CPOA CASE SUMMARIES – FEBRUARY 2023

CONSTITUTIONAL LAW

A. Plaintiff's excessive force and false arrest claims were not barred by the Heck Doctrine because his no contest plea was not entered as an actual conviction.

Duarte v. City of Stockton, 2023 U.S. App. LEXIS 3693 (9th Cir. Feb. 16, 2023)

Facts: In May 2015, Francisco Duarte was in a public area in downtown Stockton. At some point, Duarte ended up standing within a few feet of a group of Stockton Police Department officers who were detaining someone else. The Appellees here claimed that an officer twice ordered Duarte to back up. Duarte maintained that if he was ordered to back up, he did not hear it. It was undisputed, however, that when Duarte did not back up, police forcefully took him to the ground. Appellees claimed that Duarte tried to pull his arm away when police ordered to put his hands behind his back. An officer then struck Duarte in the leg with a baton, breaking a bone.

Duarte was charged with willfully resisting, obstructing, and delaying a peace officer in violation of Penal Code section 148(a)(1). He pleaded "no contest" or "nolo contendere." Although Duarte entered the equivalent of a guilty plea, the state court never entered an order finding him guilty of the charge to which he pleaded. Instead, the state court ordered that its acceptance of Duarte's plea would be "held in abeyance," pending his completion of ten hours of community service and obedience of all laws. After the six months of abeyance elapsed, the charges against Duarte were "dismissed" in the "interest of justice" on the prosecutor's motion.

In December 2018, Duarte filed a 42 U.S.C. section 1983 action in District Court, asserting claims for excessive force and false arrest against police officers and others. Duarte also brought associated municipal liability claims against the City of Stockton and the Stockton Police Department. The District Court dismissed the municipal liability claims, finding that neither municipal entity was a "person" subject to suit under Section 1983. The District Court also dismissed the false arrest claims against the individual defendants as barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck v. Humphrey* held that Section 1983 claims must be dismissed if they would "necessarily require the plaintiff to prove the unlawfulness of his conviction." *Id.* at 486. After discovery, the District Court granted summary judgment to the police officers on Duarte's claim for excessive force, finding it was also *Heck*-barred. Duarte appealed.

Held: The Ninth Circuit Court of Appeals explained that "the *Heck* rule . . . is called into play only when there exists 'a conviction or sentence that has *not* been . . . invalidated,' that is to say, an 'outstanding criminal judgment.'" *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (quoting *Heck*, 512 U.S. at 486-87). On appeal, Duarte contended that *Heck* did not apply because the criminal charges against him were dismissed without entry of a conviction. The Appellees insisted that *Heck* should nevertheless apply because by pleading no contest and completing the conditions of his agreement with the prosecution, Duarte was functionally convicted and sentenced.

The Ninth Circuit disagreed with the Appellees, explaining that the *Heck* bar requires an actual judgment of conviction, not its functional equivalent. *Wallace*, 549 U.S. at 393; *Roberts v. City of*

Fairbanks, 947 F.3d 1191, 1198 (9th Cir. 2020) ("The absence of a criminal judgment [] renders the *Heck* bar inapplicable; the plain language of the decision requires the existence of a conviction in order for a [Section] 1983 suit to be barred." (citing *Heck*, 512 U.S. at 487)); *Martin v. City of Boise*, 920 F.3d 584, 613 (9th Cir. 2019) ("Where there is no 'conviction or sentence' that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application."). The Court stated that Duarte was not convicted because he was never found or proved guilty.[1]

The Court acknowledged that Duarte pleaded "no contest" or "nolo contendere" to the resisting arrest charge, but noted that a plea itself is not a conviction. The Court stated that a plea is entered by the criminal defendant, but a conviction does not follow without a subsequent order from the court. The state court never entered an order finding Duarte guilty of the charge to which he pleaded. Instead, the state court ordered that its acceptance of Duarte's plea would be "held in abeyance," pending his completion of ten hours of community service and obedience of all laws.

Moreover, after the six months of abeyance elapsed, the charges against Duarte were "dismissed" in the "interest of justice" on the prosecutor's motion. The Ninth Circuit observed that a "dismissal" is the "[t]ermination of an action, claim, or charge without further hearing, esp. before trial; esp. a judge's decision to stop a court case through the entry of an order or judgment that imposes no civil or criminal liability on the defendant with respect to that case."[2] The Court stated that dismissal, which imposes no criminal liability, is thus the opposite of a conviction, which imposes such liability. The Court explained that because the charges against Duarte were dismissed, he was never convicted.

The Court concluded that because there was no conviction that Duarte's Section 1983 claims would impugn, *Heck* was inapplicable. Because Duarte was never convicted of a crime, his claims should not have been dismissed under *Heck*. Accordingly, the Ninth Circuit Court of Appeals reversed the District Court's dismissal of Duarte's false arrest claim. The Court also reversed the lower court's adverse summary judgment on Duarte's excessive force claim. The Ninth Circuit further held that the District Court erred in dismissing Duarte's municipal liability claims against the City of Stockton and Stockton Police Department, explaining that longstanding precedent had established that both California municipalities and police departments are "persons" amenable to suit under Section 1983.[3] The Court remanded for further proceedings.

B. Attenuation doctrine did not apply to evidence obtained in violation of the Fourth Amendment because discovery of a parole search condition was not an intervening circumstance in officer's decision to search.

People v. McWilliams, 14 Cal. 5th 429 (2023)

[1] The Court noted that the primary definition of "conviction" in *Black's Law Dictionary* is, "The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty." *Conviction, Black's Law Dictionary* (11th ed. 2019).

[2] *Dismissal, Black's Law Dictionary* (11th ed. 2019).

[3] See *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 701 (1978); and *Karim-Panahi v. L.A. Police Dep't*, 839 F.2d 621, 624 n.2 (9th Cir. 1988).

Facts: In January 2017, Officer Matthew Croucher of the San Jose Police Department responded to a report of a possible vehicle burglary in a business parking lot. A security guard told him she had seen two suspicious individuals on bikes shining flashlights into parked cars. Officer Croucher did not see anything of note as he drove through the business parking lot. When he continued through an adjacent parking lot, he noticed four or five parked cars. In one of these vehicles, Duvanh Anthony McWilliams was fully reclined in the passenger seat but apparently not asleep. Officer Croucher approached the vehicle and instructed McWilliams to exit. After McWilliams exited the car, Officer Croucher asked for his identification and allowed McWilliams to retrieve the identification from the vehicle. Croucher then performed a records check and learned that McWilliams was on parole and subject to warrantless, suspicionless parole searches. The officer searched McWilliams and his vehicle, where the officer found an unloaded gun, ammunition, drugs, and drug paraphernalia.

McWilliams was charged with multiple drug and weapons offenses. He filed a motion to suppress the evidence found in his vehicle, arguing that his Fourth Amendment rights were violated. The trial court denied the motion. McWilliams pleaded guilty to three counts of the criminal information and received a negotiated sentence of seven years in state prison. McWilliams appealed the denial of the suppression motion.

A divided Sixth District Court of Appeal affirmed, despite concluding that the officer lacked reasonable suspicion to detain McWilliams. The appellate court held that the officer's discovery of McWilliams's parole search condition sufficiently attenuated the connection between the unlawful detention and the contraband found in McWilliams's vehicle. The Court of Appeal relied on cases allowing the admission of evidence seized incident to arrest on a valid warrant, where the warrant was discovered during an unlawful investigatory stop. (*Utah v. Strieff* (2016) 579 U.S. 232; *People v. Brendlin* (2008) 45 Cal.4th 262.) The Supreme Court of California granted review to consider the proper application of the attenuation doctrine to the officer's discovery of the parole search condition here.

Held: The California Supreme Court noted that the Court of Appeal concluded, and the parties agreed, that Officer Croucher violated the Fourth Amendment[4] when he ordered McWilliams out of his vehicle with no basis to suspect McWilliams of involvement in any criminal activity. The Supreme Court explained that the exclusionary rule is "a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation." (*Davis v. United States* (2011) 564 U.S. 229, 231–232.) Where the exclusionary rule applies, it forbids admission of both the "'primary evidence obtained as a direct result of an illegal search or seizure'" and "'evidence later discovered and found to be derivative of an illegality'"—familiarly known as the "'"fruit of the poisonous tree."'" (*Strieff*, 579 U.S. at p.237, quoting *Segura v. United States* (1984) 468 U.S. 796, 804.)

[4] The California Supreme Court observed that, like the United States Constitution, the California Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches." (Cal. Const., art. I, § 13.) But under the so-called truth-in-evidence provision of the state Constitution, "'issues relating to the suppression of evidence derived from governmental searches and seizures are reviewed under federal constitutional standards.'" (*People v. Macabeo* (2016) 1 Cal.5th 1206, 1212, quoting *People v. Troyer* (2011) 51 Cal.4th 599, 605; see Cal. Const., art. I, § 28, subd. (f)(2).) The Court accordingly focused on federal constitutional standards in its analysis here.

However, the attenuation doctrine holds that, notwithstanding the exclusionary rule, "[e]vidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'" (*Strieff*, at p. 238, quoting *Hudson v. Michigan* (2006) 547 U.S. 586, 593.)

The Court explained that in conducting the attenuation inquiry, courts are guided by three factors first set out in *Brown v. Illinois* (1975) 422 U.S. 590, 603–604: (1) the "temporal proximity" between the unlawful conduct and the discovery of evidence; (2) the "presence of intervening circumstances"; and (3) the "purpose and flagrancy of the official misconduct." (See *Strieff*, at p. 239.) The Court observed that no substantial time separated Officer Croucher's illegal detention of McWilliams and his subsequent decision to search him and his vehicle. Moreover, the Court found that Officer Croucher's decision to conduct the stop, without any evident basis to believe McWilliams was connected to the activity Officer Croucher set out to investigate, indicated a purposefulness that further justified the exclusion of the evidence.

Considering the second factor, the presence of intervening circumstances, the Court stated that the central subject of disagreement here concerned whether, and to what extent, the discovery of a parole search condition disrupts the causal connection between the unlawful stop and the discovery of evidence. The Court observed that, as in *Brendlin* and *Strieff*, the police officer involved in this case conducted an unlawful seizure. And here, as in *Brendlin* and *Strieff*, the officer conducted a records check after the unlawful detention. However, unlike in *Brendlin* and *Strieff*, the records check did not reveal an outstanding warrant for arrest. Instead, it showed that McWilliams was on parole and subject to a parole condition authorizing warrantless, suspicionless searches of his person and his vehicle.

The Supreme Court explained that as judicial mandates to take a suspect into custody, the warrants in *Brendlin* and *Strieff* not only authorized, but compelled, further action by the officer. The Court noted that unlike an arrest on an outstanding warrant, a parole search is not a ministerial act dictated by judicial mandate (*Strieff, supra*, 579 U.S. at p. 240), but a matter of discretion. The Supreme Court thus concluded that the officer's discretionary decision to conduct the parole search did not sufficiently attenuate the connection between the officer's initial unlawful decision to detain McWilliams and the discovery of contraband. The evidence therefore was not admissible against him. Accordingly, the Supreme Court reversed.

C. Son received proper notice that he was violating his mother's domestic violence restraining order since deputies yelled to him about the move-out order before breaking his door and arresting him.

People v. Kenney, 88 Cal. App. 5th 516 (4th Dist. 2023)

Facts: In January 2021, C.K. was concerned about her son, 29-year-old Christopher James Kenney, who was addicted to drugs. Hoping he would voluntarily enter residential treatment if forced to move out from her home, she obtained a temporary (21-day) domestic violence restraining order ("DVRO"). The next day C.K. told Kenney that she had a restraining order and

that he had to move, although she did not show him the order and no one served Kenney with it. Kenney complied, but he returned to his mother's home two days later. Sheriff's deputies arrived and C.K. gave them a copy of the temporary DVRO. The deputies also checked with their records division to confirm the order's validity. C.K. told deputies Kenney had not yet been served with it. The deputies yelled through a locked bedroom door, "There's a restraining order on file, Christopher" and "You're not allowed to be here." During the verbal interaction with Kenney, the deputies stated, "You're not allowed here anymore" and "As of right now you're not going to be under arrest, we're gonna serve you with the restraining order." Finally, a deputy stated, "Chris, you're not allowed to be here. Come on, we'll talk about it. Serve you with your paperwork and you can get going." Kenney replied, "Break my ****ing door down, dude. This is my ****ing house." The deputies subsequently forced the door open and, after a scuffle, arrested Kenney.

In an amended information, Kenney was charged with resisting, obstructing, or delaying a peace officer in violation of Penal Code section 148. The trial court denied Kenney's motion to dismiss, and he was convicted by a jury. Kenney appealed, arguing in part that as a matter of law, the deputies acted unlawfully because, he claimed, the temporary DVRO had never been lawfully noticed or served.

Held: The Fourth District Court of Appeal explained that Penal Code section 836 authorizes a peace officer to arrest a person who has violated a DVRO where the officer "has probable cause to believe that the person against whom the order is issued has notice of the order." (*Id.*, subd. (c)(1).) Under subdivision (c)(2) of Section 836, a person who has not been served with a DVRO is nevertheless "deemed to have notice of the order" if "informed by a peace office of the contents of the protective order."

The Court of Appeal noted that the body worn camera video showed that after announcing, "Sheriff's department," deputies repeatedly asked Kenney to open the door. Deputies spoke with Kenney through the closed bedroom door. Kenney was informed, "You're not allowed to be here," and when Kenney replied, "This is my house," deputies told him, "There's a restraining order on file, Christopher," and "You're not allowed to be here, buddy." The Court concluded that there was substantial evidence from which a jury could conclude beyond a reasonable doubt that police informed Kenney of the material contents of the temporary DVRO against him within the meaning of Section 836(c)(2). Thus, the Fourth District found that the trial court correctly denied Kenney's motion to dismiss, and accordingly affirmed.

EMPLOYMENT

Limitations period for proposed officer discipline began on date the misconduct that was used as the basis for demotion was discovered, rather than when the investigation began.

Garcia v. State Dep't of Developmental Servs., 88 Cal. App. 5th 460 (3rd Dist. 2023)

Facts: Luis Garcia was employed as a Police Officer II (sergeant) with the State Department of Developmental Services ("Department"). Concerned that Garcia was doing unnecessary work activities which maximized his overtime hours, Department leadership in February 2018 instructed

Garcia to change his conduct accordingly. Around May 24, 2018, the Department learned that Garcia had manipulated his colleagues' schedules to attempt to get around this limitation on his accrual of overtime. When they learned of this conduct, the Department asked the Office of Law Enforcement Support ("OLES") to investigate.[5] Investigating between June 2018 and February 2019, OLES discovered that Garcia had also committed various acts of misconduct unrelated to the alleged overtime manipulation. In April 2019, two months after the investigation was complete, the Department issued a notice of adverse action to Garcia, stating he would be terminated due to his overtime schedule manipulation as well as other acts of misconduct discovered during the investigation. However, the Department subsequently withdrew its adverse action and retroactively reinstated Garcia to his position as sergeant. Three weeks later, on September 26, 2019, the Department issued a second notice of adverse action to Garcia, which stated that he would be demoted. The notice explained that the adverse action was based on the alleged overtime manipulation and the other misconduct that the investigation uncovered.

Garcia appealed the Department's decision to the State Personnel Board ("SPB"). He filed a motion to dismiss the Department's adverse action, arguing that Government Code section 3304(d)(1)'s one-year limitations period barred the Department's action. He reasoned that because the Department asked OLES to investigate his alleged overtime misconduct on or around May 24, 2018, the Department needed to serve its notice of adverse action within one year of that date. SPB agreed that Garcia's overtime manipulation that initially triggered the investigation fell outside the statute's one-year limitations period, but found that Garcia did not establish the allegations unrelated to scheduling manipulation were also time-barred. SPB thus sustained the Department's decision to demote Garcia. Garcia filed a petition for writ of mandate in superior court, but the court denied Garcia's challenge. Garcia appealed.

Held: The Public Safety Officers Procedural Bill of Rights Act (Government Code section 3300 et seq.; "POBRA") provides in Section 3304(d)(1) that a public agency cannot discipline a peace officer "for any act, omission, or other allegation of misconduct" unless the agency completes its investigation and notifies the officer of its proposed discipline "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." Third District Court of Appeal explained that the issue here concerned the application of Section 3304(d)(1) in cases with multiple acts of misconduct discovered on multiple dates. In Garcia's view, the statute's one-year limitations period begins to run on all acts of misconduct once the agency initiates an investigation into any one of these acts. The Court of Appeal disagreed, noting that the California Supreme Court stated in *Mays v. City of Los Angeles*, which also involved Section 3304(d)(1), that "[t]he one-year period runs from the time the misconduct is discovered."[6] The Third District explained that the provision's language made clear that the date of "discovery" for each act, not the date an investigation is initiated for any one act, is the relevant consideration. The Court held that Section 3304(d)(1)'s one-year limitations period begins to run on an act of misconduct from the time the misconduct is

[5] OLES is governmental entity, separate from the Department, charged with investigating certain allegations of serious misconduct by Department law enforcement personnel.

[6] *Mays v. City of Los Angeles*, 43 Cal.4th 313, 321 (2008), superseded by statute on other grounds as stated in *Squire v. County of Los Angeles*, 22 Cal.App.5th 16, 23 (2nd Dist. 2018).

discovered.[7] The appellate court explained that result was consistent with the statutory text, case precedent, and the principle of avoiding absurd results. Because Garcia presented no evidence of the dates the Department or OLES discovered, or even should have discovered, his different acts of misconduct that ultimately formed the basis of his demotion, his appeal failed. The Third District accordingly affirmed.

MISCELLANEOUS

Newly enacted Evidence Code section 352.2 prevented admission of a prejudicial rap video because that statute applied retroactively to cases that are not yet final.

People v. Venable, 88 Cal. App. 5th 445 (4th Dist. 2023)

Facts: One member of the Westside Projects gang was killed and another was wounded when bullets were fired from a small white car. Months later, police arrested a known informant for an unrelated offense. The informant offered to provide information about the shooting. He told the police—and eventually testified—that Travon Rashad Venable, Sr., drove the car used in the shooting and identified another man as the shooter. Both Venable and the shooter were members of the California Gardens Crips ("California Gardens") gang, a rival of the Westside Projects. A jury found Venable guilty of first degree murder and attempted murder. The jury also found true, on each count, a gang enhancement and a gang-related firearm enhancement. In a bifurcated proceeding, the judge found Venable had one prior serious felony conviction and one "strike" prior. The judge sentenced Venable to a total of 129 years to life.

On appeal, Venable argued in part that the trial judge erred by admitting a YouTube rap video in which Venable appeared along with other California Gardens members and featured Venable's brother. According to the prosecution's gang expert, one of the lines in the rap meant that Venable's brother had heard a California Gardens member shot someone else in the head at the specific shooting location. In the expert's opinion, the video was a way of "claiming ownership" of the shooting and bragging about it. However, the expert conceded it was the gang as a whole taking credit, and not any particular member of the gang.

The Fourth District Court of Appeal initially found no errors except for those conceded by the People. The California Supreme Court granted review, and transferred the matter back to Court of Appeal with directions to vacate its previous opinion and reconsider the cause in light of the newly effective Evidence Code section 352.2.[8] Section 352.2 requires trial judges to consider specific factors before admitting evidence of a form of creative expression—which explicitly includes

[7] See *Mays*, 43 Cal.4th at p. 321; see also *Bacilio v. City of Los Angeles* (2nd Dist. 2018) 28 Cal.App.5th 717, 724 ["The '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"].

[8] Section 352.2 was enacted by Assembly Bill No. 2799 (2021–2022 Reg. Sess.) (Stats. 2022, ch. 973), and took effect January 1, 2023.

rap—in a criminal proceeding to avoid injecting racial bias and improper consideration of criminal propensity.

Held: The Fourth District Court of Appeal explained that Section 352.2 provides in part that in any criminal proceeding "where a party seeks to admit as evidence a form of creative expression, the court, while balancing the probative value of that evidence against the substantial danger of undue prejudice under Section 352, shall consider, in addition to the factors listed in Section 352, that: (1) the probative value of such expression for its literal truth or as a truthful narrative is minimal" absent certain conditions; and "and (2) undue prejudice includes, but is not limited to, the possibility that the trier of fact will…treat the expression as evidence of the defendant's propensity for violence or general criminal disposition as well as the possibility that the evidence will explicitly or implicitly inject racial bias into the proceedings." The Court explained that the Legislature made this change to address the problem of introducing racial stereotypes and bias into criminal proceedings by allowing rap lyrics into evidence.[9]

Here, it was uncontested that the trial judge did not consider the additional specific factors before admitting the rap video in Venable's trial and that the trial, as a result, didn't comply with the new requirements for admission. The Court considered the question of whether these new requirements applied retroactively to cases like Venable's, which were pending on appeal at the time of their enactment. (See *In re Estrada* (1965) 63 Cal.2d 740.) In *People v. Frahs* (2020) 9 Cal.5th 618, the California Supreme Court explained "'[t]he *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.'" (*Frahs, supra*, 9 Cal.5th at p. 628.)

The Fourth District here concluded that Section 352.2 is ameliorative and therefore applies retroactively in nonfinal cases. The Court explained that Section 352.2 provides defendants of color charged with gang-related crimes an ameliorative benefit, specifically, a trial conducted without evidence that introduces bias and prejudice into the proceedings, limitations designed to increase the likelihood of acquittals and reduce punishment for an identified class of persons. Under *Frahs*, that meant the Legislature intended the new provision to apply retroactively to the cases of defendants, like Venable, whose cases were not yet final. (*Id.*, at pp. 627–628.) The Court also concluded that the application of Section 352.2.'s factors likely would have influenced the trial in Venable's favor. The Court explained that the admission of the video without the new safeguards was prejudicial because there was substantial doubt whether the trial judge would have admitted the video evidence and the prosecution used the video to tie Venable, the alleged driver, to the specific crime. Accordingly, the Fourth District Court of Appeal therefore reversed and remanded for a new trial.

[9] The Court observed that to address the problem, the Legislature announced their intent "to provide a framework by which courts can ensure that the use of an accused person's creative expression will not be used to introduce stereotypes or activate bias against the defendant, nor as character or propensity evidence; and to recognize that the use of rap lyrics and other creative expression as circumstantial evidence of motive or intent is not a sufficient justification to overcome substantial evidence that the introduction of rap lyrics creates a substantial risk of unfair prejudice." (Stats. 2022, ch. 973, § 1, subd. (b).)