The California Legal Update

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

Vol. 21 September 23, 2016 No. 10

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

www.legalupdate.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

THIS EDITION'S WORDS OF WISDOM:

> "*There are three kinds of people in this world; those who are good at math, and those who aren't.*" (Anonymous)

IN THIS ISSUE:

***Cases*:**

CASES:

***Use of Force and High Speed Chases*:**

Mullenix v. Luna **(Nov. 9, 2015) __ U.S. __ [193 L.Ed.2nd 255; 136 S. Ct. 305]**

Rule: The legality of shooting at a high-speed chase suspect vehicle is an unsettled issue for which an officer is, to date, entitled to qualified immunity from civil liability.

Facts: Israel Leija, Jr., had an outstanding warrant for his arrest. Sgt. Randy Baker, of the Tulia, Texas, Police Department, tried to arrest him on the night of March 23, 2010. Leija, however, declined to cooperate, and sped off in his car. Sgt. Baker, soon joined by Trooper Gabriel Rodriguez of the Texas Department of Public Safety (DPS), gave chase. As Leija led an 18-minute chase on Interstate 27 at speeds of between 85 to 110 miles per hour, he twice called the Tulia Police dispatcher on his cellphone, warning the dispatcher that he had a gun and that he would shoot at the officers if they did not abandon their pursuit. Leija sounded like he might be intoxicated. Leija's threat and his possible state of inebriation was broadcast to all concerned officers. Meanwhile, other officers were setting up tire spikes at three locations including one on I-27 beneath the Cemetery Road overpass. The use of the spike strips was done in accordance with training the officers had received on the deployment of spike strips, including on how to take a defensive position so as to minimize the risk posed by the passing driver. DPS Trooper Chadrin Mullenix also responded to the Cemetery Road overpass, initially intending to set up a spike strip there. Upon learning that it was already being done, Trooper Mullenix decided instead that he might be able to disable Leija's car by shooting at it as it passed under the overpass. Trooper Mullenix had not received training in this tactic, nor had he ever attempted to do it before. But he radioed his idea to the pursuing Trooper Rodriguez and got an acknowledging "10-4" in response, with information concerning their location and speed. Trooper Mullenix also asked the DPS dispatcher to inform his supervisor, Sgt. Byrd, of his plan, asking whether it might be "worth doing." Before receiving Sgt. Byrd's response, however, Trooper Mullenix left his vehicle and, armed with his service rifle, took a shooting position on the overpass, 20 feet above I-27. From this position, it was arguably possible for Trooper Mullenix to hear Sgt. Byrd's response to "stand by" and "see if the spikes work first." Meanwhile, another officer, Randall County Sheriff's Deputy Tom Shipman, arrived at Trooper Mullenix's location and discussed with him his plan and where to shoot the vehicle to best carry it out. Deputy Shipman also informed Mullenix that another officer was located beneath the overpass, manning the spike strip. Approximately three minutes later, Leija's vehicle was observed approaching the overpass. Trooper Mullenix fired six shots at Leija's car just before it hit the spike strip. Leija's car went out of control, bouncing off the median and rolling two and a half times. It was later determined that Leija had been killed by Mullenix's shots, four of which struck his upper body. There was no evidence that any of Mullenix's shots hit the car's radiator, hood, or engine block, as was apparently intended. Leija's relatives filed a federal civil rights 42

U.S.C. § 1983 lawsuit, alleging that Trooper Mullenix had violated the Fourth Amendment by using excessive force against Leija. Trooper Mullenix's motion for summary judgment, claiming qualified immunity, was denied. The Fifth Circuit Court of Appeal affirmed. The United States Supreme Court granted certiorari, agreeing to hear the case.

Held: The United States Supreme Court, in a split, 8-to-1 decision, reversed. But in doing so, the Court determined only that Trooper Mullenix was entitled to qualitied immunity, not deciding the issue of whether he had in fact violated the Fourth Amendment by shooting at Leija's car. This case is a Fourth Amendment, excessive use of force case (shooting and killing someone being as extreme a "seizure" as there can be). Recognizing the complexities of police work, the Court noted that it is often difficult for an officer to determine how the relevant statutory or constitutional rights of an individual might apply to the factual situation with which the officer is then confronted. For this reason, the doctrine of qualified immunity has been developed, protecting officers from civil liability in cases where the rules for a specific set of circumstances have not been clearly established. In order to deny a police officer the protection of qualified immunity, the rules guiding his actions in any particular case must be sufficiently clear so that every reasonable officer would have understood that what he is doing violates a civil plaintiff's rights. The Court also noted that there need not be a prior case directly on point for it to be a settled issue. It merely needs to be shown that existing precedent places the statutory or constitutional question beyond debate. "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." The issue here, therefore, is not whether Officer Mullenix used excessive force, but rather whether that if he did, is the prior case law so "clearly established" that a reasonable officer in his position should have recognized that the force he used was excessive. The dissent answered with an affirmative "yes." The majority opinion, however, answered in the negative. In this case, Officer Mullenix confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers if they didn't abandon their pursuit, and who was moments away from encountering an officer waiting to stop him through the use of a spike strip. The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these particular set of circumstances "beyond debate." The federal Fifth Circuit had ruled in this casse that a police officer may not "use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." The Supreme Court, however, found that while this may be true in some cases, there are exceptions. "(T)his area is one in which the result depends very much on the facts of each case." Prior case law is not sufficiently clear on the issue of how this rule is to be applied in a circumstance similar that which Officer Mullenix found himself confronted, to put him on notice that his actions in shooting at Leija's car constituted the use of excessive force. The Court found that none of its precedents "squarely governs" the facts here. And lower court decisions are contradictory. In so finding, the Court discounted the fact that spike strips were in place and that this may have resolved the issue without the necessity of shooting at his vehicle, noting that spike strips are not always successful in ending a chase. Also, the use of spike strips can be just as dangerous as shooting at the vehicle. An officer cannot be faulted for choosing one dangerous alternative over another. Ultimately, whatever can be said of the wisdom of officer Mullenix's plan, the Supreme

Court's precedents do not establish "beyond debate" that he acted unreasonably by shooting at Lejia's car in the hope that by doing so, he might avoid the risks to other officers and other drivers that relying on spike strips would entail. Therefore, Officer Mullenix is entitled to qualified immunity under the circumstances of this case.

Note: So did Officer Mullenix use excessive force from a Fourth Amendment constitutional perspective? The answer is: *We don't know*. The best I can tell you is that the issue of "excessive force" depends upon the unique circumstances of each individual case. But what you should get out of this case is the fact that shooting at a fleeing felon (or in any high-speed chase situation) is always going to be an issue which someday—perhaps in your case—the Supreme Court may finally answer the question. And you may not like the answer. There is Supreme Court authority to the effect that you are *not* required to break off a high speed chase (although unique circumstances, such as when approaching a school zone with children present, might dictate a different result), and that stopping the violator by bumping the his car and pushing him off the road, severely injuring him, is not unreasonable. (*Scott v. Harris* (2007) 550 U.S. 372.) But the best guidance we have for circumstances when you shoot at the suspect is that, with no settled rule for you to follow, you are entitled to qualified immunity from civil liability. (E.g., *Brosseau v. Haugen* (2004) 543 U.S. 194.) In the meantime, I've read where some police departments (e.g., LAPD and LASD) are instituting polices against shooting at moving vehicles, noting studies that have concluded that the occupants of such vehicles are seldom armed, nor (other than their erratic driving) dangerous. While I'm not usually a fan of any blanket policy that limits an officer's discretion, in discussing the use of firearms, given the plethora of such high-profile cases we've seen as of late, this particular policy is perhaps inevitable, and maybe advisable.

***Search Warrants*: *Material Omissions*:**
***Search Warrants*: *Stale Information*:**
***Search Warrants*: *A Franks Motion to Traverse*:**

People v. Lee **(Nov. 10, 2015) 242 Cal.App.4th 161**

Rule: The fact that firearms were purchased and registered years earlier does not detract from the assumption that they are still possessed by the defendant, absent evidence that they were subsequently sold or destroyed. An evidentiary hearing on the issue of whether a search warrant affidavit fails to describe material information (I.e., a *Franks* hearing) is allowed only after the defendant makes a "substantial showing" of such a material omission.

Facts: Defendant was approached by a homeless man, Donald Bolding, who was panhandling on a freeway off-ramp in Los Angeles. Defendant was driving a rented car with his fiancée sitting in the front passenger seat and others, including a nephew, in the back. When defendant declined to give Bolding any money, he (Bolding) showed his displeasure by lifting his sweatshirt, exposing a tattoo on his stomach depicting a male and a female in a sexual position. Angry because his fiancée was greatly offended by this, defendant pulled around the corner,

retrieved a tire iron from the trunk, and, with his nephew in tow, walked back to where Bolding was still soliciting money. He then hit an unsuspecting Bolding with the tire iron while demanding that he "[g]et on your hands and your knees and apologize." With his nephew punching and kicking at Bolding, the two of them chased him around the stopped cars until they finally cornered him against a fence. Defendant hit Bolding numerous times with the tire iron until Bolding finally apologized. Other motorists intervened, causing defendant to finally stop the assault. The witnesses were able to get a good description of defendant and the license number of his car. Bolding suffered lacerations to his head and a broken left arm. A subsequent investigation resulted the discovery that defendant had two firearms registered to him, both of which he had purchased some 17 years earlier. It was also discovered that in 2001, defendant had been arrested and convicted of misdemeanor possession of a firearm and felony possession of narcotics. And although his criminal convictions were expunged in 2007, he was still prohibited from legally owning any firearms pursuant to the provisions of P.C. § 1203.4. The continued registration of both firearms was confirmed with another officer assigned to the LAPD's (Los Angeles Police Department) gun unit. Defendant's "prohibited status" was also verified through records of the California Department of Justice, "via the Armed Prohibited Persons System." Shortly after the assault, defendant left the country, returning to his native South Korea. Arrangements were made through an attorney for defendant to return to the United States and turn himself in. He was thereafter arrested some six months after the assault and charged with assault with a deadly weapon and with a "great bodily injury" allegation. Two weeks later, Detective Ken Yueng obtained a search warrant for a house in Malibu where defendant stayed while in the United States. The warrant authorized a search for the two firearms still registered to him, along with ammunition, and evidence related to the assault. Only ammunition was found at the house. But present in the house at the time were several persons, one of whom knew about the assault and who identified for investigators a person who had been a passenger in the car. That person, identified as David Lee (not the defendant Lee), was located several months later and interviewed. David Lee later testified as a prosecution witness against defendant, describing for the jury defendant's (and the nephew's) assault upon Bolding. Prior to trial, however, defendant filed a motion to quash the search warrant, and demanded a "*Franks*" (i.e., *Franks v. Delaware* (1978) 438 U.S. 154.) evidentiary hearing, arguing that the affiant had left out the fact that defendant had purchased the firearms described in the warrant 17 years earlier while living at a different address, and that if the magistrate had known this, he would have considered that the information was too "stale" to justify the issuance of a search warrant. This, per defendant, meant that the witness David Lee would never have been found, and therefore shouldn't have been allowed to testify. The trial court granted defendant an evidentiary hearing, and subsequently granted his motion to quash (or, more correctly, "*traverse*") the warrant. But it denied the motion to suppress David Lee's testimony saying he would have been found anyway. Defendant was subsequently convicted and sentenced to seven years in prison. He appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. Defendant argued on appeal that David Lee's testimony should have been suppressed as the fruit of an illegal search, the warrant having been quashed. In support of this argument, defendant noted that the search warrant for

defendant's Malibu residence was "misleading," in that material evidence (i.e., that the firearms in question had been purchased 17 years earlier while living at a different address) had been left out of the affidavit. As such, the firearms information was stale, negating the necessary probable cause for the issuance of the warrant. The trial court had so held. But the Appellate Court disagreed. In the first place, defendant should *not* have been allowed to have a "*Franks*" hearing. A "*Franks* hearing" (per ***Franks v. Delaware***) is an evidentiary hearing where a court will allow testimony (including cross-examination of the affiant) concerning an alleged intentional or reckless inclusion of false or misleading information in a warrant affidavit, or the failure to include information in the affidavit that a reasonable magistrate, in approving a warrant, would have needed in order to determine the existence of probable cause. However, before such a hearing is allowed, a defendant must first make a "substantial preliminary showing" that a false statement was intentionally or recklessly ("unintentionally," or even "negligently," not being enough) included in the affidavit, or that the affiant deliberately or recklessly omitted material facts that negate probable cause when added to the affidavit. The Court ruled here that the fact that defendant had purchased and registered the firearms 17 some years earlier was immaterial to the issue of whether there was probable cause to believe he still possessed those firearms, at least absent evidence that he had since sold or destroyed them. No such evidence was presented. The affidavit correctly stated that the guns were still registered to him. As such, it is immaterial that they were purchased years ago; i.e., the information was not "stale." The assumption, therefore, being that he still owned the guns, it was reasonably inferred that he kept them with him at his current residence. The warrant, therefore, was erroneously quashed by the trial court. In that the warrant was legally valid, discovery of witness David Lee's existence was not an issue. Whether or not he would have been found anyway is irrelevant.

Note: The discovery of the identity of a witness through an illegal act committed by law enforcement, had the court been forced to decide that issue, is the subject of some prior case law. Generally, the courts are reluctant to suppress a witness's identity, precluding him from testifying, and will only do so when it is unlikely that he would ever have been found or would have come forward on his own. "The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means and, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness." (*United States v. Ceccolini* (1978) 435 U.S. 268, 276-279; see also *People v. McCurdy* (2014) 59 Cal.4th 1063, 1092-1093.) David Lee testified that defendant had threatened his life if he informed on him. They didn't say here, but that fact might motivate some to testify, while discouraging others. Also note that the Court kept calling defendant's motion to suppress a "*motion to quash*," as opposed a "*motion to traverse*." The correct use of these terms dictates that a motion to quash is a challenge to the sufficiency of the probable cause as appears on the face of the warrant. A motion to traverse is the *Franks* situation where the defendant, after making the necessary "substantial showing" as discussed above, is allowed an evidentiary hearing in order to go behind the warrant to ferret out intentional or reckless material falsehoods or omissions. Those two terms should not be confused, as they were here.

***Battery; per P.C. §§ 242 & 243.6*:**

In re B.L. **(Aug. 31, 2015) 239 Cal.App.4th 1491**

Rule: The non-consensual knocking of an item from a person's hand constitutes a battery.

Facts: The 15-year-old female defendant was a student at the John F. Kennedy High School in Richmond, California, participating in a physical education class taught by Wendolyn Eaglin. Harry Campbell, another physical education instructor, was also teaching a class. With both classes outside on the blacktop, defendant approached Campbell and told him that her mother was waiting for her outside the school property and wanted to take her home. She asked Campbell to unlock the school gates so she could leave. Campbell told defendant that per instructions from the school administration, no teacher could grant her an early release. After talking to someone on her cell phone, defendant, became somewhat agitated and raised her voice, repeating her request to Campbell, telling him this time that her brother was waiting for her and that he should open the gate. When Campbell pointed out the inconsistency about who was picking her up, defendant lost it and, using racial slurs (Campbell is black) and other profanity, demanded that he open the gates. Not liking defendant's attitude, Campbell responded; "Your mother. Sorry, mom" (whatever that means). With this, defendant threatened to "beat your ass, bitch," and hit Campbell with a Frisbee she was carrying. As Campbell raised his arm to deflect the Frisbee, defendant, totally losing her cool, punched him in the face and then kicked him in the groin. Another student intervened, also attacking Campbell. As this was going on, Eaglin approached with her walkie-talkie in hand, holding it open and sticking out in defendant's direction so that other staff could hear the commotion and, hopefully, come to their aid. As she did so, defendant, while calling Eaglin a "black bitch," slapped the device out of her hand, knocking it to the ground. The District Attorney of Contra Costa County filed an original wardship petition alleging that defendant had committed two counts of misdemeanor battery on school employees, per P.C. §§ 242/243.6. Following a contested hearing in the juvenile court, the both allegations were sustained. Defendant was deemed a ward of the court and placed on probation at her mother's home, with 60 days of home supervision that could be terminated after 30 days depending on her conduct. (*I'll bet that taught her a lesson*.) Defendant appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. It was not contested that the punching and kicking of Harry Campbell was a battery. The issue was whether knocking the walkie-talkie out of Wendolyn Eaglin's hand, where there was no proof that defendant had actually touched Eaglin's person, was also a battery. Conceding that this is an issue of first impression in California, the Court held that what defendant did here was indeed a battery. Battery is a general intent crime. Per P.C. § 242: "A battery is any willful and unlawful use of force or violence upon the person of another." P.C. § 243.6 describes the circumstance when a battery is committed against a school employee engaged in the performance of his or her duties. To constitute a battery, the slightest degree of touching is sufficient. Any force used against the person is enough. It need not be violent or severe, nor cause bodily harm or even pain, and it need not leave a mark. Any harmful or offensive touching constitutes an unlawful use of force or violence under the statutes. Defendant admitted here that she knocked the walkie-talkie out of

Eaglin's hand, Eaglin being a school employee who, at the time, was engaged in the performance of her school duties. Defendant argued, however, there can be no battery where she did not actually touch Eaglin's person in some way. With there being no California case law on the issue, the Court turned to Prosser & Keeton's Hornbook on Torts (5th Ed. 1984), § 9, pp. 39-40, where it is noted that; "if all other requisites of a battery against the (victim) are satisfied, contact with the victim's clothing, or with a cane, a paper, or any other object *held in the plaintiff's hand*, will be sufficient . . . . The interest in the integrity of [the] person includes all those things which are in contact or connected with the person." (Italics added) Per Prosser, therefore, there is no requirement of a direct unlawful contact with the person of the victim, at least in a civil tort context. Other hornbooks (e.g.; 2 *Wharton's Criminal Law* (2014–2015 supp.) § 195, pp. 357–363; *LaFave, Substantive Criminal Law* (2nd ed. 2003) §16.2, pp. 552–564), as well as case law from other jurisdictions (e.g.; *State v. Townsend* (1993) 124 Idaho 881; plus other cited cases.), have applied Prosser's rule in the criminal context. So going with the weight of authority, the Court here held that knocking an item from the victim's hand is indeed a battery.

Note: This Court does not discuss the concept of an "*indirect touching*," as is discussed in the following case. It would seem obvious, however, that the non-consensual harmful or offensive touching of an object closely associated with the person of the victim constitutes a "willful and unlawful use of force or violence upon the person of another," and "force" used against the victim. As I recall, that's what I was taught in the police academy some 45 years ago. It may be because this is just such an obvious issue that there are no prior cases in California discussing it. Well, now there is. So if there was ever any doubt, we now know that the harmful and offense touching of a victim needed to constitute a battery need not be against that victim's person herself.

***Battery, per P.C. §§ 242 & 243(e)(1)*; *Indirect Touching*:**

People v. Dealba **(Dec. 7, 2015) 242 Cal. App. 4th 1142**

Rule: The use of a motor vehicle to intentionally strike another occupied vehicle constitutes an indirect battery committed upon the occupants of the second vehicle, at least where the impact generated by the collision was sufficiently forceful to establish the "touching" element of battery.

Facts: D.D. separated from her husband, the defendant, in February, 2012. The couple had produced two children during their eight-year marriage; six-year old S.S. and four-year-old T.T. Disagreements arose between D.D. and defendant over the custody of the two children to the point where D.D. had to pull them out of the school in which they were enrolled because defendant would take them from class in the middle of the day and hide them from D.D., threatening to keep them from her. By April of 2012, a court custody hearing was pending as they tried to work out a custody arrangement. On the morning of April 30, D.D. was in the process of parallel parking her Volkswagen Beetle in front of a new school in which she hopped to enroll the children, both of whom were sitting in the back seat, when defendant drove up

alongside her in a Mazda he'd borrowed from friends. Defendant got out of his car and was walking towards her when she became "afraid" and "terrified," and drove off. Defendant got back into his car and chased after her, coming up alongside her car by driving on the wrong side of the road, in the opposing lane of traffic. Defendant pulled his Mazda into the side of D.D.'s Volkswagen three or four times, "smashing" the side of her car. D.D. testified to trying to maintain control of her car so that she didn't hit parked vehicles at the side of the road and children walking on the sidewalk, as defendant "kept knocking (her) car over to the (right) side." D.D. testified she could see defendant "turning his steering wheel and trying to smash the front of his car into her car." Finally, with defendant driving the wrong way in the opposing lane of traffic, he collided head-on with a pickup truck coming in his direction, allowing D.D. to escape. She drove to a local police station to report the incident. As a result of the collisions, D.D.'s Volkswagen's left side mirror had been knocked off. The collisions also left tire marks and scratches on the side of her car. Charged in state court with assault with a deadly weapon (P.C. § 245(a)(1)) and spousal battery (P.C. § 243(e)(1)), defendant was convicted of both counts. With a prior serious felony conviction, defendant was sentenced to state prison for eight years. He appealed, challenging the sufficiency of the evidence to support the spousal battery charge.

Held: The Second District Court of Appeal (Div. 3) affirmed. Defendant argued on appeal that there was insufficient evidence to sustain his conviction of spousal battery because there was no evidence of the required "touching" element of a battery. As noted by defendant, he never physically touched D.D. during their altercation. P.C. § 242 defines "battery" as "any willful and unlawful use of force or violence upon the person of another." Case law, in discussing the elements of battery, has established that the "unlawful use of force or violent" element of a battery requires only that there be a "harmful or offense touching of another." "It has long been established that 'the least touching' may constitute battery. In other words, force against the person is enough; it need not be violent or severe, it need not cause bodily harm or even pain, and it need not leave a mark." Therefore, "[o]nly a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery." More on point with this case, the touching element of battery may be satisfied by either a direct touching (e.g.; punching, kicking, or tripping), or an indirect touching (e.g.; forcing a person by threats to jump from a window or a vehicle). Also, the touching can be done indirectly by causing some other object to touch the victim. Defendant argued here that there was no evidence that either he, or his automobile, caused a touching of D.D. The Attorney General argued, on the other hand, that there *was* sufficient evidence of a touching because defendant "rammed her car with enough force that she almost lost control of her car." Leaning more towards the A.G.'s argument, the Court ruled that based upon the evidence as presented at trial, a reasonable trier of fact could have concluded that not only had defendant's repeated acts of banging into the side of D.D.'s car resulted in sufficient force to move or jostle D.D. within her car, but also that defendant's acts caused the steering wheel, which D.D. grasped with her hands, to move, jostle, and exert force within her hands as the repeated collisions shoved her car closer to the side of the road, causing her to almost lose control of her car. It was reasonable to infer under these facts that D.D. braced herself in order to maintain control of her car by keeping her hands on the steering wheel. This, the Court ruled,

was a sufficient indirect touching to constitute a battery, supporting defendant's conviction of spousal battery under P.C. § 243(e)(1).

Note: While this is an issue of first impression in California, the Court cited authority from other states to the effect that a touching for purposes of a battery need not be committed directly against the victim; it may be committed against anything "*intimately connected with the person of the victim*." (See also *In re B.L.* (2015) 239 Cal.App.4th 1491, above.) "Under this view, the use of a motor vehicle to intentionally strike another occupied motor vehicle may constitute battery" upon the occupants of the second vehicle. (*State v. Townsend* (1993) 124 Idaho 881 [865 P.2d 972].) Also, the act of striking another vehicle, as occurred in this case may, constitutes a battery where it is found that the victim, being "*sufficiently closely connected*" with his or her own vehicle, is "touched" through the force of impact by being jostled or otherwise impacted through the transference of energy from the collision. (*Clark v. State* (Fla. 2001) 783 So.2d 967.) I'm not sure it's really necessary to go through such a strained analysis to reach the conclusion that if you purposely ram your car into another's, you have committed an indirect battery upon the occupants of that second car. But either way, the result is justified. Whatever "floats your boat," as they say.

***Confessions*; *Offers of Leniency*:**
***Cooperation Agreements*:**
***Robbery/Murder Special Circumstances*:**
***Use of Recalcitrant Witnesses, Hearsay, and the Sixth Amendment*:**

People v. Perez **(Jan. 8, 2016) 243 Cal.App.4th 863**

Rule: (1) Confessions motivated by offers of leniency are inadmissible in trial. (2) Cooperation agreements between police officers and suspects are improper unless authorized by a prosecutor. (3) A P.C. § 190.2(a)(17) robbery-murder special circumstance does not apply to the getaway driver absence evidence that he acted "with reckless indifference to human life and as a major participant." (4) Refusal of a recalcitrant witness to answer any and all questions does not trigger the "prior inconsistent statement" exception to the Hearsay Rule. Allowing a prosecutor to ask such questions violates a defendant's Sixth Amendment right to confrontation and cross-examination.

Facts: Defendant was friends with one Christopher Jasso. Jasso recruited defendant to help him commit an armed robbery in Indio, California. The plan was for Jasso to rob a taxi driver while defendant followed him in another car, picking him up after the robbery. Defendant knew that Jasso was armed with a .25 caliber pistol. On the night of September 6, 2003, Jasso called for a taxi to pick him up. With Jasso in the taxi, and defendant following as planned, the robbery went down as expected except that Jasso shot the cab driver, Carlos Cuellar Cardona, twice in the head, killing him. Defendant picked him up after the robbery and the two left the scene. Jasso gave defendant $100 of the $300 he'd gotten in the robbery. He also gave him the pistol, instructing him to get rid of it, which defendant later did. Three months after the robbery/

murder, investigators were led to believe that a person named Manuel Rivera had supplied the gun used by Jasso. Contacted by police, Rivera admitted that the gun used in the murder was his. He also told investigators that defendant had confessed to him his involvement in the robbery/murder as the getaway driver. As a result of their interview with Rivera, authorities contacted Perez. Located at his apartment, the officers requested that defendant come to the Indio police station to be interviewed. Defendant voluntarily agreed. Detective Darren Flagg and Sergeant Richard Banasiak of the Indio Police Department conducted the interview. After waiving his *Miranda* rights, and after approximately 25 minutes of questioning during which defendant denied any involvement in the murder, Sergeant Banasiak told him that if he "[told] the truth" and was "honest," then, "we are not gonna charge you with anything." The sergeant continued, telling defendant that he was either a "suspect that we are gonna prosecute," or a "witness," and added that defendant had "witnessed something terrible that somebody did." Sgt. Banasiak followed up this statement by telling defendant that if he was honest and told the truth during the interview, "you'll have your life, maybe you'll go into the Marines . . . and you'll chalk this up to a very scary time in your life." "I don't want you to go to jail for murder. Okay. I don't want you to ruin your life." Immediately thereafter, defendant stated that he had "some information" and, shortly after that, although denying that he knew Jasso would shoot the victim, confessed to his involvement in the robbery during which Jasso robbed and killed the victim. Defendant also agreed to go with the detectives to the scene and describe the events as they occurred. Although released after this interview, defendant was arrested five months later and charged with first degree murder (P.C. § 187(a)) with the special circumstance allegation that the murder had been committed in the course of a robbery (P.C. § 190.2(a)(17)). Prior to trial, defendant filed a motion to suppress his confession to the investigators, arguing that they were obtained as the result of a promise of leniency and, therefore, were involuntary as a matter of law. After the trial court denied his motion, and with his confession being used against him at trial, a jury found defendant guilty of first degree murder and found true the robbery/murder special-circumstance allegation. The trial court sentenced defendant to life in prison without the possibility of parole. (Jasso was convicted in a separate trial and sentenced to death.) Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 1) reversed. Defendant raised a number of issues on appeal:

(1) *Offer of Leniency*: A defendant's confession is admissible in evidence only if obtained voluntarily. In order for a confession to be considered voluntary, it must be the accused's decision to speak. In the words of the California Supreme Court, a confession must be entirely "self-motivated." In other words, he must freely and voluntarily choose to speak "without any form of compulsion or promise of rewards." "(W)here a person in authority (such as a police interrogator) makes an express or clearly implied promise of leniency or advantage for the accused which is a motivating cause of the decision to confess, the confession will be held to be involuntary and inadmissible as a matter of law." This rule raises two separate questions: Was a promise of leniency either expressly made or implied, and if so, did that promise motivate the subject to speak? All the surrounding circumstances, including the characteristics of the accused and the details of the interrogation, will be examined in determining this issue. Here, defendant

was told that he had the option of being treated as a witness in which case he would not be charged, or as a suspect. While being falsely told that they already had evidence tying him to the crime (e.g., that they'd found his fingerprints in the victim's taxi and that he was depicted on a store's security video that was recorded shortly before the victim was killed), he was also told such things as "I don't want you to go to jail for murder. Okay. I don't want you to ruin your life." There was nothing implied in the investigator's promise that all he had to do was open up and tell them what he knew about the robbery and murder of Carlos Cardona and he would not be charged. Under the circumstances of this case, this promise of not being charged motivated defendant to confess to his involvement as a co-principal in the crime, albeit only as the getaway driver. The trial court had found that these promises were not the motivating cause of defendant's confession. The Appellate Court disagreed, finding that such a blatant offer of leniency required that his confession be suppressed. In so finding, the Court rejected the People's argument that it was made clear to defendant that whether or not he was prosecuted was actually up to the District Attorney. The transcripts of the interrogation showed that the detective did not tell defendant this until after he had succumbed to the offer of leniency and confessed. "Statements made to (defendant) *after* he confesses cannot be causally related to his decision to confess." (Italics in original) The Court further rejected the People's argument that because defendant, who was not an unintelligent person (i.e., had a high school degree), and had not been deprived of food or sleep, he should have known that he was not being offered immunity. The Court ruled that falsely promising a defendant that he will not be charged with a crime in order to elicit a confession renders that confession involuntary even when the defendant is well educated, rested, and fed. Lastly, the Court also rejected the argument that the detectives only promised defendant that they, the officers, would not recommend prosecution if he cooperated, with no guarantee that a prosecutor wouldn't decide otherwise. To the contrary, defendant was told several times, in several ways, that if he cooperated, he would be able to "have (his) life," join the Marines, and "chalk this up to a very scary time in your life." After rejecting various other arguments to the effect that defendant's confession was triggered by causes other than the detectives' offers of leniency, the Court ruled that his confession should have been suppressed. And because defendant's confession constituted the bulk of the evidence against him, the error in admitting it into evidence was not harmless, requiring reversal of his conviction.

(2) *Cooperation Agreement*: The trial court had denied defendant's motion to dismiss the case in its entirety based upon the argument that the prosecutor had authorized the investigators to offer defendant immunity from prosecution. A "cooperation agreement" generally involves "an agreement between a defendant and a law enforcement agency," to the effect that in exchange for a suspect's cooperation, he will be accorded some benefit. As in the practice of plea bargaining, "[t]he government is held to the literal terms of [a cooperation] agreement . . . ." As he did in the trial court, defendant argued that he was offered a "cooperation agreement" to the effect that if he told the investigators what happened, he would not be prosecuted. However, in order to enforce a cooperation agreement, the defendant must first show that a state or local prosecutor authorized the agreement, thereby granting the law enforcement officer "'actual authority'" to enter into the agreement. "Apparent authority" is not enough. In this case, the investigators contacted a prosecutor who told them that they could treat defendant as a witness instead of a suspect, although they were to *Mirandize* him first in any case. The Court found this to be insufficient to

show that the investigators were authorized, in effect, to offer him immunity from prosecution. The defendant's motion on this issue, therefore, was properly denied.

(3) *Robbery/Murder Special Circumstance*: The California Supreme Court recently held in *People v. Banks* (2015) 61 Cal.4th 788, that the fact that a person is the getaway driver in an armed robbery case, during which the actual robber shoots and kills a victim, is insufficient as a matter of law to support a robbery-murder special circumstance, at least absent evidence that defendant had acted "with reckless indifference to human life and as a major participant." There was no evidence in this case that defendant was anything other than just the getaway driver. Upon retrial, therefore, the Court held that defendant may not be tried on the robbery/murder special circumstance.

(4) *Cross-Examination of Witness Manuel Rivera*: Manuel Rivera, who told police that he had provided the gun used in the murder and identified defendant as the getaway driver, was called as a witness by the prosecution. But when brought to court, Rivera refused to answer any questions despite *not* having a Fifth Amendment privilege to stand mute, and despite the trial court holding him in contempt. Even so, the prosecutor, upon Rivera being declared by the court to be a "hostile witness," was allowed to ask a series of leading questions concerning what Rivera had told the police about defendant's involvement. The theory for doing so was that Rivera's silence constituted a "prior inconsistent statement," per Evid. Code §§ 770 and 1235, and was thus admissible as an exception to the Hearsay Rule. The Court, however, ruled that allowing the prosecutor to ask these questions was not allowed as an exception to the Hearsay Rule. More importantly, it constituted a violation of defendant's Sixth Amendment right to confrontation. The rule is this: "A defendant's confrontation rights may be violated where a prosecutor examines a recalcitrant witness and poses questions that relate to prior statements made by that witness, in circumstances where the witness's recalcitrance effectively prevents cross-examination concerning those prior statements." In this case, the prosecutor's leading questions put before the jury evidence of defendant's involvement in the robbery/murder. Because Rivera refused to answer any questions, however, defense counsel was precluded from cross-examining him. As such, his Sixth Amendment right to confront and cross-examine the witness was denied to him. This is true despite the trial court's instruction to the jury that the prosecutor's unanswered questions did not constitute evidence. Upon retrial, should Rivera continue to refuse to answer the prosecutor's questions, he will not be allowed to testify at all.

Results: Based upon the above, the case, therefore, was remanded for retrial, but without defendant's confession, without the special circumstance allegation, and, should Rivera remain uncooperative, without his testimony.

Note: I briefed this case primarily to reemphasize the importance of avoiding the use of offers of leniency in an interrogation. As a police interrogator, absent a prosecutor's okay (referred to here as a "cooperation agreement"), and despite what you see on television, *YOU DO NOT HAVE THE AUTHORITY TO PLEA BARGAIN WITH A CRIMINAL SUSPECT*. Period. End of discussion. Assuming the facts of this case were properly described by the Appellate Court (which, admittedly, is not always the case), this was such a blatant violation of the rule against offers of leniency, where the officers did no less than offer Perez complete immunity in exchange for his cooperation, that it's hard for me to fathom what the detectives could have been thinking

unless they honestly didn't think that Perez would ever be used as anything other than a witness. If that's the case (and it might well have been), then more careful cooperation and communication with the prosecutor should have been initiated so that everyone was on the same page.