CPOA CASE SUMMARIES – DECEMBER 2022

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Suspect's Miranda waiver was involuntary and required reversal where detective encouraged suspect to continue speaking to police after requesting counsel by saying she cared about getting his story the right way out.

People v. Avalos, 85 Cal. App. 5th 926 (4th Dist. 2022)

Facts: In May 2012, police arrested 18-year-old high school student Ismael Avalos on a murder charge and questioned him in an interrogation room at a police station. During the interview, a forensic technician removed his shirt, pants, socks, and shoes. The technician gave him a paper gown to wear. After about five hours of questioning by police, Avalos said, "I wanna talk to a lawyer." After some further dialog, Anaheim Police Detective J. Trapp said, "I respect your decision that you wanna talk to a lawyer, but if for some reason you want to change your mind and you wanna talk to me, you can, just ask for me. I don't care if it's 2:00, 3:00 in the morning I'll come back. Okay? Because I care about you getting your story the right way out. Okay?"

After spending the night in a holding cell, Avalos told one of the jailers he wanted to speak to the detectives again. Avalos was brought back to the same interrogation room for a second interview, still apparently wearing the same paper gown from the day before. After Avalos asked about socks, an officer asked him if he was cold. Avalos said that it had been colder where he was being held. After waiving his *Miranda*[1] rights, Avalos admitted shooting the murder victim. Avalos was convicted of murder with a firearm enhancement and a substantive gang crime. Avalos appealed, arguing that the trial court erred by admitting the second interview into evidence over his objection.

Held: The Fourth District Court of Appeal explained that to establish a valid *Miranda* waiver, the prosecution must show "the waiver was knowing, intelligent, and voluntary." (*People v. Nelson* (2012) 53 Cal.4th 367, 374–375.) The Court stated that when a *Mirandized* suspect is being questioned by the police, and the suspect at any point says he wants to speak to an attorney, the police cannot question the suspect any further "until counsel has been made available to him, unless the *accused himself* initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484–485, italics added.) Once a suspect invokes the right to counsel, the police can no longer engage in efforts to convince the suspect to speak to them[2] because "'a change of mind prompted by continued interrogation and efforts to convince the defendant to communicate with the officers' cannot be considered a voluntary, self-initiated conversation."[3]

The Fourth District found here that, given Avalos's state of mind and the surrounding circumstances (Avalos was in high school with no record of prior arrests, his apparent confusion about the role of a detective versus a lawyer, the apparent coldness, his clothes being

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).
[2] See *McNeil v. Wisconsin*, 501 U.S. 171, 176–177 (1991).
[3] *People v. McClary*, 20 Cal.3d 218, 226–227 (1977), overruled on other grounds as stated in *People v. Cahill* (1993) 5 Cal.4th 478, 509–510, fn. 17.

taken away, and he was wearing a paper gown), Avalos did not make a voluntary, knowing, and intelligent *Miranda* waiver prior to the second interview. Moreover, given the detective's statement encouraging Avalos to speak to her because she cared about him getting his "story the right way out"—after he had invoked the right to counsel—the Court believed Detective Trapp, rather than Avalos, initiated the second interview. The Court also found the admission of the interview into evidence was not harmless beyond a reasonable doubt. Accordingly, the Fourth District reversed the judgment, and remanded.

B. A reasonable search of a vehicle, in which parolee sat in back seat, did not include a locked glove compartment.

Claypool v. Superior Court, 85 Cal. App. 5th 1092 (3rd Dist. 2022)

Facts: Brandon James Claypool was driving a car with two passengers, Malcolm Clay in the front passenger seat, and Carlos Olivia, a parolee, in the rear seat on the passenger's side. A police officer testified that police first saw Claypool's car in an area where the officer had contacted multiple known gang members and personally made multiple gun arrests. Police followed Claypool's car until it stopped, blocking a residential driveway, in violation of Vehicle Code section 22500(e)(1). The officers approached the car and contacted its occupants. An officer testified that he could not recall whether he saw Claypool remove the keys from the ignition. By the time Claypool was visible in the bodycam footage, the car keys were in his lap and the engine was off. Olivia advised police he was on parole, and they decided to do a parole search of the passenger compartment.

Officers directed each of the occupants to exit the car in turn. An officer said he noticed front seat passenger Clay was visibly sweating and appeared nervous, though the video evidence was not dispositive. One officer testified that he thought Clay responded, "I don't know," when asked if there was a gun in the car. Claypool was asked to leave items on the dashboard as he exited the car, and police were apparently able to retrieve his keys during the search. Police used a key on Claypool's keychain to unlock the glove box, and found a loaded firearm. One officer testified he "believe[d]" that key "was the same key used for the ignition."

Claypool was charged with possession of a firearm by a felon, carrying a loaded firearm in a vehicle, and other charges, along with an enhancement for a prior strike pursuant to the three strikes law. At the preliminary hearing, Claypool moved to suppress, claiming insufficient evidence supported the connection between Olivia and the locked glove box, and the otherwise lawful parole search exceeded its legitimate scope. However, the magistrate found it reasonable to believe that Olivia could have quickly handed a gun up front for his compatriots to lock in the glove box. Claypool moved to dismiss the information, but the trial court denied the motion in agreement with the magistrate's conclusions. Claypool brought a petition for writ of mandate or prohibition to challenge the denial of the motion to suppress evidence and dismiss the charges. The Third District issued a stay of trial and an order to show cause.

Held: The Third District Court of Appeal explained that a parole search of a car based on a passenger's status as a parolee requires a nexus between the area or item searched and the parolee, as discussed by the California Supreme Court in *People v. Schmitz* (2012) 55 Cal.4th 909. A

permissible search based on a passenger's parole status is limited to "those areas of the passenger compartment where the officer reasonably expects that the parolee could have stowed personal belongings or discarded items when aware of police activity." (*Id.* at p. 926.) In a footnote, the *Schmitz* court addressed the search of "closed compartments of the car like the glove box, center console, or trunk." (*Schmitz, supra*, 55 Cal.4th at p. 926, fn. 16.) As these were not at issue in that case, the Supreme Court thus expressed no opinion of whether a search of "such closed-off areas could be based solely on a passenger's parole status." (*Ibid.*) However, the *Schmitz* court emphasized: "The reasonableness of such a search must necessarily take into account all the attendant circumstances, including the driver's legitimate expectation of privacy in those closed compartments, the passenger's proximity to them, and whether they were locked or otherwise secured." (*Id.*)

The People argued here that the parole search of backseat passenger Olivia permissibly extended to the locked glove box because officers could reasonably expect the parolee could have secreted contraband there after he became aware of the police. However, the Third District stated that absent additional evidence, the facts did not support such an attenuated inference. The Court did not find it objectively reasonable to believe Olivia might have secreted a gun in the glove box after he saw police. To do so would almost certainly require the engagement and assistance of both Claypool, who had the keys, and Clay, who was in the front passenger seat. The Court noted, however, that police did not observe anything suggesting the occupants of the car were maneuvering to get the gun from the backseat passenger into the glove box and lock it. The key the police used to open the glove box was on the same keychain as the ignition key, and the police testimony suggested there was only one ignition key. It therefore appeared improbable the occupants could have accessed the glove box while the car was moving. Moreover, Claypool's privacy interests were strong, as both the owner of the car and the person who retained possession of the key to the glove box. Accordingly, the Third District Court of Appeal issued a peremptory writ of mandate and directed the trial court to grant Claypool's motion.

C. The private search exception to the Fourth Amendment's warrant requirement is not foreclosed simply because cell site location information is involved.

Kleiser v. Chavez, 2022 U.S. App. LEXIS 33918 (9th Cir. Dec. 9, 2022)

Facts: Two disgruntled Mr. Electric employees provided the Department with large amounts of Mr. Electric's data, which included printouts of cell site location information that provided GPS coordinates for company vehicles which showed all movement of electricians in the field. The Washington State Department of Labor and Industries used the data to write citations and assess administrative fines against Mr. Electric for violations of Washington's electrical code stemming from improper supervision of journeymen electricians in Clark County.

James Kleiser and Mr. Electric (jointly "Mr. Electric") filed a 42 U.S.C. section 1983 action against the Department alleging in part that a Fourth Amendment violation occurred when the Department obtained the data without a warrant. The District Court granted summary judgment to the Department and Mr. Electric appealed.

Held: On appeal, Mr. Electric argued that *Carpenter v. United States*, 138 S. Ct. 2206 (2018), and *Wilson v. United States*, 13 F.4th 961 (9th Cir. 2021), foreclosed the Department's use of Mr. Electric's location information because, when read together, the cases extinguished the applicability of the private search exception[4] to the Fourth Amendment to location information.

The Ninth Circuit of Appeal explained that the Supreme Court in *Carpenter* held that the third-party doctrine[5] does not apply as an exception to the Fourth Amendment's warrant requirement when the government seeks cell site location information. (*Carpenter*, 138 S. Ct. at 2219-21.) The Ninth Circuit stated that the private search exception is an altogether separate exception to the Fourth Amendment." While the Ninth Circuit had recognized in dicta that these two exceptions rest "on the same precepts concerning the equivalence of private intrusions by private parties," *Wilson*, 13 F.4th at 971 n.9, *Carpenter* foreclosed the expansion sought by Mr. Electric. The Supreme Court had emphasized that the holding in *Carpenter* was a "narrow one" (138 S. Ct. at 2220), and the *Carpenter* opinion did not mention the private search exception whatsoever.

The Ninth Circuit noted that the United States Courts of Appeal for both the Sixth and the Eighth Circuits had already found that *Carpenter* did not apply in private search exception cases. See *United States v. Miller*, 982 F.3d 412, 431 (6th Cir. 2020) and *United States v. Ringland*, 966 F.3d 731, 737 (8th Cir. 2020). The Ninth Circuit now joined its sister circuits and held that the dicta from *Wilson* coupled with the *Carpenter* holding did not foreclose the availability of the private search exception when location information is involved. Accordingly, the Ninth Circuit Court of Appeals affirmed the District Court's ruling finding *Carpenter* inapplicable in private search exception cases.

D. Warrantless vehicle search was justified by probable cause where subject vehicle smelled of marijuana and officer knew occupants were not old enough to legally possess recreational marijuana.

People v. Castro, 2022 Cal. App. LEXIS 1018 (2nd Dist. Nov. 18, 2022)

Facts: In June 2020, Los Angeles Police Department Officer Miguel Zendejas and his partner, Officer Organista, were riding in a marked patrol car when they observed two males sitting in a

[4] See *Wilson* 13 F.4th at p. 967 for a description of the private search exception. *Wilson* noted that the Fourth Amendment protects individuals from Government actors, not private ones. A private party may conduct a search that would be unconstitutional if conducted by the government. The private search doctrine concerns circumstances in which a private party's intrusions would have constituted a search had the government conducted it and the material discovered by the private party then comes into the government's possession. When private parties provide evidence to the government on their own accord, it is not incumbent on the police to disregard the evidence. The *Wilson* Court noted that the Supreme Court formalized the private search doctrine in *Walter v. United States*, 447 U.S. 649 (1980), and *United States v. Jacobsen*, 466 U.S. 109 (1984).

[5] The Supreme Court in *Carpenter* described the third-party doctrine, expressing that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties. See *Carpenter, supra*, at p.2216. That remains true "even if the information is revealed on the assumption that it will be used only for a limited purpose." *Id.*, quoting *United States v. Miller*, 425 U. S. 435, 443 (1976). The Government is thus typically free to obtain such information from the recipient without triggering Fourth Amendment protections. The third-party doctrine partly stems from the notion that an individual has a reduced expectation of privacy in information knowingly shared with another. *Id.*, at p. 2219.

car parked on a public street. The officers ran the parked car's vehicle registration and learned it was expired. Both the parked car and the patrol car had their windows rolled down as the patrol car approached the parked car. Officer Zendejas testified that he noticed "a strong odor of marijuana coming from inside the vehicle," describing it as "the smell of burnt marijuana." Based on the "expired registration, and pending a narcotics investigation," the officers initiated a traffic stop. Officer Zendejas exited the patrol car. Phillip Castro was sitting in the driver's seat, and there was a passenger in the front seat and another in the back, apparently hiding. Officer Zendejas recognized the two passengers from prior encounters and knew they were minors. The officer asked Castro if they had been smoking, and Castro responded affirmatively. Castro said he had smoked marijuana two hours earlier. Castro also said he was 20 years old, and the car was his.

The officers subsequently conducted a search of the vehicle and found, among other things, an open duffle bag in the trunk that contained an operational and loaded nine-millimeter handgun with no serial number on it. After Officer Organista advised Castro of his *Miranda* rights, Castro admitted the handgun was his. The district attorney filed an information charging Castro with carrying a loaded, unregistered handgun in a vehicle. Ultimately, the trial court denied Castro's motion to suppress the evidence from the vehicle search. Castro pleaded no contest to carrying a loaded, unregistered handgun, and the trial court placed him on probation for two years with conditions. Castro appealed, contending that the warrantless search of his vehicle did not fall within the automobile exception to the Fourth Amendment's warrant requirement, and the trial court should have suppressed the evidence from the vehicle search.

Held: The Second District Court of Appeal concluded that the warrantless search of Castro's car did fall within the automobile exception to the Fourth Amendment's warrant requirement, and affirmed. The Court explained that warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." (*Katz v. U.S.* (1967) 389 U.S. 347, 357, fns. omitted.) Under the so-called automobile exception, "officers may search a vehicle without a warrant if it 'is readily mobile and probable cause exists to believe it contains contraband' or evidence of criminal activity." (*People v. Johnson* (2nd Dist. 2018) 21 Cal.App.5th 1026, 1034.)

Based on the strong odor of burnt marijuana emanating from defendant's car, Castro's admission he had smoked marijuana, and the fact all occupants of the car were under 21 years of age, the Court found that the officers had probable cause to believe they would find contraband or evidence (e.g., marijuana possessed by someone under 21) of a crime in the car. Officer Zendejas's belief that there was still marijuana in the car based on the current smell of marijuana coming from inside the car was reasonable under the circumstances of this case. Accordingly, the officers had probable cause to search the car under the automobile exception, and the trial court did not err in denying defendant's motion to suppress.

E. Defendant was not detained within the meaning of the Fourth Amendment because a reasonable person would view deputy's use of a spotlight as lacking in coercive force.

People v. Tacardon, 2022 Cal. LEXIS 7809 (Cal. Dec. 29, 2022)

Facts: Sheriff's Deputy Joel Grubb was on patrol when he drove past a BMW legally parked in

front of a residence. The car's engine and headlights were off. Smoke emanated from slightly open windows. He saw three people inside and made eye contact with them as he drove past. Grubb made a U-turn, parked approximately 15 to 20 feet behind the BMW, and turned on his spotlight. He did not activate his siren or emergency lights or issue any commands to the car's occupants. He approached the BMW at a walking pace and did not draw a weapon. A woman emerged from the backseat of the BMW, closed the door behind her, and walked towards the back of the vehicle. The woman complied with the deputy's direction to stand near the sidewalk behind the BMW. The deputy spoke in a calm and moderate voice and did not draw a weapon. Deputy Grubb continued approaching the car. As the deputy came within a few feet of the BMW, he smelled marijuana smoke coming from inside. He saw clear plastic bags on the rear passenger floorboard containing a green leafy substance. Leon William Tacardon sat in the driver's seat. During a two or three minute discussion, Tacardon said he was on probation. A records search confirmed that Tacardon was on probation with a search condition. The deputy searched the BMW and seized the bags, which contained 696 grams of marijuana, and a vial of 76 hydrocodone pills.

Tacardon was charged with possession for sale of hydrocodone and marijuana. The superior court granted his motion to suppress the evidence and dismissed the charges. The Court of Appeal reversed. The Supreme Court of California granted review to examine the significance of the deputy's use of a spotlight in this circumstance.

Held: The Supreme Court explained that police officers can approach people on the street and engage them in consensual conversation. (*People v. Brown* (2015) 61 Cal.4th 968, 974.) In situations involving a show of authority, a person is seized 'if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,"' or '"otherwise terminate the encounter"' [citation], and if the person actually submits to the show of authority." (*Id.*) The Court explained that courts consider the totality of the circumstances in determining whether a detention occurred.

The Supreme Court explained that the use of a spotlight generally conveys a different meaning to a reasonable person than the use of a patrol car's emergency lights. Red and blue lights are almost exclusively reserved for emergency and police vehicles. An officer's use of flashing red lights, or combination of red and blue lights, behind a vehicle typically conveys a command to stop. However, the Supreme Court declined to state a bright-line rule. The Court stated that the proper inquiry requires consideration of the totality of the circumstances, including the use of a spotlight. While it was clearly possible that the facts of a particular case could show a spotlight was used in an authoritative manner, the use of a spotlight, standing alone, did not necessarily effect a detention under the Fourth Amendment.

Considering the circumstances here,[6] the Supreme Court concluded that Tacardon was not detained when Deputy Grubb parked behind the BMW, shined a spotlight on it, and began to approach on foot. The spotlight was used as a matter of course and was not unusually bright or flashing. Moreover, the deputy did not stop Tacardon's vehicle or block him from driving away, did not activate a siren or emergency lights or give directions by loudspeaker, did not approach rapidly or aggressively on foot or draw a weapon, gave no commands, and made no demands. The

[6] See *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988) and *In re Manuel G.*, 16 Cal.4th 805, 821 (1997) for discussion of relevant circumstances in the context of assessing detention.

female passenger was detained only after she got out of the car and started to walk away, the deputy directed her to remain, and the passenger complied. Whether Tacardon was detained when Deputy Grubb detained the passenger depended on whether Tacardon perceived the interaction, but the magistrate did not consider that question. The Supreme Court accordingly reversed the judgement of the Court of Appeal and remanded the matter for a new factual finding as to whether Tacardon was aware of the woman's detention and to assess whether Tacardon was detained under the totality of the circumstances.

F. Inventory search of truck parked illegally by driver without valid license on private property was not Fourth Amendment violation where vehicle was impounded for valid community caretaking purpose.

United States v. Anderson, 2022 Cal. App. LEXIS 1032 (4th Dist. Dec. 16, 2022)

Facts: At approximately 2:00 a.m., San Bernardino County Sheriff's Department ("SBCSD") Deputy Daniel Peterson noticed the license plate on Jonathan Anderson's truck was partially obscured (a Vehicle Code violation), so the deputy initiated a traffic stop. Anderson abruptly turned onto a dead-end street and accelerated to the end of the road, then pulled into the driveway of a private home. Deputy Peterson and another deputy who arrived as backup learned that Anderson had an expired driver's license and a long criminal history.

The deputies conducted an inventory search before towing Anderson's truck, and, after finding a handgun under the driver's seat of his truck, they arrested Anderson for being a felon in possession of a firearm. Anderson moved to suppress the handgun, arguing that the deputies violated the Fourth Amendment because the inventory search was invalid. He claimed in part that the deputies lacked a valid "community caretaking purpose" when they conducted the search. The District Court denied his motion, and Anderson entered a conditional guilty plea retaining his right to appeal the suppression decision. The District Court sentenced Anderson to a prison term followed by three years' supervised release. Anderson appealed the denial of his suppression motion and one of the conditions of his supervised release.

Held: The Ninth Circuit Court of Appeals explained that one "well-defined exception to the warrant requirement" is the inventory search. *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). This exception arises under the community caretaking exception to the warrant requirement for seizure of property. *See United States v. Cervantes*, 703 F.3d 1135, 1140-41 (9th Cir. 2012). "Under the community caretaking exception, 'police officers may impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic.'" *Id.* at 1141 (quoting *Miranda v. City of Cornelius*, 429 F.3d 858, 864 (9th Cir.2005) (internal quotation marks omitted)). "[I]mpoundment serves some 'community caretaking'" purpose if a vehicle is "parked illegally, pose[s] a safety hazard, or [i]s vulnerable to vandalism or theft." *Id.* (internal citation omitted).

The Ninth Circuit affirmed, holding that the District Court did not err in concluding that the government had established that a valid community caretaking purpose existed for impounding and inventorying Anderson's truck before the search was conducted. The Court of Appeals explained that the deputies had an objectively reasonable belief that Anderson's truck, which he had parked in a private driveway, was parked illegally. The Ninth Circuit noted that the District

Court found that the homeowner wanted the car off the property and that there was no one available to move Anderson's truck because Anderson did not have a valid license, he had no passengers with him, and he told the deputies he was not from the area where he was stopped. The Circuit Court determined that the District Court did not clearly err in finding that the deputies spoke to the homeowner before conducting the search. Because this finding was entitled to deference, no remand was required.

G. Qualified immunity denied to police officer who shot and killed decedent for failure to warn before using deadly force where practicable because officer had time to tell decedent to "stop."

Smith v. Agdeppa, 2022 U.S. App. LEXIS 35945 (9th Cir. Dec. 30, 2022)

Facts: In October 2018, Los Angeles police officer Edward Agdeppa and his partner Officer Perla Rodriguez responded to a Hollywood gym to investigate calls that someone was trespassing and engaging in disruptive conduct. Both officers activated their body-worn cameras. The officers encountered Albert Dorsey in the men's locker room, but he ignored their orders to get dressed and leave the gym. The officers attempted to handcuff Dorsey but he resisted. As he resisted, both officers' body-cams were knocked off but still captured audio over the next approximately three minutes. In deposition testimony, Agdeppa alleged that after the body-cams fell to the floor, the locker room struggle escalated and turned violent. Agdeppa said he warned Dorsey that he would tase him if he did not submit to handcuffing, but Dorsey continued. Both officers attested that they used their tasers in "stun" mode several times as Dorsey became increasingly aggressive. In his deposition testimony and affidavit submitted in support of his summary judgment motion, Agdeppa alleged that Dorsey repeatedly struck him on the face and knocked him backward into a wall, disorienting him and causing him to drop his taser. As he recovered from his disorientation, he alleged that he witnessed Dorsey "straddling" Rodriguez and "pummeling" her head and face with a "flurry of punches" as she lay on the floor in a fetal position. Agdeppa alleged that Dorsey appeared to be trying to kill Rodriguez in a "vicious[] and violent[]" attack and he "believed that the next punch would likely kill her." In his affidavit submitted later in support of his summary judgment motion, Agdeppa stated that he "unholstered and drew [his] service weapon" and "gave Dorsey a verbal warning, stating words to the effect that Dorsey needed to stop." Agdeppa alleged that Dorsey instead "continued to pummel" Rodriguez with her taser in his hand, so from a distance of six-to-eight feet away, Agdeppa fired five shots to stop Dorsey, who "began to fall backwards and away" from Rodriguez as Agdeppa fired the final shot. Dorsey was killed. However, the bodycam audio did not capture any verbal warning to stop from Agdeppa to Dorsey. Statements from gym security guards who witnessed part of the encounter contradicted Agdeppa's story, including as to the number of shots that Agdeppa fired, whether Dorsey reached for Agdeppa's firearm, and whether Dorsey was holding Agdeppa's wrist until after the second shot was fired.

Dorsey's mother, Paulette Smith, sued Agdeppa pursuant to 42 U.S.C. section 1983 alleging the officer used unreasonable deadly force when he shot and killed Dorsey. The District Court denied Agdeppa's motion for summary judgment on qualified immunity grounds, and Agdeppa appealed.

Held: The Ninth Circuit Court of Appeals explained that in its review of the denial of qualified immunity, the Court would examine: (1) whether the facts, viewed in the light most favorable to

the plaintiff, show that the officer's conduct violated a constitutional right; and (2) whether the right in question was "clearly established" at the time of the officer's action. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014). If either question was answered in the negative, the officer would be entitled to qualified immunity.

The Court of Appeals affirmed, concluding that the District Court properly denied Agdeppa's request for qualified immunity for two reasons. First, the District Court recognized that a reasonable jury could reject the police officers' account of the shooting because there were significant discrepancies between their versions of events and other evidence in the record. Second, the Ninth Circuit had long held that the Fourth Amendment requires officers to warn before using deadly force when practicable. *See, e.g.*, *Gonzalez v. City of Anaheim*, 747 F.3d 789, 794 (9th Cir. 2014) (en banc); *Harris v. Roderick*, 126 F.3d 1189, 1201, 1204 (9th Cir. 1997). The defense could not argue that it was not possible for Agdeppa to give Dorsey a deadly force warning because Agdeppa's sworn statements showed that he had time to tell Dorsey to "stop." The encounter lasted approximately four minutes after the officers first attempted to handcuff Dorsey, and the officers tased Dorsey at least five times during that interval. Agdeppa never claimed that he warned Dorsey that he would switch from using his taser to using his firearm if Dorsey did not submit to being handcuffed, nor did he argue that it was impracticable to do so. Thus, the District Court correctly ruled that a jury could decide that Agdeppa's use of deadly force violated clearly established law.

Dissenting, Judge Bress stated that Officers Agdeppa and Rodriguez found themselves in a violent confrontation with a large, combative suspect, who ignored their repeated orders to stop resisting and failed to respond to numerous taser deployments. After the suspect's assault on the officers intensified and he wrested one of the officers' tasers into his own hands, one officer shot the suspect to end the aggression. The dissent maintained that the split-second decision officers made here presented a classic case for qualified immunity. The dissent expressed that the majority's decision otherwise was contrary to law and required officers to hesitate in situations in which decisive action, even if leading to the regrettable loss of human life, may be necessary to protect their own.

EMPLOYMENT

Triable issues existed as to teacher's First Amendment retaliation claim against school principal when she told teacher that he would need a union representative the next time she saw him wearing MAGA hat.

Dodge v. Evergreen Sch. Dist. #114, 2022 U.S. App. LEXIS 35868 (9th Cir. Dec. 29, 2022)

Facts: Eric Dodge was a teacher for over 17 years in the Evergreen School District #114 ("District") in Vancouver, Washington. For the 2019-2020 school year, he was assigned to teach a sixth grade science class at Wy'east Middle School for the first time. Before the 2019-2020 school year began, he attended two days of teacher training and brought with him a of Donald Trump's presidential campaign slogan Make America Great Again ("MAGA") on a red hat. After consulting with the District's Chief Human Resource Officer Jenae Gomes, Principal Caroline

Garrett told Dodge at the end of the first day that he needed to exercise "better judgment." When Principal Garrett learned that Dodge brought his hat with him again the second day, she called him a racist and a homophobe, among other things, and said that he would need to have his union representative present if she had to talk to him about the hat again. Through the District's online reporting system, Dodge filed a complaint against Principal Garrett, which was sent to Jenae Gomes, the school district's Chief Human Resource Officer. Gomes initiated an investigation as required by District policy, and determined that no policy violation had occurred. Dodge appealed to the school board, but the school board affirmed the denial of his complaint.

Dodge sued Principal Garrett, HR Officer Gomes, and the District under 42 U.S.C. section 1983 for retaliating against him for engaging in protected political speech in violation of the First Amendment. The District Court held that the individual defendants were entitled to qualified immunity and granted summary judgment in their favor. The District Court also granted summary judgment for the District. Dodge appealed.

Held: The Ninth Circuit Court of Appeals explained that to establish a prima facie First Amendment retaliation claim, the plaintiff must prove that "(1) []he engaged in protected speech; (2) the defendants took an 'adverse employment action' against h[im]; and (3) h[is] speech was a 'substantial or motivating' factor for the adverse employment action."[7] If the plaintiff establishes a prima facie case, a defendant can avoid liability for retaliation by showing that it had a legitimate administrative interest in suppressing the speech that outweighed the plaintiff's First Amendment rights. *Pickering v. Bd. of Ed.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).[8]

The Ninth Circuit first concluded that Dodge was engaged in speech protected by the First Amendment because the undisputed facts demonstrated that his MAGA hat conveyed a message of public concern, and he was acting as a private citizen in expressing that message. The Court next held that viewing the facts in the light most favorable to plaintiff, at a minimum, there were triable issues of fact regarding whether Principal Garrett, who had authority over Dodge's employment, took adverse employment action against him when she stated that the next time Dodge had his MAGA hat, they would have a meeting in which he would need his union representative. Because it was undisputed that Dodge's MAGA hat motivated Principal Garret's action, the Court found that Dodge submitted sufficient evidence of a prima facie First Amendment retaliation claim against her for purposes of summary judgment. The Court concluded that the record failed to establish that Gomes took any adverse employment action against Dodge, and Dodge's First Amendment retaliation claim against Gomes thus failed as a matter of law.

Analyzing whether Principal Garrett had a legitimate administrative interest in preventing Dodge's speech that outweighed his First Amendment rights, the Court determined that while some of the training attendees may have been outraged or offended by his political expression, no evidence of actual or tangible disruption to school operations had been presented. The Court explained that some people may not like the political message being conveyed could not itself be a basis for

[7] *Howard v. City of Coos Bay*, 871 F.3d 1032, 1044 (9th Cir. 2017) (quoting *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir. 2004)).

[8] The Court noted that an employer also is not liable for First Amendment retaliation if it proves that it would have taken the adverse employment action absent the protected speech. However, this rule was not at issue here because it was undisputed that any adverse employment action that occurred was related to Dodge's MAGA hat.

finding disruption of a kind that outweighs the speaker's First Amendment rights. Therefore, Principal Garrett's asserted administrative interest in preventing disruption among staff did not outweigh Dodge's right to free speech. Moreover, any violation of Dodge's First Amendment rights by Principal Garrett was clearly established where longstanding precedent held that concern over the reaction to controversial or disfavored speech itself does not justify restricting such speech. For these reasons, the Ninth Circuit Court of Appeals reversed the District Court's grant of summary judgment in favor of Principal Garrett.

Addressing Dodge's claim against the Evergreen School District, the Court held that the school board's dismissal of Dodge's administrative complaint on the grounds that Principal Garrett did not violate any District "policy or procedure," was not an approval of her conduct or the basis for it. Dodge failed to establish that a material dispute of fact existed regarding whether the District ratified any unconstitutional conduct by Principal Garrett. The Court therefore affirmed the district court's grant of summary judgment in favor of the District.

FIREARMS

Supreme Court's finding New York's gun carrying licensing statutes unconstitutional did not foreclose California defendant's retrial on a charge of carrying a loaded firearm in public as an active participant in a criminal street gang.

People v. Velez, 85 Cal. App. 5th 957 (5th Dist. 2022)

Facts: After a trial, a jury found Christopher Alexander Velez guilty of, among other things, carrying a loaded firearm in public as an active participant in a criminal street gang (Section 25850(c)(3)). The trial court stayed execution of punishment on that count. While the case was pending, the United States Supreme Court in June 2022 decided *New York State Rifle & Pistol Assn., Inc. v. Bruen* (2022) 142 S.Ct. 2111, which held that the New York's "proper cause" requirement for an unrestricted license to carry a handgun outside the home impermissibly infringed on the right of law-abiding citizens to bear arms in public for self-defense. Christopher appealed, arguing that he could not be retried on the charge of carrying a loaded firearm in public as an active gang participant because *Bruen* rendered unconstitutional California's licensing scheme (Section 26150 et seq.) and—by extension—section 25850, which criminalizes carrying a loaded firearm in public. Christopher contended that California's general gun carrying licensing statutes, Sections 26150 and 26155, contained the same "fatal flaws as New York's licensing statute."

Held: The Fifth District Court of Appeal noted that Penal Code sections 26150 and 26155, subd. (a)(2), condition issuance of a public carry gun license on—among other things—a showing of good cause. The Fifth District explained that *Bruen* concerned New York's licensing scheme. To secure an unrestricted license to carry a firearm outside the home or place of business, an applicant pre-*Bruen* needed to prove that "'proper cause'" existed. (*Bruen, supra,* 142 S.Ct. at p. 2123.) The phrase "proper cause" was construed by New York state courts to require the applicant to "'demonstrate a special need for self-protection distinguishable from that of the general community.' [Citation.]" (*Id.*) The United States Supreme Court concluded that "the State's

licensing regime violates the Constitution" "[b]ecause the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense." The *Bruen* Court stated that "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms" (142 S.Ct. at p. 2156). The Supreme Court expressed that California was one of the few states to have an analogue to New York's proper cause standard.

In view of *Bruen*, the Fifth District here concluded that subdivision (a)(2) of Sections 26150 and 26155 was clearly unconstitutional. The Court noted that Christopher went further, arguing that California's *entire* licensing scheme was unconstitutional on its face because the licensing authority had discretion to deny a public carry license even if all the criteria have been met. However, the Court found that the remainder of California's licensing scheme remained valid because the good cause condition was severable and the licensing scheme was not rendered unconstitutional by "may issue" language or by "good moral character" conditions. The Fifth District noted that *Bruen* only struck down one specific provision of New York's gun licensing scheme that impermissibly burdened law-abiding citizens' Second Amendment rights by mandating proof of a special need beyond general self-defense. The Fifth District here declined to expand *Bruen*'s scope to the degree that Christopher urged.

The Court of Appeal found that *Bruen* did not foreclose a retrial on the charge of carrying a loaded firearm in public as an active participant in a criminal street gang. The Fifth District Court of Appeal accordingly reversed the conviction for carrying a loaded firearm in public as an active participant in a criminal street gang and remanded to give the People an opportunity to retry that charge.

MISCELLANEOUS

A. Prison's annual review of inmate's maximum confinement status, based on his gang membership, satisfied due process requirements.

Johnson v. Ryan, 2022 U.S. App. LEXIS 34637 (9th Cir. Dec. 15, 2022)

Facts: In 1991, The Arizona Department of Corrections ("ADC") adopted a Security Threat Group ("STG") policy to minimize the threat of inmate gang activity to the safe, secure and efficient operation of institutions. In October 2014, the STG Validation Hearing Committee classified ADC inmate Richard Johnson as a validated member of the Warrior Society STG.[9] Pursuant to ADC's policy, Johnson was assigned to maximum custody confinement. Johnson filed suit under 42 U.S.C. section 1983 against ADC officials, alleging, in part, that ADC's annual reviews of his maximum security confinement are insufficient to satisfy the Due Process Clause of the Fourteenth Amendment.[10] Johnson alleged, in part, that in maximum security confinement, he is confined to

[9] An STG is defined as "[a]ny organization, club, association or group of individuals, either formal or informal (including traditional prison gangs), . . . whose members engage in activities that include . . . committing or attempting to commit unlawful acts or acts that violate the Department's written instructions, which detract from the safe and orderly operation of prisons."

[10] U.S. Const. amend. XIV, Section 1.

his cell for twenty-four hours per day, strip searched every time he leaves his cell, takes meals in his cell, and has limited access to rehabilitation programs. These conditions are substantially more restrictive than the general population from which he was moved. The District Court dismissed Johnson's due process challenge regarding ADC's annual review process for failure to state a claim. Johnson appealed this order.

Held: The Ninth Circuit Court of Appeals considered whether the District Court erred when it screened Johnson's claim that ADC's annual reviews of his confinement status violated his due process rights. The Court held that Johnson had a liberty interest in avoiding assignment to maximum custody as a consequence of his STG validation. Nevertheless, Johnson failed to state a claim for a due process violation under the three-prong framework set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Assessing the second prong of the *Mathews* analysis, the Court asked, "Given the procedures that ADC has in place, what is the risk that ADC officials will erroneously determine that Johnson remains a security risk to the prison?" However, Johnson did not challenge the procedures by which he was initially validated as an STG member. Instead, he argued that ADC's annual reviews of his confinement status did not afford him adequate process because they were based solely on his alleged gang affiliation, without regard to his criminal history, propensity of violence, or disciplinary record within his past reclass review period or his disciplinary record overall. The Court explained that Arizona had "not alleged that Johnson has violated disciplinary rules or is an immediate threat to the staff or other inmates. Rather, Arizona is concerned that Johnson's gang membership presents an ongoing threat to the security of the prison, its staff, and its inmates. ADC's immediate concern is not conduct-based. It is based on Johnson's status as a member of the Warrior Society, which ADC has determined is an active prison gang and presents a general threat to the security of the prison."

The Ninth Circuit held that ADC was entitled to substantial deference in its determination that an inmate's STG membership and failure to renounce and debrief posed a continuing security threat. Although Johnson disagreed with ADC's judgment, he failed to plausibly allege how that judgment created a risk that he will be erroneously classified as a security threat. The Ninth Circuit Court of Appeals accordingly affirmed the District Court's dismissal of Johnson's claim that ADC's annual reviews of his maximum security confinement were insufficient to satisfy the Due Process Clause.

Dissenting in part, Judge Rakoff stated that while Arizona provided the "mirage" that a once validated member of an STG could later escape solitary confinement, the reality was that he would be kept there for the entire duration of his sentence. Judge Rakoff believed that this was unconstitutional, and contrary to the Ninth Circuit's previous holdings. Judge Rakoff dissented from the majority's analysis pertaining to Johnson's claim that Arizona's refusal to consider factors other than his initial STG validation and his subsequent failure to debrief denied him due process.

B. A trial court may consider hearsay evidence when ruling on a gun violence restraining order petition.

San Diego Police Dep't v. Geoffrey S., 2022 Cal. App. LEXIS 1032 (4th Dist. Dec. 16, 2022)

Facts: In April 2020, the San Diego Police Department ("Department") filed a gun violence restraining order ("GVRO") petition Geoffrey S. with an attached declaration and four redacted police reports describing several police contacts with Geoffrey over five days in April 2020. In one such incident, police responded to a disturbance call just before midnight at Geoffrey's residence. Geoffrey admitted to the police that he had been posting on social media about Bill Gates killing millions of people and told the police that "Bill Gates is a murderer." Geoffrey also admitted that he possessed shotguns. Two or three days later, officers were dispatched to Geoffrey's house in response to reports of Geoffrey's threatening statements on social media and attempts to buy ammunition. Before arriving at Geoffrey's house, Police learned that in multiple Facebook posts, Geoffrey described his atypical beliefs about Bill Gates and the COVID-19 vaccine, attempted to gather followers to defend themselves against a government takeover, discussed his attempts to stock up on ammunition, and encouraged others to do the same. No Facebook posts were attached to the GVRO petition, however. When police arrived at Geoffrey's house, according to the police reports, "Geoffrey was very animated, agitated and was rambling about a government takeover." He "was exhibiting psychotic and delusional behavior." "When asked specifically about his quest for ammunitions and his intentions, Geoffrey replied that it was none of our business and quoted his 1st and 2nd amendment rights." The police and a psychiatric clinician who was part of the response believed that Geoffrey was a potential danger to others and decided to place him on a 72-hour psychiatric hold.

The trial court held a GVRO hearing. No witnesses testified at the hearing, and the Department submitted no additional evidence beyond the police reports and declaration. The trial court issued the GVRO, which prohibited Geoffrey from owning or possessing firearms or ammunition for one year. Geoffrey appealed from the one-year GVRO.

Held: The Fourth District Court of Appeal stated that the GVRO statute provides for three types of protective orders prohibiting a person from owning or possessing a firearm, ammunition, or magazine. One of these is a one to five year GVRO issued after notice and hearing if the court finds "by clear and convincing evidence" that there is a "significant danger" of gun violence (Section 18175). The Court noted that the only evidence the Department submitted in support of the GVRO petition was the attached declaration of Detective Garlow and the hearsay police reports. On appeal, Geoffrey argued that hearsay evidence was inadmissible in a GVRO hearing under Penal Code section 18175.

In *Kaiser Foundation Hospitals v. Wilson* (4th Dist. 2011) 201 Cal.App.4th 550, the Fourth District held that hearsay evidence is admissible at a hearing on a workplace violence restraining order ("WVRO"). Here, the Fourth District concluded that *Kaiser*'s rationale also applied to a GVRO hearing under Section 18175. Based on the language, purpose, and legislative history of the GVRO statute, and its similarity to the WVRO and civil harassment restraining orders ("CHRO") statutes, the Court held that hearsay evidence is admissible at a GVRO hearing. The Court explained that Penal Code section 18175(a) states that the court "shall consider *evidence*" of the factors listed in

Section 18155(b)(1), and "may consider *any other evidence* of an increased risk for violence," including the factors listed in Section 18155(b)(2). (Section 18175(a), italics added.) The Court noted that the Evidence Code defines hearsay as a form of evidence.[11] The Court thus determined that the statutory terms "evidence" and "any other evidence" as used in Section 18175(a) logically include the form of "evidence" defined as "hearsay evidence."[12] For purposes of resolving the hearsay issue, the Court did not find any meaningful distinction between the WVRO phrase "any testimony that is relevant" (Code Civ. Proc., Section 527.8(j)) and the GVRO phrase "any other evidence of an increased risk for violence." (Penal Code section 18175(a).)

Moreover, the Court noted that Section 18175(a) allows the court to consider "any other evidence of an increased risk for violence, *including, but not limited to, evidence of the facts identified in paragraph (2) of subdivision (b) of Section 18155*." (Section 18175(a), italics added.) Section 18155(b)(2)(F) allows the court to consider "[d]ocumentary evidence, including, but not limited to, police reports […]." (*Id.*)[13] The Court explained that documentary evidence and police reports offered for the truth of the matter asserted are classic forms of hearsay. (See Evid. Code section 1200.) Thus, the inclusion of documentary evidence and police reports in Section 18155(b)(2)(F)—and its incorporation by reference in Section 18175(a)—signaled that the Legislature intended the terms "evidence" and "any other evidence" as used in Section 18175(a) to include hearsay evidence.

The Fourth District also concluded that the totality of the evidence was sufficient to support the trial court's finding by clear and convincing evidence that Geoffrey posed a "significant danger" of gun violence. (Section 18175(b)(1).) The Court explained that because the Department's hearsay evidence came from multiple independent sources that were consistent with one another, including Geoffrey's pastor, his friend, his own Facebook posts, and Geoffrey himself, and it was corroborated by other evidence Geoffrey submitted at the hearing, and not otherwise refuted, the Court concluded that the hearsay evidence was sufficiently reliable to support the GVRO. As the Fourth District was not persuaded by Geoffrey's other arguments, the Court of Appeal accordingly affirmed the one-year GVRO.

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[11] Evid. Code section 1200(a) ["'Hearsay evidence' is *evidence* of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."], italics added.

[12] *Id.*

[13] Section 18155 (b)(2)(F) refers specifically to documentary evidence of either recent criminal offenses by the subject of the petition that involve controlled substances or alcohol, but the Court explained that Sections 18155 and 18175 both treat the documentary evidence described in this subdivision as being 'includ[ed]' within the broader category of 'any other evidence of an increased risk for violence.' ([Sections 18155(b)(2), 18175(a)].) Moreover, the Court could not "conceive of any rational reason why the Legislature would create a narrow hearsay exception just for evidence of alcohol or substance abuse used to prove an increased risk for violence, but not for actual threats of harm or other evidence used to prove an increased risk for violence."