

APPENDIX E

Sidebar Colloquy Preceding Court's Approval of Trick Jury Instruction, During Which the LA City Defendants' Counsel Cory Brente (Along with Judge Wilson) Euchred Promises from Ferguson-Cassidy's Counsel That They Would Refrain from Asserting During Closing Argument That Officer Maynard's Action in Moving from a Position of Secluded Cover into Face-to-face Proximity to Ferguson-Cassidy (ie. The Ambush Itself!) Was Part of What Made Maynard's Shooting of Ferguson-Cassidy Unreasonable. See Plaintiff's Rule 28(j) Letter and CFC_EOR_164[Last Line]-172[line9]

Rule 28(j) Letter to Panel Dated Nov. 14, 2017 (Day of Oral Argument) by Eric C. Jacobson
Ninth Circuit Docket Entry 52-1

Transcript of Proceedings Held September 9, 2015 Outside the Presence of the Jury (AKA "Sidebar" Discussion) Regarding the So-called "Negligence Jury Instruction" and Muzzling of Plaintiff's Counsel: CFC_EOR_164[Last Line]-172[line9]

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November 14, 2017

Honorable Jacqueline H. Nguyen,
Honorable Andrew D. Hurwitz and
Honorable Richard K. Eaton.
Judges of the Ninth Circuit Court of Appeals

***Re: Cash Ferguson-Cassidy v. City of Los Angeles,
Officer Jacob Maynard, et al., Ninth Circuit Case No.
15-56573 Oral Argument Held November 14, 2017***

Honorable Judges:

Under Federal Rule of Appellate Procedure 28(j) I write in follow-through with my representation at oral argument herein this morning that I would provide the court with the passages of the transcript in the Excerpt of Record that substantiated my assertion that the trial judge and defendants' counsel (in sum) "pulled a fast one" in inserting the so-called "negligence instruction" at the last minute, and further muzzled plaintiffs' counsel during oral argument. I made these points in the AOB at pp 33-35 at §3 and in the Reply Brief at pp.31-33 at §3. Having just re-read the passage, found at CFC_EOR_161-172, I believe my description today of the side-bar discussion as in the nature of placing "handcuffs" on or engaging in "psychological warfare" towards plaintiffs' counsel, is apt:

Plaintiffs' counsel were ordered not to characterize Maynard's breaking of cover as a precipitating factor in the shooting purportedly because such a "negligent" act cannot be the basis of civil liability for using excessive force. This is "nonsense on stilts" substantively in ways too numerous to mention here. But obviously Maynard's breaking of cover is part of the "totality of circumstances" that constituted the shooting (which consists of a continuum of acts), and in no way should plaintiff's counsel have been deterred from characterizing Maynard's actions as "objectively unreasonable" during closing argument in any way plaintiffs' counsel saw fit! It was (after all) closing argument!

What makes the attached colloquy (literally just prior to oral argument) even more diabolical is that while the defendants' attorneys and (alas) the district court were thus "running circles around" plaintiffs' counsel, jerry-rigging a so-called "negligence instruction" and concomitantly assiduously micro-managing plaintiffs' counsel leeway during oral argument, they were knowingly promulgating jury instructions that OMITTED entirely to direct the jury to consider as a factor in the jury's "objective reasonableness or unreasonableness" analysis under *Graham v. Conner* either Maynard's non-announcement of his presence prior to the shooting or "whether the communication of a warning in advance of using deadly force was practical and whether such a warning was given" per Ninth Circuit Model Jury Instruction 9.25[8]. Doubtless they were hoping the plaintiffs' counsel wouldn't notice and object to this glaring plain error! And they evidently didn't as I acknowledged in the Reply brief and today.

The effect of the latter omission meant that even if plaintiffs' counsel had argued during closing argument that the failure to announce and/or warn were reasons for the jury to find for plaintiff, the jury would not have had any law to apply (and they are of course told that what lawyers say is neither evidence or the law). And likewise, as to Judge Hurwitz's query, the jury cannot possibly be inferred to have considered and concluded that a warning was impracticable (to use the styling of *Harris v. Roderick*) or impractical (to use the styling in Model Jury Instruction 9.25[8]) because the jury hadn't been instructed AT ALL to consider the non-announcement or non-warning in their deliberations on the overall civil liability issue in this case, namely whether Officer Maynard's shooting of Mr. Ferguson-Cassidy was or was not objectively reasonable.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Eric C. Jacobson", with a long, sweeping flourish extending to the right.

Eric C. Jacobson
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03:20:51

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11:37:55

(Proceedings resumed in open court)

2

(Related testimony reported, not transcribed herein.)

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MS. SMITH: I have no further questions.

4

THE COURT: Thank you, sir.

11:40:45

MR. NEWMAN: Thank, Your Honor.

6

THE COURT: The evidence is now complete.

7

What remains is for me to instruct you on the law

8

which you must follow. You can find the facts however you

9

decide. And I have to confer with the parties. This is my

11:41:00

suggestion: I'm going to ask you -- maybe it's a little off

11

your schedule -- but to take lunch early -- and so that we

12

don't waste time -- and come back at a quarter to 1:00. When

13

you come back at a quarter to 1, 00 I'll be ready to give my

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instructions, which will be 15 minutes or so; then the lawyers

11:41:25

will have a chance to sum up or argue, and then you decide the

16

case. Okay.

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(Proceedings held outside the presence of the jury:)

18

THE COURT: I'm giving you each a copy of the

19

instructions that I propose to give. They're substantially

11:42:20

based upon the instructions in the Ninth Circuit Model

21

Instruction book regarding excessive force claims and 1983.

22

Would you take a look at those.

23

MS. SMITH: Yes.

24

Your Honor, before we get into that, if I could

11:42:25

remind the court that the defendants did reserve their Rule 50

11:42:38 motion from yesterday.

2 THE COURT: What is the Rule 50 motion?

3 MS. SMITH: Our motion to dismiss this case based
4 upon the evidence that's been presented during this trial.

11:42:48 THE COURT: Motion is denied.

6 MS. SMITH: Thank you, Your Honor.

7 The defendants also have an additional special jury
8 instruction we would like to submit to the court, and I have it
9 before the court.

11:42:49 THE COURT: First look at the ones I have, and
11 then -- they're pretty standard. I given those instructions in
12 recent excessive force cases. They're well established.

13 MS. SMITH: Your Honor, defendants have reviewed the
14 packet that the court provided, and we would like to submit our
11:44:45 additional instruction.

16 THE COURT: Let me see your instruction.

17 MR. GILBERT: Your Honor, if I may, two other
18 instructions we filed previously.

19 THE COURT: Which are those? Let me see those.

11:46:08 MR. GILBERT: Thank you, Your Honor.

21 MR. DUNCAN: Could we see copies of those?

22 MR. GILBERT: We served with them previously on
23 Counsel.

24 THE COURT: I'm rejecting both of the instructions,
11:46:25 No. 5 and 6 proposed by the plaintiff. In my view, the

11:46:47 instructions that I have proposed adequately deal with the
2 issues.

3 MR. GILBERT: May I be heard on that, please?

4 THE COURT: On what?

11:47:05 MR. GILBERT: On --

6 THE COURT: I've read them. What more do you want
7 to ...

8 MR. GILBERT: Your Honor, both respond to the
9 arguments of plaintiff's expert as to how the officer should
11:47:16 respond. They're not covered in the standard instructions that
11 have been proposed by the court. There's no instruction on the
12 reasonable expectations of the officers and whether they are
13 required to wait to see a weapon or whether they can
14 perceive --

11:47:31 THE COURT: That's not a question of law; it's
16 specific to each situation, and you can't guide a jury by
17 giving them a broad principle that may not have a fit to these
18 facts. You can argue those matters to the jury, and you can
19 argue that one expert or the other is not to be credited; but
11:47:38 when you ask to instruct a jury, you're telling them that
21 something is so as a matter of law, and all these situations
22 are fluid, and in my view, the instruction that covers the
23 factors to be considered in an excessive force claim adequately
24 guide the jury.

11:48:25 MR. GILBERT: Your Honor, the proposed instruction

11:48:2B from the court does not provide any instruction on what
2 movement can or -- what can cause --

3 THE COURT: But that should be the subject of
4 testimony, expert testimony, and what the officers testified
11:48:39 and what the jury believes was objectively reasonable under the
6 circumstances. I think it's covered.

7 MR. GILBERT: Thank you, Your Honor.

8 THE COURT: Just one moment.

9 I've just read the case that the city submitted, this
11:56:30 *Billington* case. First, it's not a case that discusses the
11 applicability of a jury instruction, it's a qualified immunity
12 case in the context of summary judgment. But I don't
13 understand initially how it would help the jury here in light
14 of the way the case was presented because the -- the
11:57:23 plaintiff's position isn't that the defense provoked the
16 plaintiff. The plaintiff maintains that he just came out of
17 the house, with or without the gun, and didn't hear a warning
18 and was shot. The defense says that he came out of the house
19 with a gun in his hand, was given a five-word warning, and shot
11:58:00 on the heels of that warning. I don't understand where a
21 question of a negligent tactic becomes relevant.

22 MR. BRENTE: May I address it, Your Honor?

23 THE COURT: Yes.

24 MR. BRENTE: Thank you.

11:58:24 This, I think, has been the theory of their case, and

11:58:38 it was -- came out to the testimony of their expert that --
2 about Officer Maynard should have stayed against that wall and
3 shouldn't have stepped out to see the plaintiff. He shouldn't
4 have stepped out to see his hands, and when he did, he exposed
11:58:58 himself, which put him danger -- "him" being Officer Maynard --
6 and he shouldn't have yelled out that command and not expected
7 the plaintiff to turn in his direction, and he was all blacked
8 out. All those things that they're going to be arguing suggest
9 exactly this, that it did provoke a response from the
11:59:10 plaintiff. They're going to say, "Well, if you believe Officer
11 Maynard's version, it was him that caused all this to occur.
12 It was his negligence, his actions that if it happened, caused
13 the plaintiff to turn in his direction; so he's the one that's
14 responsible.

11:59:30 And this instruction and the *Billington* case, I think
16 makes clear that that won't give rise to a Fourth Amendment
17 violations. It might give rise to state tort cause of action,
18 but it won't give rise to a Fourth Amendment violation because,
19 as the court knows, under *Daniels v. Williams*, which I know
11:59:40 this court is familiar with, negligence will not give rise to a
21 Fourth Amendment violation. So I think the jury needs to be
22 instructed on that because that's been the theory of their case
23 through their witnesses, and particularly their expert and the
24 cross-examination of our expert.

12:00:08 THE COURT: How does the plaintiff respond? Are you

12:00:07 familiar with this case?

2 MR. NEWMAN: No, I'm not --

3 THE COURT: This case essentially discusses a
4 situation where an officer was criticized for not following
12:00:39 proper police tactics which resulted in a shooting, and the
6 argument is that even if the officer didn't follow correct
7 procedures and it was that failure to follow procedures that
8 created the heightened situation, if he was responding to a
9 objectively reasonable threat of harm to himself he could use
12:01:10 deadly force.

11 So in this case, the argument is that even if the
12 officer shouldn't have moved from the protection of the wall,
13 that -- I mean, your argument is he shouldn't have moved from
14 that and that if he hadn't, this wouldn't have happened; is
12:01:45 that the argument?

16 MR. NEWMAN: That's somewhat part of the argument,
17 Your Honor.

18 THE COURT: What is the rest of it?

19 MR. NEWMAN: The rest of the argument is he did not
12:01:30 act as a reasonable officer; he never identified himself as a
21 police officer; he had covered up his uniform --

22 THE COURT: I know that, but the part that the
23 defendant is now discussing is not the notice, so forth. It's
24 just the issue of how the plaintiff intends to argue Maynard's
12:02:29 moving from behind the wall to -- as he put it -- to see the

12:02:41 hands of the plaintiff.

2 And is your argument going to be that the
3 plaintiff -- if you find that Maynard shouldn't have moved from
4 his spot of protection, that he, even if you accept the defense
12:03:15 version, it could have been avoid, and therefore the shooting
6 was excessive?

7 Is that going to be your argument?

8 MR. NEWMAN: No, not really.

9 THE COURT: What is it going to be?

12:03:28 MR. NEWMAN: The moving from that point of cover is
11 not the driving force that caused this. The fact that he was
12 not -- not visible as a police officer and he never identified
13 himself is a police officer, those are the main factors, along
14 with the fact we don't believe there was ever a gun in
12:03:43 Mr. Cassidy's hand.

16 THE COURT: I know all of that, and that's just
17 something for the jury to decide, but the question is, is your
18 argument going to be something along the lines of, You ought to
19 find for the plaintiff because if the defendant hadn't moved
12:04:00 from his point of cover and confronted the plaintiff, the whole
21 episode wouldn't very have happened and the shooting wouldn't
22 have happened; therefore, the shooting was excessive because
23 the -- because Maynard exercised bad judgment in moving from
24 behind the wall to get a better look at the plaintiff?

12:04:25 MR. NEWMAN: No, we're not going to argue that.

12:04:42 We're going to argue the exercised bad judgment when he used
2 excessive force shooting Mr. Cassidy.

3 THE COURT: If he doesn't argue that, then it's not
4 necessary.

12:04:55 MR. BRENTE: Your Honor, I'm not going to argue with
6 the court --

7 THE COURT: And as part of the -- the problem is in
8 these cases, even in the case *Billington*, they ultimately
9 revert back to discussing *Graham v. O'Connor*, and all these
12:05:16 cases recognize that that's the the bellwether for all these
11 situations, that the *Graham v. O'Connor* instructions are the
12 best formulation.

13 Now, if the argument was going to be that you ought
14 to find for the plaintiff because if Maynard had not moved from
12:05:53 behind that wall, none of this would have happened, that's
16 another matter; but he said he's not going to be argue that.

17 MR. BRENTE: Well, just to be clear. I still think
18 it's relevant, and that's my view; so I've made my record. But
19 I guess I would say I find it hard it believe that's not going
12:06:20 to get mentioned by them, but I'm going to take them at their
21 word, and I'm going to be jumping up if anyone making an
22 argument on that side starts to mention anything about Maynard
23 moving away from that wall, because I'm accepting the
24 representation -- as the court is -- that they're not going
12:06:25 there.

12:06:27 THE COURT: And they're shaking their head that's
2 correct.

3 MR. DUNCAN: We have been warned. We realize what
4 the court has said, and we will keep our promise.

12:06:35 THE COURT: You see you at --

6 MR. DUNCAN: Your Honor --

7 THE COURT: -- Yes.

8 MR. DUNCAN: -- may I have one comment on instruction
9 No. 5?

12:06:40 I do not recall any evidence being introduced for a
11 limited purpose. If I'm wrong --

12 THE COURT: I think you're right. I'll take that one
13 out.

14 MR. DUNCAN: Thank you. 12:05 p.m.

12:07:05 (Noon recess)

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18

19 **LOS ANGELES, CALIFORNIA; WEDNESDAY, SEPTEMBER 9, 2015;**

20 **12:50 P.M.**

21

22

23 (Proceedings held outside the presence of the jury:)

24

12:50:25 THE COURT: Before the jury comes down, to make it
absolutely clear: In terms of the scope of the argument -- of

12:50:18 course it begins with *Graham versus O'Connor* -- the question
2 that's pivotal is the reasonableness of a particular use of
3 force from the perspective of a reasonable officer on the scene
4 rather than with the 20/20 vision of hindsight, but even under
12:50:39 *Billington*, events leading up to the shooting are relevant to
6 the extent they inform the reasonableness of the shooting
7 itself.

8 What plaintiff must not argue on the facts of this
9 case is if you find Officer Maynard unreasonably created the
12:50:50 situation where the accidental or purposeful use of deadly
11 force upon Cassidy would become likely, such conduct would be a
12 violation of Cassidy's Fourth Amendment right to be free from
13 unreasonable seizures. So I just wanted to make it clear that
14 you're not restricted from discussing his cover and all that as
12:51:25 part of the overall analysis of the events. What you can't say
16 is that if he hadn't gotten -- he was wrong to step behind the
17 wall, and if he hadn't done this, then none of this would have
18 happened. That's impermissible.

19 MR. BRENTE: May I address that?

12:51:40 THE COURT: Yes.

21 MR. BRENTE: Well, at the bottom of an instruction
22 that wasn't given -- it's a Ninth Circuit Model, it's 9.18, I
23 believe -- is the concept that negligence is insufficient to
24 establish a Fourth Amendment violation. It's the very bottom
12:51:55 paragraph of 9.18. It talks about negligence not being enough

12:52:01 to establish constitutional violation I ask the court give some
2 instruction on that concept.

3 THE COURT: Let me just get the ...

4 (Pause in the proceedings)

12:52:54 THE COURT: 9.18.

6 MR. BRENT: Your Honor, I believe in the last
7 paragraph -- it's in brackets, I believe -- at the end of 9.18.

8 THE COURT: How did you propose the language?
9 Negligence -- what did you say?

12:56:54 MR. BRENT: Well, I was just paraphrasing my
11 understanding of *Daniels versus Williams*, which is essentially,
12 you know, negligence -- negligence will not give rise to a
13 constitutional violation. Negligent acts by an officer will
14 not give rise to a constitutional violation; his acts must
12:57:15 be -- I'm just paraphrasing. That's why I was proposing to
16 essentially add what's in the bracketed part of 9.18 either on
17 a separate page or on the boat of the current 9.22, which, I
18 think, is page 13 of the current --

19 THE COURT: The problem is the instruction as it's
12:57:26 now given does not contain the word "intentionally." Maybe the
21 best thing to do is to start with the second sentence,
22 beginning, "Thus, the plaintiff must prove the defendant meant
23 to engage in the acts that caused a seizure of the plaintiff's
24 person" -- I guess not the seizure --

12:58:23 MR. BRENT: Right.

12:58:0B THE COURT: -- maybe just the last sentence,
2 "Although the plaintiff does not need to prove the defendant
3 intended to violate the plaintiff's Fourth Amendment rights, it
4 is not enough if the plaintiff only proves defendant acted
12:58:20 negligently."

6 MR. BRENTE: Yes.

7 THE COURT: I think I'll give that, just that part
8 because that seems appropriate. Okay.

9 Bring the jury down.

12:58:30 THE CLERK: Yes, Your Honor.

11 MR. BRENTE: Your Honor, so as to not violate any --

12 (Open Court - Jury Present)

13 THE COURT: Okay.

14 Members of the jury, now that you have heard all the
12:59:45 evidence, you will shortly hear the arguments of the lawyers,
16 it is my duty to instruct you on the law as it applies to this
17 case. A copy of these instructions will be sent with you to
18 the jury room when you deliberate. You must not infer from
19 these instructions or from anything I may have said or done as
01:00:00 any indication that I have an opinion regarding the evidence of
21 what your verdict should be. It is your duty to find the facts
22 from all the evidence in the case. To those facts you will
23 apply the law as I give it to you. You must follow the law as
24 I give it to you whether you agree with it or not, and you must
01:00:25 not be influenced by any personal likes, dislikes, opinions

9th Circuit Case Number(s)

15-56573

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s/ Eric C. Jacobson

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