The California Legal Update

Remember 9/11/2001, 12/7/1941; Support Our Troops; Support Our Cops

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THIS EDITION'S WORDS OF WISDOM:

> "*America will never be destroyed from the outside. If we falter and lose our freedoms, it will be because we destroyed ourselves.*" (Abraham Lincoln)

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CASES:

***Robbery and Community Property*:**

People v. Aquilera **(Jan. 28, 2016) 244 Cal.App.4th 489**

Rule: Community property may be the subject of a theft or a robbery even though taken by a spouse. The "permanently" element of a theft and robbery is defined as including an intent to deprive the victim of his or her property temporarily but for an unreasonable time so as to deprive that person of a major portion of its value or enjoyment.

Facts: Defendant and his wife, Angelica Avila, had already been in a tumultuous marriage for six years when they attended a baptism together on August 3, 2014. Their prior history together consisted of a series of violent assaults by defendant on Avila, during which, while beating on her, he would commonly take her purse and cellphone from her to prevent her from calling the police. On this date, a restraining order was in effect from an assault defendant had perpetrated on Avila only a week previously. Arguing at the party, Avila went to their car intending to drive away, taking her purse and cellphone. Defendant ran after her, grabbing her by the neck and "strangling" her. Avila was able to break free and enter the car, locking the doors and windows as she started the engine.

Defendant broke the driver's side window and, after turning off the engine, attempted to pull Avila out of the car through the window. Witnesses pulled defendant away from the car. However, he was able to get ahold of Avila's purse. Defendant took her cellphone and wallet from the purse, throwing the purse back into the car. Responding police found defendant a block away talking on his cellphone with Avila's cellphone and wallet in his pocket. Both parties suffered minor cuts and bruises in the altercation. Defendant was charged among other things with a second degree robbery (see P.C. § 212.5) for taking Avila's cellphone from her by force and violence. However, there was testimony at defendant's subsequent trial to the effect that the cellphone, having been purchased by defendant for Avila and to which he had ready access, was community property. Despite this evidence, the trial court declined to instruct the jury on the difference between community and separate property. Convicted of second degree robbery (among other related offenses), defendant appealed.

Held: The Second District Court of Appeal (Div. 4) affirmed. Defendant's argument on appeal was that the record was devoid of any evidence that defendant had intended to permanently (as opposed to temporarily) deprive Avila of her cellphone. At trial, whether or not the cellphone was community property was not litigated although there was evidence presented that defendant had purchased it for Avila and that both parties had access to it. The prosecutor argued at trial that it need not be shown that defendant had intended to permanently deprive Avila of her phone, but rather only that he intended "to remove it from the owner's [Avila's] possession for so extended a period of time that the owner would be deprived [of] a major portion of the value or enjoyment of the property; the property being the phone."

Defendant's purpose in taking Avila's cellphone, as argued by the prosecution, was to prevent her from calling the police, and as such met the above legal standard. The overall issue on appeal was whether this was sufficient evidence to prove a robbery.

Community Property: There is a rebuttable presumption under California law that property acquired during a marriage is community property in which each spouse has a present and equal interest, and an equal right to management and control (see Fam. Code, §§ 760, 751, 1100(a) & (c)). Although not discussed at trial, Avila's trial testimony raised the question whether Avila's cellphone was community property, and if so, can it be the subject of a robbery? The general rule is that community property may be the subject of a theft by one of the spouses. (*People v. Sobiek* (1973) 30 Cal.App.3rd 458, involving theft by a co-owner of property; and *People v. Kahanic* (1987) 196 Cal.App.3rd 461, involving a spouse's vandalism of community property). Such a taking exceeds the taking spouse's rights to the property, and thus constitutes a taking of property not owned by the taking spouse.

However, an exception to this rule was found in *People v. Llamas* (1997) 51 Cal.App.4th 1729, where the defendant spouse stole his wife's car which, under the circumstances, was community property. The *Llamas* court held that the defendant spouse could not be convicted of V.C. § 10851(a) (auto theft). Section 10851(a) requires that the taking of an automobile be accomplished "with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle. Per *Llamas*, although a person may be found guilty of stealing community property, section 10851(a) specifically provides that the automobile taken must be "a vehicle not his or her own . . . ." Where that automobile is community property, the spouse committing the theft has an undivided half interest in it. Therefore, it is *not* "a vehicle not his or her own." Failing to satisfy this element of a 10851(a) auto theft, a spouse cannot be convicted of a violation of this section.

The Court here, however, held that the rule of *Llamas* does not apply to a robbery, as discussed below. *Intent Necessary for a Robbery*: Robbery, per P.C. §§ 211 & 212 (of the second degree, per § 212.5), is a theft from the person of the victim accomplished by force or fear. A theft has at times been described, as in the *Llamas* case itself, as requiring an intent to "permanently" deprive the owner of her or her property. Defendant argued that because he intended in this case only to deprive Avila of her cellphone temporarily, that there was no theft, and therefore could be no robbery as well. The Court held here, however, as decided by the California Supreme Court (*People v. Avery* (2002) 27 Cal.4th 49, 58.), that an intent to permanently deprive a theft victim of his or her property is in fact not an accurate description of the required "mens rea" (i.e., "criminal intent"). As correctly argued by the prosecutor at defendant's trial, the necessary intent in any theft case (including robbery), although often summarized as the intent to deprive another of the property permanently, is satisfied by proof of an "intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment."

And while V.C. § 10851(a) requires only an intent to "either . . . permanently or temporarily deprive the owner" of possession of a vehicle, "robbery requires an intent much more invasive to the owner's rights—the intent to deprive the owner of the property 'temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment.'" The jury in this case found this standard of proof to have been met, defendant having taken Avila's cellphone in order to prevent her from calling the police. The Appellate Court ruled here that such a finding was supported by the evidence. Defendant, therefore, was properly convicted of robbery.

Note: Under the category of "*learning something new every day*," the rule of *Avery*, to the effect that the "*permanently*" element of a theft is really something less than what you or I might consider to be permanent, but more than the "*temporarily*" as used in V.C. § 10851(a), was news to me. I knew that we commonly gave a broad definition to the "*permanently*" element of a theft (and thus a robbery as well), but had never seen the specific definition of the term as argued by the prosecutor here and used by the Court. But why was not Avila's wallet also not the subject of a robbery? This was not discussed in the reported case decision, but I have to assume it was because, not being needed in order to summon the police for help as was the cellphone, or for any other immediate purpose, that its taking did not meet the requirement of an "intent to deprive temporarily but for an unreasonable time so as to deprive the person of a major portion of its value or enjoyment." Again, this is not a holding of this case. But it does point out the necessity for the prosecution to show that in order for a temporary deprivation of property to constitute a completed theft or robbery (i.e., for its taking to be considered "*permanent*"), we're going to have to show that its temporary loss was for an unreasonable time so as to deprive the victim of some immediate need for the property; i.e., "to deprive the person of a major portion of its value or enjoyment."

***Burglary; Entry of a Room Within a Structure*:**

People v. Garcia **(Feb. 25 2016) 62 Cal.4th 1116**

Rule: Entry into a room within a structure constitutes a separate count of burglary only when the invaded room provides an objectively reasonable expectation of privacy and security, distinct from that the enclosing structure itself provides, which makes the room similar in nature to the stand-alone structures enumerated in P.C. § 459.

Facts: On the afternoon of May 18, 2011, victim M. was working alone in a store in Escondido that provided food and other services for pregnant women and young children. At some point, she noticed defendant riding on a bicycle in front of the store, slowing to look inside. A short time later defendant entered the store, looked around, smiled at M., and then left. Defendant soon reentered the store and engaged M. in conversation about the store's welfare recipient voucher program. Finally, revealing his true intentions, defendant pulled a gun from his jacket pocket and demanded the money from the cash register.

After also taking money from M. herself, defendant had M. remove the "open" sign from the front door and turn off the lights. He eventually forced M. to the back of the store and into the store's bathroom, located down a hallway and behind some refrigerators and a locked office, out of sight of the main part of the store. Still at gunpoint, defendant ordered M. to disrobe. He then raped her, penetrating her with his fingers and penis. After stealing M.'s car, defendant was later arrested and charged in state court with two counts of second degree (commercial) burglary, aggravated kidnapping, forcible rape, and rape with a foreign object (his fingers), along with various enhancements. Convicted of all charges, he was sentenced to prison for an aggregate term of 74 years and four months to life.

The two counts of burglary were based upon his entry of the store with the intent to commit robbery and his subsequent entry into the bathroom with the intent to commit a rape, respectively. The Fourth District Court of Appeal (Div. 1) upheld his conviction, although it reduced defendant's sentence by staying the punishment for the second count of burglary. Defendant filed a petition with the California Supreme Court.

Held: The California Supreme Court unanimously reversed the second count of burglary and remanded the case to the trial court for resentencing. The issue raised by this case is "whether—and if so, when—multiple convictions are permitted for serial entries within a single structure." Defendant's argument was that he could only be convicted of one count of burglary under the circumstances of this case. The People contended that entering into the bathroom with the intent to commit a rape constituted a separate burglary from the entering of the business itself when done with the intent to commit a robbery. P.C. § 459 provides, in part, that "[e]very person who enters any house, *room*, . . . shop, warehouse, store, . . . or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (Italics added)

Clearly, entering M.'s store with the intent to commit a robbery constituted one count of burglary. The People's argument was based upon the inclusion of the word "*room*" in the statute, indicating a legislative intent to the effect that entering interior rooms of a building with the intent to commit a felony (e.g., rape) is a separate act of burglary, and may be charged as such. As authority for this argument, the People cited the Supreme Court's own case of *People v. Sparks* (2002) 28 Cal.4th 71, where it was held that entry into a bedroom within a single-family house intending to commit a felony inside supported the defendant's conviction for burglary. The Supreme Court disagreed, at least under the circumstances of this case, noting that in *Sparks* the defendant's original intent in entering the house itself was unclear. But that, per the Court, does not mean that successive entries into a building and then into a specific room inside the building will not ever support multiple burglary counts. In order to do so, however, the invaded interior room must be shown to provide an objectively reasonable expectation of privacy and security, distinct from that the enclosing structure itself provides, which makes the room similar in nature to the stand-alone structures enumerated in P.C. § 459. The Court found the facts in this case to be insufficient to meet this standard.

In considering the relevant circumstances, the Court noted that the bathroom was not owned, possessed, or otherwise occupied by a different entity than the store itself. It was a close issue, but still not enough to justify a burglary count, as to whether the bathroom bore objective indications of enhanced privacy and security for its occupants. On the one hand, the bathroom was located in a back hallway, behind a set of refrigerators, behind the office, and outside of the view of the public entering into the main part of the store. One could access the bathroom only by leaving the main part of the store and passing the store's office which, as testified to at trial, was locked and inaccessible to members of the public. These attributes of the bathroom might convey to a reasonable onlooker that the back hallway, and rooms located off that hallway, were areas that members of the public could not enter without permission. But on the other hand, there was no evidence in the record suggesting that the bathroom was locked to the public or other passersby.

To the contrary, the record suggested that the bathroom, unlike the nearby office, could be accessed by anyone and was at best merely a limited transitory source of privacy. The absence of this evidence significantly diminished the possibility that a fact finder could consider the bathroom to provide a heightened expectation of privacy and security beyond what the store itself provided. Therefore, on the facts of this case, the risks to a store occupant's personal safety occurred at the moment that defendant entered the store with the intent to commit a robbery. The bathroom itself did not provide a separate, reasonable expectation of additional protection. Convicting defendant of a second burglary was redundant and unlikely to serve the purposes of the burglary statute. He should have been charged with, and convicted of, only a single burglary offense.

Note: Talk about splitting hairs. On the other side of the coin, the Court cites cases where entering an apartment within an apartment building, or an office within an office building, clearly meets the standards described here. And I can see the wisdom of such cases. But, per this case, entering a specific room contained within a residence or a business is a different story, at least where there is already evidence to support a burglary of the residence or business itself. However, I would think that because the victim was taken into a back room, more secluded and further away from possible rescue, for the purpose of committing a crime wholly different from that which was originally intended in entering the business, would be relevant. But the Court never discussed this theory. Lastly, when you note that we're talking about a bathroom, where people traditionally take care of very private personal matters and don't generally leave the door open, or even unlocked, as they do so, as opposed to the front public area where business is openly and unabashedly conducted among strangers, I would have thought that the "reasonable expectation of protection from intrusion relative to the larger structure" would have been obvious. But then that's just me.

***Police Dogs and Use of Force*:**

Lowry v. City of San Diego **(9th Cir. Apr. 1, 2016) 818 F.3rd 840**

Rule: Whether a police department's policy of using a dog to flush out possible suspects in a nighttime commercial burglary constitutes reasonable force is an issue that must be determined by a jury.

Facts: Sara Lowry was an employee of the Tenzing Corporation located on Mission Blvd., Suite 201, in San Diego. On February 11, 2010, she went out drinking with a few friends after work. Getting loaded, she decided to call it a night at about 9:30. But rather than attempt to make it home, she wisely went back to her office to sleep it off on a couch. Around 11:00 p.m., she woke up, having to "visit the mayor" (i.e., void her bladder), which she did. But in the process of going to and from the bathroom, she unknowingly triggered the company's burglar alarm. She went back to sleep on the couch.

ADT Security received the alarm and called San Diego Police Department. Officers Mike Fish, David Zelenka and Sergeant Bill Nulton responded, accompanied by Sergeant Nulton's police service dog, Bak. Finding the door to Suite 201 propped open, the officers could not see inside due to the darkness and therefore couldn't tell if anyone was inside. Before entering Sergeant

Nulton yelled loudly: "This is the San Diego Police Department! Come out now or I'm sending in a police dog! You may be bitten!" After between 30 to 60 seconds with no response, the same warning was repeated once or twice more, still with no response. Passed out on the couch, Lowry didn't hear the warnings. So, consistent with the department's protocol, Sergeant Nulton released Bak "off lead" (i.e., off of her leash) into the suite.

Going in himself, but not keeping track of Bak's location, Sgt. Nulton noticed a person (subsequently determined to be Lowry) under a blanket on the couch. At the same time, Bak jumped on top of Lowry. The two struggled momentarily before Sergeant Nulton called Bak off. Bak, as trained, responded immediately, returning to Sergeant Nulton's side. Lowry emerged from her skirmish with Bak with a "large gash" on her lip that was bleeding profusely. Later treated at a hospital, it was determined that although it only took three stitches to close the wound, Bak had almost completely bitten through Lowry's lip. Shortly after the incident, Sergeant Nulton told Lowry: "I just can't believe that's the only damage. You're very lucky. She could have ripped your face off." Lowry, of course, was not arrested.

Later evidence showed that SDPD trains its police dogs to enter a building, find a person without differentiating who that person might be, bite him or her, and hold that bite until a police officer arrives and removes the dog. The decision whether to conduct a canine search on or off lead is left to the officer's discretion. But had the search been of a residence, a search "should normally be conducted on-lead unless the handler can reasonably determine there are no residents or animals in the home." Lowry later filed suit in federal court against the City under 42 U.S.C. § 1983, alleging a violation of her Fourth Amendment rights. The City's motion for summary judgment (motion to dismiss prior to trial) was granted by the district court judge. Lowry appealed.

Held: The Ninth Circuit Court of Appeal, in a split, 2-to-1 decision, reversed. On appeal from a granted summary judgment motion, the appellate court is to view the evidence in the light most favorable to the non-moving party (i.e, Lowry, in this case). The issue is whether, while assuming Lowry's version of the facts is true, are there any triable issues that should be heard by a jury? "'Where the objective reasonableness of an officer's conduct turns on disputed issues of material fact,' . . . 'it is "a question of fact best resolved by a jury."' (Citation)"

While the trial court ruled that there are no such disputed issues, and that as a matter of law the City is protected from liability, a majority of a Ninth Circuit three-judge panel disagreed and ruled that there *are* disputable facts to be resolved. Plaintiff Lowry argued that the use of Bak under the circumstances described above constituted an unreasonable use of force, thus violating her Fourth Amendment right to be free from an unreasonable seizure. Specifically, Lowry alleged that the City's "bite and hold" policy resulted in the officers using excessive force against her.

Via what is sometimes referred to as a "*Monell* motion" (per *Monell v. Dep't. of Soc. Servs. of the City of New York* (1978) 436 U.S. 658.), while in effect conceding that the officers did no more than follow their own department polices in the use of a dog, Lowry was seeking to hold the City of San Diego responsible for an unconstitutional use-of-force policy. In determining whether the force used is excessive, a court is to balance "the nature and quality of the intrusion

on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." This inquiry is a "highly fact-intensive task for which there are no per se rules." However, it is to be made "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."

In doing this analysis, a court is to look at three factors: (1) The severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted; (2) the government's interest in the use of force; and (3) the gravity of the intrusion on the individual when balanced with the government's need for that intrusion.

(1) *Severity of the Intrusion*: In this case, the trial court determined that the severity of the intrusion was minimal in that Lowry suffered minor injuries only. The Ninth Circuit disagreed, ruling that this ignores the potential damage that might have been done. Recognizing that the use of a police dog to effectuate an arrest is a "severe" use of force (i.e., "the most severe force authorized short of deadly force"), the Court held that the potential harm that could have been caused must also be considered. Even Sgt. Nulton recognized how "lucky" Lowry had been, telling her that Bak "could have ripped your face off." Therefore, under the circumstances of this case, the Court held that a reasonable juror could find that by allowing Bak to enter Suite 201 with him off lead, and by failing to keep track of Bak's precise location while searching the suite, Sergeant Nulton increased the likelihood that Bak would bite and seriously injure Lowry before being called off. Under these circumstances, a reasonable juror could conclude that releasing Bak into the suite posed a high risk of severe harm to any individual present. Accordingly, for purposes of summary judgment, this factor weighs in favor of a finding that Lowry's constitutional rights were violated.

(2) *The City's Countervailing Interests*: This factor involves the examination of three non-exclusive sub-factors: **(**a) The severity of the crime at issue; (b) whether the suspect posed an immediate threat to the safety of the officers or others; and (c) whether the suspect was actively resisting arrest or attempting to evade arrest by flight. In looking at these sub-factors, the Court ruled that the fact that the crime in issue was only a second degree commercial burglary weighs only slightly in the City's favor. A commercial burglary, per the Court, is *not* an inherently dangerous crime. Secondly, there is no evidence to support the argument that Lowry, asleep on a couch, posed any danger to the officers. She certainly did not actively resist the officers or attempt to evade arrest. In noting this, the Court rejected the dissenting opinion's conclusion that by failing to respond to Sgt. Nulton's verbal commands to submit before they sent in the police dog, the officers could have interpreted this as an attempt to resist or evade arrest. Other factors to consider are Sgt. Nulton's verbal warning that the dog was about to be released (favoring the use of the dog, but only slightly in that Lowry was asleep) and the availability of other tactics, such as keeping Bak on his leash (slightly favoring Lowry's argument that the force used was excessive). Considering these factors, pro and con, a reasonable juror could have in fact found that the use of a police dog under the circumstances was unreasonable.

(3) *Balancing the Conflicting Interests*: Whether deploying Bak in this case was "objectively reasonable" turns on "whether the degree of force used was necessary, in other words, whether the degree of force used was warranted by the governmental interests at stake." "(T)he degree of force used by [the police] is permissible only when a strong government interest compels the

employment of such force." In this case, the issue was whether the possibility of a burglary suspect being inside a commercial establishment warranted the use of a police dog to flush out that suspect, knowing that the suspect might very well have his "face ripped off" in the process. The Court here held that a reasonable jury might very well conclude that such force was unreasonable under these circumstances and that the City's dog-use policies are therefore unreasonable. But it is an issue for a jury to decide. Because the City failed to show that there were no questions of fact for a jury to decide, and rejecting the City's claim of qualified immunity, the Court held that summary judgment for the City was not warranted. The case was remanded to the trial court for a civil trial on these issues.

Note: It's hard to argue that there aren't triable issues to be decided, as there typically are whenever deadly or serious force is used in subduing a suspect. I briefed this case as a reminder that anytime a police dog is used to subdue potentially dangerous suspects, such a use of force will be considered serious and almost always scrutinized by the courts after-the-fact. Here, the bottom line is whether the City's policy of using a police dog to flush out possible suspects in a nighttime commercial burglary constitutes reasonable force or not. But the Court couldn't get it out of its head that the burglary suspect—Lowry—was asleep on a couch and, as it turned out, wasn't a dangerous burglary suspect at all. This, of course, violates the Court's own rule that the situation is to be looked at by the court (and a jury) as a reasonable officer would have perceived the situation at the time, "rather than with the 20/20 vision of hindsight."

Reading this case, I kept thinking of an academy classmate of mine who, *way* back in 1971, as a new recruit working in the field before we'd even graduated, was almost shot (the bullet hitting the doorjamb just above his head) by a suspect hiding in a darkened residence as my classmate and his training officer checked the house for an intruder, not knowing if there was even anyone in there. A police dog, used in the same manner as Bak was in this case, would likely have averted that near-tragedy. So was the use of a dog in the circumstances of this case warranted? In my (never to be so) humble opinion (and that of the dissenting justice), *you're darn-tooting*. But we'll have to wait and see if a jury agrees.

***The Dissipation of Probable Cause or a Reasonable Suspicion*:**
***Protective Sweeps*:**
***Residential Searches and the Exigency Exception to the Search Warrant Requirement*:**

Sialoi v. City of San Diego **(9th Cir. May 24, 2016) 823 F.3rd 1223**

Rule: Upon "dissipation" of probable cause to arrest or a reasonable suspicion to detain, an arrest or a detention, respectively, violates the Fourth Amendment. After dissipation of the probable cause to arrest, failure to release an already arrested person violates the Fourth Amendment. A protective sweep of a residence is unlawful absent evidence that the searched residence harbors an individual posing a danger to those on the arrest scene. A warrantless search of a residence based upon an exigency is unlawful absent both probable cause to believe that a crime has been or is being committed and a reasonable belief that entry is necessary to prevent the destruction of evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.

Facts: On evening of October 2, 2010, a large barbeque and family gathering occurred in front of a San Diego apartment building, celebrating the birthday of a seven-year-old member of the family. The involved apartment belonged to Sialoi Sialoi, Jr., and his wife; a Samoan family, and was reportedly located in what was recognized as a "high-crime area" of the city. At 10:22 p.m., the apartment manager called 9-1-1 to report that two black or Samoan adult males had been "ducking around" the apartment complex, "as if waiting for someone," and that one of them was carrying a handgun while the other had a shotgun.

Two minutes after the first call, the apartment manager called back to clarify that the suspects were black and not Samoan, giving the dispatcher a detailed physical and clothing description of both. Sgt. Allen Sluss and about 10 other San Diego Police Department officers responded, arriving some four minutes after the second call. When the officers arrived, most of the Sialoi family was still outside, drinking coffee, eating birthday cake, playing a guitar, and singing songs, while some of the women and younger children were inside the apartment. There was apparently no alcohol being consumed. As alleged by the plaintiffs in the subsequently filed civil suit, the responding officers first contacted three teenagers playing in the parking lot near the apartment, none of whom were even close to the descriptions given by the apartment manager. But one of them was carrying an object in his hand that appeared to be a handgun.

With their own guns (including a couple of AR-15 assault rifles) drawn, the officers ordered the teenagers to the ground where each of them was handcuffed and searched. The apparent weapon was determined at that point to be a plastic paintball gun. Even so, the three teenagers were put into a locked patrol car. Within minutes after the officers began "securing the scene," the apartment manager called 9-1-1 again, telling the dispatcher that the teenagers the officers had detained (or, as later determined by the Court, arrested) were not the suspects that he had reported in his initial call; a fact that was relayed to Sgt. Sluss.

Despite this information, and now with some 20 officers at the scene, the rest of the family was contacted. Each family member was herded into the middle of the parking lot at gunpoint where they were searched and handcuffed, while red laser lights were concentrated on some of them. Sialoi Sialoi Jr. was patted down for weapons, handcuffed, and put into the back of the police car because he initially refused to put his hands in the air and complained to the officers about them pointing their weapons at the children. As alleged by the plaintiffs, the officers also reportedly pushed a pregnant family member onto the ground. Another family member's complaints that he had recently had back surgery were ignored when he was "violently" handcuffed, resulting in his rotator cuff, labrum, and biceps tendon being torn. (Remember; this is all as the plaintiffs alleged, and not necessarily how the evidence will eventually come out at trial.)

The few remaining family members who were inside the apartment were ordered outside where they were detained while Sergeant Sluss and several other officers searched the Sialois' apartment without a warrant or consent. Finding nothing, everyone was released (with apparently no paper work being filed). Plaintiffs contended that they were detained for approximately 30 to 40 minutes although the police computerized log of the incident indicated that the incident lasted only 17 minutes. The apartment manager was never contacted. The plaintiffs later filed a civil suit in federal court against the officers and the City of San Diego, pursuant to 42 U.S.C. § 1983 and California law, alleging unlawful detention, arrest, and search,

and the use of excessive force. The defendants moved for summary judgment (i.e., that the case be dismissed prior to trial) on the ground of qualified immunity. The federal district court granted the motion with respect to the City but denied it with respect to the officers. The officers then appealed the denial of their motion for summary judgment with respect to the unlawful detention, arrest, and search claims (but not as to the excessive force claims, conceding, apparently, that this was a triable issue).

Held: The Ninth Circuit Court of Appeal affirmed. The issue here is not whether the sued officers are in fact civilly liable, but rather whether, "while taking the facts in the light most favorable to the plaintiffs" (as the Court is required to do), there are triable issues that must be decided by a civil jury. In analyzing these issues, the Court broke the incident down into four parts:

(1) *Seizure of the Teenage Boys*: In response to a radio call concerning two black men carrying firearms and lurking around the apartment complex, six to seven San Diego P.D. officers first came upon the three teenage Samoan boys playing with what was quickly determined to be a plastic paintball gun, referred to the Court as a "toy." First, the Court held that putting the three boys onto the ground, handcuffing and searching them, and putting them into a police car, is an action a jury could very well determine was an "arrest" as opposed to merely a detention, the difference between the two depending upon the circumstances. While the initial contact was justified, arresting them, after determining that none of them were armed, certainly was not. At the point where it was determined that the item carried by one of the boys was merely a paintball gun, any suspicion that the teenagers were engaged in a crime dissipated. Dissipation of probable cause to arrest evolves into a Fourth Amendment violation if the persons arrested are not thereafter released from custody. Not only did the teenagers *not* possess a gun, but none of them in any way matched the apartment manager's description of the suspects. The Court found, therefore, that as the facts were alleged by the plaintiffs, the three boys were unlawfully arrested.

(2) *Seizure of Sialoi Sialoi Jr.*: The officers handcuffed Sialoi Sialoi Jr. and placed him in the back of the police car after he "pleaded" with the officers to stop pointing their weapons at the children. Plaintiffs admitted that Sialoi Sialoi Jr. did "raise his voice' and initially refused to raise his hands when directed to do so by the police, but claimed that he calmed down within a matter of minutes and complied with the officers' requests when they approached him for the purpose of handcuffing him. Handcuffing a person and putting him into a police car under these circumstances may well be determined by a civil jury to be an arrest, as opposed to merely a detention as argued by the defendant officers. More to the point, once the officers confirmed that the item possessed by the initially contacted teenage boys was not a firearm, they no longer had any reason to believe that Sialoi Sialoi Jr.—or in fact any of the family members—was engaged in the criminal activity that the apartment manager reported. "Accordingly, taking the facts in the light most favorable to Sialoi Sialoi Jr., the officers arrested him without probable cause, thereby violating (the Fourth Amendment)."

(3) *Detention of Others at the Party*: Everyone else at the party was subjected to being patted down for weapons, handcuffed, and/or ordered to stand in the middle of the apartment complex's parking lot. Those in the apartment when the officers arrived were ordered from the apartment and herded into the parking lot with the others. Without worrying about whether each individual

was subjected to an arrest or merely a detention, which itself requires at least a "reasonable suspicion" to believe that they were involved in criminal activity, the Court ruled here that upon discovery that the originally contacted teenagers were not armed, and noting that no one at the party matched the description of the black male subjects reported to the police by the apartment manager, there was not even enough to justify detaining anyone. The fact that the apartment was in a "high-crime area," by itself, did not justify detaining the participants in an otherwise peaceful party. And the civil defendants' argument that the "remaining plaintiffs were 'agitated' and 'display[ed] growing hostility'" was not supported by the evidence deduced up to this point. "In sum, the officers had no basis for concluding that the gathered plaintiffs had anything to do with the events portrayed in the apartment manager's report, and nothing the remaining plaintiffs did once the officers arrived offered any basis for detaining them."

(4) *Warrantless Search of the Sialois' Apartment*: The defendant officers argued that the warrantless search of the Sialois' apartment was justified by the need for a protective sweep and/or under the exigency exception to the search warrant requirement. The Court rejected both theories. As for protective sweeps, such a search, limited as it is, is unlawful absent evidence that the searched apartment "harbor[ed] an individual posing a danger to those on the arrest scene." (*Maryland v. Buie* (1990) 494 U.S. 325.) In this case, with everyone already either detained or arrested, and having found that no one at the party possessed any weapons or was even close to the physical description provided by the apartment manager, there was no basis for believing that there might be anyone in the apartment who constituted a danger to the officers or others. Under the "exigency exception," a warrantless entry into a residence is lawful if the officers "have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is necessary to prevent the destruction of evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

In this case, the defendant officers argued that they were still looking for the "second gun" possessed by the suspects reported by the apartment manager. The Court rejected this argument, noting that after having found that the contacted teenagers had a paintball gun only (i.e., a "toy"), and that no one at the party matched the physical or clothing descriptions of the suspects who were reported to be "lurking" around the apartments, the officers lacked any probable cause to believe a second gun existed at all, or that anyone at the Sialoi's party was involved in any criminal activity. The Court therefore held that searching the Sialoi's apartment violated their constitutional rights. As to each of the issues above, the Court further found that the applicable legal rules are well-established and that the officers are therefore not entitled to qualified immunity.

Note: I'll reserve judgment on this case because I tend to piss off County Counsel when I get critical in writing about still-pending civil litigation. And I don't know whether this case has yet been resolved, nor even whether anything the plaintiffs have alleged is true. But I think it's important for officers to recognize that not every party in a high-crime area requires armed intervention. The majority of the citizens in such areas are law abiding and certainly entitled to throw birthday parties on occasion. But the lesson learned here, whether the officers are found liable by a civil jury or not, is that when "probable cause" (that seemed apparent from the original report to police), or a "reasonable suspicion" in a detention situation, is shown not to

exist (i.e., newly learned facts has “dissipated” the probable cause or reasonable suspicion), then you must scale down the response, make friendly with the citizens at the scene, and thank them for their cooperation before leaving. Enough said.