CPOA CASE SUMMARIES – SEPTEMBER 2022

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Trooper's search of a tinted car containing 20,000 rounds of ammunition and hour-long detention of suspect was supported by probable cause.

United States v. Guerrero, 2022 U.S. App. LEXIS 24810 (9th Cir. Sep. 2, 2022)

Facts: Sergio Guerrero was in his passenger car with heavily tinted windows driving southward on Highway 10 in Arizona when he was pulled over by Trooper Amick 23 miles north of Tucson. After Guerrero consented to a search of his car, Trooper Amick found 20,000 rounds of rifle and handgun ammunition in Guerrero's car. The ammunition included 13,000 rounds suitable for high-powered assault weapons. Trooper Amick handcuffed and detained Guerrero for approximately one hour while waiting for federal agents from the Bureau of Alcohol, Tobacco, and Firearms ("ATF") to arrive.

After the District Court denied Guerrero's motion to suppress, he pleaded guilty to smuggling ammunition in violation of 18 U.S.C. section 554(a). Guerrero appealed the denial of his motion.

Held: In a per curiam opinion, the Ninth Circuit Court of Appeals noted that "[s]earches and seizures 'conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well delineated exceptions.'" *United States v. Brown*, 996 F.3d 998, 1004 (9th Cir. 2021) (quoting *Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993)). One exception is a *Terry* stop, which allows an officer briefly to detain an individual when the officer has a reasonable articulable suspicion that an individual is engaged in a crime. *Terry v. Ohio*, 392 U.S. 1 (1968). Another exception is when an officer has probable cause to arrest an individual. *Brown*, 996 F.3d at 1005. "In distinguishing between a *Terry* stop and a full-blown arrest, courts consider whether a reasonable person would believe that he or she is being subjected to more than a temporary detention, as well as the justification for the use of such tactics..." *Id.* at 1006 (simplified and internal quotation marks omitted).

The Court stated that it affirmed the denial of Guerrero's motion to suppress "because of the consistent conclusions of Judge Gould and Judge Bea, representing a majority of the panel, that we should affirm the denial of the motion to suppress. Affirmance is required by the conclusions of the judges in the majority, even though the reasoning of Judge Gould and Judge Bea in their separate concurrences filed herewith is different." In Judge Gould's concurrence, he maintained that the combined factors of the length of the detention and the use of handcuffs under the circumstances transformed Guerrero's detention from a *Terry* stop into a de facto arrest. The judge also stated that probable cause supported Guerrero's de facto arrest, pointing to the car's heavily tinted windows and 20,000 rounds of ammunition in Guerrero's car, including rounds suitable for high-powered assault weapons. Thus, there was probable cause that Guerrero was smuggling ammunition, which was sufficient to support Trooper Amick's detaining Guerrero until federal agents arrived. Citing *United States v. O'Looney*, 544 F.2d 385 (9th Cir. 1976) as instructive for the case here, Judge Bea argued that Trooper Amick merely detained Guerrero; he did not effectuate a de facto arrest despite Guerrero's extended detention and being placed into handcuffs. However, even if Trooper Amick had effectuated a de facto arrest, Judge Bea believed there

was probable cause to do so based on, taken together, the large quantity of ammunition fit for use in high-powered assault weapons and inconsistencies in Guerrero's story to Trooper Amick.

A dissenting judge would have reversed the denial of Guerrero's motion to suppress. The dissent stated that Trooper Amick's stop ripened into an arrest when he held Guerrero handcuffed, on a roadside, for an extended period, waiting for federal officers to arrive. The dissent maintained Trooper Amick had no probable cause to do so.

B. Affidavit was not deficient because magistrate could reasonably infer that citizen informant acted in accord with Microsoft's legal obligation to report apparent child pornography.

People v. Rowland, 82 Cal. App. 5th 1099 (6th Dist. 2022)

Facts: In February 2019, Los Altos Police Department Detective Edgar Nava authored an affidavit and accompanying statement of probable cause (jointly, the search warrant affidavit or affidavit) in support of a search warrant for the residence of Jeffrey Lee Rowland and two vehicles. According to Detective Nava's statement of probable cause, he was assigned to investigate a report about child pornography from Mountain View Police Department Sergeant Dahl - a member of the Silicon Valley Internet Crimes Against Children Task Force. Dahl's report indicated he investigated two "Cybertips" of exploited children. The Cybertips were received from the National Center for Missing and Exploited Children ("NCMEC"). NCMEC received the anonymous Cybertips from a Microsoft Online Operation employee who viewed two files of apparent child pornography. Sergeant Dahl and Detective Nava also each reviewed both image files. The affidavit included information specifying that the images were uploaded using a Microsoft product ("Bing Image"), the IP address from which the image files were uploaded to the Internet, the file names, and the exact times at which they were uploaded. The search warrant affidavit did not name the Microsoft employee who submitted two child pornography Cybertips to NCMEC or the person who forwarded the Cybertips from NCMEC to the police.

On the same day that Detective Nava signed the affidavit, based on the information in the detective's affidavit, a Santa Clara County Superior Court judge found probable cause and issued a search warrant for the residence and two vehicles for "evidence and instrumentalities of possession of child pornography … occurring from January 1, 2000 to present." Five days later, police officers executed the warrant and seized items, including a PNY thumb drive containing an estimated 1,000 images of child pornography and 25 videos of child pornography. The Santa Clara County District Attorney filed a complaint charging Rowland with a single count of possessing or controlling matter depicting a person under 18 years of age personally engaging in or simulating sexual conduct (Penal Code section 311.11(a)).

Rowland filed a motion to quash the search warrant, claiming that the search warrant affidavit failed to state probable cause. The trial court denied the motion to quash. Rowland later pleaded no contest to the possession of child pornography count in exchange for formal probation for two years with conditions, including serving nine months in the county jail. Rowland appealed from the denial of his motion to quash.

Held: On appeal, Rowland argued that the trial court erred by denying his motion to quash the search warrant because, among other things, the only information in the affidavit linking the

alleged child pornography to Rowland's residence came from an uncorroborated "anonymous tipster," which was insufficient to provide probable cause. The Sixth District Court of Appeal considered the question under the Fourth Amendment of the presumptive reliability of information from a third party electronic communication service provider in an affidavit supporting the application for a search warrant for child pornography.

The Court explained that "'[t]he question facing a reviewing court asked to determine whether probable cause supported the issuance of the warrant is whether the magistrate had a substantial basis for concluding a fair probability existed that a search would uncover wrongdoing.' [..] '"The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him [or her], … there is a fair probability that contraband or evidence of a crime will be found in a particular place."' [Citation.] … [T]he warrant 'can be upset only if the affidavit fails as a matter of law to set forth sufficient competent evidence' supporting the finding of probable cause." (*People v. Westerfield* (2019) 6 Cal.5th 632, 659.) The Court of Appeal noted that there is no requirement that information provided by a citizen informant be corroborated for it to constitute probable cause supporting the issuance of a warrant.[1]

Here, the affidavit informed the magistrate that a person who worked for Microsoft notified NCMEC about two suspect images that the employee had viewed. The Sixth District found that the police and magistrate (based on the search warrant affidavit) had reason to believe that the Cybertips came from a reliable witness employed by Microsoft who acted in accord with Microsoft's federal obligation to report apparent child pornography. The police and magistrate also had reason to believe that a reliable person at NCMEC forwarded the two pornographic images to the police in accord with NCMEC's legal obligation. Rowland acknowledged that NCMEC simply acted as a conduit for passage of the information. That the affidavit did not provide the name of the individual at Microsoft who originally submitted the tips or the person who forwarded the tips from NCMEC to the police did not, under the totality of the circumstances, undermine the determination that the tips came from unbiased citizen informants who could be presumed reliable and thus did not need any independent corroboration. The Sixth District thus concluded that the trial court did not err by rejecting Rowland's argument that the search warrant affidavit was deficient because an alleged anonymous tipster provided the information linking him to the two pornographic images.

The Court ultimately concluded that the search warrant affidavit sufficiently provided probable cause to believe that evidence of the possession of child pornography could be found in Rowland's residence and the vehicles identified in the search warrant. Rowland had not established that the affidavit failed to provide sufficient competent evidence to support the magistrate's finding of probable cause. Accordingly, the Sixth District Court of Appeal affirmed.

C. Where officer shoots at suspect resulting in no injuries but then stops, and the suspect later kills his hostages, there is no actionable deadly force tort claim.

Golick v. State of Cal., 82 Cal. App. 5th 1127 (1st Dist. 2022)

Facts: In early 2017, Albert Wong became a patient at The Pathway Home ("Pathway"), a private corporation that provided mental health services at the Veterans Home. During the relevant time,

[1] See *People v. Ramey*, 16 Cal.3d 263, 269 (1976); *People v. Smith*, 17 Cal.3d 845, 852 (1976) (plur. opn.) ["An untested citizen-informant who has personally observed the commission of a crime is presumptively reliable."].

Christine Loeber was the executive director of Pathway and Dr. Jennifer Golick was Pathway's clinical director. Wong was treated for psychological conditions following his military service in Afghanistan. Wong was hospitalized later that year in a psychiatric ward after expressing plans to carry out suicidal and homicidal intentions using a gun. In February 2018, Wong was terminated from the Pathway program because he refused to comply with program policies and treatment plans, had brought weapons onto the campus, and had made specific threats to kill members of the staff by coming onto the campus and shooting them with a gun.

In March 2018, a heavily armed Wong went to the Veterans Home and, while brandishing his weapons, entered a room where people were attending a party. He let everyone go from the room except for Ms. Loeber, Dr. Golick, and Dr. Gonzales Shushereba. Napa County Sheriff deputies were dispatched to the Veterans Home in response to reports of an "active shooter" and "possible shooting." Through radio updates, the dispatcher broadcast background information about Wong, reporting that he was armed with an assault rifle and much ammunition, and had taken hostages. Deputy Sheriff Steve Lombardi was the first officer to arrive at the scene. Lombardi learned that Wong was holding three women in the room, and that Wong had not fired his guns.

Lombardi came to the Group Room, partially pushed open a closed metal door, observed Wong with a rifle, then let the door close, backed up and took up a position covering the doorway. Lombardi fired his rifle through the closed door and Wong fired back. The shooting sequence lasted approximately 10 seconds. Law enforcement officers had no further engagement with Wong. Hours later, an FBI SWAT team entered the room and found Wong and the three victims dead. A California Highway Patrol investigation concluded that Wong killed his hostages after he exchanged fire with Lombardi. Autopsy reports revealed that none of the bullets that Lombardi fired hit Wong or any of Wong's victims. Plaintiffs later expressly alleged that Wong shot his hostages after he exchanged gunfire with Lombardi.

Family members of the victims filed wrongful death actions naming multiple defendants, including the County of Napa, the Napa County Sheriff's Office and Deputy Sheriff Lombardi (the "County defendants"). These cases were consolidated in the trial court. The trial court sustained demurrers to the respective third amended complaints filed by the Loebers and the Golicks (collectively, "plaintiffs"), concluding they failed to allege facts establishing a duty of care upon which to predicate the County defendants' alleged liability for negligence. Plaintiffs' appeals from the judgments were consolidated.

Held: The First District Court of Appeal noted that a "plaintiff in a negligence suit must demonstrate, among other things, a legal duty to use due care. (See *Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077, 1083.) "Public employees are liable for injuries resulting from their acts or omissions to the same extent as private persons, except where otherwise exempted or immunized by law. ([Government Code section] 820.)"[2] (*Adams v. City of Fremont* (1st Dist. 1998) 68 Cal.App.4th 243, 264, disapproved in part on another ground in *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 222, fn. 9 ("*USA Taekwondo*").) "As a general principle, a 'defendant owes a duty of care to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous.'" (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434–435; see Civil Code section 1714.) "Recovery

[2] Foreshadowing the disposition to some degree, the First District noted in a footnote that it did not reach issues of immunity, as these would arise only after a court determines that the defendant otherwise owes a duty of care. *Davidson v. City of Westminster*, 32 Cal.3d 197, 201–202 (1982).

for negligence depends as a threshold matter on the existence of a legal duty of care." (*USA Taekwondo, supra*, 11 Cal.5th at p. 213.)

On appeal, plaintiffs' main argument for why the County defendants owed a duty of care to the decedents was that, because Deputy Lombardi breached a duty to act reasonably when he used deadly force against Wong, the County defendants could be held liable for the wrongful deaths of the hostages.

The Court noted that under California law, police officers have a duty in tort to act reasonably when employing deadly force against a suspect. (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629.) Thus, an "officer's lack of due care can give rise to negligence liability for the intentional shooting death of a suspect." (*Munoz v. Olin* (1979) 24 Cal.3d 629, 634.)

The First District observed that under *Brown* and *Koussaya v. City of Stockton* (3rd Dist. 2020) 54 Cal.App.5th 909, negligence liability for an officer's unreasonable use of deadly force may potentially extend to unintended victims whom the officer injures in the course of a deadly force incident. The Court explained that here, however, no one suffered a physical injury during the exchange of gunfire between Deputy Sheriff Lombardi and Wong. Instead, after Lombardi stopped engaging with Wong, Wong shot the hostages and himself. The Court stated that "'as a general matter, there is no duty to act to protect others from the conduct of third parties' [citation]." (*Barenborg v. Sigma Alpha Epsilon Fraternity* (2nd Dist. 2019) 33 Cal.App.5th 70, 76.) The Court stated that plaintiffs cited no authority for their theory that, because Lombardi attempted to apply deadly force against Wong, he thereby assumed a tort duty of care to the hostages to prevent Wong from subsequently killing them.

The Court of Appeal noted that if someone had been injured or killed during the exchange of gunfire between Lombardi and Wong, the question of Lombardi's civil liability might be different. The Court expressed that Plaintiffs' pleaded allegations suggested an injury in which Lombardi's use of force was almost incidental. They alleged that Wong threatened to kill Pathway employees and subsequently acted on that threat, by arming himself, taking hostages, and—after exchanging shots with Lombardi—killing the hostages and himself. These pleaded facts precluded plaintiffs from relying on Deputy Lombardi's duty to refrain from the unreasonable use of deadly force as a basis for holding the County defendants civilly liable for the wrongful deaths of Plaintiffs' loved ones.

The First District also rejected Plaintiffs' argument that Deputy Lombardi owed plaintiffs a duty of reasonable care because his conduct increased the risk that Wong would harm his hostages. The Court explained that in order to state a claim for affirmatively increasing a risk of harm, plaintiffs must allege a "direct connection" between the challenged conduct and some risk of harm or heightened risk of harm that would not otherwise have arisen if not for the defendant's conduct. (*Lopez v. City of San Diego* (4th Dist. 1987) 190 Cal.App.3d 678, 683.) The Court found that Plaintiffs failed to plead facts linking Deputy Lombardi's conduct to the hostages' murders, instead only presenting speculation.

The First District also concluded that Plaintiffs' allegations regarding Lombardi's conduct at the crime scene did not show that he had a special relationship with the hostages that gave rise to a duty to protect them from Wong. The Court noted that cases finding a special relationship based on the performance of police duties are rare and involve situations in which the victim

detrimentally relied on some conduct or representation by the officer. (*Adams, supra*, 68 Cal.App.4th at p. 279 [collecting cases]; *Lopez, supra*, 190 Cal.App.3d at p. 681.) The Court found that plaintiffs did not allege that the hostages detrimentally relied on anything that Deputy Lombardi said or did.

For these reasons, the First District Court of Appeal accordingly affirmed.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 16, available at www.jones-mayer.com.

D. Probation condition limiting defendant's access to the internet without prior consent from his probation officer for purposes of limiting his sexual contact with minors was constitutionally overbroad.

People v. Salvador, 83 Cal. App. 5th 57 (6th Dist. 2022)

Facts: Defendant Jomar Hernandez Salvador pleaded no contest to felony false imprisonment and misdemeanor sexual battery. The trial court granted a three-year term of probation and imposed, among others, conditions requiring Salvador to consent to searches of his electronic devices, and restricting his use of social media and the Internet. Salvador objected to these conditions on the grounds they were invalid under *People v. Lent* (1975) 15 Cal.3d 481 and violated his First Amendment rights. In particular, he argued there was an insufficient nexus between the conditions and the offenses. The trial court overruled Salvador's objections, finding that the conditions were reasonably related to the offenses because he used electronic devices to communicate with the victims.

Held: On appeal, Salvador challenged the probation conditions allowing for searches of his electronic devices and restricting his use of social media and the Internet. He contended that the conditions were invalid under *Lent*, and he argued that they were overbroad in violation of his rights under the First and Fourth Amendments. The Attorney General argued that the conditions were valid because there was a nexus to the offenses in that Salvador used an electronic device to communicate with the victims. The Attorney General also argued that the conditions were permissible under the Fourth Amendment and did not unduly burden Salvador's First Amendment rights.

The Sixth District Court of Appeal initially explained that "[a] condition of probation will not be held invalid unless it: (1) has no relationship to the crime of which the offender was convicted; (2) relates to conduct which is not in itself criminal; and (3) requires or forbids conduct which is not reasonably related to future criminality." (*People v. Castellanos* (6th Dist. 2020) 51 Cal.App.5th 267, 275, citing *Lent, supra*, 15 Cal.3d at p. 486.) All three prongs of the *Lent* test must be found before a reviewing court will invalidate the condition. (*People v. Olguin* (2008) 45 Cal.4th 375, 379.) The third prong, relating to future criminality, "contemplates a degree of proportionality between the burden imposed by a probation condition and the legitimate interests served by the condition." (*In re Ricardo P*. (2019) 7 Cal.5th 1113, 1122.) The Sixth District also noted that "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.)

The Sixth District first concluded that the imposition of the electronic device search condition was not an abuse of discretion because the condition as defined was tailored with sufficient specificity to avoid unconstitutionally intruding on Salvador's Fourth Amendment rights. Because Salvador used social media to text with the victims, the Court found that the nexus to condition prohibiting Salvador from entering or posting to social media sites, while attenuated, was sufficiently established such that imposition of the condition was not an abuse of discretion under the *Lent* test. Noting that *People v. Pirali*[3] controlled the social media condition here, the Court added that any burden on Salvador's use of social media was reasonably tempered by his ability to obtain prior approval from the probation officer. Moreover, the use of social media was "not so necessary to the activities of daily living that this requirement would unduly burden Salvador's rights."

The Court of Appeal next considered whether the condition which restricted Salvador's access to the Internet more generally implicated Salvador's First Amendment rights. The Court noted that "[r]estrictions upon access to the Internet necessarily curtail First Amendment rights." (*In re Stevens* (2nd Dist. 2004) 119 Cal.App.4th 1228, 1235.) The Court noted that here, the factual nexus was Salvador's use of social media to contact the victims, not his access to materials on any other part of the Internet. The Court found that the general restriction against Internet access thus swept far more broadly than necessary to serve the purposes of the condition—preventing or deterring contact with minors for sexual purposes. Moreover, the Court noted that the Internet has become even more central and commonplace in the lives of ordinary people, and is now practically unavoidable in daily life. The Sixth District stated that no valid purpose was served by preventing Salvador from engaging in the kinds of Internet access that have become common and ubiquitous – such as work-related tasks or accessing news sites. The Court thus concluded that this portion of the Internet condition was unconstitutionally overbroad in violation of Salvador's First Amendment rights, and struck that portion of the condition. The Sixth District Court of Appeal affirmed the judgment as modified.

E. Search conducted by state trooper acting pursuant to cross-deputization agreement was valid because tribes have inherent sovereign immunity to select individuals who may act as tribal police on tribal lands.

<u>United States v. Fowler</u>, 2022 U.S. App. LEXIS 25802 (9th Cir. Sept. 13, 2022)

<u>Facts</u>: The Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation have a cross-deputization agreement with the State of Montana under which the Tribes have agreed to commission state police to act as tribal police where there is a gap between their respective criminal jurisdictions. Specifically, the agreement provided that "certain officers of the local jurisdictions and [the Montana Highway Patrol] will be appointed as commissioned law enforcement officers of the Tribes" and, when acting within the Reservation, "shall have the same authority to arrest Indians for violations of Titles III and IX of the Tribal code and shall have the same authority to issue citations and/or summonses and to accept bond as officers of the Tribes."

The Tribes passed a resolution designating Trooper David Moon of the Montana Highway Patrol for cross-deputization and resolving that Moon be "grant[ed] tribal arrest authority." In May 2019, while driving on a highway that runs through the Fort Peck Indian Reservation in eastern Montana, Eric Fowler – who is a member of an Indian tribe - was stopped by Trooper Moon. The stop led to

[3] 217 Cal.App.4th 1341 (6th Dist. 2013).

the discovery of a firearm and other evidence that in turn led to federal criminal charges. Fowler was indicted on one count of being a felon in possession of a firearm, and one count of possessing an unregistered firearm, based on the firearms seized from the truck.

Fowler moved to suppress the evidence from the stop. After the District Court denied that motion, Fowler entered a conditional plea of guilty to being a felon in possession of a firearm, reserving his right to appeal. He was sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Fowler appealed the denial of the suppression motion, challenging the validity of the cross-deputization agreement.

Held: On appeal, Fowler argued that the Tribes lack the inherent sovereign authority to enter into a cross-deputization agreement with the State of Montana. Rejecting this argument, the Ninth Circuit Court of Appeals emphasized that the cross-deputization agreement deputizes state officers to enforce tribal law, not state law, and emphasized that Congress has expressly provided for the Tribes' authority to enter into such compacts. Under the Indian Reorganization Act of 1934, Congress authorized tribes to adopt constitutions, and it provided that, "[i]n addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the . . . [power] to negotiate with the Federal, State, and local governments." 25 U.S.C. section 5123(a), (e).

The Ninth Circuit explained that the inherent sovereignty of a tribe "includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions." *United States v. Wheeler*, 435 U.S. 313, 322 (1978). The tribe itself, as a political entity, cannot investigate crimes or arrest offenders; only individuals can do that. The Court stated that the right to enforce tribal law necessarily includes the right to select those individuals—whether they are employees of the tribe, private contractors, or, as here, employees of another sovereign. *Cf. Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). "[T]ribal authority remains subject to the plenary authority of Congress,"[4] and such authority is limited as a necessary result of tribes' dependent status.[5] However, the Court found that nothing in the Tribes' dependent status precluded them from entering into such an agreement with the State of Montana.

The Ninth Circuit concluded that because the cross-deputization agreement was valid, Trooper Moon was validly deputized to enforce tribal law, and he had jurisdiction to seize and search Fowler's truck. Accordingly, the Ninth Circuit Court of Appeals affirmed.

F. Police-chase immunity pursuant to Vehicle Code section 17004.7 required compliance with a minimum annual training hours requirement.

Flores v. City of San Diego, 83 Cal. App. 5th 360 (4th Dist. 2022)

Facts: In March 2017, San Diego Police Department ("SDPD") police officers were involved in police vehicle pursuit with William Flores, who repeatedly refused to pull over his speeding motorcycle and fled. Ultimately, William Flores crashed into retaining wall and was killed. At the time of the pursuit, the SDPD written policy for preserving safety during vehicle pursuits included

[4] *United States v. Cooley*, 141 S. Ct. 1638, 1641, 1643 (2021).

[5] The Court explained, for example, that given this dependent status, tribes "cannot enter into direct commercial or governmental relations with foreign nations," *Wheeler*, 435 U.S. at 324, 326.

specific guidelines from the Commission on Peace Officers Standards and Training ("POST commission"). The written vehicle pursuit policy also required officers to read the policy and certify that they had received, read and understood the policy. SDPD utilized a training video to train its officers annually on the vehicle pursuit policy adopted by the SDPD. The training video used during the 2016 training period, which was the training period cycle prior to the incident at issue in this case, was 25 minutes 50 seconds in length.

Patricia Flores and Angelica Sanchez sued the City of San Diego for wrongful death and negligence, respectively, in connection with the death of William.[6] The City moved for summary judgment on the ground that it was immune from liability under Vehicle Code section 17004.7. Section 17004.7 grants immunity to an agency, shielding the agency from liability for collisions involving vehicles being pursued by peace officers, if the agency "adopts and promulgates a written policy on, and provides regular and periodic training on an annual basis for, vehicular pursuits … ." (Section 17004.7(b)(1); see *Ramirez v. City of Gardena* (2018) 5 Cal.5th 995, 997.) The trial court entered judgment in favor of the City. Patricia Flores and Sanchez appealed.

Held: On appeal, the appellants contended that the trial court erred in granting summary judgment. They argued that the City was not entitled to immunity under Section 17004.7, because, among other things, the trial court failed to apply California Code of Regulations, title 11, section 1081 ("Regulation 1081"), which includes certain standards that govern the required training on vehicle pursuits, including an annual one-hour minimum time requirement.

The Fourth District Court of Appeal concluded that the vehicle pursuit policy training required by Section 17004.7 must meet certain basic standards that are set forth in Regulation 1081, as adopted by the POST Commission, including the annual one-hour minimum time standard set out in that regulation, before a governmental entity is entitled to immunity under the statute. Not only did the City fail to present undisputed evidence that the training it provided in the year prior to the incident at issue met the annual one-hour standard, but the City failed to dispute the fact, put forth by the appellants, that the training implemented by the City comprised a single video of less than half the required one-hour duration.

The Court concluded that in the absence of training that met the standards imposed by Regulation 1081, as required by Section 17004.7, the City was not entitled to immunity under Section 17004.7, as a matter of law. Accordingly, the Fourth District reversed the lower court's grant of summary judgment in favor of the City, and remanded for further proceedings.

MISCELLANEOUS

A. Prison inmate who received illegal cell phone may be convicted of conspiracy to deliver a cell phone to a prisoner because he had prearranged a plan with the deliverer.

People v. Bueno, 83 Cal. App. 5th 44 (4th Dist. 2022)

[6] Patricia Flores was William's mother and Sanchez was Flores's girlfriend. Although Patricia Flores and Sanchez originally filed separate actions, the two actions were consolidated in the trial court.

<u>Facts</u>: Penal Code section 4576(a) bars possession with the intent to deliver or the actual delivery of a cellular telephone to a prison inmate. Alan Bueno was a prison inmate at the time of the events here. He arranged with a prison employee codefendant to obtain a cellular telephone. The Imperial County District Attorney filed a complaint against Bueno and two codefendants. Regarding Bueno, the complaint charged one count of conspiracy to deliver a cellular telephone to an inmate or to possess a cellular telephone within a state prison with the intent to deliver to an inmate under Section 4576(a). Bueno filed a motion to dismiss, asserting that he could not be charged with conspiracy to deliver a cellular telephone to himself. He claimed that he could only be punished for possession of a cellular telephone by a maximum 90-day loss of credits and that only the person who delivers the cellular telephone to the inmate is subject to prosecution.

The trial court denied his motion to dismiss. Bueno subsequently pleaded no contest to one felony count of conspiracy to violate Section 4576(a). Bueno appealed, challenging the denial of his motion to dismiss.

<u>Held</u>: Bueno contended again on appeal that he could not be convicted of *conspiracy* to commit Section 4576(a). He argued that he could not be criminally liable for the offense of conspiring to deliver a cellular telephone to an inmate, as a matter of law, when he was the inmate to whom the cellular phone was delivered. Bueno argued that a rule analogous to the "buyer-seller rule," recognized by some federal courts, applied to preclude him from being held criminally liable for conspiring to violate Section 4576(a). The "buyer-seller rule" adopted by the Ninth Circuit, for example, precludes conspiracy liability where the *only* relationship between the alleged conspirators is that of a buyer and a seller of controlled substances. (See *U.S. v. Lennick* (9th Cir. 1994) 18 F.3d 814, 819, fn. 4.)

The Fourth District Court of Appeal noted that Bueno did *not* contend that the undisputed facts of the case failed to establish the essential elements of a conspiracy, and stated that the facts demonstrated that Bueno, through his no contest plea as well as the factual basis provided in the plea, admitted that all the elements required to establish a conspiracy were satisfied.

The Fourth District concluded that the legislative scheme set forth in Section 4576 did not demonstrate that the Legislature intended for an inmate such as Bueno to be punished less severely than the prison employee for his role in the cooperative plan between the two of them to ensure that Bueno would obtain a cellular telephone through the employee's conduct. The Court explained that the legislative design demonstrated that the Legislature provided for lesser punishment under subdivision (c) of section 4576 for an inmate who has *not actively participated in a collaborative plan* (unlike Bueno) to ensure that someone else brings a cellular telephone into the prison but who nevertheless ends up in possession of such a device; it did not suggest that an inmate may never be convicted of a conspiracy to commit a violation of subdivision (a) of section 4576. Accordingly, the Fourth District Court of Appeal affirmed.

B. Felony-murder rule peace officer exemption applied where circumstantial evidence supported a finding that robber would have been aware of the facts of officer's death.

<u>People v. Sifuentes</u>, 83 Cal. App. 5th 217 (1st Dist. 2022)

<u>Facts</u>: In December 1998, Miguel Galindo Sifuentes and his associates were robbing a restaurant late night after closing time at 11 p.m. Sifuentes was armed, and with two of his fellow armed

robbers, Vasquez and Le, herded employees and customers into a walk-in refrigerator. A server had earlier pressed a panic button which automatically dialed the police. Deputy Schwab arrived at the restaurant in a marked Dublin Police vehicle, she was dressed in full police uniform. When she entered the restaurant, she was surprised by Vasquez who was armed. After hitting the deputy in the face, Vasquez took Deputy Schwab's gun. The deputy moved into the restaurant. There she encountered Sifuentes and an armed Le, who both walked the deputy towards the back of the restaurant while keeping right behind her. While walking with these two, Deputy Schwab attempted to activate the emergency button on her radio, but Le ordered not to mess with her radio. As they were walking, the deputy heard gunshots. As gunshots continued, they continued walking towards the back. After the last gunshot, Sifuentes grabbed or tapped Le's left shoulder, said to Le, "Go," or "Let's go," and the two men ran out the east exit door. After Deputy Schwab radioed that shots were fired, she went through the foyer. There she saw Deputy Sheriff John Monego on the ground.

A jury convicted Sifuentes of first degree murder under a felony-murder theory, and found not true the felony-murder special-circumstance allegations against him. In 2019, after the Legislature amended the felony-murder law, Sifuentes petitioned for resentencing. The parties agreed Sifuentes could not be convicted of felony murder under current Penal Code section 189(e), but the trial court found that the peace officer exception in Section 189(f) applied, and denied the petition. Sifuentes appealed.

Held: On appeal, Sifuentes contended, among other things, that substantial evidence did not support the trial court's finding that Sifuentes knew or reasonably should have known that the victim of the shooting was a peace officer engaged in the performance of his duties. The First District Court of Appeal explained that effective January 1, 2019, Senate Bill No. 1437 amended the felony-murder rule "to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life."[7] The Legislature made an exception, however, where the victim was a peace officer engaged in the performance of his or her duties "where the defendant knew or reasonably should have known that the victim was a peace officer engaged in the performance of the peace officer's duties." (Section 189(f).) If section 189(f) applies, "a defendant who participates 'in the perpetration or attempted perpetration of a felony listed in [Section 189] subdivision (a) in which a death occurs is liable for murder.'" (*People v. Hernandez* (2nd Dist. 2021) 60 Cal.App.5th 94, 108.)

The Court considered the facts here; it was near midnight and Sifuentes was in the middle of executing a planned robbery of a closed restaurant; Sifuentes knew unharmed witnesses were secured in the walk-in refrigerator; he knew Vasquez was armed near the entrance; he knew that someone was shooting a barrage of shots from near the restaurant entrance; he knew the police had been dispatched to the scene of the crime because Vasquez had assaulted and disarmed the arriving officer, Schwab; he had taken Schwab hostage; and he knew the shooting occurred just moments after Schwab had arrived and been prevented from using her radio. The First District Court of Appeal concluded that there was sufficient evidence for a reasonable trier of fact to conclude beyond a reasonable doubt that Sifuentes knew or should have known, before or during the shooting, that a peace officer engaged in the performance of his duties was the target of the

[7] Stats. 2018, ch. 1015, section 1(f); see Penal Code section 189(e).

shots that caused the peace officer's death. Rejecting Sifuentes' other arguments also, the First District accordingly affirmed.

C. Abuse of discretion standard applies when evaluating denial of a petition to unseal search warrant affidavits with confidential informants.

Elec. Frontier Found., Inc. v. Superior Court, 83 Cal. App. 5th 407 (4th Dist. 2022)

Facts: The Electronic Frontier Foundation, Inc. ("EFF") is a non-profit organization focused on protecting civil liberties in the digital world. Holding the view that cell-site simulators always collect the data of innocent people, EFF has sought information about search warrants to use cell-site simulators requested by the San Bernardino County Sheriff's Department (the "Sheriff") and issued by the San Bernardino County Superior Court.

Between 2018 and 2020, EFF moved to unseal affidavits filed in support of executed search warrants requested by the Sheriff and issued under seal by the Superior Court between March 2017 and March 2018.[8] The Sheriff and the San Bernardino County District Attorney (collectively, the County) opposed the unsealing of portions of seven of the warrant packets. The County argued that the returns to the executed search warrants and the "*Hobbs* affidavits"[9] in support of the warrants should remain sealed indefinitely, because they contained sensitive information about confidential informants (Evidence Code section 1041) and "official information," meaning information "acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made." (Evidence Code section 1040(a).) The trial court denied EFF's motion and ordered the affidavits to remain sealed. EFF appealed.

Held: On appeal, EFF argued in part that the trial court should have unsealed the search warrant affidavits under Penal Code section 1534(a). That section provides that that a warrant and its related documents need not be made public for 10 days after its issuance, but "[t]hereafter, if the warrant has been executed, the documents and records shall be open to the public as a judicial record." (Section 1534(a).) EFF argued that the search warrant packets had to be unsealed under Section 1534(a) because the warrants had been executed long before EFF moved to unseal them.

The Fourth District Court of Appeal, observed however, that the confidential informant privilege in Evidence Code section 1041 creates "an exception to [Section 1534(a)]." (*Hobbs, supra*, 7 Cal.4th at p. 962.) Under this exception, a search warrant affidavit that contains information about a confidential informant, also known as a "*Hobbs* affidavit," may be sealed in whole or in part to protect the informant's identity. (*Id.* at pp. 971–975.) Likewise, under Evidence Code section 1040, a public entity has a qualified right not to disclose official information if "[d]isclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." (Evidence Code section 1040(b)(2).)

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[8] EFF stated that it sought the search warrant materials "to learn more about (1) the nature of the offenses under investigation, (2) the expertise and qualities of the affiants, (3) why the affiant believes the searches will assist the investigation, (4) the nature of the information to be provided under the warrant, (5) what providers must do to comply with the warrant, and (6) reasons for seeking sealing and/or nondisclosure."

[9] *People v. Hobbs*, 7 Cal.4th 948, 962 (1994).

EFF argued that the Court should review de novo the trial court's ruling that nothing in the *Hobbs* affidavits should be unsealed. However, the Fourth District noted that the California Supreme Court had held that a trial court's ruling that official information under Evidence Code section 1040 should not be disclosed is reviewed for an abuse of discretion. (See *People v. Suff* (2014) 58 Cal.4th 1013, 1059 ["A trial court has discretion to deny disclosure [of official information] … when the necessity for confidentiality outweighs the necessity for disclosure … [and its] ruling is reviewed under the abuse of discretion standard."].) The *Hobbs* Court also held that the trial court did not abuse its discretion "in conducting its own in camera review of the sealed materials [and] affirming the magistrate's determination that the sealing of the entirety of [the search warrant application] was necessary to implement the People's assertion of the informant's privilege" under Evidence Code section 1041. (*Hobbs, supra*, 7 Cal.4th at p. 976.)

Here, the Fourth District concluded that he abuse-of-discretion standard was appropriate, and applied that standard. The Court explained that it had thoroughly reviewed the *Hobbs* affidavits and concluded that the trial court reasonably found that the information they contained was either official information under Evidence Code section 1040 or information that must remain sealed to avoid revealing a confidential informant's identity. The trial court thus reasonably found that EFF's reasons for wanting to unseal the *Hobbs* affidavits—to learn more about the Sheriff's use of cell-site simulators—did not outweigh the County's interest in protecting the official information and the identity of confidential informants contained in the affidavits. The Court therefore concluded that the trial court did not abuse its discretion under section 1532(a) or Evidence Code sections 1040 and 1041 in declining to unseal the *Hobbs* affidavits.

EFF also argued that it had a First Amendment right to have the *Hobbs* affidavits unsealed and that the privileges afforded by Evidence Code sections 1040 and 1041 must yield to that right. The Court disagreed, finding the claim failed under a history and utility test because search warrant materials were not historically open to the public, nor would their disclosure benefit the public. The Fourth District Court of Appeal accordingly affirmed.

D. En banc Ninth Circuit Court concludes that Assembly Bill 32 violates the Supremacy Clause.

Geo Grp., Inc. v. Newsom, 2022 U.S. App. LEXIS 26882 (9th Cir. Sep. 26, 2022)

Facts: The Immigration and Nationality Act provides that the Secretary of the Department of Homeland Security ("DHS") "shall arrange for appropriate places of detention for aliens detained pending removal or a decision on removal." 8 U.S.C. section 1231(g)(1). Section 1231(g)(1) gives both "responsibility" and "broad discretion" to the Secretary "to choose the place of detention for deportable aliens."[10] Congress has expressed that the Secretary should favor the use of existing facilities for immigration detention, whether through purchase or lease. Section 1231(g)(1)-(2). The Secretary has "authority to make contracts . . . as may be necessary and proper to carry out the Secretary's responsibilities,"[11] including with private parties. Pursuant to federal procurement regulations, the Secretary has "authority and responsibility to contract for authorized supplies and services," and the Secretary "may . . . delegate broad authority to manage the agency's contracting functions to heads of such contracting activities."[12] Immigration and Customs Enforcement

[10] *Comm. of Cent. Am. Refugees v. INS*, 795 F.2d 1434, 1440 (9th Cir.), *amended by* 807 F.2d 769 (9th Cir. 1986).
[11] 6 U.S.C. section 112(b)(2).
[12] 48 C.F.R. section 1.601(a).

("ICE"), a component of DHS, carries out immigration detention. As one option, ICE officials "may enter into contracts of up to fifteen years' duration for detention or incarceration space or facilities, including related services."[13]

A substantial portion of ICE's detention operations take place in California. California law prohibits local governments from entering into new agreements or expanding existing agreements to house immigration detainees.[14] There are significant fluctuations in the population of noncitizens who are detained, requiring ICE to maintain flexibility. Given all these constraints, ICE has decided to rely almost exclusively on privately owned and operated facilities in California, rather than building or operating its own detention facilities. ICE contracts out its detention responsibilities to private contractors, as well as to local, state, or other federal agencies. Two of these private contractor detention facilities are run by The GEO Group, Inc. ("GEO Group").

In 2019, California enacted Assembly Bill 32 ("AB 32"),[15] which states that "a person shall not operate a private detention facility within the state." Penal Code section 9501. A "private detention facility" is defined as "a detention facility that is operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity."[16] AB 32 does not prohibit the federal government from leasing existing facilities owned by private companies.[17]

The United States and GEO Group filed suit to enjoin the enforcement of AB 32. The District Court consolidated the proceedings. The United States and GEO Group each moved for a preliminary injunction, and California moved to dismiss and for judgment on the pleadings. The District Court dismissed the United States and GEO's claims as to ICE-contracted facilities and denied the motion for a preliminary injunction as to those facilities because it found no likelihood of success on the merits. The United States and GEO Group (together, "appellants") appealed. A divided three-judge Ninth Circuit Court of Appeals panel reversed.[18] The Ninth Circuit granted California's petition for rehearing en banc.

Held: The en banc Ninth Circuit Court of Appeals explained that the Supremacy Clause states that "the Laws of the United States . . . shall be the supreme Law of the Land . . . , any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supremacy Clause "prohibit[s] States from interfering with or controlling the operations of the Federal Government." *United States v. Washington*, 142 S. Ct. 1976, 1984 (2022). The Court observed that the Supremacy Clause precludes states from dictating to the federal government who can perform federal work. A state may not "require[] qualifications" for those doing government work "in addition to those that the Government has pronounced sufficient." *Johnson v. Maryland*, 254 U.S. 51, 57 (1920), and "[a state] may not deny to those failing to meet its own qualifications the right to perform the functions within the scope of the federal authority." *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 385 (1963).

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[13] 48 C.F.R. section 3017.204-90.
[14] See Civil Code section 1670.9(a)-(b); *see also* Government Code section 7310(a)-(b).
[15] 2019 Cal. Legis. Serv. Ch. 739 (West).
[16] Penal Code section 9500(b).
[17] See Penal Code section 9503 (clarifying that AB 32 does not prohibit "any privately owned property or facility that is leased and operated by the Department of Corrections and Rehabilitation or a county sheriff or other law enforcement agency").
[18] See *GEO Grp., Inc. v. Newsom*, 15 F.4th 919 (9th Cir. 2021); see also Client Alert Vol. 36, No. 21.

The Court acknowledged that the scope of a federal contractor's protection from state law under the Supremacy Clause is substantially narrower than that of a federal employee or other federal instrumentality. States can therefore impose many laws on federal contractors that they could not apply to the federal government itself. The Court explained, however, that even when evaluating state regulations of federal contractors, courts distinguish regulations that merely increase the federal government's costs from those that would control its operations.

In *Leslie Miller, Inc. v. Arkansas*, 352 U.S. 187 (1956) (per curiam), the United States Supreme Court held that a state law requiring building contractors to obtain a state license could not be enforced under the Supremacy Clause against a contractor hired on a federal construction project. The *Leslie Miller* Court further explained that applying the state licensing requirement to a federal contractor would "require[] qualifications in addition to those that the Government has pronounced sufficient." *Id.* at 190 (quoting *Johnson*, 254 U.S. at 57). Similarly, in *Public Utilities Commission v. United States*, 355 U.S. 534 (1958), the Supreme Court held that it violated the Supremacy Clause for a state law to require common carriers to seek approval from a state agency for rates negotiated with the federal government to transport federal property. (*Id.* at 544.)

Here, the en banc Court stated that, under *Leslie Miller* and *Public Utilities Commission*, when federal law gives discretion to a federal official to hire a contractor to perform federal work, a state cannot override the federal official's decision to do so under the Supremacy Clause. The Court stated that AB 32 would give California the power to control ICE's immigration detention operations in the state by preventing ICE from hiring the personnel of its choice. Given the fluctuating demand, Congress's preference for existing facilities, and California's limits on agreements with local governments, ICE had determined that privately run facilities are the most "appropriate" for California. Section 1231(g)(1). The Court explained that AB 32 would take away that choice. AB 32 would instead give California a "virtual power of review over the federal determination" of appropriate places of detention (*Leslie Miller*, 352 U.S. at 190); would allow the "discretion of the federal officers [to] be exercised . . . only if the [state] approves" (*Public Utilities Commission*, 355 U.S. at 543); and would effectively "require[] qualifications in addition to those that the Government has pronounced sufficient" (*Johnson*, 254 U.S. at 57). To comply with California law, the Court explained, ICE would have to cease its ongoing immigration detention operations in California and adopt an entirely new approach in the state. The Court concluded that AB 32 breached the core promise of the Supremacy Clause.

The en banc Ninth Circuit Court of Appeals held that appellants were likely to prevail on their claim that AB 32 violated the Supremacy Clause as AB 32 would give California a virtual power of review over ICE's detention decisions. Accordingly, the en banc Court of Appeals vacated the District Court's denial of the appellants' motion for preliminary injunctive relief and remanded for further proceedings.

For a more detailed discussion of this case, please see Client Alert Vol. 37, No. 15, available at www.jones-mayer.com.