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:

"*Arguing with my wife is like reading the Software License agreement. In the end, I have to ignore everything and just click*, '*I agree*.'"

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

Sentencing Minors to Life Without the Possibility of Parole*:** I don't typically brief sentencing cases, and I'm not an expert by any means on juvenile law, so I'm kind of speaking out of school here. But for those of you who have to deal with those little buggers, I thought you might be interested in the U.S. Supreme Court's latest pronouncement on the rules for sentencing minors to life without the possibility of parole ("LWOP") when tried in adult court and convicted of first degree murder. First a little history: In ***Miller v. Alabama (2012) 567 U. S. 460, the Supreme Court held that an individual who commits a homicide when he or she is under the age of 18 *may* be sentenced to life without parole. However, recognizing that all but a small minority of juvenile offenders are permanently incorrigible, imposing an LWOP sentence on a juvenile is constitutional *only* if the sentence, under local statutes, is not mandatory, and only if the sentencer is given the discretion to impose a lesser punishment. ***Montgomery v. Louisiana*** (2016) 577 U. S. 190, made the rule retroactive, at least when considered on collateral review (i.e., other than in a direct appeal from the conviction). Now, within the last month, the U.S. Supreme Court decided the case of ***Jones v. Mississippi*** (Apr. 22, 2021) __ U.S. __ [2021 U.S. LEXIS 2110; 2021 WL 1566605], where it was held that it is *not* required that the sentencing judge make an on-the-record factual finding—either explicitly or implicitly—of the defendant's permanent incorrigibility before imposing a life-without-parole sentence. In ***Jones***, the sentencing judge did in fact make comments to the effect that he was aware of his discretion in sentencing the defendant to a lesser sentence before he imposed an LWOP sentence. But the ***Jones*** Court notes only "'that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing' a life-without-parole sentence." (Quoting ***Miller v. Alabama***, *supra*, at p. 483.) It does not say that the court's analysis has to be expressed on the record. And while it also does not say in ***Jones*** that it is even necessary for a sentencing judge to state on the record that he or she is aware of, and is exercising the court's discretion, having that discretion and being aware of it being a constitutional requirement, it is strongly recommended that a sentencing judge put something on the record to reflect his or her knowledge of this fact. What's interesting to note is that Brett Jones was only 15 years old when he stabbed his grandfather some eight times with a kitchen knife during an argument over whether the little fart had a right to shack up with his girlfriend in his grandfather's house. In California, as the law stands today, Jones (as a 15-year-old) could only have been prosecuted in juvenile court, with a potential release date of sometime before his 25th birthday. (See the *Admin. Note* in the *California Legal Update*, Vol. 26, #3, Mar. 6, 2021, discussing **SB 1391** (effective Jan. 1, 2019), **W&I §§ 707(a)(1)-(2)**, **607(c)**, and ***O.G. v. Superior Court*** (2019) 40 Cal.App.5th 626.) But in Mississippi, he's going away forever absent a later change in circumstances and modification of his sentence. Just goes to show that if you're a minor under the age of 16 and are intent upon stabbing your grandfather to death, do it in California and not Mississippi.

Second Amendment Right to Bear Arms*:** For those of you interested in your **Second Amendment** rights, the United States Supreme Court just granted certiorari in a case out of New York—a very anti-**Second Amendment** state—in the case of ***State Rifle & Pistol

Ass'n v. Crolett (Apr. 26, 2021) U.S. LEXIS 2144; cert. granted. The sole question on appeal before the High Court is: "*Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment*." Should be interesting.

CASE LAW:

***The Community Caretaking Doctrine and Residences*:**

Caniglia v. Strom **(May 17, 2021) __ U.S. __ [__ S.Ct. __; __ L.Ed.2nd __; 2021 U.S. LEXIS 2582]**

Rule: The "Community Caretaking Doctrine," created to justify warrantless entries into impounded automobiles for a non-criminal investigative purpose, does not justify the warrantless entry into a residence or seizure of firearms therein.

Facts: Edward Caniglia—a resident of Rhode Island and petitioner in this civil suit—had an argument with his wife. During the argument, petitioner retrieved a handgun from their bedroom, put it on the table between them, and asked his wife to "shoot (him) now and get it over with." Not finding this to be a reasonable solution to their argument, she simply left instead; spending the night in a hotel. But when she couldn't reach him by phone the next morning, she called the police and asked them to do a welfare check. Respondents (Officer Robert F. Strom, et al) accompanied the wife back to the house and found petitioner alive and well, sitting on the porch. When questioned, petitioner denied that he was suicidal, but agreed to submit to a psychiatric evaluation at a hospital. However, he imposed one condition; i.e., that the officers promise him not to confiscate his firearms. Despite their promise, once petitioner was taken away by ambulance and after allegedly misinforming the wife about his wishes, the officers had her show them where petitioner kept his firearms, and confiscated them (two pistols). Released from the hospital and finding his guns gone, petitioner sued the officers in federal court, alleging that they violated his Fourth Amendment rights by entering his home without a warrant and seizing both him and his firearms. The district court granted summary judgment to respondents, dismissing the lawsuit. The First Circuit Court of Appeal affirmed, but solely on the ground that the decision to remove petitioner and his firearms from the premises was justified under the "community caretaking exception" to the search warrant requirement. (See *Caniglia v. Strom* (1st Cir. 2020) 953 F.3rd 112.) The United State Supreme Court granted certiorari.

Held: The United States Supreme Court, in a unanimous decision, reversed. The sole issue in this appeal was the applicability of the so-called "Community Caretaking Doctrine" to residences. First off, it was noted that the Fourth Amendment's provisions protecting "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is most acute when discussing one's right to privacy within his or her own home. "The 'very core' of this guarantee is 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (*Florida* v. *Jardines* (2013) 569 U. S. 1, 6.) The Court recognized, however, that there are exceptions. "(T)he Fourth Amendment does not prohibit all unwelcome intrusions 'on private property,' . . . only

'unreasonable' ones." The respondent officers here, and the First Circuit Court of Appeal, submitted that the so-called "community caretaking" theory constituted one of those exceptions. The Supreme Court disagreed. The Community caretaking theory was first recognized in the landmark U.S. Supreme Court case decision of *Cady v. Dombrowski* (1973) 413 U.S. 433. In *Cady*, however, the issue was the warrantless search of an impounded vehicle, done for the purpose of locating an unsecured firearm, and in a non-criminal investigative context. A number of lower state and federal courts have since used the community caretaking theory to justify warrantless entries into private residences, as the First Circuit did in this case. The Supreme Court, however, held that expanding community caretaking beyond the warrantless searches of vehicles to include the entry and searches of residences "goes beyond anything this Court has recognized," and that "(n)either the holding nor logic of *Cady* justified (such an) approach" In so ruling, the Court noted that there is a significant "constitutional difference" between vehicles—for which there is a lesser expectation of privacy—and residences. Without further discussion, the Court concluded that "(w)hat is reasonable for vehicles is different from what is reasonable for homes," and declined the respondents' attempt to expand the community caretaking theory to justify warrantless governmental entries into private residences.

Note: Up until now, lower appellate court cases, both state and federal, have gone both ways on this issue. Foreshadowing this case, the California Supreme Court has already ruled that in their opinion, community caretaking *does not* apply to residences. (See *People v. Ovieda* (2019) 7 Cal.5th 1034, 1044-1053: *California Legal Update*, Vol 24, #9, Aug. 30, 2019; a decision I admittedly disagreed with at the time.) So it's good to finally get some clear cut rule on this issue that is now to be applied nation-wide. But this case does not alter any of the other recognized exceptions to the warrant requirement. A plethora of case law has recognized that warrantless residential entries are often determined to be reasonable (and thus constitutional) where, for instance, the entry is necessary in order "to fight a fire and investigate its cause; to prevent the imminent destruction of evidence; to engage in hot pursuit of a fleeing felon or prevent a suspect's escape; to address a threat to the safety of law enforcement officers or the general public; to render emergency assistance to an injured occupant; or to protect an occupant who is threatened with serious injury." (See Justice Kavanaugh's concurring opinion, and the numerous cases he cites as authority for these various theories.) Of particular importance—discussed by Justices Alito and Kavanaugh in their respective concurring opinions—is the issue of "welfare checks." The common situation involves a report to law enforcement to the effect that an elderly person has not been seen in some time and is not responding to phone calls or to knocking at his or her door. Despite being argued by the petitioner in this case, during the oral arguments, that it might be a Fourth Amendment violation for officers to enter a residence to check on the welfare of its occupant in such a circumstance, Justices Alito and Kavanaugh disagree. They both basically opine that despite the absence of a "community caretaking" theory justifying an entry, it would be reasonable for officers to enter the missing person's residence anyway. Per Justice Kavanaugh, this new "decision does not prevent police officers from taking reasonable steps to assist those who are inside a home and in need of aid." Perhaps best labeled as an "exigent circumstance" (given that we cannot use "community caretaking" anymore), a warrantless entry in such a circumstance is justified "because the officers have an '*objectively reasonable basis*' for believing that an occupant is 'seriously injured or threatened with such injury.'" (Citing *Brigham City* v. *Stuart* (2006) 547 U. S. 398, at pp. 400 & 403.) But back to the issue at hand: Without community caretaking to justify the entry into Caniglia's home and

the seizure of his firearms (without debating whether Caniglia's wife's consent was legally sufficient under these circumstances, but assuming that it probably was not), is there some other legal justification we might have used? In this case, the officers had reason to believe that the petitioner's mental evaluation and hospital stay wouldn't take long, and that he would be home soon, with access again to his firearms. Assuming that would be a dangerous situation, they wanted the guns out of the house. (Think of the repercussions had they left the guns there and petitioner came home and shot himself.) The Ninth Circuit has found a similar situation to provide the necessary "exigent circumstance" to allow for the warrantless seizure of the pistols. (See *Rodriguez v. City of San Jose* (9th Cir. 2019) 930 F.3rd 1123, 1136-1141, where the Court also found, as an alternative theory, community caretaking to apply, and then also limited its ruling to the circumstances of that case.) More importantly, however, had this occurred in California, the Penal Code provides for a readily obtainable search warrant. (See P.C. § 1524(a)(10)) Given the ease by which such a search warrant could be obtained, telephonically, one might surmise that a court would require officers do so. Given all the issues that obtaining a search warrant would eliminate, that would be my strong recommendation.

***Unduly Suggestive Photo Lineup Identifications*:**
***Error Pursuant to Brady v. Maryland*:**
***Pretrial Written Motions*:**

***United States v. Bruce* (9th Cir. Jan. 12, 2021) 984 F.3rd 884**

Rule: Whether or not an in-court identification of a defendant by a witness is tainted by a suggestive pre-trial photo lineup identification depends upon the circumstances. The suppression by the prosecution of evidence favorable to an accused, whether intentional or not, violates due process, at least where the evidence is material either to guilt or to punishment, and whether or not the defense has made a request for such evidence.

Facts: Defendant David Bruce was a guard at the United States Penitentiary at Atwater, California. Another Atwater prison guard—who soon became key to the issues in this case—was Paul Hayes. On December 12, 2015, a local resident, Thomas Jones (and his wife), attempted to pay a visit with an Atwater inmate by the name of Devonne Randolph. The Joneses had developed a scheme with Randolph whereby they would receive packages containing drugs and other contraband for him and bring them as far as the Atwater Prison's parking lot where they would be delivered to an intermediary known to Jones only as "*Officer Johnson*." Officer Johnson would then smuggle the packages into the prison itself. Although this scheme working successfully in October and November, 2015, a third attempt on December 12th did not go quite as expected. Stopped and subjected to a random prison parking lot search, (the legality of which was not in issue; see *Cates v. Stroud* (9th Cir. 2020) 976 F.3rd 972, 983-984.), the officers found four vacuum-packed bags of marijuana, a package of heroin, and three marijuana cigarettes in Jones' car. Present and participating in this search was prison guard Paul Hayes. Faced with drug smuggling charges, and hoping to avoid becoming an inmate himself, Jones was very cooperative with the ensuing investigation. First, Jones helped to identify the man who referred to himself as "Officer Johnson." In addition to providing a detailed physical description, Jones indicated that Officer Johnson commonly wore a Pittsburg Steelers hat. Knowing that defendant wore a Steelers cap, the officers showed Jones a Facebook photo depicting defendant sporting

such a cap. Jones identified defendant without hesitation as the man he knew as Officer Johnson. With this information, prison agents set up another parking lot meeting scheduled for several days later. With Jones' cooperation, agents went to the prison parking lot and sent out a text message as if from Jones, announcing the arrival of another delivery. Within minutes, defendant responded to the parking lot driving his personal vehicle, circling the parking lot several times as if checking out the scene, and slowing each time as he passed Jones' car. Rather than wait until defendant made contact with Jones, the agents stopped him as he continued to drive around the parking lot. Despite being caught red-handed, defendant denied that he was there to receive a drug shipment. Defendant was indicted by a federal grand jury some fifteen months later—in March 2017—and charged with conspiracy, attempted possession with intent to distribute heroin or marijuana, and accepting a bribe as a public officer. Although not clearly explained in the Ninth Circuit's written decision, a possible defense available to defendant early on was what is sometimes referred to as a "*Soddi*" defense; i.e.: "*Some other dude did it*." In arguing such a defense, defendant claimed that his only transgression was participating in some illegal sports wagering. With an issue as to the possible unconstitutional suggestiveness of Jones' identification of defendant as the man he knew as "Officer Johnson," having identified defendant from a Facebook photograph in which only two people were depicted and with only defendant wearing a Steelers cap, what was considered at that time to be a dearth of any other evidence connecting him with Officer Johnson's illegal drug-smuggling activities was no doubt a concern to the prosecutors. The government therefore filed a written pre-trial ex-parte motion for the court's in camera review (excluding defense counsel), asking for a ruling to the effect that the government need not disclose to defendant certain information about two other Atwater prison guards; one of them being Paul Hayes. In the motion, it was disclosed to the court that Hayes was present during the search of defendant's vehicle, but explained that the government had no intention of calling him as a trial witness. The government's motion further disclosed to the court that Hayes' personnel file contained potentially incriminating information, including seventy-plus inmate complaints (some of which, it later turned out, involved Hayes coercing inmates into testifying against defendant). Significantly, it was disclosed to the court that, subsequent to the events described above, Hayes came under investigation for smuggling drugs at another federal prison in Victorville, California. What the government's motion *did not* include was anything to forewarn the court that defendant had an option of arguing a "Soddi defense," and that Hayes—given his history of alleged abuses of inmates and drug-smuggling activities—was a good candidate to be that "other dude." The trial court granted the government's motion. As it turned out, the case against defendant proved to be relatively strong. At trial, Thomas Jones positively identified defendant as the guard to whom he delivered the contraband. Also, an inmate by the name of Robert Rush testified to helping with the distribution of the smuggled drugs and the collection of the resulting proceeds from the inmates, which Rush split with defendant. Money transfer and cellphone evidence linking the various parties to defendant was also introduced. The jury convicted defendant on all counts. Shortly after defendant's conviction, however, Paul Hayes was indicted in federal court on charges of drug smuggling at the Victorville prison, to where he had since been transferred. Although the investigation of Hayes' alleged drug smuggling did not begin until some sixteen months after defendant was indicted, defendant's trial wasn't to begin for another seven months. It was during this seven-month period that the government filed its pretrial ex parte motion in defendant's case, as discussed above, to prevent this new information about Hayes from being released to the defense. With all this new evidence coming to light, defendant filed a motion for

a new trial, alleging "*Brady* error." (*Brady v. Maryland* (1963) 373 U.S. 83.) Bruce's motion centered on the argument that he should have been informed that Hayes was the target in the very similar Victorville drug smuggling investigation. He also should have been told that Hayes had been actively engaged in coercing Atwater prison inmates into testifying against defendant. Defendant argued that *Brady v. Maryland* imposed a pretrial duty upon the prosecution to provide such evidence to the defense. Despite being somewhat irritated that the government had misled him in its pretrial ex parte motion, the trial court judge denied defendant's motion for a new trial, ruling that even with the potentially exonerating evidence that, under *Brady*, should have been revealed to the defense, the existing "overwhelming evidence that supported the jury's verdict (against defendant) completely and totally" justified the denial of defendant's new trial motion. The Ninth Circuit was thereafter called upon to review these findings.

Held: The Ninth Circuit Court of Appeals affirmed. There were two main issues on appeal; (1) the admissibility of Thomas Jones' in-court identification of defendant as the man he knew as "Officer Johnson," after an alleged unconstitutionally suggestive identification from a Facebook photograph, and (2) *alleged Brady* error.

(1) *Jones' Identification of Defendant*: In considering the value of Thomas Jones' in-court testimony identifying defendant as the man he knew as Officer Johnson, and to whom he was delivering contraband, the Court found that his pretrial identification of defendant from a Facebook photograph was not, under these circumstances, tainted as being unduly suggestive. Pre-trial identifications of a suspect which are unduly suggestive can, in theory, taint that witness' later in-court trial identification; a potential Fifth Amendment due process violation. The issue in such a circumstance is "whether the procedure (used in the pretrial identification of a suspect) was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." The Court ruled here that the mere fact that there were only two people in the Facebook photograph shown to Jones, and that defendant was the only one wearing a Steelers cap, was offset by the circumstances of this particular identification. Despite the arguable suggestiveness of the procedure used in this case, the Court found Jones' identification of defendant to be reliable based upon the fact that (1) Jones had met, and been face to face with defendant on at least two prior occasions, (2) Jones identified defendant from the photo without hesitation, (3) he was certain of the identification at the time he made it, and (4), when later testifying, he explained to the jury that before he was shown the photo, he accurately described details concerning defendant's beard, hair color, body type, clothing, and vehicle. Under these circumstances, Jones' in-court testimony identifying defendant as the man who he knew as Officer Johnson was properly admitted into evidence.

(2) *Brady Error*: In response to defendant's new trial motion, the government conceded it had intentionally avoided calling Hayes as a witness because it knew Hayes was subject to some serious impeachment evidence. The question became, therefore, whether the government's efforts to make Hayes' credibility a non-issue by minimizing his participation in defendant's arrest and investigation eliminated its obligations under *Brady*. Ultimately, the Ninth Circuit held that the *Brady* rules were still relevant, particularly when it was not just Hayes' credibility in issue, but when the suppressed evidence also tended to indicate that he, rather than defendant, might have been the drug smuggler. The trial court determined at defendant's motion for a new trial that purposely hiding the circumstances surrounding Hayes alleged drug-smuggling activity at Victorville from the defense, as well as actively persuading Atwater inmates to testify against defendant through threats and intimidation, did in fact constitute *Brady* error, but that the over-

whelming evidence of defendant's guilt supported defendant's conviction nonetheless. The Ninth Circuit agreed. The rule of *Brady*, at least on its face, is simple: "(T)he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (*Brady v. Maryland*, *supra*, at p. 87.) A defendant's request for such material is not required. (*United States v. Agurs* (1976) 427 U.S. 97.) Also, a prosecutor's good or bad faith is irrelevant. *(Brady*, *supra*; *United States v. Shaffer* (9th Cir. 1986) 789 F.2nd 682.) Either way, failing to disclose material favorable evidence violates due process because it compromises the integrity of the defendant's trial. In this case, the government made a weak argument that by not using Hayes as a witness at defendant's trial, and then getting the trial court's blessings via a pretrial motion to have information about Hayes excluded from the trial, telling the trial court (but with defendant excluded) about Hayes' shady background, that they'd met their obligations under *Brady*. Neither the trial court nor the Ninth Circuit bought this argument. In fact, the trial court judge indicated that he might have "thought a little harder" about the government's motion (inferring that he would have been more likely to spot the potential *Brady* issues) had he been told about Hayes' continuing involvement in the investigation of defendant's illegal activities. However, just because the dictates of *Brady* are violated does not mean that a defendant is entitled to a new trial. The error in not providing relevant impeachment information to the defense only warrants a new trial when the suppressed evidence is also "material." To be material, it must be shown that "the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict. . . . A 'reasonable probability' is a probability sufficient to undermine (the court's) confidence in the outcome." In this case, both the trial court and the Ninth Circuit found that the evidence against defendant was sufficiently strong to overcome the government's failure to provide to the defendant the negative information they had on Hayes; i.e., that there is a "reasonable possibility" defendant would have been convicted anyway. In other words, the suppressed information was immaterial.

Note: The trial tactic of filing written pretrial motions in an effort to limit the admission of potentially damaging evidence (or, in other circumstances, to convince a trial court judge to admit important evidence against an opponent) remains an effective means of strengthening one's case, available to both the prosecution and the defense. Judges certainly appreciate it. It gives them the opportunity—not necessarily available when ruling off-the-cuff from the bench—to properly consider the applicable rules of evidence, and to insure that both parties are accorded a fair trial. Nothing in the *Bruce* case decision should be interpreted as intimating otherwise. However, prosecutors, both state and federal, must recognize that the availability of such a trial tactic does not circumvent their discovery obligations under *Brady v. Maryland*. In fact, under California state law, a prosecutor's intentional suppression of relevant *Brady* material, whether by way of a pretrial motion or otherwise, is punishable as a felony offense. (See Pen. Code § 141(c).) In this particular case, on its face, there did not initially appear to be anything wrong with the government's efforts to prevent the admission of evidence of misconduct committed by someone whose connection to the circumstances of the case appeared, at least at the time, to be tenuous at best, and whose credibility was seemingly irrelevant. But as the case proceeded, Paul Hayes' strong connection to the case—as the "some other dude" who may in fact have been the real culprit—became apparent. We cannot speculate whether or not the government's attorneys were fully aware of this before filing its in camera ex parte motion to keep Hayes' history from

being used by the defense. But at whatever point Hayes' close connection to the issues in this case became apparent, the appropriate measures should have been taken to provide the defense with the information they needed to stage a proper defense. *Brady* requires no less. The bottom line is that prosecutors cannot use the tactic of a pretrial written motion to skirt their discovery obligations under *Brady*, attempting to hide potentially exonerating evidence from the defense as well as the court.

***Resisting Arrest, per P.C. § 148(a)(1)*:**
***P.C. § 148(a)(1) and a Defendant's Knowledge that the Person Resisted Was a Peace Officer*:**
***P.C. § 148(a)(1) and an Officer's Failure to Act in the Performance of His or Her Duties*:**
***Pitchess Motions and the Materiality Requirement*:**

People v. Mackreth **(Dec. 9, 2020) 58 Cal.App.5th 317**

Rule: To be guilty of resisting arrest pursuant to P.C. § 148(a)(1), it is required only that the defendant knew, or reasonably should have known, that the person resisted was a peace officer. A suspect's voluntary intoxication is irrelevant to this issue. Detentions without a reasonable suspicion, arrests without probable cause, or an officer's use of unreasonable force, fail to meet the P.C. § 148(a)(1) requirement that the officer is acting in the performance of his or her duties. *Pitchess* discovery is inappropriate absent a showing by the defendant that the information sought is material to a disputable issue.

Facts: On August 17, 2017, just after midnight, defendant Tristan Mackreth got into a road-rage altercation with a woman named Lisa Ward. Calling 911, Ward reported to police that defendant intentionally ran his car into hers, forcing her off the road. Ward told the 911 dispatcher that defendant had been chasing her with his lights out and "totally sideswiped" her car. Responding to this call, Sunnyvale Public Safety Officer Matthew Meyer—wearing a "standard police uniform" with a badge that was "readily apparent"—contacted a "very upset," "hysterical," and "confused" Ward. He also talked to a bystander—Arthur Megoloff—outside a 7-Eleven convenience store. Megoloff told Officer Meyer that defendant was acting in a "threatening manner" and had gone "all nuts on me." Per Megoloff, defendant had run into the 7-Eleven. Officer Meyer could see defendant in the store "stuffing things down his pants" as the store clerk (who appeared to be "clearly afraid") tried to deal with him, causing the officer to be concerned that defendant might be committing a robbery and/or might be armed. He therefore called for Code-3 backup. Officer Meyer made eye contact with defendant who then ran into a back room. As Officer Meyer entered the store, defendant reappeared with keys and something else in his hands, which later turned out to be a phone. (Unbeknownst to Officer Meyer, or other responding officers, defendant had used that phone to call 911, reporting that he had been involved in a traffic accident.) Officer Meyer drew his Taser and pointed it at defendant, yelling at him to "get on the ground." Defendant eventually complied, but not before Officer Meyer noted that defendant was displaying clear signs of being under the influence of a stimulant; i.e., "very sweaty (and) fidgety," "delusional," and "disconnect(ed) with reality." Defendant asked Officer Meyer to "show me your badge," which seemed unusual in that Officer Meyer's badge was clearly displayed on his uniform. Officer Meyer later testified that he did not think defendant believed he was a police officer and that he did not seem to "recognize the reality of what was going on." When defendant got onto the ground, Officer Meyer told him not to move or he

would be tased. Despite this warning, defendant popped back up again. Officer Meyer therefore tased him, as promised, the force from which knocked defendant to the ground once more. Incapacitated only momentarily, however, defendant got up again and ran towards the clerk. Officer Meyer chased after him, striking him twice with his baton. But defendant, un-phased, jumped over the counter and made for the exit, going through Megoloff who tried to shut the door on him. Just then Lt. Jonathan Griffith and Officer J.W. Carrel—both also in uniforms with visible badges—arrived with lights and sirens blaring. And the fight was on. Outside the store, the three officers were eventually able to get defendant handcuffed and subdued, but only after a two-minute struggle which included the use of the officers' Tasers, batons, and fists. The fight resulted in all three officers suffering minor abrasions. Lt. Griffith also suffered an "atrial fibrillation" (i.e., a quivering or irregular heartbeat). A subsequent blood test showed that defendant had an "abuse level" of methamphetamine in his system. Defendant later related to his sister, detectives who interviewed him, and in his testimony at trial, that he was under the influence of methamphetamine at the time, was "obviously hallucinating (and) wasn't in my right mind," and that he did not believe that the officers were real police officers, thinking they were "fake cops." As for the traffic collision, defendant claimed that Lisa Ward had swerved into his car when he tried to pass her on the right because she was driving too slow. Defendant testified at trial that he went into the 7-Eleven store to use their phone to report the accident. Convicted by a jury of the misdemeanor offenses of resisting arrest (P.C. § 148(a)(1)), vandalism (P.C. § 594(b)(2)(A)), and being under the influence of methamphetamine (H&S Code § 11550(a)) (the jury acquitting him of attempted robbery and assault with a deadly weapon, and hanging on a lesser included offense of assault), defendant was sentenced to time served (440 days) and three years of probation. He appealed his resisting arrest conviction only.

Held: The Sixth District Court of Appeal affirmed, although remanding the case back to the trial court for resentencing.

(1) *Defendant's Knowledge That the Persons Resisted Were Peace Officers*: Defendant's primary argument on appeal was that he could not be convicted of resisting arrest unless it was proven that he "*actually knew*" that the persons he resisted were a police officers. Per defendant, whether or not he "*should have known*" that the persons resisted were peace officers was not enough. Penal Code § 148(a)(1) provides in pertinent part: "Every person who *willfully* resists, delays, or obstructs any public officer (or) peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment," is guilty of a misdemeanor. (Italics added) Defendant argued that the term "*willfully*" means that he must actually have known that the person he resisted was a peace officer. With defendant being under the influence of methamphetamine, and as demonstrated by his asking Officer Meyer to see his badge, there was evidence to support his testimony that he actually thought the officers were "fake cops." The prosecution argued—with the trial court instructing the jury accordingly—that it was only necessary that defendant knew, *or reasonably should have known*, that the officers were peace officers. Without disputing that defendant's mental condition at the time may have interfered with his ability to recognize the officers as peace officers, the prosecutor argued to the jury that the fact that all three officers were in full uniform, with their badges prominently displayed, would have put any reasonable person on notice that they were in fact peace officers. As for whether defendant's drug-induced condition might have affected this issue, it was noted that one's voluntary intoxication is irrelevant when the offense at issue is a "general intent" crime. (See P.C. § 25(a)) Resisting arrest, per P.C. § 148(a)(1), is such a general intent crime. Finding

the meaning of the word "*willfully*" to be an issue of statutory construction, the Court of Appeals agreed with the prosecution. The Court found that the Legislature did *not* intend for its use of the word "*willfully*," as used in P.C. § 148(a)(1), to create a requirement of "actual knowledge." The Penal Code itself, at section 7, paragraph (1), defines the word "*willfully*:" "(W)hen applied to the intent with which an act is done or omitted, ('willfully') implies simply a purpose or willingness *to commit the act*, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage." The Court also reviewed the legislative history of section 148, comparing it with the very similar statute of "resisting an executive officer," pursuant to P.C. § 69. In looking at this legislative history, it was noted that both statutes are the product of a single resisting statute which as originally written, included both a "knowing" and a "willful" element. Then, in 1872, the Legislature split the resisting statute into sections 69 and 148, the former (resisting an executive officer) requiring that the offense be committed "*knowingly*," while the later (resisting a peace officer) be done "*willfully*." Subsequent legislative amendments to these sections have not changed these elements. Also, a prior case out of the Fifth District—*People v. Lopez* (1986) 188 Cal.App.3rd 592, 599—held that a violation of section 148(a)(1) *does not* include a requirement that the offender actually know that the person resisted was a peace officer. And again, the Legislature has amended P.C. § 148 subsequent to the *Lopez* decision, but did not see the necessity of broadening the elements of this offense when it had the opportunity to do so. By this, the Court concluded that the "Legislature (has) clearly expressed its decision to require different mental states for the two offenses;" i.e., P.C. §§ 69(a) and 148(a)(1). Defendant, however, cited a prior case out of the same district (but by a different three-judge panel) which specifically held that "section 148, subdivision (a)(1)—like the similar offense described by section 69—requires that a defendant have actual knowledge he or she is resisting an officer in the performance of duty." (See *In re A.L.* (2019) 38 Cal.App.5th 15, at p. 22.) The Court here handled this contrary decision by simply stating that it disagreed with its colleagues' conclusions in *A.L* on this issue, noting specifically that "(t)he cases upon which the *A.L.* opinion relied do not support its conclusion."

(2) *Lawfulness of the Officers' Actions*: The Court included a brief discussion relative to the element of P.C. § 148(a)(1) requiring that the officers' actions in attempting to detain and arrest defendant must have been lawful (i.e., supported by a reasonable suspicion and probable cause, respectively), and without any excessive force being used. It is a rule that where police officers act *unlawfully*, they are *not* acting "*in the performance of their duties*" (a necessary element of P.C. § 148(a)(1)), and as such, a suspect is entitled to use reasonable force in resisting an unlawful detention, arrest, or an officer's use of unreasonable force. (See Jury Instructions CALCRIM Nos. 2656 & 2670.) Here, however, the Court found that there was no evidence to support the argument that the officers acted unlawfully. So this was a non-issue.

(3) *Pitchess Discovery Motion*: Lastly, defendant, before trial, filed a *Pitchess* motion (see *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531.), seeking access to the officers' confidential personnel records, looking for any evidence of prior acts of excessive force and/or dishonestly. The trial court denied defendant's motion. On appeal, defendant argued that this was reversible error. However, the Appellate Court agreed with the trial court. Noting that with the entire event being video recorded by the officers' body cameras, a dash-cam video, and the 7-Eleven's surveillance camera, the Court held that there was no dispute as to what had occurred. The various videos failed to substantiate defendant's argument that excessive force had been used, or that the officers acted without the necessary reasonable suspicion and/or probable cause in attempting to subdue and arrest defendant. Because defendant was unable to advance any

plausible argument as to how the officers' personnel records might be material to any disputable issue, the trial court did not err in refusing to provide defendant with the *Pitchess* discovery he had sought.

(4) *Conclusion*: The only thing defendant won on appeal was an order remanding the case to the trial court for a determination as to whether he was entitled to the benefits of the subsequently enacted Assembly Bill No. 1950, which amended P.C. § 1203a to limit to one year the length of a probationary period for a misdemeanor conviction. So while defendant's conviction was upheld, the case was remanded for possible resentencing.

Note: This is an excellent case on what it takes to constitute a violation of P.C. § 148(a)(1), resisting arrest, shooting down (at least under the facts of this case) a number of possible legal defenses to such a charge. And while not discussed in a lot of detail, it's particularly important to note that a suspect's intoxication (alcohol or drugs), even to the point of being totally paranoid, is irrelevant to the issue of whether he reasonably should have known that the officers involved were in fact peace officers. The case also provides prosecutors with great fodder for resisting a defendant's *Pitchess* motion, preventing a defense attorney from doing a fishing expedition into an officer's confidential personnel records. So anytime a prosecutor is preparing to put on a P.C. § 148(a)(1) case, he or she needs to pull this very instructive case up and read it in its entirety.