Law Enforcement Digest

December 2017

Law enforcement officers: Thank you for your service, protection and sacrifice.

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HONOR ROLL

756 Basic Law Enforcement Academy – July 25, 2017 through December 1, 2017

President:	Deputy Cory Cruz, King County SO
Best Overall:	Officer Nathan Anderson, Everett PD
Best Academic:	Officer Nathan Anderson, Everett PD
Best Practical Skills:	Officer Westin Adams, Seattle, PD
Patrol Partner:	Officer Michael Phillips, Everett PD
Tac Officer:	Officer Russ Hicks, WSCJTC
	Officer Will Davis, Kent PD

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NINTH CIRCUIT COURT OF APPEALS

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CIVIL RIGHTS LAWSUIT: A REASONABLE JURY COULD FIND: (1) AN OFFICER VIOLATED A PERSON'S CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHTS BY SHOOTING AND STOMPING ON THE PERSON'S HEAD AFTER HE LAY PRONE ON THE GROUND; AND (2) AN OFFICER VIOLATED A PERSON'S CLEARLY ESTABLISHED DUE PROCESS RIGHTS BY STOMPING ON THE PERSON'S HEAD AFTER HE LAY PRONE ON THE GROUND.

Zion v. County of Orange, 874 F.3d 1072 (November 1, 2017).

FACTS (portions excerpted from the opinion):

Connor Zion suffered several seizures. He then bit his mother and cut her roommate with a kitchen knife. Police were called. Deputy A arrived at Zion's apartment complex. As Deputy A exited his police car, Zion ran at him and stabbed his arms. Deputy B drove up separately and witnessed the attack on Deputy A.

The patrol car dash cameras recorded the incident. The dash camera footage shows Zion running toward the apartment complex. Deputy B shoots him from about fifteen feet away. Nine shots are heard and Zion falls to the ground. Deputy B then runs to where Zion has fallen and fires nine more rounds at Zion's body from a distance of about four feet, emptying his weapon. Zion curls up on his side. Deputy B pauses and walks in a circle. Zion is still moving. Deputy B then takes a running start and stomps on Zion's head three times. Zion died at the scene.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Zion's mother filed a 42 U.S.C. § 1983 (Section 1983) lawsuit against Deputy B. The lawsuit did not challenge Deputy B's first nine round volley at Zion. Rather, the lawsuit alleged that Deputy B's second volley (fired at close range while Zion was lying on the ground) and the head stomping violated Zion's Fourth and Fourteenth Amendment rights. The District Court granted Deputy B's motion for summary judgment based on qualified immunity. The Plaintiff appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit disagreed with the District Court.

ANALYSIS (portions excerpted from the opinion):

A plaintiff may file a Section 1983 lawsuit against an officer for violating a person's constitutional rights. An officer is entitled to qualified immunity if: (1) the officer did not violate a constitutional right; or (2) the constitutional right was not clearly established at the time of the incident. Here, the Ninth Circuit considered whether Deputy B violated Zion's clearly established Fourth and Fourteenth Amendment rights.

1. Fourth Amendment

A use of force is excessive and violates the Fourth Amendment if it's objectively unreasonable under the circumstances. Courts evaluate the reasonableness of an officer's use of force with the non-exhaustive *Graham* factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. The most important factor is whether the

suspect posed an immediate threat. It is clearly established that an officer violates the Fourth Amendment by using deadly force against a person who no longer poses an immediate threat.

Here, by the time of the second volley, Deputy B had shot Zion nine times at relatively close range, and Zion had dropped to the ground. In the video, Zion appears to have been wounded and is making no threatening gestures. While Deputy B could not be sure that Zion was not bluffing or only temporarily subdued, Zion was lying on the ground and so was not in a position where he could easily harm anyone or flee. In this case, a reasonable jury could find: (1) that Deputy B should have held his fire unless and until Zion showed a sign of danger or flight; or (2) that the second round of bullets was justified, but not the head-stomping. Additionally, a jury could reasonably conclude that Deputy B could have sufficiently protected himself and others after Zion fell by pointing his gun at Zion and pulling the trigger only if Zion attempted to flee or attack. As such, a jury could find that Deputy B violated Zion's clearly established Fourth Amendment rights and is not entitled to qualified immunity.

2. Fourteenth Amendment

An officer's conduct that "shocks the conscience" violates a person's Fourteenth Amendment Due Process rights. An officer violates the Fourteenth Amendment if he/she acts with "a purpose to harm without regard to legitimate law enforcement objectives."

Here, Deputy B did not violate the Fourteenth Amendment by emptying his weapon at Zion. The two volleys came in rapid succession, without time for reflection.

The head stomps are different. After the two volleys, the video shows Deputy B walking around in a circle for several seconds before returning for the head strikes. He even takes a running start before each strike. This is exactly the kind of "brutal" conduct the Fourteenth Amendment's Due Process Clause protects against.

Here, a reasonable jury could find that Deputy B knew he had rendered Zion incapable of causing harm or fleeing. Deputy B had just fired eighteen bullets in Zion's direction, half of them at very close range while Zion lay on the ground. No competent officer could have failed to at least wound his target under these conditions. Deputy B then paused before delivering what appeared to be vicious blows to Zion's head. A reasonable jury could find that Deputy B knew or easily could have determined that he had already rendered Zion harmless. If so, a reasonable jury could conclude that Deputy B was acting out of anger or emotion rather than any legitimate law enforcement purpose. As such, Deputy B is not entitled to qualified immunity.

RESULT: The Ninth Circuit reversed the District Court.

CIVIL RIGHTS LAWSUIT: JAIL'S POLICY PROHIBITNG DELIVERY OF UNSOLICITED MATERIAL TO INMATES WAS REASONABLY RELATED TO A VALID PENOLOGICAL INTEREST AND DID NOT VIOLATE THE FIRST AMENDMENT.
Crime Justice & America, Inc. v. Honea, 876 F.3d 966 (November 29, 2017).

FACTS: (portions excerpted from the opinion):

Criminal Justice & America (CJ&A) is a magazine that contains articles intended to help inmates navigate the criminal justice system, as well as advertisements for attorneys and bail bondsmen. CJ&A provides the magazine to inmates for free. CJ&A's only source of revenue is the advertising it sells.

CJ&A distributes its magazine in one of two ways. In jails that allow "general distribution," stacks of the magazine are left in common areas each week. In other jails, copies of the magazine are individually addressed and mailed to one out of every ten inmates.

The Butte County Jail houses an average of 580-590 inmates each day. Due to staffing constraints, inmates are not directly supervised by a correctional officer for significant portions of the day. The jail instead employs "remote surveillance, direct observation" and "linear models of supervising, so corrections officers spend just a few minutes of every hour in each housing area, or briefly observe inmates from hallways without even entering housing areas. That means corrections officers are not physically present in all areas of the jail to continually monitor inmate behavior.

Abuse of paper is a persistent problem at the Butte County Jail. Inmates use paper to cover windows, speakers, and lights; to clog toilets and block air vents; to start fires; and to conceal contraband. Jail officials report that paper-related violations occur "every day." These violations are almost always committed using paper that inmates do not have a personal connection, such as pages torn out of phone books or donated paperbacks. "Personally owned papers" such as letters, photographs, and legal mail are almost never used for such purposes.

In an effort to combat paper-related violations, 31 electronic kiosks were installed throughout the jail, along with two portable kiosks. The kiosks allow inmates to access electronic versions of the jail handbook, administrative forms, and reading material. The kiosks can easily accommodate reading material uploaded in portable document format (PDF).

In 2004, CJ&A requested permission to distribute paper copies of its magazine at Butte County Jail every week. Each issue of the magazine has 36-40 pages, so granting CJ&A's request would have resulted in the introduction to the facility of at least 1,800 pages' worth of material every week. Butte County officials refused CJ&A's request, citing a longstanding but unpublished policy forbidding the delivery of unsolicited commercial mail to inmates. The month after CJ&A made its request, Butte County issued a departmental order that put this policy into writing.

PROCEDURAL HISTORY (portions excerpted from the opinion):

CJ&A filed a 42 U.S.C. § 1983 lawsuit against the Butte County Sheriff. In this lawsuit, CJ&A argued that the jail's ban on unsolicited commercial mail violates the First Amendment. The District Court held that the jail's mail policy did not violate the First Amendment. CJ&A appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit agreed with the District Court.

ANALYSIS (portions excerpted from the opinion):

The Ninth Circuit found that the Butte County jail's mail policy is reasonably related to legitimate penological interests. The Ninth Circuit reasoned:

1. The Butte County Jail's ban on unsolicited commercial mail is not an arbitrary form of volume control. The ban is a rational response to the fact that its inmates consistently misuse unsolicited paper in ways that threaten institutional security, such as covering windows and lights, blocking air vents and speakers, clogging toilets, passing notes, obstructing security cameras, and hiding contraband. Covering windows and lights makes it difficult for corrections officers to perform required safety checks, and it allows inmates to conceal their activities. Blocking speakers prevents corrections officers and inmates from communicating with each other. The dangers associated with

inmates using paper to obstruct security cameras and conceal contraband are self-evident. Additionally, inmates are far more likely to misuse paper with which they do not have a personal connection, such as pages torn from phone books or donated books, than paper that belongs to them, such as legal mail, personal letters, and photographs. Thus, the ban on unsolicited commercial mail is intended to limit inmates' access to the type of paper they are most likely to use improperly to compromise jail security.

2. The electronic kiosks are an adequate alternative to paper copies of unsolicited commercial mail. With the kiosks in place, there are 31 locations throughout the jail where inmates could access an electronic version of the magazine, plus two portable kiosks. The kiosks provide a meaningful way for CJ&A to offer its magazine to inmates.

3. The Butte County Jail uses supervision models that provide far less direct supervision than models employed in other counties. Therefore, distribution of unsolicited paper may cause more problems in the Butte County Jail than in other jails.

4. The Butte County Jail's installation of electronic kiosks indicates that the mail policy is not an exaggerated response. The kiosks were installed to eliminate as much paper as possible in the housing units, because inmates commit so many rule violations with paper. The kiosks are not just designed for reading material. Jail officials are trying to eliminate from housing units hard copies of inmate request forms, property release forms, sick slips, grievance forms, and the jail handbook.

RESULT: The Ninth Circuit affirmed the District Court.

CIVIL RIGHTS LAWSUIT: A WARRANTLESS SEARCH OF A PROBATIONER'S RESIDENCE (OVER A CO-RESIDENT'S OBJECTION TO THE SEARCH) WAS A REASONABLE SEARCH UNDER THE FOURTH AMENDMENT BECAUSE: (1) PROBATIONER WAS ON PROBATION FOR SERIOUS OFFENSES; (2) PROBATIONER HAD RECENTLY PARTICIPATED IN A VIOLENT FELONY; AND (3) PROBATIONER WAS STILL AT LARGE.
Smith v. City of Santa Clara, 876 F.3d 987 (November 30, 2017).

FACTS: (portions excerpted from the opinion):

Vahid Zarei reported to the San Jose Police Department that his car had been stolen. Zarei told police that he had just given Justine Smith a ride in the car and discovered that his spare key was missing. A few days later, Zarei's friend found the car in Santa Clara, California. Zarei and his friend then drove to Santa Clara to retrieve the car. When they arrived, but before they could get to the car, Justine and an unknown male entered the car and drove away. Justine was the driver. Zari and his friend followed the car. At some point, the car stopped and the unknown male exited Zarei's vehicle and stabbed Zarei in the stomach. The male got back into Zarei's case, and Justine drove away. Zarei was taken to the hospital with life-threatening injuries.

Police officers investigated the car theft and the stabbing. The officers met Zarei while he received treatment in the hospital. The officers showed Zarei a photo of Justine, and he identified her as the driver of the stolen car.

Officers later learned that Justine was on probation for three years in connection with felony convictions for grand theft and forgery. As a condition of her probation, Justine agreed to warrantless searches of her residence.

Police contacted the probation department to locate Justine's residence. Justine had reported her address to probation as 940 Gale Drive, which was the address of her mother's unit in a small, two-unit duplex. Justine had also reported her address to the Department of Motor Vehicles as 942 Gale Drive, which was the address for the other unit in the duplex.

Police surveilled the Gale Drive duplex but did not see Justine. After waiting awhile, they knocked on the door to 940 Gale Drive and announced, "Probation Search. Open the door." Josephine Smith (Justine's mother) opened the door, and said that Justine did not live there. Josephine demanded that the officers get a search warrant to enter her home. The officers explained that they needed to conduct a probation search for Justine. Josephine became angry and refused to let them in.

The officers entered the home despite Josephine's objections. The officers then told Josephine that they needed to search the 942 unit of the duplex, and may force entry if Josephine did not open the door to that duplex. Josephine gave the officers the key to the 942 unit.

PROCEDURAL HISTORY (portions excerpted from the opinion):

Josephine sued the officers under 42 U.S.C. § 1983 (Section 1983) and a California law that provides a cause of action for individual whose "rights secured by" federal or California law have been interfered with "by threat, intimidation, or coercion." The district court dismissed the Section 1983 claim based on qualified immunity. A jury found for the officers on the state law claims. Josephine appealed to the Ninth Circuit Court of Appeals, and argued that the officers should have obtained a search warrant when she refused to consent to the search. The Ninth Circuit disagreed.

ANALYSIS (portions excerpted from the opinion):

Under the Fourth Amendment, a search must be reasonable. An officer must have a search warrant or a recognized exception to the warrant requirement to search a home. One recognized exception to the warrant requirement is a probation search (i.e., a search of a probationer's residence under a state law or regulation that authorizes the search).

For probation searches, the question is whether a warrantless probation search that affects the rights of a third party is reasonable under the totality of the circumstances. To answer this question, courts balance the degree to which the search intrudes upon the third party's privacy against the degree to which the search is needed for the promotion of legitimate governmental interests.

Under the facts of this case, the Ninth Circuit found that the governmental interests at stake were sufficiently great that the warrantless search of the duplex, over Josephine's objection, was reasonable. The Ninth Circuit reasoned:

1. At the time of the search, the police knew that Justine was serving a felony probation term for serious offenses.

2. Police had probable cause to believe that Justine had just been involved in the theft of an automobile and a stabbing, and that she was still at large.

3. A governmental interest justifying warrantless probation searches is the need to protect the public from the probationer, who is more likely than the ordinary citizen to reoffend.

4. Once the government has probable cause to believe that the probationer has actually reoffended by participating in a violent felony, the government's need to locate the probationer and protect the public is heightened. This heightened interest in locating the probationer is sufficient to outweigh a third party's privacy interest in the home that she shares with the probationer.

RESULT: The Ninth Circuit affirmed the District Court.

LED EDITORIAL NOTE: The Ninth Circuit's opinion cautioned that its holding is limited to the facts of this case, i.e., police had probable cause to believe that the probationer, who was on probation in connection with serious offenses, had just participated in a violent felony and was still at large. The Ninth Circuit did not comment on whether searching a probationer's residence (over the objection of a present and objecting co-resident) would be reasonable under the Fourth Amendment if the probationer is not on probation for serious offenses, or is not involved in a new, serious offense.

Additionally, this case involved a police officer's authority to search a probationer's residence under California law. Washington law differs as to a police officer's authority to search a probationer's residence. As always, officers are encouraged to discuss these issues with their agency legal advisors and local prosecutors.

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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