10-1336-CV

To Be Argued By
JAMES N. TALLBERG, ESQUIRE

IN THE

United States Court of Appeals
FOR THE SECOND CIRCUIT

JOSEPH M. MONTANEZ,
Plaintiff-Appellee,
v.
DANIEL SHAROH, POLICE OFFICER,
MICHAEL McCORMACK, POLICE OFFICER,
Defendants-Appellants,

CITY OF MILFORD, KEITH L. MELLO, POLICE CHIEF,
MACHARELLI, POLICE OFFICER, KIELY, POLICE OFFICER,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT
(Honorable Janet Bond Arterton, U.S.D.J.)

BRIEF OF DEFENDANTS-APPELLANTS
MICHAEL McCORMACK and DANIEL SHAROH

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JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1331, the district court had jurisdiction over this action which asserted, *inter alia*, claims pursuant to 42 U.S.C. § 1983 and the Fourth Amendment to the United States Constitution.

On March 29, 2010, the District Court, Arterton, J., issued its ruling on defendants' motion for summary judgment on all of plaintiff's claims filed pursuant to Federal Rule of Civil Procedure 56. The district court denied defendants' motion as to defendants McCormack and Sharoh, appellants herein. The district court also ruled that these two defendants were not entitled to qualified immunity as to plaintiff's Fourth Amendment claim, as a matter of law, both because the law was clearly established at the time and because the conduct of these defendants was not objectively reasonable, as defined in § 1983 jurisprudence. Notice of this interlocutory appeal was timely filed on April 6, 2010.

Jurisdiction in the Court of Appeals as to the district court's interlocutory decision on the defense of qualified immunity is premised upon 28 U.S.C. § 1291. Behrens v. Pelletier, 516 U.S. 299 (1996).

STATEMENT OF ISSUES

1. Did the district court err when it determined that defendants Sharoh and McCormack were not entitled to qualified immunity?

2. Did the district court err in determining that plaintiff's Fourth Amendment rights were violated and that no emergency or exigent circumstances existed?

3. Did the district court err when it granted summary judgment *sua sponte* in favor of the plaintiff on his Fourth Amendment claim?

STATEMENT OF THE CASE

I. THE PARTIES

Defendants-appellants Michael McCormack and Daniel Sharoh (hereinafter, "defendants") were at all relevant times employed as police officers by the City of Milford, Connecticut. Plaintiff-appellee Joseph Montanez (hereinafter, "plaintiff"), a *pro se* prisoner, brought suit against these defendants and several other police officers, the Milford Chief of Police, and the City of Milford arising from an incident that took place at plaintiff's former residence at 17 Clinton Street in Milford on April 9, 2006.

II. PROCEDURAL HISTORY

By complaint dated April 14, 2008, plaintiff commenced this action in the Superior Court for the State of Connecticut, Judicial District of New Haven at New Haven. Plaintiff's complaint set forth two principal causes of action under 42 U.S.C. § 1983: a federal claim for unreasonable search and seizure and a claim for alleged failure to properly train its officers against the City of Milford.

On May 28, 2008, defendants timely filed a notice of removal to the United States District Court for the District of Connecticut based on that court's subject matter jurisdiction pursuant to 28 U.S.C. § 1331. On July 1, 2009, defendants filed their answer and affirmative defenses.

Plaintiff filed an amended complaint dated November 13, 2008, which re-alleged his initial causes of action and added claims for freedom of association, freedom from summary punishment without a fair trial, freedom from the deprivation of liberty without due process of law, freedom from racial discrimination, due process of law, and equal protection of the

laws.[1] Defendants filed their answer and affirmative defenses to plaintiff's amended complaint on January 14, 2009.

Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 56, defendants moved on February 27, 2009 for summary judgment on the plaintiff's entire complaint. At oral argument on defendants' summary judgment motion, the district court gave defendants notice that it was considering granting summary judgment, *sua sponte*, in favor of the plaintiff against defendants McCormack and Sharoh and gave the parties the opportunity to respond with supplemental briefing and exhibits. On February 8, 2010, the defendants filed a supplemental memorandum of law and exhibits in support of their motion for summary judgment.

By ruling dated March 29, 2010, the district court (Hon. Janet Bond Arterton, U.S.D.J.) granted defendants' motion for summary judgment as to the City of Milford, and defendants

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[1] During a telephonic status conference on January 15, 2009, the plaintiff conceded that his claims for freedom of association, freedom from summary punishment without a fair trial, freedom from the deprivation of liberty without due process of law, freedom from racial discrimination, due process of law, and equal protection of the laws relate to his criminal case arising from the search and seizure of his residence on April 8, 2006, and not to the present civil action which arises solely from events that occurred on April 9, 2006. Because these claims are not properly directed to the defendants they were dismissed and not addressed in defendants' summary judgment motion.

Mello, Macharelli and Kiely and denied defendants' motion for summary judgment as to defendants McCormack and Sharoh on plaintiff's Fourth Amendment warrantless-entry claim holding that these defendants were not entitled to qualified immunity because no emergency or exigent circumstances could justify their warrantless entry and that it was not objectively reasonable for these defendants to believe that their conduct did not violate the plaintiff's Fourth Amendment right. See Montanez v. City of Milford, --- F.Supp. 2d ---, 2010 WL 1286831 (D. Conn. 2010). In addition, the district court, *sua sponte*, granted summary judgment on liability in favor of the plaintiff against defendants McCormack and Sharoh holding that no emergency or exigent circumstances existed that would excuse defendants McCormack and Sharoh's warrantless entry and that the defendants were not entitled to qualified immunity. This interlocutory appeal followed.

III. STATEMENT OF FACTS

On April 8, 2006, certain members of the Milford Police Department ("MPD") served and executed a search and seizure warrant on plaintiff's home located at 17 Clinton Street in

Milford, Connecticut. A-35.[2] On this date, the plaintiff lived at 17 Clinton Street with his wife, Kristin Lender, her seven-year-old daughter and their one-month-old daughter. A-49,59. When the police arrived, only Lender and one of her two daughters were home; the plaintiff was not there. A-35, 56.

During the course of the search on April 8, 2006, MPD officers located marijuana, cocaine, an Uzi 9mm firearm, three loaded thirty (30) round magazines, two empty thirty (30) round magazines, an empty firearm holster, a box of .22 caliber ammunition, a box of .38 caliber ammunition, and various drug paraphernalia. A-58, 73.[3] The plastic bags containing cocaine seized by the MPD were located on a computer stand in the kitchen of the residence. A-36. The 9mm Uzi and a 30-round clip fully loaded with 9mm ammunition were found in a lower kitchen cabinet. A-36. Neither McCormack nor Sharoh were involved in the

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[2] Numerals preceded by "A" refer to pages of the Appendix. The defendants-appellants attempted to contact the *pro se* incarcerated plaintiff-appellee regarding the contents of the Appendix but received no response. As a result of plaintiff-appellee's non-responsiveness, there is no Joint Appendix.

[3] Although the Uzi is listed as a "pistol" in a police inventory report, the prosecuting authority charged plaintiff with possession of "an assault weapon, to wit: a Israel Military Industries Uzi . . . in violation of Connecticut General Statutes section 53-202c(a)," a charge to which the plaintiff plead guilty. Compare A-73 with A-91-94.

April 8, 2006, execution of the search and seizure warrant on plaintiff's home. A-161-62.

While the MPD was searching the plaintiff's home, the plaintiff called Lender. A-36. MPD Detective Arthur Huggins answered the phone and spoke with the plaintiff who told Detective Huggins he would be home within an hour. A-36. The police waited at plaintiff's home for approximately an hour and a half but the plaintiff did not arrive. A-37. The MPD officers then left plaintiff's home. That same day, Detective Huggins obtained an arrest warrant for the plaintiff for the charges of possession of marijuana, possession of narcotics, criminal possession or a firearm, possession of an assault weapon, reckless endangerment, and two counts of risk of injury to a minor. A-37, 75. Later that night, at approximately 8:34 p.m., MPD Chief Keith Mello issued an All-Points Bulletin ("APB") regarding the plaintiff, warning that the plaintiff was a convicted felon who was wanted for weapons and narcotics violations, that he may be armed and to use "extreme caution" if he was located. A-157, 162-63.

After the MPD executed the search and seizure warrant on plaintiff's home, MPD Detective Zavaglia, in his capacity as a mandated reporter, placed a call to the Department of Children and Families ("DCF") hotline and reported that he had observed

young children living in a home with drugs and guns and that the dangerous items seized from the residence that day had been easily accessible to young children. A-37, 77; see Conn. Gen. Stat. § 17a-101(b) (mandating that police make report to DCF based on these facts). There had previously been two substantiated claims of abuse and neglect involving one of the children. A-163, 174.

Late in the evening on April 8, 2006, a DCF caseworker came to the MPD and requested a police escort to the plaintiff's residence to conduct a welfare check of the plaintiff's children. A-79, 84, A-174.[4] McCormack and Sharoh, along with fellow MPD officers Macharelli and Kiely accompanied the DCF caseworker to plaintiff's home. A-79, 84, 174.

At this time, the officers were aware that there had been a history of DCF involvement with the occupants of plaintiff's home, including two substantiated claims of abuse and neglect. A-163-64, 174. DCF had a serious concern about the health and well-being of plaintiff's children and wanted to immediately conduct a welfare check and remove the seven-year-old child from

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[4] According to the single redacted page of the DCF report that plaintiff submitted in opposition to summary judgment (DCF Case Number 141521, page 6 of 19) the DCF Investigator arrived at MPD Headquarters at approximately 11:40 p.m. on April 8, 2006, waited for one hour for a police escort, and arrived at plaintiff's residence at approximately 1:00 a.m., on April 9. A-174.

plaintiff's home due to possible neglect and abuse. A-163, 165. At the very least, the DCF employees wanted to ensure that the plaintiff's children did not return to 17 Clinton Street while the plaintiff was a fugitive. A-164-65. The defendants were also aware of Chief Mello's APB regarding the plaintiff. A-162-63.

At approximately 1:00 a.m. on April 9, 2006, McCormack and Sharoh knocked on the door of plaintiff's residence and announced their police presence. There were lights on inside the home but there was no response to the officers' knocking. A-80, 85. The officers then requested the MPD Communications Room to place a telephone call to the residence, but there was no response. A-80, 85. A security check was done of the residence and the south side door was found open. A-80, 85.

McCormack and Sharoh entered the home to conduct a welfare check for plaintiff's children. A-80, 85. No one was found in the home at that time. A-80, 85. McCormack and Sharoh did not conduct a full search and nothing was seized from the residence. A-80, 85. McCormack and Sharoh were inside the home for approximately five minutes and then exited through the same door, which they secured. A-80-81, 85-86. The officers advised the caseworker that no one was home and left the scene. A-81, 86. The result of DCF's mandated investigation of the welfare of

plaintiff's children demonstrates that the concerns DCF relayed to defendants on April 9, 2006, were well founded. A-166, 167.[5]

The plaintiff never returned to his residence after the police executed the search and seizure warrant on April 8, 2006. A-57. The plaintiff did not learn of the welfare check conducted at his residence on April 9, 2006, until well over a year later when he received a response to a Freedom of Information request sometime after June 5, 2007. A-57-58. There is no evidence in the record that the plaintiff was harmed by the defendants' brief entry into his home on April 9, 2006.

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[5] Along with their supplemental summary judgment filings, both defendants and plaintiff filed unredacted submissions under seal because they contained, "DCF information . . . [that is] confidential and may not be disclosed to anyone, except as specifically authorized by Section 17a-28 of the Connecticut General Statutes." A-29. On March 29, 2010, the district court granted defendants' motion to seal these items. A-29. The unredacted submissions were accompanied by redacted, unsealed versions that appear in the Appendix filed herewith.

SUMMARY OF ARGUMENT

The district court erred in denying qualified immunity and summary judgment to the defendants and in granting, *sua sponte*, summary judgment on liability in favor of the plaintiff on his Fourth Amendment claim. Based on the undisputed facts, the defendants had an objectively reasonable basis for a brief warrantless entry into plaintiff's home to conduct a child welfare check pursuant to the emergency aid or exigent circumstances exception to the warrant requirement.

In particular, defendants were confronted with the following circumstances at the time of their entry: an APB had issued warning that the plaintiff was 1) a convicted felon wanted on weapons and narcotics violations; 2) that plaintiff may be armed and should be considered dangerous; 3) that if plaintiff was located officers should use "extreme caution"; 4) in addition, DCF had informed Sharoh concerning DCF's prior involvement with plaintiff's family, including two substantiated complaints of abuse and neglect; 5) lights were on in the house at 1:00 a.m., but no one would answer the phone or door; and 6) DCF workers wanted to immediately assess the welfare of plaintiff's children and remove a child into protective custody pursuant to Connecticut General Statutes § 17a-101g(e)-(f). A-157, 159, 161-68. These facts establish exigent circumstances.

Even if the district court found the emergency aid exception to be inapplicable in this case, it should have nonetheless concluded that the defendants could have reasonably, but mistakenly, believed that the exception was applicable. Thus, the district court erred in determining that the defendants were not entitled to qualified immunity.

In addition, the district court erred in granting summary judgment *sua sponte* in favor of the plaintiff on liability because it did not consider the facts in the light most favorable to the defendants and, at the very least, should have found a factual dispute as to whether emergency or exigent circumstances existed.

ARGUMENT

I. STANDARDS FOR SUMMARY JUDGMENT AND REVIEW IN THE COURT OF APPEALS

When passing upon a motion for summary judgment, the court may not resolve factual disputes or make credibility determinations, even if the case is one which eventually will be tried without a jury. In Re Unisys Savings Plan Litigation, 74 F.3d 420 (3d Cir. 1996). Rather, the court must resolve any ambiguities and draw all inferences against the moving party. Cargill, Inc. v. Charles Kowsky Resources, Inc., 949 F.2d 51 (2d Cir. 1991). The evidence of the party against whom summary judgment is sought must be believed. Revak v. SEC Realty Corp., 18 F.3d 81 (2d Cir. 1994). The court must construe the evidence in the light most favorable to the party opposing summary judgment and deny the motion, unless no construction of the evidence could support judgment in that party's favor. Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 14 (2d Cir. 1993). "If, as to the issue on which summary judgment is sought, there is any evidence in the record from which a reasonable inference could be drawn in favor of the opposing party, summary judgment is improper." Gummo v. Village of Depew, 75 F.3d 98, 107 (2d Cir. 1996) (emphasis supplied).

To raise a genuine issue of material fact sufficient to defeat a summary judgment motion, the non-movant need not match, item for item, each piece of evidence proffered by the moving party. So long as the opponent has offered enough evidence to exceed the "mere scintilla" threshold, summary judgment is to be denied. In Re Unisys Savings Plan Litigation, 74 F.3d at 433. Even if the non-moving party's evidence appears "implausible," the court may not "weigh" the evidence and must proceed with the greatest caution. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54, 58-59 (2d Cir. 1997).

Summary judgment is a "drastic device since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." Heyman v. Commerce Industrial Insurance Co. 524 F.2d 1317, 1370 (2d Cir. 1975). The granting of a motion for summary judgment, "denies the non-movant its 'day', i.e. a trial, in court. Moreover, experience has shown that a trial often establishes facts and inferences not gleanable from papers submitted pre-trial." SRI International v. Matsushita Electric Corp. of America, 775 F.2d 1107, 1116-17 (Fed. Cir. 1985) (en banc). Doubts about the propriety of granting summary judgment should therefore be resolved in favor of the non-movant.

In this Court, review of a district court's grant of summary judgment is *de novo*. Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1535 (2d Cir. 1997).

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT DEFENDANTS-APPELLANTS SHAROH AND MCCORMACK WERE NOT ENTITLED TO QUALIFIED IMMUNITY

A. The Emergency Aid Or Exigent Circumstances Exception To The Warrant Requirement

Although it is a basic principal of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness', the warrant requirement is subject to certain exceptions." Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006) (quoting Flippo v. West Virginia, 528 U.S. 11, 13 (1999) (per curiam)).

The Supreme Court and many of the circuit courts have long recognized that a police officer serving as a community caretaker to protect persons and property is constitutionally permitted to make warrantless entries under exigent circumstances. Cady v. Dombrowski, 413 U.S. 433 (1973); United States v. Newbourn, 600 F.2d 452 (4th Cir. 1979); Lockhart-Bembery v. Sauro, 498 F.3d 69, 75 (1st Cir. 2007); Martin v. City of Oceanside, 360 F.3d 1078, 1082 (9th Cir. 2004); United States v. York, 895 F.2d 1026, 1030 (5th Cir. 1990); United

States v. Nord, 586 F.2d 1288, 1289 (8th Cir. 1978); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996). But see United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994)(holding that community caretaking exception applies only to automobile searches); United States v. Pichany, 687 F.2d 204, 208-09 (7th Cir. 1982)(same).

Although the exigent circumstances exception has been accepted for years, its precise contours have not remained fixed and there is no bright line test an officer may consult when faced with such a situation. Rather, as law enforcement officials and the courts have "recognized the combustible nature of domestic disputes;" Tierney v. Davidson, 133 F.3d 189, 197 (2d Cir. 1999), and have wrestled with the state's increasing role in child welfare protection, the exception has generally been expanded. See Deborah Tuerkheimer, *Exigency*, 49 Ariz.L.Rev 801, 806-813 (2007)(discussing the demise of consent and rise of

the exigent circumstances exception to the warrant requirement).[6]

Even when not performing a community caretaking function, a police officer may search a home without a warrant if, in an emergency, "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, 437 U.S. 385, 394 (1978). Courts apply an objective standard of reasonableness in assessing whether exigent circumstances existed. U.S. v. Zabare, 87 F. 2d 282, 289 (2d Cir. 1989).

While this inquiry must be fact specific, this Court has cautioned against "too narrow a view" of what constitutes the urgent need required to establish exigent circumstances. U.S. v.

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[6] The demise of the consent exception is seen in Georgia v. Randolph, 547 U.S. 103 (2006), decided approximately two weeks before this April 9, 2006 incident, in which the Supreme Court held that a spouse's consent to a residence search is not valid if a non-consenting co-tenant is physically present and expressly refuses to consent. Randolph, 547 U.S. at 108. These decisions highlight the "powerful forces pulling a police officer standing on the threshold of a home in opposite directions: the Fourth Amendment pushing him toward a magistrate and a warrant, domestic violence drawing him through the door to intervene in one of the most common and volatile settings for serious injury or death." *Exigency*, 49 Ariz.L.Rev. at 804-05 (quoting Brigham City v. Stuart, 122 P.3d 506, 516 (Utah 2005). Although the tension between these competing forces arises most often in domestic violence situations, the facts of the case at bar - involving the welfare of children suspected to be the victims of neglect or abuse - present roughly the same dilemma for the responding police officers.

Farra, 725 F.2d 197, 199 (2d Cir. 1984)(quoting U.S. v. Martinez-Gonzalez, 686 F.2d 93, 100 (2d Cir. 1982)).

As the Fourth Circuit recently held:

> The cases reiterating this principle are well-known and too numerous to mention, and the almost unparalleled frequency of the principle's iteration by the Court attests not only to its importance to law enforcement but also to its extension of simple fairness to officers who cannot be said to be liable for actions that are found unlawful only by courts splitting hairs in hindsight.

Hunsberger v. Wood, 583 F.3d 219, 220 (4th Cir.2009) (denying rehearing en banc); Hunsberger v. Wood, 570 F.3d 546 (4th Cir. 2009)(reversing denial of officers' motion for summary judgment and holding that qualified immunity protects them from liability based on exigent circumstance exception to warrant requirement); *cert. denied*, 130 S.Ct. 1523 (2010).

The exigent circumstances exception under the Connecticut state constitution mirrors the exception under the federal constitution. State v. Blades, 225 Conn. 609, 624 (1993), (citing State v. Geisler, 222 Conn. 672, 691-92 (1992)); State v. Magnano, 204 Conn. 259, 266 (1987); State v. Guertin, 190 Conn. 440, 447-451 (1983); State v. Klauss, 19 Conn.App. 296, 300 (1989). The extent of the warrantless entry must be "strictly circumscribed by the emergency which serves to justify it. . . and cannot be used to support a general exploratory

search." Blades, 225 Conn. at 618 (citations omitted; internal quotations omitted).

The brief and narrowly tailored warrantless entry made by Sharoh and McCormack on April 9, 2006 was objectively reasonable under the circumstances. Accordingly, they are protected by the doctrine of qualified immunity.

B. Qualified Immunity Is Applicable Because Sharoh And McCormack Did Not Violate Clearly Established Law

Qualified immunity shields government officials from liability for performance of discretionary functions and serves to protect public officials from costly, but insubstantial, lawsuits. Pearson v. Callahan, 129 S.Ct. 808, 816 (2009); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Dean v. Blumenthal, 577 F.3d 60, 68 (2d Cir. 2009); Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995). It is important to resolve immunity questions at the earliest possible stage of litigation, as qualified immunity is not merely a defense to liability, but a protection from suit. Saucier v. Katz, 533 U.S. 194, 200 (2001). Whether individual defendants are entitled to qualified immunity is a question of law to be decided by the court. Hunter v. Bryant, 502 U.S. 224, 228 (1991).

Last year, in Pearson, the Supreme Court abandoned the rigid two-pronged test for deciding qualified immunity that had

been required by Saucier. Pearson, 129 S.Ct. at 818. In so doing, the Court held that the defendant police officers were entitled to qualified immunity regarding a claim for monetary damages under 42 U.S.C. § 1983, arising from a warrantless home entry because when the events occurred in 2002, the applicable warrant exception - the 'consent-once-removed' doctrine - had gained acceptance in the lower courts and the law governing that exception was not clearly established. Id., at 822-23.

Central to the Court's application of qualified immunity in Pearson was the fact that the law in this area was unsettled. Id., at 823. The Court reasoned that some lower courts and other circuits had accepted the 'consent-once-removed' doctrine as a legitimate exception to the warrant requirement, therefore:

> The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on 'consent-once-removed' entries. 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. Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.

Pearson, 129 S.Ct. at 823.

The unanimous Court also held that, "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." Pearson, at 823 (quoting Wilson v. Layne, 526 U.S.

603, 614 (1999)).[7] Similarly here, in April 2006, the precise contours of the exigent circumstances exception were far from clearly defined and have, if anything, been expanding. See Brigham City, Utah, 547 U.S. 398 (reversing Utah Supreme Court and holding that exigent circumstances exception applied).

Prior to April 2006, there were a number of reported federal decisions in the Second Circuit in which courts recognized the applicability of qualified immunity for police officers under the emergency aid or exigent circumstances doctrine, all of which provided Sharoh and McCormack with a legitimate basis to believe they could lawfully assist DCF with its child welfare check and potential child removal. See Tierney, 133 F.3d at 196 (holding that officer who entered residence without warrant following report of a domestic disturbance was entitled to qualified immunity based on emergency aid or exigent circumstances doctrine)(relying on Mincey, 437 U.S. at 394); Williams v. Lopes, 64 F.Supp.2d 37, 45 (D. Conn. 1999)(police officers entitled to qualified immunity for warrantless entry because it was objectively reasonable for them to try to ensure the safety of plaintiff's

[7] It is significant that Pearson was decided in 2009, almost three years *after* Sharoh and McCormack were confronted with their urgent situation, when DCF investigators requested their assistance at approximately 1:00 a.m. on April 9, 2006.

minor daughter); Ward v. Murphy, 330 F.Supp.2d 83, 91 (D. Conn. 2004)(DCF employees' warrantless entry into the plaintiff's residence fell within the exigent circumstances exception based on their concerns regarding health and welfare of infant).

Similarly, in U.S. v. Bradley, 321 F.3d 1212 (9th Cir. 2003), police arrested a woman for drug charges and wanted to determine the whereabouts and wellbeing of her nine-year-old son. Id. Police went to the woman's home and knocked on the door, but there was no answer. Id. The officers found the back door unlocked, announced themselves and walked into the house where they found the woman's son whom they took into protective custody. Id. The court in Bradley, affirmed the district court's determination that the officers had acted out of genuine concern for the nine-year-old boy's welfare and that the officers' entry into the woman's home was lawful. Id., at 1215.

As of April 2006, neither the Supreme Court nor the Second Circuit had held that entering a private residence to conduct a welfare check, at the request of DCF, under facts similar to this case, could give rise to a Fourth Amendment violation. Instead, the case law weighed heavily in favor of the availability of the exigent circumstances exception for situations involving risk of injury to children. See Tenenbaum v. Williams, 193 F.3d 581, 596 (2d Cir. 1999)(DCF caseworkers

protected by qualified immunity because "[i]f they err in not removing [a] child, they risk injury to the child and may be accused of infringing the child's rights").[8] Here, there is little difference between the defendants and DCF employees who are protected by qualified immunity when they act reasonably to protect the health and welfare of children, even in cases in which they enter private residences without a warrant. See Ward, 330 F. Supp.2d at 91.

In 2002, the Second Circuit recited factors to be considered in reviewing the applicability of the exigent circumstances exception, all of which weighed in favor of the

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[8] The district court was dismissive of defendants' reliance on Tenenbaum and Ward, finding those decisions inapplicable because there was "[n]o comparable concern about competing constitutional rights" in this case. Ruling at 17, A-25. The district court erred in this regard because it gave no credit to the undisputed fact, as averred to in Sharoh's Supplemental Affidavit, that there had been prior substantiated complaints of abuse and neglect concerning one of the children at issue. Sharoh Supp. Aff., ¶ 12, A-163-64, 174. The district court also did not credit the undisputed fact that, based on DCF's history with the family and the totality of circumstances concerning the discovery of drugs and a gun at the residence the day before, DCF wanted to *immediately* remove the child and conduct a welfare check. Id., ¶¶ 19-20, 23-24, A-165, A-166. The court also minimized the fact that DCF was conducting its own statutorily mandated investigation of the child's welfare, which investigation resulted in a finding that is significant to this case because it demonstrates that the concerns DCF relayed to Sharoh and McCormack were well founded. Id., ¶¶ 27-28, A-166, A-167; *see also* Conn. Gen. Stat. § 17a-101g(e)-(f) (allowing for ninety-six hour removal of child without parental consent if DCF concludes there is an imminent risk of physical harm to the child).

legality of the brief warrantless entry Sharoh and McCormack, as follows:

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause ... to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the peaceful circumstances of the entry.

Loria v. Gorman, 306 F.3d 1271, 1284 (2d Cir. 2002)(quoting United States v. Fields, 113 F.3d 313, 323 (2d Cir.1997) (quoting United States v. MacDonald, 916 F.2d 766, 769-70 (2d Cir.1990) (en banc))). These factors are "intended not as an exhaustive canon, but as an illustrative sampling of the kinds of facts to be taken into account." MacDonald, 916 F.2d at 770.

C. The District Court Erred Because The Conduct Of Sharoh And McCormack Was Objectively Reasonable

The district court relied on dicta in Gorman about the sanctity of the home, but erred in its application of the above six factors. A-8-9, 13-16. Moreover, the holding of Gorman is of no consequence to this matter because "Gorman [the defendant officer] himself conceded that no one was in danger and that no emergency existed at the time of the arrest." Gorman, 306 F.3d at 1285. When Officer Gorman entered the plaintiff's residence without a warrant, he was investigating the violation of a noise

ordinance for which there was only a potential twenty-five dollar fine - a far cry from the facts of this case. Id.

Here, the gravity of the incident was on an entirely different level from that in Gorman. First, Sharoh and McCormack believed the plaintiff was armed and dangerous, was a convicted felon wanted on serious felony drug and weapons charges, and knew that DCF was sufficiently concerned about the safety and welfare of plaintiff's children that they planned to immediately remove a child from the home, at least on a temporary basis. A-162-65. Second, it was objectively reasonable for the officers to believe the plaintiff was armed because their fellow officers had seized an empty holster from the residence the day before, along with boxes of different caliber ammunition. A-58, 73.

Third, there was an objectively reasonable suspicion that raising children in a house with drugs and weapons easily accessible constituted abuse or neglect. A-37, 77. Fourth, the plaintiff was a fugitive from justice at the time of the entry and the officers had every reason to fear that he may have been hiding at the residence and, therefore, a threat to the safety of the DCF worker, who had requested a police escort. A-162-63, 174. The fifth factor identified in Gorman - a likelihood that

the suspect might escape - is not applicable because Sharoh and McCormack were not seeking to apprehend the plaintiff.[9]

Finally, McCormack and Sharoh's entry into plaintiff's residence was entirely peaceful and appropriate under the circumstances. They entered through an open or unlocked door, did not cause any property damage or seize anything, and left after no more than five minutes once they confirmed that the children being sought by DCF were not present. A-80-81, 85-86.

Based on the totality of these undisputed facts, all of the relevant Gorman factors confirm that exigent circumstances existed justifying the brief and warrantless entry into plaintiff's residence by Sharoh and McCormack. Accordingly, the district court erred in finding that qualified immunity was inapplicable.

The district court also erred by finding that, "since the weapons and drugs found after the previous day's search and seizure were gone, there was no basis to think that the existence of guns or drugs remained a risk to children less than

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[9] There is no evidence that Sharoh and McCormack were seeking to locate the plaintiff or take him into custody. To the contrary, Sharoh was the Road Supervisor on the date in question and only had the misfortune to take this call because DCF needed an escort and he was the supervisor on duty. A-162. The officers were there to keep the peace and enable the DCF workers to do their job trying to ensure the safety and well being of plaintiff's children, who were plainly put in harm's way by plaintiff's illegal activities.

24 hours later." A-28. The drugs and Uzi were not the only risk to the children. Instead, the drugs and Uzi were the tools of illegal activity conducted in the presence of young children and the warning sign that provided DCF, and concomitantly Sharoh and McCormack, with an objectively reasonable basis to be concerned about the children's welfare.

While drugs and a gun were found at and removed from plaintiff's house the day before, an empty firearm holster and boxes of different caliber ammunition were also found, strongly suggesting that the plaintiff had additional weapons that he may have been carrying on his person. A-58, 73.[10] Therefore, contrary to the court's conclusion, the existence of guns remained a very real risk to plaintiff's children, and the DCF worker, especially because the plaintiff was still at large and could have returned to his house at any time after the MPD had concluded its search the previous day.

Chief Mello had issued an APB regarding the plaintiff in which he described the plaintiff as "dangerous" and warned to

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[10] During the execution of the search warrant on April 8, 2006, police seized plaintiff's 9 mm Uzi, as well as boxes of ammunition for a .22 caliber and .38 caliber firearm, and an empty holster. A-73. From this, it can reasonably be inferred that, in addition to the 9 mm Uzi, plaintiff also owned .22 caliber and .38 caliber guns that he kept on his person or in his car before he surrendered several days later. In splitting hairs regarding exigent circumstances, the district court erred by ignoring this evidence.

"use extreme caution" if the plaintiff were located. A-157. Considering these facts, coupled with DCF's concern that plaintiff's children may be at risk and their desire to remove plaintiff's seven-year-old step-child from the home, it was objectively reasonable for the defendants to believe their brief warrantless entry into plaintiff's home was lawful.

The district court also erred in concluding that the record contained no evidence of suspicions that plaintiff's wife was endangering her children or was unable or unwilling to take care of them. A-23. To the contrary, there was a documented history of DCF involvement, including substantiated claims of abuse and physical neglect. A-163, 174. Based on this prior history, as well as DCF's statutory mandate to conduct child welfare checks within a compressed time frame due to the obvious risks presented to children who are victims of abuse and neglect, DCF's purpose in going to plaintiff's home on April 9, 2006 was to remove the child, or children, from plaintiff's residence, at least while DCF conducted its investigation concerning whether plaintiff's children had been neglected or abused. A-164, 174.

In determining that it was objectively unreasonable for the defendants in this case to believe that exigent or emergency circumstances existed at the time of their entry into plaintiff's home the district court erroneously concluded that

"the record shows that Sharoh and McCormack had no reason to believe that there was any 'person within' the home whomsoever." A-22. The district court further noted that the defendants had not received any tips or information that anyone was home; no one answered their knock or an MPD phone call to the residence; they did not see any movement or hear any sounds; and Officer Zavaglia had reported to DCF that the seven-year-old child was with her grandmother at an unknown address. A-22. The district court's analysis of these facts is flawed on multiple grounds.

First, whether or not the defendants received a tip that anyone was home is irrelevant because the defendants did not initiate the response to plaintiff's home, but were instead merely escorting the DCF employee who requested their assistance. A-162, 174. Moreover, the DCF investigative process requires a "home visit at which the child and any siblings are observed . . . and an evaluation of the parents and home." Conn. Gen. Stat. § 17a-101g(b).

Second, it is undisputed that the lights in plaintiff's home were on and that a side door was found either open or unlocked by the defendants; both of which could indicate that someone was in the home. A-80, 85. Though there was no answer to the defendants' knocking or phone call, in cases where officers' knocks or announcements were unanswered a finding of exigent

circumstances was not foreclosed. A-80, 85. To the contrary, courts have interpreted an unanswered knock as an additional factor leading police to reasonably believe someone inside a home may need immediate aid because it indicates that they are unable to come to the door. See Murdock v. Stout, 54 F.3d 1437 (9th Cir. 1995)(warrantless entry justified when lights and television on but no answer to officers' phone call or shouting their presence at slightly open back door); United States v. Rohrig, 98 F.3d 1506 (officer permitted to enter home without warrant when no one answered officer's knocks on the front door or windows). In this case, based on the facts known to the defendants, it was entirely reasonable for them to believe that the plaintiff may have been hiding in the home or instructing the seven-year-old to not answer the door to prevent giving away the plaintiff's whereabouts.

Finally, while the district court was correct in noting that the seven-year-old was reportedly at her grandmother's house the day before when the MPD were executing the search warrant, there is no evidence that the defendants or the DCF employees had any reason to believe that the seven-year-old would still be at her grandmother's house at 1:00 a.m. on April

9, 2006.[11] What the defendants did know on April 9, 2006, was that DCF employees wanted to remove a child from the plaintiff's home. A-159, 161-68. Thus, defendants had an objectively reasonable basis to believe that there existed an immediate need for their assistance in determining the safety and welfare of plaintiff's children.

This case bears some similarity to Williams, 64 F. Supp. 2d 37. In Williams, the court held it was reasonable for the defendant officers to believe that exigent circumstances existed when, after the plaintiff was transported to the hospital, the defendants entered the plaintiff's residence without a warrant to retrieve a car seat and information regarding the care of plaintiff's minor child. Id. The fact that the defendants knew there was no one home at the time of their entry was not material to whether qualified immunity applied because the defendants' conduct was objectively reasonable under the circumstances. Id., at 45-46.

Although the district court's decision correctly states that "the subjective intentions of the defendants . . . plays no

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[11] The more logical inference from the timing of DCF's 1:00 a.m. welfare check is that DCF could not locate the children and considered them missing or at risk, which is why they asked for a police escort and, when lights were observed on in the house but no one answered, they feared the worst and erred on the side of caution in checking on the safety of the children.

role in . . . Fourth Amendment analysis;" Ruling at 8, n.6, A-16; the court's *sua sponte* granting of summary judgment to the plaintiff suggests that the court believed the officers had some ulterior motive in entering plaintiff's residence. Indeed, the court held that because a warrant had already issued for plaintiff's arrest on charges of risk of injury to a minor "any evidence gathered regarding the children's welfare" would not be totally divorced from the defendants' law enforcement function. Id., A-20.[12]

The district court's analysis is flawed because it imputed ill motives to Sharoh and McCormack and ignored the objective reasonableness of the officers' conduct. Stuart, 547 U.S. at 404 (holding that officers were entitled to qualified immunity for warrantless home entry based on objective reasonableness of

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[12] At oral argument on the summary judgment motion, the district court suggested that, because the plaintiff was charged with risk of injury arising from the April 8, 2006 criminal investigation, there might be a "lack of clarity as to whether or not this [subsequent warrantless entry] was the community caretaking function as opposed to the police investigative function." Transcript of Oral Argument on Defendants' Motion for Summary Judgment Motion, 1/22/10, at 13-14, A-186-87. This suggests the district court believed that the officers had an ulterior motive in entering plaintiff's residence; namely to gather evidence in support of the risk of injury charge he faced or to attempt to bring plaintiff into custody. The district court's suspicion, however, is both flatly contradicted by the record and, more importantly, irrelevant to the qualified immunity analysis.

conduct because "officer's subjective motivation is irrelevant").

Finally, the district court's "narrow view" of exigent circumstances is patently unfair and erroneous. The district court's finding that the defendants' conduct was unreasonable in a constitutional sense is an overly harsh indictment of law enforcement officers who played no role in plaintiff's arrest or prosecution and instead were assisting DCF in carrying out the state's important mandate to ensure the safety of children who were obviously at risk and living in an environment that was not conducive to their well being. The search for the children was brief - five minutes or less - narrowly tailored to the purpose of ensuring the safety of the children and for a legitimate purpose based on exigent circumstances. A-80-81, 85-86. No constitutional violation occurred here, and the defendants are entitled to summary judgment in their favor.

III. THE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT *SUA SPONTE* IN FAVOR OF THE PLAINTIFF ON HIS FOURTH AMENDMENT CLAIM

Although a district court has the power to grant summary judgment *sua sponte*, this power should be exercised sparingly. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); Jardines Bacata, Ltd. v. Diaz-Marque, 878 F.2d 1555, 1561 (1st Cir. 1989). Although there may be instances when it is permissible

for a court to grant summary judgment on its own initiative coincident with a decision to deny a motion for summary judgment, such instances should be rare. Jardines, 878 F. 2d at 1560.

In Jardines, the court stated:

> Courts that yearn for the blossom when only the bud is ready act at their peril; proceeding with unnecessary haste frequently results in more leisurely repentance. Consequently, we have too often in the recent past been forced to vacate sua sponte summary judgments.

Id., at 1560-61.

Even if the district court determined that the defendants had not made a sufficient evidentiary showing to demonstrate the existence of exigent circumstances justifying a warrantless entry, or that there are genuine issues of material fact that prevent the entry of summary judgment for the defendants, a proposition they dispute, at the very least the district court should have allowed a jury to decide the reasonableness of defendants' conduct. Moreover, in granting summary judgment *sua sponte* in plaintiff's favor, the district court resolved factual disputes in the plaintiff's favor in clear contradiction of the summary judgment standard of review.

While the district court contends that it viewed the record in the light most favorable to the defendants, its analysis of

the undisputed facts demonstrates that the opposite is true. Had the district court genuinely viewed the undisputed facts in the light most favorable to the defendants it would not have ignored the defendants' knowledge of the history of DCF involvement with plaintiff's family or DCF's intention to remove a child from plaintiff's home. A-159 (Line Up Sheet noting that "DCF went out to do welfare check and remove child"). Further, the district court would not have characterized defendants' concern that they may have missed some weapons and that the children may still have been at risk as mere "speculation". A-23.[13]

For example, the district court's conclusion that there was no evidence that reflected "any suspicion of Lender as endangering her children or concern that she was unable or unwilling to take care of them," is flatly contradicted by the record. Compare A-23 with A-163-64, 174 (page 6 of DCF Report documenting two prior substantiated reports of neglect and abuse

[13] It was patently unfair for the district court to substitute its judgment in place of the objectively reasonable concerns of Sharoh and McCormack regarding the threat to safety presented by the plaintiff while he was a fugitive from justice. In entering a private residence, with or without a warrant, these law enforcement officers regularly face a grave risk of danger from drug dealers armed with assault weapons, such as the Israel Military Industries Uzi seized from plaintiff *and* the other .22 and .38 caliber weapons that were not recovered by police. A-73, 94, 157. For the district court to dismiss the defendants' legitimate concerns and impose civil liability, *sua sponte*, is manifestly unjust.

and two prior unsubstantiated reports). In addition to this history of child abuse and neglect, it was the accessibility of the seized drugs and assault weapon to the children while they were under the care of Lender (and presumably the plaintiff) that created DCF's objectively reasonable concern for the children's welfare, which was conveyed to the defendants. A-163-64.

Viewed from the defendants' perspective, they were confronted with the following circumstances at the time of their entry: an APB had issued warning that the plaintiff was 1) a convicted felon wanted on weapons and narcotics violations; 2) that plaintiff may be armed and should be considered dangerous; 3) that if plaintiff was located officers should use "extreme caution"; 4) in addition, DCF had informed Sharoh concerning DCF's prior involvement with plaintiff's family, including two substantiated complaints of abuse and neglect; 5) lights were on in the house at 1:00 a.m., but no one would answer the phone or door; and 6) DCF workers wanted to immediately assess the welfare of plaintiff's children and remove a child into protective custody pursuant to Connecticut General Statutes § 17a-101g(e)-(f). A-157, 159, 161-68. Viewed in this light, a reasonable jury could easily conclude that exigent circumstances

existed justifying a brief entry in plaintiff's house to conduct a welfare check.

The district court erred by substituting its judgment for that of the defendant officers. From the defendants' perspective, it was entirely reasonable to conclude that the children were likely "in imminent risk of physical harm from the child's surroundings and that immediate removal from such surroundings is necessary to ensure the child's safety." Conn. Gen. Stat. § 17a-101g(e).

When these facts are viewed in the light most favorable to the defendants, this is not one of the rare instances in which summary judgment should be granted *sua sponte*. At the very least, the district court should have allowed a jury to decide the reasonableness of the defendants' conduct. Accordingly, the order granting summary judgment in favor of the plaintiff must be vacated.

CONCLUSION

For the foregoing reasons, the appellants respectfully urge the Court to reverse the district court's denial of their summary judgment motion and the district court's *sua sponte* grant of summary judgment in plaintiff's favor.

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CERTIFICATION

This is to certify that a copy of the foregoing, along with a copy of the appendix has been mailed, postage prepaid, this 16th day of August, 2010, to the following pro se party:

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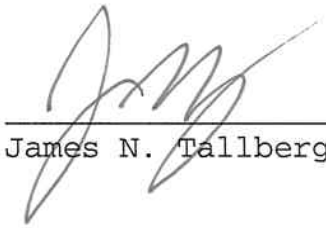
CERTIFICATE OF COMPLIANCE

I, James N. Tallberg, hereby certify that this brief is in compliance with the Federal Rules of Appellate Procedure 32(a)(7)(B). This brief is in 12 point Courier font with a 2 point or more leading between lines, and contains seven thousand six hundred forty-five (7645) words.



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