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No Body Armor for Violent Felons: Chapter 21 Reinstates the James Guelff Act

Scott Walker

Code Section Affected

Penal Code § 12370 (amended).

SB 408 (Padilla); 2010 STAT. Ch. 21 (*Effective June 2, 2010*).

I. INTRODUCTION

In 1994, for reasons unexplained, a drifter named Victor Lee Boutwell went on a rampage—he was armed with two semi-automatic pistols, a fully automatic pistol, two assault rifles, and thousands of rounds of ammunition.¹ Worse still, he was wearing full body armor and a Kevlar helmet.² After stealing two vehicles and evading law enforcement for over two hours, Boutwell confronted police near San Francisco's Pacific Heights neighborhood.³ Officer James Guelff was the first to respond and immediately drew Boutwell's fire.⁴ Though Guelff was able to return fire, Boutwell's body armor stopped the rounds.⁵ Tragically, as the officer reloaded his service revolver, a bullet from Boutwell's assault rifle ended Guelff's life.⁶ By the time police managed to kill Boutwell, the gunman had also shot and injured a homeless man, a paramedic, and another officer.⁷

Just three years later, a similar standoff took place during a bank robbery in North Hollywood.⁸ There, Emil Matasareanu and Larry Phillips Jr. robbed a bank armed with semi-automatic handguns and automatic assault rifles.⁹ Like Boutwell, the men also wore body armor.¹⁰ Almost immediately, swarms of law enforcement responded, surrounding the bank.¹¹ Despite being vastly outnumbered, the heavily armed and armored robbers were able to hold officers

1. Jim Herron Zamora, *26 S.F. Cops to Get Medals of Valor*, SFGATE.COM, Feb. 1, 1996, <http://www.sfgate.com/cgi-bin/article.cgi?f=/e/a/1996/02/01/NEWS13549.dtl> (on file with the *McGeorge Law Review*).

2. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1707, at 3 (Mar. 24, 1998).

3. David Margolick, *25 Minutes of Terror in San Francisco*, N.Y. TIMES, Nov. 15, 1994, at A20.

4. *Id.*

5. *Peace Officer Memorial*, BEHINDTHEBADGE.NET, http://www.behindthebadge.net/pmemorial/pmem_g.html (last visited Mar. 17, 2011) (on file with the *McGeorge Law Review*).

6. *Id.*

7. Margolick, *supra* note 3.

8. B. Drummond Ayres Jr., *Police Kill 2 Bank Robbery Suspects in a Wild Gun Battle*, N.Y. TIMES, Mar. 1, 1997, available at <http://www.nytimes.com/1997/03/01/us/police-kill-2-bank-robbery-suspects-in-a-wild-gun-battle.html?scp=1&sq=Bank%20of%20America%20robbery%20North%20Hollywood&st=cse>.

9. T. Christian Miller, *Bank Donates Vehicle to LAPD as Officers Revisit Shootout Scene*, L.A. TIMES, Mar. 1, 1998, at B3.

10. Beth Shuster, *Robbers May Be Linked to Denver Heist*, L.A. TIMES, Mar. 8, 1997, at B1.

11. See Ayres, *supra* note 8 (noting that someone activated the bank's alarm causing the police to respond rapidly).

at bay for almost an hour¹²—largely due to the protection their body armor afforded.¹³ Over the course of the gun battle, the gunmen wounded five civilians and eleven police officers.¹⁴ The standoff ended when authorities fatally wounded both gunmen.¹⁵ Miraculously, only Matasareanu and Phillips died.¹⁶ Chapter 21 seeks to prevent such drawn-out and dangerous standoffs by curing constitutional defects in a law that prohibited violent felons from using body armor.¹⁷

II. LEGAL BACKGROUND

In 1998, the Legislature enacted the James Guelff Act of 1998 (Guelff Act), which criminalized the ownership, purchase, or possession of body armor by persons convicted of violent felonies.¹⁸ In 2009, the Second District Court of Appeal struck down the Guelff Act on due process grounds, holding that its definition of body armor was unconstitutionally vague.¹⁹ Shortly thereafter, legislators introduced Chapter 21 in an effort to reinstate the Guelff Act.²⁰

A. *The Guelff Act*

The Legislature originally enacted the Guelff Act in response to an increase in incidents involving the use of body armor in the commission of violent crimes, such as the Boutwell standoff and the North Hollywood shootout.²¹ The Guelff Act declared it a felony for a person previously convicted of a violent felony to own, purchase, or possess body armor.²² The drafters enacted the Guelff Act “to help stem the tide of recent criminal incidents which create a dangerously threatening environment for both police officers and citizens,” namely, using body armor in the commission of violent crimes.²³ Many considered the law a

12. *See id.* (“The police tried to keep the bandits from escaping the bank but were initially outgunned.”).

13. Dana Bartholomew, *44 Minutes of Terror; Bank Heist Leaves Scar on Valley Residents*, DAILY NEWS OF L.A., Feb. 28, 2007, at N1 (noting that many of the rounds fired by the police simply bounced off the robbers’ armor).

14. Claire Vitucci, *Remembering Day of Violence, Valor*, L.A. TIMES, Feb. 18, 1998, at B4.

15. Ayres, *supra* note 8. There is some uncertainty as to whether the police actually killed Phillips. This is because Phillips shot himself with a pistol in the same moment that he was struck by an officer’s bullet. *North Hollywood Gunbattle Autopsies Out*, UNITED PRESS INT’L, Apr. 10, 1997.

16. Vitucci, *supra* note 14.

17. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 6 (Apr. 22, 2010).

18. CAL. PENAL CODE § 12370(a) (West 2009).

19. *People v. Saleem*, 102 Cal. Rptr. 3d 652, 669 (2009).

20. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at G-H (Jan. 19, 2010).

21. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1707, at 1-2 (Mar. 24, 1998).

22. CAL. PENAL CODE § 12370(a).

23. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 1707, at 1 (Mar. 24, 1998). As the Los Angeles City Council observed in a supporting statement, “[t]he department is concerned that as more incidents occur and become known to the public, more persons of criminal intent, including ex-felons, will use body armor in the commission of their crimes. *Id.* The use of body armor in the commission of crimes

vital public safety measure,²⁴ and courts and prosecutors continually enforced it for over a decade.²⁵ In 2009, despite the apparent value to public safety, the Second District Court of Appeal invalidated the Guelff Act in *People v. Saleem*.²⁶

B. People v. Saleem and the Constitutionality of the Guelff Act

In 2007, police officers investigating a suspicious vehicle encountered one of the passengers, Ethan Saleem, wearing a military-style flak jacket.²⁷ The officers believed the jacket was body armor within the meaning of the Guelff Act and arrested Saleem after he said he had a previous conviction for voluntary manslaughter.²⁸ A jury convicted Saleem of violating the statute.²⁹ On appeal, Saleem argued that the Guelff Act was void for vagueness because “its definition of body armor did not give him fair notice of the characteristics making his body vest illegal.”³⁰

The court agreed, explaining, “the core due process concern underlying the void for vagueness doctrine is fair notice.”³¹ Fair notice “requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited”³² Therefore, it was necessary to decide whether the Guelff Act’s definition of body armor provided such notice.³³

The law defined body armor by reference to a definition found in the Code of Regulations.³⁴ The Regulations explain that “‘body armor’ means those parts of a complete armor that provide ballistic resistance to the penetration of the test ammunition for which a complete armor is certified.”³⁵ The court first observed that this definition was provided in the context of body armor *certified for use by law enforcement*³⁶ and required a determination of whether a particular garment

by ex-felons limits police officers’ options in controlling criminal acts” *Id.* at 2.

24. *E.g.*, SENATE COMMITTEE ON PUBLIC SAFETY, ANALYSIS OF SB 408, at G (Jan. 19, 2010) (referring to SB 408 as a “critically important public safety measure”); Brent Begin, *Repeal of Body Armor Ban Draws Police Ire*, S.F. EXAMINER, Jan. 6, 2010, <http://www.sfexaminer.com/local/Repeal-of-body-armor-ban-draws-ire-80768262.html> (discussing law enforcement agencies’ outrage at the Second District Court of Appeals’ decision to rule the Guelff Act unconstitutional).

25. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 408, at 2 (Jan. 21, 2010).

26. *People v. Saleem*, 102 Cal. Rptr. 3d 652, 670 (Cal. Ct. App. 2d Dist. 2009).

27. *Id.* at 669. An expert in the Saleem trial testified that such flak jackets were intended to protect against “shrapnel from exploding mines and hand grenades, not bullets.” *Id.* Nevertheless, the vest bore a label identifying it as “body armor.” *Id.* at 670.

28. *Id.* at 655-56.

29. *Id.* at 655.

30. *Id.* at 664.

31. *Id.* at 669.

32. *Id.* at 660.

33. *Id.* at 667.

34. *See* CAL. PENAL CODE § 12370(a) (West 2009); CAL. CODE REGS. tit. 11, § 942(e).

35. CAL. CODE REGS. tit. 11, § 942(e) (2010).

36. *Saleem*, 102 Cal. Rptr. 3d at 658-59.

met the prescribed certification standards.³⁷ The court held this determination was beyond the common experience of most people since the definition required expert knowledge of ballistics and bullet resistant materials.³⁸

The court explained that, under the Regulations' technical definition, "only an expert would know if any particular protective body vest was proscribed by [the Guelff Act]."³⁹ Moreover, "[e]ven if Saleem had read [the Guelff Act] and the Regulations, he could not have reasonably ascertained his vest possessed the characteristics making it illegal"⁴⁰ Accordingly, the court reversed Saleem's conviction.⁴¹

III. CHAPTER 21

Chapter 21 redefines "body armor" as "any bullet-resistant material intended to provide ballistic and trauma protection for the person wearing the body armor."⁴²

IV. ANALYSIS

After the Court of Appeal held the Guelff Act unconstitutional, Chapter 21's proponents sought to reinstate the law by redefining body armor in terms that ordinary people would understand.⁴³ By adopting a more common-sense definition taken from the Penal Code, proponents believe Chapter 21 will resurrect the popular law.⁴⁴

A. *The New Definition of "Body Armor"*

Chapter 21 borrows the new definition of body armor from a related section of the Penal Code rather than the Code of Regulations.⁴⁵ Under the Regulations' definition, a person needed expert knowledge of ballistics, bullet-resistant materials, and certification standards in order to determine whether the statute proscribed a particular garment.⁴⁶ By contrast, the new definition requires no such

37. *Id.* at 669.

38. *Id.*

39. *Id.* at 667.

40. *Id.* at 670.

41. *Id.*

42. CAL. PENAL CODE § 12370(f) (amended by Chapter 21).

43. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 4-6 (Apr. 22, 2010).

44. *Id.*

45. CAL. PENAL CODE § 12022.2(c) (West 2009) ("As used in this section, 'body vest' means any bullet-resistant material intended to provide ballistic and trauma protection for the wearer.").

46. *Saleem*, 102 Cal. Rptr. 3d at 669. Curiously, as the *Saleem* court observed, there is no explanation for why the technical definition was incorporated over other existing definitions such as the "body vest" definition ultimately adopted by Chapter 21. *Id.* at 666 n.5.

expert knowledge since the plain language conveys a generalized notion of body armor that most people would understand—“any bullet-resistant [garment] intended to provide ballistic and trauma protection”⁴⁷ While this new definition is broader than the previous definition,⁴⁸ the authors expect the general enforcement scheme to remain unchanged.⁴⁹

B. General Acceptance of the Guelff Act, Then and Now

Prior to *Saleem*, many regarded the Guelff Act as an important public safety measure.⁵⁰ As a result, the state enforced the law for over a decade notwithstanding the vague definition.⁵¹ In fact, the goal of keeping body armor from violent felons gained such widespread support that Congress enacted a similar federal law in 2001.⁵² Accordingly, once the Court of Appeal held the Guelff Act unconstitutional, law enforcement groups swiftly called for the law’s reinstatement.⁵³

Given the general acceptance of the prior law, it is not surprising that Chapter 21 was similarly well-received.⁵⁴ The Legislature passed it unanimously at every stage⁵⁵ without any registered opposition.⁵⁶ Outside the Legislature, however, Chapter 21 did face some limited opposition. For example, Gerald Peters, the attorney who represented the defendant in *Saleem*, said the call to reinstate the Guelff Act was ““a propaganda campaign to convince people that police are going to die.””⁵⁷ Consequently, Chapter 21 may face future constitutional challenges—perhaps on Second Amendment grounds—as has been the case with laws creating similar restrictions.⁵⁸

47. CAL. PENAL CODE § 12370(f) (amended by Chapter 21).

48. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 5 (Apr. 22, 2010).

49. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 408, at 2 (Jan. 21, 2010) (“This bill does not expand the reach of state law, as it was enacted, only as it can be enforced currently. In the absence of *People v. Saleem*, this law and its sentencing expenses would have continued as had been practice for more than a decade.”).

50. *E.g.*, SENATE COMMITTEE ON PUBLIC SAFETY, ANALYSIS OF SB 408, at G (Jan. 19, 2010) (referring to SB 408 as a “critically important public safety measure”); Begin, *supra* note 24 (discussing police outrage over the repeal of SB 408).

51. SENATE APPROPRIATIONS COMMITTEE, ANALYSIS OF SB 408, at 2 (Jan. 21, 2010) (noting that the Guelff Act had been enforced successfully for more than a decade).

52. James Guelff & Chris McCurley Body Armor Act of 2001, 18 U.S.C. § 931 (2010).

53. Begin, *supra* note 24. For example, shortly after the *Saleem* ruling, pressure from San Francisco Police Chief George Gascón and the Los Angeles Police Protective League, among others, led Attorney General Jerry Brown to petition the California Supreme Court to review the lower court’s decision. *Id.*

54. *E.g.*, Senate Floor Vote of SB 408, Unofficial Ballot (Jan. 28, 2010), http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0401-0450/sb_408_vote_20100128_1141AM_sen_floor.html.

55. *Id.*

56. ASSEMBLY COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at 7 (Apr. 22, 2010).

57. Begin, *supra* note 24.

58. *See, e.g.*, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (involving a constitutional challenge on Second Amendment grounds of a law prohibiting the possession of firearms by a person subject to a temporary protective order). The U.S. Supreme Court recently framed a discussion of Second Amendment

V. CONCLUSION

Chapter 21 essentially reinstates the Guelff Act by revising the definition of body armor.⁵⁹ Although the law was well received and successfully enforced from 1998 to 2009,⁶⁰ the Court of Appeal held it unconstitutional in 2009 because it found the definition of body armor to be impermissibly vague.⁶¹ Chapter 21 overcomes this constitutional defect by replacing the previously vague and overly-technical definition with an explicit, common-sense definition.⁶² In this way, Chapter 21's proponents believe the new definition will provide sufficient notice of the types of body armor prohibited, thereby satisfying constitutional due process notice requirements.⁶³

Although the revised definition may face new constitutional challenges in the courts, given the definition's plain language and common-sense approach, Chapter 21 is likely to withstand such challenges.⁶⁴ Rather, the more debatable issue will likely be whether a particular garment falls within the new definition of body armor.⁶⁵

protections in terms of interpersonal conflict and self-defense, interpreting the phrase "bear arms" to mean to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." District of Columbia v. Heller, 128 S. Ct. 2783, 2793 (2008) (quoting *Muscarello v. United States*, 524 U.S. 125, 130 (1998)). Thus, given this focus on self-defense, an argument can be made that the right to bear arms encompasses the use of body armor since arms and armor are arguably complementary means of self-defense.

59. SENATE APPROPRIATIONS COMMITTEE, COMMITTEE ANALYSIS OF SB 408, at 2 (Jan. 21, 2010).

60. *Id.* at 1-2.

61. *People v. Saleem*, 102 Cal. Rptr. 3d 652, 664-70 (2009).

62. See CAL. PENAL CODE § 12370(f) (amended by Chapter 21) (redefining "body armor" as "any bullet-resistant material intended to provide ballistic and trauma protection for the person wearing the body armor").

63. See SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF SB 408, at G-J (Jan. 19, 2010) (proposing that the new definition will overcome the problems identified in *Saleem* without specifically discussing due process fair notice requirements).

64. See *Saleem*, 102 Cal. Rptr. 3d at 666 n.5 (appearing to suggest, indirectly, that the adoption of the definition of body vest found in Penal Code section 12022.2(c) could overcome the constitutional notice problems posed by the previous definition).

65. See *id.* at 658-59. (implicitly recognizing that a conviction based on the former version of the Guelff Act required a given piece of body armor to satisfy the statutory definition).