The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops; Stand Up For Our Country

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THIS EDITION'S WORDS OF WISDOM:

"*Doctors are saying that each piece of bacon you eat takes nine minutes off your life. Based on that math, I should have died in 1732*." (Unknown)

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CASE LAW:

***Fourth Amendment Searches of Vehicles*:**
***Using a Key in a Vehicle as a Fourth Amendment Search*:**
***Fourth Waiver Searches and the Probable Cause Requirement*:**

United States v Dixon **(9th Cir. Dec. 31, 2020) __ F.3rd __ [2020 U.S. App. LEXIS 40827]**

Rule: A Fourth Amendment search occurs when a law enforcement officer physically inserts a key into the lock of a vehicle for the purpose of determining a suspect's ownership of, or control over, that vehicle. Absent probable cause, such a search is unlawful. Before officers may conduct a warrantless search of a vehicle pursuant to a Fourth waiver condition, they must first have probable cause to believe that the defendant owns or controls the vehicle to be searched.

Facts: Defendant Howard Dixon—a convicted felon on federal "supervised release" with a Fourth waiver—was suspected by the San Francisco Police Department of being involved in an earlier shooting. SFPD Officer Edward Ochoa began surveilling defendant in January, 2018, observing him as he drove around a particular neighborhood near the Oakdale Apartments in several different vehicles—a black BMW and a blue Honda minivan—on different occasions. Although defendant reported to his federal probation officer that he lived at the Oakdale Apartments, Officer Ochoa was unaware of this, inexplicably failing to check with defendant's P.O. Other databases Ochoa did check listed other possible addresses for where he might be living. On March 9th, Officer Ochoa observed defendant at the Oakdale Apartments, exiting the building, reentering it, and then exiting it again; this time carrying two garbage bags and walking towards the Blue Honda minivan he'd been observed driving on prior occasions. Defendant was stopped and detained, prompting him to drop the garbage bags along with a set of keys. Using these keys, Officer Ochoa entered the apartment from where defendant had come. In the apartment was discovered illegal drugs and paraphernalia. Using the same keys, Officer Ochoa unlocked the Honda and searched it, finding a large bag of marijuana in a backpack. Defendant was transported to SFPD's Bayview Station where he was searched. Twenty-one baggies containing cocaine, heroin, and methamphetamine were recovered from his person. Indicted in federal court for possession with the intent to distribute heroin, cocaine, and methamphetamine, defendant filed a motion to suppress with written declarations in support of his arguments. The Government filed declarations in response. The federal district court judge ruled on the suppression motion without conducting an evidentiary hearing, relying solely on the opposing declarations. In defendant's declaration, he noted that there were two "sky blue" minivans parked side-by-side at the scene of his arrest—a fact that was confirmed by an officer's body camera—and that the officers first used the keys in an unsuccessful attempt to open one of the minivans that, as it turned out, belonged to someone else. The district court judge granted defendant's motion as to the search of the apartment, ruling that Officer Ochoa did not have the necessary "*probable cause*" (see Note, below) to believe defendant lived there (which, by the way, would not have been an issue had Officer Ochoa checked with defendant's probation officer first). The judge denied defendant's motion as to the search of the Honda, however, reasoning that under the Ninth Circuit's prior decision in *United States v. $109,179 in U.S. Currency* (9th Cir. 2000) 228 F.3rd 1080, the law was that the insertion of the key into the minivan's lock was not itself a search, and that possession of a key that fit the minivan's lock

amounted to probable cause to believe that defendant exercised control over that minivan. The trial court further held that this "intervening" lawful search of the Honda minivan, producing a large bag of marijuana, attenuated any taint from the apartment search, and therefore declined to suppress the evidence found on defendant's person when he was searched at the station. At trial, somehow the large bag of marijuana found in the Honda got mixed up with the suppressed evidence from the apartment, necessitating the exclusion of that evidence as well. The jury subsequently hung on the "intent to distribute" charges, convicting defendant only on the lesser included offense of simple possession. Sentenced to a year and 9 months in prison, defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. Recognizing that defendant was on federal supervised release, a condition of which was that he "submit to a search of his person, residence, office, vehicle, or any property under his control . . . at any time with or without suspicion," the Court noted that this was not the end of the inquiry. "(T)his authority is not limitless." In addition to having waived his right to warrantless searches "with or without suspicion, . . . the individual subject to (such a condition) must 'exhibit a sufficiently strong connection to [the property in question] to demonstrate "control" over it.'" As the trial judge had ruled relative to the apartment, the Government is required to prove by a preponderance of the evidence that the officers had "probable cause" to believe that the Honda minivan belonged to defendant, or at least that he had control over it. The trial court ruled that sticking defendant's key into the Honda's door lock, and finding that it did in deed unlock the door, supplied that necessary probable cause. *United States v. $109,179 in U.S. Currency*, *supra*, does in fact so hold. However, since the case of *$109,179 in U.S. Currency* was decided, the U.S. Supreme Court has broadened the grounds for arguing a Fourth Amendment violation from simply having one's "*expectation of privacy*" violated, to also including "*physical intrusions*" onto one's property; i.e., a "*trespassory search.*" (See *United States v. Jones* (2012) 565 U.S. 400, 404-405; and *Florida v. Jardines* (2013) 569 U.S. 1.) The Ninth Circuit ruled here that applying *Jones*'s "*property-based analysis*," a Fourth Amendment search occurs when an officer physically inserts a key into the lock of a vehicle for the purpose of obtaining information, as occurred here. The "information obtained" in this case was whether the Honda was defendant's or not. As with the apartment search, the Government must prove that prior to the search at issue (i.e., the insertion of the key into the door lock), and despite defendant's prior waiver of his search and seizure rights (i.e., the *Fourth* waiver"), the officers had "*probable cause*" to believe that the Honda was either defendant's car, or that he at least had control over it. This issue was not decided by the trial court, the matter having been decided based upon written declarations only. Therefore, the case was remanded back to the trial court with instructions to hold an evidentiary hearing (i.e., with live testimony) for the purpose of deciding whether, prior to Officer Ochoa inserting the key into the Honda's door lock, the officers had sufficient information to establish probable cause to believe that the Honda belonged to defendant, or that he had control over it.

Note: California case authority differs from this decision in at least two respects. First, California cases have held that even though sticking a key into a door lock is in fact a search, it is so minimally intrusive that it is not a Fourth Amendment violation to do so. See, for instance, *People v. Robinson* (2012) 208 Cal.App.4th 232, 246-255; "The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so small that the officers do not need probable cause; for the

search to be reasonable.'" (See also *United States v. Concepcion* (7th Cir. 1991) 942 F.2nd 1170, 1172.) On whether there is such a thing as a "*Minimal Intrusion Doctrine*," it must be noted here that the Ninth Circuit cheats a bit in holding that *United States v. $109,179 in U.S. Currency* stands for the proposition that sticking a key into a door lock is not a search, taking its quote for that proposition out of context. Looking at the quote from the case of *$109,179 in U.S. Currency* that the Ninth Circuit uses here, the Court quoted the decision (at pg. 1088) as saying "that 'inserting the key into the car door lock for the purpose of identifying [the claimant]' was not a Fourth Amendment search." What the Court *really* said in *$109,179 in U.S. Currency* was that it was not an "*unreasonable search*." In other words, the Court *did not* say that it wasn't a search at all, but only that as a search, it was not "*unreasonable*." Taking in context, the holding in *$109,179 in U.S. Currency* appears to be consistent with California's Minimal Intrusion Doctrine. Nowhere in the *Dixon* case here does the Court even mention the Minimal Intrusion Doctrine. Secondly, it is true that the Ninth Circuit's prior decisions have held that you need "*probable cause*" to believe the place to be searched belongs to the defendant, or at least that he has control over it. (E.g. see *Motley v. Parks* (9th Cir. 2005) 432 F.3rd 1072, 1080-1082.) "Probable cause" is how the Ninth Circuit defines the U.S. Supreme Court's use of the phrase "*reason to believe*," or "*reasonable belief*." (E.g., see *Payton v. New York* (1980) 445 U.S. 573.) California, on the other hand, has held in at least one case that only a "*reasonable suspicion*" is required. (*People v. Downey* (2011) 198 Cal.App.4th 652, 657-662; noting that at least five other federal circuits have ruled that something less than probable cause is required, and that the Ninth Circuit is a minority opinion on this issue.) But until this difference of opinion is revolved by the U.S. Supreme Court, you will be held to the higher standard of proof should your case be filed in federal court as opposed to state court.

***Booking Questions*:**
***Miranda, Juveniles, and Questions Re: Age and Birthdate*:**

In re J.W. **(Oct. 23, 2020) 56 Cal.App.5th 355**

Rule: A minor's responses to booking questions relative to the minor's age and date of birth are admissible in evidence despite the lack of a preceding *Miranda* admonishment and waiver, even when relevant to the elements of a pending criminal charge.

Facts: On November 15, 2019, sixteen-year-old defendant J.W. was observed by Los Angeles Police Department officers walking down the street, carrying a backpack. Defendant made eye contact with the officers and, as if to say; "*Hey, look at me; I'm doing something illegal*," panicked and took off running. The officers gave chase. Not knowing that case law says that "fight alone is insufficient to justify a detention" (*People v. Souza* (1994) 9 Cal.4th 224.), but that items discarded while in flight are admissible in evidence as "abandoned property" (*People v. Rodriguez* (2012) 207 Cal.App.4th 1540.), defendant tossed his backpack as he ran. After catching defendant attempting to hide in a laundromat, the officers retrieved the backpack. The backpack was found to contain a loaded semi-automatic handgun with one round in the chamber. As defendant was being handcuffed, he spontaneously told the officers that he was carrying the gun for protection. Taken to the police station, and while being booked (but before being *Mirandized*), defendant was asked for his age and date of birth, which he willingly provided. With a petition being filed in the Juvenile Court alleging a violation of Pen. Code § 29610

(minor in possession of a firearm), the officer was allowed (over defendant's objection) to testify to defendant's age and date-of-birth responses obtained during booking. The petition was sustained and defendant was placed at home on probation. Defendant appealed.

Held: The Second District Court of Appeal (Div. 2) affirmed. Defendant's argument on appeal was that his booking responses relative to his age and birthdate should have been suppressed, having been made in violation of *Miranda v. Arizona*, and that without this evidence, the Juvenile Court magistrate's true finding cannot stand. The Court of Appeal recognized that defendant's status as a minor is certainly an element of the offense of being a minor in possession of a firearm, per Pen. Code § 29610. The validity of the Juvenile Court's order sustaining the allegations against defendant, therefore, does in fact turn on whether *Miranda* bars admission of the statements he made during booking about his age and birthdate. The basic rules are well established. *Miranda* precludes the use in evidence of any incriminating statements made while the suspect is in custody and subjected to an interrogation by a law enforcement officer. *Miranda*'s protections apply to juveniles as well as adults. Defendant here—a minor—was certainly in custody, and his statements relative to his age and birthdate were in fact made in response to a law enforcement officer's questions. However, not all questioning is to be classified as an interrogation. When such questioning by law enforcement is, and when it is not, to be classified as an "interrogation," as this term is legally defined, depends upon the circumstances. To be subjected to an interrogation necessarily involves either (1) "express questioning," or (2) "any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) A recognized exception to the above involves what is sometimes referred to as "*booking questions*." Per the U.S. Supreme Court, a suspect's answers to express questions during the booking process regarding his or her "name, address, height, weight, eye color, *date of birth*, and *current age*" (italics in original) are not barred by *Miranda*, even though not preceded by the standard *Miranda* warnings. *(Pennsylvania. v. Muniz* (1990) 496 U.S. 582, 586, 601.) In this particular case (i.e. involving J.W), the Court had to wrestle with whether "the routine booking question exception to *Miranda* still appl(ies) when the questions posed—here, (defendant's) date of birth and current age—fall squarely within *Muniz*'s core definition of 'booking questions' but, on the facts of the specific case, are nevertheless 'reasonably likely to elicit an incriminating response from the suspect.'" Noting that there is a difference of opinion (i.e., a "split of authority") between the California Supreme Court (see *People v. Elizalde* (2015) 61 Cal.4th 523.) and the Ninth Circuit Court of Appeal (see *United States v. Henley* (9th Cir. 1993) 984 F.2nd 1040.), the Court sided with the former. *Elizalde* involved prison officials asking in-coming gangster inmates for their gang affiliation for purposes of determining where to house them, hoping to avoid gang-related issues within the prison. The gangster's response was often relevant and incriminating in his later prosecution in any gang case. Gang affiliation is *not* one of the the seven categories of "basic identifying biographical data" as set forth in *Muniz*, and is reasonably likely to elicit an incriminating answer. For this reason, a gangster's response to a gang affiliation question was held in *Elizalde* to constitute an exception to the "*booking questions*" exception as described in *Muniz*, and (absent a preceding *Miranda* admonishment and waiver) inadmissible in evidence. The Court in *Elizalde*, however, went on to hold that any of the seven *Muniz*-established categories *do* in fact fall within booking questions exception, making a defendant's responses to such questions admissible in evidence against him despite the lack of a *Miranda* admonishment and waiver.

The Ninth Circuit in *United States v. Henley* expressed a different point of view, holding that *any and all* questions asked during the booking process—even if those questions seek one or more of the seven categories of "basic identifying biographical data" enumerated in *Muniz*—are subject to exclusion under *Miranda* in any circumstance where "a police officer has reason to know that [the] suspect's answer may incriminate him." The Court here (in *In re J.W.*) decided to follow *Elizalde* for three reasons. First, California Supreme Court cases take precedence over Ninth Circuit cases when being reviewed by lower California courts. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2nd 450, 455–456.) Secondly, the Court agreed with *Elizalde*'s implicit conclusion that its approach is more consistent with the holding in the *Muniz* decision itself. And lastly, but perhaps most importantly, the Court found *Elizalde* to be more consistent with the rationale underlying *Miranda*; i.e., "creating prophylactic protections safeguarding a suspect's Fifth Amendment privilege against self-incrimination from the 'inherently compelling pressures' of (a) custodial interrogation." Under this rationale, for instance, "the Supreme Court has declined to apply *Miranda* in situations that 'do not implicate the concerns underlying *Miranda*' because 'the coercive atmosphere' of (a) custodial interrogation 'is lacking.'" (*Illinois v. Perkins* (1990) 496 U.S. 292, 296.) Also, *Miranda* has been found to be inapplicable "in situations in which competing concerns 'outweigh the need for' *Miranda*'s 'prophylactic rule' and the time consuming 'on-the-scene balancing process' it entails." (*New York v. Quarles* (1984) 467 U.S. 649, 657–658.) The responses to such booking questions as occurred here are only likely to be usable later in evidence in unusual circumstances; i.e., more "likely to be . . . insignificant in the scheme of things." Such booking questions also are not administered under circumstances where there exist "inherently compelling pressures" that might "compel (a suspect) to speak" when he or she might not otherwise have done so. On the other side of the coin, it is critical for law enforcement to know who it is admitting into custody in that statutes require law enforcement to treat juveniles different than adults. This responsibility is, of course, hindered when an arrestee's age cannot be determined. The bottom line to all this is that the Court here found the *Muniz*-established "*booking questions*" exception to the rule of *Miranda* to apply whenever a juvenile, during booking, is asked for his age and birthdate despite the fact that his answers may at some point be relevant to a prosecution on the pending charges. For these reasons, the Court held that the Juvenile Court magistrate did not err in admitting the officer's testimony regarding defendant's answers to the booking questions about his age and date of birth. With this evidence as part of the record, there was sufficient evidence to support the Juvenile Court's adjudication.

Note: Arguably, this same theory applies to adult cases as well, despite the fact that the important governmental interest of being able to determine that the person in custody is a minor does not exist. So until we get a case that says otherwise, I think we have to assume (at least in state court) that a suspect's responses to booking questions that fall into any of the seven *Muniz*-established categories (i.e., "name, address, height, weight, eye color, date of birth, and current age") come within booking questions exception and are therefore admissible in a later criminal case, even if directly relevant to an element of the charged offense. And then hopefully, the United States Supreme Court will someday tell us whether California (*People v. Elizalde*) or the Ninth Circuit (*United States v. Henley*, and other cases cited in the opinion) are correct. Given the Ninth Circuit's dismal track record of appeals heard by the United States Supreme Court, I like our chances.

***Use of Force and Civil Liability*:**
***Use of a Beanbag Shotgun*:**
***Kneeling on a Suspect's Back*:**

Cortesluna v. Leon **(9th Cir. Oct. 27, 2020) 979 F.3rd 645**

Rule: (1) The use of a beanbag shotgun on a suspect is constitutionally justified where it is believed that the suspect had just committed a dangerous crime, is armed with a knife, and fails to follow orders to keep his hands up and away from the knife in his pocket. (2) Kneeling on the back of a suspect prone on the ground in order to facilitate his handcuffing when the suspect is no longer resisting and complied with orders to lay on the ground, is constitutionally illegal.

Facts: Plaintiff Ramon Cortesluna had a drinking problem; getting violent and abusive with his live-in girlfriend and her two daughters (ages 12 and 15) when he drank. On the evening of November 6, 2016, he did just that, chasing his family into a back room with a chainsaw. Twelve-year-old I.R. called 911, telling the operator that they were all barricaded in a room because plaintiff was "always drinking," had "anger issues," was "really mad," and was breaking up the house with a chainsaw and was going to hurt them. I.R. further reported that her mother was holding the door closed to prevent plaintiff from entering and hurting them. I.R.'s older sister then came on the line, telling the operator that plaintiff was "sawing on the door knob" as they spoke. The 911 operator could hear a sawing sound as she talked to the two girls. This information was passed onto Union City police units in the area, resulting in five officers—including the eventual civil defendants; Officers Manuel Leon, Daniel Rivas-Villegas, Robert Kensic—responding to the scene. Upon their arrival, the officers found the house to be quite. But they could see plaintiff through a window, holding nothing more than a beer. Checking back with the dispatcher, she confirmed that the caller had reported plaintiff was using a chainsaw but acknowledged that "we can't hear [a chainsaw] over the phone," suggesting that he might have been using it "manually." The dispatcher further reported to the officers that during the 911 call, she heard sawing sounds in the background as if plaintiff were trying to saw the bedroom door down, and that the callers complained that they were unable to get out. As Officer Leon stood by, ready with a beanbag shotgun, Officer Rivas-Villegas knocked on the front door, identifying himself, and commanding plaintiff to come to the door. A few seconds later, plaintiff emerged from a nearby sliding glass door, holding a large metal object that looked like a crowbar (described in the dissent as a "pick tool"). Ordered to drop it, he did. Despite this compliance, Officer Leon announced that he was "going to hit him with less lethal" (i.e., his beanbag shotgun), while telling another officer to get out of his way. But before he could, Officer Rivas-Villegas ordered plaintiff to "come out, put your hands up, walk out towards me." Plaintiff put his hands up as ordered. Officer Rivas-Villegas then told plaintiff to "keep coming." Plaintiff complied, walking out of the house towards the officers. When plaintiff was about ten to eleven feet from the officers, Officer Rivas-Villegas told him "stop" and "get on your knees." Plaintiff stopped as ordered, but failed to drop to his knees. As plaintiff stood there, Officer Kensic observed a knife in the front left pocket of his sweatpants, announcing to the other officers that plaintiff had "a knife in his left pocket, knife in his pocket!" Officer Kensic then told plaintiff; "[D]on't, don't put your hands down," and "hands up." Plaintiff turned his head toward Officer

Kensic, who was on plaintiff's left side, (and away from Officer Leon, who was on plaintiff's right side) and ignored Officer Kensic's orders by simultaneously lowering his head and his hands. Officer Leon immediately shot plaintiff with a beanbag round from his shotgun, quickly firing a second beanbag shot as plaintiff's hands were still in a downward position near his belly where the first shot hit. The second shot hit plaintiff on the hip. Roughly two seconds elapsed between Officer Kensic's "hands up" order and the second shot. Despite being shot twice with successive beanbags, plaintiff again raised his hands over his head, and then, when ordered again, lowered himself to the ground. As he was doing so, Officer Rivas-Villegas used his foot to push plaintiff flat on the ground. Once down, Officer Rivas-Villegas pressed his knee into plaintiff's back and pulled his arms behind his back so that Officer Leon could handcuff him. Officer Rivas-Villegas then lifted plaintiff up by his handcuffed hands and moved him away from the doorway. Plaintiff's girlfriend and her two daughters were found safe and unharmed in the house. (Unknown if they ever found a chainsaw.) Plaintiff later filed a civil suit in federal court (per 42 U.S.C. § 1983) alleging that Officer Leon had used excessive force in shooting him with a beanbag shotgun, that Officer Rivas-Villegas had used excessive force when he kneeled on him while on the ground, and that Officer Kensic was also liable for having failed to intervene and stop the excessive force. As a result of the officers' actions, plaintiff claimed that he suffered physical, emotional, and economic injuries. The federal district (trial) court granted the civil defendants' (i.e., the officers) respective summary judgment motions, ruling that that the force used by Officers Leon and Rivas-Villegas was objectively reasonable under the circumstances and that they were entitled to qualified immunity. As for Officer Kensic, the court ruled that he had no reasonable opportunity to intervene and therefore could not be liable. Plaintiff Appealed.

Held: The Ninth Circuit Court of Appeals, in a severely splintered split decision (2-to-1), reversed in part and affirmed in part, remanding the case back to the trial court for further hearings. The rules are well established: Qualified immunity protects individual officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. In determining the availability of qualified immunity, a court is to employ a two-part analysis; (1) whether the facts taken in the light most favorable to the plaintiff show that the officer's conduct violated a constitutional right, and if so, (2) whether that right was clearly established at the time of the officer's actions, such that any reasonably well-trained officer would have known that his conduct was unlawful.

(1) *Use of the Beanbag Shotgun by Officer Leon*: Plaintiff argued that Officer Leon violated the Fourth Amendment by shooting him twice with a beanbag shotgun. A majority (2-to-1) of the Court disagreed, finding that the use of the beanbag shotgun under these circumstances was constitutionally reasonable. First, the Court noted that the use of beanbag shotguns is considered to be "less lethal" than the use of a standard firearm. Beanbag rounds are "potentially lethal at thirty feet and could be lethal at distances up to fifty feet." They are therefore "not to be deployed lightly." However, the use of a beanbag shotgun "is permissible only when a strong governmental interest compels the employment of such force." (*Deorle v. Rutherford* (9th Cir. 2001) 272 F.3rd 1272, 1279-1280.) In assessing the governmental interest, a court is to consider "(1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight." (*Glenn v. Washington County* (9th Cir. 2011) 673

F.3rd 864, 872.) Using these standards, a majority of the Court found Officer Leon's use of a beanbag shot gun to be reasonable. This was based upon the severity of plaintiff's crime (chasing after others with what was believed to be a chainsaw), he emerged from the house carrying a large metal object, he had a visible knife in his pants pocket, and while ignoring the officers' orders to keep his hand up, started to reach in the direction of that knife. This, per the majority of the Court, constituted reasonable grounds justifying the use of a less lethal beanbag shotgun in subduing plaintiff. (The dissent disagreed, feeling that plaintiff, as he was surrounded by five armed police officers, did not constitute a threat at that point. The dissenting Justice also noted that plaintiff's knife was positioned in his pocket with the blade facing up, making it unlikely plaintiff could readily use the knife to hurt anyone. Per the dissent; "A jury could instead easily find that Officer Leon was a trigger-happy member of the police force who literally 'jumped the gun' in a display of excessive force. This is amply shown by Officer Leon saying 'I'm going to hit him with less lethal' (the beanbag shotgun) even before (plaintiff) had emerged from the house.")

(2): *Officer Rivas-Villega Kneeling on Plaintiff's Back*: Plaintiff argued that Officer Rivas-Villegas violated his Fourth Amendment right to be free from excessive force by leaning too hard on his back, causing injury. On this issue, a majority of the Court (with a different justice dissenting) agreed. The Court first noted that although a knee on the back is a lesser personal intrusion than beanbag rounds, it still constitutes a meaningful personal intrusion when it causes injury. (Citing *LaLonde v. County of Riverside* (9th Cir. 2000) 204 F.3rd 947.) In this case, after noting that whether or not plaintiff actually suffered any injuries is irrelevant, the majority of the court held that Officer Rivas-Villegas was not entitled to summary judgment. Under the circumstances as alleged by plaintiff, it was evident that he was not resisting (if he ever did) by the time Officer Rivas-Villegas knelt down on his back. Per the Court, plaintiff no longer posed a risk once he was on the ground. Voluntarily lying face down, experiencing visible pain from having been shot by the two beanbag rounds, there was no apparent need for Officer Rivas-Villegas to kneel on him while he was handcuffed. Although the knife remained in plaintiff's pocket, from Officer Rivas-Villegas' perspective he should have been able to see that the knife was protruding blade-up such that it would not have been possible for plaintiff to grab it and attack the officers. Existing precedent (i.e., *LaLonde v. County of Riverside*) clearly established the rule that kneeling on a suspect's back when unnecessary constitutes a Fourth Amendment excessive force issue that needs to be resolved by a civil jury. This part of plaintiff's lawsuit was therefore remanded to the trial court for trial. (The dissenting opinion, in viewing a videotape taken from plaintiff's home security system, found the force used *not* to be excessive. In so finding, this Justice pointed out that Officer Rivas-Villegas did not "jump" on plaintiff's back or otherwise "drop" his knee on him, and that the disputed "kneeling" lasted no more than eight seconds while facilitating another officer in his efforts to put handcuffs on the plaintiff. The dissent did not find this to be unconstitutionally excessive.)

(3) *Officer Kensic's Civil Liability for not Intervening*: Plaintiff argued that Officer Kensic violated his constitutional rights by failing to intervene in an effort to prevent the alleged excessive force employed by Officers Leon and Rivas-Villegas. The trial court held, however, that there was no evidence that Officer Kensic knew in advance what the other officers would do, and did not have the opportunity to intervene as the alleged excessive force acts occurred, in that the events unfolded very rapidly; i.e., in a matter of seconds. The entire panel of the Ninth Circuit agreed, upholding that trial court's granting of summary judgment in Officer Kensic's favor.

Note: I don't often brief Ninth Circuit civil cases dealing with excessive force claims in that at best, all they typically say is that there either is, or is not, enough evidence to submit to a jury. That in itself might be helpful except for the fact, as evidenced by this case, that the individual Ninth Circuit justices are seldom consistent in their conclusions. But there's not a lot out there on the use of "less lethal" beanbag shotguns, so I thought briefing a case on this issue would be helpful. If you, as a law enforcement officer, have available to you beanbag shotguns, it would be nice to know when you can lawfully use them. Given the split of opinion on Officer Leon's use of the beanbag shogun in this case kind of shows you where the courts might draw the line. If it's still unclear to you where that line might be (as it is to me), think about restricting the use of beanbag shotguns to those instances where actually shooting and killing the suspect would have been lawful. (E.g., see P.C. § 835a(a)(2): "(*O*)*nly when necessary in defense of human life*." See also subds. (b) & (c) of P.C. § 835a.) *My own opinion* (*if you care*): I think Officer Leon overreacted and that shooting the plaintiff under the circumstances present here was unnecessary, or at least a little premature. A squirt of pepper spray would have accomplished the same thing and eliminated the possibility of causing serious injury. As for the *kneeling-on-the-back* issue, I again would have sided with the minority opinion; i.e., that there is nothing constitutionally wrong with kneeling on a subject's back for a minimal amount of time (eight seconds here) in order to facilitate the often difficult task of handcuffing a suspect, so long as not done in a brutal or unnecessarily violent manner. I do note that plaintiff claimed he was injured in the process; a claim that has yet to be proved. If he was injured, then Officer Rivas-Villegas's act of kneeing on plaintiff's back may have been more forceful than this decision reflects. But as we've seen by recent events (e.g., the May 25, 2020, killing of (five-time felon, career criminal, drug-abusing) George Floyd by asphyxiation in Minnesota), kneeling on a suspect's *neck* (as opposed to his back) for some *eight minutes and 46 seconds* is clearly (in my opinion) excessive, at least if done on a non-resisting suspect. *Please hold your cards and letters*! I'm in no way saying that killing Floyd was justified just because he may have been someone of questionable character. But I also don't presume to prejudge (now former) Officer Derek Chauvin's potential criminal liability in killing Floyd. We'll have to wait and see how the evidence turns out at Chauvin's trial before judging any of the players in this incident.

***P.C. § 69(a) vs. P.C. § 148(a)(1); Resisting Arrest*:**

People v. Kruse **(Oct. 30, 2020) 56 Cal.App.5th 1034**

Rule: Whether or not P.C. § 148(a)(1) (resisting arrest) is a lesser included offense of P.C. § 69(a) (resisting an executive officer) depends upon under which theory the defendant is prosecuted; attempted resistance (no) or actual resistance (yes).

Facts: Defendant Cody Ashton Kruse was dating Heather Koetter in September, 2019, when he went to visit her at her Escondido apartment. Koetter already had several friends over, including Samantha Howell. At some point, defendant and Koetter got into an argument over defendant exchanging text messages and talking with another girl. Koetter asked defendant to leave, which he did. However, he returned 20 minutes later because he'd forgotten his cellphone and backpack. Things started to deteriorate when Koetter refused to let defendant back into the apartment to get his belongings. At Howell's insistence, Koetter eventually relented and opened

the door. Rather than just take his stuff and leave, however, defendant pushed his way in and sat down on the couch. The situation now degraded into Koetter yelling and screaming at defendant, attempting to physically pull him off the couch, and punching on him. As Koetter got more and more angry, and more and more physical, defendant merely sat there and laughed, telling Koetter he wasn't going anywhere. After about an hour of this, defendant went into Koetter's bedroom where her seven-year-old daughter was sleeping and locked the door. After some period of time, with Koetter yelling and pounding on the bedroom door, defendant finally came out. At this point, Howell got involved, getting in defendant's face and calling him a "little bitch." Defendant started to lose his cool. While standing "nose to nose" with Howell, defendant angrily told her he was going to put a bullet through her brain and kill her. Howell later testified that defendant's threat scared her because she knew he had a criminal record and he had told her earlier that evening that he had a trial going on involving a murder. She later testified that she felt defendant was the type of person who was capable of following through with his threat. At this point, neighbors finally called the police. Escondido Police Department officers responded. After a quick interview of the participants, the officers arrested Koetter on a misdemeanor domestic violence charge for having battered defendant. Defendant himself was detained, handcuffed, and led out of the apartment, during which time (foretelling things to come) he was uncooperative, yelling and screaming at the officers, and bragging about getting only six months in jail for having committed a murder. Upon determining that Koetter was the aggressor in the preceding argument, defendant was given his backpack and told to leave. When Howell saw this, she confronted defendant, yelling at him in the presence of the officers (and as recorded on an officer's bodycam): "You're the one who threatened to put a bullet in my brain, you know? You're the one who threatened us." Hearing this, one of the officers started asking questions about the confrontation between Howell and defendant. Howell told the officer that defendant's threat made her immediately fear for her safety, that she was afraid of him because he told her he was involved in a murder case, and she believed that he hung out with people who had guns and that he might have guns as well and could readily carry out his threat. Determining that this new information constituted probable cause to charge defendant with making a criminal threat (per P.C. § 422), Officer Danny Armenta caught up with defendant as he was walking away and detained him. Asked for permission to search his backpack, defendant consented. A small amount of methamphetamine was recovered. So defendant was arrested, handcuffed, and put into the back seat of a patrol car. (*You can't make this stuff up*.) On the way to the police station, defendant became very agitated and uncooperative, challenging Officer Armenta to fight. Defendant's increasing combativeness caused Officer Armenta to have to call for backup to assist in moving him from the patrol car to a holding cell at the police station. And then, after the paperwork was done, and with defendant still refusing to cooperate as he continued to issue challenges to fight, assistance had to be called in order to move him from the holding cell and back into the patrol car for transportation to jail. Officer Armenta later testified that defendant's demeanor inside the holding cell was angry, very agitated, confrontational, and combative, and that his repeated challenges to a fight deterred him from performing his duty to place defendant in handcuffs and transport him to the Vista Detention Facility for booking. Defendant was subsequently charged in state court with making a criminal threat to Howell (P.C. § 422), attempting to deter or prevent an executive officer from the lawful performance of his duties by means of violence or threat of violence (P.C. § 69(a)), and possession of a controlled substance (H&S Code § 11377(a)). Convicted on all counts by a jury, he was thereafter sentenced to three years and eight months in state prison. He appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. The only issue on appeal was the trial court's refusal to instruct the jury on the elements of Penal Code § 148(a)(1); resisting arrest, as a "lesser included" (or, in the alternative, a "lesser related") offense of the charged offense of Penal Code § 69; attempting to deter or prevent an executive officer from lawful performance of his duties by means of violence or threat of violence. Subdivision (a) of P.C. § 69 provides as follows:

> "Every person who *attempts*, by means of any threat or violence, to deter or prevent an executive officer (i.e., a police officer; see *People v. Buice* (1964) 230 Cal.App.2nd 324, 335.) from performing any duty imposed upon the officer by law, *or* who knowingly resists, by the use of force or violence, the officer, in the performance of his or her duty (is guilty of a felony/wobbler)." (Italics and citation added.)

In contrast, P.C. § 148(a)(1) provides:

> "Every person who willfully resists, delays, or obstructs any public officer, peace officer, . . . in the discharge or attempt to discharge any duty of his or her office or employment, when no other punishment is prescribed, (is guilty of a straight misdemeanor)."

Defendant wanted a lesser included instruction so that the jury would have the alternative of convicting him of a misdemeanor only, instead of a felony P.C. § 69. The Court first noted that a trial court is required "sua sponte" (on its own initiative) to instruct a jury on any lesser offense "necessarily included" in the charged offense, so long as there is substantial evidence that the lesser crime was committed. A lesser offense is necessarily included in a greater offense whenever you cannot commit the greater offense without having also committed the lesser offense; i.e., the greater offense necessarily includes all the elements of the lesser offense, plus more. Looking at the elements of Pen. Code § 69, the Court noted that a violation of this crime can be committed in either or both of two ways; (1) by *attempting* by means of any threat or violence, to deter or prevent an executive officer from performing his or her duties, *or* (2) by *actually* resisting, by the use of force or violence, the officer in the performance of his or her duties. Looking at the elements of Pen. Code § 148(a)(1), the Court held that this section is a lesser included offense of the second alternative only, both sections including an element of *actual resistance*. The prosecution in this case sought to prosecute defendant under the first alternative (i.e., *attempting to resist*) only, having asked to instruct the jury accordingly (See CALCRIM 2651), while rejecting an instruction as to the second alternative (i.e., *actually resisting*) CALCRIM 2652). P.C. § 148(a)(1) includes as an element the act of *actual resistance*. As such, it is not a lesser included offense of the version of P.C. § 69 advanced by the prosecution. The trial court, therefore, did not err by refusing to instruct the jury on the lesser included offense of P.C. § 148(a)(1).

Note: The Court included two cases as authority for its conclusions here: The California Supreme Court at *People v. Smith* (2013) 57 Cal.4th 232, and a federal district court decision at *Lewis v. Arnold* (C.D.Cal., Oct. 17, 2019) 2019 U.S. Dist. LEXIS 202476. So it's really pretty clear-cut law. But I briefed it anyway mostly because I've always wondered how P.C. § 69(a) differs from P.C. § 148(a)(1) and thought this case might tell me. It didn't. Recognizing that we

can always charge a misdemeanor *attempted* resisting as a P.C. §§ 664/148(a)(1), I still don't know how we decide to charge one over the other except that we should probably reserve the felony section 69(a) for the more serious cases. When I was a cop, we generally used section 148 absent any evidence that we came out of the altercation either bleeding, bruised, or otherwise broken in some way. Here, defendant probably deserved the greater offense given the severity of his threats and the difficulties his persistent resistance caused over an extended period of time.