); *U.S. v. Kelley*, 953 F.2d 562, 564 (9th Cir. 1992); *U.S. v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997).

resolve the legal dispute. In denying qualified immunity, this Court in *Calabretta* rejected that argument and held that the law was already clearly established in 1994, when the events in that case occurred. "Any government official can be held to know that their office does not give them an unrestricted right to enter peoples' homes at will." *Calabretta*, 189 F.3d at 813.

Unlike the appellants in *Calabretta*, the Deputies in their opening brief do not make any legal argument describing how in their view the legal standard expressed by the district court was in error. Nor do they make any legal argument discussing how that standard, even if correctly expressed by the district court, was not clearly established on March 9, 2005.

The Deputies' submission to this Court fails in another critical way. Their review of the facts is riddled with inaccuracies, omissions, and interpretations which collectively reveal that they have not properly sought to adhere to the summary judgment rule that requires the facts to be reviewed in the light most favorable to the Loudermilks.

The clearly established legal rules require the voluntariness of the consent to be judged under the totality of circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). It is self-evident that in order to adhere to this standard, a party must give a full and fair evaluation of all of

the factors which bear on the question of the voluntariness of the consent. See *Crowe v. County of San Diego*, 608 F.3d 406, 433 (9th Cir. 2010)(police "may not disregard facts tending to dissipate probable cause.")

The greatest single failure in this regard is the omission of any reference to the repeated threat from at least three of the government actors that the Loudermilk children would be removed immediately without court order if consent to search was not granted forthwith. Although the appellants make scant reference to these threats in their statement of facts, these threats are entirely omitted in the argument section of their brief. But it is clear from both the facts and the district court opinion that the threat to remove the children was by far the most decisive factor in a long pattern of falsehoods, bravado, and strong-arm tactics. (See section II.d. below).

c. The Totality of the Circumstances Supports the District Court's Ruling on the Voluntariness of Consent

In *U.S. v. Soriano*, 361 F.3d 494, 502 (9th Cir. 2004), this Court recognized that courts in this Circuit 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. However, even in *Soriano*, this Court established that these five factors were not an exclusive list; in fact, in that case this Court found that a major factor was the threat (later abated) to remove a child, a factor discussed *infra*.

The first factor to consider is whether the Loudermilks were "seized" at the time "consent" was given. This Court "has established that, '[t]he proper focus when determining coerciveness or restraint sufficient to constitute an arrest or detention is not on the subjective belief of the agents. Rather we review the situation from *the perspective of the person seized.*'" *Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1995) (quoting *U.S. v. Delgadillo-Velasquez*, 856 F.2d 1292, 1295 (9th Cir. 1988) (emphasis in original). Moreover, it was clearly established law in this Circuit that a consensual encounter may escalate into being a seizure "when a law enforcement officer, through coercion, physical force, or a show of authority, in some way restricts the liberty of a person," *U.S. v. Washington*, 387 F.3d 1060, 1068 (9th Cir. 2004) (internal quotations omitted), or if there is a "threatening presence of several officers…" *U.S. v. Chavez-Venezuela*, 281 F.3d 897, 898 (9th Cir. 2002). Such a seizure occurs under the Fourth Amendment when, "taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable

person that he was not at liberty to ignore the police presence and go about his business" or that he "was not free to decline the officers' requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 437, 439 (1991) (internal quotations and citations omitted).

From the Loudermilks' perspective, two CPS agents and two uniformed deputies arrived unannounced at their door two weeks after they had cancelled the meeting with Agent Cagle and two months after Cagle had first visited the Loudermilks' home to investigate an anonymous report. None of these officials had previously had any personal contact with the Loudermilks. These officials had no court order to search the home and threatened to arrest them if the Loudermilks declined to consent to a search. After the Loudermilks did in fact decline to consent, four more armed, uniformed officers arrived at their home.

Deputies argue that "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." Appellants' Brief at 33-34. But the Deputies' subjective belief about the Loudermilks' constitutional rights or about the rectitude of their own conduct is irrelevant. The "relevant question ... is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly

established law and the information the searching officers possessed. [The officer's] subjective beliefs about the search are irrelevant." *Calabretta*, 189 F.3d at 812-13.

After the CPS agents conferred with their lawyer, Defendant Rhodes, the demands were more focused. If not allowed in, the CPS agents said they would remove the Loudermilks' children from their custody, and Agent Cramer actually began filling out a Temporary Custody Notice. This all occurred in the presence of six uniformed deputies, whose vehicles were blocking the driveway and none of whom gave any indication to suggest that they would not back up the CPS agents. The undisputed fact is that the Deputies did not leave, nor give any indication to the Loudermilks that they were not ready, willing, and able to enforce Rhodes' threat to remove the children. Danner himself testified that he was engaged in conversation to "keep the situation…basically calm." (ER-84, Exhibit 6, 14:9-11).

A rational trier of fact could conclude from the summary-judgment record that a reasonably objective parent in the Loudermilks' position would not have believed that they were at liberty to leave with their children, were free to decline the officers' request, or otherwise free to terminate the encounter by simply retreating into their home. They were in fact "seized."

Because they were seized, when they finally relented their "consent" was not voluntary.

Moreover, as the district court explained in *U.S. v. Velazco-Durazo*, 372 F. Supp. 2d 520, 525 (D. Ariz. 2005), "In *Cormier* [*v. United States*, 220 F.3d 1103, 1109 (9th Cir. 2000)] this Court identified two sets of coercive circumstances that would transform a knock and talk into a seizure: (1) if the police compelled an occupant to open the door under the badge of authority and (2) *if the police were unreasonably persistent in attempting to gain entry*." (Emphasis added)

In *Velazco-Durazo*, which the district court handed down shortly before the events in this complaint occurred, the district court concluded that "[t]he police unreasonably persisted for approximately two-and-a-half minutes in loud knocking rising to the level of heavy pounding on doors and windows in summoning Defendant to the door. By all indications they were not leaving unless Defendant came to the door." *Id*. The court concluded that the police behavior was not a consensual "knock-and-talk" encounter, but was in fact an unlawful seizure. *Id*. at 526.

Thus, the first *Soriano* factor stands in favor of the Loudermilks. The Deputies' persistence in remaining for the better part of an hour, demanding entry, threatening to remove children, to arrest, and to handcuff, all backed

by eight government officials and a state attorney go far beyond the officer's conduct in *Velazco-Durazo*.

The fifth factor in *Soriano*, whether the person has been told that a search warrant could be obtained, also militates in favor of the Loudermilks' position. In *U.S. v. Cormier*, 220 F.3d at 1112, this Court stated that "the application of the fifth factor... hinges on whether a suspect is informed about the possibility of a search warrant in a threatening manner." In *Soriano*, "multiple officers... told Mukai that if she did not give consent to the search, their next step would be to obtain, or to seek to obtain, a search warrant... when probable cause to justify a warrant exists, the weight of the fifth factor is significantly diminished." *Soriano*, 361 F.3d at 504-505. Restated, if there is not probable cause to justify a warrant , the threat to obtain one weighs heavily *against* voluntariness.

In this case, the deputy threatened to go get a search warrant "in five minutes." (ER-84, ¶ 96). However, these threats were unlawful and therefore coercive.

If the threat to get a court order was in regards to entry to the home, the deputies should have known better. An anonymous tip on its own is insufficient evidence to obtain a search warrant (*U.S. v. Clark*, 31 F.3d 831, 834 (9th Cir. 1994), and that two-month-old anonymous tip was the only

evidence that Appellants had. (*See also Calabretta*, 189 F.3d at 816: "[t]he anonymous tip claiming bruises was in that case insufficient to establish special exigency." (Citing *Good v. Dauphin County*, 891 F.2d 1087 (3d Cir. 1989)).

If on the other hand the threat to get a court order was in reference to removing the children, this threat was even less lawful and therefore more coercive. Both Arizona and federal law set a high standard to remove children from their parents. Arizona law requires that before children are taken into custody, it must be:

> clearly necessary to protect the child because probable cause exists to believe that the child is either: 1. A victim or will imminently become a victim of abuse or neglect. 2. Suffering serious physical or emotional injury that can only be diagnosed by a medical doctor or psychologist. 3. Physically injured as a result of living on premises where dangerous drugs or narcotic drugs are being manufactured. For the purposes of this paragraph, "dangerous drugs" and "narcotic drugs" have the same meaning prescribed in § 13-3401. 4. Reported by child protective services to be a missing child at risk of serious harm.

A.R.S. § 8-821(B).

It is particularly telling that the social worker defendants called for police back-up *before* they went to the house because they considered the Loudermilks to be "uncooperative." It is undisputed that threatening to take children into custody because the parents aren't "cooperating" is contrary to Arizona law. "Refusal to cooperate in the investigation or to participate in

the offered services *does not constitute grounds for temporary custody* of a child except if there is a clear necessity for temporary custody as provided in § 8-821." A.R.S. § 8-803(D) (emphasis added.) As this Court held recently in *Crowe v. County of San Diego*, 608 F.3d at 433, although "police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." (citing *U.S. v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005). This statute was on the books on March 9, 2005, but similarly to their inexplicable failure to discuss *Calabretta*, Deputies do not even cite it in their opening brief.

The Deputies had no probable cause to believe that the Loudermilk children were victims of abuse or neglect. The only evidence they had was a two-month-old anonymous tip. They had no probable cause to believe that the children were suffering serious physical or emotional injury. There was no allegation regarding drug use of any type. The Loudermilk children had not been reported as missing. Thus, none of the requirements of Arizona law for removing a child were present.

Federal law gives exactly the same result. "The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." *Mabe v. San*

Bernardino County, 237 F.3d 1101, 1107 (9th Cir. 2001). Officials violate this right if they remove a child from the home absent "information at the time of the seizure that establishes 'reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.'" *Id.* at 1106 (quoting *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)). The Fourth Amendment also protects children from removal from their homes absent such a showing. *Doe v. Lebbos*, 348 F.3d 820, 827 n.9 (9th Cir. 2003). Officials who remove a child from the home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant. *Mabe*, 237 F.3d at 1108.

A threat to get a warrant is inherently coercive if the threat has no legal authority behind it. The Deputies had no legal authority under state or federal law to remove the children.

d. Appellants Engaged in a Pattern of Coercive Behavior

The defendants engaged in numerous coercive activities in an attempt to override the Loudermilks' decision not to allow them in. First, they showed up in uniform in four marked police cars, the lowest level of the force continuum, and blocked the driveway. They joined the social workers

in demanding entry into the Loudermilks' home. CPS worker Cash claimed she had a search warrant when she did not. Deputy Ray threatened to arrest John Loudermilk for not cooperating with the social worker. Deputy Ray also threatened to get a warrant "within five minutes" to enter the house, a threat unsupported by any legal authority. Defendant social workers and the Assistant Attorney General threatened to remove the children if the Loudermilks did not allow them into the home. The defendants began filling out a TCN, which the Deputies believed would automatically place the Loudermilk children in state custody.

Some of these threats were withdrawn. For example, Deputy Ray withdrew his threat to arrest John Loudermilk when talking to attorney Schmidt on the phone. But the threat to obtain a search warrant and the threat to remove the Loudermilk children were never withdrawn. Thus, their coercive nature was still in effect.

e. The Threat to Remove Children is the Most Important "Voluntariness" Factor to Consider.

In *Soriano*, before even discussing the above five factors in regards to voluntary consent, this Court considered the threat to take away the child to be the most important factor to consider when deciding whether the woman's consent was voluntary:

> We will review these five factors in the context of this case below, but there was a *more important factor* in the particular circumstances of this case, so we begin with that. It was the threat to take away Mukai's children which provides the most serious basis for questioning the voluntariness of Mukai's consent to the search. *If that threat had remained unabated, Mukai's consent could properly be set aside as involuntary.*

Id., 361 F.3d at 502. (Emphasis added).

Thus, this Court held that an *unabated threat* to take away a child, like the threat in this case, would be sufficient to set aside a finding of voluntariness under the clearly erroneous standard of review. In *Soriano*, before the woman signed a consent form, a second officer assured the woman that her children would *not* be taken from her. No such withdrawal of the threat exists in this case. This Court held in *Soriano* that while reasonable minds could differ about the effect of the second officer's assurances, the trial court's finding that consent was voluntary was not clearly erroneous because of the abatement of the threat. *Id*. The majority found consent to be a close call under the clearly erroneous standard. *Id.* at 503. But Judge Berzon dissented and concluded:

> It is the government that "bears the heavy burden of demonstrating that consent was freely and voluntarily given." *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (citing *Schneckloth*, 412 U.S. at 222, 93 S. Ct. 2041). The government is unable to meet this burden, and the district court erred in concluding otherwise.
>
> *Id.* at 517.

Additionally, "[t]he relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit 'cooperation,' they exert the 'improper influence' proscribed by *Malloy* [*v. Hogan*, 378 U.S 1 (1960)]." *U.S. v. Tingle*, 658 F.2d 1332, 1335 (9th Cir. 1981). *See also Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (all of the officers on the scene told defendant that her infant children would be taken from her if she did not cooperate; held, confession was not voluntary but coerced).

The Deputies' argument concerning voluntariness is disingenuous. It skips over the essence of the issue. There is no discussion about the legal effect of the threat to remove the children that was made in their presence. There is no discussion of the social worker beginning to fill out the Temporary Custody Notice in their presence. The Loudermilks were not faced with conflicting representations. Instead, they were faced with repeated representations that their children would be removed if they did not consent to the search of their home. Before they finally relented, this threat was backed by two CPS agents, five uniformed deputies, and a uniformed sergeant at their home, and an Assistant Attorney General on the telephone. And one of the CPS agents by her own admission had already begun to fill

out a Temporary Custody Notice. Deputies acknowledge in their fact section that "[o]nce the parent is handed the TCN, the children are in CPS's care." Appellants' Brief at 13. But they don't discuss how that clear and present danger to the Loudermilks affects the factual issue of the voluntariness of consent.

Instead, later in their brief, in the section where the more senior officers attempt to avoid liability by deflecting all of the blame on the more junior Deputy Ray, they say "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." Appellants Brief at 46. Apart from bordering on the dishonorable, this statement is simply not true.

As a matter of undisputed fact, Sergeant Sousa, at the request of Deputy Ray, reviewed A.R.S. § 8-821, which sets out the standards for the emergency removal of a child. "After Sergeant Sousa arrived, he and Deputy Ray reviewed A.R.S. § 8-821 and determined that they could not arrest the Loudermilks. In addition, Sergeant Sousa did not believe they had exigent circumstances to enter the home." Appellants' Brief at 14-15.

In other words, Sergeant Sousa, the most senior man on the scene, had every reason to believe that there was no legal authority to back up the threat to immediately remove the Loudermilks' children. He had himself

subjectively come to that very conclusion after reviewing the circumstances with Deputy Ray and reviewing the applicable statute and applying the correct constitutional standard. He had the knowledge, experience, and authority to put a stop to the unlawful encounter and failed to act. If any one of the Deputies is more responsible than the others it is Sergeant Sousa, not his subordinate who called him to the scene.

Finally, the Deputies fail to acknowledge the effect of the participation of one of the defendants who did not appeal. Assistant Attorney General Rhodes communicated to Attorney Schmidt (and presumably to the social worker defendants, who also have not appealed and claimed privilege below) that CPS had the legal authority to carry out their threat to remove the children. A rational trier of fact could conclude from the summary-judgment record that the Defendants deliberately preyed upon the Loudermilks' parental instincts to inculcate fear in the Loudermilks that they would take away their children to elicit their "cooperation." The Loudermilks did the only thing any reasonable parent could have done in the circumstances: They "consented" to the search of their home in fear that their young children would be taken from them. John Loudermilk testified that "that was our only choice" since he believed that he would be "arrested and our children taken away, if we did not let them in." (ER-84, ¶ 139)

Tiffany Loudermilk testified that if she did not let Appellants in, her children would have been taken for up to 72 hours. (ER-84, ¶ 140).

Deputies argue that Deputy Ray's retraction of the threat to arrest John Loudermilk leads to a conclusion that the Loudermilks' eventual consent was voluntary. This is not a reasonable inference. The Loudermilks had been resisting entry into their home for over two months. They had canceled an appointment with social worker Cagle. They still resisted when informed that Mr. Loudermilk would be arrested. They still resisted when told that the defendants could get a court order in five minutes. But when finally faced with the threat to have their children removed, they "consented." This is not the mark of a free and voluntary consent; it is the sign of coerced cooperation in the face of escalating threats beyond what any reasonable person should be expected to endure.

The district court concluded that the law of the Fourth Amendment was sufficiently clear regarding the voluntariness of consent to put the Deputies on notice. The court also concluded that the facts could support a finding that the defendants, including the Deputies, coerced consent through threats and the presence of six uniformed deputies.

Therefore, this case falls squarely within the Supreme Court's holding in *Johnson v. Jones*, 515 U.S. 304 (1995), as suggested by this Court's

show-cause order. Like the issue before this Court, *Johnson* "resolved a fact-related dispute about the pretrial record, namely, whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Johnson*, 515 U.S. at 307. As the Supreme Court further explained in *Johnson*:

> [A] district court's order denying a defendant's motion for summary judgment was an immediately appealable 'collateral order' (i.e., a "final decision") under *Cohen*, where (1) the defendant was a public official asserting a defense of 'qualified immunity,' and (2) the issue appealed concerned *not which facts* the parties might be able to prove, but, rather, whether or not *certain given facts showed a violation of "clearly established" law*.

Id. at 311 (emphasis added). In the context of this case, *Calabretta* clearly established that it is a violation of the Fourth Amendment for police officers and social workers to conduct a search of a home during a social-worker investigation in the absence of a warrant, exigent circumstances, or valid consent.

The Appellant Deputies' reliance on *Behrens v. Pelletier*, 516 U.S. 299 (1996) is misplaced. Appellants' Brief at 3-4. *Behrens* was chiefly addressing "whether a defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss deprives the court of appeals of jurisdiction over a *second appeal*, also based on qualified immunity, immediately following a denial of summary judgment." *Id*. at

301 (emphasis added). After concluding that there is not a jurisdictional bar to pursuing a second interlocutory appeal the Supreme Court simply reiterated what it had said in *Johnson*.

> *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; **if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under *Cohen* and *Mitchell* See 515 U.S. at 313-318, 115 S. Ct., at 2156-2158.** *Johnson* reaffirmed that summary judgment determinations *are* appealable when they resolve a dispute concerning an "abstract issu[e] of law" relating to qualified immunity, *id.*, at 317, 115 S. Ct., at 2158-typically, the issue whether the federal right allegedly infringed was "clearly established," see, *e.g.*, *Mitchell*, *supra*, at 530-535, 105 S. Ct., at 2817-2820; *Davis v. Scherer*, 468 U.S. 183, 190-193, 104 S. Ct. 3012, 3017-3019, 82 L. Ed. 2d 139 (1984) .

Id. at 313. (bold added, italics in original.) [4]

In this case, the district court concluded that the evidence could support a finding that particular conduct occurred, *i.e.*, that consent was coerced by threats and the presence of six uniformed deputies. The "abstract issue of law" is whether the Loudermilks' right to be free from a

[4] The Appellants also include this section of *Behrens* in an even longer block quotation but exclude the sentence we have bolded as represented by an ellipsis in their response.

warrantless, nonconsensual search of their home during a social services investigation was clearly established on March 9, 2005.

This Court thoroughly discussed the qualified immunity standard in *Calabretta v. Floyd*, 189 F.3d 808, 812-13 (9th Cir. 1999), which also was an appeal from a denial of summary judgment. In that case, this Court rejected the claim by social workers and police officers that they should be immune from suit for a warrantless, nonconsensual search of a home in the course of investigating an anonymous tip of alleged child abuse or neglect. In *Calabretta* the officials did not coerce consent; they simply ignored the refusal to grant consent and entered the home over the objections of the parents. That factual distinction does not change the legal standard. A search is "nonconsensual" whether consent is coerced or refusal is ignored.

In their brief, the Deputies claim that their own belief that the Loudermilks' consent was voluntary was "reasonable," even if legally erroneous. Their argument does not withstand scrutiny whether viewed as an appellate-jurisdiction question or on the merits of their qualified-immunity defense. The Maricopa County Sheriff's Office policy on consent specifically provides that for consent to search to be voluntary it must be given "without fear, threats, or promises," and that, "Reliance upon the supposed consent of the defendant is risky because it cannot be anticipated

how the facts surrounding this alleged consent, as testified to by the officer and the defendant, will appear to the court." (ER-84, Exhibit M, MCSO 0051 a ¶ 14.A).

The district court held that a trier of fact could conclude that the Loudermilks' consent was not voluntary. That holding by itself precludes this Court from exercising appellate jurisdiction. Additionally, in light of the summary above, it is difficult to understand how any officer could argue that it was objectively legally reasonable under the circumstances of this case to believe that the Loudermilks' "consent" was voluntary when this Court's cases, the statutes of Arizona, and the Sheriff's own written policy placed the Deputies on notice that it was not reasonable.

III. The Deputies Violated Mr. and Mrs. Loudermilk's Constitutional Rights.

No intellectually serious argument can be made to support the Defendants' incredulity about why an innocent man would wish to keep a government official from intruding into his home without legal authority. "The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority." *Baldwin v. Placer County*, 418 F.3d 966, 970 (9th Cir. 2005).

In our discussion of the issue of this Court's jurisdiction we have already addressed most of the issues necessary for the resolution of the issue

of qualified immunity. We do not repeat those arguments here. Instead, we focus on the implications that arise from the role played by counsel for the Loudermilk family who was advising them by phone, and the active role taken by the Deputies in their support of the social workers' threat to remove the Loudermilk children.

a. The Loudermilks' Consultation with Their Attorney did not Automatically Make Consent Voluntary.

"An individual may waive his Fourth Amendment rights by giving voluntary and intelligent consent to a warrantless search of his person, property, or premises." *U.S. v. Torres-Sanchez*, 83 F.3d 1123, 1129 (9th Cir. 1996). Whether consent to a search was voluntary, or was the product of duress or coercion, is a question of fact to be determined from the totality of the circumstances. *Schneckloth*, 412 U.S. at 223 (1973).

Without ever quite saying so directly, the Deputies appear to argue that because the Loudermilks spoke with an attorney, their consent should be deemed voluntary as a matter of law. But even here the Deputies misstate what the record evidence is and what the district court held. The district court did not find that the summary-judgment record supported the conclusion that the Loudermilks consented "with advice of counsel" as Appellants assert. Instead, the district court held:

> After speaking with Defendant Rhodes, attorney Schmidt told Plaintiff John Loudermilk the CPS agents would take the children into temporary custody if not allowed inside the home (PSOF ¶¶ 134-136). Schmidt said he thought the Loudermilks' Fourth Amendment rights were being violated but that Schmidt could not make the decision for John Loudermilk about whether to allow them inside (PSOF ¶¶ 135, 137).

District Court Decision at 8.

The mere fact that one spoke to a lawyer does not magically turn coerced consent into valid consent. Speaking to an attorney is just one factor among many that may be considered when determining whether consent was voluntary or if it was coerced.

For example, in *U.S. v. Molt*, 589 F.2d 1247 (3d Cir. 1978), the district court held that the defendant's consent to search was involuntary even though the defendant consulted with his attorney immediately before consenting. *Id*. at 1249. On appeal, the government "urge[d] that Molt's college education, his business experience, and his consultation with his attorney prior to consenting combine to create an atmosphere of voluntariness." *Id*.

The Third Circuit disagreed and held that consultation with an attorney is just one fact to be considered in the voluntariness equation.

> [W]e are unwilling to accord the importance suggested by the government to the factor of Molt's communication with his attorney prior to acquiescing in the search. Certainly Molt's representation to the attorney that he had nothing to hide, the

> attorney's opportunity to read the statute, and the attorney's advice to Molt that he permit the inspection weigh in favor of the government's position. Nevertheless, "(v)oluntariness is a question of fact to be determined from all the circumstances…" *Schneckloth*, 412 U.S. at 248-49, 93 S. Ct. at 2059. To overturn the district court's finding that Molt's consent was not voluntary would be tantamount to holding that, as a matter of law, consent based on an attorney's advice must be voluntary. We return to the rule of *Krasnov*, supra, and based on the conflicting credible evidence, we will not disturb the district court's finding.

Id. at 1252. See also *U.S. v. Blakeney*, 942 F.2d 1001 (6th Cir. 1991), where the Sixth Circuit held that voluntariness was to be decided on the totality of circumstances even when an attorney is involved.

Contrary to the assertions of the Deputies in their brief, in this case the attorney did *not* advise the Loudermilks to consent to the search. Instead, he advised them that the government agents had no legal right to either enter their home or take their children into custody but that the officials steadfastly intended to remove the children if not allowed inside.

This Court should reject the Deputies' argument for the same reasons the Third Circuit rejected the government's argument in *Molt*. The district court in this case considered all of the facts, including actual threats and a growing law enforcement presence, along with the discussions the Loudermilks had with an attorney, and concluded that the facts could support the conclusion that their consent was coerced. That factual

conclusion is supported by the record and is consistent with well-established law.

The Deputies in their brief cite no legal authority that actually supports their apparent argument that consulting with an attorney operates to make consent valid in all cases as a matter of law. The two cases they do cite are completely inapposite to the issue they appear to raise.

They say that *U.S. v. Iglesias*, 881 F.2d 1519 (9th Cir. 1989) is "particularly instructive." Appellants' Brief at 31. But *Iglesias* did not involve a consultation with an attorney before consent was given at all. This Court simply held that the district court's ruling that consent was voluntary was not clearly erroneous.

The Deputies rather curiously cite *McKeon v. Daley*, 101 F. Supp. 2d 79 (N.D.N.Y. 2000), for the proposition that consulting with an attorney "precluded a finding that the plaintiff's constitutional rights had been violated." Appellants' Brief at 33. But *McKeon* is irrelevant to this case. First, the plaintiff in *McKeon* never raised the issue of consent in relation to any sort of search. McKeon sued several government officials for illegal arrest, unlawful threats and photographs, and wrongful use of legal process, among other issues. However, she never alleged that the officials had

conducted any search at all much less one that she had supposedly consented to after consulting with an attorney.

The Deputies cite the section of *McKeon* discussing the plaintiff's claim against the district attorney for conducting an unlawful custodial interrogation. The court arrived at the rather unremarkable conclusion that the district attorney in that case had not conducted an illegal custodial interrogation in part based on the fact that the defendant spoke with her attorney before going to the courthouse, conferred with him privately before going into the meeting, and that "her attorney was present throughout the questioning session," and that "neither plaintiff nor her attorney appear to have objected to [the district attorney's] questioning of plaintiff despite ample opportunity." *Id*. at 91-92.

The opportunity to talk to legal counsel is not some sort of magic bullet that immediately makes consent voluntary. In fact, as stated above, the Loudermilks' legal counsel did not even advise them to consent. They determined themselves that rather than suffer the loss of their children, they would allow the deputies and social workers to enter.

The district court's conclusion that a jury could find that consent under the totality of circumstances in this case was not voluntary but was coerced by threats and a large police presence is not clearly erroneous and

none of the cases cited by the Deputies further their argument to the contrary.

b. The Deputies Actively Participated in Coercing Consent.

In the district court the Deputies made a rather curious and inconsistent argument. First, they argued that their participation amounted to "a reasoned and ultimately successful attempt by the MCSO Defendants to handle and defuse a confrontation." MCSO Defendants' Motion for Summary Judgment (Docket 78) at 11. Then, they argued that "they did not substantially participate in the alleged violation of the Loudermilks' Fourth Amendment rights." *Id*. In other words, before the district court the Appellants wished to take credit for persuading the Loudermilks to change their minds ("defusing") while simultaneously disavowing any responsibility if the change of mind was coerced.

The Deputies were not merely bystanders. They were active participants in coercing consent to search. It was clearly established law that the threatening presence of several officers is an important factor in determining whether consent to search is voluntary and whether a person is seized.

They cannot claim that they were merely present or merely "standing by." Indeed, the physical presence of a single uniformed law enforcement

officer is considered to be the use of "force." "The force continuum begins with the officer's physical presence, which obviously can influence behavior of people who see the officer…" *Mason v. Hamilton County*, 13 F. Supp. 2d 829, 831 (S.D. Ind. 1998).

Moreover, the physical presence of a single officer is considered to be the lowest level on the "use of force continuum." *Mason*, *supra*. It is undisputed that Deputies were trained in the "use of force continuum" and that they are trained to use the least amount of force necessary in a given situation.

After Sergeant Sousa arrived on the scene he determined that there were no grounds for arrest under ARS 8-821(H) and that there was no justification to enter the Loudermilks' home without a search warrant. The written policy of the Maricopa County Sheriff's Office about consent searches further put Sergeant Sousa and the rest of the MCSO Defendants on notice that, "[a]ny consent to search must be voluntary, *without fear, threats or promises*." (ER-79, Exhibit M, MCSO 0051 a ¶ 14.A) (emphasis added). The written policy also says that "reliance upon the supposed consent of the defendant is risky," id. at ¶ 14.D., and that it can be "unwise as a matter of general practice to rely upon the arrested person giving consent at the time

of his arrest, if it is possible to obtain a search warrant in advance of the arrest." Id. at ¶ H.

Sergeant Sousa was the patrol sergeant. He had the authority to order the Deputies to leave the Loudermilks' home, but he did not do so. Each of the Deputies individually and all of them together were active participants in the violation of the Loudermilks' constitutional rights. Their conduct was contrary to clearly established law; it was contrary to their training; and it was contrary to the Sheriff's written policy about "consent searches."

IV. The Defendants are not Eligible for Qualified Immunity

Appellants cite *Malley v. Briggs*, 475 U.S. 335, 341 (1986), beginning mid-sentence to support their assertion that they are eligible for qualified immunity: "if officers of reasonable competence could disagree on the issue of whether a particular action violated a constitutional right, immunity should be recognized." Appellants' Brief at 28.

But the full quote in context is illustrative: "Defendants will not be immune if, on *an objective basis*, it is obvious that *no reasonably competent officer* would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341 (emphasis added).

Furthermore, in *Malley*, police officers were sued after applying for an arrest warrant. They attempted to assert absolute immunity. "In *Malley v. Briggs*, the Supreme Court held that police officers were not entitled to absolute immunity for statements made in an affidavit submitted to a magistrate for the purpose of obtaining an arrest warrant." *Burns v. County*, 883 F.2d 819, 822 (9th Cir. 1989). *Malley* is best understood in the narrow context of evaluating police conduct when they apply for an arrest warrant.

But in any event, *Malley* says and the Supreme Court last year has reiterated in *Pearson v. Callahan*, 555 U.S. 223 (2009), that the qualified-immunity standard is one of *objective reasonableness*. The qualified immunity inquiry "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were clearly established at the time the action was taken." *Pearson*, 129 S. Ct. at 822.

No reasonable reading of *Malley* could lead to the Deputies' conclusions about qualified immunity. Their discussion of the law of qualified immunity in this regard is simply wrong.

A comparison of the facts in *Calabretta* to this case is instructive. In both cases, CPS received an anonymous tip. In both cases, social workers followed up with an initial contact to the family within a few days. But in both cases, several days went by between the anonymous tip and the social

worker showing up at the front door. In *Calabretta*, it was 14 days; in this case it was over two months, a fact that the deputies ignore.

In both cases, the social worker brought a police officer with her to assist in gaining the cooperation of the family. In *Calabretta* it was only one. In this case it began with two and ended with six. The police officers in both cases demanded to be let into the home, and issued threats to the parents. In *Calabretta*, this threat was to enter over the objections of the parent; in this case, the threat was more serious – to arrest John Loudermilk if he did not let them in.

Here is where the cases diverge. In *Calabretta*, the social worker and police officer actually did enter over Mrs. Calabretta's objection. But in this case, the Loudermilks stood firm in their resistance to warrantless entry. So the defendants continued to issue more threats, including stating that they would go to court and get a warrant "in five minutes." The Loudermilks still did not consent to entry. The last threat was to remove the children from the home, and the social workers actually began filling out a Temporary Custody Notice, which the deputies understood at the time to mean that the children would then be in state custody immediately.

In *Calabretta*, the government officials did not receive qualified immunity. The court held that they had violated a clearly established

constitutional right. In this case, where the Deputies engaged in even more coercive activity, they should not be granted qualified immunity either.

The Deputies argue that "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." Appellants' Brief at 35-36. However, this analysis is tightly bound to the factual question of whether a reasonable officer would have believed that the Loudermilks' consent was free and voluntary. As argued above, this belief is simply not reasonable.

The Sixth Circuit ruled in a similar case, *Myers v. Potter*, 422 F.3d 347 (6th Cir. 2005), that police were not entitled to qualified immunity on summary judgment. Specifically, the court held that "in many factual contexts…, the fact that a right is 'clearly established' sufficiently implies that its violation is objectively unreasonable." *Id.* at 352. In this case, the right of parents to be free from the unjustified entry of their home in a child protective services investigation has been established for over a decade by *Calabretta*, a case the Deputies simply ignored in their opening brief. They cannot now credibly argue that it was reasonable for them to act as they did.

Accordingly, the district court's denial of summary judgment should be upheld.

CONCLUSION

The district court held that there was a triable issue of fact in regards to the voluntariness of the Loudermilks' consent, a ruling that this Court should give deference to. Because this appeal fails to raise any abstract issues of law, this Court lacks jurisdiction.

Deputies argue that the district court erred in denying their motion for summary judgment and that they should be granted qualified immunity. This is wrong. The law of the Fourth Amendment in relation to warrantless searches in child protective investigations is clearly established and has been since at least 1999 (the year *Calabretta* was decided). There was a clear violation of the Loudermilks' constitutional right to be protected from unreasonable searches and seizures, taking the facts in the light most favorable to the Appellees. And with the case law in the Ninth Circuit, the Arizona law expressly stating that non-cooperation is insufficient grounds to remove children, and the Maricopa County Sheriff's Office's own policy on consent searches, no reasonable officer could have relied on the Loudermilks' supposed "consent." This Court should uphold the district court's denial of summary judgment.

RESPECTFULLY SUBMITTED this 13th day of January, 2011.

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STATEMENT OF RELATED CASES

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

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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 12,918 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/ Michael P. Farris
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 13th day of January, 2011, I caused this Brief of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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