IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

TONY RICHARD LOW,

Plaintiff, No. CIV S-05-2211 MCE DAD P

vs.

GARY R. STANTON, et al.,

Defendants. FINDINGS & RECOMMENDATIONS

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Plaintiff is a state prisoner proceeding pro se with several civil claims brought pursuant to 42 U.S.C. § 1983, the Religious Land Use and Institutionalized Persons Act (RLUIPA), and state law. Before the court is defendant Hambright's motion for summary judgment.[1]

BACKGROUND

Plaintiff's complaint alleges as follows concerning defendant Hambright:

> On August 3rd, 2005 [sic] defendant Hambright violated my constitutional right to access to the courts by yanking me out of Judge Smith's court room while I was actually speaking to the

[1] Plaintiff originally named nineteen defendants. On August 13, 2008, defendants Petteway, Allen and Shepard were dismissed with prejudice pursuant to a settlement agreement. There are sixteen remaining defendants all of whom have, either separately or jointly, filed seven motions for summary judgment.

> Judge. Defendant Hambright without any other authority other then his own terminated my in court conversation with Judge Smith when I was asking Judge Smith a question concerning a motion to declare a conflict that my public defender was suppose to file.
>
> Defendant Hambright had no right to terminate my in court conversation with Judge Smith nor was he instructed to literally pull me out of the court room by Judge Smith or any other authority.
>
> * * *
>
> The actions of defendant Hambright of terminating the plaintiffs [sic] court appearence [sic] and conversation with Judge Smith constitutes a denial of access to the courts and further denied the plaintiffs [sic] rights under the Sixth Amendment to the United States Constitution.
>
> The actions of defendant Hambright to unreasonably seize the plaintiff who is a pretrial detainee constitutes unreasonable seizure and fertuer [sic] violates the plaintiffs [sic] rights under the Fourth Amendment to the United States Constitution.

(Compl. filed Nov. 2, 2005, at 23-23, 38-39.) Plaintiff seeks punitive damages in the amount of $10,000. (Id. at 45-46.)

Based on these allegations, plaintiff is proceeding with the following three claims against defendant Hambright: (1) denial of plaintiff's right of access to the court, (2) denial of plaintiff's rights under the Sixth Amendment, and (3) denial of plaintiff's rights under the Fourth Amendment to be free from an unreasonable seizure.

I. Motion for Summary Judgment Standards Under Rule 56

Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

Under summary judgment practice, the moving party

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and 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, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the

claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

On December 8, 2006, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154 F.3d 952, 957 (9th Cir. 1998) (en banc); Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

II. Undisputed Facts

The parties agree that the following facts are undisputed: Defendant Hambright has been a correctional officer at the Solano County Jail since June of 1997. On August 3, 2005, he was assigned to the court holding area for Superior Court B. A correctional officer with that assignment remains in the holding area and does not enter the courtroom unless the bailiff needs

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assistance or there is an emergency in the courtroom. There is a speaker system that allows the officer in the holding area to hear what is being said in the courtroom.

On August 3, 2005, plaintiff appeared in the Solano County Superior Court for a readiness conference. Judge R. Michael Smith was the presiding judge. Because plaintiff's attorney, Ms. Ryan, was unavailable due to a family illness, Deputy Public Defender Robert Warshawsky appeared on behalf of plaintiff in her place.

Both parties have submitted a copy of the transcript of the readiness conference held on August 3, 2005 and therefore the recording of the proceedings are undisputed.[2] The relevant portions of the transcript reflect the following exchange:

> MR. WARSHAWSKY: . . . . My suggestion would be, given the time waiver status, that we stand over to early September, and that would allow my office to complete the subpoena process, and then if there's a conflict [of interest] we can advise the Court.
>
> THE DEFENDANT: I'm not waiving time.
>
> MR. WARSHAWSKY: Well, he's already waived time.
>
> THE COURT: He has waived time, but he also has the right to withdraw that time waiver, too. Are you withdrawing your time waiver?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: We'll set it for preliminary hearing then. I'll put it over to Department 17. The presiding judge will be covering for me in this type of situation. The last day for preliminary hearing would be the 17th of August. 15th of August, nine o'clock for

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[2] Defendant has requested that this court take judicial notice of the transcript of the August 3, 2005 readiness conference in state court. Both parties have submitted that transcript in connection with the pending motion for summary judgment and it is therefore in the record before this court and is obviously to be considered. Accordingly, the court need not take judicial notice of the transcript which is in the record before this court, although it would otherwise be perfectly appropriate to do so. See Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist., 498 F.3d 1031, 1039 n.2 (9th Cir. 2007) (taking judicial notice of oral argument transcript); In re American Continental/Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996) (when ruling on a Rule 12(b)(6) dismissal, a district court may take into account judicially noticeable materials such as publicly available records and transcripts from judicial proceedings in related or underlying cases which have a direct relation to the matters at issue) rev' d on other grounds sub nom. Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998).

readiness conference; 16th of August, nine o'clock for preliminary hearing.

THE DEFENDANT: Your Honor, may I address the Court, please? I've attempted to contact my public defender, Ms. Ryan, and she refuses to speak to me. I spoke to her approximately last Thursday - - Wednesday and Thursday, and she told me that she wasn't gonna (sic) be my attorney no more. She's going to file a conflict in the Court and that I was going to be appointed a conflict attorney today.

THE COURT: Well, that's not going to happen today because Ms. Ryan, due to family illness, is not here.

THE DEFENDANT: So I don't know what's going on.

THE COURT: What is going on is this. You are withdrawing your time waiver. The readiness conference is set for the 15th of August. The preliminary hearing is set for the 16th of August. So within the next two weeks, you'll have your preliminary hearing, and I'm sure before then, Ms. Ryan will come back and talk to you, and if there's a conflict of interest, I'm sure that will get taken care of before that as well.

THE DEFENDANT: I have one additional thing. The District Attorney and I - -

MR. WARSHAWSKY: Don't say anything, please.

THE COURT: The District Attorney won't be talking with you because you are represented.

THE DEFENDANT: Pardon?

THE COURT: The District Attorney won't talk with you because you are represented by an attorney.

THE DEFENDANT: That's what I mean.

MR. WARSHAWSKY: Don't say anything.

THE DEFENDANT: I have a right to speak in this court, your Honor.

THE COURT: Hang on.

THE DEFENDANT: Your Honor - -

THE COURT: At this point, I think Mr. Warshawsky is attempting to protect your interests by asking you not to speak in open court where everybody gets to hear what you have to say.

> You may say something that might end up incriminating you.
>
> THE DEFENDANT: I understand that. I have a right to speak.
>
> THE COURT: We are done for today.
>
> THE DEFENDANT: So you are denying me the right to talk to you completely?
>
> THE COURT: You don't have any right to talk to me completely. You have the right to address the Court. Thank you.

(Pl.'s Decl., Ex. A at 3-5.) That concluded the recording of the proceedings.

Following the exchange between plaintiff and the court set forth above, defendant Hambright entered the courtroom and grasped plaintiff's waist restraints and shirt-collar and pulled him from the courtroom, through the doorway and into the holding area. The distance from the courtroom to the holding area was no more than a few feet and plaintiff remained on his feet during the passage.

III. Access to Court Claim

A. Defendant's Motion

In his declaration, defendant Hambright states that he was listening to the proceedings on the speaker system. (Def.'s Decl. ¶ 5 at 2.) When Judge Smith indicated he was finished with plaintiff, the bailiff opened the door into the court holding area and instructed plaintiff to follow him. (Id.) Plaintiff moved towards the door but stopped a few feet from it and in a loud and animated fashion, attempted to speak to Judge Smith. (Id. ¶ 6 at 2.) The bailiff told plaintiff to exit the courtroom but plaintiff refused to leave. (Id.) Judge Smith reiterated to plaintiff that he was finished with him. (Id. ¶ 7 at 2-3.) It was obvious to defendant Hambright that plaintiff was not following the orders of either the judge or the bailiff. (Id. ¶ 8 at 3.) Defendant responded by grasping plaintiff's waist restraints and shirt collar and pulling him from the courtroom into the holding area. (Id.)

Defendant Hambright argues that plaintiff was not denied access to the court because Judge Smith had concluded the proceedings and indicated that he was finished speaking

to plaintiff. (Def.'s Mem. of P. & A. (Def.'s P&A) at 6.) He contends that because the proceedings were concluded, plaintiff suffered no actual injury in terms of access to the court. (Id. at 7.) In his reply to plaintiff's opposition, defendant Hambright argues that plaintiff is attempting to extend the right of access to the court beyond its accepted limits. (Reply at 3.) He argues that the right applies only to direct criminal appeals, habeas petitions, and civil rights actions. In addition, defendant Hambright asserts that plaintiff has failed to demonstrate any actual injury and that an alleged interference with his right to counsel does not satisfy the injury requirement. (Id.)

Defendant Hambright also argues that plaintiff's claim is barred by Heck v. Humphrey, 512 U.S. 477 (1994), because plaintiff's claim that defendant denied him access to the court by forcibly removing him from the courtroom necessarily implicates the validity of his subsequent criminal conviction which has not been set aside . (Def.'s P&A at 7.)

B. Plaintiff's Opposition

Plaintiff argues that his right of access to the court claim presents a new legal issue. In this regard, he states:

> Plaintiff in his verified complaint raises a constitutional question which has not been addressed before in the 9th Circuit. Does the fundamental constitutional right of access to the courts apply to an unconvicted pretrial detainee when he is seized by non-court county correctional officer during a court appearence [sic] effectively hindering and interfering with a criminal proceeding.

(Pl.'s Opp'n, Mem. of P. & A. (Pl.'s P&A) at 5.) Plaintiff confusingly argues that the standard set forth in Lewis v. Casey, 518 U.S. 343 (1996) applies only to denial of access to the court claims brought by convicted prisoners and does not apply to his claim which arose when he was a pre-trial detainee. (Pl.'s P&A at 5.) He contends that here the court should instead apply the standard set forth in Phillips v. Hust, 477 F.3d 1070, 1076 (9th Cir. 2007) with respect to actions seeking a remedy for a lost opportunity to present a legal claim which requires a showing of "(1) the loss of a 'nonfrivolous' or 'arguable' underlying claim; (2) official acts frustrating the

litigation, and (3) a remedy that may be awarded as recompense but that is not otherwise available in a future suit." (Id.)

As to this first element, plaintiff asserts that his underlying claim is based on his Sixth Amendment right to counsel. (Id. at 6.) He argues that when defendant Hambright pulled plaintiff out of the courtroom while he was addressing the court about a conflict with his attorney, Ms. Ryan, his Sixth Amendment right to counsel was violated. (Id. at 6-7.) As to the second element, plaintiff argues that defendant Hambright prevented plaintiff from "seeking the assistance of counsel and to address the court." (Id. at 8.) In addition, plaintiff contends that defendant Hambright was not authorized to use force on plaintiff because under the Solano County Sheriff's Department policy, force may only be used to effect an arrest or to overcome resistance, and those circumstances were not present here. (Id. at 9-10.) As to the last element, plaintiff argues that this civil action is his only means to obtain punitive and nominal damages. (Id. at 11.) Lastly, plaintiff disputes that his claim is Heck barred. (Id. at 11-12.)

In his unauthorized response to defendant's reply, plaintiff argues that he is not required to show actual injury because he was a pretrial detainee at the time of the events in question and not a convicted person. (Pl.'s Response at 3) (citing Benjamin v. Fraser, 264 F.3d 175, 185 (2nd Cir. 2001)).

C. Analysis

"Under the First and Fourteenth Amendments to the Constitution, state prisoners have a right of access to the courts." Phillips, 477 F.3d at 1075 (citing Lewis, 518 U.S. at 346). Claims alleging a denial of the right to access the courts fall into two possible categories: (1) when systemic official action frustrates a plaintiff 's ability to prepare and file his lawsuit, and (2) when official acts have caused the loss of a meritorious case and a suit can no longer be litigated. Christopher v. Harbury, 536 U.S. 403, 413-14 (2002).

Plaintiff argues that his access to courts claim falls within the second category, a backward-looking claim seeking a remedy for his lost opportunity to present a legal claim. As

noted by plaintiff, the Ninth Circuit has identified three elements of such a claim. Phillips, 477 F.3d at 1076. The first element requires "the loss of a 'nonfrivolous' or 'arguable' underlying claim[.]" Id. In this regard, plaintiff contends that defendant Hambright's action violated his constitutional rights because he "was querying the court concerning a conflict of interest with his attorney of record and had notified the court of the fact plaintiff's attorney Ms. Ryan was refusing to communicate with plaintiff and had a conflict with the plaintiff." (Pl.'s P&A at 6.)

The court is not persuaded that plaintiff's attempt to claim a constitutional violation based upon these factual allegations satisfies the nonfrivolous requirement. Defendant Hambright's removal of plaintiff from the courtroom at the conclusion of the readiness hearing, did not interfere with plaintiff's ability to raise with the court the issue of a conflict with his appointed counsel. The transcript of the hearing reflects that the state trial court judge presiding over the proceedings had unequivocally concluded the readiness hearing after informing plaintiff that if, after his appointed counsel met with him, he still believed there was a conflict the issue would be addressed by the court prior to the preliminary examination. Moreover, the trial court did not rule with respect to any potential assertion by plaintiff of a breakdown in communication with his appointed counsel at the readiness hearing.

Plaintiff would bear the burden of proof at trial of establishing the essential elements of his denial of access to the courts claim. Here, for the reasons identified above, there is a complete failure of proof concerning an essential element of plaintiff's case on that claim. Accordingly, the court will recommend that defendant Hambright's motion for summary judgment be granted as to plaintiff's claim that the defendant denied him access to the courts in violation of his constitutional rights. See Celotex Corp., 477 U.S. at 323.

IV. Sixth Amendment Claim

Plaintiff also claims that when defendant Hambright removed him from the courtroom, his Sixth Amendment rights were violated.

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A. Defendant's Motion

Defendant Hambright moves for summary judgment on this claim, arguing that the nature of plaintiff's Sixth Amendment claim is not even entirely clear. (MSJ at 8.) Defendant contends that to the extent plaintiff is claiming that defendant's actions denied him his Sixth Amendment right to counsel or prevented plaintiff from exercising his right to represent himself, there has been no evidence offered to support such a claim. (Id.) Defendant Hambright observes that the evidence before the court establishes that plaintiff was represented by an attorney at the time of his appearance before the court and that defendant acted merely to protect the dignity of the courtroom from plaintiff's histrionics. (Id.) Moreover, defendant Hambright suggests that plaintiff's actions of ignoring the directives of both the judge and the bailiff demonstrated that he could not conduct himself in accordance with the protocols of the courtroom as required of a person representing himself. (Id.)

Defendant Hambright also argues that if plaintiff's claim is that he interfered with plaintiff's right to counsel, the evidence does not support this claim. (Id.) Defendant asserts that the evidence before this court establishes that he did not interfere with the confidential relationship between plaintiff and his counsel but instead merely prevented plaintiff from continuing to argue with Judge Smith after the judge made it clear that the court appearance had concluded. (Id. at 9.)

Finally, defendant Hambright argues that any Sixth Amendment claim brought by plaintiff would, in any event, be Heck-barred because the claim would necessarily implicate the validity of plaintiff's subsequent criminal conviction. (Id.)

B. Plaintiff's Arguments

Plaintiff contends that at the point he informed the state trial court about the potential conflict he had with his appointed attorney and withdrew his time waiver, he was then proceeding pro per. (Id. at 13-14; Reply at 4.) Plaintiff argues that, therefore, when defendant Hambright forcibly removed him from the courtroom, the defendant was interfering with

plaintiff's rights to self-representation and to secure new counsel. (Opp'n at 15; Reply at 4.) Plaintiff also disputes defendant's contentions that plaintiff was yelling at the judge, was violating the dignity of the courtroom, persisted in trying to argue with the judge, and refused to leave the courtroom. (Opp'n at 13-14.)

C. Analysis

The court finds plaintiff's arguments both unpersuasive and unsupported by the evidence and record before the court. Although plaintiff apparently wishes to believe otherwise, he was represented by counsel at the readiness hearing conducted in the state trial court. (Pl.'s Decl., Ex. A at 2-4.) Mr. Warshawsky, a Deputy Public Defender as was Ms. Ryan, appeared at the readiness hearing as plaintiff's counsel. (Id.) Moreover, as noted above, the trial court judge informed plaintiff that his appointed counsel Ms. Ryan would be contacting plaintiff soon and that if there was a conflict between them that would cause her to withdraw as his counsel, that matter would be resolved prior to the scheduled preliminary hearing. (Id. at 4.) Thus, plaintiff's arguments that he was proceeding pro se when he addressed the court is completely unpersuasive and belied by the evidence before this court. Accordingly, plaintiff's claim that defendant Hambright's actions somehow violated plaintiff's right to self-representation or his right to be represented by counsel is wholly unsupported by any evidence and without merit. Therefore, defendant Hambright's motion for summary judgment in his favor should be granted as to plaintiff's Sixth Amendment claim.

V. Unreasonable Seizure Claim

Plaintiff also has claimed that because he was a pretrial detainee at the time of this incident, when defendant Hambright pulled him from the courtroom it was in violation of his Fourth Amendment right to be free from unreasonable seizure.

A. Defendant's Motion

Defendant Hambright moves for summary judgment in his favor as to this claim, arguing that a seizure under the Fourth Amendment occurs when a government official uses

physical force to restrain the liberty of a citizen. (MSJ at 9-10.) He explains that under the law whether a seizure is unreasonable requires a balancing of the nature and quality of the intrusion against the governmental interest at stake. (Id. at 10.) Defendant Hambright observes that a pretrial detainee's rights under the Fourth Amendment are limited. (Id.) Defendant argues that to the extent plaintiff is alleging an excessive use of force such a claim cannot be based on the Fourth Amendment. (Id. at 11.) He argues that, even if the Fourth Amendment applied in the circumstances of this case, that the evidence establishes that his limited use of force in removing plaintiff from the courtroom was reasonable. (Id. at 11-12.)

Should the cause of action be construed as a claim of the excessive use of force in violation of the Fourteenth Amendment, defendant Hambright argues that summary judgment should be granted in his favor. (Id. 12-13.) In this regard, the defendant contends that in considering such a claim the court must balance several factors, such as, the need for the application of force, the relationship between the need and the amount of force used, the extent of the injury inflicted, and whether the force was applied in a good faith effort to maintain and restore discipline. (Id. at 13.) Defendant Hambright argues that here the evidence establishes that there was a need to use force because plaintiff refused to leave the courtroom and attempted to re-enter it after he had been removed, that the amount of force used was appropriate, that plaintiff suffered no physical injuries during the incident, that force was applied only after repeated commands were made to plaintiff to leave the courtroom, and that defendant acted in good faith to restore order in the courtroom. (Id.)

B. Plaintiff's Arguments

Plaintiff asserts that he is proceeding with an unreasonable seizure claim under the Fourth Amendment and not a Fourteenth Amendment excessive use of force claim. (Id. at 15.) In this regard, plaintiff states:

> The issue here is whether or not plaintiff has a liberty interest to be free from unreasonable seizure[,] not whether defendant Hambright used excessive force to effectuate his seizure of the plaintiff.

> It is reasonable for the plaintiff to have an expectation of liberty to exercise his Constitutional Sixth Amendment rights within the confines of a courtroom without being unreasonably seized while he is was [sic] in the enjoyment of a constitutionally permissive act.

(Id. at 16.)

C. Analysis

> A seizure under the Fourth Amendment has been described as follows:
>
> " '[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person....' " Brown v. Texas, 443 U.S. 47, 50 (1979) (internal citation omitted) (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)). The Supreme Court has been clear that although not every encounter between a police officer and a citizen is a seizure, United States v. Mendenhall, 446 U.S. 544, 553-54 (1980); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976); Sibron v. New York, 392 U.S. 40, 61 (1968), "the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime – 'arrests' in traditional terminology." Terry v. Ohio, 392 U.S. 1, 16 (1968). But "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Id. at 19 n.16. Indeed, the Supreme Court has "conclude[d] that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Mendenhall, 446 U.S. at 554.

U.S. v. Faulkner, 450 F.3d 466, 469 (9th Cir. 2006) (parallel citations omitted).

The court agrees with defendant that in light of the evidence before this court the Fourth Amendment does not apply to the incident at issue. A Fourth Amendment seizure occurs when a person who has the right to walk away, is restrained. Here, plaintiff is arguing that he was seized because he was taken from the courtroom after the proceedings had concluded. However, as a pretrial detainee appearing as a criminal defendant in pretrial proceedings in state court plaintiff obviously did not enjoy unfettered freedom of movement at that time in question. Certainly plaintiff was not free to leave the courtroom. He had previously been lawfully detained while awaiting trial on criminal charges. The Fourth Amendment did not prohibit defendant

Hambright from removing plaintiff from the courtroom under the circumstances established by the evidence before the court. See Tennessee v. Garner, 471 U.S. 1, 7-8 (1985) (holding that the "reasonableness" of a particular seizure depends not only upon when it is made, but also on how it is carried out); Graham v. Connor, 490 U.S. 386, 395 (1989) (the Fourth Amendment governs events "in the course of an arrest, investigatory stop or other 'seizure' of a free citizen"); see also Shah v. County of Los Angeles, 797 F.2d 743, 745 n.1 (9th Cir. 1986) (pretrial detainee who claimed that jail deputies mistreated him in numerous ways including through assault and harassment found not to have alleged any acts on the part of deputies that could conceivably implicate his Fourth Amendment rights).

Therefore, defendant's motion for summary judgment in his favor as to plaintiff's Fourth Amendment claim should also be granted.

CONCLUSION

In accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Defendant Hambright's July 25, 2008 motion for summary judgment (Doc. No. 125), be granted; and

2. Defendant Hambright be dismissed from this action with prejudice.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within fifteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised

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that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 22, 2009.

DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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