

Please review Page 6 - Intro In RE: California Constitution and Page 10 because this is the submitting of enough probable cause for investigation of Civil Rico. This is being submitted to open investigations in regards to the property theft of a direct source federal witness of on going crimes in the Inland empire. Please be advised that a mock auction was conducted upon the past Employee of Wells Fargo Bank of America BAC Financial an Countrywide. The attached documentation shows spoilage of evidence conducted by a witness whom is actively involved with Real Estate REO transfers in exchange for testimony. There was no mortgage upon this home and it is the third home stolen declared as such and the second Council Strip by the courts to rule no triable issues after a mistrial for questionable jury tampering. NAR National Association of Realtors is already opening investigations. CCP 262 - states you must investigate and cannot interfere while these investigations are going on.

The Real Estate Company is First Team Real Estate which should not come to a surprise as this is the company The Head Justice Daniel Otelia reports upon his CA 700 Form a 10% vested Ownership interest which has grown to 29 franchise offices up and down the coast. This BTW has been documented and witnessed by a Level 5 ADA Agent under the DOJ. The property at 1095 Lowry Ranch Road is now involved in these federal investigations which fall under LA district from where the wire fraud roaming IP address into the County recorders office exists upon this property. This one - best sit down when you read this...

## **POLICE CIVIL LIABILITY LAWSUITS IN CALIFORNIA**

By Matthew J. Orebic, Deputy City Attorney for City of Berkeley  
League of California Cities®

**Webinar**

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See Page 6 Intro In RE: Cal Constitution - Page 10 Submitting Probable Cause for Federal Investigation  
In RE: Spoilage of Evidence - Third Party Graft Benefits - Video Surveillance In full documentation of  
retaliation of Federal Witness by past employers stealing identity to conduct a foreclosure upon a property  
that did not hold a mortgage upon it. - Witnessed by a Level 5 ADA Agent under the DOJ.

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## INTRODUCTION

This paper provides an overview of police civil liability issues in California under federal law (42 U.S.C. section 1983) and state law. Preliminary matters such as whether to remove the case to federal court, the pre-lawsuit claim requirement, and the applicable statute of limitations are discussed first. After reviewing the threshold liability issue of duty, including whether a “special relationship” with an officer arises, the paper turns to claims involving detention, arrest, search, use of force, retaliation, and discrimination. Liability issues arising out of cases involving taking a person into protective custody under Welfare and Institutions Code section 5150 are discussed in some detail in light of the recent cases of *Hayes v. County of San Diego* and *Sheehan v. City and County of San Francisco*. California civil rights laws that arise in police civil liability cases, such as Civil Code sections 51.7 and 52.1 and the California Constitution, are also discussed. The paper then turns to the defenses of qualified immunity for federal claims and several statutory immunities for state tort claims. The final sections address the discovery rules governing police personnel files, the use of formal settlement offers to reduce a plaintiff’s claim for attorney’s fees, and bifurcation motions and motions *in limine* to exclude prior complaints against an officer at trial, while allowing evidence of a plaintiff’s prior arrests.

### I. REMOVAL TO FEDERAL COURT - FACTORS TO CONSIDER

Police civil liability lawsuits that contain both state and federal claims can be filed in either state or federal court.<sup>1</sup> Such lawsuits typically include a federal claim under 42 U.S.C. section 1983. Therefore, if a lawsuit is filed in state court with a Section 1983 claim, the defendants may remove the lawsuit to federal court.<sup>2</sup> The rules governing removal from state to federal court are technical, strictly construed, and beyond the scope of this paper.<sup>3</sup> However, the decision whether to remove the case must be made *immediately* at the outset of the case and typically in unison with the other defendants.<sup>4</sup>

There are several important differences between state and federal court to consider when deciding whether to remove a police civil liability case to federal court. First, police officer personnel files are more difficult to obtain in state court than in federal court, as will be discussed below. Therefore, if defense counsel feels disclosing a defendant police officer’s personnel file regarding third party citizen complaints will be problematic, even if the files are disclosed under a protective order and are not likely to come into evidence at trial, he or she may want to consider not removing a police civil liability lawsuit filed in state court.

Second, in certain counties, a Superior Court jury pool may be less favorable than a District Court jury pool for a police officer defendant. This will vary by county, but there is little

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<sup>1</sup> *Williams v. Horvath*, 16 Cal.3d 834 (1976).

<sup>2</sup> 28 U.S.C. § 1441(b).

<sup>3</sup> See Rutter Group *California Practice Guide, Federal Civil Procedure Before Trial* for the procedural requirements for removal.

<sup>4</sup> *Id.*

question that a juror's past personal experiences with police officers will influence the juror's perception of a police civil liability case. Thus, whether the jury pool is more favorable in state or federal court should also be considered in the decision whether to remove a case.

Third, if a summary judgment motion is more disfavored in the local superior court than the local federal district court, this factor should also be considered because often there is a possibility of success on a partial or full summary judgment motion. In federal court the judge can also summarily adjudicate a single issue, whereas, in state court a summary adjudication motion must eliminate an entire cause of action.<sup>5</sup> Thus, if a discrete issue in the case is subject to summary adjudication in federal court but not state court (because the issue would not dispose of an entire cause of action), removal to federal court may be preferable.

Finally, in a multi-plaintiff case, in federal court under Federal Rule of Civil Procedure 68, a cost-shifting offer to settle can be conditioned on *all* the plaintiffs accepting the various offers. However, in state court, under Code of Civil Procedure section 998, such a conditional cost-shifting settlement offer is not allowed.

## II. THE PRE-LAWSUIT CLAIM REQUIREMENT FOR STATE LAW CLAIMS

The pre-lawsuit claim requirement of the Government Claims Act (Gov. Code §§810-996.6) (formerly called the Tort Claims Act) applies to claims asserted under state law, but not federal law.<sup>6</sup> The CEB treatise on *Government Tort Liability Practice* is an excellent resource to research the law governing the pre-lawsuit claim requirement. The requirement is only touched on here and is beyond the scope of this paper. However, if involved early enough, defense counsel should carefully monitor the claim process to evaluate the sufficiency, accrual, tolling, and timeliness of a claim as governed by Government Code sections 901, 905, 910, 911.2, 911.3, 911.4, 913, 915, 935, 945.3, 945.4, and 945.6.

Government Code section 945.4 (when read together with Section 950.2) provides that no lawsuit can be brought against a public employee for which a claim is required "until a written claim therefor has been presented" to the public entity. However, the employee need not be named in the claim even if known to the plaintiff.<sup>7</sup> Failure to submit a pre-lawsuit claim is fatal to a state tort law cause of action.<sup>8</sup> In fact, failure to *allege compliance* in the complaint with the pre-lawsuit claim requirement is fatal to a state tort law claim for damages, and the claim must be dismissed at the demurrer stage under Section 945.4.<sup>9</sup>

Under Government Code section 911.2, the deadline to submit a pre-lawsuit claim for an "injury" to a person or personal property is six months, whereas other claims must be

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<sup>5</sup> Cf. Code of Civ. Proc. §437c with Fed.R.Civ.Proc. 56.

<sup>6</sup> *Williams, supra*, 16 Cal.3d 834.

<sup>7</sup> Gov. Code § 950.

<sup>8</sup> *Janis v. State Lottery Comm'n*, 68 Cal.App.4th 824, 832 (1998).

<sup>9</sup> *State v. Superior Court (Bodde)*, 32 Cal.4th 1234, 1239 (2004).

submitted within one year. The word “injury” in Section 911.2 includes harm to the body, emotional distress, and reputation.<sup>10</sup> The issue of whether the word “injury” also includes a violation of civil rights brought under Civil Code section 52.1 (discussed below) has apparently not yet arisen in case law.

The most important mistake for defense counsel to avoid is an inadvertent waiver of the late claim defense due to failure to *return* (not deny) a late claim within 45 days.<sup>11</sup> There is no case law on the issue of whether the late claim defense is preserved if the claim appears timely on its face, but in fact is not timely submitted. While that is likely the rule, whenever it appears a claim might be untimely in whole or in part, the best practice is to proactively investigate the actual accrual date(s) and, if late in whole or in part, *return* the claim or the late part of the claim within 45 days.

### III. THE GOVERNMENT CLAIMS ACT – A DEFENSE AS TO UNIQUE POLICE FUNCTIONS?

The fundamental principle of the Government Claims Act is that public entities and employees are only liable to the extent provided by statute.<sup>12</sup> The Act governs the potential liability of public entities and their employees and confines it to “rigidly delineated circumstances.”<sup>13 14</sup> Under Government Code section 820(a), a public employee, such as a police officer, may be held liable “to the same extent as a private person” under general tort principles, and when such liability arises, the entity is typically vicariously liable under Government Code section 815.2(a).<sup>15</sup> There are no cases discussing whether Government Code section 820(a) should apply to police officers when they are providing a service or engaging in conduct for which there is *no equivalent* in the private sector. For instance, it is unclear if Sections 815 and 820(a) of the Act would preclude a claim against a police officer (and therefore the entity as well) for incorrectly executing a search warrant, which is a court order, because a private person cannot engage in such a task.

### IV. STATUTE OF LIMITATIONS DIFFERS FOR STATE AND FEDERAL CLAIMS

The statute of limitations governing state and federal claims in a police civil liability case are different.

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<sup>10</sup> Gov. Code § 810.8.

<sup>11</sup> Gov. Code § 911.3.

<sup>12</sup> Gov. Code § 815.

<sup>13</sup> *Williams, supra*, 16 Cal.3d at 838.

<sup>14</sup> *State of California v. Superior Court*, 32 Cal.4th 1234, 1243 (2004) (a specific statutory basis is required to hold a public entity directly liable for its own conduct and the general negligence statute in Civil Code section 1714 is *not* a statute that can be utilized to directly sue a public entity; there must be a “specific statute declaring [the entity] to be liable, or at least creating some specific duty of care” by the agency in favor of the injured party); see also *Eastburn v. Regional Fire Protection Authority*, 31 Cal.4th 1175, 1183 (2003).

<sup>15</sup> *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715-16.

Under state law, Code of Civil Procedure section 342 provides “(a)n action against a public entity upon which a cause of action for which a claim is required ... must be commenced within the time provided in Section 945.6 of the Government Code.” In a police civil liability case, a pre-lawsuit claim is required under Government Code section 911.2, and therefore, Government Code section 945.6 governs the limitations period. Section 945.6(a) provides, “any suit brought against a public entity on a cause of action for which a claim is required to be presented ... must be commenced: (1) If a written notice is given in accordance with Section 913, not later than six months after the date such notice is ... deposited in the mail” (and) (2) “If written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action.” The limitations period under § 945.6 also applies to public employees.<sup>16</sup> Thus, the limitations period is either six months after the denial of the claim, or if the claim is not acted upon, two years after the incident. Tolling of the limitations period is rare.

Under federal law: “In determining the proper statute of limitations for actions brought under 42 U.S.C. § 1983, [courts] look to the statute of limitations for personal injury actions in the forum state.”<sup>17</sup> Under California law, the statute of limitations for personal injury actions is two years.<sup>18</sup> Therefore, the statute of limitations for federal claims under 42 U.S.C. section 1983 is two years.<sup>19</sup>

## V. DUTY AS A THRESHOLD ISSUE

In police civil liability cases, the California Supreme Court has emphasized that the threshold issue of duty must be analyzed first *before* reaching the issues of whether the other elements of a claim are adequately pled or immunities apply.<sup>20</sup> The existence of a duty is a question of law for the court.<sup>21</sup>

### A. No General Duty To Investigate Or To Investigate Further

In *Williams v. State of California*, the California Supreme Court upheld a demurrer to allegations the police conducted a negligent investigation of an accident.<sup>22</sup> The Court held that the “failure of police personnel to ... investigate properly, or the failure to investigate at all, where the police had not induced reliance on a promise, express or implied, that they would provide protection” does not state a claim for negligence due to the lack of duty to investigate.<sup>23</sup>

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<sup>16</sup> Gov. Code § 950.6(b).

<sup>17</sup> *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004).

<sup>18</sup> Code of Civ. Proc. § 335.1.

<sup>19</sup> There is a rare exception under 42 U.S.C. section 1985, which has a one-year limitations period.

<sup>20</sup> *Williams v. State of California*, 34 Cal.3d at 23 (1983).

<sup>21</sup> *Thompson v. County of Alameda*, 27 Cal.3d 741, 750 (1980).

<sup>22</sup> *Williams, supra*, 34 Cal.3d at 23-24.

<sup>23</sup> *Williams, supra*, 34 Cal.3d at 25. The defenses under state law immunities under Government Code sections 845 and 821.6 for failure to investigate or to investigate properly are discussed below.

Similarly, in a criminal matter, once probable cause arises, an officer has “no duty of further investigation.”<sup>24</sup>

In federal case law, the “duty to investigate” or further investigate has a checkered history in the Ninth Circuit, but currently there is no such duty. In 2001, in *Arpin v. Santa Clara Valley Transportation Agency*, the Ninth Circuit held “officers may not solely rely on the claim of a citizen witness that he was a victim of a crime to establish probable cause, but *must independently investigate* the basis of the witness’ knowledge or interview other witnesses.”<sup>25</sup> In 2003, without mentioning *Arpin*, the Ninth Circuit held there is no general duty to further investigate a claim of innocence or the lack of criminal intent, “once probable cause is established.”<sup>26</sup> However, an officer cannot simply ignore evidence “that would negate a finding of probable cause.”<sup>27</sup> Later in 2003, in *Peng v. Mei Chin Penghu*, the Ninth Circuit held that, despite *Arpin*, probable cause is established without such an independent investigation, if the victim provides “ ‘facts sufficiently detailed to cause a reasonable person to believe a crime had been committed and the named suspect was the perpetrator.’ ”<sup>28</sup> And just after *Peng*, the Ninth Circuit held there is no duty to investigate, but rather, the failure to investigate must involve “another recognized constitutional right” to arise to a cognizable claim.<sup>29</sup> For instance, an intentional failure to investigate due to racial discrimination violates the equal protection clause.<sup>30</sup> More recently, in *John v. City of El Monte*<sup>31</sup>, the Ninth Circuit ostensibly harmonized *Arpin* and *Peng* by stating:

... in *Peng*, we concluded that because the alleged victim provided sufficiently detailed facts regarding the incident, her allegations alone sufficed to establish probable cause for the arrest. *Arpin v. Santa Clara Valley Transportation*, 261 F.3d 912 (9th Cir.2001), is not inconsistent. There, we concluded that because the officers had based their arrest solely on an unexamined charge by a bus driver that a rider had assaulted him and had done no further investigation, they did not have probable cause. *Arpin*, 261 F.3d at 925.

Accordingly, the independent investigation rule for solo reporting parties announced in *Arpin* appears to have been abandoned if the victim’s statement is sufficiently detailed as in *Peng*. *Arpin* now appears to stand for the unremarkable proposition that probable cause does not arise if an uninvestigated complaint is not reasonably specific and there is no corroborating evidence.

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<sup>24</sup> *Hamilton v. City of San Diego*, 217 Cal.App.3d 838, 846 (1990).

<sup>25</sup> *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir. 2001) (emphasis added).

<sup>26</sup> *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003); accord *Cameron v. Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013).

<sup>27</sup> *Broam*, *supra*.

<sup>28</sup> *Peng v. Mei Chin Penghu*, 335 F.3d 970, 978 (9th Cir. 2003) citing *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1444 (9th Cir. 1991) quoting *People v. Ramey*, 16 Cal.3d 263 (1976).

<sup>29</sup> *Ogunrinu v. City of Riverside*, 79 F.App’x 961, 962-63 (9th Cir. 2003) quoting *Gomez v. Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985).

<sup>30</sup> *Elliot-Park v. Manglona*, 592 F.3d 1003, 1006 (9th Cir. 2010).

<sup>31</sup> *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008).

## B. No General Duty To Assist Or Respond

Under state law, all persons owe a duty to use due care in their own actions to avoid creating an unreasonable risk of injury to others.<sup>32</sup> By contrast, those who have not created a risk of harm generally have no duty to take affirmative action to assist or protect another.<sup>33</sup> Although police officers are paid to act in service of the general public, their official duties do not support liability for failing to prevent injury to an individual; like private citizens, they generally have no duty to come to the aid of others.<sup>34</sup> This “no duty” rule will “bar recovery when plaintiffs, having suffered injury from third parties who were engaged in criminal activities, claim that their injuries could have been prevented by timely assistance from a law enforcement officer.”<sup>35</sup> If this were not the rule, the police would potentially be “legally responsible to individual citizens to prevent their victimization by crime.”<sup>36</sup>

The fact that an injured party has requested, or even received, police assistance does not itself create a “special relationship” (discussed below) that gives rise to a tort duty to take action or a certain type of action.<sup>37</sup> In other words, a police officer responding to an incident creates no special relationship; the officer need not provide emergency medical aid to any particular individual<sup>38</sup>, utilize any particular law enforcement tactic<sup>39</sup>, or conduct any particular type of investigation.<sup>40</sup> Even in the face of imminent harm to a person, and even when the police are on the scene observing, the failure of the police to take action to assist the person does not state a claim because the police simply have no legal duty to act.<sup>41</sup> The police owed no “duty to ... protect” even when a physical attack in their presence was reasonably foreseeable and easily preventable.<sup>42</sup>

## C. A Special Relationship Gives Rise To A Duty

An exception to the “no duty” to assist rule is the special relationship doctrine. A “special relationship” between a citizen and the police, giving rise to a duty, arises only in rare circumstances when police conduct “not only contributed to and increased the preexisting risk, but also *changed* the risk that would otherwise have existed ... (there is) detrimental reliance on the officers' conduct that prevented them from seeking other assistance; and ... the officers' conduct lulled the ... (citizen) into a false sense of security.”<sup>43</sup> A duty of protection or assistance

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<sup>32</sup> *Minch v. Department of California Highway Patrol*, 140 Cal.App.4th 895, 908 (2006).

<sup>33</sup> *Williams, supra*, 34 Cal.3d at 23.

<sup>34</sup> *Id.* at 23-24; *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1129 (1998).

<sup>35</sup> *Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1129 (1998), citing *Williams*, 34 Cal.3d at 25.

<sup>36</sup> *Adams v. City of Fremont*, 68 Cal.App.4th 243, 275 (1998).

<sup>37</sup> *Hartzler v. City of San Jose*, 46 Cal.App.3d 6, 10 (1975).

<sup>38</sup> *Rose v. County of Plumas*, 152 Cal.App.3d 999, 1004 (1984).

<sup>39</sup> *Lopez v. City of San Diego*, 190 Cal.App.3d 678, 682 (1987).

<sup>40</sup> *Von Batsch v. American Dist. Telegraph Co.*, 175 Cal.App.3d 1111, 1122 (1985).

<sup>41</sup> *Davidson v. City of Westminster*, 32 Cal.3d 197, 206-09 (1982).

<sup>42</sup> *Id.*

<sup>43</sup> *Adams, supra*, 68 Cal.App.4th at 284.

may arise from a special relationship created by an officer's words or conduct.<sup>44</sup> To establish such a relationship, the plaintiff must demonstrate that an officer assumed a greater duty than that generally owed to members of the public.<sup>45</sup>

Courts apply this doctrine narrowly to "a limited class of unusual cases."<sup>46</sup> A plaintiff may contend an officer undertook a greater duty by voluntarily providing assistance and by implied and express promises to provide a particular level of protection.<sup>47</sup> A plaintiff may also claim dependence on the officer, who by his or her conduct and promises, lulled the plaintiff into a false sense of security, inducing detrimental reliance on the officer for protection.<sup>48</sup>

However, a special relationship does not arise if the "police conduct only incrementally increased the risk to which the injured person was already exposed."<sup>49</sup> For instance, an officer merely stating to a citizen that an officer will be "(r)esponding to a call for assistance is 'basic to police work and not 'special' to a particularized individual,' " and therefore, does not give rise to a special relationship.<sup>50</sup>

In *M.B. v. City of San Diego*, the plaintiff called the police asking for assistance because a man named Johnson, who had previously worked on plaintiff's home, was sexually harassing her with obscene phone calls, had previously broken into her home, and had stolen her underwear from her bedroom while she was sleeping in the room.<sup>51</sup> The police told her "not to worry" and that an officer would "come by and check on" her, but no officer ever did so.<sup>52</sup> Two days later, Johnson went to plaintiff's house and raped plaintiff in her home. She alleged a special relationship existed because she "reasonably relied" on the police advice by failing to take other protective measures such as installing an alarm and moving to a friend's home. The court held that these facts did not establish a special relationship and dismissed the case for lack of duty. Although the police said they would "come by and check on" her, the court held such a statement in response to a call for police assistance is "basic to police work and not 'special' to a particular individual."<sup>53</sup> Rather, to establish a special relationship, the police must have "induced reliance on a specific promise that they would provide specific protection."<sup>54</sup> Additionally, the court held no special relationship arose because the officer's statements that the police would "come by and check on" her and not to worry "did not *increase* the risk Johnson would return to her house and harm her, they merely failed to *decrease* the risk."<sup>55</sup>

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<sup>44</sup> *M.B. v. City of San Diego*, 233 Cal.App.3d 699, 704-705 (1991); *Minch, supra*, 140 Cal.App.4th at 905.

<sup>45</sup> *Walker, supra*, 192 Cal.App.3d at 1398.

<sup>46</sup> *Minch, supra*, 140 Cal.App.4th at 905.

<sup>47</sup> *Zelig, supra*, 27 Cal.4th at 1129; *Walker, supra*, 192 Cal.App.3d at 1399.

<sup>48</sup> *Walker, supra*, 192 Cal.App.3d at 1399; *Adams, supra*, 68 Cal.App.4th at 281-82.

<sup>49</sup> *Adams, supra*, 68 Cal.App.4th at 284.

<sup>50</sup> *Adams, supra*, 68 Cal.App.4th at 279 quoting *M.B. v. City of San Diego, supra*, 233 Cal.App.3d at 706.

<sup>51</sup> *M.B. v. City of San Diego, supra*, 233 Cal.App.3d at 702.

<sup>52</sup> *Id.* at 702-03

<sup>53</sup> *Id.* at 706.

<sup>54</sup> *Id.* at 705.

<sup>55</sup> *Id.*

#### D. Specific Misrepresentations Involving Risk Of Physical Harm Can Give Rise To A Duty

In *Garcia v. Superior Court*, the Court held the parole officer, while having no duty to warn, but having voluntarily “chosen to discuss the parolee’s dangerousness” with the plaintiff, had a legal “duty” to use reasonable care in doing so.<sup>56</sup> In *Garcia*, a violent parolee told his parole officer “he was looking for” his girlfriend, Ms. Morales, and he would “kill her if [he] found her.”<sup>57</sup> The parole officer then told the parolee's girlfriend, Ms. Morales: "He's not going to come looking for you" and "assured [Morales] of her safety."<sup>58</sup> As a result, Ms. Morales allegedly “failed to take steps to protect herself” and the parolee killed her. The Court held that under these facts, there was no specific promise to protect Ms. Morales, and therefore, no “special relationship.”<sup>59</sup> However, this was not necessary for the heirs to state a claim. Rather, Morales' heirs could assert a specialized tort claim called "misrepresentation involving a risk of physical harm."<sup>60</sup>

The *Garcia* case was distinguished in *M.B. v. City of San Diego* (discussed above), where the police said “not to worry” and they would “come by and check on” the citizen.<sup>61</sup> In *M.B.*, the court held *Garcia* did not apply because the officer was “not making representations about what Johnson (the suspect), in particular, might do based on any special knowledge they had about him.”<sup>62</sup> The court reiterated that negligent acts in the context of any police investigation are simply not actionable without a special relationship or a specific misrepresentation about the level of danger posed by the suspect.<sup>63</sup>

#### E. Duty To Intervene With Another Officer

Police “officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen.”<sup>64</sup> However, the officer must have a “realistic opportunity” to do so.<sup>65</sup> The same rule applies under state tort law<sup>66</sup>, but such a tort action may be barred by the statutory immunity under Government Code section 820.8 for injuries caused by another person.

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<sup>56</sup> *Garcia v. Superior Court*, 50 Cal.3d 728, 736 (1990).

<sup>57</sup> *Id.* at 736.

<sup>58</sup> *Id.* at 733.

<sup>59</sup> *Id.* at 734.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 702-03

<sup>62</sup> *Id.* at 708.

<sup>63</sup> *Id.* at 708 n. 5. The investigative immunity under Government Code section 821.6 is discussed *infra*.

<sup>64</sup> *Cunningham v. Gates*, 229 F.3d 1271, 1289-90 (9th Cir. 2000) quoting *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *rev'd on other grounds*, 518 U.S. 81 (1996).

<sup>65</sup> *Id.* quoting *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n. 3 (1st Cir. 1990).

<sup>66</sup> *Lujano v. County of Santa Barbara*, 190 Cal.App.4th 801, 809 (2010) (“duty to intervene does not arise until a person's constitutional rights are being violated in the officer's presence and there must be sufficient time to do so”).

## F. A Mandatory Duty May Arise Under Certain State Laws

Government Code section 815.6 provides for liability when a public entity fails to discharge “a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury ... .” To state a cause of action under Section 815.6, a plaintiff must assert an enactment that (1) imposes a mandatory rather than a discretionary duty, and (2) is intended to protect against the kind of injury suffered.<sup>67</sup> “Enactments” defined by Government Code section 810.6 include statutes, ordinances, and regulations adopted “by an agency of the state pursuant to the Administrative Procedure Act,” but do not include police department regulations put in place by the executive staff.<sup>68</sup>

It is beyond the scope of this paper to attempt to identify all statutes that give rise to a mandatory duty for police officers under Government Code section 815.6. However, statutes that might be characterized as imposing mandatory duties on officers are:

- Informing a domestic violence victim of the right to make a citizen’s arrest (Pen. Code § 836(b));
- Enforcing domestic violence restraining orders (Pen. Code § 836(c)(1));
- Investigating who was the dominant aggressor, if there are mutual restraining orders in a domestic violence incident (Pen. Code § 836(c)(3)); and
- Confiscating a deadly weapon in possession of a person taken into protective custody for a mental health condition (Welf. & Inst. Code § 8102(a)).

These state laws would not, however, give rise to any federal constitution right. Rather, they may arguably provide a potential basis for tort actions under Government Code section 815.6, but there are no cases so holding.

## VI. DETENTION

### A. Federal And State Claims Can Be Made

A claim of improper detention by a police officer can be asserted as a federal claim under 42 U.S.C. section 1983 for an unreasonable seizure under the Fourth Amendment or a state tort claim for false imprisonment.<sup>69</sup>

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<sup>67</sup> *Thompson v. City of Lake Elsinore*, 18 Cal.App.4th 49, 54 (1993).

<sup>68</sup> See *Wilson v. County of San Diego*, 91 Cal.App.4th 974, 982 (2001) (employee manual).

<sup>69</sup> *Moore v. City & County of San Francisco*, 5 Cal.App.3d 728, 735 (1970).

## B. Authority To Detain A Person Is Based On “Reasonable Suspicion”

A police officer is authorized to detain a person when the officer has “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”<sup>70</sup> A fuller statement of the test is: “the circumstances known or apparent to the officer must include specific and articulable facts which, viewed objectively, would cause a reasonable officer to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person the officer intends to stop or detain is involved in that activity.”<sup>71</sup> The factors relevant to whether an officer has reasonable suspicion in different situations are evaluated in hundreds of cases too voluminous to cover here. A good resource for an overview of the relevant cases is the CEB *California Judge’s Benchbook - Search and Seizure*.

## C. The Test As To Whether A Detention Occurred

The test of whether a detention occurred is whether the police conduct “would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.”<sup>72</sup> This is an objective test based on what the officer said and did, and therefore, the officer and the person’s subjective beliefs are irrelevant.<sup>73</sup> Pertinent factors include whether the officer spoke in commanding tone or used language such as “stop” or “hold it” rather than requesting language such as, “[M]ay I speak with you just a minute.”<sup>74</sup> Non-verbal factors include the use of patrol car lights and blocking the person’s path.<sup>75</sup>

## D. The Detention Must Be Of Reasonable Duration – Warrant Check Issue

In “assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant.”<sup>76</sup> For instance, a traffic infraction stop is treated as a detention (although there is probable cause for a non-custodial citation “arrest”).<sup>77</sup> Thus, a traffic infraction stop “must be reasonable in duration and not prolonged beyond the time necessary to address the traffic violation.”<sup>78</sup> However, during a traffic stop, “warrant checks,

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<sup>70</sup> *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), overruled on other grounds by *United States v. Little*, 18 F.3d 1499 (10th Cir. 1994) (en banc); *Terry v. Ohio*, 392 U.S. 1 (1968); *People v. Souza*, 9 Cal.4<sup>th</sup> 224, 231 (1991).

<sup>71</sup> *People v. Conway*, 25 Cal. App. 4th 385, 388 (1994).

<sup>72</sup> *Florida v. Bostick*, 501 U.S. 429, 438 (1991); *Brendlin v. California*, 551 U.S. 249, 256-57 (2007)

<sup>73</sup> *People v. Zamudio*, 43 Cal.4<sup>th</sup> 327, 345 (2008); *U.S. v. Thompson*, 106 F.3d 794, 798 (7<sup>th</sup> Cir. 1997); *U.S. v. Analla*, 975 F.2d 119, 124 (4<sup>th</sup> Cir. 1992).

<sup>74</sup> *U.S. v. McFarley*, 991 F.2d 1188, 1191 (4<sup>th</sup> Cir. 1993); *Ford v. Superior Court*, 91 Cal.App.4<sup>th</sup> 112, 128 (2001).

<sup>75</sup> *McFarley*, *supra*; *United States v. Kim*, 25 F.3d 1426, 1430 (9<sup>th</sup> Cir. 1994).

<sup>76</sup> *United States v. Sharpe*, 470 U.S. 675, 686 (1985).

<sup>77</sup> *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998).

<sup>78</sup> *People v. Gallardo*, 130 Cal.App.4th 234, 238 (2005).

are permissible as long as they do not prolong the stop beyond the time it would otherwise take.”<sup>79</sup> Thus, if an officer runs a warrant check in a manner that does not prolong the time needed to verify the authenticity (and validity) of the driver’s license and write a citation, doing so is lawful. If the warrant check unreasonably prolongs the stop, however, it may give rise to a claim for an unlawfully prolonged detention.

#### E. The Requirement To Identify Oneself During A Detention Is Unsettled In California

An officer’s authority to require the person to identify him or herself during an investigative detention remains unsettled in California.<sup>80</sup> In earlier cases, the Ninth Circuit repeatedly ruled that a detainee cannot be compelled to identify him or herself during an investigative detention, and therefore, cannot be legally arrested for refusing to provide identifying information under Penal Code section 148, which prohibits resisting or delaying an officer in the course of his or her duties.<sup>81</sup>

The state court in *In re Gregory* came to the same conclusion, holding “a person who merely refuses to identify himself or answer questions” during an investigative detention does not violate Penal Code section 148 or otherwise furnish grounds for arrest. ... “A categorical requirement for identification ... incident to a lawful detention would thus appear invalid ... .”<sup>82</sup>

As recently as 2002, in *Carey v. Nevada Gaming Control Board*, the Ninth Circuit held that the law of the Fourth Amendment is *so clearly established* on this point that any officer who arrests a detainee during an investigative detention for merely refusing to provide identifying information is personally liable for damages and *cannot claim qualified immunity*.<sup>83</sup>

In 2004, the United States Supreme Court considered the issue in *Hiibel v. Sixth Judicial District Court*.<sup>84</sup> In *Hiibel*, the Supreme Court held an officer may arrest a suspect for his refusing to orally identify him or herself during an investigative detention if a state statute requires the

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<sup>79</sup> *Id.*

<sup>80</sup> In contrast, if the officer has a legal basis to issue a person a *citation* for any offense, that person *must* provide satisfactory evidence of identification, or face arrest. Penal Code § 853.5. Further, in detentions for *Vehicle Code violations*, the requirements to produce satisfactory identification, and the consequences for failing to do so, are governed by Vehicle Code sections 40302 and 40305.

<sup>81</sup> *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9<sup>th</sup> Cir. 1987) (the use of Penal Code “Section 148 to arrest a person for refusing to identify himself during a lawful Terry stop violates the Fourth Amendment’s proscription against unreasonable searches and seizures.”); see also *Carey v. Nevada Gaming Control Board*, 279 F.3d 873, 880 (9<sup>th</sup> Cir. 2002) (“the police cannot, consistent with the Fourth Amendment, compel identification during an investigatory stop”); *Kolender v. Lawson*, 658 F.2d 1362, 1366 (9<sup>th</sup> Cir. 1981) ); judgment aff’d and remanded, 461 U.S. 352, 103 S.Ct. 1855 (1983) (requirement to physically produce identification during a *Terry* stop violates the Fourth Amendment).

<sup>82</sup> *In re v. Gregory S.*, 112 Cal.App.3d 764, 779, 780 (1981).

<sup>83</sup> *Carey v. Nevada Gaming Control Board*, 279 F.3d 873, 882 (9<sup>th</sup> Cir. 2002).

<sup>84</sup> *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

person to do so.<sup>85</sup> However, California does not have such a law. Further, the *Hiibel* Court did not address the issue of whether an officer can require the detainee to produce *written* identification.

In 2007, without mentioning *Carey*, in *United States v. Lopez*, the Ninth Circuit commented on *Hiibel* in a footnote as follows:

Apart from disclosing one's identity, *see Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 187–89, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), a person detained by police has no general obligation to answer questions or volunteer information.<sup>86</sup>

This statement indicates the Ninth Circuit's position may now be that a person *is* required to disclose one's identity during an investigative detention in light of *Hiibel*, but the question remains unsettled. Section VIII(C) below will address when an officer can conduct a pat search, pocket search, or vehicle passenger compartment search for identification during an investigative detention.

#### F. Valid Orders Issued During A Detention

Police officers have wide discretion to issue orders for officer safety during a detention. In *Smith v. City of Hemet*, an officer responded to a dwelling on a battery call and encountered a suspect on the front porch as he arrived.<sup>87</sup> The officer ordered the person to take his hands out of his pockets and come down off the porch, but the person did not comply with either command. The Ninth Circuit held that the suspect's separate acts of refusing take his hands out of his pockets and come down off the porch, among other failures to follow basic directives, "(e)ach ... constituted a violation of (Penal Code) §148(a)(1) sufficient to warrant the filing of a (separate) criminal charge."<sup>88</sup>

State courts have similarly given officers a wide berth to ensure their safety during a detention. Refusing to comply with a lawful order during a police detention violates Penal Code section 148(a), even if the person is just a bystander.<sup>89</sup>

#### G. Detentions During Search Warrants - Use Of Handcuffs

When police officers execute a search warrant, the "risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the

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<sup>85</sup> 542 U.S. at 178 ("*Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop"); accord *Cady v. Sheahan*, 467 F.3d 1057, 1063 (7th Cir. 2006) (applying Illinois state law requiring a detainee identify him or herself).

<sup>86</sup> *United States v. Lopez*, 482 F.3d 1067, 1078 n.3 (9th Cir. 2007).

<sup>87</sup> *Smith v. City of Hemet*, 394 F.3d 689, 693 (9<sup>th</sup> Cir. 2005).

<sup>88</sup> *Id.* at 697.

<sup>89</sup> *In re Muhammed C.* (2002) 95 Cal.App.4<sup>th</sup> 1325, 1328-29 (bystander willfully delayed the officers' performance of duties by refusing the officers' repeated requests that he step away from the patrol car).

situation.”<sup>90</sup> In *Muehler v. Mena*, the Supreme Court held: “An officer's authority to detain (occupants) incident to a search (warrant) is categorical and it does not depend on the ‘quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.’ ”<sup>91</sup> The Ninth Circuit has also stated that, under *Muehler*, the duration of a detention may last as long as the search and requires no further justification, provided the detention is conducted in a reasonable manner.<sup>92</sup> Further, in *Muehler*, the Court held that handcuffing the occupants for two to three hours while the officers conducted a search of their home was a “marginal intrusion” outweighed by the interests of the officers in effectuating the search.<sup>93</sup>

On the other hand, the Ninth Circuit has held the use of handcuffs during a search warrant to restrain an 11-year old child for 15 to 20 minutes<sup>94</sup>, or a gravely ill person several hours after the premises are secured, raises a question of fact as to whether the manner of detention was reasonable given the totality of the circumstances.<sup>95</sup> Thus, while the use of handcuffs to detain non-disabled adult occupants during a search warrant for several hours is lawful under *Muehler*, leaving children or leaving gravely ill occupants in handcuffs after the premises have been secured may raise a question of fact on the issue of the reasonableness of the manner of the seizure under the Fourth Amendment.

#### H. Whether A Detention Becomes A *De Facto* Arrest Requiring Probable Cause

If a detention turns into a *de facto* arrest, it becomes an unreasonable seizure under the Fourth Amendment unless the officer has probable cause to arrest<sup>96</sup>. There is “no bright line rule for determining when an investigatory stop crosses the line and becomes an arrest.”<sup>97</sup> Rather, whether a police detention is an arrest or an investigative stop is a fact-specific inquiry made “by evaluating not only how intrusive the stop was, but also whether the methods used [by police] were reasonable *given the specific circumstances*.”<sup>98</sup> Whether a seizure is “an arrest or an investigatory stop depends on what the officers *did*, not on how they *characterize* what they did.”<sup>99</sup> For instance, removing a suspect from a vehicle and handcuffing him does not necessarily convert the detention into an arrest requiring probable cause if the circumstances

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<sup>90</sup> *Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

<sup>91</sup> *Muehler v. Mena*, 544 U.S. 93 (2005).

<sup>92</sup> *Dawson v. City of Seattle*, 435 F.3d 1054, 1066 (9th Cir. 2006).

<sup>93</sup> *Muehler*, 544 U.S. at 98.

<sup>94</sup> *Tekle v. United States*, 511 F.3d 839, 850 (9th Cir. 2007).

<sup>95</sup> *Franklin v. Foxworth*, 31 F.3d 873, 876-77 (9th Cir. 1994) (removing a gravely ill and semi-naked man during a search warrant from his sickbed without providing any clothing or covering, and then by forcing him to remain sitting handcuffed in his living room for two hours, rather than returning him to his bed within a reasonable time after the search of his room, was unreasonable under the Fourth Amendment).

<sup>96</sup> *Dunaway v. New York* 442 U.S. 200, 212 (1979).

<sup>97</sup> *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir.1988) quoting *United States v. Hatfield*, 815 F.2d 1068, 1070 (6th Cir.1987).

<sup>98</sup> *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (emphasis in original) quoted in *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002).

<sup>99</sup> *Gallegos v. City of Los Angeles*, 308 F.3d 987, 991-92 (9th Cir. 2002) (emphasis in original).

justify such measures.<sup>100</sup> Similarly, after a long car chase, “(p)ointing a weapon at a suspect, ordering him to lie on the ground, handcuffing him, and placing him for a brief period in a police vehicle for questioning—whether singly or in combination—does not automatically convert an investigatory detention into an arrest requiring probable cause.”<sup>101</sup>

The criteria the courts typically consider in deciding whether a detention became an arrest are the length of the detention, handcuffing the suspect, placing the suspect in a patrol car in handcuffs, and/or transporting the suspect to a different location such as the police station. The latter almost always constitutes a *de facto* arrest.<sup>102</sup> Similarly, detaining the suspect for an unreasonably long period under the totality of the circumstances will constitute a *de facto* arrest.<sup>103</sup>

## VII. ARREST

### A. Probable Cause Is The Standard For Arrest

#### 1. A “Fair Probability” Under The Totality Of The Circumstances

Under federal case law, a “police officer has probable cause to arrest a suspect without a warrant if the available facts suggest a ‘fair probability’ that the suspect has committed a crime.”<sup>104</sup> Probable cause includes the “totality of the circumstances” and only requires that there be a “fair probability.”<sup>105</sup> Probable cause is a lower standard than a preponderance standard because it does *not* require a belief that is “more likely true than false.”<sup>106</sup>

Under state law, a police officer has the authority to arrest a person, if the officer has “probable cause” to believe that the person has committed a misdemeanor in the officer’s presence or has committed a felony. Pen. Code § 836. (The misdemeanor-presence rule is discussed below.) The state courts use similar language to define probable cause. “Probable cause” to arrest exists when the facts and circumstances known to the arresting officer would cause a person of reasonable caution to believe an offense has been or is being committed by the person to be arrested.<sup>107</sup> Probable cause requires a “fair probability” the person committed a crime, and is evaluated through the eyes of the officer.<sup>108</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056 (9th Cir. 1995); accord *People v. Johnson*, 231 Cal.App.3d 1, 12-13 (1991); *People v. Bowen*, 195 Cal.App.3d 269, 274 (1987).

<sup>102</sup> *Dunaway v. New York*, 442 U.S. 200, 212 (1979).

<sup>103</sup> *Florida v. Royer*, 460 U.S. 491, 500 (1983); *U.S. v. Place*, 462 U.S. 696, 709-10 (1983).

<sup>104</sup> *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1094 (9th Cir. 2006); *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999) (“fair probability” is sufficient for probable cause); *United States v. Smith*, 790 F.2d 789, 792 (9th Cir. 1986) (“fair probability”).

<sup>105</sup> *Illinois v. Gates*, 462 U.S. 213 (1983).

<sup>106</sup> *Texas v. Brown*, 460 U.S. 730, 742 (1983).

<sup>107</sup> *People v. Souza*, 9 Cal.4th 224, 230 (1994).

<sup>108</sup> *Bailey v. Superior Court*, 11 Cal.App.4th 1107, 1111 (1992).

## 2. Officer's Subjective Motive Irrelevant On The Issue Of Probable Cause

The subjective intent of the officer is irrelevant in evaluating probable cause because the issue is determined by an objective test, e.g., what a hypothetical “reasonable officer” would believe.<sup>109</sup> In a false arrest claim, the subjective intent of the officer cannot be considered on the issue of probable cause.<sup>110</sup> Thus, even if the officer has an ulterior law enforcement motive unrelated to the stated basis for initiating an otherwise valid traffic stop, the stop is lawful.<sup>111</sup>

## 3. No Duty To Further Investigate Once Probable Cause Arises

See Section V(A) above regarding the lack of any officer duty to further investigate a claim of innocence or the lack of criminal intent “once probable cause is established.”<sup>112</sup>

## 4. Probable Cause For Any Crime Makes The Arrest Valid

An arrest is lawful if the officer has probable cause for *any* crime; it is irrelevant if the officer subjectively thinks there is a different crime or believes a different arrest charge is more appropriate.<sup>113</sup> The “any crime” rule includes a local police officer making an arrest under federal law when not prohibited from doing so under federal law.<sup>114</sup>

## 5. Evaluate The Facts Through The Eyes Of The Officer

Whether probable cause exists is always evaluated through the eyes of the officer on the scene at the time of the incident and can incorporate all of the officer's prior training and experience.<sup>115</sup>

## 6. Probable Cause Through Collective Knowledge

Police officers “can make arrests based on information and probable cause furnished by other officers” or a direction from another officer to make an arrest, provided the directing officer

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<sup>109</sup> *People v. Letner*, 50 Cal.4<sup>th</sup> 99, 145 (2010).

<sup>110</sup> *Devenpeck v. Alford*, 543 U.S. 146, 153-55 (2004) (probable cause is an “objective standard” rendering the officer’s subjective intent or belief irrelevant under the Fourth Amendment).

<sup>111</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>112</sup> *Cameron v. Craig*, 713 F.3d 1012, 1019 (9th Cir. 2013); *Broam v. Bogan*, 320 F.3d 1023, 1032 (9th Cir. 2003); *Hamilton v. City of San Diego*, 217 Cal.App.3d 838, 846 (1990); *Gillian v City of San Marino*, 147 Ca.App.4<sup>th</sup> 1033, 1045 (2007) (citizen victim’s detailed and specific information is sufficient for probable cause).

<sup>113</sup> *Devenpeck, supra*, 543 U.S. at 153; *Gomez v. Garcia*, 112 Cal.App.3d 392, 397-98 (1980).

<sup>114</sup> *Sturgeon v. Bratton*, 174 Cal.App.4<sup>th</sup> 1407, 1413 (2009); *Gonzales v. City of Peoria*, 722 F.2d 468, 474 (9th Cir. 1983), *overruled on other grounds by Hodgers–Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

<sup>115</sup> *United States v. Fouche*, 776 F.2d 1398, 1403 (9th Cir. 1985) *overruled on other grounds in California v. Hodari D.*, 499 U.S. 621 (1991).

has probable cause for the arrest.<sup>116</sup> Further, when police officers are working together, “when there has been communication among agents, probable cause can rest upon the investigating agents’ ‘collective knowledge’.”<sup>117</sup> However, it is unclear whether probable cause can be based on collective knowledge among officers working together when there has been no communication among officers to assemble facts that would arise to probable cause.

B. State Law For Most Misdemeanor Arrests Requires The Officer Either Witness The Crime Or Obtain A Citizen’s Arrest

Under the Fourth Amendment, an officer can make a custodial warrantless arrest for any crime, including an infraction.<sup>118</sup> An officer’s violation of the state statutory requirements for misdemeanor arrests and infractions is *not* a violation of the Fourth Amendment.<sup>119</sup>

State law governing arrests is more restrictive than the Fourth Amendment. State law does not authorize a warrantless arrest for most misdemeanors, unless the misdemeanor is committed in the officer’s presence.<sup>120</sup> The word “presence” means “the crime must be apparent to the officer’s senses,” and therefore, can include hearing.<sup>121</sup> Exceptions to the presence requirement for misdemeanor arrests are violation of a domestic violence protective or restraining order (Pen. Code § 836(c)(1)), domestic violence (as defined in Pen. Code § 836(d)), and carrying a concealed weapon in a controlled area of an airport (Pen. Code § 836(e)). Probable cause, however, is still required.

Under state law, an officer can lawfully effectuate a misdemeanor arrest when the offense took place outside the officer’s presence through a citizen’s arrest. Under Penal Code section 837, a citizen may lawfully make a misdemeanor arrest for an offense committed in his or her presence, and then may delegate to a police officer the act of taking the suspect into custody.<sup>122</sup> In considering whether a citizen’s arrest was made, the citizen need not use any “magic words” and the citizen’s arrest “may be implied from the citizen’s act of summoning an officer, reporting the offense, and pointing out the suspect.”<sup>123</sup>

After Penal Code 142 was amended in 2003, an officer was no longer legally obligated to accept custody of the arrestee from a citizen or effectuate the citizen’s arrest under Penal Code section 142. On the contrary, under the Fourth Amendment, the officer is legally required to

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<sup>116</sup> *People v. Gomez*, 117 Cal.App.4th 531, 538 (2004); *United States v. Ramirez*, 473 F.3d 1026, 1032 (9th Cir. 2007).

<sup>117</sup> *United States v. Jensen*, 425 F.3d 698, 705 (9th Cir. 2005).

<sup>118</sup> *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001); *Virginia v. Moore*, 553 U.S. 164, 171 (2008).

<sup>119</sup> *Virginia v. Moore*, 553 U.S. 164, 176 (2008); *Edgerly v. City & Cnty. of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010).

<sup>120</sup> Penal Code § 836; *Arpin v. Santa Clara Valley Trasnp. Agency*, 261 F.3d 912, 920 (9th Cir. 2001) quoting *Johanson v. Dept. of Motor Veh.*, 36 Cal.App.4th 1209, 1216 (1995).

<sup>121</sup> *People v. Bloom*, 185 Cal.App.4th 1496, 1501 (2010).

<sup>122</sup> *Arpin, supra*, 261 F.3d 912, 920; *Padilla v. Meese*, 184 Cal.App.3d 1022, 1030 (1986).

<sup>123</sup> *Id.*

evaluate whether the citizen has probable cause to make a legal arrest.<sup>124</sup> In situations where the citizen has made an unlawful custodial arrest, the officer may momentarily “accept custody” of the arrestee, if necessary to keep the peace, but only for the purpose of releasing the arrestee under Penal Code section 849(b), which provides for release when there are insufficient grounds for making a criminal complaint.

### C. State Law Generally Requires A Field Citation-Release For Infractions

Under Penal Code section 853.5, an officer must release a person cited for an infraction in the field if the person provides satisfactory evidence of identification and signs a promise to appear in court on the citation/notice to appear. If the person does not provide satisfactory identification or does not sign the citation, the officer may effectuate a custodial arrest.<sup>125</sup> The officer may offer the person the option of providing a thumb print if satisfactory identification is not provided, but is not required to do so.<sup>126</sup> The specific grounds for not releasing a *misdemeanor* arrestee discussed next cannot be used as grounds for non-release for an infraction.<sup>127</sup>

### D. State Law Gives The Officer Discretion To Issue A Field Citation-Release Or Book For A Misdemeanor, But Citation-Release After Booking For A Misdemeanor Is Required, With Several Exceptions

Under Penal Code section 853.6(a), an officer has discretion to release a person arrested for a misdemeanor with a citation-release in the field, but also has discretion to book the person at jail. After booking is complete, however, the jailor must release a misdemeanor arrestee pursuant to a citation-release/notice to appear signed by the arrestee, unless one of the 10 exceptions in Section 853.6(i) applies. The most common exceptions to the misdemeanor citation-release after booking rule include: (1) the existence of warrants, (2) a misdemeanor driving under the influence arrest, (3) severe intoxication, (4) the offense would likely continue, or (5) immediate release would jeopardize the prosecution of the offense or endanger persons.

As stated above, a violation of the state law citation-release rules for infractions and misdemeanors is not a Fourth Amendment violation; it is solely a state law claim.<sup>128</sup> Earlier cases to the contrary in the Ninth Circuit, namely *Bingham v. City of Manhattan Beach*<sup>129</sup> and *Reed v. Hoy*<sup>130</sup>, have been “effectively overruled.”<sup>131</sup>

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<sup>124</sup> *Arpin, supra*, 261 F.3d 912, 924-25.

<sup>125</sup> Penal Code § 835.5.

<sup>126</sup> *Id.*

<sup>127</sup> *Edgerly v. City and County of San Francisco*, 713 F.3d 976, 982 (9th Cir. 2013).

<sup>128</sup> *Virginia v. Moore*, 553 U.S. 164, 176 (2008).

<sup>129</sup> 341 F.3d 939, 950 (9th Cir. 2003).

<sup>130</sup> 909 F.2d 324, 330 n. 5 (9th Cir. 1989).

<sup>131</sup> *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 956 (9th Cir. 2010).

E. State Law False Arrest Claims Have Two Procedural Differences From Federal Law At Trial

For a warrantless arrest, under state law, the officer has the burden of proof at trial to establish the existence of probable cause.<sup>132</sup> Under federal law, the plaintiff has the burden of proof to establish the officer did not have probable cause to arrest, if the officer provides some evidence of probable cause.<sup>133</sup>

Additionally, in a federal claim for unlawful arrest, the jury decides whether probable cause existed.<sup>134</sup> In a tort claim for false arrest, the court must “instruct the jury as to what facts, if established, would constitute probable cause. ... The jury then decides whether the evidence supports the necessary factual findings.”<sup>135</sup>

This makes for somewhat confusing jury instructions in a case containing both a tort claim for false arrest and a Section 1983 claim for unlawful arrest.

F. Outcome Of The Arrest Is Irrelevant On The Issue Of Liability

“The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted – indeed, for every suspect released.”<sup>136</sup> Accordingly, the outcome or status of any arrest charge is irrelevant to the issue of whether probable cause for the arrest existed.<sup>137</sup> However, if the plaintiff claims the officers were untruthful with the prosecutor, the fact that a criminal prosecution occurred may come into evidence as part of a plaintiff’s claim for emotional and monetary damages in a federal (Section 1983) claim of unlawful arrest.<sup>138</sup>

G. Officer’s Territorial Authority

Under Penal Code section 830.1(a), a local police officer’s authority to make an arrest outside the political subdivision that employs him or her is limited to: (a) jurisdictions where the chief of police, county sheriff, or their delegate, has given officers from the arresting officer’s jurisdiction prior consent to make arrests, or (b) crimes committed in the officer’s presence and there is immediate danger to person or property, or of the escape of the perpetrator of the

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<sup>132</sup> CACI 1402; *Cervantez v. J.C. Penney Co.* 24 Cal.3d 579, 592 & fn. 7 (1979), superseded on other grounds by Pen. Code § 243; *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1044 (2007).

<sup>133</sup> CACI 3021 citing *Dubner v. City & County of San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001).

<sup>134</sup> *Id.*

<sup>135</sup> *Levin v. United Air Lines, Inc.*, 158 Cal.App.4th 1002, 1018–19 (2008).

<sup>136</sup> *Baker v. McCollan*, 443 U.S. 137 (1979).

<sup>137</sup> *Borunda v. Richmond*, 885 F.2d 1384, 1389 (9<sup>th</sup> Cir. 1989).

<sup>138</sup> *Id.*

offense. Otherwise, an officer's power to arrest outside his or her employer's jurisdiction is the same as any private citizen and governed by the law applicable to citizen arrests.<sup>139</sup>

If an officer observes a traffic infraction or crime in his or her own jurisdiction, he or she can pursue the suspect even if the suspect crosses the jurisdictional boundary.<sup>140</sup> However, if an officer observes a non-dangerous traffic infraction in an outside jurisdiction in which there is no prior agreement to allow the officer to enforce laws, there are conflicting cases as to whether the clause allowing the officer to prevent "escape" can be used to make a traffic stop.<sup>141</sup>

#### H. Failure To Give An Arrestee A *Miranda* Warning Is Not Actionable

The failure to Mirandize an arrestee "cannot be a grounds for a § 1983 action."<sup>142</sup>

### VIII. SEARCH

The law of search fills many volumes of legal treatises. This paper only touches on the common search issues that arise in police civil liability cases. Under federal law, claims of unlawful search must be brought as a Section 1983 claim under the Fourth Amendment.<sup>143</sup> Under state law, a tort claim for invasion of privacy is potentially actionable.<sup>144</sup>

#### A. Running A License Plate Is Not A Search

A license plate check does not arise to the level of a search under the Fourth Amendment.<sup>145</sup>

#### B. A Pat-Down Search During An Investigative Detention Requires An Articulate Belief The Person Is Armed And Dangerous

Under *Terry v. Ohio*<sup>146</sup>, an officer may conduct a "frisk" or pat-down search without violating the Fourth Amendment's ban on unreasonable searches and seizures if: (1) the investigative stop is lawful, and (2) the police officer reasonably suspects that the person stopped is armed and dangerous.<sup>147</sup> The sole justification of a *Terry* stop pat-down search is the "protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."<sup>148</sup> The standard for determining whether a pat-down search is

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<sup>139</sup> *People v. Monson*, 28 Cal.App.3d 935, 940 (1972).

<sup>140</sup> *People v. Cooper*, 101 Cal.App.4th Supp. 1, 6 (2002).

<sup>141</sup> *Cf. People v. Hamilton*, 191 Cal.App.3d Supp. 13, 19 (1986) with *People v. Landis*, 156 Cal.App.4th Supp. 12, 18 (2007).

<sup>142</sup> *Chavez v. Martinez*, 583 U.S. 760, 772 (2003).

<sup>143</sup> *Conn v. Gabbert*, 526 U.S. 286, 293 (1999).

<sup>144</sup> *Baughman v. State of California*, 38 Cal.App.4th 182, 189 (1995).

<sup>145</sup> *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1150 (9th Cir. 2007).

<sup>146</sup> *Terry v. Ohio*, 392 U.S. 1, 8 (1968).

<sup>147</sup> *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009).

<sup>148</sup> *Terry, supra*, 392 U.S. at 29.

reasonable is “whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”<sup>149</sup> The officer need not be absolutely certain that the individual is armed, but an officer’s “unparticularized suspicion or ‘hunch’” is not enough to establish reasonableness.<sup>150</sup> The officer must be able to point to “specific reasonable inferences drawn from the facts in light of his experience.”<sup>151</sup> As with probable cause, the need for a pat-down search takes into consideration the “totality of the circumstances” and is evaluated from the perspective of the officers’ experience, rather than from the perspective of someone untrained in law enforcement.”<sup>152</sup>

During a pat-down search, “if an officer feels an item that he recognizes as contraband or evidence, that ‘touch’ may provide probable cause for the arrest of the person and seizure of the evidence.”<sup>153</sup> The Ninth Circuit has held that, during a pat-down, an officer feeling a rectangular tin, a marijuana pipe, or a golf-ball-sized cellophane bundle wrapped in duct tape provides a sufficient probable cause to remove those items from the suspect’s pocket.<sup>154</sup>

### C. Search For Identification During An Investigative Detention

Traffic stops for infractions are treated as investigative detentions for the purpose of evaluating the lawfulness of a search.<sup>155</sup> During a traffic stop, if the person to be cited does not provide satisfactory identification, an officer is entitled to conduct a limited search for identification in the locations in the passenger compartment where a wallet is likely to be found.<sup>156</sup> In *People v. Hart*, the court held that if officer safety is an issue during the stop, “the officer may control the movements of the vehicle’s occupants and retrieve the license himself” from the vehicle.<sup>157</sup> The court so ruled even though the officer had no suspicion the detainee is involved in drugs, weapons, or violence.<sup>158</sup>

While not as clearly established as passenger compartment searches for identification, California courts have also approved of pocket searches for identification during an

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<sup>149</sup> *Id.* at 27.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *United States v. Magana*, 797 F.2d 777, 780 (9th Cir. 1986) citing *United States v. Cortez*, 449 U.S. 411, 417 (1981).

<sup>153</sup> *United States v. Miles*, 247 F.3d 1009, 1013 (9th Cir. 2001).

<sup>154</sup> *United States v. Hartz*, 458 F.3d 1011, 1018 (9th Cir. 2006).

<sup>155</sup> *Knowles v. Iowa*, 525 U.S. 113, 117 (1998).

<sup>156</sup> *People v. Artero D.*, 27 Cal.4<sup>th</sup> 60, 83-85 (2002).

<sup>157</sup> *People v. Hart*, 74 Cal.App.4<sup>th</sup> 479 (1999).

<sup>158</sup> *Id.* at 484-85; accord, *People v. Webster*, 54 Cal.3d 411, 431 (1991) (for officer safety, an officer may search a vehicle for registration papers after removing the occupants from the car); *People v. Faddler*, 132 Cal.App.3d 607, 610 (1982) (officer can lawfully search glove compartment for driver’s license when occupants “boisterous and mouthy”).

investigative detention of a pedestrian in certain circumstances.<sup>159</sup> However, there is no case law in the Ninth Circuit approving a pocket search for identification during an investigative detention. In fact, in one unpublished case, the Ninth Circuit held a pocket search for identification during a bicycle traffic stop violated the Fourth Amendment, but the officer was entitled to qualified immunity due to the two state court cases that suggested such a search was lawful.<sup>160</sup> Further, as stated in Section VI(E) above discussing whether a detainee must verbally identify him or herself during an investigative detention, the Ninth Circuit's position on this issue may have shifted in light of the Supreme Court's decision in *Hiibel v. Sixth Judicial District Court*.<sup>161</sup>

Since the issue of obtaining identification during investigative detentions continues to be a difficult legal problem for police officers, attached to this paper as Exhibit A is a Training Bulletin the Berkeley Police Department uses to advise officers on strategies to obtain identification from the subject of an investigative detention.

#### D. Search Incident To Custodial Arrest

##### 1. Search Of Arrestee Is Authorized For All Custodial Arrests

In *Robinson v. United States*, the Supreme Court established that a police officer who makes a lawful arrest may conduct a warrantless search of the arrestee's person.<sup>162</sup> However, the arrest must be a *custodial* arrest, not a field-citation release.<sup>163</sup> A strip search of an arrestee is governed by separate rules explained below in Section IX(G).

##### 2. Search Of Area Within The Arrestee's "Immediate Control"

In *Chimel v. California*, the Supreme Court established that pursuant to a lawful custodial arrest, the officer may conduct a warrantless search of the area within the arrestee's "immediate control."<sup>164</sup>

##### 3. Search Of Arrested Person's Vehicle Contemporaneous With The Arrest Is Now Limited To Specific Circumstances

From 1981 to 2009, *New York v. Belton* provided a bright-line rule that, "when a policeman has

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<sup>159</sup> *People v. Loudermilk*, 195 Cal.App.3d 996, 1002 (1987) (if officer feels wallet during a lawful patdown search for weapons after suspect denied having identification, the officer is justified in taking it from the suspect's pocket to identify him"); *People v. Long*, 189 Cal.App.3d 77, 88 (1987).

<sup>160</sup> *Salsbury v. City of Berkeley*, 188 Fed.Appx. 613, 615 (9th Cir. 2006).

<sup>161</sup> *United States v. Lopez*, 482 F.3d 1067, 1078 (9th Cir. 2007) referring to *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004).

<sup>162</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>163</sup> *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998) (search incident to arrest rule does not apply in non-custodial "arrests" such as traffic infractions).

<sup>164</sup> 395 U.S. 752, 763 (1969); *Davis v. United States*, 131 S. Ct. 2419, 2424 (2011).

made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>165</sup> In 2009, in *Arizona v. Gant*, the Supreme Court overruled the long-standing *Belton* rule by holding “*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been *secured and cannot access* the interior of the vehicle.”<sup>166</sup> *Gant* held an officer may “search a vehicle incident to a recent occupant's arrest only when the arrestee is *unsecured and within reaching distance* of the passenger compartment at the time of the search.”<sup>167</sup> The Court also reiterated the automobile exception to the search warrant requirement, holding it is still lawful to conduct a vehicle search if the police have reason to believe that the vehicle contains “evidence relevant to the crime of arrest.”<sup>168</sup>

In 2010, as to the word “unsecured,” the Third Circuit discarded it as an element of the rule because it reasoned that was not the intent of *Gant*, and held that even when a suspect is in handcuffs, the surrounding area and containers/bags may be searched incident to arrest under *Gant*, provided there is something “more than the mere theoretical possibility that a suspect might access a weapon or evidence.”<sup>169</sup> In 2011, the Supreme Court in *Davis v. United States* reiterated the “new rule” announced in *Gant*, but this time left out the word “unsecured”.<sup>170</sup> In *Davis*, the Court characterized its holding in *Gant* as follows: “(A)n automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains “evidence relevant to the crime of arrest.”<sup>171</sup>

However, in 2014, in *Riley v. California*, the Supreme Court re-announced the rule quoting its holding in *Gant* that a vehicle search incident to arrest can proceed “only when the arrestee is

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<sup>165</sup> *New York v. Belton*, 453 U.S. 454, 460 (1981) overruled by *Arizona v. Gant*, 556 U.S. --, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

<sup>166</sup> *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

<sup>167</sup> *Id.* at 343.

<sup>168</sup> The Court in *Gant*, 556 U.S. at 346-47, also noted that even if the person is not under arrest, an officer can search a vehicle's passenger compartment if there is reasonable suspicion the person is dangerous and might access the vehicle and gain immediate control of weapons, citing *Michigan v. Long*, 463 U.S. 1032 (1983), and further noted the general “automobile exception” to the search warrant requirement when there is probable cause that evidence of a crime will be found, citing *United States v. Ross*, 456 U.S. 798, 820–22 (1982); the Ninth Circuit has also observed a search for drugs in the passenger compartment is lawful under *Gant* pursuant to a DUI arrest for drugs because there was a reasonable belief “evidence relevant to the crime of arrest” would be found. *United States v. Martinez*, 403 Fed.Appx. 182, 183-84 (9th Cir. 2010); accord *United States v. Salas De La Rosa*, 366 Fed.Appx. 757, 759 (9th Cir. 2010).

<sup>169</sup> *United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010) (handcuffed suspect’s bag that is close to the arrestee may be searched incident to arrest).

<sup>170</sup> *Davis v. United States*, 131 S.Ct. 2419, 2425, 180 L.Ed.2d 285 (2011).

<sup>171</sup> *Id.*

unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>172</sup>

Currently, if an arrestee is handcuffed and placed in a patrol car, he is not within “reaching distance” of his own car, and therefore, absent a reasonable belief the car contains evidence of a crime (or some other extenuating circumstance or other basis to search such as an inventory search conducted after impoundment), a search of the passenger compartment is unlawful under *Gant*. If the arrestee is handcuffed, but not yet in the patrol car, it is unclear (a) if he is still in “reaching distance” to his own car, and (b) whether he is “unsecured.” However, the fact the arrestee is in handcuffs makes it unlikely he will be considered unsecured. Thus, *Gant* is a significant shift from the long-standing *Belton* rule, which categorically allowed a vehicle passenger compartment search as part of the search incident to arrest rule.

The words “reaching distance” are now being refined by the courts. There is no Ninth Circuit authority on this issue yet, but the Third Circuit held it applied to a bag close to the arrestee.<sup>173</sup>

#### 4. Search Of A Cell Phone Is Now Generally Prohibited Without A Warrant

The United State Supreme Court recently ruled in *Riley v. California* that the search incident to arrest rule does not apply to cell phones in the arrestee's possession.<sup>174</sup> A search warrant must be obtained to search a cell phone when it is seized incident to arrest.<sup>175</sup> The only exception is for an exigent circumstance, such as when there is a need to prevent imminent destruction of evidence, pursue a fleeing suspect, or assist persons who are seriously injured or threatened with imminent injury.<sup>176</sup> If a search warrant for the phone's contents will be pursued, the officer should attempt to prevent remote deletion of the cell phone's data during the time it takes to obtain a warrant.<sup>177</sup> To do so, the officer should either turn the phone off, remove its battery, or place the phone in an aluminum "Faraday bag" to isolate the phone from radio waves.<sup>178</sup>

#### E. Non-Custodial Arrest Does Not Trigger The Search Incident To Arrest Rule

The search incident to arrest rule does not apply in non-custodial “arrests” such as traffic infractions.<sup>179</sup> Thus, even if the officer could have made a custodial arrest, e.g., for a misdemeanor, if the officer elects not to do so, a pocket search is not lawful. *Id.*

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<sup>172</sup> *Riley v. California*, WL 2864483 (2014).

<sup>173</sup> *U.S. v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010).

<sup>174</sup> WL 2864483 (2014).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998).

## F. Search Warrants – Damaging Property And Leaving The Premises In Disarray

In *Liston v. County of Riverside*, the Ninth Circuit stated it is not clear that an allegation that “the officers ransacked their home, dumping out garbage and removing items from drawers and closets, without cleaning up after themselves” even states a claim under the Fourth Amendment.<sup>180</sup> The court held “only unnecessarily destructive behavior, beyond that necessary to execute a warrant effectively, violates the Fourth Amendment.”<sup>181</sup> In fact, with respect to cleaning up, it might be a violation of the Fourth Amendment to prolong the search to clean up once the search is over. The federal courts allow officers significant leeway in executing a search warrant in terms of reasonable damage that arises.<sup>182</sup>

Under state law, police officers have immunity under Government Code section 821.6 for property damage sustained during the execution of a search warrant.<sup>183</sup> Additionally, under Penal Code section 1531, a city is immune from liability when an officer forces a door open pursuant to a warrant after being refused admittance.

## G. Strip Searches

### 1. Definition

Strip search is defined as “requir[ing] a person to remove or arrange *some or all* of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks, or genitalia of such person.”<sup>184</sup>

### 2. The Basic Parameters On The Manner Of Conducting A Strip Search

Strip searches must be conducted by a member of the same gender absent exigent circumstances, and in a private setting.<sup>185</sup> Touching of the breasts, buttocks, or genitalia of the person being strip searched is prohibited.<sup>186</sup> Thus, if an arrestee refuses to comply with a request for a visual body cavity search and the search cannot be done without touching the

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<sup>180</sup> *Liston v. County of Riverside*, 120 F.3d 965, 979 (9th Cir. 1997) implicitly overruled on other grounds by *Saucier v. Katz*, 533 U.S. 194 (2001).

<sup>181</sup> *Id.* quoted in *Mena v. City of Simi Valley*, 226 F.3d 1031, 1041 (9th Cir. 2000).

<sup>182</sup> *Cf. United States v. Becker*, 929 F.2d 442, 446 (9th Cir. 1991) (reasonable for officers to use a jackhammer to break up a concrete slab in the backyard in order to search for evidence underneath) with *San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose*, 402 F.3d 962, 974 (9th Cir. 2005) (unreasonable for officers to cut a mailbox off its post, jackhammer the sidewalk, and break a refrigerator).

<sup>183</sup> *Baughman v. State of California*, 38 Cal.App.4th 182, 189 (1995) (destroyed floppy discs during search warrant not actionable and subject to immunity).

<sup>184</sup> Pen. Code § 4030(c).

<sup>185</sup> Pen. Code § 4030(l) and (m); *Byrd v. Maricopa Cnty. Sheriff's Dep't*, 629 F.3d 1135, 1146 (9th Cir. 2011).

<sup>186</sup> Pen. Code § 4030(j).

buttocks or genitalia, it appears a warrant is required. See *Bull v. City and County of San Francisco*.<sup>187</sup> Any physical body cavity search requires a warrant and must be performed by medical personnel.<sup>188</sup>

### 3. Strip Searches Are Only Allowed In Specific Circumstances

#### a. Strip Search Of Arrestee Who Will Be Placed In The General Jail Population Is Allowed, But There Is A Three-Hour Waiting Period Under State Law For Minor Crime Arrestees

In 2012, the United States Supreme Court held in *Florence v. Board of Chosen Freeholders of County of Burlington* that under the Fourth Amendment, due to the need for jail security, it is lawful to strip search any arrestee, regardless of the crime, who is placed in the “general jail population” where contact with other arrestees will occur.<sup>189</sup> In 2010, the Ninth Circuit had reached the same conclusion in *Bull v. City and County of San Francisco*, and overruled its two prior decisions to the contrary.<sup>190</sup>

However, under Penal Code section 4030(g), if a person (a) is arrested for a crime that does not involve violence, weapons, or drugs, and (b) there is no reasonable suspicion the person is concealing weapons or drugs, and (c) the person is not being cite-released after booking, the arrestee must be given three hours to post bail before being strip searched for placement in the general jail population. A violation of Section 4030(g) can trigger a discretionary award of attorney’s fees under Section 4030(p).

#### b. A Booked Arrestee Who Will Not Be Placed In The General Jail Population Cannot Be Strip Searched At Jail Unless Reasonable Suspicion Exists

In *Bull v. City and County of San Francisco*, although the court ruled that all arrestees who will be placed in the general jail population may be strip searched, the court expressly stated: “We do not, however, disturb our prior opinions considering searches of arrestees who were not classified for housing in the general jail or prison population.”<sup>191</sup> Here, the Ninth Circuit is referring to an interim period between an arrestee’s arrival at the jail for booking, but before a decision is made to place the arrestee in the general jail population.<sup>192</sup> During this interim

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<sup>187</sup> *Bull v. City and County of San Francisco*, 595 F.3d 964, 974 (9th Cir. 2010).

<sup>188</sup> Pen. Code § 4030(h) and (k); *People v. Wade*, 208 Cal.App.3d 304, 308-09 (1989); *Fuller v. M.G. Jewelry*, 950 F.3d 1437, 1449 (9<sup>th</sup> Cir. 1991).

<sup>189</sup> *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510, 1518, 182 L.Ed.2d 566 (2012).

<sup>190</sup> *Bull v. City and County of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010).

<sup>191</sup> The Supreme Court in *Florence* also left open the question of “the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.” 132 S.Ct. at 1522.

<sup>192</sup> *Bull, supra*; *Edgerly v. City and County of San Francisco*, 599 F.3d 946, 957 (9th Cir. 2010).

period, under federal law, an officer must have “reasonable suspicion” the arrestee is concealing drugs, contraband, or a weapon on his or her body to conduct a strip search.<sup>193</sup>

Reasonable suspicion for a strip search at jail during the interim period may be based on “such factors as the nature of the offense, the arrestee’s appearance and conduct, and the prior arrest record.”<sup>194</sup> However, in *Way*, the Ninth Circuit held an arrest charge of being under the influence of a narcotic does not in itself give rise to “reasonable suspicion” needed for a strip search during the interim period at jail before a decision is made to place the arrestee in the general jail population.<sup>195</sup> The court in *Way* recognized that *some* arrest charges are sufficient to trigger reasonable suspicion for a strip search during the interim period upon arrival at jail. For instance, in *Thompson v. City of Los Angeles*, an arrest for grand theft auto was sufficiently associated with violence to justify a strip search.<sup>196</sup> Conversely, in *M.G. v. Fuller*, a *felony* arrest for a stolen ring did not give rise to reasonable suspicion to strip search an arrestee at jail during the interim period.<sup>197</sup> Thus, it is important to note the requirement of reasonable suspicion that the arrestee is hiding contraband or a weapon on his or her body even applies to *felony* arrestees with respect to a strip search during the interim period.<sup>198</sup>

Finally, a strip search in the field absent probable cause or some other authority such as a warrant or a search clause (discussed below) is not advised. In *Bull*, the Ninth Circuit stated a strip search of an arrestee in the field is analyzed under different principles that do not include jail security and, therefore, are not permitted with reasonable suspicion but, rather, would require probable cause as to the search.<sup>199</sup>

Under state law, strip searches during the interim period at jail is not as restrictive as federal law. Penal Code section 4030(f) provides:

No person arrested and held in custody on a misdemeanor or infraction offense, *except those involving weapons, controlled substances or violence* ... shall be subjected to a strip search or visual body cavity search prior to placement in the general jail population, *unless* a peace officer has determined there is *reasonable suspicion* based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband. No strip search or visual body cavity search or both may be conducted without the prior *written authorization* of the supervising officer on duty. The authorization shall include

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<sup>193</sup> *Edgerly, supra; Way v. County of Ventura*, 445 F.3d 1157, 1162 (9<sup>th</sup> Cir. 2006).

<sup>194</sup> *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872 (9<sup>th</sup> Cir. 1993).

<sup>195</sup> 445 F.3d at 1162.

<sup>196</sup> *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1447 (9<sup>th</sup> Cir. 1989); overruled by *Bull v. City and County of San Francisco*, 595 F.3d 964.

<sup>197</sup> *M.G. v. Fuller*, 950 F.2d 1437, 1449 (9<sup>th</sup> Cir. 1991).

<sup>198</sup> *Id.*; see also *Kennedy v. L.A. Police Dep’t*, 901 F.2d 702, 712 (9<sup>th</sup> Cir. 1990) (reasonable suspicion for a strip search at jail not present for arrest charge of stealing roommate’s belongings).

<sup>199</sup> 595 F.3d at 981.

the specific and articulable facts and circumstances upon which the reasonable suspicion determination was made by the supervisor.

This use of the words “except” and “unless” in the same sentence make the scope of Section 4030(f) unclear. The text appears to say a person arrested for any felony or any lower crime involving weapons, controlled substances, or violence *can* be stripped searched during the booking process, whether or not the person will be placed in the general jail population. Even assuming that is the intent of Section 4030(f), the Ninth Circuit’s Fourth Amendment decisions discussed above do not allow such a broad rule. As stated above, “an arrest for being under the influence of a drug does not supply reasonable suspicion that drugs are concealed in a bodily cavity” and violates the Fourth Amendment.<sup>200</sup> Thus, for arrestees that will *not* be placed in the general jail population, while the type of crime is a significant factor and sometimes a dispositive factor, under the Fourth Amendment the Ninth Circuit still requires a reasonable suspicion the person is concealing a weapon or contraband for which a strip search is needed. This constitutional rule overrides any lesser standard set forth in Section 4030(f).

c. Field Strip Search Of Parolee Or Probationer For Narcotics Offense

The United States Supreme Court and the California Supreme Court have both ruled that probation and parole searches are lawful under the Fourth Amendment without the need for reasonable suspicion.<sup>201</sup> The Ninth Circuit treats parole and probation searches as the same type of search.<sup>202</sup> Probation and parole searches are only unlawful if they are “arbitrary, capricious, or harassing.”<sup>203</sup>

The question arises, however, whether a search clause for a probationer or parolee includes a *strip* search. The answer probably depends on the crime for which the person is on probation or parole. If it is a narcotics crime, because drugs are often hidden on the body<sup>204</sup>, the search clause was probably intended and understood to include a strip search. As to the location of the strip search, it can be conducted in the field (especially since taking the person to the police station would constitute an unlawful *de facto* arrest).<sup>205</sup> Similarly, the Fourth Circuit held a strip search was not “unnecessarily intrusive” where a search was conducted inside a police van and the subject's trousers were pulled down, but his shorts were not removed.<sup>206</sup>

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<sup>200</sup> *Way*, 445 F.3d at 1162.

<sup>201</sup> *U.S. v. Knights*, 534 U.S. 112, 121 (2001) (probation); *People v. Woods*, 21 Cal.4<sup>th</sup> 668, 681 (1999) (probation); *Samson v. California*, 547 U.S. 843, 856 (2006) (parole); *People v. Reyes*, 19 Cal.4<sup>th</sup> 743 (1998) (parole); Pen. Code § 3067 (parole).

<sup>202</sup> *U.S. v. Harper*, 928 F.2d 894, 896 n. 1 (9<sup>th</sup> Cir. 1991).

<sup>203</sup> *Samson*, *supra*; *Reyes*, *supra*.

<sup>204</sup> *People v. Smith*, 172 Cal.App.4<sup>th</sup> 1354, 1364 (2009).

<sup>205</sup> *Id.*

<sup>206</sup> *United States v. Dorlouis*, 107 F.3d 248, 256 (4<sup>th</sup> Cir. 1997); *Richmond v. City of Brooklyn Center*, 490 F.3d 1002, 1008 (8<sup>th</sup> Cir. 2007) (strip search of arrestee in motel room upheld); see also *Smith v. City of Oakland*, C 07-6298 MHP, 2011 WL 3360451 (N.D. Cal. 2011).

d. Field Strip Search Of Person Named In Narcotics Search Warrant

A person named in a narcotics search warrant can presumably be strip searched in a private area at the premises of the search because narcotics are often hidden on the body.<sup>207</sup>

A draft strip search policy that conforms to the above rules is attached to this paper as Exhibit B.

IX. FORCE

A. Burden Of Proof

The plaintiff has the burden of proof in a Section 1983 claim to establish the officer used excessive force.<sup>208</sup> Similarly, under state law, the plaintiff in a civil case has the burden of proving that a police officer used excessive force and thereby committed a battery.<sup>209</sup>

B. Reasonable Force Is The Federal Standard, Not The Least Amount Of Force Needed

Under federal law, a claim of excessive force pertaining to a person detained in the field or an arrested pretrial detainee is governed exclusively by the reasonable force standard under the Fourth Amendment.<sup>210</sup> However, if the person is not yet seized, the “shocks the conscience” standard under the Fourteenth Amendment’s substantive due process clause applies.<sup>211</sup>

The hallmark of the rule of reasonable force is that the force used was reasonable under the circumstances, not as they actually existed, but as they reasonably appeared to the officer.<sup>212</sup> In *Graham*, the Supreme Court held,

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation.<sup>213</sup>

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<sup>207</sup> *People v. Smith, supra*.

<sup>208</sup> *Reynolds v. County of San Diego*, 858 F.Supp. 1064, 1069 (S.D. Cal. 1994) *aff'd in part and remanded in part*, 84 F.3d 1162 (9th Cir. 1996).

<sup>209</sup> *Edson v. Anaheim*, 63 Cal.App.4<sup>th</sup> 1269, 1273 (1998) (prima facie battery is not established, unless and until plaintiff proves unreasonable force was used).

<sup>210</sup> *Graham v. Connor*, 490 U.S. 386, 395 (1989).

<sup>211</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (during police chase, the person is not yet seized).

<sup>212</sup> *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

<sup>213</sup> *Id.*

The "least amount of needed force" is *not* the legal standard for use of force.<sup>214</sup> Rather, officers "need only act within that range of conduct we identify as reasonable."<sup>215</sup>

Police officers are also authorized to use force to control and diffuse "a volatile situation," such as when a larger confrontation in a crowd situation could erupt if the police do not step in.<sup>216</sup>

### C. Use Of Force To Detain

Grasping a person's arm during a detention is authorized for officer safety and, if the suspect pulls away, the suspect has committed a violation of Penal Code section 148.<sup>217</sup> Even in situations where a detention has not yet been initiated, an officer can be given leeway to grab a person's arm for officer safety. For instance, in *People v. Rosales*, the police officer approached the person he suspected as being involved in narcotics activity, but the officer did not initially intend to detain the suspect; rather, the officer was going to attempt to initiate a consensual encounter to ask the suspect some questions.<sup>218</sup> The officer approached the suspect, but then grasped the suspect's hand and pulled it out of the suspect's pocket because the officer saw a bulge in the suspect's pocket and thought the suspect might be reaching for a weapon. Drugs fell on the ground as the suspect's hand came out of his pocket. The court held that "even without a detention, we believe the officer was entitled to take appropriate precautionary measures to ensure his own safety. Grabbing and extricating defendant's hand in a single defensive maneuver was, under the circumstances shown, a measured and justifiable response to defendant's potentially threatening conduct."<sup>219</sup>

### D. Use Of Force To Arrest

Under Penal Code section 835a, a police officer may use reasonable force to make an "arrest, prevent escape, or overcome resistance."<sup>220</sup> A police officer "need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or ... overcome resistance."<sup>221</sup> Citing Penal Code section 835a, the Supreme Court in *Hernandez v. City of Pomona* held:

... an officer with probable cause to make an arrest "is not bound to put off the arrest until a more favorable time" and is "under no obligation to retire in order to avoid a conflict." (citations omitted.) Instead, an officer may "press forward and make the

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<sup>214</sup> *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

<sup>215</sup> *Id.*

<sup>216</sup> *Eberle v. City of Anaheim*, 901 F.2d 814, 820 (9th Cir. 1990) (police can forcibly move a person out of football stands to avoid melee).

<sup>217</sup> *In re Gregory S.*, 112 Cal.App.3d 764, 771, 778 (1980).

<sup>218</sup> *People v. Rosales*, 211 Cal.App.3d 325, 328 (1989).

<sup>219</sup> *Id.* at 331.

<sup>220</sup> Pen. Code § 835a.

<sup>221</sup> *Id.*; accord *Graham v. Connor*, 490 U.S. 386, 396 (1989).

arrest, using all the force [reasonably] necessary to accomplish that purpose.” (citations omitted.) Consistent with these principles, Penal Code section 835a provides that a peace officer with reasonable cause to make an arrest “may use reasonable force to effect the arrest” and “need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested.”<sup>222</sup>

While use of force claims often give rise to a question of fact that cannot be dismissed on summary judgment, in *Jackson v. City of Bremerton*, the plaintiff, who was arrested for interfering with an officer, asserted “(1) she was sprayed with a chemical irritant prior to her arrest; 2) three officers pushed her to the ground to handcuff her and roughly pulled her up to her feet during her arrest; and 3) an officer ‘rolled up the windows and turned up the engine in the July heat in order to ‘adjust her attitude.’ ”<sup>223</sup> Once on the ground, an officer “placed his knee on her back.”<sup>224</sup> Under these facts, the Ninth Circuit held there was no excessive force as a matter of law.<sup>225</sup>

One the other hand, there are many cases holding excessive force claims must typically be resolved by a jury.<sup>226</sup>

#### E. Gun Pointing Can Be An Actionable Use Of Force

In *Robinson v. Solano County*, the Ninth Circuit held “that pointing a gun at the head of an apparently unarmed suspect during an investigation can be a violation of the Fourth Amendment, especially where the individual poses no particular danger.”<sup>227</sup> However, as observed in the unpublished case of *Thompson v. Lake*, “(c)ourts have frequently distinguished *Robinson* on the basis of arrests (versus investigative stops), felonies (versus misdemeanors), potentially armed suspects (versus obviously unarmed suspects), and the presence of dangerous circumstances (versus their absence). [Citations omitted.]”<sup>228</sup> The *Thompson* court reasoned that such factual distinctions are appropriate when approaching a potentially armed person, and therefore, “*Robinson* does not establish a clear standard” for those situations.<sup>229</sup>

For instance, in *Los Angeles County v. Rettele*, the Ninth Circuit held *Robinson* is not applicable to executing a search warrant even for a non-violent crime.<sup>230</sup> In *Rettele*, the officers were serving a search warrant involving identity theft and fraud. The person answering the door

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<sup>222</sup> 46 Cal.4th 501, 518-19 (2009).

<sup>223</sup> *Jackson v. City of Bremerton*, 268 F.3d 646, 652 (9th Cir. 2001).

<sup>224</sup> *Id.* at 650.

<sup>225</sup> *Id.* at 653.

<sup>226</sup> *Santos v. Gates*, 287 F.3d 846, 853 (9th Cir.2002); *Liston v. Cnty. of Riverside*, 120 F.3d 965, 976 n. 10 (9th Cir. 1997).

<sup>227</sup> *Robinson v. Solano County*, 278 F.3d 1007, 1015 (9th Cir. 2002); see also *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010) (pointing gun during low-level threat is actionable).

<sup>228</sup> *Thompson v. Lake*, 2013 WL 424436 \*5 (D. Nev. 2013).

<sup>229</sup> *Id.*

<sup>230</sup> *Los Angeles County v. Rettele*, 550 U.S. 609, 611 (2007).

allowed the officers to enter the dwelling without incident. Nonetheless, the officers (a) ordered the person answering the door to “lie face down on the ground,” and (b) “entered their bedroom with guns drawn and ordered them to get out of their bed and to show their hands.”<sup>231</sup> Under these facts, the Supreme Court held that as a matter of law, because the officers were serving a search warrant, the officers acted “in a reasonable manner to protect themselves from harm,” and therefore, “the Fourth Amendment is not violated.”<sup>232</sup>

Similarly, in *Jama v. City of Seattle*, the Ninth Circuit ruled that gun pointing at occupants upon entry into a dwelling pursuant to a narcotics search warrant is lawful as a matter of law.<sup>233</sup> The court held “it was not unreasonable, under the circumstances, for SWAT team officers to point their guns at Jama during the initial protective sweep. Because ‘the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence,’ [t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation.”<sup>234</sup>

Gun pointing has also been ruled lawful as a matter of law in far less dangerous encounters than serving a search warrant. In the unpublished case of *Anderson v. City of Bainbridge Island*, the plaintiff alleged the officers used excessive force “when they aimed their guns at his chest during the arrest.”<sup>235</sup> Anderson was speeding and had fled from the officers in his car to evade a traffic stop. When the officers later saw Anderson on foot, there was no basis to believe he was armed. Yet, the court held that as a matter of law, due to the uncertainties of the situation, it “was reasonable for the officers in this situation to draw their guns in an effort to ensure the safety of everyone.”<sup>236</sup>

In *Thompson v. Lake*, the court ruled that the officers' display of weapons did not violate clearly established law in the situation of that particular case.<sup>237</sup> There, the plaintiff was cut off on the highway by an unmarked police vehicle. At a stop light, the plaintiff got out of his vehicle and approached the driver's side unmarked police vehicle and knocked on the window twice to complain about being cut off. In response, the unmarked police vehicle sounded its siren and several police officers emerged from a second unmarked police vehicle and approached the plaintiff with their guns drawn. The court ruled the officers were entitled to qualified immunity because the law of gun pointing is not clearly established in this factual situation.<sup>238</sup> (Qualified immunity will be discussed further in Section XX.)

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<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 616.

<sup>233</sup> *Jama v. City of Seattle*, 446 Fed.Appx 865, 867 (9th Cir. 2011).

<sup>234</sup> *Id.* at 868 quoting *Michigan v. Summers*, 452 U.S. 692, 702–03 (1981).

<sup>235</sup> *Anderson v. City of Bainbridge Island*, 2010 WL 4723721 at \*2 (W.D. Wash. 2010) *aff'd* 472 Fed.Appx 538 (9th Cir. 2012).

<sup>236</sup> *Id.* at 5.

<sup>237</sup> *Thompson v. Lake*, 2013 WL 424436 (D. Nev. 2013).

<sup>238</sup> In brief writing, defense counsel may wish to attempt to distinguish *Robinson* on its facts. In *Robinson*, the officers were dispatched to a “semi-rural” area in the middle of the day to address a crime that was “at most a misdemeanor.” 278 F.3d at 1014. Moreover, the officers in *Robinson* had no reason

F. Under *Hayes*, A State Claim For Negligent Use Of *Deadly* Force Will Now Apply A Different Standard Than A Federal Excessive Force Claim

Under state law, a claim of excessive force is asserted as either a battery or negligent use of force. Until recently, it was assumed the “reasonable force” standard under federal law applied equally to these two state law torts.<sup>239</sup> However, with respect to the use of *deadly* force<sup>240</sup>, the state law standard for a negligent use of force claim was recently changed by the California Supreme Court in *Hayes v. County of San Diego*.<sup>241</sup>

In *Hayes*, when the officers arrived, Hayes’ girlfriend reported Hayes had attempted suicide earlier that night by inhaling car exhaust fumes, Hayes had attempted suicide on a prior occasion, and she was concerned for his safety. She also stated there were no guns in the house. The officers entered the house to conduct a welfare check on Hayes without first investigating his background or calling for assistance from the psychiatric emergency response team. The officers saw Hayes in the kitchen and ordered him to show his hands. As Hayes raised his hands “he walked toward the deputies” holding a large knife. The officers shot Hayes when he was “between two to eight feet away.”<sup>242</sup>

The California Supreme Court held that, under these facts, “the state and federal standards are not the same” with respect to a claim of negligent use of deadly force.<sup>243</sup> Rather, “state negligence law, which considers the totality of the circumstances surrounding any use of deadly force ..., is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used.”<sup>244</sup> The Court held an officer’s “tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in

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to believe the plaintiff was evading contact with the police inside a dwelling. Instead, the plaintiff in *Robinson* came out from his house to meet the officers, walking 135 feet in a “peaceful” manner. *Id.* at 1010. The officers in *Robinson* thus had ample opportunity to determine the plaintiff was not armed. *Id.* Still, when the plaintiff in *Robinson* identified himself, the officers drew their guns and pointed them at his head. *Id.* And, even after the plaintiff in *Robinson* complied with the officers’ instructions to put his hands over his head, the officers continued to point their guns - one officer going so far as to thrust his gun to within three feet of the plaintiff’s head. *Id.*

<sup>239</sup> *Edson v. City of Anaheim*, 63 Cal.App.4th 1269, 1274 (1998); *Johnson v. County of Los Angeles*, 340 F.3d 787, 794 (9th Cir. 2003) (reasonable force under federal law precludes a state law claim based on said force).

<sup>240</sup> Deadly force “creates a substantial risk of death or serious bodily injury.” *Smith v. City of Hemet*, 394 F.3d 689, 705 (9th Cir. 2005). For instance, a taser is considered “nonlethal” force. *Bryan v. MacPherson*, 630 F.3d 805, 810 (9th Cir. 2010). The use of a police dog to apprehend a suspect is not deadly force as a matter of law. *Thompson v. County of Los Angeles*, 142 Cal.App.4th 154, 167 (2006).

<sup>241</sup> *Hayes v. County of San Diego*, 57 Cal.4th 622, 639 (2013).

<sup>242</sup> *Id.* at 626.

<sup>243</sup> *Id.* at 639.

<sup>244</sup> *Id.*

determining whether the use of deadly force gives rise to negligence liability.”<sup>245</sup>

*Hayes* held when *deadly* force is used, the federal and state standards differ in that, under state negligence law, an officer’s pre-use of force tactical decisions can also be considered as to whether the use of deadly force was reasonable.<sup>246</sup> In the Ninth Circuit, on the other hand, under *Billington v. Smith* (discussed below), an officer’s pre-force tactics are not actionable, unless the pre-force tactic itself constitutes “an independent Fourth Amendment violation.”<sup>247</sup> Thus, under federal law, “(e)ven if an officer negligently *provokes* a violent response, that negligent act will not transform an otherwise reasonable subsequent use of force into a Fourth Amendment violation.”<sup>248</sup>

1. A Negligent Tactics Claim Under *Hayes* Might Not Be Actionable If The Officer Is Making A Lawful Arrest For A Crime

The California Supreme Court in *Hayes* distinguished its 2009 opinion in *Hernandez v. City of Pomona*.<sup>249</sup> In *Hernandez*, the officers had probable cause to make an arrest, but the suspect fled and posed an immediate danger to the officers. The officers pursued the suspect and unleashed a dog to apprehend him and eventually shot and killed him in self-defense. The Court expressly avoided the threshold issue of duty on the issue of negligent tactics because it found as a matter of law the officers’ pre-shooting conduct was not negligent.<sup>250</sup> Although the Court skipped over the issue of whether a duty existed as to the pre-force tactics, the Court indicated the officers’ *decision* to pursue Hernandez cannot be actionable negligence. This is because the Court held that under Penal Code section 835a, officers have a statutory privilege to *immediately* make a lawful arrest, and use force to do so if necessary; the statute and case law provide that officers have no obligation to wait or retreat.<sup>251</sup>

Since *Hayes* did not involve an attempt to make a lawful arrest, it is not clear whether an officer’s statutory privilege under Section 835a to *immediately* make a lawful arrest with force, if needed, overrides a negligent tactics claim that escalates to the use of deadly force. However, there is a meritorious argument that Penal Code section 835a and *Hernandez* still stand for that proposition when there is probable cause to arrest.

2. A Negligent Tactics Claim Under *Hayes* Might Not Be Actionable In Non-Deadly Force Cases

The Court in *Hayes* also did not address whether pre-force tactical decisions in *non*-deadly force cases can be the basis of a negligent use of force claim. This is important because if pre-force

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<sup>245</sup> *Id.*

<sup>246</sup> 57 Cal.4th at 639.

<sup>247</sup> *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002).

<sup>248</sup> *Id.* (emphasis in original).

<sup>249</sup> *Hernandez, supra*, 46 Cal.4th 501 (2009).

<sup>250</sup> *Id.* at 521 n. 18.

<sup>251</sup> *Id.* at 518-19.

tactical decisions are made actionable in a negligent use of non-deadly force claim, almost any use of force could give rise to a question of fact as to whether the officer reasonably should have pursued additional non-force tactics before using force. Prior to *Hayes*, the viability of a negligent tactics claim regarding the use of force was questionable due to the ruling in *Munoz v. City of Union City*.<sup>252</sup> *Munoz*, which also involved officers' response to a mental health crisis call, held officers have *no legal duty* with respect to pre-use of force tactical decisions.<sup>253</sup> Whether this holding in *Munoz* survives the *Hayes* case in *non*-deadly force cases is an important issue that has not yet been decided by the appellate courts.

Preliminarily, to state a negligence claim, "a plaintiff must show that defendant had a duty to use due care" and "the question of whether a legal duty exists is analyzed under general principles of tort law" by the court alone.<sup>254</sup> After a lengthy analysis, the *Munoz* court concluded no legal duty of care arises as to pre-force tactics because a mental health crisis:

... is an unstable situation in which the police must be free to make split-second decisions based on the immediacy of the moment. Knowledge that any unsuccessful attempt at intervention will be subjected to second-guessing by experts with the 20/20 vision of hindsight years following the crisis is likely to deter the police from taking decisive action to protect themselves and third parties. These practical concerns compelled us to observe how imposing a duty of care (for pre-force tactics) would actually threaten, and not promote, public safety.<sup>255</sup>

This is because "imposition of a tort duty on public safety officers ... is certainly likely to result in a more tentative police response." "(E)xposing police officers to tort liability for inadequate or unreasonable assistance ... could inhibit them from providing intervention at all."<sup>256</sup>

In *Hayes*, the California Supreme Court overruled the "no duty" rule in *Munoz* regarding negligent pre-force tacticals in deadly force cases.<sup>257</sup> As stated above, *Hayes* held that in cases involving *deadly* force, "state negligence law, which considers the totality of the circumstances surrounding any use of deadly force (citation omitted), is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used."<sup>258</sup> However, *Hayes* carefully avoided deciding whether pre-force tactical decisions can be actionable negligence in *non*-deadly force cases by couching every sentence in the opinion in the context of *deadly* force only. This careful use of language suggests the "no duty" rule for pre-force tactical decisions may remain good law in *non*-deadly force cases under *Munoz*.

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<sup>252</sup> 120 Cal.App.4th 1077, 1096 (2004).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 1093; *Adams v. City of Fremont*, 68 Cal.App.4th 243, 264 (1998).

<sup>255</sup> *Munoz*, 120 Cal.App.4th at 1096.

<sup>256</sup> *Id.*

<sup>257</sup> *Hayes*, 57 Cal.4<sup>th</sup> at 639.

<sup>258</sup> *Id.*

If a negligent use of force claim can be based on an allegedly negligent tactic preceding a non-deadly use of force, and Penal Code section 835a and *Hernandez* do not provide a defense in a lawful arrest situation, then a pre-trial dismissal in a force case will be made even more difficult by the lack of any common law or statutory immunity (unlike qualified immunity under federal law) pertaining to the use of force under state law.<sup>259</sup>

X. SECTION 5150 CASES - USE OF FORCE AND REASONABLE ACCOMMODATION UNDER THE ADA

A. State Law On The Use Of Force: *Hayes*

In *Hayes*, the California Supreme Court held there is a duty of care with respect to an officer's tactical decisions preceding the use of *deadly* force when the officer is responding to a call for assistance with a mentally disordered person who is a danger to himself or others under Welfare and Institutions Code section 5150.<sup>260</sup> In *Hayes*, the claim of negligent tactics was merely that the officers had approached Hayes, who they had reason to believe was suicidal, and ultimately used deadly force against him, without first:

- (a) Requesting assistance from the department's psychiatric emergency response team,  
or
- (b) Gathering additional available information about Hayes.<sup>261</sup>

When the case was returned to the Ninth Circuit, it did not state these omissions were negligent, but remanded the case to reconsider the issue in light of the interlocutory ruling by the state Supreme Court that a duty of care arises as to the officers' pre-contact tactical decisions under these facts.<sup>262</sup>

B. Federal Law On Use Of Force: *Luchtel* and *Sheehan*

In 2010, with respect to the use of force to take a person into protective custody under Welfare and Institutions Code section 5150, under federal law the officers may use force to subdue the person.<sup>263</sup> In *Luchtel*, the Ninth Circuit held the officers pinning a delusional person to the floor, which allegedly resulted in breaking her arm, was reasonable as a matter of law given the level of her resistance.<sup>264</sup>

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<sup>259</sup> *Scruggs v. Haynes*, 252 Cal.App.2d 256, 266 (1967); *Robinson v. Solano County*, 278 F.3d 1007, 1016 (9th Cir. 2002).

<sup>260</sup> *Hayes*, 57 Cal.4<sup>th</sup> 622.

<sup>261</sup> *Hayes v. County of San Diego*, 736 F.3d 1223, 1231 (9th Cir. 2013).

<sup>262</sup> *Id.* at 1232.

<sup>263</sup> *Luchtel v. Hagemann*, 623 F.3d 975, 983 (9<sup>th</sup> Cir. 2010).

<sup>264</sup> *Id.*

In 2014, however, the Ninth Circuit, in *Sheehan v. City and County of San Francisco*, addressed the use of force in a Section 5150 case in a different manner.<sup>265</sup> In *Sheehan*, the officers responded to a 5150 call by a licensed social worker regarding a resident of a group home for persons with mental illness. The social worker reported Sheehan was mentally disordered, was off her medication, and had threatened to kill him with a knife.<sup>266</sup> The social worker had completed the 5150 form and asked the officers to transport Sheehan to the hospital. The officers went to Sheehan's room with the social worker, announced their presence, and entered Sheehan's locked room with the social worker's pass key.<sup>267</sup> Sheehan charged the officers with a knife, while saying: "get out of here. I'm going to kill you. Get out of my room. I don't need your help."<sup>268</sup> The officers retreated to the hallway and Sheehan closed the door behind them. Shortly thereafter, the officers drew their weapons and forcibly re-entered the room by forcing the door open after several kicks and shoulders rams.<sup>269</sup> Sheehan again charged the officers with the knife, and this time the officers shot her five or six times.<sup>270</sup> Sheehan survived and sued the officers for unlawful entry, excessive force, and other claims.

The Ninth Circuit held the officers had the authority to enter the room both the first and the second time under the emergency aid exception to the warrant requirement. However, it was a jury question as to whether the second entry was conducted in an unreasonable manner and/or with excessive force given that the officers knew Sheehan was mentally ill, highly agitated, and was not likely to respond to the forced entry rationally.<sup>271</sup> The court held that while officers' use of deadly force was reasonable "at the moment" of the shooting, a question of fact arose under the "reckless provocation" rule announced in *Billington v. Smith*.<sup>272</sup> The *Sheehan* court noted that *Billington v. Smith* held "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation (here, potentially the unreasonable manner of the second entry) is an *independent* Fourth Amendment violation, he may be liable for his otherwise defensive use of deadly force."<sup>273</sup>

The *Sheehan-Billington* "reckless provocation" rule is limited to acts that are unlawful and recklessly provoke a violent confrontation resulting in the use of deadly force. *Sheehan* and *Billington* do not suggest Section 1983 liability will arise due to merely *negligent* pre-force tactics that do not arise to unconstitutional conduct. Stated another way, under the *Sheehan-Billington* rule, pre-force negligent tactics *cannot* be part of the basis of an excessive force claim under federal law, unless the pre-force tactic *itself* is unlawful/unconstitutional and recklessly provoked a violent reaction. Whereas, under state law, *Hayes* held pre-force *negligent* tactics

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<sup>265</sup> *Sheehan v. City and County of San Francisco*, 743 F.3d 1211 (9th Cir. 2014) pet. for cert. filed May 22, 2014.

<sup>266</sup> *Id.* at 1218.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 1219.

<sup>269</sup> *Id.* at 1236 n. 3.

<sup>270</sup> *Id.* at 1220.

<sup>271</sup> *Id.* at 1226-27.

<sup>272</sup> *Id.* at 1230 citing *Billington v. Smith*, 292 F.3d 1177, 1190 (9th Cir. 2002).

<sup>273</sup> *Id.* (emphasis added) citing *Billington*, *supra*.

can be the basis of a negligent use of *deadly* force claim, at least where there is no probable cause to arrest for a crime.

### C. The ADA Issue Of Reasonable Accommodation Under *Sheehan*

In *Sheehan*, the Ninth Circuit also held that Title II of the Americans With Disabilities Act (ADA) “applies to arrests, though ... exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment.”<sup>274</sup> The “reasonableness analysis” the court refers to is the “reasonable accommodation” rule for disabled persons under the ADA.<sup>275</sup> In a Title II claim based on a public entity’s alleged failure to provide a reasonable accommodation under 28 C.F.R. § 35.130(b)(7), the plaintiff bears the initial burden of producing evidence of *the existence* of a reasonable accommodation.<sup>276</sup>

In *Sheehan*, the court denied the city’s motion for summary judgment on the plaintiff’s ADA claim because, given Sheehan’s mental disability and clear statement she would try to kill the officers if they re-entered her room, a jury should decide whether the officers’ re-entry was a violation of the “reasonable accommodation” rule under the ADA.<sup>277</sup> In *Sheehan*, the plaintiff alleged “there was no *immediate* need to subdue her and take her into custody” and because she had locked herself in her room, the court held a “reasonable jury could find that Sheehan was in a confined area and not a threat to others—so long as they did not invade her home.”<sup>278</sup> The court stated that, under these particular facts, a jury should decide whether the officers should have “used the passage of time to defuse the situation” or “non-threatening communication” as a “reasonable accommodation” for her disability, rather than allegedly precipitating an immediate confrontation, which they arguably should have anticipated would be deadly.<sup>279</sup> However, if there had been additional facts as to a more immediate danger posed by an unsecured person, the court may have dismissed the reasonable accommodation issue without allowing it to go a jury.

### D. Avoiding Liability Under *Hayes* and *Sheehan* In Section 5150 Cases

As a practical matter, the *Hayes* case places pressure on officers to gather information about a person who may be taken into protective custody under Section 5150 *before* even approaching

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<sup>274</sup> *Id.* at 1232.

<sup>275</sup> To state a claim under Title II of the ADA, a plaintiff must allege: “(1) he is an individual with a disability; (2) he is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) he was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of [his] disability.” *O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

<sup>276</sup> *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

<sup>277</sup> *Sheehan*, 743 F.3d. at 1233.

<sup>278</sup> *Id.* at 1226.

<sup>279</sup> *Id.*

the person, and to utilize a psychiatric response team, if possible. Additionally, *Sheehan* effectively holds that to get an ADA claim dismissed in a Section 5150 case, if there is no immediate danger, the officers should proceed slowly with non-threatening communication, and not unreasonably provoke the person, as doing so may be a failure to “reasonably accommodate” a disabled person under the ADA.

To avoid liability under *Hayes* and *Sheehan* in Section 5150 calls that result in the use of force, an officer should therefore attempt, where practical, to:

- Utilize a records check/collect information about the subject before contact, time permitting,
- Call in staff with mental health expertise, if available, and
- If there is no immediate danger, proceed slowly with non-threatening language so as not to “provoke” the person.

Unfortunately, such advice will frequently be impractical due to the need to act quickly when an officer is called in to help with a dangerous person experiencing a severe mental health crisis. However, these factors should be kept in mind given the *Hayes* and *Sheehan* decisions.<sup>280</sup>

## XI. DISCRIMINATION AND RACIAL PROFILING

To state a Section 1983 claim under the Equal Protection Clause of the Fourteenth Amendment for racial discrimination, a plaintiff “must produce evidence to permit a reasonable trier of fact to find by a preponderance of the evidence that the decision ... was racially motivated.”<sup>281</sup> The fact that the officer and the plaintiff are of different races combined with a disagreement as to the reasonableness of the arrest is insufficient to show an Equal Protection Clause violation.<sup>282</sup> The same rule governs racial discrimination claims in excessive force cases.<sup>283</sup>

In a claim of racial profiling, e.g. for a traffic stop, the officer’s subjective motive under the Fourth Amendment is irrelevant because the lawfulness of the stop is evaluated solely on the objective criteria of what the officer saw and heard.<sup>284</sup> Thus, ulterior law enforcement motives, e.g. based on a hunch, are permitted for an otherwise valid traffic stop.<sup>285</sup> The use of a traffic

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<sup>280</sup> A petition for certiorari was filed on May 22, 2014 in *Sheehan*.

<sup>281</sup> *Bingham v. Manhattan Beach*, 341 F.3d 939, 949 (9th Cir. 2003) (citations, quotation marks, and brackets omitted), *overruled on other grounds by Virginia v. Moore*, 553 U.S. 164 (2008); *see also Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 754 (9th Cir. 2001); *Navarro v. Block*, 72 F.3d 712, 716 (9th Cir. 1995).

<sup>282</sup> *Bingham*, 341 F.3d at 948.

<sup>283</sup> *See Gomez v. City of Fremont*, 730 F.Supp.2d 1056, 1069 (N.D. Cal. 2010); *McKenzie v. Milpitas*, 738 F.Supp. 1293, 1301-02 (N.D. Cal. 1990) (conjecture insufficient to show racial animus in an excessive force case).

<sup>284</sup> *Whren v. United States*, 517 U.S. 806, 813 (1996).

<sup>285</sup> *Id.*

stop for a minor Vehicle Code violation in order to attempt to explore a hunch that something more serious is afoot is usually called a “pretext stop.” However, that term should be avoided, because it may imply an improper purpose. Rather, it is more accurately referred to as a valid traffic stop with an additional law enforcement purpose.

A valid traffic stop under the Fourth Amendment can still violate the Equal Protection Clause of the Fourteenth Amendment if the stop is the product of “selective enforcement of the law based on considerations such as race.”<sup>286</sup> Such selective enforcement or racial profiling claims must be made under “the Equal Protection Clause, not the Fourth Amendment.”<sup>287</sup>

Discrimination claims in police civil liability cases can also potentially be pled under state tort law as an intentional infliction of emotional distress, or under state Civil Code section 51.7 (if excessive force is also claimed) and potentially Civil Code section 52.1, the elements of which are discussed below in Section XVI.

## XII. RETALIATION CLAIM

In *City of Houston v. Hill*, the Supreme Court held, “the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.”<sup>288</sup> While an individual's critical comments may be “provocative and challenging,” they are “nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”<sup>289</sup> These ruling were reiterated by the Ninth Circuit in *Duran v. City of Douglas*.<sup>290</sup>

In 2006, in *Skoog v. County of Clackamas*, the Ninth Circuit held there is a First Amendment right to be free from police action motivated by retaliation against criticism or challenges, *even if probable cause existed* for the officer's action.<sup>291</sup> However, the officer's “retaliatory animus” must have been a “but for” cause of the officer's action, meaning the plaintiff must establish the officer *did not have a separate valid motive* for the same action.<sup>292</sup> This heightened “but for” requirement on the element of causation is defense counsel's best argument to dismiss a retaliation claim. In other words, if it is undisputed the officer had a separate valid motive for his or her action, the First Amendment retaliation claim fails on the issue of causation alone.

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<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> 482 U.S. 451, 461 (1987).

<sup>289</sup> *Id.*

<sup>290</sup> 904 F.2d 1372, 1378 (9th Cir.1990).

<sup>291</sup> 469 F.3d 1221, 1235 (9th Cir.2006). Also, the police conduct must arise to a level that would “chill a person of ordinary firmness from future First Amendment activity.” *Ford v. City of Yakima*, 706 F.3d 1188, 1193 (9th Cir. 2013). However, an arrest, a search, and even a decision to book a person arrested for a misdemeanor rather than issue a field citation-release, have all been deemed the type of action that meets the “chill” requirement. *Id.*

<sup>292</sup> *Lacey v. Maricopa County*, 693 F.3d 896, 916-17 (9th Cir. 2012) (en banc).

In 2012, the United States Supreme Court stated in *Reichle v. Howards*: “This Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of Howards' arrest.”<sup>293</sup> Accordingly, in 2013, in *Acosta v. City of Costa Mesa*, the Ninth Circuit cited *Reichle* for the proposition that if the officers’ “seizure and arrest were supported by probable cause, the officers are entitled to qualified immunity” on a retaliatory arrest claim because *Reichle* states whether the claim is actionable is not clearly established.<sup>294</sup> However, also in 2013, the Ninth Circuit held just the opposite in *Ford v. City of Yakima*.<sup>295</sup> There, without commenting on *Reichle*, the Ninth Circuit held qualified immunity is *not* available on a retaliatory arrest claim because it is clearly established *in this circuit* under *Skoog* that a retaliatory arrest claim is actionable, even if the officer has probable cause.<sup>296</sup> Thus, the Ninth Circuit’s opinions in *Ford* and *Acosta* are in direct conflict with one another on the issue of whether a retaliatory arrest claim is clearly established when the officer has probable cause to arrest, and in turn, whether qualified immunity applies. One unpublished district court opinion held *Ford* is controlling, and therefore, qualified immunity is not available.<sup>297</sup> However, this conflict between *Ford* and *Acosta* as to whether qualified immunity applies to a retaliatory arrest claim when the officer has probable cause to arrest has yet to be resolved.

### XIII. MONELL CLAIM

In *Monell v. Department of Social Services of City of New York*, the Supreme Court held a public entity can be sued under 42 U.S.C. section 1983, if its “policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy” causes a constitutional violation.<sup>298</sup> However, the Supreme Court has repeatedly emphasized the unconstitutional acts of a police officer cannot, standing alone, lead to municipal liability because there is no *respondeat superior* liability under Section 1983.<sup>299</sup> Rather, when the basis of a Section 1983 claim against a public entity (known as a “*Monell* claim”) is an implied policy of nonfeasance such as deliberate indifference toward training or supervision, a public entity’s liability can only be established in “limited circumstances,” where officers “so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are ‘deliberately indifferent’ to the need.”<sup>300</sup> Further,

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<sup>293</sup> *Reichle v. Howards*, 132 S.Ct. 2088, 2093 (2012). Recall that in the previous section, a person can make a claim for a violation of the Equal Protection Clause even if the officer has probable cause for the traffic stop under the Fourth Amendment. *Whren*, 517 U.S. at 813. But in *Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012), in discussing qualified immunity, the Court said: “*Whren*’s discussion of the Fourteenth Amendment does not indicate, much less “clearly establish,” that an arrest supported by probable cause could nonetheless violate the First Amendment.” Thus, the question remains unsettled.

<sup>294</sup> *Acosta v. City of Costa Mesa*, 718 F.3d 800, 825 (9th Cir. 2013).

<sup>295</sup> *Ford*, 706 F.3d at 1196.

<sup>296</sup> *Id.*

<sup>297</sup> *Morse v. San Francisco Bay Area Rapid Transit Dist.*, 2014 WL 572352 (N.D. Cal. 2014).

<sup>298</sup> 436 U.S. 658, 694 (1978).

<sup>299</sup> *Board of the County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403 (1997).

<sup>300</sup> *Id.* at 407 citing *City of Canton*, 489 U.S. 378, 387, and 397 (1989).

the “deliberate indifference” by the public entity must be the “moving force” closely linked to the alleged constitutional violation.<sup>301</sup>

Even if a public entity has an unlawful policy or practice, a *Monell* claim cannot be stated against a public entity without first establishing an underlying claim of a constitutional violation by an officer pursuant to that policy or practice.<sup>302</sup>

With respect to discovery, as discussed below in Section XXII, federal courts typically allow plaintiff’s counsel access to the relevant prior citizen complaints against an officer defendant to attempt to establish a “plainly obvious” pattern of constitutional violations by the officer, while the state courts are much more restrictive. However, at trial, as discussed in Section XXIII below, federal courts typically bifurcate the *Monell* claim to avoid enlarging a one-incident case into several mini-trials about the officer’s prior citizen complaints.

#### XIV. SUPERVISORY LIABILITY

##### A. Federal Law

The elements of supervisory liability under Section 1983 in the Ninth Circuit have changed over the years. In 1976, the Supreme Court held a police chief was not liable for the constitutional violations of the city’s officers, even when the violations are not “rare, isolated instances” and had occurred in “unacceptably high numbers.”<sup>303</sup> A police chief’s mere “failure to act” in the face of constitutional violations was not a sufficient basis for imposing Section 1983 supervisory liability, which the Court held requires express or implied approval of such misconduct.<sup>304</sup>

In 1989, the Supreme Court adopted the “deliberate indifference” standard for Section 1983 municipal liability claims (*Monell* claims) based on inadequate training and expressly rejected the “gross negligence” standard for such claims.<sup>305</sup>

In 1999, the Ninth Circuit in *L.W. v. Grubbs* applied the “deliberate indifference” standard to all Section 1983 supervisory liability claims.<sup>306</sup> However, it is not clear why certain Ninth Circuit cases after *Grubbs* seem to characterize “reckless or callous indifference” as only one option among others to establish supervisory liability.<sup>307</sup>

In 2009, the Supreme Court in *Ashcroft v. Iqbal* held “the term ‘supervisory liability’ is a misnomer” in a Section 1983 case because there simply is no *respondeat superior* liability under

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<sup>301</sup> *Id.* at 407-08.

<sup>302</sup> *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

<sup>303</sup> *Rizzo v. Goode*, 423 U.S. 362, 375 (1976).

<sup>304</sup> *Id.* at 371.

<sup>305</sup> *City of Canton v. Harris*, 489 U.S. 378, 386-87 (1989).

<sup>306</sup> *L.W. v. Grubbs*, 92 F.3d 894, 900 (9<sup>th</sup> Cir. 1996).

<sup>307</sup> See *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9<sup>th</sup> Cir. 2000).

Section 1983 against a supervisor.<sup>308</sup> The Court held in *Ashcroft* that supervisors cannot be found liable based upon their “knowledge and acquiescence in their subordinates” unconstitutional conduct.<sup>309</sup> Rather, a supervisor can only be held liable for *their own* unconstitutional conduct.<sup>310</sup> Based on this holding, the dissent in *Ashcroft* noted that the Court “is eliminating *Bivens* [and § 1983] supervisory liability entirely.”<sup>311</sup> Thus, it appeared the Supreme Court eliminated a cause of action for supervisory liability under Section 1983 for nonfeasance or failure to act.

Despite this ruling in *Ashcroft*, in 2011, the Ninth Circuit held in *Starr v. Baca* the “deliberate indifference” standard for supervisory liability remains viable.<sup>312</sup> However, in *Starr*, the Ninth Circuit heightened the “deliberate indifference” standard previously articulated in *Grubbs*. In *Starr*, the Ninth Circuit held that, after *Ashcroft*, the plaintiff must show the supervisor had “knowledge of” a subordinate’s unconstitutional prior conduct as well as deliberate indifference to it, which deliberate indifference was the moving force of the subsequent violation.<sup>313</sup> The *Starr* case appears to hold “knowledge” is required, not a reason to know.<sup>314</sup> In fact, the required element of “deliberate indifference” appears incompatible with “reason to know” because without actual knowledge, the indifference cannot be *deliberate*. Therefore, supervisory liability under *Starr* as it interprets *Ashcroft* appears to require actual “knowledge” of prior constitutional violations.

With respect to the causation element for supervisory liability under Section 1983 (assuming such a claim still exists despite *Ashcroft*), it can only be established in “limited circumstances” where officers “so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers, who, nevertheless, are ‘deliberately indifferent’ to the need.”<sup>315</sup> Further, the “deliberate indifference” must be the “moving force” closely linked to the alleged constitutional violation.<sup>316</sup>

In summary, assuming supervisory liability claim under Section 1983 still exists after *Ashcroft*, it requires a plaintiff to establish:

1. The officer violated persons’ constitutional rights “often.”
2. The supervisor had actual “knowledge” of those violations.
3. The supervisor was “deliberately indifferent” to those actual violations such that the need for additional training or supervision was “plainly obvious.”

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<sup>308</sup> *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 1957-58.

<sup>312</sup> *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011).

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* at 1207.

<sup>315</sup> *Board of the County Commissioners of Bryan County, Oklahoma*, 520 U.S. at 407 citing *City of Canton*, 489 U.S. 378, 387, and 397.

<sup>316</sup> *Id.* at 407-08.

4. The supervisor's "deliberate indifference" was the "moving force" that is closely linked to the officer's unlawful conduct.

#### B. State Law

In *C.A. v. William S. Hart Union High School District*, the California Supreme Court held a school district can be held vicariously liable under Government Code section 815.2 for the negligence of its "supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student."<sup>317</sup> Previously, in *Munoz v. City of Union City*, the court of appeal held that in a police civil liability case, vicarious liability under Section 815.2 for negligent supervision of a police officer "clearly contemplates that the negligent employee whose conduct is sought to be attributed to the employer at least be specifically identified, if not joined as a defendant" in order that the trier of fact may "determine if the elements needed to assert vicarious liability have been proved."<sup>318</sup> The Supreme Court in *William S. Hart Union High School District* declined to approve or disapprove of this holding in *Munoz* at the trial phase. Instead, the Court stated: "Whatever the merits of the quoted remarks (from *Munoz*) as to a jury trial, they have no application at the pleading stage."<sup>319</sup> Accordingly, a supervisor's direct tort liability for negligent hiring, supervision, or retention of a police officer that causes damage to a person may be an actionable claim under state law at the pleading stage.

#### XV. NEGLIGENCE

Under Government Code section 820(a), public employees such as police officers may be held liable to the same extent as private persons under general tort principles, and when such liability arises, the entity is typically vicariously liable under Government Code section 815.2, unless an immunity applies.<sup>320</sup>

As stated in Section IX(F) above, to state a negligence claim, "a plaintiff must show that defendant had a duty to use due care" and "the question of whether a legal duty exists is analyzed under general principles of tort law" by the court alone.<sup>321</sup> A claim for negligent detention (instead of false imprisonment) or negligent arrest (instead of false arrest) is not actionable.<sup>322</sup> Rather, the reasonable suspicion and probable cause standards govern these claims. Presumably, the same can be said for negligent search (instead of invasion of privacy). Rather, the reasonable suspicion, probable cause, and applicable constitutional standards that govern search claims should apply. Further, with respect to searches, a tort claim for negligent investigation is barred by the investigative immunity under Government Code section 821.6 as discussed below in Section XIX(I).

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<sup>317</sup> *C.A. v. William S. Hart Union High Sch. Dist.*, 53 Cal.4th 861, 879 (2012).

<sup>318</sup> *Munoz*, 120 Cal.App.4th 1077, 1113 (2004).

<sup>319</sup> 53 Cal.4th at 872.

<sup>320</sup> *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715-16 (claim of officer negligence for placing citizen in position unreasonably exposed to moving traffic).

<sup>321</sup> *Adams v. City of Fremont*, 68 Cal.App.4th 243, 264 (1998).

<sup>322</sup> *Moore v. City and County of San Francisco*, 5 Cal.App.3d 728, 735 (1970).

As discussed above in Section IX(F), under *Hayes*, there is now a claim for negligent use of deadly force (instead of battery) in a case where the plaintiff alleges negligent tactics were used in connection with *deadly* force. As also discussed above, it is unclear if such a claim can be made in a claim involving non-deadly force and/or where there is probable cause to arrest.

The California Supreme Court allows a claim for negligent infliction of emotional distress by direct victims (not bystanders) in only three situations: (1) the negligent handling of corpses<sup>323</sup>, (2) the negligent misdiagnosis of a disease that could potentially harm another<sup>324</sup>, and (3) the negligent breach of duty arising out of a preexisting relationship.<sup>325</sup> Accordingly, a claim for negligent infliction of emotional distress in a typical police civil liability case does not state a claim.

Given the above case law, it appears a negligence claim will most commonly arise in a traffic situation where an officer directs a person to stand in an unsafe place or a common traffic accident involving an officer.<sup>326</sup> Otherwise, a negligence claim does not seem to be viable or add anything to the torts noted above, with the exception of a negligent tactics claim in a deadly force case.

## XVI. CALIFORNIA CONSTITUTION

### A. Article I, Section 13 (Unreasonable Search and Seizure)

Article I, section 13 of the California Constitution protects against “unreasonable searches and seizures.” Article I, section 13 has been part of the California Constitution since 1879 (prior to 1974 it was article I, section 19). In *Katzberg v. Regents of University of California*, the California Supreme Court stated no authority exists one way or the other as to whether there is a private right of action for damages for violations of Article 1, section 13 of the California Constitution.<sup>327</sup> California’s federal district courts for the Northern and Eastern Districts, on the one hand, and the Central District, on the other hand, are split on this issue.<sup>328</sup> In any event, violations of the California Constitution can be pled as a cause of action under Civil Code section 52.1, which is discussed in the next Section. However, as discussed below, the elements of a Section 52.1 action are unsettled.

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<sup>323</sup> *Christensen v. Superior Court*, 54 Cal.3d 868, 879 (1991).

<sup>324</sup> *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 923 (1980).

<sup>325</sup> *Burgess v. Superior Court*, 2 Cal.4<sup>th</sup> 1064, 1076 (1992).

<sup>326</sup> *Lugtu*, *supra*.

<sup>327</sup> *Katzberg v. Regents of University of California*, 29 Cal.4th 300, 324 (2002).

<sup>328</sup> *Cf. Wigfall v. City & Cnty. of San Francisco*, 2007 WL 174434 (N.D. Cal. 2007) (Article 1, § 13 does not provide a private cause of action) and *Hoch v. Tarkenton*, 2013 WL 1004847 (E.D. Cal. 2013) (Article 1, § 13 does not provide a private cause of action) with *Millender v. County of Los Angeles*, 2007 WL 7589200 (C.D. Cal. 2007) (Article I, § 13 does provide a private cause of action) *aff'd* 620 F.3d 1016 (9th Cir. 2010) *rev'd sub nom. Messerschmidt v. Millender*, 132 S.Ct. 1235 (2012) *rev'd in part*, 472 F. Appx 627 (9th Cir. 2012).

B. Article I, Section 7 (Due Process and Equal Protection)

There is no private right of action for money damages for a violation of the due process clause in Article I, section 7.<sup>329</sup> There is also no private right of action for money damages for a violation of the equal protection clause in Article I, section 7.<sup>330</sup>

C. Article I, Section 2 (Free Speech)

There is no private right of action for money damages for a violation of the free speech clause of Article I, section 2, even in the absence of a common law tort remedy.<sup>331</sup>

XVII. CIVIL CODE SECTION 52.1

The Tom Bane Civil Rights Act, Civil Code section 52.1(a), provides: “If a person ... interferes ... or attempts to interfere by *threats, intimidation, or coercion*, with the *exercise* ... by any individual ... of rights secured by the Constitution or laws of the United States, or the rights secured by the Constitution or laws of this state,” then under Section 52.1(b) the individual can bring “a civil action for damages.” (Emphasis added.)

In interpreting Section 52.1, federal courts “are bound by pronouncements of the California Supreme Court on applicable state law, but in the absence of such pronouncements ... follow decisions of the California Court of Appeal unless there is convincing evidence that the California Supreme Court would hold otherwise.”<sup>332</sup> Accordingly, the analysis of Section 52.1 must start with the state law cases.

The enactment of Section 52.1 was motivated by an increasing incidence of hate crimes in California.<sup>333</sup> Accordingly, the damages available for a violation of Section 52.1 are punitive in that they may include not only actual damages, but treble damages, a \$25,000 penalty, and attorney’s fees.<sup>334</sup>

In *Venegas v. County of Los Angeles*, the California Supreme Court held that unlike Civil Code section 51.7 (discussed in the next Section), Section 52.1 does not require an allegation of “discriminatory animus or intent based upon the plaintiff’s membership in a protected class of persons.”<sup>335</sup> Rather, Section 52.1 “provides remedies for ‘certain misconduct that interferes with’ federal or state laws, if accompanied by threats, intimidation, or coercion, and whether or not state action is involved.”<sup>336</sup> In *Venegas*, the County argued “that if section 52.1 indeed

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<sup>329</sup> *Katzberg v. Regents of Univ. of California*, 29 Cal. 4th 300, 329 (2002).

<sup>330</sup> *Gates v. Superior Court*, 32 Cal.App.4th 481, 522-24 (1995).

<sup>331</sup> *DeGrassi v. Cook*, 29 Cal.4<sup>th</sup> at 333, 335, 366 (2002).

<sup>332</sup> *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

<sup>333</sup> *Jones v. Kmart Corp.*, 17 Cal. 4<sup>th</sup> 329, 338 (1998).

<sup>334</sup> Civil Code §§ 52.1(b), 52.1(h), and 52(a).

<sup>335</sup> 32 Cal. 4<sup>th</sup> 820, 843 (2004).

<sup>336</sup> *Id.*

applied to all tort actions, the section would provide plaintiffs in such cases significant civil penalties and attorney fees as well as compensatory damages.”<sup>337</sup> The Court responded that “section 52.1 does not extend to all ordinary tort actions because its provisions are limited to threats, intimidation, or coercion that interferes with a constitutional or statutory right.”<sup>338</sup> The Court also stated that “we need not decide here whether section 52.1 affords protections to every tort claimant, for plaintiffs in this case have alleged unconstitutional search and seizure violations extending far beyond ordinary tort claims.” However, the *Venegas* Court then limited its holding as follows: “All we decide here is that, in pursuing relief for those constitutional violations under section 52.1, plaintiffs need not allege that defendants acted with discriminatory animus or intent, so long as those acts were accompanied by the requisite threats, intimidation, or coercion. The Court of Appeal was correct in holding that plaintiffs adequately stated a cause of action under section 52.1.”<sup>339</sup> Since *Venegas* was a case alleging unlawful and coercive search, one reading is that an unlawful, coercive search is sufficient to state a Section 52.1 claim. Another reading is the Court limited its holding solely to whether discriminatory intent is an element of Section 52.1.

In *Austin B. v. Escondido Union School District*, the court apparently read *Venegas* narrowly as only addressing the issue of discrimination, and therefore, cited the Judicial Council’s approved California Civil Jury Instruction (CACI) 3025 (now 3066) as correctly stating the elements of a Section 52.1 claim.<sup>340</sup> CACI 3066 requires the plaintiff prove an officer (1) intended to “prevent” the plaintiff from exercising a civil right, or to “retaliate” against the plaintiff for actually having exercised a civil right, and (2) did so by “threatening or committing violent acts.” CACI 3066 and CACI Jury Verdict Form VF-3035 both require the plaintiff to prove the officer threatened or committed a violent act “to prevent [him/her] from exercising [his/her] [constitutional] right or retaliate against [the plaintiff] for having exercised [his/her] [constitutional] right.”<sup>341</sup> This element of intent to “prevent a person from exercising” or to “retaliate against a person for having exercised” a civil right appears to be based on the phrase in Section 52.1 that prohibits interference “with the exercise” of rights secured by law. Again, in *Austin B.* the court stated CACI 3066 was correct.

The other element in CACI 3066 requiring “threatening or committing violent acts” is of unclear origin, but it is likely based on the statutory text read as a whole and its legislative history. With respect to the text, the phrase in Section 52.1(a) of “intimidation or coercion” must be read in conjunction with Section 52.1(j), which provides: “Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself *threatens violence* against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, *violence* will be committed against them or their property and that the person *threatening violence* had the apparent ability to carry out the threat.” (Emphasis added.)

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<sup>337</sup> *Id.*

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> 149 Cal.App.4<sup>th</sup> 860, 882 (2007).

<sup>341</sup> *Id.*

As to the legislative history, when Section 52.1 was amended in 1990 to allow plaintiffs to recover monetary damages (Stats. 1990, Ch. 392 (A.B.2683), § 1), the Legislature also considered, but rejected, a proposal to delete the language requiring interference “by threats, intimidation, or coercion.”<sup>342</sup> A bill analysis prepared by the Department of Justice commented:

As a general proposition, statutory or common law remedies are already available to redress interference with rights protected by state or federal constitutions or laws (e.g., tort). Civil Code § 52.1 focuses specifically on the *additional* element present especially in hate violence, viz., putting persons in fear of their safety. It is the element of threat, intimidation, or coercion that is being emphasized in Civil Code § 52.1. The proposed deletion would, in effect, make the civil rights remedy as an alternative cause of action in virtually every tort action: *Any* tort (and, perhaps, some contractual interferences) could be characterized as interference with “rights secured by the Constitution or laws of the United States or of rights secured by the Constitution of laws of this state. Does not the inclusion of the terms [threats, intimidation, or coercion] clearly define the types of interferences that the Act originally intended to curb (i.e. hate violence)?<sup>343</sup>

It appears the authors of jury instruction CACI 3066 may have utilized this legislative history to interpret the meaning of “threats, intimidation, or coercion” as requiring violence or a threat of violence as an element of a Section 52.1 claim.

The court in *Shoyoye v. County of Los Angeles*, side-stepped the issue of whether violence is an element of Section 52.1 and stated it “need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1,” citing *Cabesula v. Browning–Ferris Industries of California*,<sup>344</sup> but then held that “we conclude that the multiple references to violence or threats of violence in the statute serve to establish the unmistakable tenor of the conduct that section 52.1 is meant to address. The apparent purpose of the statute is not to provide relief for an over-detention brought about by human *error* rather than *intentional* conduct.”<sup>345</sup> Thus, the *Shoyoye* court, like *Austin B.*, interpreted “threats, intimidation, or coercion” to require “intentional” wrongful conduct.

The *Shoyoye* case concerned a person who was subject to a valid arrest, but not released in timely fashion due to a clerical error. The court held “where coercion is inherent in the constitutional violation alleged, i.e., an over-detention in County jail, the statutory requirement of ‘threats, intimidation, or coercion’ is not met. The statute requires a showing of coercion

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<sup>342</sup> *Shoyoye v. County of Los Angeles*, 203 Cal.App.4th 947, 959 (2012).

<sup>343</sup> *Id.* citing March 1, 1990 Department of Justice Bill Analysis at p. 2; see also Assembly Committee on Judiciary hearing March 7, 1990 at pp. 2–3.

<sup>344</sup> *Cabesuela v. Browning–Ferris Industries of California, Inc.* 68 Cal.App.4th 101, 111 (1998), superseded by statute as stated in *Francis v. State of Cal.*, WL 1792627 (N.D. Cal 2004).

<sup>345</sup> 203 Cal.App.4th at 959 (emphasis added)

independent from the coercion inherent in the wrongful detention itself.”<sup>346</sup> Thus, the facts of *Shoyoye* virtually necessitated a finding that no Section 52.1 “coercion” claim could be made.

Yet the *Shoyoye* court also observed (as the County had argued in *Venegas*) that if Section 52.1 did not require *intentional* misconduct, Section 52.1 would be a basis for a state civil rights action with a \$25,000 penalty, attorney’s fees, and treble damages for every allegation of unlawful police conduct, no matter how minor the incident.<sup>347 348</sup> The court notes that in the legislative history, it “is the element of threat, intimidation, or coercion that is being emphasized in Civil Code § 52.1.”<sup>349</sup> “The legislative history thus supports our conclusion that the statute was intended to address only egregious interferences with constitutional rights, not just any tort. The act of interference with a constitutional right must itself be deliberate or spiteful.”<sup>350</sup>

The *Shoyoye* court’s evaluation of the facts in *Venegas* harmonizes the two decisions, which is important because, as stated above, the federal courts must follow *Shoyoye* unless there is “convincing evidence” the California Supreme Court would rule otherwise.<sup>351</sup> The *Shoyoye* court observed that in *Venegas*, although it was an unlawful search case, the officers were found to have conducted a “*knowing and blameworthy interference* with the plaintiffs’ constitutional rights.”<sup>352</sup> Thus, although *Venegas* did not involve violence or a threat of violence, there was an allegation of an *intentional* violation of the Fourth Amendment.

In *Bender v. County of Los Angeles*, the plaintiff alleged both an unlawful arrest and an alleged “deliberate spiteful use of excessive force” (beating and pepper spraying of an unresisting plaintiff).<sup>353</sup> With respect to Section 52.1, the court stated, “(c)oercion is, of course, inherent in any arrest, lawful or not. But we *need not weigh in on the question* whether the Bane Act requires ‘threats, intimidation or coercion’ *beyond* the coercion inherent in every arrest, or whether, when an arrest is otherwise lawful, a Bane Act claim based on excessive force also requires violation of some right other than the plaintiff’s Fourth Amendment rights. Where, as here, an arrest is unlawful *and* excessive force is applied in making the arrest, there has been coercion ‘independent from the coercion inherent in the wrongful detention [citation omitted]—a violation of the Bane Act.”<sup>354</sup> Thus, in a case alleging *both* an unlawful arrest and intentional use of excessive force, *Bender* held the elements of Section 52.1 were met, but left

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<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> One unpublished federal district court case disagrees with this reading holding the penalty provisions are not available under Section 52.1(b). *Cuviello v. City of Oakland*, WL 3063199 (N.D. Cal. 2010) aff’d on other grounds, 434 F. App’x 615 (9th Cir. 2011).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 889 (9th Cir. 2010).

<sup>352</sup> *Shoyoye*, 203 Cal.App.4<sup>th</sup> at 961 (emphasis added).

<sup>353</sup> 217 Cal. App.4<sup>th</sup> 968, 979 (2013).

<sup>354</sup> *Id.* at 978 n. 2 (emphasis added).

open the question as to whether a claim of only unlawful arrest or only inadvertent excessive force states a Section 52.1 claim.

In summary, *Shoyoye* expressly requires an *intentional* violation of person's rights to state a claim under Section 52.1. Under *Shoyoye*, Section 52.1 strongly appears to require the intent to violate the law, not just the intent to take an action. In other words, a violation of the Fourth Amendment is not enough for a violation of Section 52.1 under *Shoyoye*. Rather, the intent must be "deliberate or spiteful" to be actionable.<sup>355</sup> Since *Venegas*, *Austin B.*, and *Bender* are not inconsistent with this holding in *Shoyoye*, the federal courts are bound to follow *Shoyoye* unless there is convincing evidence the California Supreme Court would rule otherwise, which there is not at this point in time.

Prior to *Shoyoye*, the federal district court published cases yielded opposite results on the elements of Section 52.1. *Shoyoye* evaluated two published federal district court decisions that preceded it. In *Cole v. Doe*, the Northern District federal court held an unlawful detention with use of handcuffs stated a claim under Section 52.1.<sup>356</sup> The *Shoyoye* court disagreed and noted that the court in *Cole* incorrectly based its conclusion on a finding that violence was not necessary under Section 52.1, rather than evaluating whether the element of *intentional* violation of a constitutional right was required.<sup>357</sup> Conversely, in *Gant v. County of Los Angeles*, the Central District federal court held "a wrongful arrest and detention, without more, cannot constitute 'force, intimidation, or coercion' for purposes of section 52.1."<sup>358</sup> This is because "[S]ection 52.1 requires a showing of coercion *independent from* the coercion inherent in a wrongful detention itself."<sup>359</sup> The court in *Shoyoye*, expressly agreed with *Gant* that there must be an independent showing of coercion beyond the unlawful act itself.<sup>360</sup> Similarly, in *Rodriguez v. City of Fresno*, the Eastern District federal court held a Section 52.1 claim will not arise, unless the coercion results in interference with a separate constitutional or statutory right.<sup>361</sup>

Several unpublished federal district court cases address, often briefly, whether a Section 52.1 claim has been stated, but add little to the above analysis of whether Section 52.1 requires intentional misconduct or deliberate intent to violate the law.<sup>362</sup> This issue will likely be further developed in case law in the near future.

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<sup>355</sup> *Shoyoye*, 203 Cal.App.4th at 959.

<sup>356</sup> *Cole v. Doe*, 387 F.Supp.2d 1084 (N.D. Cal. 2005).

<sup>357</sup> The *Shoyoye* court did not evaluate *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1168 (N.D. Cal. 2009), which, like *Cole*, held an allegation of excessive force states a Section 52.1 claim.

<sup>358</sup> *Gant v. County of Los Angeles*, 765 F.Supp.2d 1238, 1253-54 (C.D. Cal. 2011)

<sup>359</sup> *Id.* at 1258 (emphasis added).

<sup>360</sup> 203 Cal.App.4<sup>th</sup> at 960.

<sup>361</sup> *Rodriguez v. City of Fresno*, 819 F. Supp. 2d 937, 954 (E.D. Cal. 2011).

<sup>362</sup> The Northern District cases include: *Justin v. City & County of San Francisco*, WL 1990819 (N.D. Cal. 2008) (plaintiff cannot pursue Section 52.1 claim solely on the basis of use of force); *Luong v. City & County of San Francisco*, WL 5869561 (N.D. Cal. 2012); *Hunter v. City & County of San Francisco*, WL 4831634 (N.D. Cal. 2012); *Dorger v. City of Napa*, WL 5804544 (N.D. Cal. 2013); *Bass v. City of Fremont*,

## XVIII. CIVIL CODE SECTION 51.7

California Civil Code section 51.7 provides that all persons “have the right to be free from any violence, or intimidation by threat of violence, committed against their person or property *because* of their race, color, religion [etc.]”<sup>363</sup> Accordingly, Section 51.7 requires a plaintiff to establish a person is *motivated* by discrimination, e.g. racial discrimination.<sup>364</sup> A plaintiff’s subjective belief that an alleged violation was racially motivated is insufficient.<sup>365</sup> State law tort immunities, which are discussed in the next section, are applicable to even a claim of racial discrimination under Civil Code section 51.7.<sup>366</sup>

## XIX. STATE TORT IMMUNITIES

### A. When The Officer Is Immune, The City Is Usually Also Immune

When an employee has a specific immunity from liability under the Government Claims Act, or has a common law defense, the employer entity is also not liable, except as provided by statute.<sup>367</sup> An exception to the general rule that employee immunity results in public entity immunity is a claim for negligent emergency driving with the lights and siren on. In that case, the employee driver is entitled to statutory immunity, but the entity still has *respondeat superior* liability.<sup>368</sup>

### B. The Overall Intent Of The Statutory Immunities Is To Provide Broad Protection For Police Work

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WL 891090 (N.D. Cal. 2013); *M.H. v. County of Alameda*, WL 1701591 (N.D. Cal. 2013); *Holland v. City of San Francisco*, WL 968295 (N.D. Cal. 2013); *Skeels v. Pilegaard*, WL 970974 (N.D. Cal. 2013); *Mateos–Sandoval v. County of Sonoma*, WL 3878181 (N.D. Cal. 2013); and *Brown v. City & County of San Francisco*, WL 1364931 (N.D. Cal. 2014).

The Central District cases include *Ervin v. City of Los Angeles*, WL 4758224 (C.D. Cal. 2012) and *Hernandez v. City of Beaumont*, WL 6633076 (C.D. Cal. 2013).

The Eastern District cases include *Dillman v. Tuolumne County*, WL 1907379 (E.D. Cal. 2013); *Rodriguez v. City of Modesto*, WL 6415620 (E.D. Cal. 2013); and *Estate of Crawley v. Kings County*, WL 2174848 (E.D. Cal. 2014).

A Southern District case is *Sialoi v. City of San Diego*, WL 6410987 (S.D. Cal. 2013).

<sup>363</sup> *Austin B. v. Escondido Union School District*, 149 Cal.App.4<sup>th</sup> 860, 881 (2007).

<sup>364</sup> *Id.* at 882.

<sup>365</sup> *Gomez v. City of Fremont*, 730 F.Supp.2d 1056, 1069 (N.D. Cal. 2010); *McKenzie v. Milpitas*, 783 F.Supp.1293, 1301-02 (N.D. Cal. 1990) (excessive force case).

<sup>366</sup> *Gates v. Superior Court*, 32 Cal.App.4th 481, 513 (1995).

<sup>367</sup> Gov. Code §§ 815(b) and 815.2.

<sup>368</sup> *Brummett v. County of Sacramento*, 21 Cal.3d 880, 885 (1978).

In *Antique Arts Corp. v. Torrance*, the court stated the immunities under the Government Claims Act, read as a whole, “shows legislative intent to immunize the police function from tort liability from the inception of its exercise to the point of arrest.”<sup>369</sup> The court explained that the Act:

... sets forth a number of specific immunities for public entities in providing police protection. ... In particular, section 845 provides for immunity if no police protection is provided, or if that protection is provided, or if that protection is not sufficient. Section 846 further provides that neither the public entity nor the public employee is liable for injuries caused by a failure to make an arrest or to retain an arrested person in custody.

In addition, section 818.2 provides that the public entity is not liable for injuries caused by failing to enforce any law, and section 821 provides that a public employee is not liable for injuries caused by failing to enforce any law. The statutory scheme employed makes it clear that failure to provide adequate police protection will not result in governmental liability (citation omitted), nor will a public entity be liable for failure to arrest a person who is violating the law. (citations omitted).<sup>370</sup>

In addition, in *Amylou R. v. County of Riverside*, the court held that the investigative immunity under Government Code section 821.6 applies to all pre-arrest police investigative decisions (except use of unreasonable force).<sup>371</sup> The holding in *Amylou R.* supports the conclusion in *Antique Arts Corp.* that immunity applies to all police functions “from the inception of its exercise to the point of arrest.”

#### C. Absolute Immunity For Failure To Deploy Police Services

A city has “absolute immunity” under Government Code Section 845 with respect to all decisions relating to the deployment of police services, even when the decision not to respond to a crime in progress is malicious and motivated by racial discrimination.<sup>372</sup> However, such a discrimination claim with respect to providing police services is cognizable under Section 1983 under the Equal Protection Clause.<sup>373</sup>

#### D. Arrest Immunity Is Limited, But May Be Similar To Qualified Immunity

Government Code section 820.4 provides: “A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.” In

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<sup>369</sup> 39 Cal.App.3d 588, 593 (1974); quoted with approval in *Hartzler v. City of San Jose*, 46 Cal.App.3d 6, 7 (1975).

<sup>370</sup> 39 Cal.App.3d at 593.

<sup>371</sup> 28 Cal.App.4th 1205 (1994).

<sup>372</sup> *Gates*, 32 Cal.App.4th at 507-08.

<sup>373</sup> *John v. City of El Monte*, 515 F.3d 936, 941 (9th Cir. 2008).

*Asgari v. City of Los Angeles*, the court held Section 820.4 provides that there is no immunity for false arrest.<sup>374</sup> However, the Court in *Asgari* did not consider Penal Code section 847(b).

Penal Code section 847(b) states: “There shall be no civil liability on the part of, and no cause of action shall arise against, any peace officer ... for false arrest ... under any of the following circumstances: (1) The arrest was lawful, or the peace officer, at the time of the arrest, had reasonable cause to believe the arrest was lawful.” While there do not appear to be any state cases confirming that Section 847(b) provides immunity for a lawful arrest *as well as* an arrest reasonably believed to be lawful, the federal cases recognize this distinction.<sup>375</sup> Since the rules of statutory construction disfavor a finding of surplusage<sup>376</sup>, the phrase “or ... had reasonable cause to believe was lawful” should be given its plain meaning; namely, an officer has no civil liability for an arrest that the officer reasonably believes was lawful, even if the arrest was unlawful. This defense can arise when (a) the enforceable scope of a statute is ambiguous, or (b) the facts give rise to arguable probable cause. Both of these situations also trigger the qualified immunity defense to a federal claim of unlawful arrest discussed below.

#### E. Immunity For Failure To Make An Arrest

In *Zelig v. County of Los Angeles*, the Supreme Court held the immunity under Government Code section 846 for failing to “make an arrest” applies even if a special relationship arises.<sup>377</sup> Thus, a special relationship is not the end of the inquiry. Rather, the application of specific immunities must be separately applied and decided. This is consistent with a long line of other cases because the “question of ‘duty’ (to which the special relationship concept pertains) is only a threshold issue, beyond which remain the immunity barriers.”<sup>378</sup>

#### F. Investigative Immunity Is Very Broad

Government Code section 821.6 provides immunity against a claim of negligent investigation. Section 821.6 states:

A public employee is not liable for an injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

The broad immunity of Section 821.6 applies at all stages of a criminal proceeding (except arrest and use of force), starting with an investigation. For instance, in *Amylou R. v. County of*

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<sup>374</sup> 15 Cal.4th 744, 752 (1997).

<sup>375</sup> *Blankenhorn v. City of Orange*, 485 F.3d 463, 486 (9th Cir. 2007); *Henry v. Bank of Am. Corp.*, 522 F. Appx 406, 408 (9th Cir. 2013); *Knapps v. City of Oakland*, 647 F.Supp.2d 1129, 1165 (N.D. Cal. 2009) (“officers are not liable for false imprisonment arising out of any arrest where the arrest was lawful or the officer had reasonable cause to believe it was lawful”).

<sup>376</sup> *Metcalf v. County of San Joaquin*, 42 Cal.4th 1121, 1135 (2008).

<sup>377</sup> 27 Cal.4th 1112, 1145-46 (2002).

<sup>378</sup> *Williams, supra*, 34 Cal.3d at 23 citing *Whitcombe v. County of Yolo*, 73 Cal.App.3d 698, 704, 706 (1977).

*Riverside*, the plaintiff was a rape victim who developed an “antagonistic relationship” with the investigating officers during the course of the investigation when officers suspected that she “knew more than she was telling them.”<sup>379</sup> The court held that Section 821.6 barred Amylou’s claims for slander and other state law claims based on the officers’ conduct of the investigation:

Section 821.6 is not limited to the act of filing a criminal complaint. Instead, it also extends to actions taken in preparation for formal proceedings. Because investigation is an “essential step” toward institution of formal proceedings, it “is also cloaked with immunity.”<sup>380</sup>

Under Government Code section 821.6, officers have immunity for all aspects of a criminal investigation prior to arrest, “even for a malicious abuse of their power.”<sup>381</sup> The Legislature enacted Section 821.6 in order to “free[ ] investigative officers from the fear of retaliation for errors they commit in the line of duty.”<sup>382</sup> The immunity under Section 821.6 applies whether the police allegedly “acted negligently, maliciously or without probable cause in carrying out their duties.”<sup>383</sup> In enacting such a broad immunity for police actions, the Legislature balanced the need for impartial and vigorous law enforcement against the need for accountability as follows:

The criminal law does not enforce itself; instead, our system of law enforcement depends “upon the investigation of crime and the accusation of offenders by properly trained officers.” [citations omitted] The impartiality of that system requires that, when exercising their responsibility, the officers are “free to act in the exercise of honest judgment uninfluenced by fear of consequences personal to themselves.” [citations omitted] To eliminate that fear of litigation and to prevent the officers from being harassed in the performance of their duties, law enforcement officers are granted immunity from civil liability, even for the malicious abuse of their power. [citations omitted] “[I]n the end [it is] better to leave unredressed the wrongs done by dishonest officers than to submit those who try to do their duty to the constant dread of retaliation.”<sup>384</sup>

Courts construe Section 821.6 immunity broadly, giving it an “expansive interpretation” in the service of its purpose.<sup>385</sup> Accordingly, it extends beyond the actual target of the proceedings

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<sup>379</sup> *Amylou R. v. County of Riverside*, 28 Cal.App.4th 1205, 1208 (1994).

<sup>380</sup> *Id.* at 1210 citing *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1436-1437; see also *Johnson v. City of Pacifica*, 4 Cal. App.3d 82, 87 (1970) (Section 821.6 bars plaintiff’s claim that he was wrongfully charged and arrested for forgery due to a police officer’s negligent investigation).

<sup>381</sup> *Amylou R.* 28 Cal.App.4th at 1213.

<sup>382</sup> *Baughman v. State of California*, 38 Cal.App.4th 182, 193 (1995); accord *Amylou R.*, 28 Cal.App.4th at 1212-13.

<sup>383</sup> *Baughman*, 38 Cal.App.4th at 192; see also *Asgari v. City of Los Angeles*, 15 Cal.4th 744, 756-57 (1997).

<sup>384</sup> *Amylou R.*, 28 Cal.App. 4th at 1213.

<sup>385</sup> *Miller v. Filter*, 150 Cal.App.4th 652, 666-67 (2007).

to the claims of persons who are injured as a result of the institution of a judicial proceeding.<sup>386</sup> In determining whether Section 821.6 bars a particular cause of action, the courts look to the conduct from which it arises and consider its relationship to the initiation of criminal proceedings.<sup>387</sup> If the acts and omissions alleged are part of this process, they fall under the protection of Section 821.6.<sup>388</sup>

#### G. Immunity For Malicious Prosecution

As stated above, Government Code section 821.6 expressly provides immunity for an officer “instituting ... any judicial or administrative proceeding ... even if he acts maliciously and without probable cause.” This immunity is an absolute bar to a claim for malicious prosecution (as opposed to false arrest) against an officer.<sup>389</sup> Malicious prosecution, however, is actionable under federal law in limited circumstances as a Section 1983 claim.<sup>390</sup>

#### H. Immunity For Section 5150 Decisions

Welfare and Institutions Code “§ 5278 immunizes the police officers from the *decision to detain* ... under § 5150.”<sup>391</sup>

#### I. Immunities That Typically Do Not Apply

The statutory immunity for an employee’s misrepresentations in Government Code sections 818.8 and 822.2 are limited to commercial matters, and therefore, are not applicable in a police civil liability case.<sup>392</sup> Further, although there are a few older cases to the contrary, the discretionary immunity under Government Code section 820.2 applies only to policy-level decisions and not to an officer’s decision made in the field.<sup>393</sup>

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<sup>386</sup> *Amylou R.*, 28 Cal.App.4th at 1211-14.

<sup>387</sup> *Cappuccio Inc. v. Harmon*, 208 Cal.App.3d 1496, 1498 (1989).

<sup>388</sup> *Id.* at 1499.

<sup>389</sup> *Baughman*, 38 Cal.App.4th at 193.

<sup>390</sup> *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066-69 (9<sup>th</sup> Cir. 2004) (elements of a malicious prosecution claim under Section 1983 against a police officer are (a) an arrest, (b) lack of probable cause for the arrest, (c) malice, (d) intent to deny the arrestee equal protection or another specific constitutional right, (e) knowingly and improperly influencing the prosecutor to file criminal charges such as by knowingly providing the DA with false information, and (f) termination of the criminal case in a manner that indicates factual innocence.

<sup>391</sup> *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1234 (9<sup>th</sup> Cir. 2014).

<sup>392</sup> *Garcia v. Superior Court*, 50 Cal.3d 728, 738 n. 8 (1990).

<sup>393</sup> *Gillan v. City of San Marino*, 147 Cal.App.4th 1033, 1051 (2007); *Liberal v. Estrada*, 632 F.3d 1064, 1084 (9<sup>th</sup> Cir. 2011).

## XX. FEDERAL QUALIFIED IMMUNITY

### A. General Test For Qualified Immunity; Early Use In Some Cases; Interlocutory Appeal

The federal rule of qualified immunity “provides ample protection to all but the plainly incompetent or those who knowingly violate the law”; defendants can have a reasonable, but mistaken, belief about the *facts* or about what the *law* requires in any given situation.<sup>394</sup>

Further, under the qualified immunity doctrine, the constitutional right the officer allegedly violated must have been “clearly established” in a “particularized ... sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>395</sup> “Clearly established” means the “existing precedent must have placed the statutory or constitutional question *beyond debate*.”<sup>396</sup>

The Supreme Court has held that because qualified immunity is “an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial.”<sup>397</sup> “Indeed, we have made clear that the ‘driving force’ behind creation of the qualified immunity doctrine was a desire to ensure that ‘insubstantial claims’ against government officials [will] be resolved *prior to discovery*.”<sup>398</sup> “Accordingly, ‘we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.’”<sup>399</sup> Despite these exhortations by the Supreme Court, qualified immunity is usually decided at the summary judgment stage of the litigation in order to allow the plaintiff to conduct a factual discovery on disputed claims. However, if the face of the complaint suggests the officer’s conduct is arguably lawful, a Rule 12(b)(6) motion to dismiss based on qualified immunity at the outset of the case is appropriate.

Unlike most orders, the denial of a dispositive motion under qualified immunity is immediately appealable, if the order is based on a question of law such as whether the law was clearly established or whether the undisputed facts entitle the officer to qualified immunity.<sup>400</sup>

### B. Qualified Immunity For Arrests

With respect to an arrest, qualified immunity applies “if a reasonable officer *could have* believed that probable cause existed to arrest.”<sup>401</sup> Police officers who “reasonably but

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<sup>394</sup> *Saucier v. Katz*, 533 U.S. 194, 202, 206 (2001) quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (emphasis added).

<sup>395</sup> *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“the unlawfulness must be apparent”).

<sup>396</sup> *Ashcroft v. al-Kidd*, - U.S. -, 131 S.Ct. 2074, 2083, 179 L.Ed.2d 1149, 1159 (2011) (emphasis added).

<sup>397</sup> *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

<sup>398</sup> *Id.* citing *Anderson*, 483 U.S. at 640, n. 2 (emphasis added).

<sup>399</sup> *Id.* quoting *Hunter*, 502 U.S. at 227.

<sup>400</sup> *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2019 (2014); *Liberal v. Estrada*, 632 F.3d 1064, 1074 (9th Cir. 2011).

<sup>401</sup> *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added).

mistakenly conclude that probable cause is present” are entitled to immunity.<sup>402</sup> Whether the undisputed facts *could* support a reasonable belief that probable cause existed is a *question of law* to be determined by the court.<sup>403</sup> Thus, where sufficient material facts are undisputed, the court must adjudicate the issue of qualified immunity as to probable cause to arrest.<sup>404</sup>

### C. Qualified Immunity For Use Of Force

Qualified immunity applies to a claim of excessive force, unless the amount of force used was “clearly unlawful.”<sup>405</sup> The Supreme Court stated in 2011: “We have repeatedly told courts - and the Ninth Circuit in particular (citations omitted) - not to define clearly established law at a high level of generality.”<sup>406</sup> Rather, the case law establishing a violation must be fairly specific as to the factual scenario at hand, unless the violation is patently “obvious.”<sup>407</sup> The “bar for finding such obviousness is quite high.”<sup>408</sup>

## XXI. POLICE PERSONNEL FILES

Police civil liability lawsuits frequently involve discovery disputes over the disclosure of prior internal affairs investigations of complaints against the officer. The state and federal law governing this discovery are vastly different and, as stated at the outset of this paper, can be a factor in deciding whether to remove a case to federal court.

### A. State Law

State law restricts a plaintiff’s access to police officer personnel files. Penal Code section 832.8 defines “personnel records” to include the records of investigations of complaints against a police officer. Penal Code section 832.7(a) states: “Peace officer personnel records and records maintained by any state or local agency pursuant to Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal *or civil* proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code ... .”

Evidence Code section 1043 requires a party seeking disclosure of complaints against an officer to file a motion showing good cause and the materiality of the records to the pending litigation. This is called a *Pitchess* motion, which is common in criminal cases, but also applies in civil cases. Case law provides, “records relating to allegations of police misconduct will be disclosed

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<sup>402</sup> *Id.*

<sup>403</sup> *Hunter, supra; Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Mitchell*, 472 U.S. at 511, 526 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982); *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (“question of whether a reasonable officer *could have* believed probable cause ... existed to justify ... an arrest is ‘an essentially *legal question*’”) quoting *Mitchell, supra* (emphasis added).

<sup>404</sup> *Act/Up!, supra.*

<sup>405</sup> *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

<sup>406</sup> *Ashcroft v. al-Kidd*, - U.S. -, 131 S.Ct. 2074, 2084, 179 L.Ed. 2d 1149 (2011).

<sup>407</sup> *Mattos v. Agarano*, 661 F.3d 433, 442 (9th Cir. 2011).

<sup>408</sup> *Id.*

only upon a showing of manifest necessity.”<sup>409</sup> The element of “materiality” means the motion is “limited to instances of officer misconduct related to the misconduct asserted” in the lawsuit, which usually means similar alleged misconduct by the officer.<sup>410</sup>

The files are not typically disclosed at the first request. Rather, the requesting party is generally limited to discovery of “the names, addresses and telephone numbers of the prior complainants/witnesses,” unless the requesting party “shows he or she has been unsuccessful in obtaining the relevant information” from said persons.<sup>411</sup> However, if there is an internal affairs bureau investigation of the incident underlying the lawsuit itself, the court may require the statements provided in that particular investigation be disclosed.<sup>412</sup> Further, the discovery request must pertain to a limited time period because Evidence Code section 1045 prohibits the disclosure of any “complaints concerning conduct occurring more than five years before the event or transaction that is the subject of the litigation ... .” Finally, Section 1045 mandates a protective order governing the use of any disclosed information to protect the officer’s privacy.

## B. Federal Law

Discovery in a Section 1983 case against a police officer in federal court is governed by the Federal Rules of Civil Procedure and federal case law. The state law restrictions on discovery of police officer personnel files are given “some weight,” but are “balanced against the great weight afforded to federal law in civil rights cases against police departments.”<sup>413</sup> Due to this “great weight” afforded federal civil rights claims, discovery of relevant internal affairs investigations in a police officer’s personnel file is usually permitted in federal civil rights cases in the Northern District, especially where a *Monell* claim asserts the officer acted as part of a continuing pattern of misconduct.<sup>414</sup> In fact, the district courts have adopted a balancing test that is “moderately pre-weighted” in favor of disclosure of the investigations of relevant third party complaints against the officer.<sup>415</sup> Further, defense counsel bears the burden of proving that disclosure is not required.<sup>416</sup>

Federal courts commonly hold an officer’s privacy interests may be sufficiently protected with the use of a “tightly drawn” protective order, specifying that only the plaintiff, counsel, and experts may have access to the material.<sup>417</sup> “In order to overcome the moderately weighted presumption in favor of disclosure the party claiming the official information privilege must, at

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<sup>409</sup> *City of Hemet v. Superior Court*, 37 Cal.App.4th 1411, 1424-25 (1995).

<sup>410</sup> *Warrick v. Superior Court*, 35 Cal.4th 1011, 1019, 1021 (2005).

<sup>411</sup> *Haggerty v. Superior Court*, 117 Cal.App.4th 1079, 1090-91 (2004) cited by *Warrick, supra*.

<sup>412</sup> *Haggarty, supra*.

<sup>413</sup> *Soto v. City of Concord*, 162 F.R.D. 603, 616 (N.D. Cal. 1995).

<sup>414</sup> *Id.* at 617.

<sup>415</sup> *Kelly v. City of San Jose*, 114 F.R.D. 653, 661 (N.D. Cal. 1987).

<sup>416</sup> *Soto*, 162 F.R.D. at 609.

<sup>417</sup> *Kelly*, 114 F.R.D. at 662, 666, 671; *see also Smith v. Casey*, 2008 WL 2570855 (D. Nev. 2008)

(disclosure can generally be made under a well-crafted protective order that restricts the disclosure of such information to the parties and/or their counsel).

least, specifically describe how disclosure under a carefully tailored protective order would substantially harm a significant governmental interest and state how much harm would be done to those threatened interests by disclosure in this particular case.”<sup>418</sup> While the discovery of relevant past complaints against an officer is common in the Northern District federal court, such information is seldom admissible at trial, as will be discussed next.

## XXII. MOTIONS IN LIMINE AND BIFURCATION MOTIONS

### A. Motions *In Limine* To Exclude Past Complaints Against The Officer

There are several arguments defense counsel can assert in a motion *in limine* to exclude prior complaints against an officer from evidence at trial. Preliminarily, as to the city defendant, the investigation of a past complaint against an officer should be excluded from evidence against a city under Federal Rule of Evidence 407 because it is a “subsequent remedial measure” the city used to review officer conduct.<sup>419</sup>

As to the officer, under Federal Rule of Evidence 403, the probative value of a prior complaint is typically outweighed by the prejudicial effect against the officer, which effect is “arguably great.”<sup>420</sup> A past complaint is usually unfairly prejudicial to the officer because the jury might infer the officer “was guilty of wrongdoing merely because the Police Department conducted disciplinary proceedings. The jury might have given unfair or undue weight to this evidence or they might have been confused as to the relevance of this evidence.”<sup>421</sup> A prior complaint “tends to suggest a decision on an improper basis” or is likely to “inflame the passions” of a jury against an officer.<sup>422</sup> Similarly, a prior complaint should be excluded under Rule 403 if it “may confuse the issues” or “mislead the jury”.<sup>423</sup> A prior complaint is usually “confusing” or “misleading” because its presentation would lead to litigation of collateral issues, “thereby creating a side issue that would distract the jury from the main issues.”<sup>424</sup>

A common reason a plaintiff will attempt to introduce a prior complaint is to attempt to show a prior “bad act.” This is improper under Federal Rule of Evidence 404(b) because alleged prior “bad acts” are excluded as improper character evidence. Additionally, defense counsel can argue prior complaints are not even relevant evidence under Rule 402 because a few complaints over the course of a career do not make it more or less likely that improper conduct occurred in the case at hand. Finally, as to a prior complaint *written* by a citizen, it is

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<sup>418</sup> *Kelly, supra*, 114 F.R.D. at 672.

<sup>419</sup> *Maddox v. City of Los Angeles*, 792 F.2d 1408, 1417 (9<sup>th</sup> Cir. 1986) (administrative police investigation of an officer excluded as a “subsequent remedial measure”).

<sup>420</sup> *Id.*

<sup>421</sup> *Id.*

<sup>422</sup> *United States v. Layton*, 767 F.2d 549, 556 (9<sup>th</sup> Cir. 1985); *United States v. Winkle*, 477 F.3d 407, 417 (6<sup>th</sup> Cir. 2007).

<sup>423</sup> *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1016 (9<sup>th</sup> Cir. 2008).

<sup>424</sup> *Duran v. City of Maywood*, 221 F.3d 1127, 1133 (9<sup>th</sup> Cir. 2000).

inadmissible hearsay because it is an out of court statement offered for the truth of the matter alleged therein, and therefore, not admissible under Federal Rule of Evidence 801.

#### B. Bifurcation Of The *Monell* Claim Against The Public Entity

Under Federal Rule of Civil Procedure 42(b), a court may bifurcate a Section 1983 *Monell* claim against a city and a police chief (acting as policy maker or supervisor) from the Section 1983 claims against a police officer.<sup>425</sup> This is commonly done in the federal courts in the Northern District because a *Monell* claim cannot be stated against a city or a chief unless the plaintiff first establishes a Section 1983 claim against the officer.<sup>426</sup> Since a jury's finding in favor of the officer on the plaintiff's Section 1983 claim is dispositive as to plaintiff's *Monell* claim, bifurcating a *Monell* claim on a pattern or practice streamlines the trial and avoids "potential prejudice and confusion."<sup>427</sup>

Bifurcation of a *Monell* claim serves two important functions for defense counsel. First, it virtually ensures no prior citizen complaints against the officer will be allowed into evidence because such complaints are primarily relevant only for a *Monell* pattern and practice claim against the city or chief, rather than for the claims against the officer.

Second, if there are no state law claims left at trial, bifurcation of the *Monell* claim effectively eliminates the public entity employer from the lawsuit. This is because, as explained in Section XIII above, unlike state law, there is no *respondeat superior* liability against a city in Section 1983 claims. Even if a state tort claim proceeds to trial (for which there is *respondeat superior* liability against a public entity), eliminating the public entity from the jury instructions and the verdict form on the federal claims means that liability can only be established on the Section 1983 claim if the jury finds the police officer personally liable. Some jurors will be more reluctant to find against an officer if they believe the officer will be personally responsible for the damages. Although the officer will be indemnified as to compensatory damages under Government Code section 825, the jury is not allowed to know this.<sup>428</sup> In fact, the best practice is to make a motion *in limine* expressly prohibiting any mention of indemnification of the officer as doing so is reversible error.<sup>429</sup> Thus, bifurcation of a *Monell* pattern and practice claim is an important trial strategy for defense counsel if the *Monell* claim was not previously dismissed pursuant to a summary judgment motion.

#### C. Motions *In Limine* To Allow Evidence Of Plaintiff's Prior Arrests

Defense counsel in a federal court case should consider filing a motion *in limine* to allow evidence of the plaintiff's prior arrests so as to resolve this issue prior to the start of the trial.

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<sup>425</sup> *Quintanilla v. City of Downey*, 84 F.3d 353, 356 (9th Cir. 1996).

<sup>426</sup> *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986).

<sup>427</sup> *Quintanilla*, *supra*.

<sup>428</sup> *Larez v. Holcomb*, 16 F.3d 1513, 1519-20 (9<sup>th</sup> Cir. 1994).

<sup>429</sup> *Id.*

Doing so is recommended to avoid a sustained objection during cross-examination of the plaintiff regarding prior arrests, a ruling the judge may not want to reconsider mid-trial. Rather, since the law in federal court is favorable to the defense on this issue, briefing the issue in advance of the trial is a good practice.

In the Ninth Circuit, the plaintiff's arrest history is relevant on the issue of whether the plaintiff is biased against the police as a credibility issue, e.g. to show the plaintiff reacted with inappropriate hostility during the interaction.<sup>430</sup> However, some judges will require the prior arrest to have been made by the same police agency or even the same officers. Alternatively, a plaintiff's criminal history is admissible to show his or her claim for emotional distress damages is less than the plaintiff claims, e.g. because the plaintiff has been arrested many times.<sup>431</sup>

### XXIII. OFFERS OF JUDGMENT – EFFECT ON ATTORNEY'S FEES

A prevailing plaintiff on a Section 1983 claim in a police civil liability case is entitled to an attorney's fees award.<sup>432</sup> Because police civil liability cases often involve complex motions and a trial, a potential attorney's fees award creates considerable exposure for the public entity employer, even in a relatively small case. However, defense counsel can recommend an offer of judgment under Federal Rule of Civil Procedure 68 to potentially preclude or reduce an attorney's fees claim if the plaintiff prevails at trial.

To be effective, as explained below, a Rule 68 offer must be made very early in the case. This is often problematic because the defendants often do not want to send the message they are eager to settle, especially early in the case. Nonetheless, a good practice for defense counsel is to discuss the pros and cons of an early Rule 68 offer with their entity client.

#### A. Rule 68 Offer

Rule 68(d) provides: "If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." In a Section 1983 case, if a defendant makes a written offer of judgment under Rule 68 for a sum certain to a plaintiff, and the plaintiff does not accept the offer within 14 days, if the plaintiff's judgment at trial is not "more favorable" than a properly worded Rule 68 offer, two things occur. First, the plaintiff cannot recover any post-offer attorney's fees because those are considered part of the plaintiff's "costs" under 42 U.S.C. Section 1988.<sup>433</sup> Second, the plaintiff must pay the defendant's post-offer recoverable costs, but not the defendant's attorney's fees.<sup>434</sup>

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<sup>430</sup> *Heath v. Cast*, 813 F.2d 254 (9<sup>th</sup> Cir. 1987).

<sup>431</sup> *Knudsen v. Welsh*, 872 F.2d 428 (9<sup>th</sup> Cir. 1989); *Peraza v. Delameter*, 722 F.2d 1455 (9<sup>th</sup> Cir. 1984).

<sup>432</sup> 42 U.S.C. § 1988.

<sup>433</sup> *Guerrero v. Cummings*, 70 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1995).

<sup>434</sup> *Herrington v. County of Sonoma*, 12 F.3d 901, 907 (9<sup>th</sup> Cir. 1993); *Champion Produce, Inc. v. Ruby Robinson Co., Inc.*, 342 F.3d 1016, 1028 (9<sup>th</sup> Cir. 2003).

A Rule 68 offer is most effective if made early in the case because the offer must exceed the plaintiff's "judgment," meaning the jury's award *plus* recoverable fees and costs through the date of the offer.<sup>435</sup> Otherwise, the offer is not "more favorable" than what plaintiff would have been awarded if the judgment were entered on the date of the offer. If the Rule 68 offer is made late in the case, the plaintiff's attorney's fees alone may exceed the amount of the offer, thereby falling short of the "more favorable" requirement.

The "more favorable" requirement gives rise to an important decision as to how to frame the offer. There are two choices. First, the offer can be for a set number, e.g. \$30,001, *plus* all recoverable reasonable attorney's fees and recoverable costs through the date of the offer. The disadvantage of this offer is the defendants do not know the amount of the plaintiff's attorney's fees on the date of the offer. The advantage, however, is it will be very easy to ascertain whether the offer is "more favorable" than the jury's award. For instance, a jury award of \$30,000 is less favorable than this offer because even though the plaintiff is also entitled to attorney's fees and costs, those items were *included* in this offer.

Second, the offer can be for a set number, e.g. \$30,001, which *includes* all recoverable reasonable attorney's fees and recoverable costs through the date of the offer. The advantage of this offer is, unlike the first offer described above, the defendants know the maximum value of the offer is \$30,001. The disadvantage of this offer is that it will be much more difficult to ascertain whether this offer is "more favorable" than the outcome at trial, e.g. if the jury were to award \$10,000. In that scenario, the issue would be whether the plaintiff's recoverable attorney's fees and costs through the date of the offer exceed \$20,000. Since only the plaintiff's attorney has access to that information, there will be an issue of credibility as to whether the plaintiff's attorney worked a sufficient number of hours at a reasonable billing rate to reach the \$20,000 threshold *by the date of the offer*. To avoid this dispute, the first type of offer is safer and more effective and, if made early in the case, the exposure to an unknown amount of attorney's fees may be tolerable for the client.

With either type of offer, if defense counsel can get plaintiff's counsel to volunteer the accumulated hours or fees in the case through the contemplated date of a Rule 68 offer that is about to be made, such an admission is very helpful. For the first type of offer, such an admission will be helpful when plaintiff's counsel makes a motion for fees after the offer is accepted. For the second type of offer, such an admission will be helpful if plaintiff's counsel claims a higher amount of fees through the date of the offer in order to cover the gap between the jury's award and the offer.

#### B. A Rule 68 Offer Made Jointly But Without Entry Of Judgment Against The Officer Personally

A Rule 68 offer is an offer of judgment, and that poses a potential problem for the individual

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<sup>435</sup> *Corder v. Gates*, 947 F.2d 374, 380-81 (9<sup>th</sup> Cir. 1991).

officer who is a defendant that may not want such judgment entered against him or her even though the entity will pay it. Rule 68(a) provides, “a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued.” The exact wording of a Rule 68 offer is crucial and technical. For instance, the offer must include the payment of plaintiff’s costs (and fees, if applicable) in a clear manner.<sup>436</sup> A good resource to consult for the wording of the offer is Rutter Group *California Practice Guide, Federal Civil Procedure Before Trial*, Section 15(D).

In *Stanczyk v. City of New York*, the Second Circuit recently held a public entity employer and a police officer can make a joint offer to a plaintiff for a sum certain without allocating the amount each defendant is offering and without allowing entry of judgment against the officer.<sup>437</sup> The court reasoned: “Nothing in this (Rule 68) language appears to require that the defending party's (or parties') offer must permit taking judgment against every defending party. To the contrary, the Rule provides the defending party with discretion to ‘allow judgment on specified terms,’ terms which we believe need not include taking judgment against each defendant.”<sup>438</sup> Since “the Offer was clearly made on behalf of all Defendants and there is no dispute that the amount Stanczyk ultimately obtained was less than that provided by the Offer,” the offer complied with the requirements of Rule 68.<sup>439</sup> In fact, “in multi-defendant cases in which a single payer will likely pay the entire judgment, a full settlement that does not apportion damages will often be the most workable and logical ... and ... a nominal allocation of damages makes little sense when a package offer does not permit individual defendants to independently settle the claims against them.”<sup>440</sup>

The First and Third Circuits are in accord with the Second Circuit in *Stanczyk*, but rulings in the Fifth and Seventh Circuits (that can be distinguished from the offer in *Stanczyk*) provide an unpersuasive basis to argue such a joint offer does not comply with Rule 68.<sup>441</sup> The Ninth Circuit has not yet ruled on this issue. Therefore, defense counsel should explain to the entity defendant that (a) a joint Rule 68 offer is probably valid even if it precludes entry of judgment against the officer personally, but this issue has still not be decided in the Ninth Circuit, and (b) it would likely be improper to require an officer defendant to make an offer of judgment against him or her, even if the entity will pay for the judgment.

The exact terms of the defendants’ Rule 68 offer in *Stanczyk* were as follows:

Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant City of New York hereby offers to allow plaintiff Anna Stanczyk [*sic*] to take a judgment against it in this

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<sup>436</sup> *Cruz v. Pacific American Ins. Co.*, 337 F.2d 746, 750 (9<sup>th</sup> Cir. 1964); *Thompson v. Southern Farm Bureau Cas. Ins. Co.*, 520 F.3d 902, 904 (9<sup>th</sup> Cir. 2008).

<sup>437</sup> 2014 WL 2459696 (2d Cir. 2014).

<sup>438</sup> *Id.*

<sup>439</sup> *Id.*

<sup>440</sup> *Id.*

<sup>441</sup> *King v. Rivas*, 555 F.3d 14, 18 (1st Cir. 2009) (distinguishing the Fifth and Seven Circuit cases on joint Rule 68 offers and noting the First Circuit case that supports joint offers).

action for the total sum of One Hundred Fifty Thousand and One (\$150,001.00) Dollars, plus reasonable attorneys' fees, expenses and costs to the date of this offer for plaintiff's federal claims.

This judgment shall be in full satisfaction of all federal and state law claims or rights that plaintiff may have to damages, or any other form of relief, arising out of the alleged acts or omissions of defendants City of New York, Richard DeMartino, Shaun Grossweil[ ]er, or any official, employee, or agent, either past or present, of the City of New York, or any agency thereof, in connection with the facts and circumstances that are the subject of this action....

This offer of judgment is made for the purposes specified in Rule 68 of the Federal Rules of Civil Procedure and is not to be construed as an admission of liability by any defendants, or any official, employee or agent of the City of New York, or any agency thereof; nor is it an admission that plaintiff has suffered any damages.

Acceptance of this offer of judgment will act to release and discharge defendants the City of New York, Richard DeMartino and Shaun Grossweil[ ]er; their successors or assigns; and all past and present officials, employees, representatives and agents of the City of New York, or any agency thereof, from any and all claims that were or could have been alleged by plaintiff in the above-referenced action.<sup>442</sup>

It is interesting the above offer is for all *federal* claims on the condition the state claims be dismissed. This wording is presumably intended to avoid an *Erie* doctrine problem as to whether state civil procedure must apply to a pendant state claim in a federal case, which seems doubtful.

#### C. Rule 68 Offers In Multiple Plaintiff Cases

A Rule 68 offer to two plaintiffs can condition the offer on acceptance by both plaintiffs.<sup>443</sup> However, such a conditional offer cannot be “collusive,” such as when the offer is designed to ensure it is rejected, e.g. the offer to one plaintiff is reasonable and the offer to the other is very low.<sup>444</sup> Such an offer will not trigger the cost shifting penalty of Rule 68.<sup>445</sup>

#### D. Section 998 Offers In State Court

If the case is in state court, Code of Civil Procedure section 998 governs an offer to compromise. Like with a Rule 68 offers, a Section 998 offer is technical and counsel should consult a practice guide for the wording, such as *The Rutter Group's California Practice Guide, Civil Procedure Before Trial*, Section 12(C). For instance, to effectuate the cost-shifting penalty

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<sup>442</sup> *Id.*

<sup>443</sup> *Lang v. Gates*, 36 F.3d 73, 75 (9<sup>th</sup> Cir. 1994).

<sup>444</sup> *Amati v. City of Woodstock*, 176 F.3d 952, 958 (7<sup>th</sup> Cir. 1999).

<sup>445</sup> *Id.*

of Section 998, the offer must provide a place for the offeree to sign a statement of acceptance.<sup>446</sup>

A Section 998 offer is similar to a Rule 68 offer in that the “more favorable” clause is applied in a similar fashion.<sup>447</sup> It also appears that a joint offer by a public entity and an officer in a police civil liability case meets the criteria of Section 998.<sup>448</sup> A Section 998 offer can be conditioned on a dismissal of the lawsuit, rather than requiring entry of judgment.<sup>449</sup> Thus, it appears a public entity defendant can make a Section 998 offer on behalf of itself and the officer defendant conditional on a dismissal of the entire lawsuit without the need for a formal judgment. This is an advantage over Rule 68. However, in a multiple plaintiff case, unlike a Rule 68 offer, a Section 998 offer usually *cannot be* conditioned on *all* the plaintiffs accepting the offer.<sup>450</sup>

### CONCLUSION

There are many important issues in police civil liability cases that are unresolved and subject to conflicting interpretations. Accordingly, to reduce exposure to liability and enhance municipalities’ understanding of the exposure, defense counsel should continuously update their clients as old issues are resolved and new ones arise. Hopefully, aspects of this paper will be of some assistance in doing so.

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<sup>446</sup> Code Civ. Proc. § 998(b)(2).

<sup>447</sup> *Heritage Engineering Construction, Inc. v. City of Industry*, 65 Cal.App.4<sup>th</sup> 1435, 1441-42 (1998); *Wilson v. Safeway Stores, Inc.*, 52 Cal.App.4<sup>th</sup> 267, 271-72 (1997).

<sup>448</sup> *Santantonio v. Westinghouse Broad. Co.*, 25 Cal.App.4<sup>th</sup> 102, 115 (1994).

<sup>449</sup> *On-Line Power, Inc. v. Mazur*, 149 Cal.App.4<sup>th</sup> 1079, 1085 (2007).

<sup>450</sup> *Menees v. Andrews*, 122 Cal.App.4<sup>th</sup> 1540, 1544 (2004).

## EXHIBIT A

### BERKELEY POLICE DEPARTMENT TRAINING AND INFORMATION BULLETIN



**DATE: December 29, 2003**

**NUMBER: 286**

### **SUBJECT: TERRY STOPS AND IDENTIFYING DETAINEES: ISSUES AND STRATEGIES**

#### Purpose

The purpose of this Bulletin is to alert officers to the law and the liability risk inherent in situations where a person refuses to provide *any* identifying information during a "pure" Terry stop, and to provide officers with investigative strategies to successfully identify detainees.

In your role as an investigator, you are encouraged to use any effective, legal, and available strategies in order to identify suspects in criminal investigations during "pure" Terry stops. Your strategies are limited by the law, your resources, and your ability to get people to talk to you.

#### Policy

Officers shall vigorously and effectively identify detainees during the course of their investigations, in compliance with the law.

#### Definition Of A "Pure" Terry Stop

A "Terry stop" is an investigative detention of a person who you reasonably suspect has committed, is committing, or is about to commit a crime. (Terry v. Ohio, 390 U.S. 1 (1968)).

For purposes of this Bulletin, a "pure" Terry stop is an investigative detention where you have no basis to issue a citation or make an arrest.

#### The Law Governing ID During "Pure" Terry Stops

The federal Ninth Circuit Court of Appeals has repeatedly ruled that a detainee cannot be compelled to identify themselves during a "pure" Terry stop, and therefore cannot be legally arrested for refusing to provide identifying information under 148 PC - resisting or delaying you in the course of your duties.<sup>1</sup> The one California Court that has directly addressed the issue has come to the same conclusion.<sup>2</sup> In 2002, the Ninth Circuit held that the law of the Fourth Amendment is so clearly established on this point that any officer who arrests a detainee during a "pure" Terry stop for merely refusing to provide identifying information is *personally liable* for damages and cannot claim qualified immunity.<sup>3</sup>

However, any time you have the legal basis to issue a person a citation for *any* offense,

## **TIB #286 TERRY STOPS AND IDENTIFYING DETAINEES: ISSUES AND STRATEGIES**

that person *must* provide you with satisfactory evidence of identification, or face arrest. For purposes of this Bulletin, Municipal, Vehicle, and other Code infraction citation situations are not “pure” Terry stops because 853.5 PC gives you the authority to require the person identify themselves.

### How To Handle A Refusal To Identify During A “Pure” Terry Stop

The key to identifying a detainee who is reluctant to identify themselves during a “pure” Terry stop is to establish rapport, ask specific identity-related questions, and use your resources to confirm the information. On rare occasions, a detainee may simply refuse to give you any identifying information at all. Ultimately, you may have to end a “pure” Terry stop without identifying the detainee. Regardless of the detainee’s refusal to provide you with identifying information, keep in mind the following:

No Walking Away: Preliminarily, a detainee does not have the right to leave until you are finished with an investigation of reasonable length under the circumstances. If a detainee attempts to leave against your lawful order, there is probable cause to arrest the detainee for violating Penal Code section 148.

Roll-By Of Victims Or Witnesses: A detainee can be held for a roll-by of victims or witnesses, regardless of whether or not they provide identifying information. The roll-by may give you probable cause to make an arrest.

Photograph The Detainee: A detainee *may* be photographed in the field when it is reasonable to do so. It is reasonable to photograph a detainee who refuses to identify themselves to preserve a record of the contact and perhaps identify them later.

Follow The Detainee – Monitor For Infractions: A detainee can be released and further observed. If the detainee then commits an infraction offense, they can be detained (again) and cited. As stated above, a detainee must produce satisfactory identification for the citation, or face arrest.

A detainee must cooperate with your lawful instructions. In rare cases, a detainee will refuse to provide you with any identifying information. Far more frequently, a detainee will lie about their identity by providing you with demonstrably false information. In those cases, they are in violation of 148.9 PC, providing false information to a peace officer, and you may make the arrest.

### Making the 148.9 Case During a “Pure” Terry Stop

Sometimes a detainee will tell you their name, but you will suspect that the name is false. In these situations, detainees typically provide *additional* identifying information beyond their name. If there is probable cause to believe that the detainee has actually identified himself as either another person or a fictitious person, then you can arrest the detainee for violating Penal Code section 148.9.

When you suspect that the detainee has given you a false or fictitious name, you should elicit additional identifying information from the detainee and attempt to prove the

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information true or false. Here are some examples of specific questions which may help you establish that a name is either correct or false:

- What is your date of birth?
- What is your address? Where have you lived in the past?
- Where are you from? Where does your family live?
- What is your family member's (father, mother, etc.) name? What is their phone number?
- Have you ever been issued a driver's license or ID card? From what state?
- Are you on probation or parole? For what and from where?
- When's the last time you were arrested? Where were you arrested? By whom?
- Have you been incarcerated in jail or prison? Where? For how long?

Once you obtain some additional identifying information beyond a name, your resources to corroborate the name you've been given include:

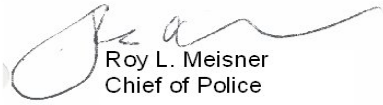
- DMV, AWS, CORPUS, CII, CLETS, NCIC, FBI/III databases
- BPD records management systems
- Calling the subject's relatives or friends to confirm ID
- Fellow officers who may know the detainee
- Fellow officers who may be able to establish a rapport with the detainee
- Fellow officers' or supervisors' experience – ask for assistance if you need it.

### Conclusion

When detainees refuse to identify themselves—and especially when they say they know their rights and that they will *not* give you any identifying information—take careful measure of the situation. Don't be baited into an illegal arrest. Outwit them. Use your knowledge, skills, and resources to successfully identify them, or to develop probable cause for the 148.9 PC arrest. Be prepared to let them walk if you exhaust all your options. The courts will look at the unique circumstances of each detention and arrest. Insure your report is thorough, accurate, and contains all the factors that went into your decision-making process.

The United States Supreme Court agreed to review this issue in their 2004 term.<sup>4</sup> Thus, the law regarding police officer authority to require identification during a "pure" Terry stop *may* be modified next year. This Bulletin will be updated to reflect any changes as a result of this pending decision.

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Roy L. Meisner  
Chief of Police

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<sup>1</sup> Martinelli v. City of Beaumont, 280 F.2d 1491, 1494 (9<sup>th</sup> Cir. 1987) (the use of Penal Code “Section 148 to arrest a person for refusing to identify himself during a lawful Terry stop violates the Fourth Amendment’s proscription against unreasonable searches and seizures.”); see also, Carey v. Nevada Gaming Control Board, 279 F.3d 873, 880 (9<sup>th</sup> Cir. 2002) (“the police cannot, consistent with the Fourth Amendment, compel identification during an investigative stop”); Kolender v. Lawson, 658 F.2d 1362, 1366 (9<sup>th</sup> Cir. 1981) (requirement to physically produce identification during a Terry stop violates the Fourth Amendment).

<sup>2</sup> People v. Gregory, 112 Cal.App.3d 764, 779, 780 (1981) (“a person who merely refuses to identify himself or answer questions” during an investigative detention does not violate Penal Code section 148 or otherwise furnish grounds for arrest. ... “A categorical requirement for identification ... incident to a lawful detention would thus appear invalid ...”).

<sup>3</sup> Carey v. Nevada Gaming Control Board, 279 F.3d 873, 882 (9<sup>th</sup> Cir. 2002)

<sup>4</sup> Larry D. Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County

EXHIBIT B

**Draft General Order**

**SUBJECT: STRIP SEARCHES**

PURPOSE

- 1 - This Order outlines the circumstances that allow and procedures required to conduct a strip search.

POLICY

- 2 - A “strip search” shall be conducted when authorized by law and only in a manner prescribed in this Order.

DEFINITIONS

- 3 - Strip Search (or Visual Body Cavity Search): A search that requires a person to remove or arrange some or all of his or her clothing so as to permit a visual inspection of their underclothing, breasts, buttocks, or genitalia.
- 4 - Physical Body Cavity Search: The physical intrusion into the stomach, rectal cavity or vagina.
- 5 - Booked/Booking: The completion of a Consolidated Arrest Report (CAR), fingerprinting, and photographing at the City Jail or other detention facility.
- 6 - Crime of Significant Violence: A crime against a person, including assault and battery:
  - (a) with a weapon; and/or,
  - (b) resulting in injury that would lead a reasonable person to seek medical attention.
- 7 - Reasonable Suspicion: The level of suspicion of criminal activity needed to conduct an investigatory detention known as a “Terry” stop (i.e., the totality of the circumstances indicate that the person is involved in, about to be involved in, or was recently involved in criminal activity.)

PROCEDURES

GENERAL

- 8 - The following requirements shall be adhered to when conducting a strip search:

- (a) **PRIVACY:** A strip search shall be conducted in a private location (i.e., an area in which uninvolved persons cannot observe the search.)
- (b) **SAME SEX:** Department personnel conducting, witnessing or providing primary security for a strip search must be of the same sex as the person being searched, absent exigent circumstances.
- (c) **NO TOUCHING:** Department personnel conducting a strip search shall not touch the breasts, buttocks, or genitalia of the person to conduct the search (Penal Code §4030(j)).
  - (1) Only a VISUAL examination is allowed during a strip search.
  - (2) Physical body cavity searches are prohibited, unless performed pursuant to a search warrant specifically authorizing a physical body cavity search.
    - (l) If so authorized, a physical body cavity search will be conducted under sanitary conditions, and only by a physician, nurse practitioner, registered nurse, licensed vocational nurse or emergency medical technician Level II licensed to practice in this State.
  - (3) An employee's actions to protect themselves or others or to overcome a person's effort to destroy or conceal contraband that results in contact with the breasts, buttocks, or genitalia of the person will not constitute a violation of the "no touch" provision of this Order.

9 - Strip searches may be conducted in the following circumstances:

- (a) **ARRESTED AND BOOKED FOR ANY CRIME, IF DESIGNATED FOR PLACEMENT IN THE GENERAL JAIL POPULATION AND THREE HOURS HAS ELAPSED TO MAKE BAIL:** Persons arrested and booked who will be placed in the general jail population may be strip-searched after three-hours have elapsed to allow the person to make bail. Penal Code §4030(g).
- (b) **ARRESTED AND BOOKED FOR CERTAIN CRIMES:** Persons arrested and booked for crimes involving weapons, possession or sale of controlled substances (other than simple possession of marijuana), and significant violence, whether or not the person will make bail or be released prior to placement in the general jail population.
- (c) **ARRESTED AND BOOKED FOR ANY CRIME, UPON REASONABLE SUSPICION AND WITH SUPERVISOR APPROVAL:** Persons arrested and booked for any crime can be strip searched during booking, even if the person will not be located in the general jail population, if an officer

submits and obtains approval for an “upgrade search” for a strip search based on specific and articulable facts that support a reasonable suspicion the person is concealing a weapon and/or controlled substances (other than marijuana), and a strip search is needed to discover said item. Reasonable suspicion may be based on a combination of factors such as the arrestee’s conduct, the nature of the offense, and the arrestee’s prior criminal record.

(1) The officer shall present an Upgraded Search Request Form containing the facts supporting a strip search, to the Patrol Division Watch Commander, or in his/her absence, a Patrol Division Supervisor, for review and approval prior to conducting a strip search.

(I) The officer shall present a signed Request form to the jail staff prior to conducting a strip search.

(ii) The results of the strip search shall be noted on the Request form.

(iii) The original Request form shall be included with the investigative report documenting the subject’s detention/arrest.

(2) Notwithstanding reports prepared by the investigative officer, Jail personnel facilitating or conducting a strip search will document the search and any findings.

(d) PURSUANT TO SEARCH CLAUSE, ATTENDANT CIRCUMSTANCES: A strip search may be conducted on a person who has a probationary or parole search clause authorizing the search of their person, but only when:

(1) The search clause arises out of a possession or sale of a controlled substance offense (other than simple possession of marijuana); and,

(2) There is reasonable suspicion the person is involved in a possession or sale of a controlled substance offense or a weapons offense, or the person is concealing a weapon or controlled substance under his or her clothes.

(e) PURSUANT TO NARCOTICS SEARCH WARRANT: A strip search may be conducted on persons who are to be searched pursuant to a narcotics search warrant.

10 - Absent other authority, a strip search will not be conducted when:

- (a) There is probable cause to arrest a person for a qualifying controlled substance offense, but no arrest or booking is accomplished.
  - (1) “Consent” to strip search a person shall not be obtained by a promise to not arrest the person, or by any other coercive tactic intended to elicit the person’s cooperation.

#### IN-FIELD STRIP SEARCHES

- 11 - Strip searches may be conducted at private locations other than the City jail, or other official detention facility, when accomplished pursuant to search warrant or parole/probationary search clause.
  - (a) If the detention takes place in a building, said person may be strip searched in a private room in the building.
  - (b) If the detention takes place in public, said person may be strip searched in a police vehicle that can ensure complete privacy (e.g., mobile substation, prisoner transport van, etc.).
    - (1) Patrol vehicles, or similarly designed police vehicles, will not be used to conduct in-field strip searches.

#### DETAINEE TRANSPORTATION, WRITTEN CONSENT

- 12 - When there is no basis to arrest a person subject to strip search pursuant to probation or parole search clause (ref. paragraph 9(d)), that person will not be transported to the police station, or other detention facility, without their consent solely for the purpose of conducting a strip search.
  - (a) - Consent to transport a person subject to search from the location of detention to the City jail, or other detention facility, for the purpose of participating in a strip search will be obtained in writing.<sup>451</sup>

#### SECONDARY SEARCHES

- 13 - If a strip search is accomplished in the field, and the person is then brought to the City jail or other detention facility, a second strip search should not be conducted unless circumstances are present indicating the individual may have armed themselves or secreted controlled substances (other than marijuana) underneath his or her clothes after the initial strip search was conducted.

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<sup>3</sup> The consent to transport form should read: “I understand that I am not under arrest at this time. However, I understand that I am to be strip searched pursuant to the terms of my probation or parole. I therefore request that I first be transported to the police station. I make this request to go to the police station voluntarily and without duress. I specifically choose not to be strip searched at a suitably private location near where I was detained.”

## USE OF REASONABLE FORCE

- 14 - If an in-custody person refuses to comply with a request for cooperation in a strip search, the investigating officer may, with supervisor approval, employ reasonable force to restrain the uncooperative person to facilitate a visual body cavity search.
- 15 - Employees may employ reasonable physical force to overcome the resistance or violence of an uncooperative person subject to search, and to restrain him/her in manner which facilitates examination.
  - (a) Employees shall consider the following in evaluating what degree of force is reasonable:
    - (1) The seriousness of the crime.
    - (2) The extent to which the person is resisting or being violent.
    - (3) The degree of force required to overcome resistance and the extent to which it threatens the person's health or safety.
    - (4) Extent to which the force was an affront to the individual's personal privacy.

### **References:**

Penal Code § 4030

*Winston v. Lee*, 470 U.S. 753, 761 (1985)

*Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S.Ct. 1510, 1518, 182 L.Ed.2d 566 (2012)

*Bull v. City and County of San Francisco*, 595 F.3d 964, 981 (9th Cir. 2010)

*Way v. County of Ventura*, 445 F.3d 1157, 1162 (9<sup>th</sup> Cir. 2006)

*People v. Fulkman*, 235 Cal.App.3d 555, 562-63 (1991)

California Criminal Investigation (2007 Edition), Chapters 17 (Bodily Intrusion Searches) and 18 (Booking Searches)