The California Legal Update

Remember 9/11/2001; Support Our Troops

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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill808@AOL.com

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THIS EDITION'S WORDS OF WISDOM:

"*Roses are red, violets are blue. I'm schizophrenic, and so am I.*" (Oscar Levant)

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CASES:

***The Second Amendment and the Right to Bear Arms*:**

Peruta v. County of San Diego **(9th Cir. Feb. 13, 2014) 742 F.3rd 1144**

Rule: The Second Amendment protects one's right to carry firearms in public as well within the home. A requirement that a person show that he has a specific need to do so, where that requirement in effect precludes most everyone from carrying firearms in public, is unconstitutional.

Facts: California prohibits the carrying of a firearm in public while concealed (P.C. § 25400), while loaded (P.C. § 25850), and while in the open whether loaded or not (P.C. § 26350), with limited exceptions (including, but not limited to, the gun owner's residence, place of business, or other private property). (P.C. § 25605.) However, one may apply for a license to carry a

concealed weapon in the city or county in which he or she works or resides. (P.C. §§ 26150, 26155) To obtain such a license (i.e., a "CCW" permit), the applicant must first meet several requirements. These include being able to demonstrate good moral character, complete a specified training course, and establish "*good cause*." (P.C. §§ 26150, 26155) Pursuant to authority authorized under California law, San Diego County issued a written policy setting forth the procedures for obtaining CCW permits in the county. Without "*good cause*" being defined by state law, San Diego imposed its own definition as "*a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way*." Good cause was to be "evaluated on an individual basis" and may arise in "situations related to personal protection as well as those related to individual businesses or occupations." The stickler, however, was the provision that merely having a general concern for "*one's personal safety alone is not considered good cause*." If the applicant was unable to demonstrate "circumstances that distinguish [him] from the mainstream," (i.e., be able to articulate some specific reason—e.g., a "*pressing need*" —why he needed to carry a concealed weapon for his own personal safety), then he did not qualify for a CCW permit. Plaintiff Edward Peruta and others wished to carry handguns for self-defense, but were unable to document specific threats against them (i.e., "good cause"). They were therefore denied CCW permits. None of the plaintiffs were otherwise barred under federal or state law from possessing firearms. Plaintiffs sued the County of San Diego and its sheriff, William Gore, in federal court requesting injunctive and declaratory relief from enforcement of the County policy's interpretation of "*good cause*." Peruta's lead argument was that by denying him the ability to carry a loaded handgun for self-defense merely because he couldn't satisfy the County's definition of "good cause" infringed upon his right to bear arms under the Second Amendment. The federal district court granted the County's motion for summary judgment, upholding the validity of San Diego County's CCW permit policy, and dismissed the lawsuit. In so ruling, the district court judge determined that "California's 'important and substantial interest in public safety'—particularly in 'reduc[ing] the risks to other members of the public' posed by concealed handguns' 'disproportionate involvement in life-threatening crimes of violence'—trumped (i.e., outweighed) the applicants' allegedly burdened Second Amendment interest." Plaintiffs appealed.

Held: The Ninth Circuit Court of Appeal, in a split (2-to-1) decision, reversed. Plaintiffs made the same argument at the Ninth Circuit level that was made in the trial court, arguing that the San Diego County policy, in light of the California licensing scheme as a whole, violates the Second Amendment. This is because San Diego's insistence on "good cause," as defined by the County, when combined with the other statutory restrictions on carrying firearms, precludes a responsible, law-abiding citizen from carrying a weapon in public for the purpose of lawful self-defense. In reversing the trial court, the Ninth Circuit cited the U.S. Supreme Court decision of *District of Columbia v. Heller* (2008) 554 U.S. 570. *Heller* stands for the general proposition that the Second Amendment is violated when a governmental entity tries to outlaw the possession of a firearm in one's home without having to disassemble it, or bind it by a trigger lock. Per *Haller*, the Second Amendment, when enacted, codified a pre-existing right for individuals to "keep and bear arms;" the "central component of the right" being "self-defense." A statute that makes one's firearms unavailable for use in exercising that right of self-defense in his or her home runs afoul of the dictates of the Second Amendment, and is unconstitutional. "(B)ecause 'the need for defense of self, family, and property is most acute in the home,' the D.C. ban on the home use of handguns—'the most preferred firearm in the nation'—failed

'constitutional muster.'" *Heller* also clarified that the right to keep and bear arms is, and always has been, an individual right, and not one that is limited to the context of a "well-regulated militia" as has been argued by some. The issue in the instant case is whether the Second Amendment's protections against a local government's attempt to restrict one's right to "keep and bear arms" extends beyond the confines of one's home. The Court here, after an exhausting historical analysis of the relevant case law, held that it does. First, going back to when the Second Amendment was first enacted, it was noted that "(c)onstitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." Recognizing that many people strongly believe that "the safest sort of firearm-carrying regime is one which restricts the privilege to law enforcement with only narrow exceptions, . . . (this) enshrinement of constitutional rights necessarily takes certain (such) policy choices off the table. . . ." In other words, although "some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem," the Ninth Circuit ruled here that it is not the role of the courts to participate in such "debatable" issues. It is not an issue of balancing the state's interest with the rights of individuals, as the trial court believed. It is rather what the "founding fathers" had in mind when they first wrote the Second Amendment that is controlling. However, the Second Amendment right to keep and bear firearms is not unlimited, being subject to certain "traditional restrictions." Prohibiting felons and mentally ill people from ownership or access to firearms is reasonable and not unconstitutional. Also, "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are presumptively lawful. But restrictions on the right to keep and bear firearms are not justified when they have the effect of negating the Second Amendment's protections altogether. In *Heller*, for instance, Washington D.C.'s requirement that firearms in the home must be almost completely incapacitated was held to be an excessive restriction on the right to keep firearms in a person's home for self-defense. On the issue of whether the Second Amendment's protections extend beyond the confines of the home, it is significant that this amendment secures the right not only to "*keep*" arms, but also to "*bear*" them as well. With this, and through an analysis of other cases, the Court found that the right to "*bear*" firearms for self-protection implied carrying them out into public places. "At the time of the founding, as now, to 'bear' meant to 'carry.'" It is ludicrous to believe that when written, the Second Amendment was intended to restrict one's right to "carry" firearms to moving it around one's home. So while *Heller* is an inside-the-home case, the Court here had no problem extending its self-protection principles to carrying firearms in public, away from the home. But, as noted above, this right is not absolute and may be subject to certain reasonable, and necessary, restrictions. It is only when such restrictions for all intents and purposes negate the right to bear arms that it runs afoul of the Second Amendment. The Second Amendment "is, in effect, destroyed when exercise of the right is limited to a few people, in a few places, at a few times." The San Diego County restrictions on obtaining CCW permits was found here to almost completely negate the right for law abiding citizens to bear arms beyond the confines of his or her home. With other laws making it illegal to carry a loaded firearm, a concealed firearm, or an "open carry" firearm (whether loaded or not), the only way people such as the plaintiffs in this case are able to carry (or bear) arms in public is to show good cause why it is necessary. With "good cause" requiring a specific need beyond that of the mere desire to protect oneself, "it is illegal (under California law) in virtually all circumstances" for otherwise law-abiding people to carry firearms in public. This, the Court found, is a violation of the Second Amendment.

Note: It is interesting to note that the Court mentioned, without deciding, that their ultimate conclusion concerning the illegality of San Diego's "good cause" requirement might have been different had it not been for the recent criminalization of carrying *unconcealed* firearms; i.e., "*open carry*" (P.C. § 26350), which, when considered in conjunction with California's other firearm restrictions, all but precluded most people from carrying concealed under any circumstances. Ultimately, all this decision says is that there must be available to law-abiding, mentally stable citizens *some* means by which they can carry (i.e., "*bear*") firearms while in public if the Second Amendment's protections are to be respected. But despite this decision, California remains one of the more restrictive states in the Union when it comes to carrying concealed, or either purchasing and owning firearms, even if only to keep in your home or business. If you're interested in the quite divergent laws in all 50 states on their respective gun laws, I'd recommend one or both of the following sources where you can order some very comprehensive publications; www.gunlawguide.com ($13.95), and www.mylegalheat.com ($15.00). The later also offers carrying concealed classes throughout the country as well as a free app you can download onto your iPhone or Droid cellphones. I've taken the Legal Heat four-hour all-lecture course, qualifying me for non-resident permits from Arizona and Utah, thus allowing me to carry concealed in 38 states (which, not surprisingly, does *not* include California). Two such classes are being offered in California in 2015; both in the City of Rocklin; January 18 and March 22.

***Use of Deadly Force and an Officer's Duty to Use Reasonable Care*:**
***Use of Force; Civil Liability and an Officer's Pre-Shooting Conduct*:**
<u>*Hayes v. County of San Diego*</u> (9th Cir. Dec. 2, 2013) 736 F.3rd 1223

Rule: A peace officer's duty of reasonable care in the use of deadly force includes an analysis of the officer's pre-shooting conduct and decisions.

Facts: San Diego Sheriff's Deputies Mike King and Sue Geer responded to a call concerning screaming coming from a neighbor's house. Going directly to the source of the screaming, Deputy King was met by Geri Neill, the owner of the house. She indicated that she and her live-in boyfriend, Shane Hayes, had been arguing about an attempt Hayes had made that evening to commit suicide by inhaling exhaust fumes from his car. She told Deputy King that there had not been any physical altercation, but that she was concerned about Hayes harming himself, indicating that he had done so on prior occasions. Deputy King did not ask Neill about the manner of Hayes' prior suicide attempts, and therefore did not know that Hayes had attempted to stab himself with a knife at least once before. Although it was verified that there were no guns in the house, it was unknown to the deputies at that time that Hayes might be armed with a knife and that he had been drinking heavily. In addition to this, the deputies had not checked whether there had been any previous calls to the residence, so they were unaware that Hayes had been taken into protective custody four months earlier in connection with a suicide attempt with a knife. With this limited information, the deputies decided to enter the house to check on Hayes' welfare; i.e., to see if he was physically and mentally capable of caring for himself. With firearms holstered, the deputies moved into the dimly lit house with light being provided by Deputy King's 16-inch flashlight which he'd been trained to use as an impact weapon when necessary. King was also armed with a Taser. Hayes was found in the kitchen, standing about

eight feet from Deputy King when King first saw him. Because Hayes had his right hand hidden behind his back, Deputy King ordered him to show his hands. Hayes took two steps towards the deputies as he raised both hands to approximately shoulder level, revealing a large knife in his right hand with the tip pointed down. Hayes yelled; "You want to take me to jail or you want to take me to prison, go ahead." Believing that Hayes constituted a threat to his safety, Deputy King immediately drew his firearm and fired two shots at Hayes, striking him while he was roughly six to eight feet away. Deputy Geer likewise drew her firearm and shot at Hayes two more times. Hayes died as a result. Deputy King later testified that only four seconds elapsed between the time he ordered Hayes to show his hands and when the first shot was fired. When asked why he believed Hayes was going to continue towards him with the knife, Deputy King testified: "Because he wasn't stopping." He also didn't order Hayes to stop because he didn't think there was time. Neill, who witnessed the shooting, testified that although Hayes was in fact approaching the deputies, he was not "charging." Per Neill, Hayes had a "clueless" expression on his face, "like nothing's working upstairs." Hayes' minor daughter, Chelsey Hayes, sued the deputies (and everyone else up the line) in federal court under authority of 42 U.S.C. § 1983, alleging that her father's Fourth Amendment rights and her own Fourteenth Amendment rights had been violated. The federal trial court judge granted the civil defendant's motion for summary judgment, dismissing the lawsuit. Chelsey Hayes appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part, and revered in part. The Court here reviewed the various means by which a court can find civil liability based upon the use of deadly force by a law enforcement officer. *First*, the Court noted that the survivors of an individual killed as a result of an officer's alleged excessive use of force may assert a *Fourth Amendment* claim on the deceased individual's behalf if the relevant state's law authorizes a survival action. California law does provide for such liability. However, in this case, Chelsey Hayes failed to properly allege her standing (i.e., as her father's personal representative or his successor in interest) to bring such a suit. This issue, therefore was remanded to the trial court for Chelsey to properly allege her standing. *Secondly*, the child of a decedent has a constitutionally protected liberty interest under the *Fourteenth Amendment's* due process clause in the "companionship and society" of her father or mother. "Official conduct that shocks the conscience" in depriving [a child] of that interest is cognizable as a violation of due process." Under the Fourteenth Amendment, where actual deliberation by the officer using deadly force is practical, an officer's "*deliberate indifference*" may suffice to shock the conscience. Where, on the other hand, the officer must make a "snap judgment" due to a rapidly escalating situation, then his conduct may be found to shock the conscience only if the officer acts with a "*purpose to harm*" unrelated to legitimate law enforcement objectives. In this case, the deputies were held to have made a "snap judgment." Plaintiff failed to allege any "purpose to harm." Therefore, as a matter of law, the Fourteenth Amendment does not provide Chelsey with grounds for relief. Summary judgment for the officers was therefore properly granted by the trial court as to plaintiff's Fourteenth Amendment claim. *Third*; plaintiff Chelsey Hayes also alleged a negligent wrongful death claim. Under this theory, a plaintiff must establish the standard elements of negligence; i.e., (1) defendant sheriff's deputies owed a duty of care; (2) defendants breached their duty; and (3) defendants' breach caused plaintiff's injury. *The trial court* here had held that the deputies owed a duty of reasonable care in deciding to use deadly force, but concluded that their use of force was objectively reasonable and therefore not negligent as a matter of law. However, the trial court also ruled that this duty of care *did not* include their conduct and the decisions they made

before the shooting. The Ninth Circuit held that this was error. Plaintiff argued that the officers breached their duty by failing to gather all potentially available information about Hayes or to request PERT assistance before confronting him. The Ninth Circuit agreed. Taking into account information about Hayes that the deputies might have known had they taken the time to research him further before confronting him in the kitchen (e.g.., that he was drunk and that he might be in possession of a knife which he had used before in a suicide attempt), the deputies might have exercised more caution before confronting him and wouldn't have been surprised by the knife he held. It was also noted that the deputies didn't first warn him before shooting. Had they known ahead of time that he might have a knife, they would have been more prepared to give such a warning. Taking all this into account, and the fact that the officers didn't find out more about his issues before confronting him, it cannot be said that their use of deadly force was objectively reasonable as a matter of law. "(A)n officer's preshooting conduct is properly 'included in the totality of circumstances surrounding [his] use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct.'" Summary judgment shouldn't have been granted. The case was therefore remanded for further proceedings.

Note: In the Court's long, disjointed dissertation, it appears to me that the justices were determined to rule that even if Deputies King and Geer's failure to collect more information about Hayes before confronting him had not been required, the issue of the reasonableness of this, and maybe any shooting is an issue that needs to be evaluated by a civil jury. But the important point of this case is that an officer's failure to do a little pre-contact investigation, when possible, finding out as much about the subject as possible before confronting him, is to be included in the mix when evaluating whether an officer's actions in using deadly force were reasonable. While this theory may be somewhat novel, at least in this context, it is certainly not unreasonable. One of the most reliable ways of avoiding making serious mistakes, whenever practical under the circumstances, is to take your time, find out as much as possible about what you're walking into, and then go in fully informed. The deputies didn't do that in this case.

***Sex Registrations per P.C. § 290(b)*:**

<u>People v. Deluca</u> **(Aug. 14, 2014) 228 Cal. App. 4th 1263**

Rule: A homeless shelter qualifies as a "residence" for purpose of the registration requirements of P.C. § 290(b).

Facts: Defendant, a "transient sex offender" who was required to register pursuant to P.C. § 290(b), spent his nights at a National Guard armory emergency winter shelter in the San Fernando Valley area of Los Angeles. (How frequent his visits were there was not discussed, probably because frequency is an irrelevant non-issue. See below.) The shelter was only open from December 1 through March 15, from 6:00 p.m. to 7:00 a.m. The shelter, however, was not a 24-hour operation, being set up anew each night and taken down each morning. Individuals who stayed at the shelter were referred to as "*clients*," not "*residents*." The cots were set up in one large open area and were available only on a first-come, first-served basis, although no one was affirmatively turned away. Clients were not segregated by gender and were not separated from the general population. No mail could be received at the armory and there was no voicemail service. Clients were not allowed to store personal possessions in the armory.

However, the armory had its own street address. Clients were supplied with cots and blankets, showering facilities, dinner every evening and sack lunches, but no breakfasts. Transportation to and from various points in the San Fernando Valley was provided. Defendant failed to register the armory as his residence within five days of his stay there, as required by P.C. § 290.011(b). He was tried and convicted for failing to register his residence and sentenced to prison for seven years and eight months. Defendant appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. On appeal, defendant argued that the National Guard armory where he stayed was not a "residence." A transient sex offender is required to register his residence. (P.C. § 290.011(a)) He is also required to provide current information as to all places where he or she sleeps, eats, works, or engages in leisure activities. (P.C. § 290.011(d)). A transient sex offender who moves into a residence has five working days within which to register at that address. (P.C. § 290.011(b)) P.C. § 290.011(g) specifically defines a "*residence*" to mean "one or more addresses at which a person regularly resides, *regardless of the number of days or nights spent there*, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, *homeless shelters*, and recreational and other vehicles." (Italics added.) The purpose of California's sex registration requirements, which are to be interpreted broadly, is to promote the state's interest in controlling crime and preventing recidivism in sex offenders by making them readily available for police surveillance *at all times*. The armory in this case was obviously a "*homeless shelter*," as listed in section 290.011(g). How often defendant stayed there is also irrelevant under the statute. Therefore, defendant was properly convicted of failing to register the armory as his residence.

Note: Harsh, you might say. But then we're talking about the safety of our families; particularly our children. Because sex offenses, as a rule, do not generally result in life sentences, there comes a time when a sex offender is going to be released back out onto the street. I don't need to preach to you about the likelihood of such a person reoffending. So if he has to be walking free among our friends and relatives, it's at least a good thing that law enforcement has the power to always be looking over his shoulder.

***Searches of Computers; Going Beyond the Scope of a Private Search*:**

People v. Michael E. **(Oct. 3, 2014) 230 Cal.App.4th 261**

Rule: Law enforcement viewing private information in a computer already viewed by a private citizen is not illegal. However, law enforcement going beyond the scope of the previously viewed information is illegal without a search warrant.

Facts: Michael E. brought his computer into Sage's Computer, a computer store in the city of Fort Bragg, for servicing, forgetting to erase all his pornography and other off-color pictures and videos. When the business owner, Sage Statham, opened up some programs, he saw what appeared to him to be underage girls engaged in sexual activity. Officer Brian Clark responded to Statham's call to the police. But after Statham showed him the pictures he'd seen, Officer Clark determined that while the pictures showed people posing in a sexual manner, none of them were nude or engaging in sexual activity. So Officer Clark asked Statham to "search through and look at" anything else of interest in the computer. Statham did as he was asked and found

some video files with "sexually explicit titles" that he had not previously noticed. However, he was unable to open these files. So he downloaded the suspect files onto a USB flash drive which Officer Clark took to the Fort Bragg police station. Clark gave the flash drive to Sergeant Lee who was able to open the files and view the videos therein. They were determined to be of "juvenile pornographic material," depicting female juveniles engaged in sexual activity. Defendant was thereafter charged in state court with possession of material depicting a person under the age of 18 engaging in or simulating sexual conduct; a felony. (P.C. § 311.11(a).) After defendant's motion to suppress the contents of his computer was denied, he pled guilty and appealed.

Held: The First District Court of Appeal (Div. 2) reversed, finding the search by law enforcement of the video files downloaded from defendant's computer to be illegal. The issue on appeal was whether the search of defendant's computer that took place after Officer Clark first viewed what Statham had originally found was beyond the scope of Statham's prior search before Clark asked him to look further. The rule of law in this situation is that when an individual (e.g., defendant) reveals private information (the contents of his computer) to another (Statham), he assumes the risk that that person will reveal the otherwise private information to the authorities (Officer Clark). When that occurs, the Fourth Amendment does not prohibit governmental use of the information already revealed; i.e., the now-nonprivate information. The Fourth Amendment is implicated only if the authorities search beyond the scope of the information already viewed by the private citizen. A search warrant is necessary in order for law enforcement to proceed further than that already viewed by private individuals. Here, Officer Clark directed Statham to look further for more evidence of pornography. As such, Statham was acting as Clark's agent, making further inquiry into defendant's computer a government search. A search warrant is needed in order to do this lawfully. There is an exception to this rule where, for instance, given the similarity and nature of the seized containers, "the police knew with substantial certainty" that the unopened containers (or, in this case, computer files) are likely to contain more of the same. But in this case, there was nothing about the unopened video files, even to the trained eye, to suggest they were pornographic, particularly since the files which were already opened by Statham were not themselves pornographic. The "sexually explicit titles" given to the video files were not themselves revealed until after Officer Clark had already told Statham to search defendant's computer for anything else, going beyond what Statham had seen on his own. Therefore, the police could not, in this case, be "substantially certain of the contents" of the video files before they opened them. The Court also rejected a second possible exception to the general rule; i.e., that "the police do not exceed the scope of a prior private search when they examine the same materials that were examined by the private searchers, but they examine these materials more thoroughly than did the private parties." The argument here was that the hard drive to defendant's computer is but a single container, and that going into the information downloaded onto Officer Clark's flash drive, which itself was later searched, was really no more than law enforcement looking at the contents of the hard drive in more detail. In rejecting this argument, the Court ruled that to consider a computer's hard drive as a single container is "wholly untenable." The fact that neither Statham, a computer specialist, nor Officer Clark were able to open the video files strongly suggests that defendant took precautions to maintain his privacy with respect to the video files. Statham's viewing of certain non-protected files in defendant's computer did not serve to compromise defendant's expectation of privacy in

the video files. Searching the computer beyond what Statham had already viewed, and then later contents of the flash drive, without a warrant was therefore illegal.

Note: The Court included a whole segment criticizing the current trend of referring to computers and cellphones as "containers of information;" a practice of which I am often guilty myself, and will probably continue to do until told not to by some higher court. Per this Court: "'Since electronic storage is likely to contain a greater quantity and variety of information than any previous storage method, . . . '[r]elying on analogies to closed containers or file cabinets may lead courts to "oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage."' [Citation.]" (Citing *United States v. Carey* (10th Cir. 1999) 172 F.3rd 1268, 1275.) Interestingly enough, however, most of the authority the Court cites here are container-search cases. To the extent, however, that this comment foretells the coming of a whole new body of law, dealing with all sorts of electronic storage devices, and requiring a whole new set of rules, I tend to agree. But otherwise, the rule of this case is "spot on." The officers here clearly went beyond the scope of the private search; a Fourth Amendment violation. It's a good rule for officers to keep in mind when faced with a similar situation.

***Intrusive Detentions vs. Arrests*:**
***Detentions and Anonymous Information*:**

***United States v. Edwards* (9th Cir. July 31, 2014) 761 F.3rd 977**

Rule: Detaining a suspect at gunpoint while having the suspect kneel as he is handcuffed does not necessarily convert a detention into an arrest, depending upon the circumstances. Anonymous information concerning a dangerous crime is sufficient to justify a detention so long as, under the circumstances, the information contains an indicia of reliability.

Facts: On May 21, 2012, at 7:40 p.m., an unidentified person called the Inglewood Police Department's 911 line to report that a young black male was shooting at passing cars, including the caller's. The caller told the dispatcher that the suspect was on the corner of West Blvd. and Hyde Park Blvd. In the five-minute phone call, the caller described the suspect as being between 5'7" and 5'9" tall and maybe 19 or 20 years old. The caller initially said that the shooter was wearing "all black" but later clarified that he was wearing a black shirt and gray khaki pants. The caller also reported that the shooter had a black handgun and, after shooting his gun, was entering "Penny Pincher's Liquor" store. Two minutes later (7:42 p.m.), the radio call went out to Officers Ryan Green and Julian Baksh. The dispatcher relayed the description as provided by the anonymous caller. The officers were told that the suspect was "now possibly inside Penny Pincher's Liquor." Officer's Green and Baksh arrived on the scene at around 7:45 p.m. and parked two blocks away. Defendant was soon seen walking eastbound approximately 75 feet from the liquor store. He matched the physical description of the shooter except that he was 5'11" tall and 26 years old. The only other person in the area was a male Hispanic wearing a green heavy jacket and blue jeans. Both defendant and the male Hispanic were detained at gunpoint by four officers, Officers John Ausmus and Landon Poirier having arrived to cover. Both males were ordered to kneel on the pavement. Officer Ausmus handcuffed defendant while still kneeling, and then stood him up to pat him down for weapons. A silver .22-caliber revolver was recovered from defendant's pant leg. Although the dispatcher had obtained a call back

number, attempts to recontact the anonymous caller were unsuccessful. Defendant was charged in federal court with being a felon in possession of a firearm. His motion to suppress the gun was denied, and he pled guilty. Defendant appealed from his 4-year prison sentence.

Held: The Ninth Circuit Court of Appeal affirmed. The Court first rejected defendant's argument that when stopped at gunpoint, he had in effect been arrested, and without probable cause. In considering the "totality of the circumstances," the Court found this stop to be a detention only. In reaching this conclusion, the Court considered two primary factors; (1) the intrusiveness of the stop, i.e., the aggressiveness of the police methods and how much the plaintiff's liberty was restricted, as viewed from the perspective of the person detained, and (2) the justification for the use of such tactics, i.e., whether the officer had sufficient basis to fear for his safety to warrant the intrusiveness of the action taken, as viewed from the perspective of the officer. While the stop was certainly intrusive, the officers' justification for the procedures used were warranted by the circumstances. Responding to a shooting call with its indisputable safety concerns requires more intrusive procedures than might otherwise be called for. The officers had sufficiently detailed information from the 911 call to reasonably believe that defendant was likely to be the shooter, and therefore could be "armed and dangerous," possibly having just committed a violent crime. Under these circumstances, therefore, the officers' actions did not convert the detention into an arrest. Defendant's second argument was that there was insufficient reasonable suspicion to justify even a detention. The landmark case decision on this issue is *Florida v. J.L.* (2000) 529 U.S. 266, where the U.S. Supreme Court held that anonymous information alone, without corroboration or other indicia of reliability, is insufficient to establish the reasonable suspicion necessary to justify a detention. However, subsequent case law has found that such corroboration does not need to be much; just something that can provide the necessary "indicia of reliability." Since *J.L.*, the Supreme Court has provided more guidance in what constitutes indicia of reliability. In *Navarette v. California* (2014) 134 S. Ct. 1683, the Supreme Court found the necessary corroboration in four circumstances: (1) The caller claimed eyewitness knowledge of the alleged dangerous activity, lending "significant support to the tip's reliability;" (2) the caller made a statement about an event "soon after perceiving that event," which is "especially trustworthy;" (3) the caller used 911, which "has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity;" and (4) the caller supplied reasonable suspicion of an ongoing and dangerous crime (drunk driving, in *Navarette*) rather than "an isolated episode of past recklessness." In this case, the caller, as in *Navarette*, reported an ongoing emergency situation even more dangerous than the suspected drunk driving in *Navarette.* The reporting party here had eyewitness knowledge of the shooting. And as in *Navarette*, the caller used the 911 emergency reporting system. This, the Court held, was sufficient to provide the necessary "indicia of reliability" to establish a reasonable suspicion to support defendant's detention. Defendant's motion to suppress, therefore, was properly denied.

Note: Not mentioned was the fact that the caller in this case left a callback number, although when the dispatcher attempted to recontact him, he had left the location, apparently deciding that he didn't want to get any more involved than he already had. But this case is but one more in a series of cases finding exceptions to the rule of *Florida v. J.L.*, which was never a very popular decision in the first place. The other problem is that most officers responding to a call such as the one here probably never know that the tipster was anonymous, and would have handled the

detention in the same manner even if they'd known that the information was provided anonymously. You just don't ignore a "man with a gun" call. Which all makes me wonder what would have been the result here had the real shooter been the poor Hispanic gentleman who was also detained at gunpoint even though he didn't match the description of the shooter.