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Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill808@AOL.com

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THIS EDITION'S WORDS OF WISDOM:

"*I fear the day that technology will surpass our human interaction. The world will have a generation of idiots*." (Albert Einstein)

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***Case Law*:**

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***DUI Arrests and Warrantless Blood Tests*:**

Missouri v. McNeely **(Apr. 17, 2013) __ U.S. __ [133 S.Ct. 1552]**

Rule: The fact that the blood-alcohol level in the bloodstream of a person arrested for DUI is rapidly dissipating does not establish a "per se" exigency sufficient by itself to justify the warrantless taking of blood from a non-consenting arrestee.

Facts: Defendant was observed by a Missouri police officer at 2:08 a.m. speeding on a highway and repeatedly crossing over the centerline. Upon stopping defendant, it was

noticed that he had bloodshot eyes, slurred speech, and the smell of alcohol on his breath. Defendant told the officer that he'd had "a couple of beers." (*Never heard that one before*.) Upon exiting his car, defendant appeared unsteady on his feet. After performing poorly during a field sobriety test, and then refusing to blow into a portable breath testing device, defendant was arrested. While transporting defendant to the station for the purpose of administering a breath test, defendant informed the officer that he would not consent to the testing of his blood-alcohol level. The officer therefore diverted to a nearby hospital to secure a forced blood draw. After reading defendant a standard implied consent admonishment concerning the automatic revocation of his driver's license for one year, and that his refusal could be used against him in a future prosecution, defendant again refused. The officer therefore directed a hospital lab technician to take a blood sample against defendant's will, which was done at approximately 2:35 a.m. (28 minutes after his being stopped). No warrant was ever sought. Subsequent laboratory tests showed that defendant's blood-alcohol level was at 0.154%, well above the legal limit of 0.08%. Defendant was charged in state court with driving while intoxicated (DWI). He filed a motion to suppress the results of his blood test arguing that no exigency had been shown excusing the lack of a search warrant. The trial court agreed, finding that "apart from the fact that '[a]s in all cases involving intoxication, defendant's blood alcohol was being metabolized by his liver,' there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant." The evidence of his blood-alcohol level was therefore suppressed. On appeal directly to the Missouri Supreme Court, the trial court's decision was affirmed. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a 6-to-3 decision, affirmed. The issue on appeal was whether the natural dissipation of alcohol in the bloodstream of a person arrested for DUI establishes a "*per se*" exigency justifying a warrantless blood draw when the arrestee has declined to give his consent. The State argued that it does. The majority of the Supreme Court, agreeing with the Missouri courts, held that it does not. The seminal case on this issue is *Schmerber v. California* (1966) 384 U.S. 757, which held that a search warrant in such a case was unnecessary. In *Schmerber*, however, the defendant had been injured in a traffic accident. Blood was withdrawn from his body over his objection while at the hospital. The Supreme Court held in *Schmerber* that because defendant had to be taken to the hospital to undergo medical treatment, and with the additional time it would take to investigate the accident, the officer reasonably determined that there was insufficient time to obtain a search warrant without compromising the validity of defendant's blood-alcohol reading. "Given these special facts," the *Schmerber* Court found that no warrant was required. Those circumstances, however, do not apply in this case. Whether or not a warrantless blood draw taken from a non-consenting DUI suspect is constitutionally reasonable must be determined on a case-by-case basis while considering the totality of the circumstances. In this case, there was no evidence of any circumstances indicating that the officer couldn't have obtained a search warrant. For this reason, a search warrant should have been obtained before forcing defendant to provide a blood sample.

Note: The Court rejected all sorts of arguments as to why DUI cases should be considered an exception to the normal rule, including the important governmental interest in preventing the destruction DUI drivers inflict on our highways, the lessened expectation of privacy inherent in motor vehicles, and the advantages of a "bright line," easy to follow test for law enforcement. And while noting that the time it takes to get a warrant is one factor that may be considered in deciding whether a warrantless forced blood draw is lawful, taking into account the availability of modern-day expedited procedures such as telephonic search warrants, the Court declined to discuss what other factors may be considered. In *Schmerber v. California*, it was the fact that the officer had to investigate a traffic collision as well as seek medical treatment for the suspect that excused the lack of a warrant. But it is also likely to be taken into account that while one officer is handling the many duties inherent in any related investigation, another may be working on a search warrant. So the bottom line is that it is now clear as mud as to what, beyond the metabolism of the alcohol in suspect's system, counts towards creating an exigency. And to add to the confusion, California doesn't even provide any statutory authority for obtaining a search warrant in misdemeanor DUI cases. (See P.C. § 1524(a)) This leaves the officer with a single choice to make in misdemeanor situations. Either you merely book him as a "refusal" (his refusal being admissible against him at trial), or you force a blood draw and see what innovative arguments your local prosecutor can come up with to save the result. One of those innovative arguments might be (as was suggested to me via various Internet discussions of the problem) that the very fact that there is no statutory justification for a misdemeanor DUI search warrant provides you with the articulable exigency needed to take the blood without a warrant. Although I poo-pooed this idea at first, the Supreme Court seems to say that this argument might just fly: "Other factors . . . *such as the procedures in place for obtaining a warrant* . . . may affect whether the police can obtain a warrant in an expeditious way and therefore *may establish an exigency that permits a warrantless search*." We'll have to wait for the next case to tell us if this works.

***Homeless Persons and Personal Property*:**

Lavan v. City of Los Angeles **(9th Cir. Sept. 5, 2012) 693 F.3rd 1022**

Rule: Taking the personal property of homeless persons, left temporarily on the street, and destroying it without notice or an opportunity to be heard, constitutes both a Fourth Amendment illegal seizure and a Fourteenth Amendment due process violation.

Facts: Plaintiffs in this civil suit are nine homeless individuals who live in Los Angeles's "Skid Row" area, commonly in small, collapsible mobile shelters called "EDARs" that were provided by a charitable organization. Plaintiffs carried all their personal possessions, including identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets, in small collapsible carts also provided by charitable organizations. On occasion, plaintiffs were forced to leave these carts and belongings on the sidewalks as they attended to necessary tasks such as showering, eating, using restrooms, or attending court. However, doing this was in direct violation of an L.A. Municipal ordinance (LAMC § 56.11) which provided that "[n]o

person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk." On separate occasions between February 6 and March 17, 2011, pursuant to this ordinance, city employees took plaintiff's personal property left temporarily on Skid Row sidewalks under circumstances where the employees knew that the property had not been purposely abandoned, and immediately had the property destroyed. Plaintiff's sued in federal district court alleging that taking and destroying their belongings violated their constitutional rights. The trial court found that the taking and destroying of plaintiffs' property under circumstances where such property had not been abandoned did in fact violate plaintiff's Fourth (seizure) and Fourteenth (due process) Amendment rights. The court therefore issued an injunction barring the City from seizing property absent an objectively reasonable belief that (1) it had been abandoned, (2) presents an immediate threat to public health or safety, or (3) was evidence of a crime or constituted contraband. The City was also required to maintain the property in a secure location for a period of at least 90 days unless to do so constituted an immediate threat to public health or safety. However, it was also ordered that the City could lawfully seize and detain *abandoned* property, as well as remove hazardous debris and other trash. This injunction is intended to "prevent[s the City] from unlawfully seizing and destroying personal property that is not abandoned without providing any meaningful notice and opportunity to be heard." Accordingly, the City was also "directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, . . . advising where the property is being kept and when it may be claimed by the rightful owner." The City of Los Angeles appealed.

Held: The City's argument on appeal was that the seizure and destruction of Plaintiffs' properly, unabandoned or not, implicated neither the Fourth nor the Fourteenth Amendments, and that therefore an injunction preventing such a seizure and destruction is unlawful. The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, disagreed, affirming the trial court's order. In this case, it was not an issue of whether the Plaintiffs' had a reasonable expectation of privacy in the contents of their personal belongings (although in footnote 6, the Court surmised that they did), but rather whether those belongings were unreasonably seized. The Fourth Amendment protects against unreasonable seizures to the same extent as it does for unreasonable searches. "A 'search' occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." The Fourth Amendment protects possessory interests even when privacy rights are not implicated The Fourth Amendment issue at stake in this case was whether there was "some meaningful interference" with the Plaintiffs' possessory interest in their property. The Court ruled that there was. "(B)y seizing and destroying (Plaintiffs') unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with (their) possessory interests in that property," thus violating the Fourth Amendment. The Court further found that taking the Plaintiffs' personal property without notice or an opportunity to be heard, and then immediately destroying that property, was a Fourteenth Amendment due process violation. The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, *or property*, without due process of law." The Court rejected the City's argument that a homeless person's personal property, at least when left

unattended on the street, is not worthy of constitutional protection. To the contrary, "this case concerns the most basic of property interests encompassed by the due process clause: (Plaintiffs') interest in the continued ownership of their personal possessions." Taking such property without notice and an opportunity to be heard, and then destroying it, does indeed constitute a due process violation. "(D)ue process requires law enforcement 'to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return.'" Further, it is irrelevant that Los Angeles enacted an ordinance prohibiting the leaving of personal property on the streets. The trial court, therefore, ruled correctly in granting an injunction.

Note: The City conceded the fact that it was unreasonable, and thus a Fourth Amendment violation, to immediately destroy the Plaintiffs' property, whether abandoned or not. So that was not an issue. The importance of this case is to alert law enforcement to the constitutional issues involved in their efforts to appease business owners and other private citizens who, understandably, may be offended by the mere presence of homeless individuals in front of their stores and in their communities in general. The bottom line is that the Constitution protects an individual's right to be homeless, to be offensive in appearance, and to otherwise disturb the idyllic appearance of our communities. (See *Jones v. City of Los Angeles* (9th Cir. 2006) 444 F.3rd 1118, 1121-1123; vacated due to settlement, (9th Cir. 2007) 505 F.3rd 1006.) So you can't just chase them off. Nor can you charge them with loitering (See *People v. Superior Court* [*Casewell*] (1988) 46 Cal.3rd 381, 401.), or otherwise criminalize their mere presence. It should also be noted that a petition for certiorari has been filed (Feb. 28, 2013) with the U.S. Supreme Court in this case, so we may not have heard the last of this issue.

***Vehicle Searches and Probable Cause*:**
***Community Caretaking and Vehicle Impounds*:**

United States v. Cervantes **(9th Cir. Nov. 28, 2012) 703 F.3rd 1135**

Rule: (1) Probable cause to believe that a vehicle contains contraband requires more than just conclusory opinions and unsubstantiated conclusions that the suspect engaged in countersurveillance driving techniques. (2) For the "community caretaking" theory to justify the impoundment of a vehicle requires evidence that to leave an arrestee's car at the scene would impede traffic, threaten public safety, or be subject to vandalism or theft.

Facts: Los Angeles Police Department narcotics detectives were surveilling a suspected narcotics "stash house" in Pacoima during an early afternoon in March, 2009, when Detective Todd Hankel observed an unidentified male drive up to, and enter, the house. The same male left the house a few minutes later carrying a large white box which he put into his truck. The male drove to a nearby street where he gave the box to another male, later identified as defendant, sitting in a white GMC Envoy. Defendant was then observed driving to a liquor store where he made a purchase. He then drove to a residence on Polk Street via Interstate 5 and through a residential area. Detective Hankel noted that defendant failed to make this trip by the most expeditious route, indicating to him that defendant was engaging in a "countersurveillance driving technique" such as

used by drug dealers in attempting to detect law enforcement surveillance. Defendant was observed sitting in his vehicle for about five minutes before he entered the residence. Two and a half hours later, defendant and a second male left the Polk Street residence in a white BMW, returning within 45 minutes. An hour after that, defendant came out of the house, went to the rear hatch area of his GMC Envoy (doing what, is unknown), and then drove away. At that point, Detective Hankel radioed for a marked patrol unit to make a legal traffic stop of defendant's vehicle. When defendant failed to come to a complete stop behind the limit line at an intersection, a traffic stop was affected with defendant making an immediate and legal stop at the curb. Upon contacting defendant, it was determined that he did not have a driver's license or any documentation for the vehicle. He told the officers that his license had been taken away after having been arrested for driving while under the influence; a conviction for which he was currently attending court-ordered classes. Upon finding no record of a driver's license in defendant's name, it was decided that his vehicle would be impounded pursuant to V.C. §§ 12500(a), 14602.6(a)(1), and 22651(h)(1). Upon doing an inventory search of the car, the white cardboard box was located on the rear passenger seat, and searched. It was found to contain two kilograms of cocaine. Defendant was arrested for transporting cocaine. (Upon booking, it was discovered that DMV records did in fact show that defendant had a valid driver's license.) Charged in federal court, defendant filed a motion to suppress the cocaine. The trial court judge denied the motion, ruling that the officers had probable cause to search defendant's vehicle. Alternatively, the trial court found that impoundment of the car (with its concurrent inventory search) was justified under the community caretaking exception to the Fourth Amendment.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed. (1) *Probable Cause*: Warrantless searches of a vehicle, where there is probable cause to believe that it contains evidence of a crime or contraband, are lawful as an exception to the search warrant requirement. In this case, the Government argued that evidence that the white box was retrieved from a "stash house," along with defendant's later "countersurveillance" driving, were sufficient to constitute "probable cause." However, the record failed to describe what it was about the residence that caused Detective Hankel to believe it was a "stash house." A conclusory allegation by law enforcement that a particular house is a suspected narcotics stash house is entitled to little if any weight. Absent testimony describing the facts and circumstances underlying Detective Hankel's conclusion, the Court declined to count his belief that the residence was a stash house towards a finding of probable cause. Similarly, Detective Hankel's conclusion that defendant had engaged in "countersurveillance driving techniques" was not supported by the record. Merely failing to take the quickest or shortest route does not mean, by itself, that a person is attempting to elude law enforcement surveillance. Comparing defendant's driving with other cases where countersurveillance driving was indeed obvious, very little weight can be given to the relevance of the route defendant chose to take. The Court therefore found these two factors to be insufficient to support a finding of probable cause. (2) *Community Caretaking*: The Government's second argument was that defendant's vehicle was lawfully searched as an inventory search during a lawful impoundment. The impoundment of defendant's vehicle, upon his arrest, is provided for by California's statutes. However, it has been held (several times now) that despite the applicability of

authorizing statutes, a vehicle may not be impounded unless it is also lawful under the so-called "*community caretaking*" theory. Community caretaking allows for a pre-court hearing impoundment of a motor vehicle *only* if to leave it at the scene of the arrest would impede traffic, threaten public safety, or be subject to vandalism or theft. The Court ruled here that there was no testimony from which it could be determined that any of the above circumstances applied. To the contrary, the evidence showed only that defendant had pulled over to the curb and legally parked his car. The fact that defendant's car was not located close to his home was held to be of minor importance. The court concluded instead that the circumstances indicated that the inventory search of defendant's car was really no more than a pretext for an investigatory search, looking for drugs. The cocaine, therefore, should have been suppressed.

Note: Some very important points were made here. First, "*conclusory*" statements from a police officer, not supported by evidence of the underlying facts and circumstances justifying such a conclusion, are worth little or nothing. This rule holds true whether writing a search warrant affidavit, writing an arrest report, or testifying in court (although it is the prosecutor's obligation to insure that an officer's testimony goes into the necessary underlying facts). As for the need to prove the applicability of the community caretaking theory, the dissent raises a very interesting question on this point; i.e.: Is it necessary for the prosecution to present evidence on this issue or should the court reach a conclusion on this issue based upon the circumstances? Citing the Ninth Circuit's own prior holding in *Ramirez v. City of Buena Park* (9th Cir. 2009) 560 F.3rd 1012, 1025; it was noted that "(W)e have concluded that a vehicle left unattended in an exposed or public location when the driver is taken into custody is *necessarily* vulnerable to vandalism or theft." (pg. 1144; italics added.) But given this indecision in the various court opinions as to whether it can be assumed that community caretaking applies depending upon the circumstances, it would help immensely for an officer to cite his or her reasons why it is believed that to leave the arrestee's car at the scene would impede traffic, threaten public safety, or be subject to vandalism or theft.

***Patdowns for Weapons*:**

United States v. I.E.V. **(9th Cir. Nov. 28, 2013) 705 F.3rd 430**

Rule: A patdown is legally justified only with a reasonable suspicion to believe that a person may be armed with offensive weapons. An object that may be contraband can be recovered only when there is full probable cause to believe that it is contraband.

Facts: Defendant, a minor, was the passenger in a vehicle driven by his adult brother, Joseph Mendez, when they entered the United States Border Patrol Checkpoint near Whetstone, Arizona. The checkpoint is located on a north-south highway about 100 miles north of the U.S./Mexican border. As the vehicle entered the primary inspection area of the checkpoint, a police dog, trained in the detection of drugs and human beings, alerted on the car. As a result, they were sent over to the secondary inspection area where defendant and his brother were asked to exit their vehicle. At that point, the dog failed to alert on either suspect. Mendez consented to a search of their car. A "canine

inspection" of the car was made, but failed to result in any new alerts. Neither Mendez nor defendant were threatening, nor did they show any signs that they might attempt to flee. However, Mendez suddenly "seemed very nervous and continually touched his abdomen area." Although there was testimony that defendant also "displayed similar behavior," this fact was not noted in the resulting arrest reports. For this reason, the federal magistrate later "discounted" this testimony. The searching officer also testified that from his training, he knew that "narcotics and firearms go together." Based upon this knowledge, the officer decided to pat-down both subjects. So while this officer patted Mendez down, a second officer patted defendant down. Although nothing was found during Mendez's patdown, the second officer (who did not testify) felt something suspicious under defendant's shirt. The second officer then lifted his shirt and found a brick-shaped object taped to his abdomen. The first officer then searched Mendez again, finding a similar object taped to his abdomen. The bricks were found to contain marijuana. Charged in federal court, defendant filed a motion to suppress. The trial court denied his motion, noting that under the totality of the circumstances (i.e., the proximity to the border, the canine alert to contraband, the nervous behavior and gestures of Mendez, and the officer's experience that individuals who transport contraband are also often armed), the marijuana was the product of a lawful patdown for weapons. Defendant appealed. (Mendez was not a party to this appeal.)

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, reversed, finding the patdown for weapons and the recovery of the marijuana to be illegal under these circumstances. Citing the landmark United States Supreme Court case decision of *Terry v. Ohio* (1968) 392 U.S. 1, the Court cited the oft-repeated rule that a police officer may conduct a limited patdown of a suspect's outer clothing, checking for offensive weapons, based upon as little as a "reasonable suspicion" that the person may be armed. The purpose of this reduced standard (searches commonly requiring full probable cause) is to allow an officer to defend himself and others against a sudden violent assault from one who is suspected of criminal activity. The test is "whether a reasonably prudent (person) in the circumstances would be warranted in the belief that his (or her) safety or that of others was in danger." In this case, it is undisputed that the officers had a reasonable suspicion (if not more) that "criminal activity was afoot." The issues are, however, (1) whether they had the necessary reasonable suspicion to believe that defendant was armed, and (2) whether the patdown was intended to feel for weapons or for contraband, and (3) whether the retrieval of the marijuana, based upon what was felt during the patdown, was lawful. The Court ruled that with nothing to indicate that defendant was dangerous, or otherwise armed, and with no contraband having yet been found, there was insufficient cause to believe defendant might be armed. While it may be true that weapons are commonly associated with drug trafficking, it has also been held (see *Ybarra v. Illinois* (1979) 444 U.S. 85) that a general suspicion of drug activity does not provide the necessary reasonable suspicion to justify a "blanket authorization for frisking anyone in the vicinity." Despite the canine alert, no drugs had yet been found up to the point of the patdown. Further, other than Mendez acting nervous and touching his abdomen, there was nothing to indicate that either he or defendant might be armed. Nervousness alone is legally insufficient to justify a patdown. Although the sequence of events was not clear from the record (as noted in the dissent), it appears that the patdowns did not occur until

after "a large portion of (the officers') investigation of the vehicle without facing any threatening behavior" had been completed, with the only additional factor being Mendez's nervousness and touching of his abdomen. As to the proximity to the border (i.e., 100 miles), which might serve to relax the legal search and seizure standards involved, this was a non-issue in that there was no evidence that either defendant or his brother had come across the border. Further, the timing of the patdowns, per the Court, made suspect the officers' true motivations for conducting them. Along that theme, the Court noted that from the testimony provided (without the officer who searched defendant testifying), the record was unclear as to whether defendant was searched (i.e., his shirt lifted) because the officer believed that he had felt a weapon, or that the object he felt under defendant's shirt was contraband. For a full search (i.e., the lifting of the shirt in this case) to be lawful, the object felt must make it "immediately apparent" that it is a weapon (requiring only a reasonable suspicion), or, in the alternative, sufficiently certain that it is contraband so that it can be said the officer had developed full probable cause. Neither circumstance appeared to be present in this case. As such, the patdown, and the resulting recovery of the marijuana, were both illegal. The marijuana should have been suppressed.

Note: The dissent, written by the Chief Judge Alex Kozinski, was critical of the majority decision for not considering the "*totality of the circumstances*," as the U.S. Supreme Court has so often criticized the Ninth Circuit for failing to do. He has a good point, the majority opinion picking apart the probable cause, piece by piece. But I also see a failure in the proper, orderly, and complete presentation of the evidence to the trial court, resulting in an unclear record, providing the 9th Circuit with too many excuses for interpreting the evidence in any way they saw fit. I don't say that to be critical, knowing how easy it is to second guess these situations. And I also know how common it is for an appellate court to shade the facts to justify a particular conclusion. So we can only take this case for what it's worth. When conducting a patdown, it must be clear (and included in your reports) as to why you felt a patdown was necessary, and recognize that the sole legal purpose for such a limited search is the recovery of offensive weapons, and not contraband. You also must be familiar with the exceptions, such as what it takes to justify the recovery of contraband if found. And then most importantly, screw all the rules and do what you need to do to stay alive.

***Use of Force; Tasers*:**

Marquez v. City of Phoenix **(9th Cir. Oct. 4, 2012) 693 F.3rd 1167**

Rule: The lawfulness of the amount of force used to affect an arrest is dependent upon the circumstances, including the degree of violence exhibited by the person to be arrested.

Facts: Officers Joshua Roper and David Guliano responded to a call in the early morning hours of July, 28, 2007, at the Plaintiffs' home, where they contacted Lydia Marquez. They learned from Lydia that her adult son, Ronald, was in a bedroom where he was attempting to perform an exorcism on her 3-year old great-granddaughter, Destiny. Also locked in the room was Lydia's 19-year old granddaughter, Cynthia. While talking to Lydia, they heard Destiny screaming and crying like she was in severe pain. With Lydia's assistance, the

officers entered the home and went to the closed bedroom door. After identifying themselves, the officers forced their way into the bedroom, their progress slowed by a bed that had been pushed up against the door. Inside, they found the small room "in chaos," cluttered with blood-spattered furniture and blood on the walls. A shirtless, heavy-set Ronald was reclined on a bed, holding a silent, motionless Destiny in a choke-hold. A screaming, also "quite large" (and naked to boot) Cynthia sat in a corner looking like she'd been beaten. (It was later discovered that in an attempt to exorcize her demons, Ronald had gouged her eye.) Officer Roper ordered Ronald to let go of the child or he would tase him. Failing to comply, Officer Roper deployed his "Taser X26 ECD," with the two darts lodging in Ronald's left side. When this seemed to have no effect, Officer Roper pulled the trigger a second time. This also failed to slow Ronald down as he kicked Officer Roper in the thighs and groin. Meanwhile, Officer Guliano was able to get Destiny away from Ronald and pass her to relatives outside the room. Putting his Taser in "stun-gun mode," Officer Roper attempted to tase Ronald with little effect as he continued to "flail" wildly. When Ronald was eventually overpowered, the naked Cynthia began an assault on the officers. It took a couple of minutes, and two Taser deployments, before she was subdued. After handling her, it was noticed that Ronald had a weak pulse. Efforts to revive him failed as he went into cardiac arrest and died. A later autopsy showed that Ronald suffered from heart disease, with "excited delirium" being listed as the cause of death. He had seven sets of Taser burns on his body, plus the two Taser probes in his side. In all, the Taser had been triggered some 22 times during the altercation. The Marquez family later sued in federal court, alleging that the officers used excessive force in causing Ronald's death. The trial court judge granted the officers' motion for summary judgment, dismissing the lawsuit. The Marquez's appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, affirmed. As in any "use of force" case, whether or not the officers violated the decedent's Fourth Amendment (i.e., "seizure") rights, depends upon a "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." In other words, how much force was used, and was it really necessary under the circumstances? In this case, Ronald was tased no less than 9 times; twice while the Taser was in the "probe mode" (i.e., shot with the darts), and 7 times in the "drive-stun mode." The Court found this to be a "considerable" amount of force, and a "not-insignificant potential intrusion upon Ronald's Fourth Amendment rights." Balanced with this, however, was the fact that the two officers walked into a blood-spattered room, an injured adult, and a child in evident distress. Although warned that he would be tased if he refused to cooperate, Ronald responded violently, resisting arrest while kicking one of the officers. Not only was it reasonable to assume that Destiny and Cynthia were in immediate danger, but that the officers were as well. Even with the use of the Taser, it took both officers to wrestle Ronald into submission. "(A)though the officers used significant force in this case, it was justified by the considerable governmental interests at stake." The Plaintiffs' lawsuit, therefore, was properly dismissed.

Note: The dissenting opinion didn't say that the majority opinion is wrong, but only that it should be up to a civil jury to determine whether the force used was excessive under the circumstances. The majority held, however, that as a matter of law, the force Officers Roper and Guliano used under these circumstances was lawful. But don't take this as an indication that the 9th Circuit is loosening up on its rules for using the Taser. This was an extreme circumstance where the violence was already in progress when the Taser was deployed. A Taser is still a potentially dangerous weapon that must be treated accordingly.