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Remember 9/11/01; Support Our Troops

THIS EDITION'S WORDS OF WISDOM:

"*Never do anything you wouldn't want to explain to the paramedics*." (Unknown author)

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***ADMINISTRATIVE NOTES*:**

***DNA Swabs and Felony Arrestees*:** The United States Supreme Court just ruled that anyone arrested for a "serious offense" (as defined by Maryland statutes) may constitutionally be required to supply a DNA sample by buccal swab as a part of the routine booking procedures. It is not necessary that the arrestee first be convicted, or even that there be a judicial finding of probable cause. (*Maryland v. King* (Jun. 3, 2013) __ U.S.__ [2013 U.S. LEXIS 4165].) Maryland defines a

"*serious offense*" as including murder, rape, first-degree assault, kidnaping, arson, sexual assault, and a variety of other serious crimes. This same issue is presently before the California Supreme Court in *People v. Buza* (2011) 197 Cal.App.4th 1424, testing the constitutionality of California's DNA and Forensic Identification Database and Data Bank Act of 1998; P.C. §§ 295 et seq. California's relevant statutes are also being reviewed by the Ninth Circuit in *Haskell v. Harris* (9th Cir. 2012) 669 F.3rd 1049. California Penal Code sections 295 et seq. allow for the taking of a DNA sample from a person arrested for *any felony offense* (P.C. § 296(a)(2)(C)), which is obviously broader than allowed under Maryland's statutes. Also, Maryland's statutes specifically limit the use of the DNA sample to establishing a person's identity. California contains no such limitation even though it is stated that the purpose of the statutes is to aid "in the accurate identification of criminal offenders." (P.C. § 295(d); see also P.C. § 295(c)) There are other significant limitations contained in Maryland's statutes that are not included within California's statutes, along with a few other procedural differences. So it isn't necessarily a forgone conclusion that the California Supreme Court's eventual decision in *Buza*, or the Ninth Circuit's decision in *Haskell v. Harris*, will necessarily follow the U.S. Supreme Court's lead on this issue. We'll just have to wait and see.

***CASE LAW*:**

***Parole Interrogations and Custody*:**
***Two-Step Interrogation Tactics*:**

<u>*United States v. Barnes*</u> (9th Cir. Apr. 18, 2013) 713 F.3rd 1200

Rule: A perceived parole interview does not necessarily mean that *Miranda* is not required. A two-step interrogation tactic negates the effectiveness of a *Miranda* waiver.

Fact: Defendant, while on parole, was contacted by an FBI informant named George Craig in an FBI-controlled, recorded telephone call. Per their agreement, defendant was to provide Craig with illegal drugs in a meeting at the Anchorage, Alaska, airport, which Craig was then to take to another person in Hawaii. When the FBI agents failed to make it to the airport in time to search Craig or monitor the transfer, Craig did the dope deal all on his own. After the agents finally got there Craig gave them a package of methamphetamine which he told them he'd gotten from defendant. A few months later, at the request of the FBI, defendant's parole agent scheduled a meeting with him. Although not one of his regularly scheduled meeting, the terms of defendant's parole required that he comply. He was not told, however, that the purpose of the meeting was to be interviewed by the FBI. Knowing that by failing to show up for the meeting his parole could be revoked, defendant arrived as instructed. He was first searched and then escorted into the interior of the building through an electronically locked door. Normally, no such search or escort was required. Upon being led into the parole agent's office, defendant found himself confronted by two FBI agents. The agents told him that they knew he had been involved in a drug transaction at the Anchorage airport.

Defendant denied the allegation. They then played a portion of the recorded phone conversation between him and their informant. Hearing this, defendant stated that he remembered the transaction and was in fact involved in it. Feeling that defendant "looked like he was going to continue talking," the FBI agents for the first time advised him of his *Miranda* rights. Defendant waived his rights and then, over the next two hours, gave a full confession. Charged in federal court with various drug-related offenses, defendant brought a motion to suppress his statements. The trial court denied his motion. His confession was therefore used against him at trial. He was convicted, and appealed.

Held: The Ninth Circuit Court of Appeal reversed his conviction. The Court first held that defendant was in custody from the very beginning of the questioning and should have been advised of his *Miranda* rights before being confronted with the taped telephone call. Whether or not a person is in custody for purposes of *Miranda* depends upon whether a reasonable person in the circumstances would have believed he could freely walk away from his interrogators. In making this determination, a court will consider (1) the language used to summon the individual, (2) the extent to which he is confronted with evidence of guilt, (3) the physical surroundings of the interrogation, (4) the duration of the detention, and (5) the degree of pressure applied to detain the individual. In this case, defendant was told to appear for a meeting with his parole agent under threat of revocation should he fail to appear. Normally, when checking in for one of his regular meetings with his parole agent, he would merely meet with her through a window in the lobby and then leave. In this case, the meeting was not one of his regularly scheduled meetings. Upon arrival at the Alaska Department of Corrections Probation building, he was initially searched and then escorted into the agent's office where he was confronted by not only his parole officer, but two FBI agents as well. In an interview behind closed doors that "was anything but a run-of-the-mill parole update," he was immediately confronted with evidence of his participation in a drug transaction, including a recorded telephone call between him and an FBI informant. Although not handcuffed, nor subjected to any high-pressure intimidation, the Court found that weighing all the above factors, defendant would *not* have reasonably believed that he was free to walk away from this meeting. As such, he was in custody for purposes of *Miranda* and should have immediately been advised of his rights. The Court further held that the agents engaged in an improper so-called "*two-step interrogation tactic*," prohibited by *Missouri v. Seibert* (2004) 542 U.S. 600. Under this theory, it has been held that when an officer deliberately questions a suspect without *Miranda* warnings, obtains a confession or inculpatory admissions, provides a mid-stream *Miranda* admonishment, and then has the suspect repeat his confession or elaborate on his earlier statements, any resulting statements are inadmissible. When an officer deliberately employs this two-step strategy, the effectiveness of the *Miranda* warning, and the subsequent wavier, must be considered. In evaluating this issue, a court is to consider; (1) the completeness and detail of the pre-warning interrogation, (2) the overlapping content of the two rounds of interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel, (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first, and (6) whether any curative measures were taken. In this case, while brief,

defendant's pre-warning interrogation was complete enough to elicit a limited confession to his involvement in the transfer of illegal drugs. There was absolutely no break between this confession and his later two-hour elaboration of his guilt. Both confessions were part of one continuous interview, and were treated as such by defendant's interrogators. The same agents were involved in both ends of this interrogation. And lastly, the agents did nothing to cure the problem, such as by telling defendant that this initial admissions could not be used against him. Because *Seibert* was clearly and intentionally violated, defendant's subsequent confession should not have been admitted into evidence.

Note: The FBI agents candidly admitted that they did not *Mirandize* defendant at the initiation of the questioning because, in their experience, such an admonishment increased the likelihood that the suspect would believe he was under arrest, provoking an invocation. *Well, duh*! That's kind of what *Miranda* is all about. The agents might also have believed that ostensibly being a parole interview, *Miranda* was not necessary. The problem is that while the typical "run-of-the-mill" parole interview is commonly held to be non-custodial, that rule does not apply under more coercive circumstances where a reasonable person would have felt that he didn't have a choice but to stick around and answer questions. The problem sought to be cured by the *Seibert* decision is that whenever a suspect is in custody, giving up non-*Mirandized* inculpatory statements during a custodial interrogation negates the legal effectiveness of a "mid-stream (*Miranda*) warning," as was done in this case. This is because it causes a suspect to question in his own simple mind the purpose of a belated invocation when he's already admitted to his crimes; sometimes referred to the "*cat-out-of-the-bag*" theory. *Seibert* held that a waiver, under these circumstances, is no good; i.e., not having been "*knowingly and intelligently*" made. Had the FBI agents in this case wanted to take the custody out of the interview, particularly since they apparently did not intend to arrest defendant at that point anyway, they should have instead done what has been held to be legally permissible. That is to just tell defendant that he was not custody and not under arrest; commonly referred to a "*Beheler admonishment*." (See *California v. Beheler* (1983) 453 U.S. 1121.) If you'd like to see more detail on the rules involving the *Beheler* admonishment, let me know and I'll send you all the law on this issue. Note also that the rule in *Seibert* has been held to apply only to cases where the adjudication of guilt occurs after *Seibert* was decided; June 28, 2004, meaning that it is not retroactive. (*Thompson v. Runnels* (9th Cir. 2013) 705 F.3rd 1089.)

***Taking Custody of Seriously Ill Children*:**
***Detention of an Objecting Parent During Medical Treatment of a Child*:**

Mueller v. Auker **(9th Cir. Oct. 25, 2012) 700 F.3rd 1180**

Rule (1) In a medical emergency, where a child is in "*imminent danger*" and the parent isn't cooperating, the state may take temporary custody of a child from the parent without a pre-deprivation hearing. (2) Temporary seizure of a hysterical, uncooperative parent who is objecting to medical procedures being performed on her child is reasonable.

Facts: As described in the Ninth Circuit's discussion of the facts in its earlier decision of August 10, 2009 (576 F.3rd 979), Plaintiff Corissa Mueller took her five-week-old daughter, Taige, to St Luke's hospital in Boise, Idaho, with a high fever. In light of Taige's age, elevated temperature, and poor appetite, Dr. Richard MacDonald recommended Taige undergo a full septic work-up including various lab tests and a spinal tap to determine if Taige had meningitis, and then begin an antibiotic regimen. Dr. MacDonald cautioned Corissa that there was a 5% chance that Taige could have meningitis, from which she could suffer brain damage or even die. He emphasized that time was of the essence to perform the spinal tap and administer antibiotics because "these babies can go from bad to worse very quickly." Corissa called home and discussed the doctor's recommendations with her husband, Eric Mueller, who had remained home with the couple's other children. Fearful of the possible effects of a spinal tap, Corissa consented to the performance of a chest x-ray and to the blood work, urinalysis, and stool sample, but withheld consent for the spinal tap and antibiotics. She determined that she would rather "wait until the initial lab results got back, or at least until . . . [Taige] got worse . . . ." Those lab tests, when received, ruled out a urinary tract or an ear infection. However, no test had yet been administered which could rule out meningitis. It was understood by all that only a spinal tap could do that. However, because Taige's temperature had fallen (although not yet normal), and she began to nurse again, Corissa denied permission to take any further diagnostic steps. Dr. MacDonald consulted with a board-certified pediatrician who agreed that for a baby in Taige's position, with her symptoms, the "standard of care" was to perform a spinal tap and administer antibiotics. However, Corissa continued to withhold permission for any further treatment. Both Child Protective Services (CPS), a division of the Idaho Department of Health and Welfare, and law enforcement, were contacted for help. A CPS Risk Assessment Worker, two police officers, and later Detective Dale Rogers, responded. Dr. MacDonald explained to them the situation, telling them that they only had a three-hour time frame before Taige might die or suffer brain damage. After being advised of the circumstances, including that an immediate decision had to be made because they were already two hours and fifteen minutes into the 3-hour allowable window of opportunity, Detective Rogers determined that Taige was in "imminent danger" of death or brain damage. Under Idaho statutes, when a law enforcement officer determines a child to be in imminent danger, he can order the child turned over to CPS whereby the State then assumes custody of that child and can consent to medical treatment. This decision has the immediate effect of placing Taige in "shelter care," i.e., temporary foster care. After several more futile attempts to get Corissa to agree to the treatment, and after Taige's temperature began to rise again, this was done. An emotional ("screaming and yelling") Corissa was escorted by the officers to a small conference room where they remained with her, refusing to allow her to use the telephone to call her husband until after she talked with Detective Rogers again. Soon thereafter, Detective Rogers presented Corissa with a written notice of the right to a post-deprivation hearing in state court. At around 3:00 a.m., some 5 hours after first bringing Taige to the hospital, Corissa was finally allowed to call her husband. A spinal tap was administered in the meantime, showing that meningitis was not present. Corissa was denied access to Taige during this treatment, but was reunited with her later that morning. Two days later, at the post-deprivation court hearing, the Muellers regained legal custody of Taige. No

evidence was presented that Taige ever suffered any neglect or that either parent was in any way unfit. Eric Mueller sued Detective Rogers, the other assisting officers, and the CPS worker (April Auker). The trial court denied the civil defendants' motion for summary judgment, at least as to several of the claims made by the Muellers, and granted Eric Mueller's motion for summary judgment. Detective Rogers and the other officers appealed, arguing that they were at least entitled to qualified immunity.

Held: The Ninth Circuit Court of Appeal reversed. There were two issues considered on appeal: (1) Whether it was "clearly established" that the officers were violating the Muellers' Fourteenth due process rights to the "care, custody, and control" of their infant daughter when they removed her from Corissa's custody; and (2) whether they violated Corissa's Fourth Amendment rights by detaining her as her daughter was being treated by the hospital's medical staff. (1) *Due Process and Qualified Immunity*: Law enforcement officials are protected from civil liability so long as their acts, even if in error, do not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The purpose of this rule is to give officers some "breathing room" in making reasonable, even if mistaken, judgments. It protects all but the plainly incompetent or those who knowingly violate the law. When the issue is the care and custody of a child, such as Taige, it is recognized that parents "have a liberty interest in the 'care, custody, and control of their child.'" A parent cannot be "summarily deprived of that custody without notice and a (court) hearing," except where the child is in "*imminent danger*." But like all constitutional protections, the parent's rights are not absolute. Other counter-vailing interests and rights, such as when "the basic independent life and liberty rights" of a child are threatened, may take precedence over the parent's rights. And while "due process" requires a "pre-deprivation (court) hearing" before the state may interfere with the care, custody and control of a child, a compelling governmental interest in the protection of the child may supersede this right as well. In this case, the Muellers' rights relative to their infant daughter, and whether these rights were outweighed by the government's interest in protecting her, were in issue. "In an emergency situation . . . when the children are subject to immediate or apparent danger or harm," the government may not only take custody of the child, but, where the child is in "*imminent danger*," may do so prior to the initiation of a court hearing on the issue. Detective Rogers, relying upon the opinions of qualified medical professionals that Taige was in danger of dying or possibly incurring brain damage if not treated immediately, declared that she was in imminent danger. There is no case authority defining "imminent danger" in any detail, nor any clearly established law that Detective Rogers could have used for guidance in this situation, requiring him to reach his own conclusions. Right or wrong, particularly with the information he received relative to Taige's condition from medical professionals, it was reasonable for Officer Rogers to declare Taige to be in imminent danger and to determine that there was no time for a pre-deprivation court hearing. There being no case authority to the contrary, the officers were entitled to qualified immunity. (2) *Fourth Amendment Seizure*: The Fourth Amendment usually requires an officer to have a warrant issued upon probable cause before seizing someone. However, "neither probable cause nor a warrant is required when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" In this case, the officers' separation of Corissa from her daughter while

medical procedures were being performed was held to be reasonable. This temporary detention of a hysterical Corissa was necessary to maintain order in the hospital and to ensure that Taige's treatment was not interrupted. The Court therefore determined that the officers were entitled to qualified immunity on this issue as well.

Note: The only reason that taking custody of Taige in this case, under these circumstances, is an issue at all is because the courts are *very* protective of a parent's right to retain custody and control of their own children. So while you have to be very careful not to act impulsively should you ever find yourself in a similar situation, you shouldn't hesitate to follow Detective Roger's lead when the circumstances call for it. While "*imminent danger*" remains undefined (although we now know that a 5% chance of death or brain damage if not treated within a 3-hour window qualifies), common sense (and perhaps a supervisor's approval) must dictate your actions. Add to this scenario those instances when the parents' objections to medical treatment are based upon their religious beliefs, and the issues become even more difficult. Your best bet is to lean over backwards to get the matter into court before a child is taken from them. But by the same token, consider the consequences of *not* taking custody of a child who appears to be in imminent danger unless medical treatment is allowed, only to find out the next day that the child has died. Can you live with that?

***Switchblade Knives, per P.C. § 17235*:**

In re Gilbert R. **(Nov. 29, 2012) 211 Cal.App.4th 514**

Rule: A knife otherwise meeting the definition of a switchblade knife, but which is equipped with a resistance-providing detent, is not prohibited by P.C. § 17235.

Facts: Anaheim Police Officer Erin Moore detained defendant, a minor, because he matched the description of a graffiti suspect. Although defendant denied being involved in any graffiti-related offenses, he admitted to possessing a switchblade knife. Defendant produced a knife from his sweatshirt pocket that was approximately seven inches long and had a three-inch blade folded in a closed position. Officer Moore determined that she could open the knife with a flick of her wrist. Arrested for possession of a switchblade, per P.C. § 653k (now P.C. § 17235), a petition was filed in Juvenile Court. During the delinquency hearing, the defense brought in a knife expert (i.e., an owner or employee of a knife store) who testified that the knife in question was not intended to be opened by the flick of the wrist. Rather, it came with a "positive detent;" i.e., a mechanism which holds the blade in a closed position. The detent feature was held in place by a "set screw" which had become "a little bit wobbly," reducing the detent pressure by approximately 15% which, per the expert, was "well within" the manufacturer's parameters. Demonstrating, the expert held the knife upside down and shook it, but the blade did not open despite the shaking. The expert further testified that while someone in the military, or a law enforcement officer, or anyone trained in the use of knives, might be able to open the knife with relative ease by a flick of the wrist, "lay users" generally would not be able to do so without some practice. The expert also pointed out that the knife had other "extra features," such as a mushroom-shaped protrusion on one end he called a

"glass impactor;" used for breaking glass should a person have to escape from a vehicle. The knife also had an opening in its body which is intended to be used to cut a seat belt or other restraint, and which emergency personnel might use to extract a person from a car. The expert identified the knife as a whole as a "SARK," or "Search And Rescue Knife." Despite this testimony, and after Officer Moore demonstrated in court how she could open the knife with a flick of the wrist, the Court determined that the knife was in fact a switchblade. The petition was sustained and defendant was placed on supervised probation. Defendant appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed. A switchblade knife is defined in former P.C. § 653k (now P.C. § 17235) as "a knife having the appearance of a pocketknife and includes a spring-blade knife, snap-blade knife, gravity knife, or any other similar type knife, the blade or blades of which are two or more inches in length and which can be released automatically by a flick of a button, pressure on the handle, *flip of the wrist* or other mechanical device, or is released by the weight of the blade or by any type of mechanism whatsoever." (Italics added) Because defendant's knife was capable of being opened merely by a "*flip of the wrist*," it met the requirements of this part of section 653k. However, section 653k also provides as exception, stating that a "'[s]witchblade knife' does *not* include a knife that opens with one hand utilizing thumb pressure applied solely to the blade of the knife or a thumb stud attached to the blade, *provided that the knife has a detent or other mechanism that provides resistance that must be overcome in opening the blade*, or that biases the blade back toward its closed position." (Italics added) A "*detent*" is "a device (as a catch, dog, or spring-operated ball) for positioning and holding one mechanical part in relation to another in a manner such that the device can be released by force applied to one of the parts." Defendant's knife came with such a detent. And while the detent had lost some of its effectiveness due to the loosening of a set screw, it still had the effect of providing *some* resistance to any effort to open it merely by a flick of the wrist. The fact that the knife was still *capable* of being opened by the flick of the wrist is irrelevant. With the detent providing some resistance to doing so triggers the exception described in the section.

Note: The Court provided a long, detailed legislative history of the statutory exception to section 17235 (653k), and the rules for interpreting the meaning of a statute, complicating their explanation. But the rule of this case is pretty simple. If the knife comes equipped with a functioning detent of some sort, the fact that a person can open the knife with one hand, and about as fast as a true switchblade without the detent, or that the detent is only partially effective, is irrelevant. It's not a switchblade.

***Robbery*; *Force Used During the Escape*:**

People v. Hodges **(Jan. 31, 2013) 213 Cal.App.4th 531**

Rule: To constitute a robbery, the force or fear used must occur at some time before the stolen property is abandoned.

Facts: Valentin Ramirez and Jason Anderson worked in plain clothes as loss prevention officers for a private company called Monument Security. They were both assigned to a Safeway store in Petaluma. While working in this capacity, Ramirez noticed defendant entering the store without a basket or shopping cart. Ramirez surreptitiously followed defendant to the soft drink aisle where he observed defendant take a Safeway plastic bag from his pocket and fill it with a six-pack of bottled soda, batteries, and bananas. After alerting Anderson by cell phone, Ramirez stationed himself at the front door. He soon observed defendant approach the front of the store, look around, and then walk out while carrying the items he had previously placed in the bag without paying for them. Ramirez followed defendant to his car where he made contact, identifying himself as store security. When asked if he had a receipt for the items in the Safeway bag, defendant claimed to have lost it. Ramirez asked defendant to accompany him back into the store to verify the purchase. Defendant declined, offering instead to give the items back. When Ramirez told defendant that it wasn't going to be that easy, defendant started the engine to his car. Surmising the defendant was not going to return to the store with him, Ramirez walked to the rear of defendant's car to get his license number and call 9-1-1. At that point, Anderson approached the scene and contacted defendant who was still sitting behind the wheel of his car with the door open. Anderson told defendant he had to return to the store. Defendant started to get out of the car, but then pushed or threw the bag of stolen items at Anderson's chest and face, hitting Anderson in the eye and knocking him into a van parked next to them. Anderson recovered quickly and reached for defendant's keys, attempting to turn off the engine. However, defendant put the car in reverse, causing the car to move backwards. Anderson, momentarily being dragged along with the car, was able to "pop out" of the vehicle as defendant hit the brakes. Ramirez yelled at Anderson to let defendant go because the police were on their way. Defendant's car began to move in reverse again, striking Anderson with the open driver's-side door. The force of the contact with the door propelled Anderson up and over the door. Defendant then backed out of the parking stall and drove away quickly. The stolen items were left lying on the ground. Defendant was later arrested. Anderson suffered pain in his shoulders, his right thumb, and his back. His right toe was broken and required surgery. Defendant was charged with robbery (P.C. § 211), assault with a deadly weapon, to wit, a car (P.C. §245(a)(1)), and petty theft with a prior (P.C. §§ 484, 666), plus three prior strike convictions for robbery. Defendant was convicted of all counts and (after the court struck two of his prior convictions) was sentenced to 11 years in prison. Defendant appealed.

Held: The First District Court of Appeal (Div. 3) reversed defendant's conviction for robbery, upholding the convictions for the other offenses. The issue here was whether the force used by defendant occurred during the commission of the theft itself which, if

so, would elevate the crime to robbery. At the close of the evidence presented during defendant's trial, defendant asked the court to instruct the jury that "(i)f Defendant truly abandoned the victim's property before using force, then, of course, he could be guilty of theft, but not of . . . robbery." The trial court declined, giving instead the standard robbery instruction; i.e., CALCRIM No. 1600. Per 1600, the jury was told that in order to prove the offense of robbery, the People must prove that (1) the defendant took property that was not his own, (2) the property was taken from another person's possession and immediate presence, (3) the property as taken against that person's will, (4) the defendant used force or fear to take the property or to prevent the person from resisting, and (5) when the defendant used force or fear to take the property, he intended to deprive the owner of it permanently. The jury was also instructed, to the effect, that a store security guard stands in the position of the store's owners, legally possessing the store owner's property. The jury, however, during deliberations, was having apparent trouble with the timing of the force used. The trial court declined to answer the jury's question directly, telling them instead that the theft is deemed to be a continuing offense, lasting until the defendant has reached a point in which he is no longer being confronted by the security guards. They were also told that the force defendant used in this case applied to the confrontation in the parking lot. This, the Appellate Court ruled, was misleading (at best). Generally, a theft continues until the perpetrator has reached a place of temporary safety *with the property*. Should he abandon the property first, however, then the theft ends at that point. It is a rule of law that if the theft is over before any force is used, then it is not a robbery but rather a simple theft and a later assault. The force or fear has to have been applied for the purpose of retaining (or regaining) possession of the stolen property, occurring at either the initiation of the theft or during the escape, and at some point before the thief reaches a place of temporary safety. In those instances when the property has already been abandoned, or surrendered, before the force or fear is applied, then it is not a robbery. In this case, the jury spotted this issue and asked the trial court for additional guidance. The trial court missed the point and failed to answer their question. As such, the robbery conviction had to be reversed.

Note: A much simpler way to state the rule would be that a theft (petty or grand) is elevated to the crime of robbery if the additional element of the defendant's use of "force or fear" occurs at any point between (1) the initial taking and (2) when the suspect reaches a place of temporary safety *or* when he abandons the stolen property, whichever occurs first. In this current case, I see another issue, not even mentioned by the Court, being whether it is still a robbery when the defendant's initial use of force (i.e., the throwing of the stolen goods into Jason Anderson's face) comprises the same act as the actual abandonment of the property. While driving off and knocking Anderson down, constituting a second use of force, didn't occur until after the property had been abandoned, and therefore cannot be used to elevate the theft to a robbery, defendant's first act of force occurred when he threw the stolen property at Anderson. The trial court judge noted that the abandonment and this first use of force occurred simultaneously, presumably concluding in his own mind that this use of force did in fact occur before it could be said that the stolen property had actually been abandoned. I tend to agree, and think that defendant's crime was a robbery. But this was a jury issue and they needed to be correctly instructed.