CPOA CASE SUMMARIES – NOVEMBER 2022

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Defendant knowingly waived his *Miranda* rights with minimal answer despite his lack of education and broken English based on the totality of the circumstances.

People v. Miranda-Guerrero, 2022 Cal. LEXIS 6885 (Nov. 17, 2022)

Facts: 22-year-old Victor M. Miranda-Guerrero was charged for alleged crimes between September 1999 and May 2000 in Huntington Beach. These charges included kidnapping to commit rape, assault with intent to commit rape, and the November 1999 murder of Bridgette Ballas. Miranda-Guerrero was arrested in May 2000 immediately after violently assaulting another woman named Deena who identified him to Huntington Beach police. Huntington Beach Police Department Detectives Dave Dierking and Sam Lopez first interview of Miranda-Guerrero began about six hours after his arrest. Miranda-Guerrero indicated that his command of English was uncertain. Miranda-Guerrero stated that he had been in the country two or three years. Lopez then gave him an advisement as to his *Miranda* rights. Lopez served as translator for the remainder of the interrogation. The two detectives would question Miranda-Guerrero a total of three times, which collectively spanned 12 hours between May 26 and May 29, 2000.

Over Miranda-Guerrero's motion to suppress, several hours of video from his interviews with police were played for the jury, including a portion of the interviews in which he told the officers that he had hit Ballas. Miranda-Guerrero was convicted by a jury of murder, assault with intent to commit rape, kidnapping to commit rape, and other crimes. His defense contested only the murder and assault allegations at trial. The jury found true a special circumstance that the murder occurred during the commission or attempted commission of rape, and it returned a death verdict.

Held: On appeal, Miranda-Guerrero challenged the admission at his trial of the statements he made to police officers during the three custodial interrogations. He argued that his statements were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 and that they were involuntary considering the totality of the circumstances. The Supreme Court of California concluded that under the totality of the circumstances, the Spanish language advisement to Miranda-Guerrero of his rights adequately informed him of his *Miranda* rights. The Court affirmed.

The Fifth Amendment to the United States Constitution provides that "[n]o person … shall be compelled in any criminal case to be a witness against himself." The Court explained that "[a] suspect who has heard and understood these rights may waive them," but such waiver must be "'knowing, intelligent, and voluntary under the totality of the circumstances.'" (*People v. Leon* (2020) 8 Cal.5th 831, 843.) "The totality approach […]mandates—inquiry into all the circumstances surrounding the interrogation," including the defendant's "age, experience, education, background, and intelligence," and "whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare v. Michael C.* (1979) 442 U.S. 707, 725.)

Here, the Supreme Court found that Miranda-Guerrero's waiver of his *Miranda* rights at his first

interview was knowing and intelligent, despite his relative youth and limited education, lack of experience with the American legal system, and difficulty understanding English. The Court noted that Miranda-Guerrero had answered "Mm hm" when first asked if he understood the advisement and made clear at the start of the third interview that his understanding of the rights then read to him by Detective Lopez from an accurately translated Spanish-language form was the same as his understanding from the first interview. Miranda-Guerrero was also reminded, albeit briefly, of the original *Miranda* admonition at the beginning of the second interview. Moreover, his statement to the officers was not rendered involuntary by the fact that it was given in response to overnight questioning. The Court explained that, as in *People v. Peoples* (2016) 62 Cal.4th 718, Miranda-Guerrero "was given numerous breaks, drinks, and food," and the officers "never offered him leniency for his confession and never threatened a harsher penalty if he remained silent." (*Id.* at p. 741.)

B. No reasonable juror could find that police officers were negligent or acted unreasonably in a shooting that resulted in the death of an individual who refused to drop a knife.

Villalobos v. City of Santa Maria, 2022 Cal. App. LEXIS 945 (2nd Dist. Oct. 31, 2022)

Facts: Police officers employed by the City of Santa Maria ("City") responded to a daytime report of a suspicious person with a knife. Video footage viewed by the trial court recorded the entire incident from the time the officers arrived. When the officers arrived at the scene, they saw Javier Garcia Gaona, Jr. (decedent) standing in the middle of the road at a major intersection holding a knife with a long blade. The officers ordered him to drop it, but he refused. Detective Felix Diaz repeatedly told decedent that they didn't want to hurt him. Decedent appeared upset, was gesticulating and talking continuously and held the blade to his neck. While Spanish speaking officers and FBI trained negotiators attempted to calm decedent and persuade him to surrender over the course of over 40 minutes, decedent continued this behavior and kept holding the knife. After about 42 minutes of unsuccessful negotiations, officers using less-than-lethal rifles fired several times from a distance of at least 30 feet, hitting decedent's torso and bruising him. Decedent stabbed himself in the abdomen three times using both hands, and apparently slashed his throat with the knife. He charged the officers while still holding the knife. Officer fired several rounds of live ammunition, and decedent collapsed. His cause of death was multiple gunshot wounds.

Decedent's parents filed a complaint against police officers involved in the shooting and the City (collectively, "respondents"), alleging negligence-wrongful death and other claims. The trial court granted respondents' motion for summary judgment, finding that respondents were not negligent and that no reasonable juror could find that the police acted unreasonably. Decedent's father appealed from the judgment.

Held: The Second District Court of Appeal stated that "the reasonableness of a peace officer's conduct must be determined in light of the totality of circumstances. [Citations.] … [P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct." (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 632.) The Court noted that "'an officer may reasonably use deadly force when he or she confronts an armed suspect in close

proximity whose actions indicate an intent to attack.'" (*Martinez v. County of Los Angeles* (2nd Dist. 1996) 47 Cal.App.4th 334, 345.)

Viewing the facts most favorably to appellant, the Court concluded that no reasonable juror could find that respondents were negligent or had acted unreasonably. The Court explained that the officers patiently waited approximately 40 minutes before resorting to less-than-lethal weapons. The negotiations with decedent had been futile. He was armed with a deadly weapon, was behaving erratically, and was also suicidal. He presented an immediate threat of physical harm to himself. At any time, he could have used the knife to inflict a grievous injury upon himself. Instead of calming down, he appeared to be growing more agitated. The Court stated that there was "no legitimate reason to continue a hopeless standoff that had disrupted the flow of traffic and was consuming police resources. The video shows that the police had closed all lanes at a major intersection. Seven officers were present. The officers reasonably used less-lethal weapons in an attempt to safely subdue decedent, disarm him, and end the crisis. The projectiles from the less-lethal weapons caused no injury other than bruising." The Court added that decedent charged the officers in an apparent attempt to commit "suicide by cop." The Court explained that despite stabbing himself three times in the abdomen and slashing his throat with the knife, the decedent was unable to kill himself and thus provoked the police into killing him.

EMPLOYMENT

Statements made by the company's technical director were admissible to show discriminatory or retaliatory animus against a fired employee because they were made by a high-ranking organizational agent.

Doe v. SoftwareONE Inc., 85 Cal. App. 5th 98 (4th Dist. 2022)

Facts: Plaintiff Jane Doe was the founder and owner of a company which was bought by defendant SoftwareONE Inc. As part of the acquisition, plaintiff was offered and accepted a position with defendant. Plaintiff was then 49 years old. At a company event nine months later in Cancun, plaintiff testified that she refused to participate in joining the CEO on a stage where he allegedly expected women to dance, and where he poured champagne allegedly poured champagne down the throats of some or all of the women who did. Plaintiff later complained to the president of defendant's American division.

Beginning shortly after the event, defendant received complaints about plaintiff's behavior. Plaintiff was reassigned to a new position but defendant's leadership team continued to be frustrated about plaintiff. About six months after plaintiff's reassignment, Jason Cochran, defendant's director of technical solutions told plaintiff during an after-work event, that defendant "is a guy's club," plaintiff was "never going to make it" working for defendant, and called plaintiff a "bitch." A few months later, defendant purchased another company similar to plaintiff's. Defendant then terminated plaintiff, citing poor performance and redundancy. Plaintiff sued defendant, alleging her firing was discriminatory and retaliatory. After the trial court granted defendant's motion for summary judgment, Plaintiff moved for a new trial, arguing that she had

made a sufficient showing of retaliatory intent. The trial court granted plaintiff's motion, finding that "there was no substantial evidence to establish pretext," but that the evidence, "taken as a whole, *could* support a reasoned inference of discriminatory or retaliatory animus." With respect specifically to Cochran's three quoted statements, the trial court overruled defendant's hearsay objection. Defendant appealed, arguing that plaintiff did not produce evidence that could "'"support[] a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus."'" (*Light v. Department of Parks & Recreation* (4th Dist. 2017) 14 Cal.App.5th 75, 94.) As relevant here, defendant contended that Cochran's comments were inadmissible hearsay and not probative of defendant's motives.

Held: The Fourth District Court of Appeal explained that "a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true" (*People v. Sanchez* (2016) 63 Cal.4th 665, 674.) However, under the authorized admissions exception in Evidence Code section 1222, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; and [¶] (b) The evidence is offered either after admission of evidence sufficient to sustain a finding of such authority or, in the court's discretion as to the order of proof, subject to the admission of such evidence." (*Id.*) Defendant argued that plaintiff failed to establish that Cochran was authorized to speak for defendant on these issues, noting that Cochran was not the decision maker as to plaintiff's demotion or termination.

The Fourth District found that the third statement, regarding Cochran calling plaintiff a "bitch," was not hearsay. The Court explained that it was not being offered to prove the truth of the matter stated but was instead offered as evidence of animus against plaintiff. This third statement, not being hearsay, was properly admitted. As to Cochran's statement that defendant was a "guy's club," the Court concluded that the trial court did not abuse its discretion by overruling defendant's objection and admitting that statement into evidence. The Court explained that Cochran's high position in the corporate hierarchy and defendant's characterization of him in its motion and supporting evidence as "leadership" were substantial evidence of his authority to speak, in general terms, about defendant's company culture. The Court also found Cochran's statement that plaintiff was "never going to make it" working for defendant admissible. Thus, the Court of Appeal concluded that the trial court properly considered and relied upon Cochran's three comments in considering the motion for new trial. Finding other matters in favor of plaintiff also, the Fourth District concluded that the evidence, in the aggregate, was sufficient to support a reasoned inference that plaintiff's demotion or firing was the result of discriminatory or retaliatory animus. The Court accordingly affirmed the lower court's order granting plaintiff a new trial.

POBRA

The one-year limitations period under the Public Safety Officer's Bill of Rights is not triggered until the public agency determines that discipline may be taken.

Shouse v. Cnty. of Riverside, 2022 Cal. App. LEXIS 911 (4th Dist. Nov. 3, 2022)

Facts: Andrew Shouse was employed as a captain by the Riverside County Sheriff's Department (the "Department"). In April or May of 2016, Chief Lyndon "Ray" Wood learned of a rumored intimate relationship involving Shouse and Deputy Karen Birchard. The rumors indicated Birchard was saving photographs or text messages on her cell phone, which Wood feared would be used in a legal action against the Department or might undermine Shouse's authority. In May 2016, Wood met with Shouse and Shouse told him he had a sexual relationship with Deputy Birchard from 2010 to 2015, while she was under Shouse's chain of command. Later that month, Chief Wood learned of another intimate relationship between Shouse and another deputy. A personnel investigation was initiated which established that Shouse had maintained multiple sexual and/or "sexting" relationships with the female employees in violation of numerous department policy and general orders. In June 2016, Shouse was given written notice that he was the subject of an administrative internal affairs investigation into the allegations of departmental policy violations. Shouse signed the written order acknowledging its receipt the same day.

The investigation proceeded and in April 2017 a detailed report was issued which concluded that allegations of improper conduct by Shouse were sustained. The Department issued Shouse a notice of intent to terminate ("NOI"). The Department terminated Shouse on April 25, 2017. Shouse filed an administrative appeal pursuant to Government Code section 3304(b) of the Public Safety Officer's Bill of Rights ("POBRA"). At an administrative hearing, the hearing officer made findings that Shouse engaged in improper sexual relationships with subordinates under his command, misappropriated county equipment and electronic mail for his personal use, was insubordinate in violating a direct order prohibiting him from contacting any person with whom he had had a personal relationship during the pendency of the investigation, and unbecoming conduct discrediting the Sheriff's Department. After an administrative appeal, the findings were sustained.

Shouse filed a petition for writ of mandate seeking review of his dismissal. The trial court denied his petition, and Shouse appealed.

Held: On appeal, the sole legal issue raised to the Fourth District Court of Appeal was whether Shouse's rights pursuant to POBRA were violated where the investigation into his alleged improper conduct was not completed within one year of discovery. Shouse contended that the Department violated the one year limitations period because Chief Wood *should* have known of the improper conduct and initiated the investigation before May 2016. Specifically, Shouse argued that because Chief Wood heard rumors about Shouse's relationships with female deputies before May 2016, the investigation should have commenced—and concluded—earlier.

The Court observed that Government Code section 3304 provides in pertinent part: "Except as provided in this subdivision and subdivision (g), no punitive action…shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency's discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. […] In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline that year…. The public agency shall not be required to impose the discipline within that one-year period." (Government Code section 3304(d)(1).)

The Court explained that "[t]he 'one-year limitation period' begins to tick once a 'person authorized to initiate an investigation' [citation] 'discovers, or through the use of reasonable diligence should have discovered' the act, omission, or other allegation of misconduct. [Citation.]" (*Bacilio v. City of Los Angeles* (2nd Dist. 2018) 28 Cal.App.5th 717, 724.) The Court added, however, that before this limitations period is triggered, the public agency must first have determined that "discipline may be taken." (Section 3304(d)(1).)

The Court noted that Chief Wood testified at the administrative hearing that while he had heard rumors of sexual relationships between Shouse and female deputies, it could not be determined that these relationships were "improper" in violation of Department polices. As Chief Wood and Undersheriff Cleary each testified, Shouse having sexual relationships wasn't the issue; it was Shouse's failure to report the relationships to the Department, and his conduct in having sex with female deputies while on duty that was improper. Thus, while Chief Wood may have been aware of certain conduct, it was premature to initiate an investigation of misconduct unless and until he learned that Shouse was engaged in *misconduct*. Wood testified that before his conversation with Shouse in May 2016, he did not know whether Birchard was in Shouse's chain of command. The Fourth District explained that because this fact was the critical fact in determining if Shouse had committed misconduct in violating Department directives, which would subject Shouse to investigation and discipline, and because the evidence was undisputed that Chief Wood gained this information in May 2016, the investigation, which concluded with the Departmental Notice of Intent in April 2017, was timely initiated. Insofar as the misconduct with the subordinate was the "tip of the iceberg," leading to the discovery of other and further misconduct for which Shouse was subjected to discipline, all allegations against Shouse were timely investigated within one year of the notice of intent to terminate. The Fourth District Court of Appeal thus concluded that the trial court correctly determined there was no violation of POBRA's one-year statute of limitations, and accordingly affirmed.

MISCELLANEOUS

A. Expansion of implied cause of action to new context was improper where the court could not be certain of the systemwide consequences of such an expansion.

Mejia v. Miller, 2022 U.S. App. LEXIS 31401 (9th Cir. Nov. 14, 2022)

Facts: In June 2018, Denise Mejia and her husband were driving their utility terrain vehicle ("UTV") in or near Berdoo Canyon, part of public lands managed by the Bureau of Land Management ("BLM") near Joshua Tree National Park. A park ranger attempted to stop the Mejias for a traffic violation and to alert them that one of their rear tires was very low, but the Mejias failed to yield and went off-road. The National Park Service requested assistance from Wesley Miller, then a senior law enforcement officer for BLM (since retired). The dispatcher indicated the suspected violation was at a felony level due to reported speeds endangering the park ranger and the public, and an apparent attempt to ram the ranger. Miller and the park ranger searched until late at night when they suspected the UTV was approaching and positioned their vehicles to block the UTV. When they saw the UTV approach, they turned on their vehicle lights and Miller yelled,

"Police, put your hands up." As the UTV passed Miller within arm's reach, he fired multiple shots. Mejia was shot in the right hand and a bullet grazed her head.

Mejia filed suit in District Court, asserting several claims against the United States under the Federal Tort Claims Act ("FTCA"). The District Court denied the United States' summary judgment motion, with those claims awaiting trial. Mejia also brought claims under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) against Miller, asserting unreasonable seizure and excessive force in violation of the Fourth Amendment. Miller did not raise the issue of whether a *Bivens* cause of action existed and sought summary judgment on qualified immunity. The District Court granted his motion on the unreasonable seizure claim, but denied it as to excessive force. Miller brought an interlocutory appeal from the denial of qualified immunity on summary judgment.

Held: The Ninth Circuit Court of Appeals stated that in 1971, the Supreme Court in *Bivens* adopted an "implied cause of action theory" permitting the petitioner to seek damages from federal officers for unreasonable search and seizure in his home. The petitioner in *Bivens* also asserted "unreasonable force" during his arrest, but the Supreme Court noted he primarily asserted the officers violated his rights of privacy,[1] and the opinion focused only on the unreasonable search-and-seizure context. Since then, the Supreme Court has recognized a *Bivens* action in two other contexts: a claim asserting a Congressman discriminated on the basis of gender in employment, in violation of Fifth Amendment due process (*Davis v. Passman*, 442 U.S. 228 (1979)), and an Eighth Amendment claim for cruel and unusual punishment against federal jailers for failing to treat a prisoner's severe asthma. *Carlson v. Green*, 446 U.S. 14 (1980). The Ninth Circuit noted that these three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Supreme Court has approved of an implied damages remedy under the Constitution itself. Since *Carlson*, expanding the *Bivens* remedy is a disfavored judicial activity.

Shortly after the briefing in the case here, the Supreme Court issued *Egbert v. Boule*, 142 S. Ct. 1793 (2022), which held that in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts. The existence of alternative remedial structures is reason enough to not infer a new *Bivens* cause of action. Similarly, uncertainty about the potential systemwide consequences of implying a new *Bivens* cause of action is by itself a special factor that forecloses relief.

The Court of Appeals held that there was no *Bivens* cause of action for Mejia's claim, which presented a new context. Given this new context, the Court stated that special factors counseled against implying a cause of action here. For example, Fourth Amendment excessive force claims against Bureau of Land Management ("BLM") officers would have "'systemwide' consequences"[2] for BLM's mandate to maintain order on federal lands, and uncertainty about these consequences provided a reason not to imply such a cause of action. The Circuit Court further determined that Mejia had alternative remedies, including administrative remedies. And while her claims pursuant to the Federal Tort Claims Act were based on a different legal theory, in Mejia's instance they were an alternative avenue to seek damages for the injuries alleged in her *Bivens* claim. The Ninth Circuit Court of Appeals accordingly vacated the District Court's denial

[1] *Bivens*, 403 U.S. at 389-90.
[2] See *Egbert* at 1803-04 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017).

of qualified immunity to Miller and remanded with instructions to enter summary judgment dismissing with prejudice Mejia's excessive force claim brought pursuant to *Bivens*.[3]

B. Bail provisions of Article 1, Section 28(f)(3) can be reconciled with those of Section 12, and both sections govern bail determinations in noncapital cases.

In re Kowalczyk, 2022 Cal. App. LEXIS 967 (1st Dist. Nov. 21, 2022)

Facts: Gerald John Kowalczyk was charged with felony counts for identity theft and vandalism, and misdemeanor counts for identity theft and petty theft. He waived arraignment on the complaint, and the trial court set bail at $75,000. Prior to his preliminary hearing, Kowalczyk filed a motion seeking release on his own recognizance ("OR"). At a hearing, the prosecutor opposed the bail motion and requested that bail remain set at $75,000. The trial court denied bail altogether and ordered Kowalczyk detained.

In July 2021, Kowalczyk filed a petition for writ of habeas corpus challenging the trial court's decision denying him bail. The First District Court of Appeal dismissed the habeas petition as moot on the motion of the People, the real party in interest, because Kowalczyk had pled and been sentenced in the underlying criminal matter. The California Supreme Court granted review and transferred the matter back to the District Court with directions to vacate its dismissal order and to "issue an opinion that addresses which constitutional provision governs the denial of bail in noncapital cases—article I, section 12, subdivisions (b) and (c), or article I, section 28, subdivision (f)(3), of the California Constitution—or, in the alternative, whether these provisions can be reconciled."

Held: The First District Court of Appeal explained that the main dispute centered around the language in the first sentence of each of the constitutional provisions. The Court observed that the lead clauses were almost identical except that section 12 states that a person "*shall be* released on bail by sufficient sureties," while section 28(f)(3) says that a person "*may be* released on bail by sufficient sureties." (Italics added.) The Court of Appeal posed the question at issue as follows: "What is the meaning of the seemingly permissive language in section 28(f)(3), and can it be reconciled with the mandatory language in section 12, which embodies a longstanding 'constitutional right to be released on bail pending trial' in noncapital cases subject to two exceptions?" (Quoting *People v. Standish* (2006) 38 Cal.4th 858, 878; see also *In re Law* (1973) 10 Cal.3d 21, 25.)

Section 28(f)(3) also states, "In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the safety of the victim, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety and the safety of the victim shall be the primary considerations. A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail."

[3] As there was no *Bivens* cause of action for Mejia's claim, the Court did not reach the question of qualified immunity.

The First District concluded that the bail provisions of section 28(f)(3) could be reconciled with those of section 12 and that both sections govern bail determinations in noncapital cases. The Court noted that this meant that section 12's general right to bail in noncapital cases remained intact, while full effect must be given to section 28(f)(3)'s mandate that the rights of crime victims be respected in all bail and OR release determinations. The Court explained that it interpreted the first sentence of section 28(f)(3) as a declarative statement recognizing that bail may or may not be denied under existing law. Under this construction, section 12's general right to bail remained intact, while full effect was accorded to section 28(f)(3)'s mandate that the rights of crime victims be respected in bail and OR release determinations. In so concluding, the First District declared that it rejected any suggestion that section 12 guarantees an unqualified right to pretrial release or that it necessarily requires courts to set bail at an amount a defendant can afford.

Having answered the question posed by the Supreme Court, the First District Court of Appeal then dismissed the petition for writ of habeas corpus as moot.