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2 IN THE UNITED STATES DISTRICT COURT  
3 FOR THE EASTERN DISTRICT OF CALIFORNIA  
4

5 LUIS FARIAS ARROYO (aka Luis )  
Farias), )

6 )  
7 Plaintiff, )

8 v. )

9 California Department of Justice, )  
Bureau of Narcotics Enforcement )  
Special Agent Supervisor and )  
10 Placer Special Investigations Unit )  
Commander JEFF CAMERON; Placer )  
11 County Deputy Sheriff KEN ADDISON; )  
Drug Enforcement Administration )  
12 Special Agent OMAR BERSAMINA; )  
and the UNITED STATES OF )  
13 AMERICA, )

14 Defendants. )  
15 )

2:08-cv-01493-GEB-KJM

ORDER GRANTING DEFENDANT  
OMAR BERSAMINA AND THE UNITED  
STATES OF AMERICA'S MOTIONS  
FOR SUMMARY JUDGMENT

16 Defendant Omar Bersamina ("Bersamina"), a federal Drug  
17 Enforcement Administration ("DEA") agent, moves for summary judgment  
18 on Plaintiff's Fourth Amendment excessive force claim, contending he  
19 did not seize Plaintiff and therefore was never in a position to use  
20 force on Plaintiff. Defendant United States of America also moves for  
21 summary judgment on Plaintiff's negligence claim. Plaintiff clarified  
22 at the hearing on the motions that his negligence claim against the  
23 United States is based solely on Plaintiff's excessive force Fourth  
24 Amendment claim alleged against Bersamina. Bersamina is the only  
25 remaining federal defendant in this action.

26 Plaintiff alleges that during the execution of a federal  
27 search warrant at 3438 Lone Ridge in Antelope California," ("3438 Lone  
28

1 Ridge"), a law enforcement officer subjected him to excessive force,  
2 in violation of his Fourth Amendment right. (First Amended Complaint  
3 ("FAC") ¶ 3). Plaintiff alleges that while he was being detained, and  
4 after he was handcuffed, that the officer violently threw him to the  
5 ground, "causing [him to suffer] serious injuries, including a broken  
6 leg," which required surgery. (Id. ¶¶ 22-24.) "Plaintiff was not  
7 arrested or charged with any crime." (Id. ¶ 24.)

#### 8 LEGAL STANDARD

9 When deciding a motion for summary judgment, the evidence is  
10 viewed in the light most favorable to the nonmoving party, and "[a]ll  
11 reasonable inferences must be drawn in the nonmoving party's favor  
12 . . . ." Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1220 (9th  
13 Cir. 1995).

#### 14 DISCUSSION

15 On June 29, 2006," at approximately 9:45 p.m., various  
16 agents from the DEA, FBI, and the California Bureau of Narcotic  
17 Enforcement/Placer County Special Investigations Unit ("SUI")  
18 "executed a [federal] search warrant at 3438 Lone Ridge" in connection  
19 with a previous arrest for the sale of nine pounds of methamphetamine.  
20 (Statement of Undisputed Facts ("SUF") ¶¶ 1-3.) Plaintiff was visiting  
21 Pablo Vital Garnica ("Garnica") for his birthday on the premises of  
22 3438 Lone Ridge when the search warrant was executed. (Id. ¶¶ 3-4,  
23 14.)

24 Plaintiff sat down next to Garnica and began drinking a  
25 beer. (Id. ¶ 5.) Plaintiff was seated "on the far left side of the  
26 driveway with Garnica to his right." (Id. ¶ 15.) "The garage is part  
27 of the house and sits in front of the house facing the driveway and  
28 the street." (Id. ¶ 38.) Garnica declares he and Plaintiff were

1 "just outside the entrance of the garage;" Garnica "was seated to the  
2 Plaintiff's right and with his back facing the street." (Id. ¶¶ 7-8,  
3 Bersamina Ex. E, Garnica Decl. ¶ 5.) Another individual who  
4 "Plaintiff did not know was sitting 'at a distance' from Plaintiff."  
5 (Id. ¶ 6; Bersamina Ex. D, First Arroyo Depo. 21:15-22:25). That  
6 individual was later identified as Francisco Alejandro Romero  
7 ("Romero"). (Id. ¶ 9.)

8 Plaintiff testified he "visit[ed] with Mr. Garnica"  
9 for "two minutes" before a van arrived, out of which came "five"  
10 police officers. (Id. ¶ 10; Bersamina's Ex. D, First Arroyo Depo. at  
11 24:3-5, 26:7-18). Plaintiff later testified that "about twenty  
12 minutes" after his arrival at 3438 Lone Ridge "six to seven police  
13 officers got out of the van." (Id. ¶ 16; Pl's Arroyo Fed. Dep. DT  
14 88:19-89:7; Bersamina Ex. F, Second Arroyo Dep. at 46:11-16.)  
15 Plaintiff testified that "after four seconds of the[] [officers']  
16 arrival, one of the officers detained him." (Id. ¶ 11; Bersamina's Ex.  
17 D, First Arroyo Depo. at 30:16.) Plaintiff testified that it was a  
18 male officer who "got out of the van" and approached him. (Id. ¶ 17;  
19 Bersamina, Ex. F, Second Arroyo Depo. 46:17-22; 47:5-7; 48:2-5; 90:24-  
20 91:2). Bersamina testified that he "did not ride with some of  
21 the other agents in the SUI raid van to the search at 3438 Lone Ridge  
22 . . . on June 29, 2006." (Id. ¶ 27.) "Multiple vehicles, including a  
23 raid van, arrived contemporaneously to serve the warrant."  
24 (Plaintiff's Statement of Disputed Facts ("PSDF") ¶ 11.)

25 Plaintiff testified "that the officer went behind him,  
26 cuffed his hands, picked him up to a standing position by grabbing his  
27 shirt collar and his cuffed hands." (SUF ¶ 18.) Plaintiff testified  
28 after he "was handcuffed," he was "lifted from his chair by his shirt

1 collar and his hands to standing position, and then pushed in the  
2 middle of his back to the concrete." (Id. ¶ 12.) The officer "pushed  
3 [Plaintiff's] back[,]" causing Plaintiff to fall "forward" to the  
4 ground and to sustain injuries. (Id. ¶¶ 19, 20; Second Arroyo Depo.  
5 49:13-19.)

6 Plaintiff gave deposition testimony that a single individual  
7 male officer threw him to the ground, that he "[could] not identify"  
8 the person or his skin, height, hair, facial hair, that the person  
9 "had a vest on" with ["b]ig letters" and "was kind of shorter than"  
10 "and stronger than" Plaintiff. (Id. ¶ 13; Bersamina, Ex. D, First  
11 Arroyo Depo. at 30:17-31:25; 32:21-33:5; 41:24-42:14.) In a later  
12 deposition, Plaintiff could not identify anything about the person who  
13 detained him, except that when Plaintiff "was put to the ground,"  
14 Plaintiff saw the individual was wearing a vest. (Id. ¶ 22; Bersamina,  
15 Ex. F, Second Arroyo Depo., 54:16-57:1; 57:12-59:1). "The officers  
16 serving the warrant all arrived wearing raid gear including vests and  
17 helmets." (PSDF ¶ 12.)

18 Plaintiff estimated in his later deposition that the  
19 person who threw him weighed "180 pounds more or less." (Pl's Response  
20 to SUF ¶ 13; Pl's Arroyo Fed. Depo. 52:23-54:16; SUF ¶ 22.) Bersamina  
21 testified that at the time of the June 29, 2006, incident he was  
22 probably 5 foot, 5 inches tall and weighed 180 pounds. (Pl's Response  
23 to SUF ¶ 13; Pl's Bersamina Depo. 40:1-4.) "Bersamina is skilled in  
24 multiple martial arts disciplines including Jiu-Jitsu, Korean karate,  
25 Wing Chun Kung Fu, Jing Quan DO and Shoot wrestling." (PSDF ¶ 18.)  
26 "Bersamina's martial arts skills have facilitated his taking taller  
27 subjects to the ground." (Id. ¶ 19.) Bersamina "is of a similar  
28

1 height, weight, and strength as the person who threw [P]laintiff to  
2 the ground causing his injuries." (Id. ¶ 24.)

3           Bersamina counters Plaintiff's evidence with Plaintiff's  
4 deposition testimony in which Plaintiff admits that after Plaintiff  
5 "personally attended the deposition of the SIU members," Jeff Cameron  
6 ("Cameron") and Ken Addison ("Addison"), he still could not "say one  
7 way or another whether or not it was any of those officers who put  
8 [him] on the ground." (SUF ¶ 23; Bersamina, Ex. F, Second Arroyo  
9 Depo. 59:6-60:10.) Further, when Plaintiff was given photographs of  
10 SIU team members . . . Addison, David Brose ("Brose"), Brandon Olivera  
11 ("Olivera"), Ben Machado ("Machado"), and Scott Bryan ("Bryan") taken  
12 right after execution of the federal search warrant on June 29, 2006,  
13 [Plaintiff] could not positively identify any of those shown in the  
14 photographs as the alleged wrongdoer. (Id. ¶ 24.)

15           Plaintiff replies in his declaration dated March 5,  
16 2010, that after having seen Cameron and Addison for the first time at  
17 their depositions on April 20, 2009, and after having seen Bersamina  
18 for the first time at his deposition on February 4, 2010, Plaintiff  
19 "**believe[s]**" these individuals "may have been the" one "who threw  
20 [him] down and caused [his] injury[,] but [he is] not sure." (Pl's  
21 Response to SUF ¶ 23; Pl's Arroyo Decl., ¶¶ 6-8; emphasis added.)

22           What Plaintiff "believes" has not been shown to be "based on  
23 personal knowledge," but rather reflects a the type of "information  
24 and belief" that does not constitute a specific identification of  
25 Bersamina as the person responsible for the seizure about which  
26 Plaintiff complains. Columbia Pictures Indus., Inc. v. Prof'l Real  
27 Estate Investors, Inc., 944 F.2d 1525, 1529 (9th Cir. 1991) (internal  
28 reference omitted).

1           Bersamina presents evidence supporting his argument that he  
2 did not seize Plaintiff. “[Special Agent (“S/A”)] Katie Dorais  
3 testified in her deposition that [Plaintiff] was detained on the left  
4 side of the driveway and immediately when the search team arrived.”  
5 (SUF ¶ 53; Bersamina Ex. H, Dorais Depo. 55:9-20, 59:23-60:8, 105:22-  
6 106:7.) It is undisputed that “Plaintiff was laying on the far left  
7 side of the driveway along and parallel to the driveway and  
8 perpendicular to the street.” (Id. ¶ 26). Another individual  
9 detained by the agents was on the far right side of that garage. (Id.  
10 ¶ 25.) Bersamina argues that “immediately [up]on the search team’s  
11 arrival at 3438 Lone Ridge . . . [he] detained . . . Romero;” Romero  
12 was the individual on the right side of the garage at 3438 Lone Ridge.  
13 (Id. ¶¶ 28, 29.) Bersamina relies on the following averments in DEA  
14 S/A Alicia Ramirez (“Ramirez”)’s declaration as support for his  
15 argument:

16           I was one of the last officers out of the SIU raid  
17 van. As I approached the garage area, I saw  
18 Special Agent Bersamina with an individual who was  
19 laying on the drive way just outside of the garage  
20 area at 3438 Lone Ridge Court. **He was lying across  
21 the driveway and parallel to the street, and was on  
22 the right side of the driveway from the direction  
23 of facing the garage from the street. I later  
24 learned this individual was named Francisco  
25 Alejandro Romero.**

26           I assisted Special Agent Bersamina as he placed  
27 handcuffs on Mr. Romero while Mr. Romero was lying  
28 on the ground. **This occurred within seconds of the  
search team’s arrival at 3438 Lone Ridge Court.**

(Id. ¶¶ 28, 29; Bersamina Ex. G, Ramirez Suppl. Decl. ¶¶ 4-5) (emphasis  
added). Bersamina presents evidence showing that Romero’s detention  
occurred at the same time when Plaintiff had been or was being  
detained on the left side of the driveway/garage area, and which also

1 shows Plaintiff and Romero's respective locations from the perspective  
2 of person looking at them from a position on the street, facing the  
3 garage; "S/A Katie Dorais was on the left side of the garage area."  
4 (SUF ¶ 31.) Bersamina relies on following Ramirez's testimony as  
5 support for his argument:

6 At the time I assisted Special Agent Bersamina in  
7 handcuffing Mr. Romero, **I was aware there were two**  
8 **other individuals on the left side of the**  
9 **garage/driveway area.** I was generally aware that  
10 those individuals were being or had already been  
11 detained as I approached and assisted Special Agent  
12 Bersamina in handcuffing Mr. Romero. I did not see  
13 who detained the other individuals. **I do recall**  
14 **that Special Agent Katie Dorais was on the left**  
15 **side of the garage area. I later learned that**  
16 **individual on the far left side of the garage area**  
17 **was [Plaintiff]. I recall seeing [Plaintiff] lying**  
18 **parallel to the driveway and perpendicular to the**  
19 **street.**

20 (Id.; Bersamina Ex. G, Ramirez Suppl. Decl. ¶ 6) (emphasis added.)

21 Plaintiff counters that Bersamina testified before that he  
22 had "no recollection" of detaining anyone at 3438 Lone Ridge. (Pl's  
23 Response to SUF ¶¶ 28, 29; Bersamina Depo. 30:18-20; 48:13-18; 56:1-  
24 10.) Plaintiff also presents Ramirez's deposition testimony, in  
25 which Ramirez testified when "she got out of the van[,] " all of the  
26 detained men were "on the ground" and "handcuffed at that point."

27 (Pl's Response to SUF ¶ 28; Ramirez Depo. 15:17-23.) Plaintiff also  
28 references Ramirez's original declaration, in which Ramirez declared  
29 "[she] did not participate in or witness [Plaintiff] being physically  
30 detained to the ground on or about June 29, 2006." (Pl's Response to  
31 SUF ¶ 31) (referencing Bersamina, Ex. I, Ramirez Decl. ¶ 4.)

32 Plaintiff argues this evidence contradicts the above portion of  
33 Ramirez's declaration in which she declares she handcuffed Romero  
34 with Bersamina, and Ramirez's assertion that detainment of Romero

1 occurred at the same time as Plaintiff's detainment. (Pl's Response  
2 to SUF ¶¶ 28, 29, 31.)

3           Bersamina concedes that "it is disputed whether  
4 S/A Ramirez assisted in placing handcuffs on Mr. Romero or whether he  
5 was already cuffed, and withdraws this factual assertion."

6 (Bersamina's Response to Pl's SUF ¶ 30.) However, Bersamina also  
7 rejoins that the time period between the agents' arrival at 3438 Lone  
8 Ridge and Plaintiff's seizure elapsed very quickly. (Id. ¶¶ 28, 29,  
9 31.) Bersamina cites Plaintiff's testimony, in which Plaintiff  
10 testified he was detained immediately when the search team arrived.  
11 (Id. ¶¶ 28, 29, 31) (referencing SUF ¶¶ 11, 21). Bersamina also  
12 cites the following portion of Ramirez's deposition testimony:

13           [Ramirez] ran past [Plaintiff] after [she] realized  
14 and saw that he was already down. That there was -  
15 we tried to do at least two officers to one  
16 defendant - that [Bersamina] was by himself. So I  
17 ran past him and ran over to the - around the  
18 vehicle and to assist [Bersamina.]

19           [ . . . ]

20           [Plaintiff] was obviously the first subject that I  
21 saw, and I ran past him. There was already a  
22 defendant kind of in the middle. **And the defendant  
23 I went to was farthest away on the other side of  
24 the driveway from [Plaintiff]. And that is where I  
25 ended up. . . . And it was Omar Bersamina that I  
26 saw handcuffing this individual by himself so I  
27 went to assist him.**

28           [ . . . ]

29           **[T]here was only one officer on Mr. Romero and that  
30 was Special Agent Bersamina. So I ran over to  
31 assist him [and] recall[ed] seeing Katie [Dorais]  
32 and another - an SIU officer with [Plaintiff].**

33 (Id. ¶ 31) (Ramirez Depo. at 16:19-24; 18:10-14; 19:2-4; 34:1-  
34 14) (emphasis added.) Further, Bersamina provides an additional  
35 declaration from Ramirez, concerning what she saw after she reviewed a  
36

1 video of 3438 Lone Ridge subsequent to the execution of the federal  
2 search warrant. Ramirez declares the video identifies Romero "on the  
3 far right side of the driveway from the direction of facing the garage  
4 from the street," as the individual Bersamina detained. (Id. ¶ 31,  
5 Bersamina Ex. R Ramirez Second Suppl. Decl. ¶ 3.)

6 "S/A . . . Klingman shot [a] video on June 29, 2006 . . .  
7 of the front exterior, including driveway, and the interior of the  
8 house at 3438 Lone Ridge . . . after the individuals at the house had  
9 been detained and the house was cleared." (SUF ¶ 50.) The Video  
10 "shows [Plaintiff] on the far left of the driveway with his head  
11 facing the garage and feet facing the street. Romero is shown on the  
12 far right of the driveway, lying perpendicular to the driveway and  
13 parallel to the street." (Id. ¶ 51.) The "Video [also] shows S/A  
14 Bersamina standing near Romero on the right side of the driveway."  
15 (Id. ¶ 52.)

16 Bersamina argues he "did not participate in Plaintiff being  
17 detained to the ground," and supports this argument with Ramirez's  
18 averment that she "assisted . . . . Bersamina in detaining a suspect  
19 other than [Plaintiff] at 3438 Lone Ridge . . . . during execution of  
20 a search warrant . . . on or about June 29, 2006." (SUF ¶ 32;  
21 Bersamina, Ex. I, Suppl. Ramirez Decl. ¶ 3.) Bersamina also provides  
22 a declaration from Ramirez, in which she declares she "did not see  
23 . . . Bersamina use any force on or come into physical contact with  
24 . . . [Plaintiff] at any time during the search on the evening of  
25 June 29, 2006." (SUF ¶ 32; Bersamina, Ex. G, Ramirez Suppl. Decl. ¶  
26 9.)

27 Plaintiff counters again with Ramirez' deposition testimony,  
28 in which Ramirez testifies when "she got out of the van" all of the

1 detained men were "on the ground" and "handcuffed at that point,"  
2 which Plaintiff argues indicates his seizure could have happened  
3 either before or after the van's arrival. (Pl's Response to SUF ¶ 32;  
4 Ramirez Depo. 15:17-23.)

5 Bersamina also provides testimony from "S/A Ramirez [who]  
6 recalls that at some point after S/A Bersamina detained Romero, he  
7 attempted to search [Romero]" and "Romero fell from S/A Bersamina's  
8 grasp." (Id. ¶ 49, Bersamina's Ex. G, Ramirez Suppl. Decl. ¶ 7.)  
9 Bersamina cites the following portion Ramirez's declaration on this  
10 point:

11 At some point after Mr. Romero and the other  
12 individuals were detained, [she] saw Special Agent  
13 Bersamina attempt to search Mr. Romero, who was  
14 lying face down on the drive way. ***In order to turn  
15 Mr. Romero over to search his front pants pockets,  
16 Special Agent Bersamina attempted to lift and turn  
17 Mr. Romero by, in part, grabbing Mr. Romero's pants  
18 and belt. It appeared that Mr. Romero slipped from  
19 Special Agent Bersamina's grasp and fell to the  
20 ground.*** Mr. Romero did not appear to be injured  
21 after he was searched.

22 (Id.) (emphasis added.)

23 "SIU agent Defendant Dave Brose testified that he was part  
24 of the SIU search team that arrived at the house in the SIU raid van."  
25 (SUF ¶ 35.) "SUI agent Brose testified that after the search team had  
26 searched the house, [he] left the house in order to drop off his raid  
27 gear." (Id. ¶ 36.) Brose testified that from the perspective of being  
28 "'outside of the garage,' 'facing the house,' he saw S/A Dorais with  
two individuals on the left side of the garage area, and" "on the  
right side of the garage on the floor was an individual face down with  
a DEA agent" who was "lying across the garage area where [Brose]  
actually had to step over his feet." (Id. ¶¶ 37, 39 Bersamina, Ex. L,  
Brose Depo. at 34:16-25; 36:22-25.)

1 Plaintiff counters that this testimony does not show that  
2 the DEA agent Brose saw was Bersamina; however, Bersamina rejoins that  
3 Brose also testified that when he "drop[ped] his gear off," he  
4 "pass[ed] by the individual laying prone on the floor that [Bersamina]  
5 had control of . . . ." (Bersamina's Response to SUF ¶¶ 37, 39-40,  
6 Bersamina, Ex. L, Brose Depo. at 41:21-42:5) Brose testified that he  
7 saw Bersamina "pick[] . . . up [that individual] by the belt and slam  
8 [him] . . . into the ground." (SUF ¶ 40, Bersamina, Ex. L, Brose Depo.  
9 at 41:21-42:5.)

10 Additional testimony supports Bersamina's argument that he  
11 seized Romero. "SUI agent . . . Bryan testified that when he exited  
12 the garage after having entered the house, he saw Bersamina searching  
13 a person 'in an aggressive manner.'" (Id. ¶ 42.) Bryan testified that  
14 "it looked a 'little rough[,] but was 'not excessive in any way that  
15 I needed to report it to my supervisor.'" (Id. ¶ 43.) Bryan also  
16 "testified that he could not identify any of the individuals detained  
17 at the search, including Plaintiff." (Id. ¶ 44.) Further, "SUI agent  
18 . . . Olivera testified that he saw Bersamina searching a face down  
19 suspect on the driveway several minutes after the house was secured."  
20 (Id. ¶ 48.)

21 Addison testified that he "saw [Bersamina] patting down a  
22 subject that was handcuffed on the ground and flipped him over." (Id.  
23 ¶ 45; Bersamina, Ex. N, Ken Addison Depo. 24:20-25.) Addison  
24 testified that "Bersamina's move was a 'tad bit aggressive but just  
25 that -- nothing that warranted any kind of action. [Addison] just  
26 thought -- it wasn't anything [he] would have done. It just seemed a  
27 little aggressive." (Id. ¶ 46; Bersamina, Ex. N, Ken Addison Depo.  
28 26:24-27:4.) Addison also testified that he could not "recall if

1 [Plaintiff was who he] dealt with or if it was who [Bersamina] dealt  
2 with." (Id. ¶ 47; Bersamina, Ex. N, Ken Addison Depo. 28:22-29:4.)

3 Plaintiff argues that Bersamina does not support his denial  
4 of participation in Plaintiff's injury with personal knowledge. (Pl's  
5 Response to SUF ¶ 32.) Further, Plaintiff counters that Bersamina  
6 testified that he had no recollection of detaining any one at the  
7 scene, or anything concerning execution of the warrant. (Pl's  
8 Response to SUF ¶ 49; Pl's Bersamina Depo. 30:18-20, 48:13-18;  
9 56:1-10.)

10 Bersamina argues "the record shows without dispute  
11 [he] did not place Plaintiff on the ground" and that "Bersamina  
12 detained Francisco Romero - not Plaintiff - on the right side of the  
13 garage area when the search team arrived." (Mot. 7:13-15.) Bersamina  
14 also argues that he "did not participate in Plaintiff being placed on  
15 the ground." (Id. 7:17.)

16 Further, Bersamina argues "Plaintiff was on the left side of  
17 the driveway sitting closest to his friend Garnica, and was detained  
18 on the left side." (Id. 7:21-22.) Bersamina asserts that evidence  
19 places Bersamina on the right side of the garage detaining Romero,  
20 when Plaintiff was being detained. (Id. ¶ 9:1-13.)

21 Plaintiff counters, arguing that "Bersamina's motion does  
22 not cite either a single excerpt from his own deposition or any  
23 declaration by him, or even his previously submitted (but since  
24 repudiated) declaration" and there is "conflicting evidence . . . as  
25 to who caused plaintiff's injuries." (Opp'n 2:18-23.) Plaintiff also  
26 argues that "[g]iven the elimination of parties dismissed as  
27 defendants based upon the evidence as it has developed and the  
28 vehement denial of defendant Cameron, to the extent someone who

1 participated in the execution of the search warrant injured plaintiff,  
2 the likelihood is now greater that the person is . . . Bersamina."  
3 (Opp'n 10:13-17.) Plaintiff also argues he now "believes Bersamina  
4 may be the person who threw him to the ground although he is not  
5 positive." (Id. 5:4-6.) Further, Plaintiff argues that "Bersamina  
6 matches the general physical description and characteristics given by  
7 plaintiff, including Bersamina's strength and martial arts training  
8 that would have allowed him to throw plaintiff to the pavement as  
9 described." (Id. 5:1-4.)

10 Plaintiff argues because his difficulty in identifying the  
11 officer who seized him is a result of Defendants "literally hiding  
12 behind the helmets and uniforms they wore when executing the search  
13 warrant," "[t]his case is therefore similar to the Ninth Circuit case  
14 of Dubner v. City and County of San Francisco, 266 F.3d 959 (2001), an  
15 action involving an alleged Fourth Amendment violation and a Plaintiff  
16 "unable to identify the officers responsible for the violation." (Id.  
17 7:8-17, 8:5-8.) In Dubner the Ninth Circuit shifted the burden to the  
18 defendants on an unlawful arrest issue after the Plaintiff presented  
19 a prima facie on the unconstitutionality of his arrest.

20 Bersamina rejoins that Dubner is inapplicable to this case  
21 and is limited to cases involving claims for "warrantless arrest,"  
22 citing Taylor v. Brockenbrough, No. CIV.A. 98-6419, 2001 WL 1632146,  
23 \*2 n.4 (E.D. Pa. Dec. 20, 2001), as support for this argument. (Reply  
24 8:21-22, 9:6-7.)

25 The Ninth Circuit's decision in Dubner was  
26 influenced by the fact that it was the police  
27 department's procedure to name the first officer on  
28 the scene as the arresting officer, even if that  
officer did not in fact make the arrest. The Ninth  
Circuit found this failure to correctly identify  
the arresting officers to be a deliberate attempt

1 to thwart false arrest claims by allowing police  
2 officers to "hide behind a shield of anonymity and  
3 force plaintiffs to provide evidence that they  
4 cannot possibly acquire." In order to prevent this  
5 injustice, the Ninth Circuit shifted the burden of  
6 producing evidence of probable cause to the  
7 defendants, allowing the plaintiff's case to  
8 proceed even though she had not identified the  
9 officers responsible for her allegedly unlawful  
10 arrest. Unlike Dubner, the present case does not  
11 involve a police department policy or procedure  
12 that would allow police officers who unlawfully  
13 beat or detain civilians to remain anonymous. As a  
14 result, the Ninth Circuit's opinion in Dubner does  
15 not inform this court's decision.

16 Taylor, 2001 WL 1632146, at \*2, n.4 (citations omitted).

17 Since Plaintiff has not controverted Bersamina's evidence  
18 showing that Bersamina seized Romero and that another officer or  
19 officers seized Plaintiff, Bersamina's summary judgment motion on  
20 Plaintiff's excessive force claim against him is granted.

21 Lastly, since Bersamina prevails on his motion, the United  
22 States' motion for summary judgment on Plaintiff's negligence claim,  
23 which is premised on Plaintiff's excessive force claim against  
24 Bersamina, is also granted.

25 Dated: May 3, 2010

26   
27 \_\_\_\_\_  
28 GARLAND E. BURRELL, JR.  
United States District Judge