The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*I just love bacon. Sometimes I eat it twice a day. It helps take my mind of the terrible chest pains I keep getting*." (Unknown)

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***Administrative Notes*:**

***Second Amendment, Right to Bear Arms*; *An Update*:** For those of you who are concerned about your Second Amendment right to bear arms, several important cases have been in the news lately:

Nationally*:** The U.S. Supreme Court, in ***N.Y. State Rifle & Pistol Ass'n v. City of N.Y. (Apr. 27, 2020) __ U.S. __ [140 S. Ct. 1525; 206 L.Ed.2nd 798], *wimped out*, dismissing as "*moot*" a challenge to a State of New York statute and a City of New York ordinance, both of which prohibited the transporting of firearms outside the City of New York. No doubt seeing enforcement of these laws as a losing cause from a constitutional standpoint, both the State and the City amended their respective statutes to eliminate these restrictions. The U.S. Supreme Court, therefore, ruled that plaintiffs had already "received the outcome they desired from their lawsuit after the State of New York amended its firearm licensing statute when the City of New York amended the rule to allow permitted persons to lawfully transport firearms to a second home or shooting range outside of the city." So, that's the end of that issue.

The Ninth Circuit and California*:** Federal Senior District Court Judge Roger T. Benitez ruled on April 23rd that California's background check requirement as a prerequisite to purchasing *ammunition* violated the **Second Amendment**, and was thus unconstitutional. (See ***Rhode v. Becerra (S.D. Cal. Apr. 23, 2020) __ F.Supp.3rd __ [2020 U.S. Dist. LEXIS 71893]; the so-called "**Safety for All Act of 2016**" (**Prop. 63**); and **P.C. §§ 30312**, **30314**, **30352**, **30370**, as amended.) Per Justice Benitez: "*The experiment has been tried. The casualties have been counted. California's new ammunition background check law misfires and the Second Amendment rights of California citizens have been gravely injured*." However, the Ninth Circuit, apparently not impressed with Justice Benitez's clever rhetoric, immediately stayed this ruling pending review, putting this decision on hold. Senior Judge Benitez is the same judge that ruled in 2019 that California's ban on *large capacity magazines* (**Pen. Code § 32310**) violated the **Second Amendment** (see ***Duncan v. Becerra*** (S.D. Cal. Mar. 29, 2019) 366 F.Supp.3rd 1131.); a ruling that is also on appeal to the Ninth Circuit with an upset Gov. Gavin Newsom and Atty. Gen. Xavier Becerra vigorously seeking a reversal.

The Ninth Circuit and Hawaii*:** Also pending in the Ninth Circuit Court of Appeal is the case of ***Young v. Hawaii (2018) 896 F.3rd 1044, where a three-judge panel of the Ninth Circuit has already ruled that The **Second Amendment** encompasses a right to carry firearms *openly in public for self-defense*, noting that the word "*bear*" implies such a right. A Hawaii statute (**Haw. Rev. Stat. § 134-9**), restricting the right to carry a firearm openly only to those who are then and there "*actively engaged*" in the protection of life and property, was held by the Court to be destructive of the "core **Second Amendment** right to carry a firearm openly for self-defense," and was therefore ruled to be unconstitutional. This decision, however, is on hold pending rehearing by an en banc Ninth Circuit panel (i.e., 11 justices), with oral arguments scheduled to take place during the week of September 21, 2020. The results of this case will necessarily affect California's own "*open carry*" statute (**Penal Code § 25850**), which prohibits the carrying of a *loaded* firearm in the open, arguably impacting one's "core **Second Amendment** right to carry a firearm openly for self-defense." (I.e., you can't defend

yourself very effectively with an unloaded gun short of *beating* your assailant to death with it.)

So stay tuned for new decisions on these very important issues; i.e., "*large capacity magazines*," "*ammunition sales*," and "*open carry*."

George Floyd as Seen by Candace Owens*:** I don't think anyone disagrees that the death of George Floyd at the hands (or, more correctly, *the knee*) of what appears at the very least to be an out-of-control brutal Minneapolis cop (noting that he has not yet been convicted) was totally uncalled for, and certainly unnecessary. The national (indeed, *international*) backlash (which I don't need to detail) has been, and continues to be, overwhelming. George Floyd, in his death, has been forever enshrined as a martyr and a hero; a symbol for highlighting the importance of eliminating police brutality wherever and whenever it may occur. But there's another side to this story which, as it comes to light, tells us that George Floyd is perhaps not entitled to the universal adulation that he is currently receiving. Don't get me wrong. It really matters not whether George Floyd was a good person or not. The apparent brutality he suffered is never okay. But as we all march around singing his praises, we should perhaps know who George Floyd really is. To that end, I suggest you "*Google*" the following: ***Candace Owens*: *I DO NOT support George Floyd!: & Here's Why! So who is "*Candace Owens*?" I personally don't know her from a hole in the wall. But I think you will agree after listening to her that she is certainly an intelligent young lady who has really done her homework. Check it out and let me know what you think.

***Case Law*:**

***Pen. Code § 632(a) & (d); Recording Confidential Communications*:**
***Proposition 8: "Right to Truth-in-Evidence;" Calif. Const., Article I, Section 28(f)(2)*:**

***People v. Guzman* (Dec. 11, 2019) 8 Cal.5th 673**

Rule: (1) California's "Right to Truth-in-Evidence" provisions (Calif. Const., article I, section 28(f)(2); i.e.; "Proposition 8") abrogates the exclusionary provisions of Pen. Code § 632(d). Under Proposition 8, California does not have an exclusionary rule based upon "independent state grounds." The exclusion of illegally obtained evidence is pursuant to federal U.S. Constitutional principles only. (2) Proposition 8 applies to both judicially created, as well as statutorily mandated, exclusionary rules. (3) A tape recording of a P.C. § 632 confidential conversation is both relevant *and* the best evidence of what was said. (4) Even though article I, section 28(f)(2) may apply to criminal proceedings only (as opposed civil cases), a defendant's equal protection and due process rights are *not* violated because criminal and civil defendants are not similarly situated. (5) A criminal defendant's "*right to privacy*" does not outrank Proposition 8's "right to truth-in-evidence" provisions. (6) Subsequent legislative amendments to P.C. § 632 do not serve to reenact the section's exclusionary provisions, even with a legislative vote of over 2/3's majority, absent an expressed legislative intent to do so and so long as it continues to basically say the same thing.

Facts: There were two victims in this case; 10-year-old E.F. and 12-year-old M.M. Both victims were acquainted with defendant's 17-year-old niece; Lorena (an adult by the time of trial). E.F. was Lorena's neighbor. M.M. was Lorena's cousin. In details derived from the Second District Court of Appeal's (Div. 3) written decision (See 11 Cal.App.5th 184), it was described that in May of 2011, when 10-year-old E.F. was at defendant's home for the purpose of playing with his daughter, defendant sat down next to E.F. on a couch and, after commenting on holes in E.F.'s leggings, reached over and rubbed her skin through the holes. He then coaxed E.F. into the bathroom where he pressed her against the sink and inappropriately touched her chest, stopping only when someone was heard coming up the stairs. Immediately after this incident, E.F. told Lorena what had happened. Lorena merely told her to avoid defendant. E.F. later told a teacher about the incident who reported it to social services. Later, in 2012, during an overnight visit with defendant's daughter, M.M. was watching television alone in defendant's living room when Defendant sat down next to her, put his hand inside her pajamas, and touched her vagina. Defendant also pulled his pants down, grabbed M.M.'s hand, and made her touch his penis. M.M. later told her mother—Esperanza—what had happened. M.M. also told her mother that Lorena had warned her about defendant. Esperanza called Lorena by telephone to discuss defendant's conduct. Unbeknownst to Lorena, Esperanza recorded this conversation. During this recorded call, Lorena made various statements unfavorable to defendant such as that she did not "feel good around (defendant), like when I'm wearing shorts or anything." She also told Esperanza that although defendant had never touched her inappropriately, she knew he was "capable of doing that," and that that was why she believed M.M. She also admitted that she had told M.M. to be careful around defendant. Defendant was eventually charged in state court with two counts of committing a lewd and lascivious act upon a child under the age of fourteen. Esperanza didn't tell anyone about the recorded telephone call until the eve of trial, at which time, over defendant's objection, the prosecution was allowed to play the recording for the jury for the purpose of impeaching Lorena's pro-defense testimony. Convicted of both charges and sentenced to five years in prison, defendant appealed to the Second District Court of Appeal (Div. 3). Losing that appeal, defendant petitioned to the California Supreme Court.

Held: The California Supreme Court unanimously affirmed. The California Legislature enacted Penal Code § 632 in 1982, as part of the Invasion of Privacy Act (P.C. § 630 et seq.). Subdivision (a) of section 632 prohibits the intentional use of "an electronic amplifying or recording device to eavesdrop upon or record (a) confidential communication," including (but not limited to) "by means of a . . . telephone," when not consented to by all parties to the communication. The offense is a felony (wobbler). Subdivision (d) specifically provides for the suppression of confidential communications obtained in violation of subdivision (a): "Except as proof in an action or prosecution for violation of this section, evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section *is not admissible* in any judicial, administrative, legislative, or other proceeding." (Italics added.) It was assumed, without deciding, that Esperanza violated this section when she surreptitiously recorded her telephone call to Lorena (the only issue, perhaps, being whether their conversation qualified as a "confidential communication," as defined in subdivision (c) of section 632.)

(1) Defendant argued on appeal, as he did with the trial court, that section 632(d) mandated the suppression of Esperanza's telephone conversation with Lorena. Both the trial court judge and the Second District Court of Appeal, however, held that California's "Right to Truth-in-Evidence" provisions, now codified at article I, section 28(f)(2) of the California Constitution

(i.e.; "Proposition 8," passed in June, 1982), abrogated the exclusionary provisions of section 632(d). In relevant part, section 28(f)(2) specifically provides that: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." This provision has been interpreted to mean that California no longer (at least as of June 8, 1982) has an exclusionary rule, except as mandated by federal U.S. constitutional standards. This has the effect of doing away with the exclusion of evidence under "*independent state grounds*." (*In re Lance W.* (1985) 37 Cal.3rd 873.) The Court here agreed with the lower courts that Proposition 8 had the legal effect of negating the exclusionary requirements of 632(d), making such evidence admissible at trial, at least so long as relevant. Here, the telephone conversation between Esperanza and Lorena was clearly relevant to Lorena's credibility when defendant chose to use her as a defense witness. In so ruling, the Court disagreed with a number of defense arguments.

(2) Defendant first argued that article I, section 28(f)(2), was intended to apply only to those exclusionary rules that were judicially created and not to those that have a statutory basis, such as in section 632(d). The Court, however, held here that merely because an exclusionary remedy is codified (i.e., contained in a statute as opposed to having been created by a court's decision) does not mean that it is beyond the reach of California's Right to Truth-in-Evidence provisions. Nothing in the case law or the language of Proposition 8's constitutional amendment, supports defendant's argument on this issue.

(3) The Court also rejected defendant's argument that there is no need for us to find that article I, section 28(f)(2) abrogated section 632(d) because both provisions can be given effect simply by excluding "the tape recording itself" while allowing Esperanza to testify to "her independent recollection of the telephone conversation to impeach Lorena." The tape recording, however, is both relevant *and* the best evidence of what was said in the Esperanza-Lorena conversation.

(4) The Court next rejected defendant's argument that because article I, section 28(f)(2) makes reference to criminal cases only, and not civil cases, that his constitutional equal protection and due process rights are violated. To this, the Court noted that even if applicable only to criminal proceedings, criminal defendants are not equally situated with civil defendants (criminal defendants facing potential loss of liberty while civil defendants are exposed to either money damages or injunctive sanctions only). It therefore does not offend the Constitution to treat them differently.

(5) The Court also rejected defendant's argument that "the right to privacy outranks the right to truth-in-evidence" and hence, as argued by defendant, the exclusionary provisions of section 632(d) must be given effect regardless of Proposition 8. The Court, however, could find no conflict between the different constitutional rights such that only one may be effectuated while another is not.

(6) The last issue raised by defendant and considered by the Court was the legal effect of legislative amendments to P.C. § 632 enacted after the passage of Proposition 8. Article I, section 28(f)(2), specifically provides that Proposition 8's negation of California's exclusionary rule does not apply to a "statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature." The Legislature has amended section 632 some five times since Proposition 8 was passed in 1982 (i.e., 1985, 1990, 1992, 1994 and 2016); four of such amendments by over a two-thirds vote of both the Assembly and the Senate. Article IV, section 9 of California's Constitution requires an amended statute to be "reenacted." However, a

reenacted statute may be amended in only some parts and not others. Government Code § 9605(a) addresses such a situation, providing that "[i]f a section or part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form. The portions that are not altered are to be considered as having been the law from the time when those provisions were enacted." The bottom line to all this statutory legal mumbo-jumbo is that merely by amending section 632, it cannot be said that the exclusionary provisions of subdivision (d) are reenacted anew. Per the Court: "More than technical reenactment is needed to overcome Proposition 8." As previously held in Lance W. (*supra*, pg. 895, fn. 18): "Neither article IV, section 9 (of the California Constitution), nor Government Code section 9605, contemplates reenactment of the unchanged portions of an amended statute in the form of its original enactment if there have been intervening amendments of those portions." In order "to find that a subsequent amendment of section 632 had the effect of reviving its exclusionary provision, there must be something in the 'language, history, or context of the amendment' to support the conclusion that the Legislature intended such a result. No such intent is apparent here. "Without evidence of such an intent, the reenactment of section 632 simply reinstates the statute as it existed at the time of reenactment." This is true even if the wording of subdivision (d) is technically changed (i.e., referred to by the Court as a "'technical, nonsubstantive' amendment"), at least so long as it continues to basically say the same thing. Finding no applicable exclusionary rule, defendant's conviction was upheld.

Note: Those of us who were in law enforcement prior to the passage of Proposition 8 (i.e., June 8th of 1982) necessarily appreciate the importance of this monumental change in California's search and seizure rules more so, I would think, than all you relatively wet-behind-the-ears "newbies" (i.e., anyone under the age of about 60). Prior to Prop. 8, we had to deal with some ridiculously (and unnecessarily) restrictive search and seizure rules that were based upon the state courts' interpretation of the California Constitution, commonly going far beyond what the U.S. Constitution required. Proposition 8 did away with all that. I've heard rumors, however, that today's California (left-leaning, pro-defendant, anti-victim) Legislature is thinking about legislatively doing away with Proposition 8, returning us to the pre-1982 rules. I cannot over emphasize how important it is that we don't let this happen. Believe me, you won't like it if we have to return to such rules as police officers being limited to *patdown searches* of arrestees prior to transporting them to jail (via which many a weapon was missed), no more *motor vehicle exception* to the search warrant requirement, restricted *plain-sight observations* from the air, etc., etc. Being a cop today is tough enough without having your hands tied, from a search and seizure standpoint, even more than they are.

***The "ShotSpotter" System*:**
***Warrantless Residential Entries and the Emergency Aid Doctrine*:**
***Warrantless Residential Entries and Community Caretaking*:**
***Warrantless Residential Entries and Exigent Circumstances*:**

People v. Rubio **(Dec 12, 2019) 43 Cal.App.5th 342**

Rule: (1) The "emergency aid" doctrine allows for a warrantless entry into a residence only if such entry is supported by specific and articulable facts that would lead a reasonable person to conclude that someone inside needs to be rescued. Community caretaking is no longer a valid

reason for making a warrantless entry into a residence. (2) Exigent circumstances justify a warrantless entry into a residence only when there is both *probable cause* to believe that a crime has been or is being committed and a *reasonable belief* that entry is necessary in order to prevent the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

Facts: A "*ShotSpotter*" system uses strategically positioned microphones throughout a city to detect and triangulate the location of gunfire as it occurs. At about 10:40 p.m., on October 19, 2016, East Palo Alto Police Department Sgt. Clint Simmont received notification via his "ShotSpotter" system alerting him to two separate burst of gunfire (five and six rounds, respectively, and a minute apart) from the garage driveway area of 2400 Gonzaga. 2400 Gonzaga is in a "high-crime" neighborhood. Sgt. Simmont later testified that in the past, he had responded to more murders within a block of that location than anywhere else in East Palo Alto. Sgt. Simmont and four other officers drove to 2400 Gonzaga and parked nearby. Neighbors and spent gun shell casings on the ground at the top of the driveway, near the garage, verified that someone had indeed been firing a gun at that location. Within about a minute of the officers' arrival, a man—later identified as Joshua Bazan—walked out of a wooden gate at the side of the garage and leading to the back yard. Sgt. Simmont recognized Bazan from prior contacts as a man who liked to drink but disliked the police. Bazan immediately began yelling obscenities at the officers and assumed a combative position. He was arrested and placed into the back seat of a patrol car. Upon contacting Bazan, two more spent casings were found behind the open gate that Bazan and just exited. At this point, Sgt. Simmont believed that there might possibly be a victim and/or a shooter "hiding out" inside the garage. Noticing that there was a door at the side of the garage, Sgt. Simmont "pounded loudly" on it while announcing four or five times that the police were there. Although no one responded, someone could be heard inside pushing items up against the door as if to barricade it. As Sgt. Simmont knocked on the door, a man came to a window next to the garage. Upon Sergeant Simmont ordering him to open the door, the man indicated that the door led to a separate room and not the garage. Going to the front door, the officers contacted Francisco Rubio, Sr.; defendant's father. Asked whether anyone in the house had been shot, Mr. Rubio responded; "*I don't think so*." Mr. Rubio granted the officers' request to search the house (which Rubio later denied). Asked who was in the garage, Mr. Rubio said his son (defendant) was. Mr. Rubio granted the officers' request to search the garage. Finding the door to the garage to be locked, Mr. Rubio went to find a key when defendant himself suddenly emerged from the garage, opening the door "just enough to slide his body out," and then closing it (which automatically relocked) behind him. An upset defendant approached the officers with his hands in his pockets, yelling for them to shoot him. Sgt. Simmont repeatedly ordered defendant to show his hands. Defendant eventually took his hands out of his pockets and, as he did so, threw a keyring into the kitchen sink. Officers detained defendant and placed him in a patrol car. Finding that the keys in the sink didn't fit the door, the officers finally just kicked it in. Sgt. Simmont later testified that he was uncertain at this point what was on the other side of the door, but that although he had no reason to believe anyone had been shot, he also "didn't have anything to rule that out, either." The garage was discovered to have been converted into an apartment. While inside, the officers observed in plain sight an "explosive device" and a semiautomatic .357-caliber Smith & Wesson pistol. A search warrant was obtained which, when executed, resulted in the recovery of the above along with ammunition, spent shell casings, a body armor vest, and some methamphetamine. Also found was surveillance equipment with a

view of the driveway. Reviewing a video from the surveillance camera showed that it was defendant who had been shooting the gun, firing into the air. Charged in state court with a host of offenses, defendant's motion to suppress was denied, the trial court judge basing his decision on the "emergency aid" doctrine and the "community caretaking" exception to the search warrant requirement, citing *People v. Ray* (1999) 21 Cal.4th 464 as his authority. Defendant entered a plea of no contest to violating H&S § 11370.1 (possession of a controlled substance while armed with a firearm) and appealed. The trial court's ruling was upheld on appeal by the First District Court of Appeal. The Appellate Court, however, granted its own motion for a rehearing in light of the California's intervening decision in *People v. Ovieda* (2019) 7 Cal.5th 1034.

Held: Upon rehearing, the First District Court of Appeal (Div. 4), in a split (2-to-1) decision, reversed. With the Court emphasizing the importance of one's right to privacy in his own home, the Attorney General argued that two exceptions to the warrant requirement applied in this case.
(1) *The Emergency Aid Exception and/or Community Caretaking*: The emergency aid exception to the warrant requirement allows police to "enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury." (*Brigham City v. Stuart* (2006) 547 U.S. 398, 400.) Whether or not an officer has a "reasonable basis for believing" that someone inside is seriously injured or in imminent threat of such an injury, the court must give "due weight" not to an officer's hunches, but "to the reasonable inferences" he is entitled to draw from the known facts, in light of the officer's experience. The officer "must be able to point to specific and articulable facts from which he concluded that his action was necessary." The Court here found that knowing someone had been shooting outside of a residence was insufficient to cause the officers to reasonably believe that someone *inside* the residence was injured or needed to be rescued. For instance, there was no blood on the ground, nor any eyewitnesses saying that a scuffle had occurred. When asked, defendant's father told the officers he "didn't think" anyone had been shot. This, the Court ruled, was insufficient to cause the officers to reasonably believe anyone had been injured or otherwise needed the officers' assistance. "With nothing more than an 'unparticularized suspicion' that emergency aid might be necessary, the police may not breach the firm line the Fourth Amendment draws at the entrance to defendant's home" (referring specifically to defendant's garage apartment as his home). Initially, the People cited *People v. Ray, supra,* which (in a "plurality" [i.e., less than a majority] opinion) cited the so-called "community caretaking" theory as authority for entering the home under the emergency aid doctrine, but with circumstances short of an expressly articulated emergency. However, the California Supreme Court, in the subsequently decided case of *People v. Ovieda, supra*, held that the "community caretaking" exception does not apply to residences. (7 Cal.5th 1034, pp. 1038, 1048.)
(2) *Exigent Circumstances*: Separate and apart from the emergency aid exception to the warrant requirement is the "*exigent circumstances*" exception. "Exigent circumstances" has been defined as "an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence." (*People v. Ramey* (1976) 16 Cal.3rd 263, 276.) Exigent circumstances include "when an entry or search appears reasonably necessary to render emergency aid, whether or not a crime might be involved." (*People v. Ovieda, supra,* at pp. 1041–1042.) Also; "entry into a home based on exigent circumstances requires probable cause to believe that the (warrantless) entry is justified

by . . . factors such as the imminent destruction of evidence or the need to prevent a suspect's escape." (*People v. Bacigalup*o (1991) 1 Cal.4th 103, 122.) The People argued here that exigent circumstances existed in this case based in part upon the officers' concern that there might be an injured person in the garage who needed immediate aid. Seeing this argument as nothing more than a "reframing of the emergency aid argument we have already rejected," The Court found that there was no articulable evidence in this case that anyone in defendant's apartment was injured or otherwise needed aid. The Court further noted the lack of any evidence to the effect that someone in the apartment was about to destroy evidence of the shooting. Arguing that a "firefight" might have occurred that night, the People further suggested that there might have been a shooter still in defendant's apartment even after defendant himself had left it. It was further asserted by the People that it was reasonable to believe that "activities intended to be hidden were continuing in the home." The Court ruled, however, that whatever Sgt. Simmont and the other officers at the scene might have subjectively believed, there were insufficient facts to raise such "conjecture" to the necessary level of probable cause. In order "to fall within the exigent circumstances exception to the warrant requirement, an arrest or detention within a home or dwelling must be supported by both probable cause and the existence of exigent circumstances." Per the Court, in considering the "totality of the circumstances," the People failed to establish that when the police entered defendant's apartment they had probable cause to believe a shooter would be found there. Whether or not another shooter remained in defendant's apartment after defendant and Joshua Bazan had been detailed was pure "speculation." As such, "exigent circumstances" did not support the officers' warrantless entry into defendant's apartment.

Conclusion: With the officers' initial entry into defendant's apartment and any observations made at that time being illegal, the Court reversed the trial court's denial of his suppression motion and remanded for further proceedings.

Note: Remembering that a search warrant was subsequently obtained, I'm assuming that "remanding for further proceedings" means having the trial court rehear the suppression motion, to include a redaction of any references to those warrantless observations from the warrant affidavit and retesting what's left to see if probable cause still exists. So whether or not defendant is going to skate on this case is still an open question. But aside from that issue, the dissent in this case, authored by Presiding Justice Stuart Pollak, is also very important. In his dissent, Justice Pollak chastises his fellow justices for ignoring the U.S. Supreme Court's admonition in prior cases which criticize the "second-guessing (a) police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the (lower court) panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. But we have instructed that reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and that '[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving.'" (at p. 357; quoting *Ryburn v. Huff* (2012) 565 U.S. 469, 477.) Here, per Justice Pollak, the following facts arguably establish the officers' reasonable belief in the existence of an emergency. "1) there were shots fired from multiple locations in the driveway; 2) a verbally aggressive person exited the gate of the residence and took a fighting stance; 3) Sergeant Simmont recognized that the person did not live at the residence; 4) shell casings were observed outside the residence; 5) the shell casings appeared to

lead to a door going into the garage; 6) when he knocked and announced his presence, Sergeant Simmont heard movement inside that sounded like someone barricading the door; 7) the sounds led officers to believe someone may have been held captive on the other side of the door; 8) [defendant] was acting erratically and refused to show his hands; and 9) the neighborhood was known as a high crime area." Some might argue that Sgt. Simmont would have been derelict in his duties had he not made an immediate warrantless entry into defendant's garage apartment to insure that there was no one in there who was either (1) a victim of, or (2) a suspect in, the shooting. I cannot advise you what to do under such circumstances. But I know for myself when I was a cop, and when confronted with similar situations, I always felt that it was better to force my way in and perhaps suffer a subsequent suppression of evidence or maybe a citizen's complaint, rather than just do nothing and leave, only to find out later that (1) I allowed a suspect to escape, or more importantly, (2) someone inside needed our assistance and suffered further harm because we just walked away.

***The "Chokehold" and Unnecessary Force*:**
***The "Chokehold" and Qualified Immunity from Civil Liability*:**

Tuuamalemalo v. Greene **(9th Cir Dec. 24, 2019) 946 F.3rd 471**

Rule: The use of a chokehold on a non-resisting, restrained person violates the Fourth Amendment's prohibition on the use of excessive force, and, as a "clearly established" rule, will subject the officer to potential civil liability.

Facts: During the evening of January 25th, 2014, plaintiff Ian Tuuamalemalo went with a small group of friends and relatives to a reggae concert at a place called "The Joint," located in the Hard Rock Hotel and Casino, in Las Vegas, Nevada. The group consumed a "few drinks" as they enjoyed the entertainment. Meanwhile, the "Homeland Saturation Team" of the Las Vegas Metropolitan Police Department ("LVMPD"), a unit specializing in riot control and led by Sgt. Tom Jenkins, was present, backing up other officers, to ensure that no fights would break out during the concert. Officer Shahann Greene (defendant) was a member of the Saturation Team. Reiterating the sometimes conflicting facts as they most favored the Plaintiff's version (as the Court is legally required to do for purposes of this appeal), the eventual dispute all started when LVMPD Gang Sergeant Andrew Burnett first approached a member of Plaintiff's party, Darin Afemata. (Why the contact is not discussed.) Seeing this, Plaintiff attempted to intervene, only to be told by one of the officers "to shut the 'F' up." This led to general pushing and shoving. As Plaintiff made his way to the front of the group, he was pushed by one of the officers. Plaintiff and other patrons were all moved to a hallway outside "The Joint," but still in the hotel. As Plaintiff was pushed along the hallway with a mixed group of patrons and police officers, he collapsed. (Drunk? The Court does not tell us.) With the help of officers and patrons, Plaintiff was able to stand up. He began walking toward the hotel exit with help from two friends, one on each side. As Plaintiff and others in his group were walking towards the hotel exit, Sgt. Jenkins pushed through the group and grabbed the back of Plaintiff's shirt. As Plaintiff turned around (all showed on a hotel security video), Sgt. Jenkins punched him on the left side of his face. Five other officers then jumped in, taking Plaintiff to the ground. As they did so, Plaintiff claimed that he heard someone call out: "Choke his ass out." In response, Officer Greene did just that; applying a chokehold on Plaintiff. The hotel video showed Plaintiff on the floor with a number

of officers on top of him without any indication that Plaintiff was resisting. The chokehold rendered Plaintiff unconscious and took several attempts to revive him. It was later testified to that the chokehold Officer Greene applied to Plaintiff was more correctly described as a "lateral vascular neck restraint" ("LVNR"), which, by applying pressure to the carotid arteries at the sides of one's neck, restricts the flow of blood to the brain rather than restricting air flow. Plaintiff was arrested for (1) disorderly conduct, (2) resisting arrest, (3) provoking commission of breach of peace, and (4) malicious destruction of property. All charges were ultimately dismissed. Plaintiff subsequently filed a civil suit in state court, with the case eventually being moved to federal court. The civil defendants' summary judgment motion—asking that the lawsuit be dismissed based upon a claim of qualified immunity—was granted as to all defendants except for Officer Greene. The claims against Defendant Greene all relate to his use of the chokehold on Plaintiff. Greene appealed the denial of the summary judgement motion as to him.

Held: The Ninth Circuit Court of Appeal affirmed. The only issue on appeal was the legal effect of using the so-called chokehold (sometimes referred to as the "*carotid restraint*") on a non-resisting, already restrained person, and whether a law enforcement officer who uses the chokehold in such a circumstance is protected from civil liability by the doctrine of "qualified immunity." An Appellate Court's "review of a grant of summary judgment based on qualified immunity involves two distinct steps. Government officials are *not* entitled to qualified immunity if (1) the facts '[t]aken in the light most favorable to the party asserting the injury . . . show [that] the [defendants'] conduct violated a constitutional right' *and* (2) 'the right was clearly established' at the time of the alleged violation.'" (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3rd 865, 871-872; quoting the U.S. Supreme Court's decision in *Saucier v. Katz* (2001) 533 U.S. 194, 201.) Here, Defendant (Greene) did not dispute that his use of the chokehold on Plaintiff (Tuuamalemalo) under the facts of this case—when Plaintiff was already otherwise subdued and not resisting—violated the Fourth Amendment as an unreasonable seizure. The only issue was whether or not Plaintiff's right to be free from such a "seizure" under circumstances similar to (i.e., in the "*specific context of*") this case is "clearly established" by prior case law. To be "clearly established," "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." (*Anderson v. Creighton* (1987) 483 U.S. 635, 640." However, the Supreme Court has also cautioned lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd* (2011) 563 U.S. 731, 742.) The Court here held that although there is not a lot of Ninth Circuit case law on the issue, at least two prior cases have made it clear that the use of a chokehold on a non-resisting, otherwise restrained, individual has been clearly established as warranting an officer so doing to be held civilly liable. (Citing *Drummond ex rel. Drummond v. City of Anaheim* (9th Cir. 2003) 343 F.3rd 1052, 1059; and *Barnard v. Theobald* (9th Cir. 2013) 721 F.3rd 1069, 1075-1076.) The Court further noted that decisions from other federal circuits hold the same thing under similar circumstances. (See *Coley v. Lucas County* (6th Cir.) 799 F.3rd 530, 541, "Chokeholds are objectively unreasonable where an individual is already restrained or there is no danger to others."; *United States v. Livoti* (2nd Cir 1999) 196 F.3rd 322, 324-327, finding that use of a chokehold against a handcuffed, non-resistant subject was an excessive use of force; and *Valencia v. Wiggins* (5th Cir 1993) 981 F.2nd 1440, 1447, holding the use of a "choke hold and other force . . . to subdue a non-resisting [detainee] and render him temporarily unconscious was unreasonable and was an excessive use of force.") With Defendant's civil liability clearly established, Officer Greene should have known that the use of the chokehold on

Plaintiff was illegal under the circumstances. His motion for summary judgement, therefore, was properly denied by the trial court.

Note: The use of the chokehold against an *unrestrained, resisting* suspect is still lawful although many California agencies have amended their departmental rules to forbid its use. Why, I'm not sure, other than it can easily result in injury if not applied properly and, I suppose, it simply looks like you're killing the person when you use it. But we were trained to use it in the '70's when I was a cop, and I (as one of the physically smallest cops on San Diego P.D. at the time) found it to be quite effective. It's certainly better than shooting the guy which, as I see it, is even more likely as less-lethal means of subduing violent suspects are eliminated from a cop's arsenal. And what with all the current problems stemming from a Minneapolis cop unnecessarily killing George Floyd (see Administrative Notes, above), protesters are demanding that the use of the chokehold by law enforcement be statutorily outlawed even though Floyd was not killed in this manner. I'm not sure I understand this thinking. Also note that the Floyd protestors are similarly demanding the elimination (or at least toning down) of the "qualified immunity" theory, making it easier to hold law enforcement officers civilly liable whenever they use force. There are currently eight qualified immunity cases now pending before the United Supreme Court. The facts of the cases vary, ranging from the shooting of a 10-year-old boy when police pursued an unarmed suspect into a yard where children were playing, to the apparently needless destruction of a house with tear gas grenades when police were given the house keys to look for a suspect after the homeowner had told police the suspect was not there, to other cases involving deaths and serious injuries stemming from police misconduct. So we may soon see some tightening up of the qualified immunity rules from what they are currently, as described in the brief above.