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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Rahne Pistor, George Abel, and Jacob Witherspoon, Plaintiffs, vs. Carlos Garcia, et al Defendants	Case: 2:12-cv-12-00786-PHX-FJM **PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT OF LIABILITY AGAINST DEFENDANTS BAXLEY NEWMAN AND McDANIEL**

NOW COME plaintiffs, and herewith move pursuant to Fed. R. Civ. P. 56 for partial summary judgment of liability against defendants Baxley, Newman, and McDaniel for violation of 42 U.S.C. 1983, and upon the state causes of action of false imprisonment and battery. This motion is based on the pleadings and papers on file to date, the attachments hereto, and any oral argument the court deems pertinent.

Dated this 16th day of May, 2013

Nersesian & Sankiewicz

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SEPARATE STATEMENT OF FACTS APART FROM MEMORANDUM (LRCiv 56.1(a)

The facts are as follows:

1. On October 25, 2013, plaintiffs were business invitees at the Mazatzal Hotel & Casino in Payson, Arizona (See Exhibit 1, Report by Defendant Baxley; Exhibit 2, Report by Defendant Newman; Exhibit 3, Report by Defendant McDaniel).[1]

2. Defendant Baxley is a police officer employed with the Gila County Sheriff. (See exhibit 1);

3. Defendant Newman is a police officer with the Gila County Sheriff (See exhibit 2);

4. Defendant Nejo is a police officer with the State of Arizona, Department of Gaming (Accord exhibits 1-3);

5. Defendant McDaniel, is a police officer with the Arizona Department of Public Safety (See exhibit 3);

6. Plaintiffs were recognized by defendants as advantage gamblers. Exhibit 1, p. 1, last paragraph (Pistor is told he is "being detained as part of an 'advantaged player' investigation.)[2];

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[1] For background and a better basis of understanding the context of events, plaintiffs are professional gamblers who had won a substantial amount of money at the Mazatzal Hotel & Casino. Their actual legal activities and methodologies are fully explained in the complaint. Doc. 1, ¶¶ 7-10, and p. 9, n.1. No formal arrests were ever made.

[2] Although Wikipedia may not be generally accepted as an authoritative publication, it can certainly reflect accepted understandings. Wikipedia has an entry for "advantage gambling, and defines it as follows: "**Advantage gambling**, or **advantage play**, refers to a practice of using **legal** ways to gain a mathematical advantage while gambling. The term usually refers to house-banked games, but can also refer to games played against other players, such as poker. Someone who practices advantage gambling is often referred to as an **advantage player**, or AP. (Emphasis added), and see Tsao v. Desert Palace, Inc., 698 F.3d 1128, 1132 (9th Cir. 2012) (discussing interplay with APs and casinos).

7. At all times relevant hereto, Baxley was informed, and his belief was, that he was "assisting with an **investigation** of gaming fraud." Exhibit 1, p. 1 (emphasis added);

8. Baxley's knowledge was also defined by his understanding that the plaintiffs "**maybe** (sic) **possibly** utilizing an electronic device to manipulate the slot machines." Exhibit 1, p. 1 (emphasis added);

9. Baxley participated to the extent of "secur[ing] all property on [Pistor's] person." Exhibit 1, p. 2;

10. Baxley's actions towards Plaintiff Pistor included, acting with Newman, approaching Plaintiff Pistor in a restroom where he: "[I]dentified both he [Newman] and I [Baxley] as police officers and explained to [Pistor] that he was being detained at the request of the Tonto Apache Tribal Police and Arizona Gaming Department for the **suspicion** of gaming violations. I was on [Pistor's] left side and grabbed his left hand by his wrist and he[] was secured into writs restraints. [Pistor] was then escorted to a secured location. When we got to the old restaurant area, I **conducted a search of [Pistor's] person and pulled out what appeared to be a "IPOD or IPHONE" along with a wallet . . . along with a motel room key**." Exhibit 1, p. 2 (emphasis added);

11. At all times relevant hereto, Newman was informed, and his belief was, that he was assisting with an "**investigation**." Exhibit 2, p. 1 (emphasis added);

12. Newman's action was undertaken in furtherance of a "plan" between the defendants to "make contact with the suspects [plaintiffs], **place them in handcuffs** and escort them to separate locations within Mazatzal casino [sic]. There **we were to remove their property**, paying particular attention for small electronic devices and other items that could be used for "cheating" the slot machines." Exhibit 2, p. 1 (emphasis added);

13. Newman also confirms that the actions undertaken were an "arrest" of Plaintiff Pistor. Exhibit 2, p. 1;

14. Newman approached Plaintiff Pistor, and with Baxley, seized Plaintiff Pistor, explaining, "he was being detained as part of an 'advantaged player' investigation." Exhibit 2, p. 1;

15. Newman also acknowledges: "Sgt. Baxley and I searched Pistor and placed his property on the table. He was wearing a scarf and a vest. I removed the scarf and placed it on the table. The vest was opened and I searched it while it was still on Pistor. I didn't remove it as he (Pistor) was still handcuffed." Exhibit 2, p. 2;

16. At all times relevant hereto, Newman was informed, and his belief was, that he was assisting with an "**investigation**." Exhibit 2, p. 1(emphasis added);

17. McDaniel was enlisted into the "investigation" of the plaintiffs involving "possible" electronic devices of questionable use. Exhibit 3, p. 1;

18. McDaniel acknowledges that the securing of the plaintiffs was the "mission" of all the defendants, with others, to undertake the seizure and search of the plaintiffs. Exhibit 3, p. 1;

19. McDaniel also acknowledges that he, with the other defendants subject to this motion and other police agents, met remote from the location of the plaintiffs at the police department of the Tonto Apache Tribe to plan out this "mission." Exhibit 3, p. 1;

20. McDaniel with Defendant Phillips, approached Plaintiff Abel, informed plaintiff Abel that he was being detained, and affirmatively stated that the detention was premised on "suspicion." Exhibit 3, p. 1.

21. McDaniel grabbed Plaintiff Abel's arm, at which point his partner, Phillips, applied handcuffs to Abel. Exhibit 3, p. 1;

22. McDaniel took two hundred dollars and a slot ticket from Plaintiff Abel's hand. Exhibit 3, p. 1;

23. While in the custody of Defendant McDaniel, Plaintiff Abel questioned the legitimacy of the search and seizure, and specifically requested a search warrant. No explanation and no search warrant were presented by McDaniel or his partner, Phillips. Exhibit 3, p. 2.

24. Once Abel was seized, he was held in a non-public room under guard for two hours and thirty-eight minutes, after which time he was released with no arrest or charges. Disc 18.[3]

25. Once Witherspoon was seized, he was held in a non-public room under guard for one hour and forty seven minutes, after which he was released without formal arrest or charges. Disc 19;

26. Once Pistor was seized, he was held in a non-public room under guard for two hours and ten minutes, of which one hour and four minutes were under the primary control of Baxley and Newman, after which he was released without formal arrest or charges. Disc 20.

27. No warrants were issued at any time for the seizure of Plaintiffs or their property. Accord exhibits 1-3, with special reference to exhibit 3, final full paragraph (production of warrant requested by Plaintiff Abel).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF LIABILITY

I. INTRODUCTION

A. OUTLINE OF BASIS FOR FACTS

The foregoing facts are supported by the written statements (party admissions) of the three defendants against whom summary judgment is sought, as well as a video of the incident. The videos are not currently attached as they are subject to a protective order which, while allowing reference to the videos in court, provides for a currently unexpired fourteen day period during which the Tonto Apache Tribe may move for a protective order. Absent a protective order, the videos will be produced. All the parties to this case possess these videos and can address the contents in any reply. The authentication of the video contents is addressed in the affidavit of counsel attached to this motion as exhibit 4. The videos referenced are Disc 18, "Interrogation of Ronnie;" Disc 19, "George-Observation; and Disc 20, "Shakedown of Witherspoon."[4] See Affidavit of Robert A. Nersesian, Exhibit 4, ¶¶ 11, 17, and 23.

B. BACKGROUND FOR REVIEWING FACTS

Plaintiffs' claims arise from an incident which was pre-planned by defendants. Plaintiffs Pistor and Abel were handcuffed and Witherspoon was physically grabbed by the arms. The plaintiffs were each physically transported to three different secure and non-public rooms where they were held under armed guard and interrogated, all for in excess of an hour. Once in the rooms, each was subjected to a search involving the

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[3] The reference to "disc" and the admissibility of its content is more fully explained in the Affidavit of Robert A. Nersesian attached as exhibit 4.

[4] These are references ascribed by the compiler as relating to plaintiffs Rahne Pistor, George Abel, and Jacob Witherspoon, respectively.

removal of all their personal property, including cash, casino payment vouchers, phones, charms, keys, a scarf, wallets, etc. No formal arrest of any plaintiff was made at the time or since. After interrogations, the plaintiffs were released, but their property was kept.

The individual defendants subject to the current motion are three of the officers placing handcuffs on Plaintiff Abel and Plaintiff Pistor. They are also the three who personally drafted reports (party admissions) upon which the facts and current motion are largely based. All three defendants admit that their actions taken against the plaintiffs were in furtherance of "suspicion" and "investigation," terms necessarily exclusive of probable cause. Plaintiffs contend that the actions of the defendants Baxley, Newman, and McDaniel violated plaintiffs' rights to be free of unreasonable search and seizure, as well as constituting false imprisonment/arrest and battery under Arizona law.

As the following is addressed, one other factor evident from exhibits 1-3 is important. Each defendant here, Baxley, Newman, and McDaniel, acknowledge that they were acting as part of a uniform plan to take all three plaintiffs into custody in similar manners for a unified purpose. Exhibits 1-3. Their actions were, thusly, in concert with all defendants, and each was effectively the cross-agent of the other. This establishes joint and several liability with respect to liability to each plaintiff. See Ariz. Rev. Stat. Ann. § 12-2506, and Accord Corder v. Gates, 947 F.2d 374, 378, n.11 (9th Cir. 1991).

II. ANALYSIS

A. THE STANDARD

A party in a lawsuit may move a court to enter summary judgment. Fed.R.Civ.P. 56(a)-(b). Summary judgment is appropriate when the moving party establishes that there is no genuine dispute as to any material fact and the moving party is entitled to

judgment as a matter of law. Id.; Celotex Corp. v. Catrett, 477 U.S. 317, 322–24 (1986). "[T]he substantive law will identify which facts are material." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court does not "weigh the evidence and determine the truth of the matter," but solely "determine[s] whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. Only disputes about the material facts preclude the granting of summary judgment. Id.

The movant bears the initial burden of proof. Celotex, 477 U .S. at 323. A party must support its assertion that there is no genuine issue of material fact by citing to particular parts of materials in the record. Fed.R.Civ.P. 56(c)(1). Once the movant meets its burden under Rule 56, the non-movant must go beyond the pleadings and designate specific facts showing a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The court must view the facts and draw all reasonable inference in favor of the nonmoving party. Rosario v. Am. Corrective Counseling Servs., Inc., 506 F.3d 1039, 1043 (11th Cir.2007)). To avoid summary judgment, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U .S. at 586. Speculation does not create a genuine issue of fact." Accord R.W. Beck & Associates v. City & Borough of Sitka, 27 F.3d 1475, 1481 (9th Cir. 1994). If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. See Anderson, 477 U.S. at 249–50. In short, summary judgment is proper upon motion

against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case. Celotex, 477 U.S. at 322.[5]

It is also worthy to note that the defendants Baxley, Newman and McDaniel should not be heard to attempt to contradict their prior party admissions included in exhibits 1-3. Pointedly, while "the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture." Milling v. Las Vegas Metropolitan Police Dept, 67 F.3d 307 (9th Cir. 1995). An attempt to contradict the salient and consistent facts from three separate prior written statements from three different opposing parties would present the very definition of gossamer threads of whimsy. Further, no reasonable jury could view three contemporaneous renditions of events in the very words of the responding defendants, and accept a later contradictory statement by these same defendants as the truth.

B. DETENTION AND SEIZURE OF THE PERSON AS ADDRESSED UNDER THE CONSTITUTION

This case involves the unconstitutional search and seizure of the plaintiffs and their property. The law has developed surrounding these constitutional rights in a manner that is, at times, confusing as one attempts to reach the core principles which are absolutely barred by the constitution. Thus, prior to the discussion of the merits, some definitional premises will better clarify the perspectives to be addressed.

At issue are the concepts of arrest and an investigatory stop. The primary difficulty in addressing the constitutional parameters of these actions is that the line

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[5] For proper attribution, the foregoing standard is largely cribbed from Wells Fargo Bank, N.A. v. Ready Built Transmissions, Inc., 2:11-CV-1014-TFM, 2012 WL 6681778 (M.D. Ala. 2012), which provides this extremely thorough, eloquent, and supported statement.

between the two is blurred, each having a different test as to its constitutional basis. Confusion also exists concerning when a police encounter constitutes an arrest or an investigatory stop. Further complicating the matter is the fact that an arrest in the area of civil liability has two different definitions depending on which type of encounter (formal arrest or investigatory stop) is at issue.

A constitutional arrest requires probable cause or warrant. See United States v. Lopez, 482 F.3d 1067, 1072 (9th Cir. 2007), accord U.S. Const. amend. IV. "Probable cause to arrest exists when officers have knowledge or reasonably trustworthy information sufficient to lead a person of reasonable caution to believe that an offense has been or is being committed by the person being arrested." United States v. Lopez, 482 F.3d 1067, 1072 (9th Cir. 2007). Further, at any given time, probable cause is to be determined under the totality of the circumstances, and not merely through reference to inculpatory facts. Crowe v. County of San Diego, 593 F.3d 841, 867 (9th Cir. 2010).

There are two types of arrest to evaluate constitutionally. First there is a formal arrest accompanied with an intent to detain, booking, etc. Secondly, a seizure without a formal arrest (i.e., a Terry[6] stop) will morph into a "full-scale arrest" for constitutional purposes if sufficient badges of formal arrest are present. See Lopez, supra at 1072. Generally, duration, the level of imposition, physical force, asportation, and such factors

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[6] "Terry stop" is a legal term of art derived from the case of Terry v. Ohio, 392 U.S. 1, 20 (1968). It is a detention of limited ("brief") duration amounting to less than an arrest for the purpose of questioning and determining a person's reason for being where they are, and allaying or validating concerns relative to suspicion of criminal activity by the person detained based on "articulable facts." Generally, it is to be in place, without aggression, and brief, and if the brief detention does not elicit facts giving rise to probable cause, the subject must be released. Further, any search attendant to the detention can only take place in situations where there is reason to suspect that the detainee is armed, and then, only to the limited extent of a pat down search. Id.

cause a seizure to transcend an allowable Terry stop, and at such point, the seizure of a person is to be evaluated as an arrest with all its constitutional restrictions. Both an investigative stop which ripens into or escalates into an arrest, and a formal arrest are constitutional only if probable cause to arrest is present. Fisher v. Harden, 398 F.3d 837, 844 (6th Cir. 2005) (citations omitted, emphasis in original); United States v. Robinson, 30 F.3d 774, 784 (7th Cir. 1994).

Contrasting with arrest, an investigatory detention that does not escalate into an arrest does not require probable cause. To be constitutional, such a seizure, nonetheless, must be based on reasonable suspicion based on articulable facts, and even a Terry stop without reasonable suspicion is unconstitutional. See Brown v. Texas, 443 U.S. 47, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); and accord Grosch v. Tunica County, Miss., CIV A 2:06CV204-P-A, 2008 WL 114773, *5-6 (N.D. Miss. 2008); and Grosch v. Tunica County, Miss., CIV A 2:06CV204-P-A, 2009 WL 161856 (N.D. Miss. 2009) (Refusing new trial on a case analogous to the present case awarding the advantage gambler $729,000.00). Here, nonetheless, as shown below, the detentions of the plaintiffs escalated far beyond any allowable Terry stop, could only be termed an arrest requiring probable cause, and could not be justified for "investigation" or on "suspicion."

C. SEIZURE OF PROPERTY AS ADDRESSED UNDER THE CONSTITUTION

With respect to a seizure of property in situations without a formal arrest, the scope of the seizure of property also has a two-fold analysis. Property on the person of the subject of the search may not be seized unless there exists probable cause thusly allowing the seizure as incident to an arrest, unless the property is in the nature of a weapon, or unless the nature of the property as contraband is readily evident. Exemplary

of this rule is the fact that search or seizure of a wallet pursuant to a Terry stop is prohibited. State v. Allen, 93 Wash. 2d 170, 172, 606 P.2d 1235, 1236 (1980), citing to United States v. Thompson, 597 F.2d 187, 190 (9th Cir. 1979). Moreover, cash is not contraband absent probable cause. Accord United States v. $405,089.23 U.S. Currency, 122 F.3d 1285, 1290 (9th Cir. 1997). Here, each plaintiff was thoroughly searched, cash was seized, and for months the property in the form of cash, cell phones, and even an innocuous plastic donkey were seized and kept.

A seizure of property in conjunction with a detention absent a formal arrest is circumscribed. Any detention of the property must be brief—likely limited to the duration of a Terry stop. See United States v. Place, 462 U.S. 696, 706 (1983). Further, per exhibits 1-3, defendants planned to secure the phones and all cash in the possession of the plaintiffs. Absent hot pursuit, or witnessing of criminal activity, the knowledge that certain items not dangerous in themselves will be seized has as an absolute prerequisite the issuance of a warrant. Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971).

D. LIABILITY

1. FIRST CONSTITUTIONAL VIOLATION—SEIZURE ABSENT A WARRANT

Plaintiffs were seized at the Mazatzal Hotel and Casino. Prior to this seizure, Baxley, McDaniel, and Newman attended a briefing at the Tonto Apache Police Department where their upcoming responsibilities and the prospective seizure of the plaintiffs and their property was planned. See Exhibit 3, p. 1. Also of note, this was prearranged to such a degree that Arizona Gaming Agents (Nejo and Loomis) appeared at the meeting, presumably from their offices in Phoenix. In short, there was time (at least

hours, and possibly days) for planning, briefing, and implementing the search and seizure of the plaintiffs who were gambling at the Mazatzal casino. Id.

Considering that the defendants subject to this motion were called into the situation that was already well developed, and were being asked to conduct seizures of persons and property, there is a glaring question or concern for all three of these officers who are to be active in the search and seizure, and that question is, "Can I see the warrant under which I am authorized to undertake this search and seizure." Accord Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971). Obviously, neither Baxley, nor Newman, nor McDaniel, nor the other three state sanctioned police officers present asked this question, and there was no warrant. The only conclusion, considering clearly established law, was that the defendants in flagrant disregard of the constitutional protections to which the plaintiffs were entitled, and were readily willing to jettison the warrant requirements of the Fourth Amendment.

In Terry v. Ohio, 392 U.S. 1, 20, 88 S. Ct. 1868, 1879, 20 L. Ed. 2d 889 (1968), the United States Supreme Court noted, "We do not retreat from our holdings that the **police must, whenever practicable**, obtain advance judicial approval of searches and seizures through the warrant procedure, . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances . . . . Terry v. Ohio, 392 U.S. 1, 20 (1968) (citations omitted, emphasis added). In context, the entire concept of exigent circumstances is dispelled in the words of Baxley, Newman, and McDaniel. Exhibits 1-3. Simply, there can be no exigent circumstances occurring at the time of the seizure if there is time for remote plotting and planning, and calm orchestrated execution with instructions prior to the event. When told that a full-blown seizure and

search of the plaintiffs is to take place pursuant to "suspicion" and "investigation", the obligations of Baxley, Newman, and McDaniel was to either excuse themselves from the illegal search and seizure, or seek out a warrant. They did neither. Their choice to willingly and actively participate stands as a choice to willfully violate plaintiffs' constitutional rights, and partial summary judgment of liability under 42 U.S.C. 1983 should enter.

2. SECOND CONSTITUTIONAL VIOLATION—AN ARREST UNDER THE CONSTITUTION WITHOUT PROBABLE CAUSE

Despite this admitted lack of probable cause (i.e, the seizure was on "suspicion" and per an "investigation"), the actions of these defendants transcended any allowable stop pursuant to Terry v. Ohio, and therefore, became an arrest for constitutional purposes. "It is well settled that a police-citizen encounter which goes beyond the limits of a *Terry* stop is an arrest that must be supported by probable cause or consent to be valid." United States v. Perdue, 8 F.3d 1455, 1462 (10th Cir. 1993) ("An encounter between police and an individual which goes beyond the limits of a *Terry* stop, however, may be constitutionally justified only by probable cause or consent."); United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (While not using the word arrest, the court held that a detention beyond the scope of a Terry stop required probable cause, the touchstone for an arrest, in order for the detention to be constitutional); McCarr v. State, 197 Ga. App. 124, 125, 397 S.E.2d 711, 712 (1990) ("Detention beyond that authorized by *Terry* is an arrest, and, to be constitutional, such an arrest must be supported by probable cause."); State v. Maurer, 15 Ohio St. 3d 239, 255, 473 N.E.2d 768, 784 (1984) ("Any police confinement beyond the parameters in Terry v. Ohio . . . is the key to what constitutes an arrest.").

For these defendants, who held the allegedly limited conveyed knowledge that plaintiffs were under "suspicion" of a crime and that there was an ongoing "investigation," plaintiffs concede defendants' knowledge fell within the parameters allowing for a valid Terry stop for purposes of this motion. This condition not only provides the lower boundary allowing for a Terry stop, but it also provides the outer limit of the allowable scope of the seizure made as something less than an arrest. Because suspicion and investigation contrast with arrest and probable cause, Baxley, Newman, and McDaniel's interaction with the plaintiffs must be limited to the constitutional borders of a valid Terry stop, and the actions well surpassed this limit.

"In the name of investigating a person who is no more than suspected of criminal activity, the police may not ... seek to verify their suspicions by means that approach the conditions of an arrest." United States v. Acosta-Colon, 157 F.3d 9, 16 (1st Cir. 1998), citing to Florida v. Royer, 460 U.S. 491 (1983). When these limits are exceeded on an investigative detention, plaintiffs' constitutional rights are violated, and in such a case, liability is established. Id, and 42 U.S.C. 1983.

Here the seizures of plaintiffs and their property were accompanied by physical seizure through grabbing (manucaption), asportation, invasive search, and lengthy (1.76-2.4 hours) custodial detention, each of which was planned by the defendants prior to the encounter with plaintiffs. Generally, each of these factors is a badge of arrest that can take the evaluation of the interaction out of the context of a Terry stop, and elevates it to the status of a full-blown arrest (which with the defendants' admissions of lack of probable cause is unconstitutional *per se*). Accord Terry v. Ohio, supra, and see United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). Here, with four factors transcending

an ordinary Terry stop present, and plaintiffs being allegedly suspected of, at most, participating in non-violent criminal activity, the law establishes that the plaintiffs were subjected to a full-blown arrest in violation of their constitutional rights. Compare United States v. Meza-Corrales, 183 F.3d 1116, 1123 (9th Cir. 1999) (Factors patently absent here such as fleeing suspects and known weapons related to the stop allowed for the handcuffing of the person during a Terry stop).

Because the defendants acknowledge that they were undertaking an "investigative" detention, adequate justification for the intrusion must exist, **and, as noted, "the encounter's scope must be sharply limited**." United States v. Borys, 766 F.2d 304, 308 (7th Cir. 1985) (emphasis added, citing to Terry, supra). While any one such factor, or even more than one such factor, is not necessarily foreclosed in the context of a Terry stop, this is to be evaluated in the context of the circumstances. For example, in securing the plaintiffs in custodial non-public environments, "the government must point to *some* specific fact or circumstance that could have permitted law enforcement officers reasonably to believe that relocating the suspect to a detention room was necessary to effectuate a safe investigation." United States v. Acosta-Colon, 157 F.3d 9, 17 (1st Cir. 1998) (emphasis in original). The asportation of plaintiffs to the secure offices is a badge of arrest because there is nothing to be done in that room which could have not occurred where plaintiffs were found—i.e., they could have been spoken to in situ.

In this circuit, the constitutional limits of a Terry stop search were expansively discussed and clearly established in the case of United States v. Miles, 247 F.3d 1009 (9th Cir. 2001). Per Miles, the scope of the search allowed is a "pat down" search. If, during the pat down search, "an officer feels an item that he recognizes as contraband or

evidence, that 'touch' may provide probable cause for the arrest of the person and seizure of the evidence. . . . In order to be lawfully seized, the identity of the item must be 'immediately apparent' [as a weapon or contraband] to the officer while conducting a lawful search . . . ." Id, at 1013. Thus, for a seizure of property in the context of a Terry stop to be constitutional, the following must be met: 1) A search cannot surpass a pat down search; 2) The touch from the pat down search must have disclosed an identified weapon or identified contraband establishing probable cause, and 3) Only then can the item be seized. Defendants acknowledge that they conducted a thorough search of plaintiffs, and all personal property was seized, inclusive of a scarf, cell phones, casino cash-out tickets, a plastic good-luck donkey, and an MP-3 player. Clearly and indisputably, the search of plaintiffs exceeded an allowable Terry pat-down, the events surpassed a Terry stop, and by definition, the seizure of the plaintiffs and their property reached the level of a full-blown arrest.

Regarding the admitted and evident manucaption and handcuffing of the plaintiffs, while standing alone this may be allowable in some investigative detentions, it must first be justified by then current circumstances. As noted in United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982), "handcuffing substantially aggravates the intrusiveness of an otherwise routine investigatory detention **and is not part of a typical Terry stop**." (emphasis added). In context, handcuffing is, therefore, an important factor to evaluate whether or not an investigatory stop has ramped-up to a full-blown arrest for constitutional purposes. Here, plaintiff's Pistor and Abel were handcuffed, and Witherspoon was grabbed by each arm and hand and forcibly escorted to a holding room. In Bautista, the court noted that the circumstances giving rise to the allowance of

handcuffs requires that the police are addressing "potentially dangerous suspects," and concluded that handcuffing was allowable due largely to the nature of the crime being investigated, to wit: Armed bank robbery.

Contrariwise, alleged simple suspected bunko—a non-violent crime—no indication of prior criminal history, no evidence of weapons, no evidence of violence, and no evidence of flight, presents the polar opposite of Bautista, handcuffing could not occur in this "typical Terry stop," and certainly was constitutionally restrained in this case. There is thusly no doubt that the detention of plaintiffs exceeded the scope of any valid Terry stop, and liability exists as a matter of law as to Baxley, Newman, and McDaniel.

There is also the durational factor. An investigative detention is to be brief. Terry, supra. There was no indication of any brevity, and all indications were of lengthy detentions. As noted, Baxley and Newman controlled the detention of the plaintiff, Pistor, for over an hour, and the entire detention lasted over two hours.

The law requires agglomeration of these factors in determining whether Terry stop ripens into an arrest requiring probable cause. See United States v. Bautista, 684 F.2d 1286, 1289 (9th Cir. 1982). The appropriate factors to be evaluated include the handcuffing and manucaption, the lengthy detentions, the full blown search (this factor standing alone actually remains an automatic enhancer rendering the purported Terry stop an arrest under constitutional principles), and whether the detainee is subjected to a custodial interrogation outside the immediate area of the detention. Before the court is the 'perfect storm' of factors bespeaking a full-blown arrest. There was no attempt by the Baxley, Newman, or McDaniel to conduct the indicated non-violent consensual citizen encounter, and they jumped directly to full-blown arrest without cause.

In summary, Baxley, Newman, and McDaniel admit that they seized Abel and Pistor, such seizure was to be with handcuffs, that they secured plaintiffs in non-public rooms, and they conducted a thorough search of each and seized all personal property and money in their possession. The only information that defendants held was that the plaintiffs were "suspected" of criminal activity, and that there was an "investigation" into the activities of plaintiffs. Their awareness, by admission, stands in direct conflict with any probable cause supporting these seizures. It evinces that they knew there was no formal arrest, and dispels any exigent circumstances. As probable cause is an absolute constitutional prerequisite to the search and seizure they describe, and they acknowledge that the seizure occurred on less than probable cause/arrest, they are liable under 42 U.S.C. 1983 for violation of plaintiffs' rights.

3. THIRD CONSTITUTIONAL VIOLATION—SEIZURE OF PROPERTY

The videos show plaintiffs' property sitting on the proximate table (floor in the case of Witherspoon) as plaintiffs are put out of the Mazatzal casino. That is, each plaintiff's property (cash, MP-player, cash-out tickets, etc.) was retained as part of the search and seizure. This is beyond the brief detention of property which could arguably be allowed under a Terry stop. United States v. Place, 462 U.S. 696, 706 (1983). Plaintiffs were subjected to an illegal seizure of their property by the defendants.

4. STATE TORT LIABILITY FOR FALSE IMPRISONMENT

Federal definitions of arrest notwithstanding, under the law of Arizona, when actual restraint of the individual is made by a police officer, this constitutes the action of arrest. Ariz. Rev. Stat. Ann. § 13-3881.A Also, in Arizona, an arrest is legally authorized only in certain circumstances dileneated within Ariz. Rev. Stat. Ann. § 13-

3883.A. The allowable bases for an arrest without a warrant under this statute establish that no basis for an arrest existed with respect to the plaintiffs here. Indeed, as noted above, the defendants admit that they restrained plaintiffs due to hearsay "suspicion" and "investigation" of criminal activity, and for no further reason. Thus, the seizures and the detentions of plaintiffs by the defendants were made without legal authority.[7]

A detention and a seizure of a person without legal authority to seize or detain constitutes the tort of false imprisonment. "False imprisonment can be defined as the detention of a person without his consent and without lawful authority." Cullison v. City of Peoria, 120 Ariz. 165, 169, 584 P.2d 1156, 1160 (1978). Here, the detention of plaintiffs was not only "without legal authority," it as contrary to the legal authority to detain actually granted. It was also, with asportation, manucaption, and custodial detention, as egregious as a detention can be. False imprisonment by defendants, Baxley, Newman, and McDaniel occurred here, and summary judgment of liability should enter.

5. STATE TORT LIABILITY FOR BATTERY

As established in the preceding section, the actions of defendants, Baxley, Newman, and McDaniel constitute false imprisonment on the basis of the lack of legal authority. Without legal authority to detain, by definition, there can be no legal authority to handcuff or physically grab plaintiffs either.

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[7] As an interesting and enlightening aside, Ariz. Rev. Stat. Ann. § 13-3888 requires of a police officer, "When making an arrest without a warrant, the officer shall inform the person to be arrested of his authority and the cause of the arrest . . . ." As noted in exhibit 1, p.2, on seizure plaintiff, Pistor, was told by defendants, Baxley and Newman, that he was being "detained" on "suspicion of gaming violations." These officers necessarily had to recognize that this basis for the "actual restraint" of Pistor did not meet the prerequisites of Ariz. Rev. Stat. Ann. § 13-3883.A.

Handcuffing without legal authority constitutes battery. Love v. Port Clinton, 524 N.E.2d 166, 167 (Ohio 1988) (“"[S]ubduing" and "handcuffing" -- are acts of intentional contact which, unless privileged, constitute a battery.”); *and see* Fuerschbach v. Southwest Airlines Co., 439 F.3d 1197, 1209 (10th Cir. N.M. 2006) (“If an arrest is determined to be unlawful, any use of force against a plaintiff may constitute an assault and battery, regardless of whether the force would be deemed reasonable if applied during a lawful arrest.”); Sulkowska v. City of New York, 129 F. Supp. 2d 274, 294 (S.D.N.Y. 2001); Johnson v. Suffolk County Police Dept., 245 A.D.2d 340, 665 N.Y.S.2d 440, 440-41 (N.Y. App. Div. 1997). Defendants Baxley, Newman, and McDaniel admit handcuffing plaintiffs. There was no legal authority to arrest or seize physically, battery is established, and partial summary judgment of liability should enter.

III. CONCLUSION

For the reasons set forth above, plaintiffs request a partial summary judgment of liability against defendants Baxley, Newman, and McDaniel on plaintiffs’ constitutional claims under 42 U.S.C. 1983, and on the state claims of false imprisonment and battery.

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