The California Legal Update

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

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net
www.legalupdatesonline.com®
www.legalupdates.com
www.cacrimenews.com

THIS EDITION'S WORDS OF WISDOM:

"*When you do squats, are your knees supposed to sound like a goat chewing on an aluminum can stuffed with celery*?"

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Second Amendment Update*; *Open Carry of Firearms: In a *lengthy* (127-page) split (7-to-4) opinion, an en banc (11 justice) panel of the Ninth Circuit Court of Appeals reversed its earlier three-judge opinion (at 896 F.3rd 1044 [9th Cir. July 24, 2018]; see ***California Legal Update***, Vol. 23 #9, July 29, 2018.) and upheld the constitutionality of a Hawaii "open carry" statute (**Hawai'i Revised Statutes § 134-9(a)**). (***Young v. Hawaii*** (9th Cir. Mar. 24, 2021) __ F.3rd __ [2021 U.S.App. LEXIS 8571].) The statute in issue requires its residents seeking a license to "*openly carry*" firearms in public to meet certain requirements. Specifically, an applicant for such a permit must (1) demonstrate "the urgency or the need" to carry a firearm, (2) be of good moral character, and (3) be "engaged in the protection of life and property." In this case, appellant George Young had applied for a firearm open-carry license relying simply upon his general desire to carry a firearm for self-defense. The state denied his application, telling him that he had failed to show an "urgency or . . . need." Filing suit in federal court, and arguing that Hawaii's statute violated the **Second Amendment** (as well as the **Fourteenth Amendment's due process clause**; an argument the Court rejected as "premature" and not currently in issue), the district court disagreed with Young and upheld the constitutionality of the statute; a decision that was affirmed here. This case follows the Ninth Circuit's earlier en banc decision of ***Peruta v. County of San Diego*** (9th Cir 2016) 824 F.3rd 919, where it was held that the **Second Amendment** does *not* protect one's right to carry a *concealed* firearm (a felony under California law, per **P.C. § 25400**.). California also has an "open carry" statute, of sorts, making it a felony to carry "a loaded firearm on the person or in a vehicle "while in any public place or on any public street in an incorporated city or . . . in a prohibited area of an unincorporated territory," whether done so openly or not. (See **P.C. § 25850(a)**, noting that this section is limited to "loaded" firearms, and does not make illegal the open carrying of firearms in any non-incorporated, non-prohibited, rural areas.) This new case out of Hawaii can be argued as authority for upholding the constitutionality of **section 25850**, supporting prior California case law to that effect. (See ***People v. Villa*** (2009) 178 Cal.App.4th 443; and ***People v. Flores*** (2008) 169 Cal.App.4th 568.) So if you're a **Second Amendment** advocate, and think you should be able to openly carry a firearm anywhere you want, you're on the losing end of this debate. (See also ***District of Columbia v. Heller*** (2008) 554 U.S. 570, and ***McDonald v. City of Chicago*** (2010) 561 U.S. 742, for the U.S. Supreme Court's discussions on your **Second Amendment** rights and its limitations.) But the issue raised in this new decision is certainly ripe for appeal to the U.S. Supreme Court where a more conservative Court (at least until President Biden "packs" it with more liberal

justices) might just turn this all on its head. So stay tuned. We haven't heard the last of this argument yet.

***California's Bail System*:** In the recent California Supreme Court case of *In re Humphrey* (Mar. 25, 2021) 11 Cal.5th 135, a unanimous Court determined that California's bail system, as currently set up, violates the **California Constitution**. Specifically, the Court found a disparity in the system where a wealthy person might secure a bail release in a case threatening public safety, while a poor person might remain in custody even though he poses no risk at all. The Court concluded that in order for the bail system to comply with the **California Constitution**, a criminal suspect's pretrial detention must be prohibited as a means of combating an arrestee's risk of flight unless the court first finds, based upon "*clear and convincing evidence*," that no other condition or conditions of release can reasonably assure the arrestee's appearance in court. The common practice of conditioning freedom solely on whether an arrestee can afford bail is unconstitutional. Other conditions of release, such as electronic monitoring, supervision by pretrial services, community housing or shelter, stay-away orders, and drug and alcohol testing and treatment, may often prove sufficient to protect the community. The Court further held that where a financial condition is nonetheless necessary, the court must take into consideration the arrestee's ability to pay the stated amount of bail, and may not effectively detain the arrestee *solely* because the arrestee lacked the resources to post bail. *My thoughts*: In today's pro-defendant (ignoring the plight of the victim) political climate, I tend to question any such reform coming out of either the Legislature *or* the court system. But to be fair, you have to admit that there is something wrong with requiring a non-violent pretrial detainee, when not a flight risk but without financial resources, to merely languish in jail while awaiting trial, while a similarly situated rich kid from La Jolla gets to go home solely because he can afford to buy his way out of jail. So maybe the Court has a valid point in deciding *In re Humphrey*. We'll just have to wait and see what changes are made and how well it works in the real world.

CASE LAW:

***State Officers' Civil Liability under 42 U.S.C. § 1983*:**
***An Arrest as a Fourth Amendment Seizure of the Person*:**
***Seizure of a Person Through the Use of Force*:**
***Physical Force Used Against an Escapee with the Intent to Restrain*:**

Torres v. Madrid **(Mar. 25, 2021) __ U.S. __ [141 S.Ct. 989; 209 L.Ed.2nd 190]**

Rule: The application of physical force by a police officer to the body of a person with the intent to restrain her constitutes a Fourth Amendment seizure, even if the person does not submit and is not subdued. This includes the situation where, despite a police officer's use of force by shooting and wounding the person, she escapes.

Facts: On July 15, 2014, four New Mexico State Police Officers, including Officers Janice Madrid and Richard Williamson, went to an apartment complex in Albuquerque to execute an arrest warrant for a specific woman. Instead, they came across two other people standing near a car in the parking lot. As the officers approached them, one of them walked away while the other—plaintiff Roxanne Torres in this lawsuit—got into a car and prepared to drive away. According to plaintiff's version of the facts, she didn't notice the officers until one of them tried to open the door to her car. Despite the officers wearing tactical vests identifying themselves as police officers, plaintiff claimed that she only saw their guns. The fact that—as she later admitted—she was "*tripping out bad*" on methamphetamine, might have had something to do with her alleged confusion. Thinking they were carjackers trying to steal her car, and later claiming that none of the apparent "car jackers" were in her way, she "hit the gas" in an attempt to escape. After unsuccessfully ordering her to stop, Officers Madrid and Williamson (who later testified that they feared they were about to be struck by plaintiff's car) opened fire on her fleeing car, striking her twice (out of thirteen rounds fired) in the back, temporarily paralyzing her left arm. Steering one-handed, she accelerated through the fusillade of bullets, past the officers, over a curb, across some landscaping, and into the street, eventually colliding with another vehicle. She made it to another parking lot a short distance away where she claims to have reported to a bystander that she was the victim of an attempted carjacking. By coincidence, someone had left a Kia Soul in that parking lot with the engine running. Seizing the opportunity, plaintiff stole the Kia and drove to a hospital in Grants, New Mexico, some 75 miles away. As noted by the Court, that was the good news, at least for her. The bad news was that the hospital airlifted her back to another hospital in Albuquerque where, the next day, she was arrested by the police. Charged in state court, plaintiff plead "no contest" to an assortment of charges. Two years later, she filed a lawsuit in federal court pursuant to 42 U.S.C. § 1983 (which provides a cause of action for the deprivation of constitutional rights by persons acting under color of state law), alleging the use of unreasonable excessive force in attempting to arrest her; a violation of her Fourth Amendment rights. The federal district (i.e., trial) court granted summary judgment to the officers (thus, dismissing the lawsuit) and the 10th Circuit Court of Appeals affirmed (see *Torres v. Madrid* (10th Cir. 2019) 769 Fed.Appx. 654.) on the ground that "a suspect's continued flight after being shot by police officers negates a Fourth Amendment excessive-force claim." The reasoning behind this decision is case law precedent (e.g., see *Brooks v. Gaenzle* (10th Cir. 2010) 614 F. 3rd 1213, 1223.) holding that "no seizure can occur unless there is physical touch or a show of authority," and that "such physical touch (or force) must terminate the suspect's movement" or otherwise give rise to physical control over the suspect. In other words, a "Fourth Amendment 'seizure' occurs only when the government obtains 'physical control' over a person or object." The plaintiff appealed to the U.S. Supreme Court which granted certiorari.

Held: The United State Supreme Court, in a split 6-to-3 decision, reversed. The issue on appeal was whether plaintiff was "*seized*" when she was shot by the New Mexico officers, even though she eluded capture at the time and wasn't taken into physical custody until the next day. This is important because it is a rule of law that unless "*seized*," she has no cause of action against the officers for an unreasonable seizure through their use of force, as the federal 10th Circuit Court of Appeal had ruled in this case. The law on this issue is complicated. It is clear that when arrested, a person is seized for Fourth Amendment purposes. Quoting the landmark case decision of *California v. Hodari D.* (1991) 499 U.S. 621, at p. 626, it was noted that "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of

authority." The majority decision here interpreted *Hodari D.* to articulate two pertinent principles. "First, common law arrests are Fourth Amendment seizures. And second, the common law considered the application of force to the body of a person with intent to restrain to be an arrest, no matter whether the arrestee escaped." Still quoting from, and interpreting *Hodari D.*, the Court noted that "[t]he word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." Taking a leisurely trip through the early Common Law as it developed throughout history, while tossing in a couple of dictionary definitions, the Court expressed several conclusions here. First, when a person is arrested, he (or she) has been "seized." "(T)he arrest of a person is quintessentially a seizure." (Quoting *Payton* v. *New York* (1980) 445 U.S. 573, 585.) Secondly, however, taking it a step further; "a corporal touch is sufficient to constitute an arrest, even though the defendant do(es) not submit." (Referred to as the "*mere touch rule*.") Noting that in this case, the officers never physically touched the plaintiff, the Court had no problem (despite the lack of any case law precedent) extending this theory to a touching accomplished by shooting her; i.e., "*an application of force from a distance*." Thus, when plaintiff was shot by Officers Madrid and Williamson, she was "*seized*" for Fourth Amendment purposes despite her subsequent escape (noting the difference between seizures by *force* and seizures by *control*). Because she had been seized through the use of force, plaintiff has the statutory right (i.e., 42 U.S.C. § 1983) to challenge the reasonableness of the force used "by persons acting under color of state law." The Court placed a couple of restrictions on this new theory. First, "(a) seizure requires the use of force *with intent to restrain*. Accidental force will not qualify." Secondly, it was held that "only force used to apprehend" qualifies, and not "force intentionally applied for some other purpose." The Court declined to decide whether force applied by some means other than shooting the suspect is to be included, such as in the use of "pepper spray, flash-bang grenades, lasers, and more." It was also noted that the test is whether an officer's challenged conduct "*objectively*" manifests an intent to restrain, finding neither the officer's subjective intentions, nor the suspect's subjective perceptions, to be relevant. And lastly, the Court held that the "intent to restrain, a seizure by force—absent submission—lasts only as long as the application of the force." This new theory, in other words, does not recognize any "*continuing arrest during the period of fugitivity*." Taking into account all these rules, the Court's majority here determined that when the officers shot plaintiff, they applied physical force to her body while objectively manifesting an intent to restrain her from driving away. Therefore, the officers seized plaintiff in that instant when the bullets struck her, thus kicking in the protections of the Fourth Amendment and allowing for a 42 U.S.C § 1983 lawsuit. Thus, the granting of the civil defendants' summary judgment motion was error.

Note: I sometimes get the feeling that appellate courts in general often have a preferred result in mind from the very start. A court will then play word games with us, juggling what they consider to be the relevant case law ("*tiptoeing through the tulips*," if you will), all in a sometimes strained attempt to reach, and justify, the desired result. The longer the printed discussion, the more likely this is true. The majority decision here is some 21 pages long. What does that tell you? And then the dissent is another 37 pages (not counting the footnotes) as three justices argue that the majority decision is "as mistaken as it is novel." 42 U.S.C § 1983 allows a person to sue a state law enforcment officer in federal court only when the officer is alleged to have violated the plaintiff's constitutional rights under color of "*state law*." The Court was faced here with the problem of providing Roxanne Torres with some means of testing the

constitutionality of the force used by the officers. Because the Fourth Amendment only protects us from unreasonable *searches and seizures*, the Court couldn't do that unless it could be argued that shooting her was in fact a "*seizure*," however brief. Had Officers Madrid and Williamson shot Torres in an off-duty barroom brawl, for instance, 42 U.S.C. § 1983 would not have applied, leaving Torres to whatever redress state law might provide. But shooting her in an attempt to arrest (i.e., "seize") her as a function of their official duties as state cops, kicks in the protections of the Fourth Amendment as well as 42 U.S.C. § 1983. That's the result the Supreme Court wanted to reach. Thus, this long, complicated, and somewhat strained decision.

***Federal Officers' Civil Liability under a Bivens Action*:**
***Fourth Amendment Use of Force and a Bivens Action*:**
***Fifth Amendment Retaliation and a Bivens Action*:**

Boule v. Egbert **(9th Cir. Nov. 20, 2020) 980 F.3rd 1309**

Rule: The U.S. Supreme Court case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* provides a non-statutory civil remedy to a U.S. citizen who alleges that a border patrol agent violated the Fourth Amendment by using excessive force while carrying out official duties within the United States. *Bivens* also provides a remedy for a violation of the First Amendment when a border patrol agent engages in retaliation entirely unconnected to his official duties.

Facts: Plaintiff Robert Boule—a U.S. Citizen—owns, operates, and lives in a small bed and breakfast inn in Blaine, Washington. His property backs up right to the U.S.-Canadian border. On March 20, 2014, he was expecting a guest who, although flying in from New York, was originally from Turkey. While Plaintiff was running errands in town, Customs and Border Patrol Agent Erik Egbert contacted him and asked him about guests staying at his inn. Plaintiff told him about the Turkish guest who, at that moment, was being picked up by an employee of the inn at the Seattle-Tacoma International Airport, some 125 miles south of Blaine. Interested in checking this new guest out, Agent Egbert stationed himself at the entrance to the inn, waiting for him to arrive. When he did, Agent Egbert followed the car up plaintiff's driveway and attempted to contact the Turkish guest. Plaintiff interceded, however, telling the agent to leave. When Agent Egbert ignored him, plaintiff stepped between the agent and the car, asking him again to leave. Per plaintiff's version of the facts, Agent Egbert then shoved him up against the car. When plaintiff refused to move away from the car, Agent Egbert grabbed him and pushed him aside and onto the ground, injuring his back. It was subsequently determined that the guest was in fact in the country legally. Plaintiff later filed a formal complaint with Agent Egbert's superiors about the incident. In alleged retaliation, Agent Egbert contacted the Internal Revenue Service, asking them to look into plaintiff's tax status. ("*Not cool*!") Plaintiff sued Agent Egbert in federal court, seeking damages for a violation of his Fourth and First Amendment rights. The district (trial) court granted Agent Egbert's summary judgment motion, dismissing the lawsuit. Plaintiff appealed.

Held: The Ninth Circuit Court of Appeal reversed. Plaintiff filed his lawsuit pursuant to what is known as a "*Bivens action*." A "*Bivens* action" refers to the U.S. Supreme Court case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* (1971) 403 U.S. 388. *Bivens* held

that despite the lack of an authorizing statute, civil damages were recoverable directly under the Fourth Amendment. In a civil action alleging a Fourth Amendment violation by a *state officer*, as opposed to a federal officer, 42 U.S.C. § 1983 would have been available. (See Note, below, and *Torres v. Madrid*, above.) Despite there being no such statute for similar actions by federal officers, the Supreme Court in *Bivens* "*implied*" potential civil liability in such a case. But *Bivens* is limited to its circumstances, i.e., in a case where federal officers were alleged to have arrested and searched the plaintiff without a warrant or probable cause, and where it was alleged that the officers used unreasonable force in making the arrest. So every new case has to be individually evaluated, looking to see whether, on its facts, it consitutes an extension of the *Bivens* theory of liability. The Supreme Court, however, has since counseled against over-using a *Bivens* theory of liability absent congressional action or instruction, concentrating on the costs and benefits of allowing such a damages action to proceed. (*Ziglar v. Abbasi* (2017) 137 S.Ct. 1843, 1848-1849.) The Supreme Court made it clear in *Ziglar* that "expanding the *Bivens* remedy is now a disfavored judicial activity," although such a remedy is still available in appropriate cases where there are "powerful reasons" to retain it in its "common and recurrent sphere of law enforcement." (*Id*., at 137 S.Ct. at p. 1857.) The district (trial) court held here that plaintiff Boule's claims did not warrant an extension of the *Bivens* theory of liability. In reversing the district court's ruling on this issue, the Ninth Circuit held to the contrary.

(1) *Fourth Amendment*: Whether or not the *Bivens* theory should be expanded to include this particular set of circumstances as occurred between Agent Egbert and Boule depends upon whether or not plaintiff's claims arise in a "*new context*," and if so, whether any "*special factors*" counsel hesitation in finding a viable *Bivens* claim. (*Hernandez v. Mesa* (2020) 140 S.Ct. 735.) As for plaintiff's Fourth Amendment claims, the Court found only a "modest extension" into a new context; the "new context" being limited to the fact that defendant is an agent of the border patrol "rather than the F.B.I." (*sic*; probably meaning the Federal Bureau of Narcotics.) As for finding "special factors counsel(ing) hesitation," the Court noted that "the inquiry is to concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." A court should also **"**consider the risk of interfering with the authority of the other branches," such as the Legislature. (*Ziglar v. Abbasi*, *supra*.) In this case, the Court found no such "special factors." The Court, finding this to be a "run-of-the-mill" Fourth Amendment case, therefore, held that plaintiff was entitled to seek a *Bivens* remedy for the alleged Fourth Amendment violation.

(2) *First Amendment*: In considering plaintiff's First Amendment retaliation claim, on the "new context" issue, the Court noted that despite the Ninth Circuit having previously found *Bivens* actions appropriate in such a First Amendment case (see *Gibson v. United States* (9th 1986) 781 F.2nd 1334.), the U.S. Supreme Court has never considered the issue. But despite the lack of Supreme Court guidance, the Court could find no special factors that might counsel hesitation in extending a *Bivens* remedy into this new context. To the contrary, the Court found retaliation allegations, available against governmental officers in general, to be a well-established First Amendment claim. A *Bivens* action was therefore held to be justified where the alleged retaliation involved a border patrol agent turning the I.R.S. onto the plaintiff, Agent Egbert's action in doing so bearing no relation to, or justification under, his duties as an agent of the border patrol.

Note: This written decision is far more complicated than it should have to be, even after I cut out as much of the legal mumbo jumbo as I could. But I briefed it anyway to highlight the

differences between a civil suit against state and local law enforcement officers, as authorized by a federal statute (i.e.: 42 U.S.C. § 1983; See *Torres v. Madrid* (Mar. 15, 2021) 141 S.Ct. 989, briefed above), and a similar lawsuit against federal officers where no such authorizing statute exists. Thus, the necessity of the *Bivens* decision, finding there to be a constitutionally authorized "*implied*" right while engaging in a little bit (or actually, *a lot*) of "judicial legislating" where the U.S. Congress, for reasons unexplained, has failed to act. The whole issue would go away, eliminating the need to discuss such nebulous concepts as "new contexts" and "special factors," if the Legislature would just get on the ball and either expand § 1983 to include federal officers, or write a whole new statute on the issue. But while we wait, *Bivens* is necessary.

***Searches of Vehicles*:**
***Leaning Into a Vehicle as a Search*:**
***Minimal Intrusiveness Into a Vehicle*:**
***Fruit of the Poisonous Tree*:**
***Inevitable Discovery*:**

United States v. Ngumezi **(9th Cir. Nov. 20, 2020) 980 F.3rd 1285**

Rule: A police officer who, during an otherwise lawful traffic stop, opens the car's door and leans into it without probable cause or any other particularized justification, violates the Fourth Amendment. Leaning into a vehicle constitutes a search. Any products of that illegal act are subject to possible suppression. Failure of the attorneys involved in the resulting litigation to argue possible applicable search and seizure issues waives them.

Facts: In the early morning hours of May 6, 2018, San Francisco Police Officer Kolby Willmes noticed defendant Malik Ngumezi sitting in the driver's seat of a vehicle in a gas station. Officer Willmes also noticed that the vehicle did not have any license plates; an apparent violation of V.C. § 5200(a). Not observed by the officer was a bill of sale affixed to the lower passenger-side corner of the windshield. Because a gas pump blocked access to the driver's side, Officer Willmes walked to the passenger side of the car and—according to defendant—opened the passenger door, leaned into the car, and asked defendant for his driver's license and vehicle registration. (Officer Willmes later testified that he could not remember whether he opened the door and leaned into the car, or whether he merely talked to defendant through the open window. The Court, therefore, assumed that defendant's version of the facts is what had actually happened.) Unable to produce anything other than a California identification card, it was quickly determined that defendant's driver's license was suspended and that he'd received three prior citations for driving with a suspended license. SFPD policy requires officers to impound a vehicle where the driver is unlicensed and has had at least one prior citation for driving without a license. In compliance with this policy, preparations were made to tow defendant's car. A pre-impound inventory search of the car resulted in the recovery of a loaded .45 caliber handgun under the driver's seat. Upon determining that defendant had a prior felony conviction, he was arrested for being a felon in possession of a firearm. Charged in federal court with a violation of 18 U.S.C. § 922(g)(1) (felon in possession of a firearm), defendant's motion to suppress was denied. He therefore submitted to a bench trial upon stipulated facts and was convicted. Sentenced to 18 months in prison, defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. In the district (trial) court, defendant had argued only that Officer Willmes should have seen the bill of sale affixed to the lower passenger-side corner of the windshield, eliminating any need (or right) to ask defendant for his identification; an argument the trial court judge rejected. On appeal, however, defendant argued instead that opening the door to his car and leaning into it constituted a search that violated the Fourth Amendment absent the applicability of an exception to the warrant requirement. This seemingly new argument, not considered by the trial court, raised a bunch of new issues on appeal.

(1) *Was it Waived*? The Court here first noted that defendant did in fact raise with the trial court the Fourth Amendment issue of the legality of a police officer leaning into his car, but only in a footnote in his written documents. With prior authority to the effect that "a perfunctory request, buried amongst the footnotes, does not preserve an argument on appeal" (see *Coalition for a Healthy California v. FCC* (9th Cir. 1996) 87 F.3rd 383, 384, fn. 2.), the Ninth Circuit held that had the Government argued that defendant had forfeited this issue, the Court would have agreed and rejected defendant's appeal. But the Government failed to do so. End of issue.

(2) *Leaning into a Suspect's Vehicle as a Fourth Amendment Search*: Assuming defendant's account of what transpired after he was legally contacted was what actually happened (noting that the officer couldn't remember what he did or didn't do), the Court held that without "probable cause, or any other particularized justification, such as a reasonable belief that the driver poses a danger," a police officer may not open the door to a vehicle and lean inside. To do so constitutes a violation of the Fourth Amendment as an "unreasonable search." The landmark case on this issue is the U.S. Supreme Court decision of *New York v. Class* (1986) 475 U.S. 106. In *Class*, an officer, during a lawful traffic stop, opened defendant's car door and reached inside for the purpose of moving papers off the dashboard so that he could read the vehicle's "Vehicle Identification Number" (i.e., "VIN"). Citing the fact that "the governmental interest in highway safety served by obtaining the VIN is of the first order," and that the VIN's location on the dashboard is "ordinarily in plain view of someone outside the automobile," the High Court held that the officer's actions of opening the door and reaching inside to push the papers aside, being minimally intrusive, were lawful. However, it was also noted in *Class* that had the defendant's vehicle's VIN been visible from the outside, "*there* (*would have been) no justification for governmental intrusion into the passenger compartment to see it*." (*Id*., at p. 119; italics added.) Finding none of the *New York v. Class* justifications (i.e., "the specific need—finding the VIN—and its minimal intrusiveness") to be present in this case, the Court here found that Officer Willmes' action of leaning into defendant's car to be in violation of the Fourth Amendment. The Court also rejected the People's argument that what Officer Willmes did was "minimally intrusive," holding that "(a)lthough the intrusion here may have been "modest," the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis." The Court instead imposed an unprecedented "bright-line" standard, i.e., that "opening a door and entering the interior of a vehicle constitutes a Fourth Amendment search," and, absent some legal justification, is illegal.

(3) *The Appropriate Remedy and Missed Issues*: Lastly, the Court determined that the only available remedy here is the suppression of the gun. In so holding, however, the Court noted that this conclusion might have been different had the Government thought to make certain legal arguments. First, it was noted that as a rule, only "evidence obtained as a 'direct product of an illegal search or seizure,' as well as 'evidence later discovered and found to be derivative of an

illegality,' is subject to suppression." (i.e., the "*fruit of the poisonous tree*" doctrine; quoting *Utah v. Strieff* (2016) 136 S. Ct. 2056). Here, the gun was found during a pre-impound inventory search of the car, and *not* as the product of the officer illegally leaning into his car. Also, under the "*inevitable discovery rule*," it is apparent that defendant's unlicensed status and prior citations for this same offense, which is what triggered the impoundment of his car per SFPD policy, would have inevitably led to the subsequent discovery of the gun during a lawful pre-impound inventory search. (Whether or not the "Community Caretaking theory" would have prevented the lawful impoundment of defendant's car was not discussed.) The Government has the burden of proof on these issues. It failed, however, to even argue their applicability. Having failed to raise these issues, they were held to be waived.

Note: It is painful just to read this case. First, it's inexcusable, and embarrassing, for a trained law enforcment officer to come to court with no recollection of how the contact went down. That's part of the officer's job, and why you make notes and write reports; to give you something with which to "refresh your memory." Secondly, for the U.S. Attorney to miss so many potentially case-saving issues that are simply first year law school stuff, is equally, if not more so, inexcusable and embarrassing. But aside from all this, I think the Ninth Circuit is also wrong in concluding that the "minimal intrusive" doctrine does not apply. The Ninth Circuit's cited authority for holding that the issue of "minimal intrusiveness" is not relevant in this case is *United States v. Jones* (2012) 565 U.S. 400. *Jones* held it to be a Fourth Amendment violation to attach a GPS tracker to a suspect's vehicle without a warrant, the tracker itself being "a small, light object that [did] not interfere in any way with the car's operation." The Ninth Circuit's theory here was that if it wasn't minimally intrusive in *Jones*, given the physical size of the tracker itself and its lack of interference with the car's operation, then the "minimally intrusive" argument must not be an issue at all. Whether or not such a tracker is "small (and) light," or the fact that it didn't affect the car's operation, would seem to me, however, to be irrelevant to the magnitude of the Fourth Amendment violation at issue in *Jones*. If you read *Jones*, it is readily apparent that it was the nature of the intrusion, and the volume of the information provided to law enforcement via the tracker, all without a warrant, that made the placing of a tracker on a person's car a constitutional issue. It is also clear that contrary to the Ninth Circuit's belief that "the Supreme Court has never suggested that the magnitude of a physical intrusion is relevant to the Fourth Amendment analysis," there is a whole body of law, including Supreme Court cases, talking about what has become known as the "*minimal intrusion doctrine*." (E.g., see *People v. Robinson* (2012) 208 Cal.App.4th 232, 246-255; citing the U.S. Supreme Court case of *Illinois v. McArthur* (2001) 531 U.S. 326, 330.) The Supreme Court itself in *New York v. Class*—the case the Ninth Circuit cites here for its authority—notes that the officer's actions of opening a suspect's car door and reaching into it in order to move some papers off the dashboard was "*little more intrusive* than a demand that respondent—under the eyes of the officers—move the papers himself." (pg. 118; italics added.) Also, the U.S. Supreme Court in *Illinois v. McArthur*, *supra*, notes that; "(w)hen faced with special law enforcement needs, diminished expectations of privacy, *minimal intrusions*, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (pg. 330; italics added.) But all this would have been totally irrelevant to this case had someone in the U.S. Attorney's Office thought to make the argument that finding the gun was not the product of an illegal "leaning" into defendant's car, or that the gun would have inevitably been found anyway. It's inexcusable that these arguments weren't made.

***Eavesdropping, Per P.C. § 632(a)*:**
***P.C. § 632(a) and Acts of Prostitution*:**
***Confidential Communications Pursuant to P.C. § 632(c)*:**

People v. Lyon **(Feb. 24, 2021) 61 Cal.App.5th 237**

Rule: A prostitute's acts and conversations while plying her trade at a client's home constitute a "confidential communication," as defined in P.C. § 632(c), making the surreptitious audio and visual recording of those acts a violation of P.C. § 632(a).

Facts: Defendant Michael J. Lyon had the nasty habit of engaging the services of prostitutes at his home, and then secretly videotaping his liaisons with them. But he wasn't very clever in doing this, repeatedly getting busted and prosecuted for violating Pen. Code § 632(a); eavesdropping on or recording confidential communications. With a prior conviction for the same in 2011—for which he received a suspended sentence and probation—defendant continued to commit this offense through 2013 and 2014. Finally in 2015, he was charged in a multi-count information, alleging his repeated violations of P.C. § 632(a) (eavesdropping) and P.C. § 647(j)(3)(A) (disorderly conduct). Sixteen counts of eavesdropping involved the surreptitious video recordings that captured both the participants' audio and visual participation in the act of prostitution, while twelve counts of disorderly conduct involved video recordings that only captured real-time images, but no audio. Out of this, he was eventually was convicted by a jury in 2018 of six counts of eavesdropping and two counts of disorderly conduct. Sentenced to six years and four months in prison, defendant appealed.

Held: The Third District Court of Appeal affirmed. Prior to trial, defendant filed a motion to dismiss, arguing that prostitutes, as a matter of law, do not have a reasonable expectation of privacy in their communications during sexual encounters at a client's residence. The trial court judge denied his motion. On appeal, defendant renewed this same argument. Subdivision (a) of Pen. Code § 632, first enacted in 1967 as part of the California Invasion of Privacy Act, imposes criminal liability on "[every] person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication . . . ." A video recorder, as used by defendant, has since been held to be an instrument which, if used in the manner proscribed under section 632, is a "recording device" for purposes of this section. (*People v. Gibbons* (1989) 215 Cal.App.3rd 1204, 1208.) The issue here was whether a prostitute's acts and conversations at a client's home while plying her trade constitute a "*confidential communication*." Subdivision (c) of section 632 provides a statutory definition of "confidential communication:" "'(C)onfidential communication' means any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive, or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." Defendant's argument was that "[o]utcall prostitution inherently entails circumstances 'in which the parties to the communications may reasonabl[y] expect that their communications may be overheard or recorded.'" As such, the acts and conversations of a

prostitute at the client's house are not "confidential communications." In support of this argument, defendant contended that a client's residence is a "workplace," and that prostitutes, as a matter of law, have no reasonable expectation of privacy in their communications at this workplace since prostitutes should reasonably expect that they will be videotaped for various reasons, including security purposes (e.g., to discover theft or drug use). In support of this argument, defendant cited (among other cases) a case out of Maine (*State v. Strong* (2013) 2013 ME 21.) where it was held that there is no expectation of privacy in a place where prostitutes carry on their trade, such as the prostitute's residence, studio, or place of business. The Court here, however, held that *Strong* does not deal with the situation where the location at issue is the client's home, instead of the prostitute's. Further, the Court also noted that unlike California's Constitution, the Constitution of Maine does not expressly include the right to privacy as an inalienable right. (See Cal. Const., art. I, § 1: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*." Italics added.) The Court further noted that the term "confidential communication" has been interpreted to include communication *by conduct*, in addition to oral or written dialogue. (See *People v. Drennan* (2000) 84 Cal.App.4th 1349, 1353, 1356.) Although a confidential communication under § 632 does not include "still, timed photographs without accompanying sound" (thus the "disorderly conduct" counts, pursuant to P.C. § 647(j)(3)(A); see Note, below), it *does* include "sound-based or symbol-based communications," which in turn includes communication by conduct, including the act of having sexual relations. (*Gibbons, supra*, 215 Cal.App.3rd at p. 1209.) It was also noted that the test of confidentiality is an objective one. A communication is confidential under section 632 if either party to that communication "has an *objectively* reasonable expectation that the [communication] is not being overheard or recorded." (*Flanagan v. Flanagan* (2002) 27 Cal.4th 766, at p. 777.) The *subjective* intent of either party to the communication is irrelevant. (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929.) In sum, after noting that "the Legislature expressed its intent to strongly protect an individual's privacy rights" when it enacted P.C. § 632, the Court rejected defendant's arguments that a prostitutes' activities in the homes of their customers were not "confidential communications." Per the Court: "As a general matter, there is nothing about prostitution activities at a private residence that strips a prostitute of their right to control the firsthand dissemination of their words and images." The prostitute's activities at a client's home, therefore, constitute a confidential communication for purposes of P.C. § 632(a). Defendant was therefore properly convicted of those counts.

Note: The confidential communication element of P.C. § 632(a) is a common stumbling block to getting eavesdropping cases filed and prosecuted. It's not unusual for me to receive calls or e-mails asking about specific scenarios that could go either way. But quite frankly, my opinion on this issue and a dime won't even get you a cup of coffee anymore. This is a good case to read in its entirely for a quick education on what constitutes a "confidential communication," and what does not. Just to educate myself a bit more, I pulled up every relevant case listed in LEXIS (the research tool I use) to add to my Fourth Amendment Search and Seizure Outline. If you'd like a list of those cases with a brief description of the facts behind each, I will be glad to send it to you upon request. *Not* in issue in this case were acts of prostitution at locations *other than* the client's home. As noted above, the State of Maine (in *State v. Strong*) says that such conversations are *not* confidential. Given the existence of California's Invasion of Privacy Act,

which specifically recognizes and is intended to protect its citizens' right to privacy, a constitutionally specified protection of a right to privacy (again, as noted above), and the Court's reasoning in this case, a California court might very well rule otherwise. We'll just have to wait and see. Also not in issue here were the two "disorderly conduct" counts, pursuant to P.C. § 647(j)(3)(A). This "Peeping Tom" misdemeanor offense deals with those instances where the offending pictures are produced without any audio recordings, and is intended to protect one's visual privacy rights in various states of undress. Defendant's only complaint about the prosecution's use of the disorderly conduct statute related to whether it is a "lesser included offense" of the already charged P.C. § 632 offenses; an argument similarly rejected by the Court.