San Diego District Attorney

D.A. LIAISON LEGAL UPDATE

(COPY - - DISTRIBUTE - - POST)

Vol. 18 February 8, 2013 No. 2
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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*The beauty of the Second Amendment is that it will not be needed until they try to take it*." (Thomas Jefferson)

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ADMINISTRATIVE NOTES:

***Firearms and Out-of-State Concealed Weapons Permits*:** An issue that was always a mystery to me while actively employed was the validity of out-of-state CCW permits (or "*CWP*," for "*Concealed Weapons Permit*") issued to a resident of another state traveling in California. I've since discovered that such an out-of-state permit is simply not recognized in California. Thus, the standard firearms-control statutes may be enforced just as they would with any California resident who doesn't have a CCW permit. My source for this information is an extremely informative pamphlet available for $13.95 from www.gunlawguide.com. Another

similar source is available through www.mylegalheat.com for an even $15.00. (I have no financial or other interest in either of these companies.) I discovered these sources upon submitting my own applications for CWP permits from my new home state of South Dakota, as well as non-resident permits from Utah and Arizona, a combination of which will qualify me to carry concealed in some 39 states (but not California). Both of these publications include a pile of information about carrying firearms in all 50 states and the District of Columbia, as well as Canada and Mexico. If this issue is of interest to you, I'd highly recommend either or both pamphlets. It's also an eye-opener to discover that outside the borders of California (and a limited number of other states; e.g., Illinois, New York, New Jersey, and Washington D.C.), there is a *whole* different attitude towards the Second Amendment reflecting a much broader acceptance of the right to bear arms. These pamphlets also illustrate the simple fact that the California Legislature is definitely in the minority in its paranoia of all things related to firearms. You might find it interesting to see what the rest of the country's thinking is on this hot-button topic. (Note my current "*Words of Wisdom*," above.

***CASE LAW*:**

Detentions and Patdowns:

People v. Mendoza **(Nov. 10, 2011) 52 Cal.4th 1056**

Rule: A detention and patdown of persons at night, by an outnumbered police officer, when one subject is hostile and the other is visibly wearing a knife sheath, is lawful.

Facts: In November, 1995, defendant, a member of a street gang, was released on parole from the California Youth Authority (now Division of Juvenile Facilities). Two of his conditions of parole were that he not possess any deadly weapons and not associate with gang members. On the evening of May 10th, 1996, defendant was in the company of other gangsters (violation #1), including his 18-year old gang-member girlfriend, Johanna Flores. He had in his possession a loaded Haskell .45-caliber handgun (violation #2). Defendant left this group to go meet yet another gangster named "Sparky." They met Sparky, who was carrying a knife in a sheath hanging from his belt, near some train tracks at about 1:30 a.m. As defendant, Flores and Sparky walked through a dark industrial area, Pomona Police Officer Daniel Tim Fraembs, alone and on patrol and in uniform, drove up behind them. Officer Fraembs got out of his marked patrol car and asked, "*How are you guys doing tonight*?" Flores described Officer Fraembs as "real nice," and not mean or sarcastic. She thought that Officer Fraembs might have stopped them for maybe curfew, but "nothing major." Defendant, being "rude" and "a jerk," responded with "an attitude," saying something like; "*What the hell are you stopping us for*?" Apparently being put on his guard, and possibly noting Sparky's knife, Officer Fraembs told defendant and Flores to "*have a seat there*;" indicating the curb. He called Sparky over to the patrol car and began to pat him down for weapons. As Officer Fraembs was doing this, defendant slowly moved up closer behind Officer Fraembs and

pointed his gun at the officer from a distance of about 2½ feet. Defendant fired once into the officer's face, killing him. Defendant immediately fled on foot, as did everyone else, but was eventually identified as the murderer and arrested. He was charged in state court with first degree murder and three special circumstances; that defendant intentionally killed a police officer (P.C. § 190.2(a)(7)), that he committed murder for the purpose of avoiding a lawful arrest (P.C. § 190.2(a)(5)), and that he intentionally killed the victim by means of lying in wait (P.C. § 190.2(a)(15)). A jury convicted defendant and found all three circumstances to be true. Defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court unanimously affirmed defendant's conviction and sentence. One of the issues on appeal was the sufficiency of the evidence supporting the death penalty special circumstance allegations that defendant murdered a police officer, per P.C. § 190.2(a)(7), and that he murdered a police officer to avoid a lawful arrest, per P.C.§ 190.2(a)(5). Defendant's motion to strike these two allegations at trial were denied. His argument was that Officer Fraembs was not acting lawfully in performing his duties when he was killed. Both allegations require as a necessary element that the murdered police officer be acting in the lawful performance of his duties at the time. Per defendant's argument, because Office Fraembs had stopped and detained him without a reasonable suspicion that he and his companions were involved in criminal activity, the detention and subsequent patdown were illegal. Thus, Officer Fraembs was not acting lawfully. The Supreme Court, agreeing with the trial court, rejected this argument. The prosecution presented testimonial and physical evidence establishing that Officer Fraembs was in full uniform and driving a marked patrol car at 1:30 a.m. when he saw two males and one female walking on a lonely industrial street. Defendant was dressed in black pants with a black bomber-style jacket while Sparky wore a baggy T-shirt and baggy pants with a knife sheath attached to his belt. Although Officer Fraembs was not alive to explain his reasons for stopping defendant and his companions, certain inferences may be reasonably drawn from the evidence. Officer Fraembs could have reasonably believed that the three people he observed needed help, apparently stopping to determine this. Flores testified that Officer Fraembs came across as "real nice," asking, "*How are you guys doing tonight*?" At this point, the contact was nothing more than a "consensual encounter." There is nothing unlawful with a police officer walking up to and contacting private citizens in public while making non-accusatory conversation. Such consensual encounters need not be supported by any suspicion of criminal activity. Although Fraembs asked his question in a friendly and non-accusatory manner, defendant, who was "a lot taller" than Officer Fraembs, responded with "an attitude," being "rude" and a "jerk," and saying something like; "*What the hell are you stopping us for*?" Also, Sparky had a knife on his belt. Officer Fraembs, apparently seeing Sparky's knife, told defendant and Flores to have a seat on the curb while he called Sparky over to the patrol car for the purpose of patting him down for weapons. Although defendant conceded the lawfulness of the consensual encounter, he contests the patdown, arguing that at that point the contact became an illegal detention. Unlike a consensual encounter, a detention is a seizure within the meaning of the Fourth Amendment. A detention, requiring only that the officer reasonably believe that the person to be detained either is, was, or is about to be involved in criminal activity, occurs when an officer restrains a person's liberty by

force or show of authority. A consensual encounter may turn into a lawful detention when an individual's actions give the appearance of potential danger to the officer. In this case, it was the middle of the night. Officer Fraembs was a lone officer with no one in the immediate vicinity who might offer assistance, outnumbered by three people including one confrontational, much taller male, and a second wearing a knife on a sheath. Both males were wearing clothing loose enough to conceal other weapons. To justify a patdown for weapons, it need only be shown that there is a reasonable suspicion to believe a person may be armed. The evidence as it existed at this point, per the Court, provided sufficient grounds to support Officer Fraembs' decision to temporarily detain the three individuals and to check them for weapons. The Court therefore concluded that the prosecution's evidence was sufficient to support the trial court's finding that Officer Fraembs acted lawfully when he detained defendant and his companions for the purpose of conducting a patdown for weapons. Because Officer Fraembs was acting lawfully, and because, as required by P.C. § 190.2(a)(5), defendant believed that he would have been arrested had he been discovered to have a concealed pistol on his person, both special circumstance allegations were properly alleged and found to be true by the jury. These special circumstances, therefore, were upheld.

Note: Fortunately, there were enough of defendant's acquaintances who turned against him, despite witness intimidation-type threats, to fill in the blanks about what happened that terrible night in Pomona. But given his character (or lack therefore), as evidenced by the pride he showed in "killing a cop," bragging about it afterwards to any number of people, many of his former friends were quick to turn against him. Johanna Flores, his girlfriend, was so disturbed by the events of that night that she was the one who originally turned him in and, despite receiving threats and having to have her entire family relocated, testified against him. Good work by the gang cops and prosecutors who pieced this case together. The fact that Ronald Bruce Mendoza is still alive and breathing is a good argument for retaining the death penalty.

***The* "*Minimal Intrusion Doctrine*:"**

***People v. Robinson* (Aug. 7, 2012) 208 Cal.App.4th 232**

Rule: The warrantless use of a key known to have been possessed by a dangerous fleeing suspect, inserting it into a door lock of a residence, if a search at all, is not an unreasonable search, and is thus lawful under the "*Minimal Intrusion Exception*" to the search warrant requirement.

Facts: On February 17, 2004, at about 10:00 a.m., Richmond Police Officer Amy Bublak heard 14 or 15 gunshots coming from the 300 block of Sanford Avenue. As Officer Bublak drove her patrol car in the direction of the gunfire, she observed a silver Volkswagen on Sanford moving towards her. Officer Bublak moved her patrol car to a position that forced the Volkswagen to stop with its passenger door facing her. The passenger in the Volkswagen, later identified as defendant, leaned out of the window and aimed a rifle at Officer Bublak for about 10 seconds before driving off with Officer Bublak in pursuit. Stopping mid-block on Sanford, defendant and the driver jumped out

of the car and fled on foot. As they did so, defendant turned briefly and again pointed the rifle at Officer Bublak before continuing his flight. The two subjects escaped, apparently being arrested at a later time under circumstances not described in the Court's written decision. Responding officers found a number of expended cartridges in front of the various residences along Sanford. Officer Bublak recovered a set of keys from the ignition of the abandoned Volkswagen. Trying the keys on the front door lock at 321 Sanford, it was found that the key did in fact unlock the door. The officers made a warrantless entry into 321 Sanford, observing in plain sight heroin, marijuana, drug packaging materials, ammunition, and photographs of defendant. Richmond detectives later obtained a search warrant for 321 Sanford, noting in the warrant affidavit the fact that the key from the Volkswagen opened the front door lock. The officers' plain sight observations made during the initial search of the house were also included in the warrant. Execution of the warrant resulted in the recovery of the above-listed items. Neighbors were located who described observing defendant arguing with others over a drug sale, retrieving an assault rifle from 321 Sanford, and getting into a firefight with the other men. Defendant then fled the shooting scene in the Volkswagen, driven by his brother, just before being confronted by Officer Bublak. A gang expert testified that in his opinion, the shooting was likely defendant, a member of a criminal street gang, protecting his turf from unauthorized drug dealings by outsiders. Charged in state court with a number of assault, weapons, and drug-related offenses, defendant moved to suppress all the evidence recovered from 321 Sanford. He contended that the warrantless entry of his residence after the shooting was unlawful, and that issuance of the search warrant was based on the police officers' observations during that illegal search. Although the trial court found no exigency justifying the warrantless entry, and thus illegal, it concluded that the warrant affidavit, after deleting the plain sight observations made during that first unlawful entry, contained sufficient probable cause to justify the issuance of the search warrant. The trial court further found that the police would have sought the warrant even without the information gained during the illegal entry. The court therefore denied defendant's motion to suppress the evidence recovered during the execution of the search warrant. The reference to using the door key in defendant's front door lock was left in the affidavit. Defendant was convicted and appealed.

Held: The First District Court of Appeal affirmed (although the case was remanded to the trial court for resentencing due to errors not relevant here). The issue was whether the use of the door key in defendant's door was a search, and if so, was it illegal. If found to be illegal, then it constituted a fact that should also have been deleted from the warrant affidavit. The reason this is a major issue here is the subsequent U.S. Supreme Court decision of *United States v. Jones* (Jan. 23, 2012) 565 U.S. __ [132 S.Ct. 945]. In *Jones* (the infamous GPS case), it was held that in assessing whether police activity constitutes a search, a court must consider whether the Common Law Fourth Amendment concept of a governmental trespass had been violated. In this case, the issue is whether it was a Fourth Amendment trespass to defendant's property, and thus a Fourth Amendment violation, when Officer Bublak used defendant's key to verify where defendant might be living, and perhaps to where he and his brother had fled. Defendant's contention was, in determining whether the warrant affidavit was sufficient, the Court should not have considered the fact that the key retrieved from the Volkswagen unlocked the front door

lock at 321 Sanford. The Court first rejected defendant's argument that the key insertion was a part of the subsequent illegal residential entry. The fact that the initial warrantless entry by the searching officers into defendant's house was illegal does not mean that the use of the key was also illegal. The two acts are separate and not dependent upon each other. "While the acts of *inserting the key* into the lock and *entering the house* were part of a continuous activity, the information obtained from inserting the key into the lock was nonetheless discrete from the information obtained from the illegal entry because the use of the key in the lock need not have led to entry of the residence at all." The Court next noted that whether or not the warrantless insertion of a key into a lock constitutes a search, and thus a Fourth Amendment violation, is subject to a difference of judicial opinion. But while the *Jones* decision might make a difference in that analysis (tending to indicate that it *is* a search), the Court found this to be an issue that is not relevant in this case, and need not be decided. The "touchstone" of the Fourth Amendment is "*reasonableness*," and that reasonableness is determined "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy, and, on the other, the degree to which it is needed for the promotion of legitimate governmental interest." With this constitutional principle in mind, the Court found that the so-called "*Minimal Intrusion Doctrine*" applies. While recognizing that this is not a universally recognized concept, with no California cases on the issue, and that not even the U.S. Supreme Court has labeled it as such, it was noted that the Supreme Court did in fact validate the concept when it specifically held in another case that, "(w)hen faced with special law enforcement needs, diminished expectations of privacy, *minimal intrusions*, or the like, [it] has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." (Italics added; *Illinois v. McArthur* (2001) 531 U.S. 326.) "The minimal intrusion exception to the warrant requirement rests on the conclusion that in a very narrow class of 'searches' the privacy interests implicated are 'so small that the officers do not need probable cause' for the search to be reasonable." Citing a number of cases that have discussed the concept, if not the rule itself, this Court found that when balanced with the governmental interest of making a quick determination of where a dangerous shooting suspect might live or have fled, with the "minimally intrusive action" of putting a door key into a person's front door and turning it, such a search, if a search at all, is reasonable and thus not in violation of the Fourth Amendment. With one caveat, and that is that the search must be justified by other circumstances such as reasonable suspicion and legitimate governmental interests, the Court found that such minimally intrusive searches to be lawful. Lastly, the fact that the defendant's front door was within the curtilage of his home, which also enjoys Fourth Amendment protection, does not alter the result. With the front door being in an area open to the general public, there was no privacy violation in approaching the door and inserting the key. As a result, the Court ruled that the information the police gained by testing the key in the front door lock of defendant's residence was properly considered by the trial court in determining whether the warrant issued was supported by probable cause.

Note: If you've never heard of the "*Minimal Intrusion Doctrine*," you are not alone. While the courts have been talking about "*reasonableness*" being important to finding exceptions to the search warrant requirement for a long time, this is apparently one of the first courts to put this label to the theory. And that's all it is; *a label*. Further, it is a very

limited theory in its application. So, short of using a key in an otherwise accessible lock, under circumstances where there is a strong governmental interest involved (e.g., such as when chasing a shooting suspect, as in this case), I wouldn't even attempt to try to walk that tight rope by thinking you can avoid getting a search warrant in any circumstance where a more extensive "search" is involved, by claiming it to be "minimally intrusive."

***Miranda*; *Readmonishment in Successive Interrogations*:**
***Tape-Recording Interrogations*:**

People v. Pearson **(Jan. 9, 2012) 53 Cal.4th 306**

Rule: Readmonishment of an in-custody suspect in successive interrogations is generally not required so long as the interrogations are reasonably contemporaneous.

Facts: In December, 1998, Penny Sigler's battered and sexually abused nude body was discovered on a freeway embankment off of Interstate 405 in Long Beach. Sigler had suffered some 114 injuries, including 25 fractures, blunt force trauma to her head and neck, and indications that she'd been strangled. She also suffered trauma to her genitalia, perineum and anus, with a splinter of wood found in her vagina. Defendant, in the company of two acquaintances—Warren Hardy and Jamelle Armstrong—got drunk at the nearby home of a friend, Monty Gmur. Defendant, Hardy and Armstrong left Gmur's home at around 10:00 p.m. The next morning, defendant told Gmur that the three of them had killed a woman although he claimed that Hardy had been the principal actor. A few days later, Gmur contacted the police and told them what defendant had told him. Long Beach Police Detective Bryan McMahon interviewed defendant on January 6**.** Defendant was advised of his *Miranda* rights which he acknowledged in writing and waived. A tape recorder wasn't turned on until defendant began his statement. Initially, defendant denied any involvement in Sigler's death. He then changed his story, admitting that he, Hardy and Armstrong had contacted the victim, but claimed that Hardy was the one who killed her by stomping and kicking her, and that Hardy and Armstrong had repeatedly "jabbed" a stick into her vagina. His only involvement, according to his story, was to help move her body over a fence and onto the freeway embankment and helping dispose of her clothing. Hardy and Armstrong were arrested the next day. After interviewing them, Detective McMahon went back to defendant for a second interview on January 7th. No *Miranda* admonishment was provided for this second interview although he was asked if he remembered his rights from the day before. Informing defendant that his version of the facts was not consistent with what Hardy and Armstrong claimed, McMahon told defendant that he "needed to tell the truth and take responsibility" for his own actions. Defendant then provided a significantly more incriminating version of the events, admitting to having robbed and raped the victim. Charged with first degree murder with special circumstances, defendant's motion to suppress his incriminating statements was denied by the trial court. At trial, defendant testified in his own defense. To the jury, he gave another version of the facts which essentially blamed Hardy and Armstrong with all the violence, claiming he attempted to stop them. A jury convicted defendant of first degree murder and found that the murder was committed in the course of a robbery, kidnapping, rape, and sexual penetration by a

foreign object, and that it involved the infliction of torture. After the penalty phase, he was sentenced to death. His appeal to the California Supreme Court was automatic.

Held: The California Supreme Court affirmed his conviction, but reversed the death penalty finding due to the trial court's improper excusal of a prospective juror. As to the guilt phase issues, defendant argued that his motion to suppress his January 7th confession (the second interview) was improperly denied due to the lack of a fresh *Miranda* admonishment. At the trial hearing on the motion to suppress, Detective McMahon testified he first interviewed defendant on January 6, starting around 1:00 p.m. and ending around 6:45 p.m. Detective McMahon advised defendant of his *Miranda* rights by reading aloud from a written form placed on the table between them, which defendant then signed indicating he understood his rights and wished to speak with the detective. After giving his first statement, where he denied any direct involvement in the murder, defendant remained in the interview room until 4:00 or 5:00 a.m. the next morning. His solitude was interrupted occasionally by the detectives who came in to verify various facts. He was then taken to jail. Defendant was brought back from the jail on January 7th at 3:30 p.m. At the initiation of this second interview, Detective McMahon asked defendant if he remembered his rights from the day before. Defendant said he did. The trial court found that defendant had understood and voluntarily waived his *Miranda* rights on the 6th, and that he still had his rights in mind on the 7th. Following *People v. Mickle* (1991) 54 Cal.3rd 140, the trial court found that the January 7th interview was reasonably contemporaneous with the previous administration of the *Miranda* advisement and defendant's waiver on the 6th, especially in light of the "continuous" law enforcement contact with him between the two events. The Supreme Court agreed. The rule is well-settled that readvisement is unnecessary where a subsequent interrogation is "*reasonably contemporaneous*" with a prior knowing and intelligent waiver. In evaluating this issue, a court is to examine the totality of the circumstances, including the amount of time that had passed since the waiver, any change in the identity of the interrogator or the location of the interview, any official reminder of the prior advisement, the suspect's sophistication or past experience with law enforcement, and any indicia that he subjectively understood and waived his rights. Under the circumstances of this case, approximately 27 hours had passed between the advisements and waiver on January 6th and the subsequent interview on the 7th. Defendant not only remained in continuous custody but was, for much of the time, in contact with the investigating officers throughout. Before agreeing to the second interview, moreover, defendant was asked if he remembered his *Miranda* rights from the day before, and he said he did. Despite defendant's lack of familiarity with the criminal justice system, having no prior convictions, there was more than sufficient evidence here that defendant still had his rights in mind at the time of the second interview. Defendant's admissions made during his second interview, therefore, were properly admitted into evidence against him. Defendant further complained that Detective McMahon failed to tape-record the entire interview conducted on January 6th. The failure to do so, according to defendant, was a due process violation under the Fifth and Fourteenth Amendments in that a complete record of the waiver and interview is necessary in order to later facilitate an evaluation of voluntariness. Here, the tape-recorder was not turned on until after the *Miranda* advisal, and just before defendant began his statement to the detective. In finding no violation of

defendant's rights, the Court noted that it is not constitutionally required that officers tape any or all of an interrogation. Federal due process is violated only when the government, in bad faith, fails to preserve evidently exculpatory evidence. Here, the detective testified that to immediately place a tape-recorder in front of a suspect from the beginning only tends to encourage him to "clam up." This falls well short of a showing that the detective acted in bad faith. No due process violation, therefore, was caused by this practice.

Note: The primary issue here, resulting from the detective's failure to provide a new *Miranda* advisal and waiver in the second interview, was really not that close. And it was significantly bolstered by the detective asking defendant whether he remembered his rights from the day before. Kudos to the detective for asking him that simple question. A second interview the day after an earlier admonishment generally isn't going to be an issue, particularly when the suspect is asked if he still has his rights in mind. But any longer than that (e.g., two days or longer), you're pushing the envelope. I'd go with a whole new admonishment. As for the tape-recording issue, my recommendation is to tape-record the entire interview, from beginning to end. To do anything short of this provides defendants with a good argument to a jury that you are hiding something. To keep a suspect from being tempted to "clam up,' as detective McMahon put it, can be handled in other ways such as by telling him that the recorder is there for his benefit to insure nothing is taken out of context, which also is a good sound-bite for a jury to hear.

***Tasers and the Use of Force*:**

Mendoza v. City of West Covina **(May 8, 2012) 206 Cal.App.4th 702**

Rule: Using a Taser on an unresisting, complaint criminal suspect constitutes excessive force.

Facts: Forty two-year-old David Mendoza walked out of a West Covina hospital at about 3:30 a.m., on March 17, 2007, where he was being treated for alcohol withdrawal sickness (i.e., the "D.T.s"). He walked from there to the nearby backyard of someone's home where he tried to get inside through a window. Police, responding to the homeowner's call for help, found Mendoza sitting on a nearby curb. West Covina Officer Enrique Macias arrested Mendoza for burglary. But after hearing Mendoza's complaints about stomach pains, hearing voices, diabetes, and high blood pressure, Officer Macias took Mendoza back to the same hospital to get him medically cleared for booking. At the hospital, Mendoza submitted willingly to a physical exam and to providing a urine sample. He was then put into a chair and handcuffed to its arm. All was going well until a nurse came at him with a tourniquet and a needle, at which point Mendoza's cooperative attitude ended. Saying that he didn't want a needle in his arm, he began to get excited. Officer Macias's attempts to calm Mendoza down, fearing that he might use the chair to which he was handcuffed as a weapon, only seemed to cause Mendoza to become increasingly agitated. So Officer Macias decided to use his Taser. Warning Mendoza that he would be tased if he didn't settle down didn't help. Finally, Officer Macias tased Mendoza, using the Taser in the "drive" (as opposed to the "dart") mode, causing them both to fall to the ground. At least one witness later testified to this

first Taser application being administered while Mendoza was still sitting in the chair. Other officers arrived to help and Mendoza was pinned to the ground. Witnesses described three or four officers all "on top" of a struggling Mendoza, some holding him down by placing their feet on his head and on his back. These witnesses also described a scene where Office Macias used his Taser on Mendoza up to 5 or 6 times. The computerized log from the Taser Macias used showed that it had been discharged 14 times, at least once for as long as 30 seconds, although there was evidence that the Taser's log was inaccurate. Also, in attempting to get Mendoza to quit resisting, Officer Macias punched him 5 or 6 times with his fist. All the while, witnesses described Mendoza as saying things like; "*Please God, make it stop. Make it stop. Please help me*." Eventually, the officers were able to get Mendoza onto his stomach and he was handcuffed behind his back. About this time, however, Mendoza quit breathing. Attempts to resuscitate him failed, and he died. Mendoza's two sons later sued in state court for wrongful death, alleging that Officer Macias used excessive force in violation of their father's constitutional rights. During the ensuing civil jury trial, a forensic pathologist testified that Mendoza died due to "restraint asphyxiation," from the force of being pinned to the ground. Also, a "use of force" expert testified that Macias's initial use of the Taser was unnecessary and excessive because Mendoza had merely expressed his refusal to submit to the intravenous blood draw and was not making any threatening moves at that time. A jury awarded the sons $750,000 each for the wrongful death of their father. The jury also found that Officer Macias had acted with "malice, oppression and/or fraud." The court assessed punitive damages against Officer Macias in the amount of $4,500. Officer Macias and the City of West Covina appealed.

Held: The Second District Court of Appeal (Div. 8) affirmed. Officer Macias's primary argument on appeal was that he was shielded from civil liability under the theory of "qualified immunity." Although this lawsuit was filed in state court, federal statutes were used as the basis for the suit. 42 U.S.C. § 1983 provides that every person who, under color of statute, deprives a citizen of his rights pursuant to the United States Constitution or federal law, shall be liable in an action at law. However, the United States Supreme Court has created a "qualified immunity" exception for public officers under limited circumstances. The qualified immunity rule shields public officers from section 1983 liability *unless* the officer has violated a clearly established constitutional right. In determining whether a police officer is entitled to qualified immunity, a court must accept the alleged facts in the light most favorable to the plaintiff, ignoring for the time being the civil defendant's version of the facts. If in so doing, it is apparent that no constitutional right had been violated, then the officer is not liable. But if a constitutional violation *did* occur under the facts as alleged by the plaintiff, then the officer is liable only if the right which was violated is "clearly established." Whether the right is clearly established turns on whether the case law at the time of the alleged constitutional violation made it sufficiently clear that every reasonable officer would have known his conduct violates that right. In evaluating these issues in the context of an excessive force claim, a court must consider several factors: (1) The severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or trying to evade arrest by flight. Officer Macias argued in this case that his use of force was not excessive under the

circumstances, but that even if it was, the standards for using fists and Tasers was not "clearly established," thus entitling him to claim qualified immunity. In support of this argument, Officer Macias cited the Ninth Circuit case of *Mattos v. Agarano* (9th Cir. 2011) 661 F.3rd 433 (See *Legal Update*, Vol. 17, #2, Feb. 27, 2012). In *Mattos*, it was held that despite the use of Tasers in each of two separate fact scenarios being held to be excessive force, the law was not sufficiently settled at that time to deny immunity to the officers involved. In the present case, however, there was at least one witness who testified to Macias tasing Mendoza once in the chest before Mendoza was even out of the chair to which he was handcuffed. The Court then went on to cite other cases, published and unpublished, holding that using various types of force, including Tasers, on a compliant, nonresistant suspect violated clearly established constitutional rights. Based upon this analysis, the Court found that "Mendoza had a clearly established constitutional right to be free from being "Tasered," punched, and pinned to the floor so hard on his stomach that he "asphyxiated." Although there was evidence to the effect that Mendoza continued to disobey Macias's repeated commands to sit down and to quit resisting, it was also evident that the tasing and punching continued long after Mendoza had been subdued and was pinned to the floor by up to four officers. "Taken as a whole, the combined effect of this evidence supports a finding (by the jury) that Macias punched and 'Tasered' a nonresisting and compliant man that he knew was emotionally troubled and physically ill, and continued to do so when Mendoza did no more than flinch from the pain and cry for help. It also shows that Macias was responsible for the restraint that caused Mendoza to asphyxiate both as an active participant who was atop Mendoza and because he did not fulfill his duty to ensure that Mendoza was able to breathe while he was being pinned and handcuffed. . . . (S)uch conduct violated a clearly established constitutional right." As such, Officer Macias was not entitled to qualified immunity.

Note: The evidence, of course, was in conflict as to the amount of force used, and when in the sequence of events it all occurred. The above description of the facts represents the plaintiffs' version, which the jury apparently believed. Officer Macias testified to a much more controlled set of circumstances involving a much more aggressive Mendoza. But either way, this case is indicative of criticisms consistently coming from both state and federal courts concerning the increased use of the so-called "less lethal" weapons provided to law enforcement. While it was the act of sitting on Mendoza that actually led to his death, this case is more directed towards the use of the Taser and when it might be legally appropriate. This case, and those that have come before it, reflect an apparent belief by some officers (not necessarily including Officer Macias) that they can indiscriminately use all the less-lethal weapons provided to them at the slightest provocation, just so long as they don't use a firearm. The courts are trying to warn us all that you can't just pull out your pepper spray, Taser, night stick, nunchucks, beanbag shotguns, or whatever other less-lethal weapons you might have at your disposal, and expect its use to be approved merely because you were able to avoid shooting the suspect. All these weapons, "less lethal" or not, can still easily cause the death of the suspect, or at the very least, serious bodily injury, and are therefore going to be restricted in their use by the courts.