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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Health nuts are going to feel stupid someday, lying in the hospital, dying of nothing.*" (Anonymous)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

DNA and Pre-Trial Arrestees: The Ninth Circuit Court of Appeal in *Haskell v. Lyons* (9th Cir. Feb. 23, 2012) __ F.3rd __ [2012 U.S. App. LEXIS 3588], recently approved the constitutionality of taking a DNA sample from a felony arrestee *before* any judicial determination of probable cause to believe that the arrestee is in fact guilty. (See P.C. § 296(a)(2)(C)). In an interesting turn of events, a California state court had previously found to the contrary. (See *People v. Buza* (2011) 197 Cal.App.4th 1424; review granted.) The California Supreme Court is looking at *Buza*, depublishing the appellate Court's opinion at the same time. So

the only enforceable authority on this issue at the moment is the Ninth Circuit's opinion, at least until *Buza* is decided by the California Supreme Court.

Just a Suggestion re Calls and E-Mails: I'm more than happy to take phone calls and e-mails, and answering your legal questions if I can. But if I may suggest one thing that would same us both a lot of time and effort: When you get done typing out an e-mail inquiry to me, take an extra few seconds to proofread what you wrote to ensure it makes sense and asks the question(s) you intended. That extra few seconds will save us both a lot of time going back and forth trying to figure out what the issue is and what it is you wanted to know. Also know that although my cellphone number (as listed above) is still good, reception where I live is weak. So I may not get your call right away. But I check my cell periodically for messages and will promptly return your call from my home phone (the number for which I will give you, but don't give out to the general public) so that we can carry on a conversation without dropping the call.

CASE LAW:

***Miranda; Interrogation of a Prison Inmate*:**

Howes v. Fields **(Feb. 21, 2012) __ U.S. __ [182 L.Ed.2nd 17]**

Rule: The interrogation of a prison or jail inmate is not necessarily custodial just because he's an inmate, is removed from the general prison population, and/or is questioned about events that occurred prior to his incarceration.

Facts: Randle Lee Fields was an inmate in a Michigan county jail doing time on a disorderly conduct conviction. Sheriff's deputies sought to question Fields about allegations that he had molested a twelve-year-old boy prior to his incarceration. To facilitate the questioning, Fields was escorted by a correctional officer from the where he was housed to a separate part of the facility and into a conference room where the interrogation could take place in private. Fields was questioned there for 5 to 7 hours. At the beginning of the interview, and then again later, he was told that he could return to his cell whenever he wanted. At no time, however, was he ever advised of his rights under *Miranda*. The deputies were armed during the interview, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes closed. Fields claimed that during the interview, one of the deputies, using an expletive, told him to sit down, and said that "if [he] didn't want to cooperate, [he] could leave." Fields also testified that he told the deputies several times that he no longer wanted to talk with them. However, he never asked to be taken back to his cell until the end of the interview. He eventually confessed to engaging in sex acts with the boy. When he was eventually ready to leave, he had to wait an additional 20 minutes because a corrections officer had to be summoned to escort him back to his cell. The interview lasted until at least midnight, and maybe until 2:00 a.m. (depending upon who you believe), well after the hour when he would generally retire. Charged in state court with criminal sexual conduct, Fields filed a motion to suppress his confession arguing that

because he was in jail he should have been advised of his *Miranda* rights. The trial court denied his motion, admitting his statements into evidence against him. The Michigan Court of Appeals affirmed his conviction and the Michigan Supreme Court denied discretionary review. Fields filed a petition for a Writ of Habeas Corpus in Federal District Court, which was granted. The Sixth Circuit Court of Appeal affirmed, finding that Fields was interrogated while in custody and therefore should have been *Mirandized* "because isolation from the general prison population combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se" (i.e., *as a matter of law*). The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a 6-to-3 decision, reversed. The issue on appeal was whether a prison (or jail) inmate is necessarily in custody for purposes of *Miranda* merely because he is an inmate who is removed from the general prison population and questioned about events that occurred prior to his incarceration. Supreme Court precedent has declined to adopt a bright-line rule for determining the applicability of *Miranda* in a prison or jail setting. Whether or not a prisoner is in custody for purposes of *Miranda* depends upon whether the incarceration in question exerts the coercive pressure that *Miranda* was designed to guard against; i.e., the danger of coercion that results from the interaction of custody and official interrogation. Being an inmate, removing him from the general population, and questioning him about something that had previously occurred outside the prison setting, or is otherwise unconnected to what he is in prison for, may be factors to consider, but are not conclusive in and of themselves. The test is whether a "reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." In determining this, a court must look to all the surrounding circumstances. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. A court must also consider the location of the interrogation, its duration, statements made during the interrogation, the presence or absence of restraints, and whether the suspect is in fact released following the questioning. This analysis, however, is merely the first step. "Not all restraints on freedom of movement amount to custody for purposes of *Miranda*." The next question that must be answered is whether the circumstances present the same inherently coercive pressures as the type of "station house questioning" that were at issue in the *Miranda* case itself. In considering this issue, the Court noted that in a prison (or jail) situation, a person who is already a prisoner does not generally experience the shock that often accompanies being arrested off the street. Also, a prisoner isn't likely to be coerced into talking in the hopes of a prompt release, knowing he isn't going anywhere anyway. Further, unlike a person taken off the street, a prisoner knows that the law the enforcement officers who question him probably lack the authority to affect the duration of his sentence. In effect, a prison or jail inmate being questioned by law enforcement officers isn't subject to the same pressures as someone arrested and taken to a police station for questioning as occurred in *Miranda*. The Court further rejected the argument that, at least in the prison or jail setting, it makes any difference that the interrogation was conducted in a private interview room. In the case of an interrogation of an arrestee off the street, "isolation may contribute to a coercive atmosphere." In contrast, "questioning a prisoner in private does not generally remove (him) from a supportive atmosphere." In this case, for

instance, defendant would have much preferred that questioning about an alleged child molest be done out of hearing of his fellow inmates. "Isolation from the general prison population is often in the best interest of the interviewee." As for the issue of where the crime that is the subject of the interrogation took place—in the prison or elsewhere—the Court determined this to be a non-factor. In considering all the above factors, the Court concluded that defendant in this case was not in custody for purposes of *Miranda*.

Note: This is a great case, and is consistent with what has been the rule in California for a long time. (see *People v. Macklem* (2007)149 Cal.App.4th 674; a San Diego County Jail case.) And it makes perfect sense. While being arrested on the street or out of one's home and taken to a police station for questioning is no doubt a traumatic event for most, interrogating a jail inmate does not involve any big change in his physical situation. But it should be noted that the most important factor, as emphasized by the Court several times, and which occurred both here and in *Macklem*, involved the deputies telling defendant that he could return to his jail cell whenever he wanted. The only thing the deputies could have done better would have been to specifically tell him that he didn't have to talk to them if he didn't want to; the Court noting as a negative factor that " . . . he was not advised that he was free to decline to speak with the deputies." Also note that while this was a county jail case, the Supreme Court uses the terms "*prison*" and "*jail*" interchangeably, indicating that the rule applies to both.

***Search Warrants and Qualified Immunity*:**

Messerschmidt et al. v. Millender **(Feb. 22, 2012) __ U.S. __ [182 L.Ed.2nd 47]**

Rule: Officers are entitled to qualified immunity from civil liability when their conduct, even if illegal, does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Facts: Jerry Ray Bowen, a member of the Mona Park Crips street gang, had a "dating relationship" (shacking up) with Shelly Kelly. Bowen had a history of assaulting Kelly and had been convicted of multiple violent felonies. Tired of being physically abused, Kelly sought the help of Los Angeles County Sheriff's Department to protect her as she moved her property out of the apartment the two of them shared. Twenty minutes into the move, the deputies received an emergency radio call. They left, promising to be back as soon as they handled the call. As soon as they left, however, Bowen came out of the woodwork and physically attacked Kelly, screaming at her that he'd warned her never to call the police on him. After attempting to throw her off the second story landing, biting her, and dragging her around by her hair, Kelly managed to escape to her car. Bowen came after her with a black sawed-off shotgun with a pistol grip, shooting at her several times. Kelly got away unscathed and reported the assault. Detective Messerschmidt and others (defendants in this civil suit) did some research and determined that he was living at the home of his Foster-mother, Augusta Millender (plaintiff in this civil suit), in Los Angeles. The detectives got an arrest warrant for Bowen and a search warrant for the address, listing as the "*property to be seized*" the black sawed-off shotgun described by Kelly. Also listed was the following: "*All handguns, rifles, or shotguns of any caliber, or*

any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearms for which there is no proof of ownership. Any firearms capable of firing or chambered to fire any caliber ammunition." Because Kelly had indicated that Bowen was the member of a street gang, a fact verified by the detectives, they further asked for the right to seize any "(*a*)*rticles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips*'." The search warrant was executed at 5:00 a.m. one morning (night service having been approved). Plaintiffs (Augusta Millender and other family members) were rousted out of the house while the warrant was served. Neither Bowen nor the black sawed-off shotgun were found. (Bowen was arrested two weeks later at another location.) A letter addressed to Bowen at that address was recovered, along with a lawful shotgun that belonged to Augusta Millender. Plaintiffs sued the officers involved in federal court. The civil trial judge granted the plaintiffs' summary judgment motion as to the allegation that the search warrant was unconstitutionally overbroad, and rejected the officers' argument that they were entitled to qualified immunity. The officers appealed. An en banc panel of the Ninth Circuit Court of Appeal affirmed (See *Legal Update*, Vol. 15, #8, Oct. 8, 2010.) The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a 7-to-2 decision, reversed. The only issue on appeal was whether the officers were entitled to qualified immunity from civil liability. Because the issue not being raised on appeal, it was assumed that the search warrant in this case did *not* include sufficient probable cause to justify searching for any weapons other than the sawed off shotgun used by Bowen, or for any gang-related evidence. The doctrine of qualified immunity is intended to protect government officials, including law enforcement officers, from civil liability in those cases where their conduct, even if illegal, does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. The purpose of this doctrine is to allow for reasonable mistakes; i.e., to provide a law enforcement officer with a little "breathing room." In this civil suit, Millender alleged that the officers violated her Fourth Amendment rights by searching her home for weapons and gang-related material without probable cause. Ruling that the case was "only" a domestic violence incident, the Ninth Circuit agreed, finding that there was no probable cause to believe that any weapons other than the sawed-off shotgun Bowen had used might be in Millender's house, and that gang-related material was not shown to be relevant to the case. And because any reasonable officer should have recognized this, per the Ninth Circuit, the officers were not entitled to qualified immunity. As to this last conclusion, the Supreme Court disagreed. First, the Court noted that Detective Messerschmidt had run the warrant by his supervisors and a deputy district attorney before taking it to a magistrate, who also approved it. It is the magistrate's job to reject a bad warrant. The magistrate's approval of the warrant "is the clearest indication that the officers acted in an objectively reasonable manner;" i.e., in "*objective good faith*." Next, knowledge that Bowen possessed one illegal gun, that he belonged to a street gang, his demonstrated willingness

to use the gun to kill someone, and his concern about the police, would cause a reasonable officer to conclude that there very well could be additional guns in his home. A reasonable officer could also believe that seizure of other firearms was necessary to prevent any further assaults on Kelly. Also, evidence of Bowen's connection to a street gang was subject to seizure in that his gang membership was relevant to his motive for assaulting Kelly. Such evidence would also help to rebut potential defenses Bowen might raise at trial. It might also be relevant to Bowen's dominion and control over the residence searched. At the very least, an officer would not be acting unreasonably in concluding that these connections between Bowen and his alleged gang membership were relevant. "The officers' judgment that the scope of the warrant was supported by probable cause may have been mistaken, but it was not 'plainly incompetent.'" The officers, therefore, are entitled to qualified immunity.

Note: Back in October, 2010, I noted in my brief of the Ninth Circuit's decision in this case that although disturbing, the court was "*spot on*." To a large degree, I was wrong, as noted here by the Supreme Court. But by the same token, I was also right. My support for the Ninth Circuit's conclusions was based upon the need for an affiant to articulate his or her probable cause (i.e., a "*fair probability*") to believe that general categories of things like weapons or gang paraphernalia might be found. (See *People v. Ulloa* (2002) 101 Cal.App.4th 1000; things the affiant "*hopes to find*," but for which there is no articulable "*fair probability*" that they *will* be found, should not be listed in the search warrant.) Where I was wrong was in failing to recognize that despite the Ninth Circuit's conclusions on the issue, listing any and all firearms, and the gang-related paraphernalia, was likely supported by probable cause. Based upon the Supreme Court's discussions, it was apparently a mistake for officers not to contest on appeal the probable cause issue as well as whether they were entitled to qualified immunity. But the issue was not raised. The problem *might* have been Detective Messerschmidt's failure to be clear in why he expected to find anything other than Bowen's saw-off shotgun. (I don't know this to be a fact; I haven't seen the affidavit.) Just know that when you write a warrant like this one, be sure to articulate why, under the circumstances, you would expect to find weapons other than the one used in your crime, and/or gang-related paraphernalia given the suspect's suspected gang affiliation.

***Miranda*; *Voluntariness*:**

Ortiz v. Uribe **(9th Cir. Nov. 18, 2011) __ F.3rd __ [2011 U.S. App. LEXIS 23033]**

Rule: A law enforcement/polygrapher's empathic and parental role exhibited while giving instructions regarding the conduct of a polygraph examination does not, by itself, create sufficient psychological pressure that it renders a suspect's confession involuntary.

Facts: Robert Chen was shot and killed during a carjacking in Barstow, California. The investigation eventually led to defendant and two others. Defendant was 18 years old, had a GED degree, and at least one prior arrest. When contacted by detectives, defendant voluntarily accompanied them to the Barstow Sheriff's Station for questioning. After waiving his *Miranda* rights, and denying his involvement in Chen's death, defendant

agreed to take a polygraph examination. He was transported to the Sheriff's headquarters in San Bernardino where he was turned over to Detective Kathy Cardwell who was to conduct the examination. Detective Cardwell first instructed defendant about the procedures to be used and that if he did not feel comfortable with any particular question, she would reword it until he was comfortable. Defendant indicated that he was nervous and was concerned that his nervousness would affect the results. Detective Cardwell assured him that she would help him get through the examination. She further informed defendant that "the cops" could not tell her what to ask him, never telling him that she herself was a sworn deputy sheriff. In her instructions, Detective Cardwell urged defendant to tell his version of the facts rather than allow his co-defendants' statements to be the only account of what had occurred. She attempted to ingratiate herself to him by referring to defendant as "young puppy" and "poor guy," comparing him to her own sons. At one point she told him that she loved him and offered him a hug. She told him to tell the truth, reminding him of his obligation to his loved ones. She encouraged him "to do the right thing by [his] mom, . . . daughters and [his] lady." She further told him that the polygraph would "be a piece of cake" and that she would "get [him] through all of this." Detective Cardwell further told defendant that the polygraph would prove "that you didn't [kill the victim] *if you didn't*."" (emphasis used by the court). At one point she also said; "Let's get on with it and get you cleared." When defendant continued to express concern that the polygraph machine would be inaccurate because he was nervous, she told him, "[t]hat's why you and I will work out the questions, not them [the detectives]. They can't have any say so in here, this is my world . . . ." Following all this, but before the polygraph examination could be started, defendant confessed. Charged in state court with murder and related charges, defendant's motion to suppress his statements, arguing that they were involuntarily obtained, was denied. He was convicted on all counts and appealed. After his conviction was affirmed by the California Appellate and Supreme Courts, defendant filed the present Writ of Habeas Corpus in federal court. The federal district court denied the petition and he appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The issue was whether defendant's "*due process*" rights, under the Fifth and Fourteenth Amendments, were violated. As a due process issue, a court has the responsibility of determining whether, in light of the totality of the circumstances, defendant's confession was made "freely, voluntarily and without compulsion or inducement of any sort." As an appellate court, the Ninth Circuit's job was to determine whether the California courts' decision on this issue "was contrary to, or involved an unreasonable application of, clearly established Supreme Court law," or was otherwise "based on an unreasonable determination of the facts in light of the evidence." Defendant argued that his confession was involuntary because his will was overborne as a result of Detective Cardwell's deceptive interrogation tactics. The Ninth Circuit, agreeing with the California courts, ruled that his will was *not* overborne. In reaching this conclusion, the Court first noted that "coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause." Deception alone by a police officer does not render a confession involuntary. A police interrogator's state of mind is irrelevant to the question of voluntariness. Under this standard, and citing authority from another jurisdiction, the Court determined that a polygrapher's empathic and parental role

exhibited while giving instructions regarding the conduct of a polygraph examination does not create such a degree of psychological pressure that it renders a suspect's confession involuntary. This includes comparing the suspect to her own sons while telling him that she loves him and offering him a hug. In this case, defendant was made aware of the need to tell the truth in order to pass the polygraph test. Merely using a "maternal manner" while emphasizing that if he were innocent, the polygraph would prove that fact, did not rise to the level of psychological manipulation sufficient to overbear defendant's will. Detective Cardwell's tactics in this case were not coercive. The Court further rejected defendant's argument that his confession was inadmissible because Detective Cardwell "concealed the fact that she was a sworn officer and misled (defendant) into believing that she was not a police officer and that she was his ally rather than his adversary." Noting that there may be ethical issues in such a tactic when done intentionally, the constitutionality of doing this is in question only if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. While some of Detective Cardwell's comments may have suggested that she was not a law enforcement officer, she never actually suggested that she was acting in defendant's interest. It should have been apparent to defendant that she was acting at the request of the detectives who brought him there. As such, this type of "deception" (whether intentional or not) is well within the range of permissible interrogation tactics necessary to secure a lawful confession. The Court also rejected defendant's argument that some of what Detective Cardwell had said was an offer of leniency. To the contrary, defendant was specifically told that only if he was telling the truth, and he was in fact innocent, could she help him get cleared. Lastly, although appealing to a defendant's moral obligation to his or her family as leverage may be unconstitutional when it involves threats or promises, mere psychological appeals to a suspect's conscience are not enough to overcome his or her will. Based upon the totality of the circumstances in this case, there was sufficient evidence to support the California courts' conclusion that defendant's confession was not involuntary.

Note: I've never been a big fan of law enforcement interrogators playing mind games with defendants. At some point a court is going to find that such tactics in fact caused a defendant's will to be overborne. The Ninth Circuit here didn't say they liked the tactics used, even questioning the detective's ethics. All the Court held was that the California courts' conclusions on these issues were not unreasonable. Even so, I'm surprised that the Court didn't comment on Detective Cardwell's expression of love for defendant and that she wanted to give him a hug. There is prior California authority to the effect that it is a constitutional issue when a police interrogator purposely ingratiates himself with a suspect, "cleverly softening" him up (*People v. Honeycutt* (1977) 20 Cal.3rd 150.), although the issue there was the voluntariness of the original *Miranda* wavier and not whether the suspect's will to resist was overborne during the interrogation itself. But either way, I wouldn't advise pushing this particular envelope any further than occurred here.

***Use of Force; Beanbag Shotguns*:**

Glenn v. Washington County **(9th Cir. Dec. 27, 2011) __ F.3rd __ [2011 U.S. App. LEXIS 25932]**

Rule: As a "less lethal" weapon, the lawfulness of the use of a beanbag shotgun is dependent upon a determination that its use was reasonable under the circumstances.

Facts: Eighteen-year-old Lukus Glenn got wasted at a high school football game and came home at about 3:00 a.m., agitated and intoxicated, telling his parents that he wanted to take his motorcycle for a spin. When told that he wasn't going anywhere on his motorcycle, Lukus got angry and started tearing apart the house, breaking windows and kicking in the front door. Confronted with their son's unusually violent behavior, the Glenns called several of his friends to come over to help calm him down. They couldn't control him either. Instead, he put a pocket knife with a three-inch blade to his neck and threatened to kill himself. Mrs. Glenn called 9-1-1 for help. Two Washington County Sheriff's deputies responded. Mrs. Glenn told the dispatcher that Lukus said he was "not leaving until the cops shoot him and kill him." She further reported that Lukus had threatened suicide once before. The 9-1-1 tapes reflected that Mrs. Glenn had also said that Lukus was threatening her and her husband with the knife, but she later testified that she didn't mean this. Deputy Mikhail Gerba arrived first and confronted one of Lukus's friends who told him that Lukus was "over by the garage" and that they'd gotten him to calm down. At the garage, Deputy Gerba found Lukus surrounded by his parents and his other friend, still holding the knife to his neck. Pointing his Glock semiautomatic pistol at Lukus, Deputy Gerba "screamed" at him to "drop the knife or I'm going to kill you." The Glenns later alleged that Gerba was "angry, frenzied, amped and jumpy," and that his actions merely aggravated the situation. Deputy Timothy Mateski arrived about a minute later and, with his gun pointed at Lukus, also screamed at him to "drop the knife or you're going to die." Witnesses described Deputy Mateski as "frantic and excited and only pursuing a course of screaming commands at Lukus." The deputies were told by those at the scene that Lukus was only threatening to hurt himself and not others. Even so, Lukus's two friends were ordered to move behind the deputies. The Glenns were told to go into the house. Everyone complied. Shortly thereafter, Officer Andrew Pastore of the Tigard Police Department arrived, carrying a beanbag shotgun. Deputy Mateski immediately ordered Officer Pastore to "beanbag him." Pastore shot all six of the beanbag rounds at Lukus. Lukus "kind of cowered up against the garage" as he got hit by the beanbags, appearing "surprised, confused, and possibly in pain," and started to make a move towards the house. As he did so, Deputies Gerba and Mateski began firing at Lukus. He was hit with eight of the eleven rounds fired at him, killing him. The Glenns later sued the officers in federal court for "wrongful death." The trial court granted the officers' summary judgment motion, dismissing the lawsuit. The Glenns appealed.

Held: The Ninth Circuit Court of Appeal reversed, remanding the matter back to the trial court for a civil trial. Recognizing that for purposes of reviewing a summary judgment dismissal, the Court is required to assume that the Glenns' allegations are all true. Whether or not the officers here used excessive force depends upon whether their

actions were "objectively reasonable in light of the facts and circumstances known to them," taking into account the fact that police officers are often forced to make split-second judgments. In determining whether they acted reasonably, the nature and quality of the intrusion on Lukus's Fourth Amendment interests (i.e., the use of force) must be balanced with the countervailing governmental interests at stake. Two levels of force were involved in this case; the use of the beanbag shotgun and then the deputies shooting Lukus with their pistols. The deputies shooting and killing Lukus with their firearms was precipitated by him being shot with the beanbag shotgun. The beanbag barrage apparently caused him to turn towards his home where his parents were hiding with only a broken door keeping them safe. So the primary issue here was whether the use of the beanbag shotgun in the first instance was reasonable. A beanbag shotgun is considered to be a "*less lethal*" (as opposed to "*non-lethal*") weapon. While intended only to incapacitate, it can also cause death if a beanbag strikes particular parts of the body. Such a weapon "is permissible only when a strong governmental interest compels the employment of such force." In determining what degree of force is appropriate under the circumstances, a court must consider (1) whether the suspect poses an immediate threat to the safety of the officers or others, (2) the severity of the crime at issue, and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. Here, Lukus was threatening no one but himself. According to the plaintiffs' version of the facts, there was never really any indication that either the officers or anyone else was in danger. Secondly, the crime here, if any, was "not sever by any measure." Lukus was brandishing the knife at no one but himself. To the contrary, Lukus was emotionally disturbed and was in need of help, not arrest. Lastly, Lukus's "resistance was the refusal to follow the officers' commands rather than actively attacking or threatening officers or others." Under such a "static resistance category," other less intrusive methods of taking Lukus into custody might have been more appropriate. There was also evidence that the responding deputies may have aggravated the situation. Based upon this fact, and the above described circumstances, dismissing the lawsuit was not appropriate. A jury should be afforded the opportunity to determine whether the use of the beanbag shotgun, and then lethal firearms, was reasonable under these circumstances.

Note: These events are typically lose-lose situations for responding police officers. Called to a scene to prevent a person from killing himself, officers are faced with the prospect of doing it for him; typically referred to as a "*suicide by cop*" situation. If the plaintiffs' allegations are anywhere near true, the responding officers here merely aggravated a situation that was in the process of being brought under control by the time they got there. We can't dismiss the possibility that that is exactly what happened. The plaintiffs put on an expert who testified that if Lukus was a danger only to himself, as alleged by the plaintiffs, the officers should have been trying to (1) slow the situation down, (2) avoid increasing the subject's level of anxiety or excitement, (3) attempt to develop rapport, and (4) take advantage of the fact that time is on their side. Only a civil trial will tell us whether these deputies truly had the opportunity to do this. But we must also understand that as the deputies' version of the facts comes out, it may be determined that they were indeed confronted with an inebriated out-of-control youth who was in fact a danger to others and that shooting him was both necessary and reasonable under the circumstances. Only after a jury trial will we know which scenario is closer to the truth.