The California Legal Update

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

Vol. 22 July 22, 2017 No. 7

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THIS EDITION'S WORDS OF WISDOM:

> "*I don't have an attitude problem. You have a problem with my attitude, and that's not my problem.*" (Anonymous)

IN THIS ISSUE: **pg.**

ADMINISTRATIVE NOTES:

***P.C. § 32310(c) & (d)* (*Proposition 63*); *Large Capacity Magazines*:** On June 29, 2017, a federal district court judge, in the case of *Duncan v. Becerra* (June 29, 2017) 2017 U.S. Dist. LEXIS 101549, enjoined the implementation of the Proposition 63 ban on large capacity magazines (P.C. § 32310), which was scheduled to become effective on July 1, 2017. Specifically, subdivisions (c) and (d), making it a misdemeanor for a person to fail to "dispossess" him or herself of ammunition magazines that are capable of holding more than 10 rounds (as defined in P.C. § 16740) are (at least for the present) not to be enforced, per the judge's order. How long this injunction holds, or whether it is to be permanent, is anybody's guess.

***Brady & Pitchess*:** On July 11th, the Second District Court of Appeal (Div. 8) issued a comprehensive ruling (*Association for L.A. Deputy Sheriffs v. Superior Court* [*Los Angeles County Sheriff's Department et al.*] (July 11, 2017) __ Cal.App.5th __ [2017 Cal. App. LEXIS 612], concerning the relationship between *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531, and *Brady v. Maryland* (1963) 373 U.S. 83. To refresh your memory, in *Pitchess*, the California Supreme Court held that under certain circumstances, and upon an adequate showing, a criminal defendant may discover information from a peace officer's otherwise confidential personnel file when that information is relevant to his or her defense.

The California Legislature eventually codified what has become known as a "*Pitchess motion*" in Penal Code §§ 832.7 and 832.8, as well as Evidence Code §§ 1043 through 1045. Generally speaking, these statutes require a criminal defendant to file a formal written motion that establishes good cause for the discovery sought. If such a showing is made, the trial court then reviews the law enforcement personnel records in camera (i.e., without the defendant or his counsel being present) in the presence of the law enforcement agency's custodian of records, and then discloses to the defendant any relevant information the judge finds in the officer's personnel file. It has subsequently been held that even the prosecution must comply with these rules in order to gain access to the information in a police officer's confidential personnel files.

In *Brady*, decided before *Pitchess*, the U.S. Supreme Court went even further and held that constitutional due process creates an affirmative obligation on the part of the prosecution, whether or not requested by the defense (i.e., no formal motion is required), to disclose all evidence within its possession (in the officer's personnel files or otherwise) that is exculpatory to a criminal defendant. Exculpatory evidence under *Brady* includes witness impeachment evidence. Under *Brady*, all law enforcement agencies, as members of the so-called "*prosecution team*," are bound by this discovery obligation. The prosecution is held responsible for insuring compliance with *Brady* even if the prosecutor was personally unaware such information existed. An intentional or "bad faith" violation of *Brady* by a prosecutor is now (as of the first of this year) a felony (P.C. § 141(c)). As a result of the *Brady* decision, the Los Angeles Sheriff's Department (i.e., LASD) researched its own files and compiled a list of some 300 deputy sheriffs with potential *Brady* issues, categorized by LASD as (1) immoral conduct, (2) bribes, rewards, loans,

gifts, favors, (3) misappropriation of property, (4) tampering with evidence, (5) false statements, (6) failure to make statements and/or making false statements during departmental internal investigations, (7) obstructing an investigation/influencing a witness, (8) false information in records, (9) policy of equality—discriminatory harassment, (10) unreasonable force, and (11) family violence.

In an apparent attempt to simplify the *Brady* discovery problem, LASD proposed to turn the list of the 300 deputy's names over to the Los Angeles District Attorney and all other prosecutorial agencies in the county so that whenever a case was filed that included one of the listed deputies as a witness, the DA would automatically know that they had a *Brady* issue with which they had to comply. The Association for Los Angeles County Deputy Sheriffs (ALADS) objected to this proposal, arguing that it violated the formal motion requirements of *Pitchess*. The ALADS filed for an injunction asking the L.A. Superior Court to prohibit the disclosure of the list or any individual on the list to anyone outside the LASD, including prosecutors, absent compliance with the *Pitchess* statutes. The issue therefore became whether the *Brady* decision, being broader in scope than *Pitchess* and creating an affirmative duty on the part of the prosecution and all law enforcement agencies to turn over exculpatory information to the defense even when not requested, necessitated a finding that *Pitchess* (that requires a formal motion and hearing) was unconstitutionally restrictive.

To make a long story short, the Court held that *Brady* does not overrule *Pitchess*, and that both discovery obligations can work together. To the point raised in this case, the Appellate Court (for the most part) upheld the trial court's issuance of an injunction prohibiting LASD from providing the names of those on their *Brady* list to anyone outside its own agency without that party (be it the prosecution or the defense) jumping through all the formal evidentiary hearing hoops as required by *Pitchess* and as briefly outlined above. As a side note, this decision is a must-read for all prosecutors who are confronted with *Brady* and/or *Pitchess* issues in that the Court provides an exceedingly excellent review of the law on both important decisions. Also, officers who have the misfortune of having any "*Brady* material" in their personnel files might also want to read the whole decision so that you have some idea of what your rights are. The decision also includes a section on your rights under the Public Safety Officers Procedural Bill of Rights Act (POBRA), as contained in Govt. Code §§ 3300 et seq. If you don't have the resources for finding the published decision, I can send the whole thing to you.

CASES:

Use of Force and the "Provocation Rule:"

***County of Los Angeles v. Mendez* (May 30, 2017) __ U.S. __ [137 S.Ct. 1539; 198 L.Ed.2nd 52]**

Rule: A reasonable use of force cannot be deemed as unreasonable after the fact merely because the officers involved had committed some other earlier and distinct constitutional violation that may have led to the need to use force.

Facts: Deputies from the Los Angeles County Sheriff's Department with a felony parolee-at-large warrant for a person named Ronnie O'Dell went to an address where a confidential informant had told them that O'Dell was hiding. As some of the officers knocked on the front door of the residence, Deputies Christopher Conley and Jennifer Pederson went to the back yard to prevent any attempted escape out the rear. At the back of the house, the deputies found the yard cluttered with debris and abandoned automobiles. They also found three metal storage sheds and what was described as a "one-room shack made of wood and plywood." The shack, complete with an air conditioner mounted on the side, had a single wooden door covered by a blanket. After checking the three metal sheds for other persons, Deputies Conley and Pederson approached the shack not knowing that plaintiff Mendez and his wife were asleep inside.

Despite not having a search warrant for the shack, and failing to knock and announce their presence, Deputy Conley pulled back the blanket and opened the wooden door. Plaintiff Mendez rose from the futon on which he and his wife had been sleeping, carrying a BB gun in his hand that he used for rodent control. With the BB gun "point[ing] somewhat south towards Deputy Conley," and believing that it was a small-caliber rifle, the deputy yelled "Gun!" Both deputies opened fire, discharging a total of 15 rounds. Both Mendez and his wife were seriously wounded, but survived. Mendez filed a federal 42 U.S.C. § 1983 civil suit against the deputies and the County of Los Angeles, alleging (1) an illegal warrantless entry of the shack, (2) a failure to comply with knock and notice, and (3) the unreasonable use of force.

After a bench trial (i.e., with a judge but no jury), the federal district court judge found a warrantless entry and knock and notice violations, awarding nominal damages as a result. However, he also ruled that the force used by the deputies was reasonable under the circumstances. But then using a so-called "*provocation rule*," invented by the Ninth Circuit in earlier cases, the trial court held that the illegal entry and knock and notice violation had provoked the deputies' use of force, awarding Mendez and his wife $4 million. The Ninth Circuit Court of Appeal, except to rule that the deputies had qualified immunity for the knock and notice violation, otherwise affirmed. As to the use of the "*provocation rule*," the Ninth Circuit held that the deputies' illegal warrantless entry did in fact provoke the use of force, even though shooting the plaintiffs was reasonable under the circumstances. The Court therefore upheld the trial court's finding of civil liability under the provocation rule. The Government appealed.

Held: The U.S. Supreme Court reversed, remanding the case for further hearings. Specifically, the Supreme Court disapproved the Ninth Circuit's "*provocative rule*." The provocation rule permits an excessive force claim under the Fourth Amendment "where an officer intentionally or recklessly provokes a violent confrontation, so long as the provocation is an independent Fourth Amendment violation." The rule requires a court to ask itself "whether the law enforcement officer violated the Fourth Amendment in some other way in the course of events leading up to the seizure" (i.e., the use of force). If so, that separate Fourth Amendment violation may "render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law."

The rule's "fundamental flaw," as noted by the Court, "is that it uses another constitutional violation to manufacture an excessive force claim where one would not otherwise exist." Supreme Court authority (i.e., *Graham v. Connor* (1989) 490 U.S. 386.) already sets out a

"settled and exclusive framework" for analyzing whether the force used in the seizure of a person complies with the Fourth Amendment. The Court found here that the provocation rule serves to inappropriately expand on *Graham*, turning what otherwise is a reasonable use of force into a constitutional violation. The Court decided that this is not to be allowed. "If there is no excessive force claim under *Graham,* there is no excessive force claim at all." However, this does not preclude a court from finding that the deputies might still be liable for the shooting under the theory that the plaintiffs' injuries were the foreseeable result of the illegal entry into the shack. This "proximate cause" analysis of the "foreseeability or the scope of the risk created by the predicate conduct" is a different theory altogether, and takes into account any intervening factors, such as Mendez's pointing of what appeared to be a lethal firearm at the officers. Because this theory was not appropriately analyzed at the trial court level, the case was remanded for hearings on this issue.

Note: A law enforcement officer's use of force (particularly deadly force) is an issue that has long been the subject of a lot of second guessing and Monday morning quarterbacking. *I* don't need to be telling *you* that. You also likely recognize that this has become even more true in recent years as the proliferation of cameras in the hands of the general public (plus the increased use of "bodycams" by officers) has brought to our TV screens those limited instances when excessive force has in fact been used. This case is important in that it prevents a court from using the circumstances leading up to the use of force from turning an otherwise lawful use of force into a civil liability-generating incident. The "proximate cause" theory of liability, mentioned above, which includes a consideration of "foreseeability" and "intervening factors," already covers this issue without having the Ninth Circuit invent a new legal argument for making officers civilly (if not criminally) liable.

***Thirty Day Impounds of Vehicles per V.C. § 14602.6(a)*:**

Brewster v. Beck **(9th Cir. June 21, 2017) 859 F.3rd 1194**

Rule: Holding onto an impounded vehicle for 30 days, under authority of V.C. § 14602.6(a), is an unlawful seizure under the Fourth Amendment absent legal justification for the vehicle's continued seizure.

Facts: Lamya Brewster loaned her vehicle to her brother-in-law, Yonnie Percy. Upon being stopped by Los Angeles Police Department (LAPD) officers, it was determined that Percy's driver's license was suspended. Pursuant to LAPD's written policy, the officers seized the vehicle under authority of V.C. § 14602.6(a)(1) which authorizes impounding a vehicle when the driver has a suspended license, providing for the vehicle to be held for 30 days. Brewster, seeking to get her car back, appeared at a hearing before the LAPD three days later with proof that she was the registered owner of the vehicle. Showing her valid California driver's license, Brewster offered to pay all towing and storage fees that had accrued. LAPD, however, refused to release the vehicle before the 30-day holding period had lapsed.

Brewster sued in federal court under 42 U.S.C. § 1983, filing a class action lawsuit on behalf of all vehicle owners whose vehicles were subjected to the 30-day impound. The complaint alleged that the 30-day impound is a warrantless seizure that violates the Fourth Amendment. The

federal district court concluded that the 30 day impound is a valid administrative penalty and granted LAPD's motion to dismiss. Brewster appealed.

Held: The Ninth Circuit Court of Appeal reversed. It was first noted, however, that the initial impounding of the vehicle under authority of V.C. § 14602(a)(1) was not the issue. The parties agreed that the LAPD could lawfully impound—and therefore seize—Brewster's vehicle under section 14602.6(a)(1) pursuant to the community caretaking exception to the Fourth Amendment (but see Note, below). The only issue here was the legality of holding onto Plaintiff Brewster's car for the 30 days that, on its face, is authorized under section 14602.6(a)(1) and LAPD's written policy.

In this case, LAPD provided Brewster with the opportunity for a hearing "to determine the validity of, or consider any mitigating circumstances attendant to, the storage," as required by subdivisions (a)(2) and (b). But when denied her request for the return her vehicle, she complained that this continued "seizure" of her car violated the Fourth Amendment. The Court agreed. The law is clear: "A seizure (under the Fourth Amendment) is a 'meaningful interference with an individual's possessory interests in [his] property.'" Also, it is well established that a seizure, lawful at its inception, may become unlawful if unduly, and unjustifiably, prolonged. At some point after the initial seizure, "the government must cease the seizure or secure a new justification." Assuming for the sake of argument that the community caretaking theory allows for the impounding of a vehicle when the driver is not properly licensed (although this issue, conceded by Brewster, was neither discussed nor decided; see Note, below), this exception to the Fourth Amendment no longer applies once the car has been taken into police custody and the exigency is over.

In other words, the authority to impound the vehicle of an unlicensed driver no longer applies once the car has been removed from that driver's possession. In order to justify the continued warrantless seizure of the car, a new exception to the Fourth Amendment must be established. No such exception was argued here. Because the continued seizure of Brewster's car was unlawful, holding onto it for 30 days violated the Fourth Amendment.

Note: Specifically left undecided was whether the initial warrantless seizure of a car driven by a unlicensed driver violated the Fifth and Fourteenth Amendment due process clauses; i.e., being deprived of one's life, liberty, *or property*, without due process of law (e.g., a pre-seizure hearing or court determination). Only the Fourth Amendment "seizure" issue was covered in this case, and then, only as it relates to the car's continued seizure after taken off the street. Also, prior authority to the effect that the driver merely being unlicensed does not necessarily implicate the "community caretaking" impound requirements (i.e. available only to "impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic") was not discussed, the issue having been (perhaps unwisely on the plaintiff's part) conceded by the parties. So we're not yet done with the issue of the constitutionality of V.C. § 14602.6(a). Watch for future cases on this issue.

***Firearms and W&I Code § 5150 Mental Patients*:**

People v. Mary H. **(Nov. 7, 2016) 5 Cal.App.5th 246**

Rule: In a W&I Code § 8103(f)(5) hearing requested by a mental patient to regain the right to own or possess (etc.) a firearm, the People have the burden of proof to show by a "preponderance of the evidence" that the petitioner "would not be likely to use firearms in a safe and lawful manner." W&I Code § 8103 is not unconstitutionally vague.

Facts: Having had a bad day (unable to find her boyfriend to deliver some cookies), an upset Mary downed an overdose of Zofran and Percocet with two shots of tequila. She then called her daughter in Ohio to tell her how depressed she was, that she was upset with her boyfriend, that no one cared for her, and how she was going to end her life. After a second similar phone call three hours later (Mary's daughter apparently not taking the first call too seriously), Mary's daughter called the boyfriend who called 9-1-1. A deputy Sheriff and paramedics responded to Mary's house to check on her welfare. After telling the paramedics: "(*N*)*o one cares for me so I wanted to end it*," Mary was transported to the Kern Medical Center where she became "apneic" (a temporary suspension of breathing, as in "apnia;" *I had to look it up*) until her condition was stabilized.

During this time, Mary told an emergency room physician that she was actively trying to commit suicide. From information obtained from Mary's daughter, it was determined that Mary had exhibited symptoms of depression for at least 10 years, that she suffered from frequent mood swings, and that she had "strange thoughts in her mind [she] thinks . . . are for real." Despite having previously tried to kill herself via drug overdose on four separate occasions, Mary would not accept the possibility that she had psychiatric problems and refused to see a doctor. Based upon this history, the sheriff's deputy completed an "Application for 72-Hour Detention for Evaluation and Treatment," pursuant to Wel. & Inst. Code § 5150, asserting probable cause to believe Mary was a danger to herself.

Mary was transferred to the hospital's psychiatric unit for evaluation and treatment. She told the staff there that despite appearances, she did *not* suffer from depression, anxiety, mania, or psychosis, denying that she'd tried to kill herself. With regard to the cookie incident, Mary claimed she ingested alcohol and Percocet for her back pain. She acknowledged asking for help from her daughter but "doesn't remember what happened after." A mental status examination revealed poor impulse control, insight, and judgment. She was diagnosed with a "[m]ajor depressive disorder severe without psychotic features" and that she was likely to harm herself as a result. Two days later, Mary was deemed "psychiatrically stable" and discharged. However, having been so detained, W&I Code § 8103(f)(1) made Mary ineligible from owning, possessing, controlling, receiving, or purchasing a firearm (or attempting to do so) for five years unless she took advantage of the statutory provisions for a subsequent court order to regain her right to possess a firearm (W&I Code § 8103(f)(4)-(7).

Three months later, Mary exercised her rights under these provisions and petitioned the superior court for an order restoring her right to own, possess, control, receive, or purchase firearms. At the subsequent hearing, the district attorney offered, and the superior court admitted into

evidence, the records showing Mary's medical history as described above. She testified on her own behalf, telling the trial court that she was on the wagon (not drinking any more), that she no longer had access to prescription drugs, and that she was not a danger to herself or others. In effect, Mary claimed to be cured. She told the court that she needed access to her boyfriend's firearm to protect herself from rattlesnakes. The court didn't buy it, denying her petition. Mary appealed.

Held: The Fifth District Court of Appeal affirmed. After first affirming that a W&I Code § 8103 finding by the superior court was an appealable order, the Court discussed the legal standards involved. Pursuant to W&I Code § 8103(f)(1), any person who has been taken into custody as provided in W&I § 5150 because that person is a danger to himself, herself, or to others, *and* assessed within the meaning of W&I § 5151, *and* admitted to a designated facility within the meaning of W&I §§ 5151 and 5152 because that person is a danger to himself, herself, or others, may not thereafter own, possess, control, receive, purchase, *or* attempt any of the above, any firearm for a period of *five years* after the person is released from the facility. Mary fell into this category. Although Mary did not own a firearm, she sought to have access to her boyfriend's gun, alleging that she needed such access to protect herself from rattlesnakes. Pursuant to subdivision (f)(5), Mary was entitled to file a petition in the Superior Court seeking relief from the restrictions imposed by subd. (f)(1). Under subdivision (f)(6), the People of the State of California, represented by the District Attorney, has the burden of showing at such a hearing by a "*preponderance of the evidence*" that the person petitioning to regain his or her right to own, possess, control, receive, or purchase a firearm "would not be likely to use firearms in a safe and lawful manner."

At such a hearing, hearsay, in the form of declarations, police reports, criminal history information; and any other material and relevant evidence (subject to exclusion pursuant to E.C. § 352; i.e., where the "*probative value*" of such evidence is outweighed by its "*prejudicial effect*") is admissible. (Subd. (f)(5) & (9).) At this hearing, Mary questioned whether a higher standard of proof (e.g., by "*clear and convincing evidence*," or "*proof beyond a reasonable doubt*") was more appropriate. Noting that although an individual's right to possess firearms is of fundamental constitutional stature (i.e., the Second Amendment), it remains subject to the state's traditional authority to regulate firearm use by individuals who have a mental illness. In such a case, the petitioner is only being deprived of property, as opposed to her liberty or the "severance of familial ties," and that such a restriction is only temporary; i.e., five years.

Also, although the loss of the right to possess firearms can impact an individual's ability to defend himself or herself, this deprivation does not leave the individual exposed to danger without recourse to other defensive measures, such as installing home security devices and summoning the police. Lastly, to impose a higher standard of proof on the People would increase the risk of placing firearms in the hands of a person who, by being involuntarily held for mental evaluation, has shown some indication of being a danger to himself, herself, or to others. Taking these factors in account, particularly when balanced with the state's strong interest in protecting society from the potential misuse of firearms by a mentally unstable person, the Court determined that the "*preponderance of the evidence*" standard was constitutionally appropriate.

Mary also challenged the constitutionality of section 8103 on its face, arguing that the statute was too vague to be enforced; i.e., a "due process" argument. To pass constitutional muster, a statute must meet two basic requirements: (1) It must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines in order to prevent arbitrary and discriminatory enforcement. A statute is constitutional if it "(1) gives fair notice of the practice to be avoided, and (2) provides reasonably adequate standards to guide enforcement."

Mary did not argue that section 8103(f)(6) failed to give fair notice. Rather, she claimed that the phrase "*would not be likely to use firearms in a safe and lawful manner*" is so vague as to allow for arbitrary and discriminatory enforcement. The Court disagreed, holding that persons of common intelligence would not have to guess at the meanings of words and phrases used in the statute such as "*not likely*," "*use*," "*firearms*," "*safe*," or "*lawful*," each being words "of common usage." Lastly, the Court determined that finding all the above provided the trial court with "substantial evidence" that Mary "would not be likely to use firearms in a safe and lawful manner." The trial judge was not required to take Mary's word for it that she didn't have mental issues and wasn't a danger to herself, particularly in light of all the documentary evidence that she did, and was. The trial court's rulings on these issues were therefore affirmed.

Note: It wasn't an issue in this case because Mary did not own or possess a firearm of her own, but if she had, then you need to know that if not taken from her voluntarily (i.e., a free and voluntary consent), a search warrant would have been necessary to retrieve it from her home or wherever she had it stored. (See *People v. Sweig* (2008) 167 Cal.App.4th 1145 (petition granted).) That fact that W&I Code § 8103(f) prohibits a person as described therein from possessing (etc.) firearms, and that § 8103(i) makes it a felony (wobbler) to do so, does not give law enforcement the right to do warrantless searches for them. P.C. § 1524(a)(10) is your legal authority for such a warrant. Prosecutors might also note the Court further held that a petitioner in such a case is not constitutionally entitled to the assistance of appointed counsel. (pp. 263-264.) If you're interested in all the law on mental patients and firearms, I have an updated 48-page outline for you, available upon request.

***V.C. § 31; Providing False Information to a Peace Officer*:**

People v. Morera-Munoz **(Nov. 18, 2016) 5 Cal.App.5th 838**

Rule: Vehicle Code § 31, providing false information to a peace officer, is constitutional and enforceable so long as a materiality element is read into the statute.

Facts: Just after midnight on September 2, 2014, a San Francisco police officer was dispatched to investigate a report of a person asleep behind the wheel of a vehicle parked in a lane of travel. Sure enough, defendant was found blissfully sleeping while seat belted in behind the steering wheel. Although the engine was off, the keys were in the ignition. Reaching in to retrieve the keys, the officer noticed the odor of alcohol. The officer woke defendant and questioned him about how he had ended up there. The inebriated defendant incredulously denied having had

anything to drink, claiming that he had been on his way home from work. A breath test, however, revealed a blood/alcohol level of .26%.

Defendant was subsequently charged with the usual array of driving-while-under-the-influence charges, plus one count of providing false information to a peace officer, per Vehicle Code § 31. At trial, defendant testified and gave the jury a contradictory, yet equally incredulous story, of having been driven by a friend to where the officer found him, the two of them coming from an after-work party where he'd consumed "a few beers." According to defendant's story, the "friend" had parked the car and left defendant alone with the keys in the ignition. Defendant then moved over to the driver's seat, fastened his seat belt, and fell asleep.

As to the V.C. § 31 charge, the jury was instructed by the trial court according to the statutory elements of the section; i.e., "To prove the Defendant guilty of this crime, the People must prove that: One, the Defendant gave information either orally or in writing; Two, that information was given to [a] peace officer in lawfully performing or attempting to perform his duties as a peace officer; Three, the Defendant knew the information to be false." The jury bought defendant's cock-and-bull story, acquitting him of all counts except for having lied to the officer (which he necessarily admitted to by his testimony), convicting him only on the V.C. § 31 charge. Defendant appealed, arguing that section 31 is facially invalid under the First Amendment of the United States Constitution because it criminalizes the giving of false information to a peace officer without regard to the information's materiality. The Appellate Division of San Francisco's Superior Court agreed, concluding that "absent a materiality provision," section 31 is unconstitutional on its face as a violation of the First Amendment freedom of speech. Defendant's conviction was therefore reversed. The First District Court of Appeal transferred the case to itself on its own motion.

Held: The First District Court (Div. 1) reversed the Appellate Division's decision, thus reinstating defendant's conviction. The issue here was whether enforcement of V.C. § 31 violates a suspect's First Amendment freedom of speech. The principles involved are well-settled: The First Amendment's guarantee of freedom of speech means that government has no power to restrict expression because of its message, ideas, subject matter, or content. Statutes that contain content-based restrictions on speech are reputably presumed to be invalid, making it the government's burden to prove such a statute's constitutionality. But the right to free speech is not without its limits.

Certain categories of speech do not enjoy the benefit of full First Amendment protection. Also, if a statute is "content neutral," then a more lenient test than the test applied to content-based restrictions is used. This is because "[c]ontent-neutral [statutes] do not pose the same 'inherent dangers to free expression' . . . that content-based regulations do." The statute in issue here, V.C. § 31, provides: "No person shall give, either orally or in writing, information to a peace officer while in the performance of his duties under the provisions of this code when such person knows that the information is false." To give such false information to a peace officer is a misdemeanor. In arguing that V.C. § 31 poses an unconstitutional restriction on free speech, defendant cited the U.S. Supreme Court case of *United States v. Alvarez* (2012) 567 U.S. ___ [183 L. Ed.2nd 574; 132 S.Ct. 2537]. In *Alvarez*, the Supreme Court struck down as an unconstitutional restriction on free speech the Stolen Valor Act of 2005 (18 U.S.C. (former) §

704(b)), which sought to make illegal false representations, whether verbal or in writing, to the effect that the speaker had been awarded any military decoration or medal. Alvarez, himself, falsely claimed to have received the Congressional Medal of Honor.

The Court here, however, had no difficulty differentiating *Alvarez* from V.C. § 31. In *Alvarez*, for example, it was noted that among the various categories of criminal laws that may constitutionally regulate free speech are those that prohibit false statements made to a government official. Such statutes, such as V.C. § 31, are not "content-based," thus subjecting them to a lower ("an intermediate") level of scrutiny. Also, such false statements made to peace officers acting within the scope of their duties under the Vehicle Code have the potential to disrupt official investigations. As such, the government has a strong interest in regulating them. V.C. § 31 is also narrow in scope, unrelated to the suppression of free speech in general, not targeting any more speech than is necessary to insure the validity of the necessary investigation. The Court noted that a similar federal statute, 18 U.S.C. § 1001, making it illegal to "knowingly and willfully" make any materially false, fictitious, or fraudulent statements or representations "in 'any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States,'" has been upheld as lawful. (See *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.* (9th Cir. 1982) 690 F.2nd 1240.)

Similar to 18 U.S.C. § 1001, V.C. § 31 only prohibits intentional deceit to a peace officer about an investigation undertaken pursuant to provisions of the Vehicle Code. The Court did find, however, that to avoid a potential due process violation, V.C. § 31 must be limited to those statements that are material to an officer's investigation; i.e., where "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question." Section 31, as written, fails to impose any materiality requirement. However, when necessary to uphold the constitutionality of a statute, courts have an inherent power to read a materiality requirement into the statute. The Court did so here, thus leading to the conclusion that, as so interpreted, V.C. § 31 is constitutional. The jury in this case, however, was not instructed as to a materiality element. This error was harmless, however, in that the statements the jury necessarily found to be false (and not contested by the defendant) were of obvious materiality as they related to the officer's investigation. (I.e.; "*Have you been drinking*;" "*No*", and "*Where are you coming from*;" "*From work*.") Defendant, therefore, was properly convicted of providing false information to a peace officer.

Note: This decision provides an excellent and thorough analysis of *U.S. v. Alvarez*; a case that should bother you, particularly if you are a veteran. Per *Alvarez*, those idiots who claim to be decorated veterans when they are in fact anything but, may not be prosecuted for their lies, seriously diminishing the worth of those same medals and honors properly awarded to the men and women who risked their lives in earning them. But the value in this new case, in upholding V.C. § 31, is in pointing out that some intentional falsehoods, at least when "material," are illegal and may be the subject of some form of punishment. For the sake of brevity, I left an awful lot out of the Court's discussion of the differences between V.C. § 31 and the Stolen Valor Act which, if this area of the law is of any concern to you, is must reading.

***P.C. §§ 849.5 and 851.6(b) & (d); Unfiled Arrests being Denoted as Detentions*:**

Schmidt v. Department of California Highway Patrol **(Aug. 1, 2016) 1 Cal. App.5th 1287**

Rule: Failure of a prosecutorial agency to file charges in court trigger the requirements of P.C. §§ 849.5 and 851.6(b) & (d), denoting arrests as detentions only.

Facts: Petitioner John J. Schmidt was arrested by the California Highway Patrol (CHP) for Driving while Under the Influence (DUI) on May 1, 2011, and booked into the Santa Barbara County jail. He was released on his own recognizance later that same day, signing a notice to appear in court. The CHP sent Schmidt's arrest report to the Santa Barbara County District Attorney's Office. The district attorney reviewed the referral and, finding that a low blood/alcohol level (unknown what it was) and an absence of a bad driving pattern would make securing a conviction difficult, decided not to file charges "at this time."

Despite charges never being filed, the CHP failed provide Schmidt with a certificate describing his arrest as a detention, as required by P.C. § 851.6(b). Nor did the CHP report the arrest as a detention to the Department of Justice, pursuant to P.C. § 851.6(d). P.C. § 849.5 provides that if a person is arrested and "*released*" and no "*accusatory pleading*" is "*filed*," the arrest shall be deemed a detention only. Section 851.6(b) provides that when an arrest fails to result in a criminal case being "*filed*" in court, the arresting law enforcement agency *shall* issue the arrested person a certificate describing the action as a detention only.

Subdivision (d) of section 851.6 also provides that any reference to an arrest shall be deleted from the official criminal records of the arresting agency and of the Bureau of Criminal Identification and Investigation of the Department of Justice, referring to the action as a detention instead. None of this was done in Schmidt's case. Schmidt therefore brought a class action civil suit against the CHP for a writ of mandate to compel the CHP to comply with the dictates of section 849.5 and 851.6. After a court hearing at which representatives from the Santa Barbara District Attorney's Office (explaining the reasons for failing to file charges in Schmidt's case) and the Santa Barbara Police Department's Records division (describing their department's procedures in such a case, including the fact that compliance with the above statutes is consistent with the industry standard), the court issued a writ of mandate commanding compliance with the section 849.5 and 851.6 requirements. The CHP appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. At issue were the terms "*released*," "*accusatory pleading*," and "*filed*," as used in sections 849.5 and 851.6. The CHP asserted that (1) the word "*released*" as used in the statutes means released without any obligation to appear in court, (2) the term "*accusatory pleading*" includes a notice to appear, and (3) the term "*filed*" includes being filed with the district attorney. Per the CHP's argument, using their definitions of these terms, the 849.5 and 851.6 requirements do not apply. The Court disagreed with the CHP's definitions, ruling that these statutes were not intended to give law enforcement the powers of a prosecuting attorney. Rather, giving these terms "common sense meanings," the Court ruled that a person is "*released*" when he or she is free to leave police custody, whether the person is released on a notice to appear, own recognizance, or bail. Also, a notice to appear may be an "*accusatory pleading*," but only when it is "*filed*" with the court.

Merely "*filing*" it with the local prosecutorial agency has no legal effect. And lastly, the Court rejected the CHP's argument that at least in Schmidt's case, designating his arrest as a detention conflicted with statutory reporting requirements.

In so ruling, it was noted that P.C. § 11115 requires an arresting agency to file a disposition report with the Department of Justice whenever an arrested person is released without having a complaint or accusation filed with the court. Subdivision (b) of section 11115 lists six different alternative reasons for a non-filing. In this case, #4 (i.e., "the ascertainable evidence was insufficient to proceed further") applied. It is irrelevant that a different deputy district attorney might have decided otherwise. It was also held to be irrelevant that the deputy district attorney who rejected the case might have personally believed Schmidt to be guilty despite the lack of sufficient evidence to prove it. "What is relevant is that Schmidt was released and no accusatory pleading was filed against him." Because he was released without charges being filed in court, the mandates of sections 849.5 and 851.6 applied. "Schmidt is entitled to have his arrest deemed a detention (§ 849.5); entitled to a certificate from the CHP describing the action as a detention (§ 851.6, subd. (b)); and entitled to have his arrest deleted from the records of the CHP and the Department of Justice and have any such record refer to it as a detention (§ 851.6, subd. (d))."

Note: While the CHP argued that different cases will sometimes proceed via different routes (e.g., diversion, probation or parole violation as an alternative to formal prosecution of a new case, etc.), the Court noted that the system isn't perfect and there will be exceptions to the writ order as listed in this case. But generally, a person is going to be entitled to the benefits of sections 849.5 and 851.6 where a court filing and prosecution is not intended. I've also been asked about when, or how soon, do the mandates of sections 849.5 and 851.6 kick in. The Court noted that pursuant to P.C. § 853.6(e)(3), the DA has 25 days to decide to file. After that, the DA can only proceed following a new arrest or the issuance of an arrest warrant.

So it would seem to me that a law enforcement agency has at least 25 days, or until there is a formal and permanent (i.e., not being held for further investigation) reject from the DA (whichever occurs first), before the arresting agency has to worry about complying with the section 849.5 and 851.6 requirements. Upon the occurrence of one of these events (formal reject or 25 days), it is suggested by the San Diego Sheriff's Department (Training Bulletin, issued July, 2017) that sections 849.5 and 851.6 be complied with "without delay."