CPOA CASE SUMMARIES – DECEMBER 2024

CONSTITUTIONAL LAW/POLICE CONDUCT

A. Warrantless search of decedent's electronic devices did not violate CalECPA where law enforcement accessed devices with the decedent's parents' permission who had physical possession of the devices and their passcodes.

People v. Clymer, 107 Cal. App. 5th 131 (1st Dist. 2024)

Facts: In January 2019, Officer Anthony Baron responded to a call at the McKay family residence where he found Drew McKay dead in his bedroom. With McKay's parents' permission, Officer Baron and Special Agent Jeffrey Boyce searched McKay's room for narcotics and paraphernalia. McKay's parents repeatedly urged Special Agent Boyce to search McKay's iPhone and iPad, on a bedside table, and they provided the passcode to the devices. Investigators found messages between McKay and a person who was later identified as Gerald Louis Clymer, Jr., regarding the sale of illegal narcotics to McKay. Clymer was later charged with, among other things, possession of diazepam for sale.

Clymer moved to suppress the evidence obtained during the warrantless search of McKay's electronic devices, which the trial court denied. Clymer subsequently pled no contest to the diazepam charge. Clymer appealed, claiming the warrantless searches of McKay's devices violated the California Electronic Communications Privacy Act ("CalECPA") (Penal Code section 1546 et seq.), and therefore the evidence obtained through those searches should have been suppressed .

Held: The First District Court of Appeal explained that CalECPA generally prohibits government entities from accessing electronic information without a warrant except in specified contexts. As relevant here, a government entity may access electronic information without a warrant "[w]ith the specific consent of the authorized possessor of the device" or when the entity "in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires access to the electronic device information." (Section 1546.1(c)(4),(6).) An "'[a]uthorized possessor'" is defined as the "possessor of an electronic device when that person is the owner of the device or has been authorized to possess the device by the owner of the device." (Section 1546(b).) However, CalECPA does not address who becomes an "authorized possessor" of a device when the owner dies.

The First District concluded that under the circumstances that occurred here, McKay's parents became, at the relevant time, "authorized possessors" of McKay's devices, and affirmed. McKay owned an electronic device, lived in the family residence with his parents, and died in his bedroom in the family residence. The only persons who then actually possessed, and could possess, the devices at the relevant time, were his parents. His electronic devices were on a nightstand next to his bed, and upon his death, he was no longer the possessor of the devices, but his parents had actual possession of the devices, and they knew the passcodes to access the devices. Given this, there was no authorized possessor of the devices besides McKay's parents after his death, and they

gave consent for law enforcement to access the devices. (See *In re Scott K.* (1979) 24 Cal.3d 395, 404 [under 4th Amend. principles, "[v]alid consent may come from the sole owner of property or from 'a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected,'" quoting *United States v. Matlock* (1974) 415 U.S. 164, 171].) Moreover, the trial court could reasonably conclude, given the totality of the circumstances, McKay, himself, had authorized his parents to access his devices and they could therefore consent to their search. Thus, there was no violation of CalECPA.

B. Ninth Circuit panel denied defendants' motion to recall the Circuit Court's mandate and to stay proceedings while seeking certiorari in Supreme Court, because it was entirely foreseeable that the mandate would issue, and jurisdiction would return to District Court.

Chinaryan v. City of L.A., 122 F.4th 823 (9th Cir. 2024)

Facts: In the August 2024 case of *Chinaryan v. City of Los Angeles*, 113 F.4th 888 (9th Cir. 2024),[1] the Ninth Circuit Court of Appeals reversed a District Court's grant of partial summary judgment based on qualified immunity to individual officers. In reaching its conclusion, the Court declared that precedent clearly established that officers can be held liable for conducting a high-risk vehicle stop based on nothing more than a reasonable suspicion that the vehicle was stolen. The Ninth Circuit issued a mandate remanding the case to the District Court "for a new trial on all of plaintiffs' claims against the individual officers." *Id.*, at 893.

After the issuance of the mandate, the parties stipulated to stay the proceedings in the District Court while defendants seek certiorari in the Supreme Court. The District Court denied relief, ruling that it "lacks power to issue the relief the parties request" because a stay would "deviate from the mandate." The District Court stated that "[i]f the parties wanted to keep this case in abeyance until the Supreme Court resolves a forthcoming petition for a writ of certiorari, they should have petitioned the circuit court to stay the mandate." Defendants then moved the Ninth Circuit Court to recall its mandate and stay the proceedings pending resolution of the anticipated Supreme Court proceedings. Plaintiffs did not oppose the requested relief.

Ruling: The Ninth Circuit Court of Appeals denied the motion. The Court of Appeals stated, "We have the inherent power to recall our mandate in order to protect the integrity of our processes, but should only do so in exceptional circumstances."[2] Recalling the mandate is a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Defendants argued that good cause existed to recall the mandate because if the District Court applied the Ninth Circuit's prior ruling, the case would proceed to trial. However, the Court of Appeals stated that it was entirely foreseeable that, absent a motion to stay the mandate, the mandate would issue, and jurisdiction would return to the District Court.

The Ninth Circuit stated that Defendants were free to seek a stay of the proceedings in the District

[1] See Client Alert Vol. 39 No.14 for more information on the Court of Appeals August 2024 ruling.
[2] *United States v. Lozoya*, 19 F.4th 1217, 1218 (9th Cir. 2021) (en banc) (quoting *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007)).

Court while they petitioned for writ of certiorari. See *Ellis v. U.S. Dist. Ct.*, 360 F.3d 1022, 1023 (9th Cir. 2004) (en banc). "The district court possesses 'inherent authority to stay federal proceedings pursuant to its docket management powers.'"[3] Although District Courts must faithfully carry out "both the letter and the spirit" of the Ninth Circuit's mandates, *Creech v. Tewalt*, 84 F.4th 777, 787 (9th Cir. 2023) (quoting *Vizcaino v. U.S. Dist. Ct.*, 173 F.3d 713, 719 (9th Cir. 1999)), "they are free as to anything not foreclosed by the mandate," *United States v. Perez*, 475 F.3d 1110, 1113 (9th Cir. 2007). The Ninth Circuit's mandate had remanded the case to the District Court "for a new trial on all of plaintiffs' claims against the individual officers." *Chinaryan v. City of Los Angeles*, 113 F.4th 888, 893 (9th Cir. 2024). However, the Court of Appeals then did not specify a time frame or otherwise suggest that the District Court lacked authority to stay the case. Thus, the Ninth Circuit left to the District Court to determine whether a stay pending a petition for writ of certiorari would be appropriate in this case.

C. Where officers spotted an unsecured gun in the back seat of defendant's car, *Terry* stop did not escalate into a "de facto" arrest without probable cause.

United States v. In, 124 F.4th 790 (9th Cir. 2024)

Facts: In March 2020, Las Vegas Metropolitan Police Department ("LVMPD") Enforcement Bike Squad Officers Haley Andersen, Daniel Diaz, and Timothy Nye engaged in a traffic stop on bicycle near the Las Vegas Strip. The officers saw a car with a taillight out and a California license plate parked illegally. Larry Seng In ("In") was seated in the driver's seat. While Officer Diaz asked In for identification at the driver's side window, Officer Anderson shined a flashlight and saw a gun on the backseat floor.

In was ordered out of the vehicle with his hands up. Officer Diaz, holding In's hands behind his back, asked whether there were weapons on In's person or in the vehicle. In said no to both. Officer Andersen asked if In had ever been arrested, and In said he had, in California for marijuana. Officer Diaz, handcuffing In, again asked about weapons in the vehicle and In again replied, "No." Asked why there was "a Glock back there," In said he had left the shooting range, though the officers noted he was in sandals. In finally admitted the gun was his. Officer Diaz read him his *Miranda* rights. When In asked if he was being arrested, Officer Diaz said no and asked if he could search the car. In allowed it, but the officers waited to obtain further information. The officers learned that In did not have a criminal history or active warrants in Nevada. Using a Triple I check (referring to a non-routine process used to obtain interstate history records), the officers confirmed that In had prior felony convictions in California. The officers then obtained a telephonic search warrant from a state court judge to search In's car and recovered the gun.

In was charged with being a felon in possession of a firearm. In moved to suppress the gun in District Court. He argued that the officers' actions, in particular their decision to handcuff him, escalated a valid *Terry* stop into an unlawful *de facto* arrest because the officers handcuffed him before they had probable cause to believe that he was prohibited from possessing the gun. A magistrate judge concluded that there was no *de facto* arrest without probable cause. The District

[3] *In re PG&E Corp. Sec. Litig.*, 100 F.4th 1076, 1085 (9th Cir. 2024) (quoting *Ernest Bock, LLC v. Steelman*, 76 F.4th 827, 842 (9th Cir. 2023)).

Court disagreed, granting In's motion to suppress. The United States ("Government") appealed.

Held: The Ninth Circuit Court of Appeals considered whether the traffic stop became a *de facto* arrest. The Fourth Amendment to the United States Constitution protects individuals from "unreasonable searches and seizures" by the government. U.S. Const. amend. IV. The Fourth Amendment permits "two categories of police seizures": (1) *Terry* stops, *i.e.*, "brief, investigative stop[s]" when police officers "have reasonable suspicion that the person apprehended is committing or has committed a criminal offense"; and (2) "full-scale arrests," which require probable cause at the time of arrest that the person being arrested has committed a crime. *Reynaga Hernandez v. Skinner*, 969 F.3d 930, 937-38 (9th Cir. 2020) (internal quotation marks omitted). "[A]t some point," an investigative stop "can no longer be justified as an investigative stop," and turns into an unconstitutional *de facto* arrest. *United States v. Sharpe*, 470 U.S. 675, 685 (1985).

To determine whether a *Terry* stop becomes a *de facto* arrest, courts consider the totality of the circumstances, including the "severity of the intrusion, the aggressiveness of the officer's actions, and the reasonableness of the officer's methods under the circumstances." *Reynaga Hernandez*, 969 F.3d at 940 (citing *Washington v. Lambert*, 98 F.3d 1181, 1188-89 (9th Cir. 1996)). When considering the reasonableness of the officer's methods under the circumstances, courts consider whether the officer had "sufficient basis to fear for his [or her] safety to warrant the intrusiveness of the action taken." *United States v. Edwards*, 761 F.3d 977, 981 (9th Cir. 2014).

Here, the Ninth Circuit found that handcuffing In, while more intrusive than a typical *Terry* stop, was reasonable under the circumstances. The Court explained that an unsecured gun was visible in the car and In lied twice about having the gun. His response reasonably raised the possibility that the stop could turn extremely dangerous due to the information gap that existed between the officers and In and the unsecured gun on the floor of the backseat of the car. *See Washington*, 98 F.3d at 1189. Moreover, the officers were on bicycles and the stop occurred close to a densely populated tourist area. Thus, handcuffing In protected both the officers and the public and did not amount to a *de facto* arrest without probable cause. Considering the totality of the circumstances, the Court of Appeals held that the traffic stop did not turn into a *de facto* arrest. The officers had a sufficient and reasonable basis to fear for their safety, justifying their decision to handcuff In so that their safety was assured during their investigation. The Ninth Circuit Court of Appeals accordingly reversed the lower court's order granting In's motion to suppress, and remanded for trial.

QUALIFIED IMMUNITY

A. Defendant police officers were afforded qualified immunity against excessive force claims advanced by protestors injured by tear gas and projectiles at a political rally.

Puente v. City of Phoenix, 2024 U.S. App. LEXIS 32202 (9th Cir. Dec. 19, 2024)

Facts: In August 2017, then-President Trump held a rally at the Phoenix Convention Center. In preparation for the rally, the Phoenix Police Department ("PPD") had designated two separate areas outside the convention center - one called the "Free Speech Zone," for protest-assembly

purposes where anti-Trump protesters were expected to gather; and the other called the "Public Safety Zone," which ran between the Free Speech Zone and the convention center itself and was intended for security purposes. In order to facilitate emergency vehicle and police access, the Public Safety Zone was closed to the public and was fenced off from the Free Speech Zone. After hours of largely peaceful protest in the Free Speech Zone, some political protestors began throwing objects at police. Later, suspected Antifa members and others in the crowd began aggressively pushing the fence separating the Free Speech Zone from the Public Safety Zone in an apparent attempt to breach it. Plaintiff Ira Yedlin, not a suspected Antifa member, was among the members of the crowd shaking the fence. PPD officers, without warning, fired pepper balls at the ground in front of the group, which caused the group to back away. Additional pepper balls were fired at individuals who did not disperse. Yedlin, who had initially retreated after the first volley, resumed shaking the fence within 11 seconds of his retreat, and at that point he was struck several times by pepper balls.

Individuals in the Free Speech Zone then began throwing rocks, water bottles, and other objects at an increasing rate as President Trump's motorcade left the convention center. Many in the crowd threw objects at PPD officers. Police deployed smoke, tear gas, and flash-bang grenades to disperse the crowd from the Free Speech Zone. PPD announced a declaration that the assembly was unlawful via a PPD helicopter using a public address system above the Free Speech Zone and a police vehicle near one corner of the Free Speech Zone. Plaintiff Cynthia Guillen was in the Free Speech Zone when smoke was used in front of the fence. As Guillen walked away, she was hit with a projectile. To clear those protesters remaining in the Free Speech Zone, officers formed a skirmish line and slowly marched towards them. Officers in the line used further non-lethal munitions against particular individuals continuing to throw objects or otherwise act aggressively. Plaintiff Janet Travis, who was recording the events from a position directly in front of the skirmish line, was hit by a projectile.

These individual Plaintiffs and others filed an action under 42 U.S.C. section 1983, alleging among other things that the PPD's actions in dispersing the crowd of protesters constituted excessive force under the Fourth Amendment. The District Court granted summary judgment to Defendants on all claims except for the individual Fourth Amendment excessive-force claims asserted by Plaintiffs Yedlin, Travis, and Guillen. The individual Defendant PPD officers against whom individual excessive-force claims were allowed to proceed filed an interlocutory appeal from the District Court's denial of qualified immunity.

Held: The Ninth Circuit Court of Appeals observed that the Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[4] The Court explained that government officials are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'"[5] "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'"[6] The Court observed that each of the three Plaintiffs Yedlin, Travis, and Guillen individually experienced a direct physical impact from a munition fired by a PPD

[4] See U.S. CONST. amend. IV.
[5] *District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018) (citation omitted).
[6] *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015)).

officer. The Ninth Circuit concluded that, based on the undisputed facts, the Defendant officers were entitled to qualified immunity because they acted reasonably under the circumstances or violated no clearly established law. The Ninth Circuit accordingly reversed the District Court's denial of summary judgment to the individual defendants as to the excessive-force damages claims asserted Yedlin, Travis and Guillen.

As to Yedlin, the Ninth Circuit explained that by returning and vigorously shaking the security fence separating the Free Speech Zone from the Public Safety Zone just seconds after the PPD had repelled an apparent attempt to breach it, Yedlin posed an immediate threat to the PPD's ability to maintain the security fence. This would present an immediate and substantial threat to the safety of the officers, members of the public, and potentially even the President's motorcade. Under the totality of the circumstances, the Court concluded that Defendants' use of intermediate force against Yedlin was a reasonable response that was commensurate to the PPD's strong interest in avoiding any breach of the fence. Consequently, Yedlin's constitutional rights were not violated.

The Court found that Travis was struck after she remained in the area disregarding the repeated announcement that an unlawful assembly had been declared and after multiple orders to disperse had been issued. Moreover, Travis chose to place herself directly in front of the advancing skirmish line between the officers and near the remaining crowd behind her, which was continually throwing objects at the officers. The Court stated that viewing all of the circumstances in context, the repeated applications of force made by the advancing officers, including the particular blast that impacted Travis, were reasonable measures to accomplish the PPD's substantial interests in public safety.[7] Moreover, Plaintiffs could not cite any case that could have "clearly establish[ed]"[8] that Defendants' use of force against Travis was objectively unreasonable.

Distinguishing *Nelson v. City of Davis*, 685 F.3d 867, 882 (9th Cir. 2012) (citation omitted)), the Court noted that in *Nelson* and unlike here, there was no objective indication of any "threatening or dangerous behavior" (*Id.* at 880-81) by the already confined and peaceful group of college partiers when officers there deployed projectile chemical tools. The Court found that *Nelson* did not involve the larger exigent public safety concerns that were present in the overall context of the case here.

As to the circumstances involving Guillen, the Court also concluded that *Nelson* was "materially distinguishable" in several respects and that it therefore did not clearly establish that the relevant Defendants' actions violated Guillen's rights. Although there was no apparent misconduct in Guillen's *immediate* area at the time that she was struck, she was not in a discretely separate zone from those down the block in the Free Speech Zone who were still engaged in such acts. Moreover, the officers were reasonably concerned about the possibility of troublemakers circulating anonymously within the larger crowd of protesters. Third, there had been (unlike *Nelson*) numerous objective indicia that the police were trying to clear the area.

[7] See *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994) (noting the distinctive public safety interests involved with responding to organized and concerted lawlessness).
[8] *Wesby*, *supra*, 583 U.S. at 63.

B. The use of deadly force by an officer was not objectively reasonable because the plaintiff did not brandish a knife, but rather held it to his own neck.

Singh v. City of Phoenix, 2024 U.S. App. LEXIS 32687 (9th Cir. Dec. 26, 2024)

Facts: In November 2019, Phoenix Police Department Officers Brittany Smith-Petersen and Annie Batway responded to a report of an attempted armed robbery at a Home Depot. Dispatch informed the officers, who were in separate patrol vehicles, that the suspect had a knife. The officers arrived in separate vehicles and saw Krish Singh walking through a neighboring parking lot, not chasing anyone. The officers pulled their vehicles up on both sides of Plaintiff, forming an L-shaped configuration around him. Smith-Petersen directed Singh to stop and to show both hands. Singh was holding a knife against his own throat. Smith-Petersen drew her firearm and yelled that if Singh came any closer, she would shoot him, and to drop the knife. Singh responded "I'm going to die anyway." Smith-Petersen stated that if Singh came any closer, she would kill him, and again told him to put down the knife. For the remainder of the encounter, he made several statements, including that people thought he was "crazy" and that he wanted Smith-Petersen to shoot him. At no point did Singh suggest that he intended to harm either of the officers or anyone else.

Approximately two minutes into the interaction, Singh slowly began moving toward Smith-Petersen. She moved backward, explaining that she did not want to shoot Singh. Singh expressed something like, "I want to get shot," as he continued to move towards her. Batway repeatedly told him to stop. Singh stated, "Go ahead ma'am," and continued to move slowly toward Smith-Petersen. Smith-Petersen fired a single round, striking Singh in the abdomen. He fell and dropped his knife. He survived his injuries. Both officers carried "OC spray"—similar to pepper spray—and a taser at the time of the incident

Singh sued the City of Phoenix, Smith-Petersen, and Batway. The District Court entered summary judgment for Smith-Petersen on Singh's claim of excessive force, brought under 42 U.S.C. section 1983, holding that she was protected by qualified immunity. Singh appealed.

Held: The Ninth Circuit Court of Appeals explained that to determine whether qualified immunity shields a police officer or other governmental official, courts ask two questions: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) if so, whether that right was "'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson v. Callahan,* 555 U.S. 223, 232 (2009) (citations omitted). If the answer to either question is "no," the officer prevails and is immune from suit. See *id.* at 236. The Ninth Circuit agreed with the District Court that Singh had established a plausible, even though not conclusive, constitutional violation at step one of the qualified-immunity analysis. On appeal, Singh challenged only the lower court's holding that there was no clearly established law that would have put Smith-Petersen on notice that her force was objectively unreasonable in the circumstances.

The Ninth Circuit disagreed with the lower court, stating that the facts in this case were "closely akin to those in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), which sufficed to put Smith-Petersen on notice." *Glenn* also involved a mentally disturbed individual who never brandished a weapon at anyone else, and only held a knife to his own neck before officers shot the

disturbed individual. There was no other person in the open parking lot besides Plaintiff and the officers, "so a jury could conclude that no one was close enough to [Plaintiff] to be harmed by him before police could intervene." *Id.* at 874. As in *Glenn*, a jury reasonably could conclude that the officers "could have moved farther away at any time, had they wanted to," undermining the notion that Plaintiff posed an immediate threat. *Id.* The Court stated that the officers in *Glenn* had more reason to fear for their safety than Smith-Petersen did here because the officers here arrived at a scene where a less serious crime was occurring than in *Glenn*. Yet the officers in *Glenn* first used less lethal force before eventually shooting and killing the disturbed individual. Here, there were genuine disputes of fact exist as to whether less intrusive means of force were available. As in *Glenn*, Singh did not actively resist arrest, despite his failing to comply with the officers' commands. In both cases, the officers "were or should have been aware that [the individual] was emotionally disturbed." *Id.* at 875. Here, the record strongly supported that Singh was suicidal. The Court noted that an otherwise clear warning may not be effective to a mentally disturbed individual like Singh. Although Singh heard and understood the officers' warnings, they had no effect on him given his mental state. The Court here thus stated, "[a]s in *Glenn*, no *effective* warning was given to [Singh]." Given these similarities, the Ninth Circuit concluded that precedent clearly established a constitutional rights violation and that qualified immunity did not apply.[9] The Ninth Circuit Court of Appeals accordingly reversed and remanded.

C. A reasonable officer would find that a suspect who held a stick-shaped object and refused to comply with commands to drop his weapon posed an immediate threat.

Napouk v. L.V. Metro. Police Dep't, 2024 U.S. App. LEXIS 31226 (9th Cir. Dec. 10, 2024)

Facts: Around or after midnight on October 27, 2018, Las Vegas Metropolitan Police Department ("LVMPD") Sergeant Buford Kenton and Officer Cameran Gunn responded to reports of a man walking around a residential neighborhood with a "slim jim," a "long stick," or "possibly a ... machete," behaving suspiciously and walking up to cars and houses and peering into windows.

After they arrived in the neighborhood, they encountered Lloyd Gerald Napouk. Both officers thought Napouk was holding a machete. Gunn activated his patrol car lights and parked his car right in front of Napouk, and Kenton parked behind Gunn. Gunn exited his car with his gun drawn and stood near the driver side door, immediately telling Napouk to "put it on the ground," and drop it. He asked Napouk what was in his hand and repeated his command to drop it. Kenton also exited his car, moved towards Napouk with his gun drawn, repeatedly asked Napouk what was in his hand, and told him to put it on the ground. Kenton also repeatedly commanded Napouk to remove the headphones from his ears while pointing to his own ears. Though they attempted to engage Napouk over several minutes, he refused to follow their commands and repeatedly advanced towards them with what they believed was a long, bladed weapon. Though the officers repeatedly retreated and shouted commands for Napouk to drop the perceived weapon, Napouk refused to comply and kept advancing. At a certain point, Kenton told Napouk "one more step and you're dead," to which Napouk responded, "I know" and continued advancing a final time with the

[9] The Court distinguished *Napouk v. L.V. Metro. Police Dep't* (discussed next), in which the decedent held a large object that appeared to the officers to be a machete and the decedent moved the object around and pointed it in various directions, whereas here the object was a small pocketknife held only to Singh's own neck.

weapon. When Napouk he came within nine feet of Sergeant Kenton, both officers fired their weapons, killing Napouk. Napouk's weapon turned out to be a plastic toy fashioned to appear as a blade. His toxicology report revealed that he had been high on methamphetamine.

Napouk's parents and estate sued LVMPD, Gunn, and Kenton, alleging excessive force in violation of the Fourth Amendment, among other things. The District Court granted summary judgment for Defendants, determining primarily that the officers' use of force was reasonable as a matter of law. Plaintiffs appealed.

Held: Regarding the excessive force claim, the Ninth Circuit Court of Appeals explained that qualified immunity protects government officials from suit unless "(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)).

The Ninth Circuit explained that under the first prong, courts must determine whether "the use of force is contrary to the Fourth Amendment's prohibition against unreasonable seizures" (*Wilkins v. City of Oakland*, 350 F.3d 949, 954 (9th Cir. 2003)), and consider "whether it would be objectively reasonable for the officer to believe that the amount of force employed was required by the situation he confronted." *Id.* The Supreme Court has stressed that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight….The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

The Ninth Circuit found that the totality of the circumstances based on the undisputed facts showed that Napouk posed an immediate threat to the officers at the moment they fired when Napouk came within 9 feet of Sergeant Kenton. The Court stated that no rational jury could find that the officers' mistake of fact as to Napouk's weapon, which objectively looked like a machete, was unreasonable.[10] Napouk repeatedly failed to comply with the officers' orders to drop his weapon and to stop moving, and advanced toward the officers with the weapon. The Court added that Napouk may have committed assault with a deadly weapon as the event unfolded by brandishing the object and refusing to respond to the officers' orders. The severity of this perceived crime and Napouk's active resistance also favored the officers. As a result, the Court concluded that it was reasonable for the officers to perceive Napouk posed an immediate threat to their physical safety. Accordingly, the officers' conduct did not violate the Fourth Amendment. The Ninth Circuit held that even if it did, they would still be entitled to qualified immunity because the Court determined that no clearly established law prohibited the officers' actions, as prior cases with similar facts were distinguishable. Accordingly, the Ninth Circuit Court of Appeals concluded that both officers were entitled to qualified immunity from the excessive force claim, and affirmed.

[10] Even the plaintiffs described the object in their complaint as a "toy sword wrapped in duct tape" and a "machete shaped instrument."

A dissenting judge stated that the majority erred by failing to evaluate the evidence in the light most favorable to the nonmoving party and by minimizing evidence that, when properly credited, created genuine disputes of material fact. The dissent maintained that a rational trier of fact could find that the officers' use of deadly force was objectively unreasonable because Napouk did not pose an imminent threat to the safety of the officers, he was not committing a crime or resisting arrest, and several non-lethal alternatives were available to contain the slowly unfolding encounter. The dissent argued that Ninth Circuit caselaw clearly established that police officers may not kill a suspect who does not pose an imminent threat to the safety of officers or bystanders, is not committing any crime or actively resisting arrest, and in which non-lethal alternatives are available to the officers.

EMPLOYMENT

Government Code section 3350, which prohibits public employers from discouraging union membership, is not facially unconstitutional because it regulates only government speech unprotected by the First Amendment.

Alliance Marc & Eva Stern Math & Sci. High Sch. v. Pub. Emp't Relations Bd., 2024 Cal. App. LEXIS 835 (2nd Dist. Dec. 26, 2024)

Facts: The 11 public charter schools (collectively, the "Schools") in this case are chartered by the Los Angeles Unified School District. Alliance College-Ready Public Schools ("Alliance CMO") is a nonprofit public benefit corporation that contracted with the Schools to act as a managing organization to provide certain services, including human resources and employee relations. In November 2021, Public Employment Relations Board ("PERB") issued a decision and order ("Order") finding that the Schools violated Section 3550 of the Prohibition on Public Employers Deterring or Discouraging Union Membership (Government Code sections 3550–3553) and ordered the Schools, their governing boards, and their representatives to cease and desist from doing so. As originally enacted and as applicable here, Section 3550 provided that "[a] public employer shall not deter or discourage public employees from becoming or remaining members of an employee organization."[11] PERB concluded that email communications by Alliance CMO, and by principals and assistant principals at eight of the Schools tended to influence School employees' decision whether to be represented by United Teachers Los Angeles ("UTLA"),[12] in violation of Section 3550. PERB also concluded the Schools could be held responsible for those violations.

The Schools filed a petition seeking to set aside PERB's Order. After the Second District Court of Appeal summarily denied the petition, the California Supreme Court reviewed and transferred the matter back to the Court of Appeal.

[11] Stats. 2017, ch. 567, section 1.

[12] UTLA, a real party in interest in this case, is an employee organization that had been organizing the Schools' educators, and, in May 2018, filed representation petitions seeking to represent employees at two of the Schools.

Held: The Schools argued in part that PERB's interpretation of Section 3550 was erroneous, and that Section 3550 violates free speech protections guaranteed under the federal and California Constitutions. PERB and UTLA contended that PERB's interpretation of Section 3550 was not clearly erroneous, and that the Court must defer to and uphold that interpretation. As to the Schools' constitutional claims, PERB and UTLA argued in part that the communications at issue constituted government speech unprotected by the First Amendment.

The Second District Court of Appeal observed that "it is settled that '[c]ourts generally defer to PERB's construction of labor law provisions within its jurisdiction. [Citations.]…We follow PERB's interpretation unless it is clearly erroneous. [Citation.]' [Citation.]." (*Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911-912.) The Court noted that PERB interpreted the words "deter or discourage" as used in Section 3550 to mean "to tend to influence an employee's free choice regarding whether or not to (1) authorize union representation, (2) become or remain a union member, or (3) commence or continue paying union dues or fees." (*Regents of the University of California* (2021) PERB Dec. No. 2755-H at p. 21.) The Second District concluded that PERB's interpretation of Section 3550 was not clearly erroneous because it was consistent with the statutory scheme governing labor organization rights of public employees, case authority and PERB decisional law applying those statutes, and the legislative history underlying Section 3550. Because PERB's interpretation of Section 3550 was not clearly erroneous, the Court deferred to and upheld that interpretation.

The Second District noted that the free speech clause of the First Amendment prohibits governmental entities and actors from "abridging the freedom of speech."[13] However, free speech guarantees under the federal and California constitutions do not apply to government speech. (*Pleasant Grove City v. Summum* (2009) 555 U.S. 460, 467; *Delano Farms Co. v. California Table Grape Com.* (2018) 4 Cal.5th 1204, 1210–1211, 1244.) "The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech." (*Pleasant Grove*, at p. 467.) The Court held that Section 3550 is not facially unconstitutional because it regulates only government speech. Moreover, Section 3550 was not unconstitutional as applied to the communications at issue.[14] The communications by School administrators and by Alliance CMO were made not as private citizens but pursuant to official and contractual duties as School administrators. Those communications accordingly were not private speech but government speech unprotected by constitutional free speech provisions. The Second District accordingly affirmed the Order.

MISCELLANEOUS

A. Police detective's lay opinion testimony identifying plaintiff as disguised robber in surveillance video was not "helpful" under Federal Rule of Evidence 701 because the

[13] California has a parallel provision to the First Amendment's free speech provision in article I, section 2 of the California Constitution, which states: "Every person may freely speak, write and publish his or her sentiments on all subjects … . A law may not restrain or abridge liberty of speech or press."

[14] The Court noted that although incorporated and operated as nonprofit public benefit corporations, the Schools were subject to Section 3550 because they each had declared themselves to be a "public school employer" under Education Code section 47611.5(b) and thereby agreed to the government-mandated obligations of public employers.

detective testified based on evidence already in front of the jury, without the requisite personal knowledge or experience supporting a more informed identification than the jury could make on its own.

United States v. Dorsey, 122 F.4th 850 (9th Cir. 2024)

Facts: In the fall of 2013, two disguised men using a firearm robbed a series of gas stations in the Los Angeles area. After targeting gas stations for two months, the men robbed a bank of over $55,000. Investigators, including Los Angeles Police Department Detective Christopher Marsden, discovered evidence connecting Dominic Dorsey to the robberies and to a second suspect, Reginald Bailey. Although security cameras recorded each of the robberies, the robbers' disguises prevented law enforcement from identifying them from the video, so investigators relied on other evidence to make the initial identification. Law enforcement arrested Dorsey and Bailey in June 2014.

At trial, Detective Marsden offered two types of opinions about the surveillance video, which he had pored over before trial. First, he opined about details that the jury might otherwise have missed, such as the characteristics of the robbers' shoes and the markings on the shoes. These opinions were grounded in the video itself and the detective's thorough out-of-court review of that video. The District Court admitted this narrative testimony under Federal Rule of Evidence 701. Second, Detective Marsden opined that the disguised robbers shown in the surveillance video were Dorsey and Bailey. These identification opinions rested on evidence already in front the jury: still images of the robbers and of Dorsey and Bailey, and the detective's own comparison of the details in those images. The District Court also admitted this identification testimony under Rule 701, despite objections from the defense. A jury convicted Dorsey of multiple federal crimes, and he was sentenced to prison. Dorsey appealed.

Held: Under Federal Rule of Evidence 701, a lay witness may offer testimony in the form of an opinion only if it is "helpful . . . to determining a fact in issue."[15] Such lay opinion must be based on the witness's personal knowledge or experience, rather than the "specialized" knowledge of an expert.[16] The Ninth Circuit Court of Appeals explained that when a law enforcement officer points out particulars in a video that are based on a close and repeated out-of-court review and that a casual observer would likely miss, the testimony is lay opinion because the officer is contributing to the jury's in-court perception of the video. *See United States v. Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015). Such lay opinion is admissible because a juror, without the benefit of the officer's thorough review, might overlook the details highlighted by the officer's testimony. Thus, the officer's out-of-court review of the video adds value beyond simply playing the video to the jury and may be helpful to determining a fact in issue.

Here, the Ninth Circuit observed that Detective Marsden's narrative testimony based on his extensive out-of-court review of the surveillance video allowed him to highlight salient, but minor, details that the jury might otherwise have missed. The Court thus found this testimony helped the jury to "discern correctly and efficiently" those details. *United States v. Begay*, 42 F.3d 486, 503 (9th Cir. 1994). It was therefore properly admitted under Rule 701.

[15] Fed. R. Evid. 701(b).
[16] Fed. R. Evid. 701(c).

However, the Court of Appeals concluded that the District Court erred by allowing the detective to opine that Dorsey and Bailey were the disguised robbers without having the personal knowledge or experience that would support a more informed identification than the jury could make on its own. These identification opinions were based on his assessment of still images from the robberies and pictures of Dorsey and Bailey that were in evidence before the jury. They did not meet "Rule 701's requirement of helpfulness," because the detective was not "more likely to identify correctly the [robbers] than [was] the jury." *United States v. LaPierre*, 998 F.2d 1460, 1465 (9th Cir. 1993). Instead, the detective merely "spoon-fed his interpretations" of the evidence to the jury.[17] Thus, the identification opinions should have been excluded. However, the Ninth Circuit Court of Appeals affirmed Dorsey's conviction because it held that the admissible evidence at trial and the District Court's instructions rendered the inadmissible testimony harmless.

B. An assault with a firearm can be committed with an unloaded gun by a defendant who has ammunition available and the means to load it immediately.

People v. Lattin, 107 Cal. App. 5th 596 (4th. Dist. 2024)

Facts: In April 2017, Stephen James Lattin yelled racial slurs, made threatening remarks, and waved an unloaded shotgun at four victims, two of whom were minors. He was charged with, inter alia, committing four counts of assault with a firearm. A jury convicted Lattin of one count of assault with a firearm and found true a gun enhancement allegation with respect to one victim. As to the remaining three counts, the jury convicted Lattin on the lesser-included misdemeanor offenses of simple assault. At trial, Lattin requested a pinpoint instruction that an assault with a deadly weapon is not committed by a person "pointing an unloaded gun ... with no effort or threat to use it as a baton" or "pointing an unloaded gun in a threatening manner" at another person. The trial court declined to give this instruction to the jury. On appeal, Lattin asserted that this was prejudicial error, and further claimed the evidence was insufficient on present ability to support his conviction for assault with a firearm.

Held: The California Fourth District Court of Appeal stated that Penal Code section 240 defines assault to be "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." "[T]he present ability element of assault … is satisfied when 'a defendant has attained the means and location to strike immediately.'" (*People v. Chance* (2008) 44 Cal.4th 1164, 1167–1168.) The Fourth District noted that as explained by the California Supreme Court, "[i]n this context … 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion." (*Id.* at p. 1168.)

On appeal, Lattin argued that a gun must be loaded to commit assault with a firearm unless it is used as a club or bludgeon. He asserted the present ability element of assault cannot be satisfied with an unloaded gun if the defendant is too far from the victim to inflict injury with the firearm as a club or bludgeon.

The Fourth District noted the facts here showed that there was sufficient evidence that ammunition

[17] *United States v. Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014) (quoting *United States v. Freeman*, 730 F.3d 590, 597 (6th Cir. 2013)).

was readily available to Lattin. The Court stated that it had not found a single case that considered facts like those presented here—where there was evidence a firearm was unloaded but ammunition was immediately available to the defendant for loading within seconds—and then specifically considered whether such facts could support a finding of present ability. The Court concluded there was no bright-line rule in California that, unless it is used as a club or bludgeon, a gun must be loaded for an assault to be committed. The Fourth District explained that proof that a firearm was unloaded can be a complete defense to charges of assault, but it is not a complete defense in all circumstances as a matter of law. The Court stated that if, as here, ammunition is readily available, it is a question for the jury whether a defendant with an unloaded gun possesses the means to load the gun and shoot immediately, or whether he is too many steps away from inflicting injury to have the present ability to commit assault.[18] The Court determined that any error was harmless because the jury had the instructions and information it needed to decide whether Lattin had the present ability to commit an assault even if the gun was not loaded. The Fourth District Court of Appeal accordingly affirmed the judgment with respect to all four convictions.

[18] In reaching this holding, the Fourth District acknowledged its disagreement with the Judicial Council of California Criminal Jury Instructions. One of the practice notes for CALCRIM No. 875, the model instruction for assault, states a "gun must be loaded unless used as [a] club or bludgeon" in order "to have [the] present ability to inflict injury." The Court of Appeal disagreed and suggested the note's authors reconsider it.