The California Legal Update

Remember 9/11/2001; Support Our Troops

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This edition of the California Legal Update is dedicated to the memory of Escondido Police Officer *Laura Perez*, murdered on July 23, 2014. (see Admin. Note, below)

THIS EDITION'S WORDS OF WISDOM:

"*Oh what a tangled web we weave, when first we practice to deceive*." (Sir Walter Scott; *Marmion*, 1808)

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ADMINISTRATIVE NOTES:

***Officer Laura Perez; Plea for Help*:** Escondido Police Officer Laura Perez was murdered on July 23, 2014, by her husband (now in custody for murder, arson and child endangerment; http://www.kpbs.org/news/2014/jul/24/escondido-police-officer-allegedly-killed-husband/). Also a victim of this tragedy is the couple's four-year-old daughter, now left

without a mother *or* father. With all the family possessions being destroyed in the burning of their home, the Escondido Police Officer's Association (EPOA) is asking for donations for the couple's daughter. Monetary donations may be sent to the EPOA at P.O. Box 1309, Escondido, CA 92033, or any Wells Fargo branch (Account # 1613334562), or dropped off at the Escondido Police Dept. at 1163 North Centre City Parkway. In addition to cash donations, clothing for the daughter (sizes unknown), a bed, linens for the bed, and toys are needed. For more details, you can contact 760-801-1596. Also, the SD Sheriff's Department is sponsoring a BBQ at the San Marcos Station on Thursday, July 31st, from 1200 to 1400 hours, where donations may also be dropped off.

***Shoot to Kill vs. Ending the Threat*:** In the most recent *California Legal Update* (Vol. 19, #7), in my brief on *Plumhoff v. Rickard* (pg. 5), I made the comment: "*So while you've been taught that when you have to shoot, you shoot to kill (as opposed to warn, wound, or merely incapacitate), the legal justification for killing a suspect ends when it is clear that the danger has ended.*" Several veteran officers took issue with my statement that officers are taught to "*shoot to kill*," noting that, more correctly, you are taught to do whatever is necessary to "*end the threat*." I think, however, that this is really a matter of semantics and that we are in fact saying the same thing. It's just that in this politically correct, lawsuit-prone world, saying that officers are expected to have an intent to kill whenever they display a firearm is apparently a bit too blunt for some. The fact is, in my mind, when you find yourself in a situation that requires the use of a firearm to "*end the threat*," you don't attempt to do that by shooting the gun out of the suspect's hand or even wounding him in the leg, for instance. While this looks cool on TV, attempting such pinpoint accuracy in a highly tense situation is usually unsuccessful. If anything, it only increases the likelihood of missing your target altogether and hurting an innocent bystander somewhere down range. If by pulling your gun, the suspect submits and it becomes unnecessary for you to pull the trigger, then the threat is over and you won't have to kill him. That, of course, is a good thing. But if it becomes necessary to pull the trigger, you are taught to shoot for the center of mass knowing full well that by doing so, you're likely to kill the suspect. Today, this is described by some as "*ending the threat*." When I went through the police academy some 43 years ago during a perhaps not so politically correct era, it was called (more correctly, in my mind) "*shooting to kill*." You can call it what you like. The end result is the same.

***Riley v. California and Beyond*:** I'm already, and not surprisingly, being asked about how far the recent U.S. Supreme Court decision of *Riley v. California* (June 25, 2014) 573 U.S. __ [189 L. Ed. 2nd 430] really goes. *Riley* is the case that requires a search warrant to get into a person's cellphone when it is seized incident to his arrest. (See *California Legal Update*; Vol. 19, #7, pg. 2.) But there are other legal justifications for searching containers without a warrant, the most prominent being "*with probable cause*" to believe it contains evidence of a crime, an "*inventory of an impounded vehicle's contents*," "*with exigent circumstances*," and "*consent*." Also, the question comes up: *How about an arrestee's laptop computer*? *Riley* only dealt with cellphones seized incident to arrest. But given the emphasis the Supreme Court puts on the reasons why a search warrant is necessary to get into an arrestee's cellphone (i.e., the extreme amount of personal information contained in today's modern cellphones; 189 L.Ed.2nd at pp. 446-

449.), my guess is that a warrant will also be necessary to inspect the contents of a cellphone even through there is probable cause to believe it contains evidence of a crime. The *Riley* Court had no qualms rejecting the argument that a warrant would be unnecessary whenever "an officer *reasonably believes* that information relevant to the crime, the arrestee's identity, or officer safety" might be in a person's cellphone. (Italics added; 189 L.Ed.2nd at p. 450.) It is only a small step to extend this rule to those instances where there is full *probable cause to believe* a cellphone contains such information. (See *Missouri v. McNeely* (Apr. 17, 2013) __ U.S.__ [133 S.Ct. 1552]; requiring a search warrant to force a blood draw of an arrested DUI, absent exigent circumstances, even with probable cause to believe he is legally under the influence.) And while not discussed by the Supreme Court in *Riley*, I think we'll lose the argument that it is okay to inspect the contents of a cellphone found in an impounded vehicle as a part of an otherwise lawful inventory search. I don't see the legal reasoning behind the necessity of conducting warrantless inventory searches applying to the contents of a cellphone. (See *Florida v. Wells* (1990) 495 U.S. 1.) On the upside, the Court told us in *Riley* that exigent circumstances will allow for a warrantless search. (189 L.Ed.2nd at pp. 445, 451-452.) So, except for determining what is, and what is not an exigency, that is a non-issue. A "*free and voluntary*" consent will also justify a warrantless search of a cellphone. Finally, as for personal computers found in an arrestee's possession, given the fact that such a device can be expected to contain as much, if not more, personal information than a cellphone, I strongly believe the courts will eventually extend the *Riley* rule to laptops as well.

CASES:

***The Use of Deadly Force*:**

George v. Morris **(9th Cir. Sep. 16, 2013) 736 F.3rd 829**

Rule: When it is contested whether or not a decedent pointed his pistol at an officer, the reasonableness of the use of deadly force is an issue that must be decided by a civil jury.

Facts: Donald George suffered from terminal brain cancer and, while undergoing chemotherapy, became an angry person who had expressed a reluctance to continue living. His desperation caused his wife, Carol, to hide a number of firearms they kept in the house. Donald was having a particularly bad day on March 6, 2009. Carol noticed that Donald had retrieved the keys to their car. Concerned for his welfare, she followed him and watched as he took a pistol from the trunk and loaded it with ammunition. Carol attempted to take the gun away from Donald, but he refused to cooperate. A hysterical Carol called 9-1-1, accidently getting the Ventura office of the CHP instead of the Santa Barbara Sheriff in whose jurisdiction they lived. Before Ventura could get a complete address, Donald made Carol hang up. Relaying the information to the Santa Barbara Sheriff's Department, this second dispatcher called Carol back to get the rest of the address. Santa Barbara Sheriff's Deputies Jarrett Morris, Joseph Schmidt, and Jeremy Rogers responded to what they were told was a "domestic disturbance" involving a firearm. Upon arrival, Carol met them at the door and told them that Donald was on the patio with his gun. Carrying AR-15 rifles, the deputies established a perimeter around the house. Donald was soon

observed coming out onto a balcony with the aid of a walker. He was ordered to show his hands. A pistol was observed in his left hand with the barrel pointing down. There was some dispute in the evidence whether Donald pointed the pistol at the officers. Deputy Rogers testified that Donald did in fact point the gun at the officers, holding it with both hands. Plaintiff provided testimony from Carol and an expert to the effect that Donald was physically incapable of raising the barrel of the gun while holding onto his walker. Either way, nine shots were fired at Donald some twelve seconds after deputies first broadcast that he had a firearm. Donald never fired his gun. He died two hours later at the hospital. Carol George later sued the deputies in federal court alleging the excessive use of force; a violation of the Fourth Amendment. The deputies' pretrial motion for summary judgment was denied. The deputies appealed.

Held: The Ninth Circuit Court of Appeal, in a split 2-to-1 decision, affirmed. This being a pretrial determination of whether there was sufficient evidence to take to a jury, the issue being whether the officers violated Donald George's Fourth Amendment rights by using excessive force, the Appellate Court is required to assume that the plaintiff's allegations are true. Carol George, the plaintiff, argued that Donald was physically incapable of pointing a gun at the officers. Although only vaguely described in the description of the facts, it appears that both Carol and an expert testified that Donald could not have accomplished this, given his disability, at least while holding onto his walker. However, at least one deputy testified that Donald did in fact point the gun at the officers, using both hands on the pistol as he did so. In determining whether officers violated one's Fourth Amendment rights by using deadly force, the United States Supreme Court set out in *Graham v. Connor* (1989) 490 U.S. 386, a non-exclusive list of factors for the Court to consider: (1) The severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape. If it is proved that Donald George did in fact point his gun at the officers, it would be clear that he certainly "posed an immediate threat to the safety of the officers." "When an individual points his gun 'in the officers' direction,' the Constitution undoubtedly entitles the officer to respond with deadly force." A civil jury would be justified, under such circumstances, in finding that the use of deadly force was justified. But at the pretrial summary judgment stage, it must be assumed that the plaintiffs will be able to convince the jury that, as they alleged, Donald never raised his pistol and aimed it at the officers. With such an "issue of fact" to be decided, plaintiff is entitled to a trial. As such, the officers are not entitled to relief at this point.

Note: The Court was not indifferent to the dangerousness of the situation. "(W)e are clear-eyed about the potentially volatile and dangerous situation these deputies confronted." The Court also noted that dangerousness inherent in a "domestic violence" radio call is a factor to be considered in determining the reasonableness of using deadly force. But with the plaintiff providing evidence to the effect that Donald George was physically incapable of pointing his pistol at the deputies, this left "*issues of fact*" for a civil jury to resolve. The dissent, however, written by the highly respected Stephen Trott, noted how incredible and unbelievable the plaintiff's evidence on this issue is. In a long discussion of the facts (and the law), adding a lot of detail the majority decision ignored, Justice Trott described in detail the "indisputable evidence that a serious domestic dispute was in progress, (with) a heated quarrel between a desperate wife and a defiant husband over a firearm." Justice Trott also discusses the dangerousness of the situation, the fact that Carol George did not see the shooting herself and really had no idea whether her husband

pointed his pistol at the officers, and how speculative the so-called expert testimony was on this issue. But being outvoted, Justice Trott's opinion does not relieve the deputies of the discomfort of having to endure a civil trial on the issue of the reasonableness of the deadly force they used. Such is the nature of a civil lawsuit.

***Agents of Law Enforcement*:**
***Warrantless Searches and Bodily Intrusions*:**

George v. Edholm **(9th Cir. May 28, 2014) 752 F.3rd 1206**

Rule: When a private citizen acts at the behest of law enforcement officers, he becomes a police agent and is subject to the same restrictions as any other government actor. Bodily intrusions, done without a court order, consent, or an exigency, are unconstitutional.

Facts: Pomona Police Officers Greg Freeman and Daryll Johnson, in full uniform and a marked police car, were patrolling an area known as a hangout for gang members and drug dealers when they observed two men standing in front of an apartment complex. The officers got out of their car and approached the men when one of them, plaintiff Clifford George, started to run. The officers called to George to stop, and he did. George informed the officers that he was on parole for an armed robbery conviction. They therefore conducted a parole search of his nearby apartment, resulting in the recovery of a .380-caliber semi-automatic pistol. George was arrested for violating his parole and transported to the police station. He was taken to a "strip tank" to be searched. Stripped naked, George was told to turn around. He immediately started shaking and fell to the ground as if he was having a seizure. But while on the ground, he was observed reaching under his body and pushing his finger up his anus, attempting to conceal something that appeared to be a plastic baggie. Although it was suspected that he was faking the seizure and that he was hiding something in his rectum, paramedics were called. George was transported to the hospital either by the paramedics or in a police car (the record was unclear) and strapped to a gurney in the emergency room. There was some dispute as to what the E.R. staff was told, with the record again being unclear. But the hospital records showed that the officers reported that George possibly had a seizure, and that he may have both swallowed some drugs and inserted drugs into his rectum. The emergency room physician, Dr. Thomas Edholm, treated George. George's vitals were taken and it was determined that everything was "severely high" and "consistent with cocaine toxicity." Dr.Edholm concluded from this, and having been told that he might have also swallowed cocaine, that George's life was in danger. With George being uncooperative, and becoming hysterical, efforts to remove whatever might have been in his rectum were unsuccessful even though Dr. Edholm could feel with his fingers a plastic type of material. George was therefore sedated. Engaging in what was medically described as "aggressive management," a metal "anoscope" was inserted into his rectum. This made it possible to see a golf ball-sized baggie filled with a white material. Dr. Edholm removed the baggie with long forceps and gave it to the officers. George was then intubated with a tube being inserted through his nose into his stomach, through which a gallon of a liquid laxative called "GoLYTELY" was used to flush out his intestines. It was undisputed that George had not consented to any of these medical procedures and no warrant had been obtained. He was subsequently charged in state court with possession of cocaine base for sale, per H&S § 11351.5. He pled no contest and was sentenced to an eight-year prison term. George sued the officers and

the doctor in federal court alleging that by forcibly subjecting him to these medical procedures without his consent his Fourth (search and seizure) and Fourteenth (due process) Amendment rights had been violated. The federal civil trial court granted the officers' motion for summary judgment, ruling that the officers weren't responsible for what the doctor might have done, and that even if they were, they were entitled to qualified immunity. The lawsuit was therefore dismissed. (The lawsuit against Dr. Edholm was eventually dismissed and is not at issue in this appeal.) George appealed on the issue of the lawfulness of the hospital search.

Held: The Ninth Circuit Court of Appeal reversed. George argued on appeal that the conduct of Officers Freeman and Johnson, and the treatment administered by Dr. Edholm at the hospital, violated his Fourth Amendment right to be free from unreasonable searches, as well as his Fourteenth Amendment "due process" right to refuse medical treatment. The officers initially argued that they weren't responsible for what Dr. Edholm did in that as a private person, his actions were not subject to constitutional scrutiny. Although Dr. Edholm is in fact a private citizen whose actions are generally not subject to the constitutional restrictions imposed law enforcement officers, the contrary is true if it is found that he acted at the behest of the government. "Private action may be attributed to the State . . . if there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." In this case, there was evidence to support George's claims that Dr. Edholm engaged in "aggressive management" in treating George at least partially because the officers had told him (falsely, it was alleged) that George had suffered a seizure and that he'd swallowed cocaine; allegations the officers later denied. Whether or not the officers had in fact told the doctor this, which would make the doctor a state agent, is a disputed issue that must be decided by a civil jury. The officers, therefore, are not entitled to summary judgment on this basis. It must therefore be determined whether, as a state agent, Dr. Edholm's actions did in fact constitute a constitutional violation. The Fourth Amendment requires that a nonconsensual physical search of a suspect's body, like any other search, be reasonable. A body search requires "a more substantial justification" than other searches. The Supreme Court has identified three factors to consider in determining the reasonableness of a search of one's body: (1) The extent to which the procedure may threaten the safety or health of the individual; (2) the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity, and (3) the community's interest in fairly and accurately determining guilt or innocence. The first and third factors weigh in the officers' favor. In this case, the Court found that any danger to George's health and safety was slight even though not non-existent. While George claimed to have been in "significant pain," and the procedures used caused some anal bleeding, his life did not appear to be in any danger. Also, the community has a strong interest in prosecuting those who are selling cocaine, and George likely would not have been prosecuted without the evidence he had hidden in his rectum. However, these two factors are far out-weighed by the second factor. The "intrusion upon [George's] dignitary interests in personal privacy and bodily integrity" was extreme. The Court reviewed the many previous cases which have held that similar, or even less intrusive procedures "shock the conscience," being "too close to the rack and the screw" to survive constitutional scrutiny. Such intrusive body searches are permissible only when they are reasonably necessary to respond to an immediate medical emergency. The mere possibility that the baggie of cocaine in George's rectum could possibly rupture and cause an overdose is insufficient to constitute an immediate medical emergency. Viewing the evidence in the light most favorable to George, as the Court must do in a motion for summary judgment, a

reasonable jury could conclude that the only actual risk to George's health was the possibility that the baggie of cocaine base could rupture. That sort of speculative, generalized risk cannot on its own justify nonconsensual procedures as invasive as were performed in this case. Since George himself would have been responsible for any such medical risk, only a showing of the greatest imminent harm can justify intrusive action for the purpose of removing the drug. Also, less intrusive means of recovering the substance were available, such as by merely keeping George in the hospital while administering laxatives and monitoring his bowel movements until the cocaine passed on its own. The Court concluded, therefore, that the procedures used in this case to extract the baggie of cocaine from George's rectum could in fact be found by a civil jury to constitute a Fourth Amendment violation. Also, since the law is quite clear that such invasive procedures are unconstitutional, the officers are not entitled to qualified immunity.

Note: The Court declined to decide the merits of George's argument that the officers' actions here also constituted a Fourteenth Amendment due process violation, holding instead that qualified immunity protects the officers, at least absent any prior case law on the issue. But the Court is correct in concluding that the law is quite clear on the Fourth Amendment issue: Any such bodily intrusions, which would include sticking a tube down his nose, done without consent and without a warrant, are unconstitutional absent some really strong justification (e.g., the drug container has in fact ruptured and the suspect's death is imminent). And in some cases (such as in *Winston v. Lee* (1985) 470 U.S. 753, where the issue was the legality of subjecting the defendant to a 45-minute surgical procedure to recover a bullet), a bodily intrusion will not be allowed even with a court order. So the option of getting a search warrant may not always be available although I'm not aware of any case that has yet to hold this for a procedure short of actual surgery. What wasn't discussed, or figured into the cited factors to consider, was the difficulty in convincing a suspect to voluntary ingest a laxative, and then the difficulty, inconvenience, and manpower issues of having someone guard him and "monitor his bowel movements" for whatever time it takes him to decide he needs to poop. But just know that anytime you see the need to venture below a suspect's skin to recover evidence, you have a "bodily intrusion" issue and it might be best to seek the assistance of a prosecutor. As we now know, even a simple medically supervised blood withdrawal requires a court order absent an exigency or consent. (*Missouri v. McNeely* (Apr. 17, 2013) 133 S.Ct. 1552.)

***First Amendment Freedom of Speech*:**

Acosta v. City of Costa Mesa **(9th Cir. May 3, 2013) 718 F.3rd 800**

Rule: City ordinances which seek to prohibit disruptive acts at City Council Meetings are constitutional only if written so as to not also prohibit constitutionally protected speech or acts.

Facts: The Costa Mesa City Mayor, Allan Mansoor, proposed that the City enter into an agreement with Immigration and Customs Enforcement ("ICE") that would allow its police officers to be designated as immigration agents, giving them the authority to enforce federal immigration laws within the City. Public discussion of the proposed agreement was scheduled for the City Council's December 6, 2005, meeting. In compliance with California law, members of the public were allowed to address the City Council concerning any item listed on the meeting's agenda at the time designated for public comment. Speakers were each afforded three

minutes to speak. Plaintiff in this lawsuit, Benito Acosta, attended that meeting and addressed the City Council on this issue. Acosta is a founding member of the "Colectivo Tonantizin;" an organization that represents the rights of undocumented and immigrant workers and their families. A "visibly emotional and agitated" Acosta told the City Council that such an agreement with ICE would undermine public safety by deterring illegal alien workers from reporting crimes against them for fear of deportation. During this presentation, Acosta referred to Mayor Mansoor as a "*racist pig*," prompting the Mayor to cut Acosta's speaking time short by calling for a recess. Acosta, however, responded by expanding his slur to a "*f__king racist pig*." The City Council subsequently passed the proposal by a 3-to-2 vote. With this agreement making national news, the City Council placed the issue on their agenda again for the January 6, 2006 meeting. With an overflow crowd filling the council chambers, groups supporting and opposing the agreement demonstrated outside City Hall. During the public comment portion of the meeting, a total of twenty-five speakers addressed the City Council; fifteen in favor of the agreement and ten against, including Acosta. At about two minutes into his remarks, Acosta turned to the audience and asked for those who agreed with him to stand. Mayor Mansoor interrupted, saying "we're not going to do that." Acosta ignored him and told the crowd to "do it" three times until 20 to 30 people stood up, with some beginning to clap. The Mayor abruptly recessed the meeting, indicating that they were going to return in a few minutes. Acosta, however, returned his attention to the departing council and attempted to complete his speech. At the orders of Police Chief John Hensley, officers approached Acosta and told him to step down from the podium and leave the chambers. As he asked why his speaking time was being cut short and why he was being asked to leave the podium, officers tried to quietly escort him out of the chambers. Upon Acosta's request, he was allowed to retrieve his notes. However, when again being led away, he told the officers not to touch him, jerking away from them. He attempted to prevent his removal by leaning away from the officers and planting his feet. An "upper-body control hold" (i.e., by an officer putting an arm around his chest) was applied and he was forcefully led out of the building. Once the officers were outside the Council Chambers, with Acosta increasing his efforts to resist the officers, they encountered a large crowd. When the officers attempted to move Acosta into the City Hall and away from the volatile demonstrators, some of whom were throwing objects at the police, Acosta wrapped his legs and arms around a pole in an attempt to prevent the officers from moving him. The officers separated him from the pole and began to move him toward the City Hall. Acosta continued to resist, causing himself and an officer to fall to the ground. Once inside the City Hall, Acosta was placed in handcuffs. Acosta later sued the Mayor, Chief of Police, and several individual officers in federal court, challenging, among other things, the constitutionality (as a First Amendment, freedom of speech, and Fourteenth, due process, issue) of Municipal Code § 2.61, which makes it a misdemeanor to disrupt a City Council meeting. He also challenged his seizure as unconstitutional under the Fourth Amendment. After all the pre-trial summary judgment motions were decided, a civil jury was left with Acosta's First (freedom of speech) and Fourteenth (due process) claims against the Mayor and the City. A jury "implicitly" found Acosta's conduct disruptive, under § 2.61, by rejecting all of his claims. Acosta's post-trial motions for a verdict notwithstanding the jury's verdicts were denied, and he appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part and reversed in part. On appeal, Acosta argued that § 2-61 is "facially invalid" because it is constitutionally overbroad. Subdivision (a) of 2-61 provides that "The presiding officer (i.e., the Mayor) at a (City Council)

meeting may in his or her discretion bar from further audience before the council, or have removed from the council chambers, any person who commits *disorderly, insolent, or disruptive behavior*, including but not limited to, the actions set forth in (b) below." (Italics added) Subdivision (b)(1) prohibits "any personal, impertinent, profane, insolent, or slanderous remarks." Subdivision (b)(6) says: "No person shall, by disorderly, insolent, or disturbing action, speech, or otherwise, substantially delay, interrupt, or disturb the proceedings of the council." A court will invalidate a statute for being constitutionally overbroad if "there [is] a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court." Such a statute is *not* overly broad if, by its terms, it *only* permits a presiding officer to eject an attendee for actually disturbing or impeding a meeting. But the term "*disturbing*" is limited to the "*actual disruption of the meeting*." Giving it a broader meaning, to where it brings within its prohibitions lesser, constitutionally protected acts, will make it overbroad. It may not arbitrarily deem just *any* violation of its rules of decorum to be a disturbance. In evaluating Costa Mesa's § 2.61, the Court found that it was overbroad on its face in that, by its terms, it necessarily includes activities that do not fall within an allowable definition of an actual disturbance. Subdivision (a)'s prohibition of "*disorderly, insolent, or disruptive behavior*," and subdivision (b)(6)'s prohibition of "*disorderly, insolent, or disturbing action* (*or*) *speech*," was found to be too broad "because it unnecessarily sweeps a substantial amount of non-disruptive, protected speech within its prohibiting language." Also, by prohibiting the making of "*personal, impertinent, profane, insolent or slanderous remarks*" subdivision (b)(1) impermissibly includes within it regulation constitutionally protected speech. The Court also noted that while under the right circumstances, the offending portions of such a statute may be severed from those parts that pass constitutional muster, in this case the elements are so interwoven that the entire ordinance must be invalidated. However, because the officers, in arresting Acosta, reasonably relied upon the legality of their actions pursuant to § 2.61, and because probable cause supported their decision to take Acosta into custody, and because the force they used was reasonable under the circumstances, they are entitled to qualified immunity from any civil liability. Lastly, however, even though § 2.61 is invalid on its face, in this particular case the ordinance was applied in regards to Acosta in a constitutionally acceptable manner in that the evidence supported the jury's conclusion that Acosta had in fact caused an actual disruption of the City Council meeting. Therefore, despite the facial invalidity of the ordinance, the jury's verdict finding against him stands.

Note: *Confused*? If you cut through all the Court's legal mumbo-jumbo (95% of which I already cut out of this brief), all they are saying here is that if a statute, by its terms, in trying to prohibit disruptive acts or speech, also (even if unintentionally) purport to make illegal certain constitutionally protected actions and/or speech, then it is written too broad. The statute needs to be written more narrowly so that it can only be used in prohibiting actions or words that are not constitutionally protected. That's called "*facial invalidity*." On the other hand, "*as applied invalidity*" depends upon how that statute was used in the particular case in issue. Here, § 2.61 was only used as probable cause for Acosta's arrest for the actual disruptive acts he committed, and which were not protected by the Constitution. Thus, while § 2.61 is constitutionally invalid on its face, the officers are entitled to qualified immunity for using a statute they had no reason to know was invalid. Acosta's arrest, therefore, was lawful under these circumstances, eliminating any civil remedy he might have otherwise had. Also, I'm using this case as an excuse to update and expand my First Amendment, Freedom of Speech article, which deals

primarily with how to handle leaflet distributors and signature collectors on private property (e.g., department store entrances and in malls, etc.), to include disruptions at public meetings. If you want a copy of this article, you need merely ask.

***Search Warrants and Child Pornography*:**
***Good Faith*:**

United States v. Needham **(9th Cir. June 14, 2013) 718 F.3rd 1190**

Rule: An exert officer's opinion that a child molester probably possesses child porn at his home and/or on his electronic devices is unsupported by probable cause absent other evidence of such possession.

Facts: An Orange County mother's five-year-old son reported to her that a man in a mall bathroom had just touched his penis with his fingers, "soft" and "quickly." He pointed the culprit out to her; the suspect sitting on a bench near the restrooms holding a "Jamba Juice" cup. The mother had seen the same man exit the bathroom shortly before her son. She reported the incident to the Orange Police Department, providing a description of him and his clothing. Detective Leslie Franco of the department's Youth Services Bureau was able to identify the suspect as defendant through a surveillance video of the mall's Jamba Juice store's customers and the American Express card he used to buy his drink. Detective Franco ascertained defendant's address through American Express and, upon checking his criminal history, found that he was a registered sex offender. It was determined that he'd been charged when he was 16 years old with child molestation and other related offenses, including the possession of obscene matter. A search warrant was obtained to search his home, person, and automobile, asking for permission to search for the clothing defendant was wearing at the time along with his American Express card. Most of the three-and-a-half page description of items to be searched was devoted to defendant's papers and electronic and digital storage devices, looking for child pornography or evidence of possession or distribution of child pornography. Detective Franco had no prior information that defendant owned or used electronic devices, or that he might possess child pornography, but based her suspicions merely on her training and experience. In the affidavit, she noted only that: "I believe that (defendant) has an unnatural sexual interest in children. I have learned the following characteristics are found to exist and be true in cases involving persons who molest children, buy, produce, sell, or trade child pornography and who are involved with child prostitutes. They receive sexual gratification and satisfaction from actual physical contact with minors, communications with minors and from fantasy involving the use of pictures, photographs or electronic media and writing on or about sexual activity with minors. These people collect sexually explicit material of children consisting of photographs, magazines, motion pictures, video tapes, DVD's, electronic media, books and slides which they use for their own sexual gratification and fantasy. Such persons rarely, if ever, dispose of their sexually explicit materials, especially when they have taken the photographs or made the video involved, as these materials are treated as prized possessions." An Orange County magistrate signed the warrant. Upon executing the warrant, an Apple iPod was recovered on which images and videos of child pornography were later discovered. Charged in federal court with possession of child

pornography, defendant's motion to suppress the contents of the iPod was denied. He pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal unanimously affirmed. Defendant's argument on appeal, as it was in the trial court, was that the allegations as made in the warrant affidavit were insufficient to establish probable cause to believe that he possessed child pornography. More specifically, defendant argued that an officer's expert opinion alone (e.g., that evidence of a child molestation necessarily establishes probable cause that the suspect might also possess child pornography in his home and on his electronic devices) is insufficient to establish probable cause without some other evidence to back up that opinion. Defendant is correct, and the Ninth Circuit has so held in the context of a civil case. (See *Dougherty v. City of Covina* (9th Cir. 2011) 654 F.3rd 892.) "(A) search warrant issued to search a suspect's home computer and electronic equipment lacks probable cause when (1) no evidence of possession or attempt to possess child pornography was submitted to the issuing magistrate; (2) no evidence was submitted to the magistrate regarding computer or electronics use by the suspect; and (3) the only evidence linking the suspect's attempted child molestation to possession of child pornography is the experience of the requesting police officer, with no further explanation." But the Court also held in *Dougherty* that the law on this issue was so unsettled that the offending officers were entitled to qualified immunity from civil liability. The standard is the same in a criminal case. Where the rule is unsettled, "*good faith*" will save an otherwise deficient warrant. "Evidence seized pursuant to a search warrant will *not* be suppressed even if the warrant was defective so long as the officers acted in reasonable and objective good faith in relying upon the warrant and serving it." (*United States v. Leon* (1984) 468 U.S. 897.) The resulting evidence will only be suppressed where a search warrant affidavit is so lacking in the indicia of probable cause that official belief in the existence of probable cause is entirely unreasonable. *Dougherty* tells us that an officer's expert opinion alone does not establish probable cause, although it remains a close, unsettled question. As such, the warrant in this case was not "so lacking in the indicia of probable cause" that Detective Franco, or any other reasonable officer, should have been aware of the rule. As such, the trial court properly denied defendant's motion to suppress.

Note: It was not discussed whether the defendant's prior criminal history, including the possession of obscene matter and being a registered sex offender, made any difference. So we have to assume that it did not. There are two concurring opinions; each of which saying exactly the opposite from the other while both agreeing to affirm. One (Justice Berzon) says that if it were not for the prior case (i.e., *Dougherty*), she would reverse and suppress the evidence, finding that "good faith" didn't apply. The other (Justice Tallman) felt that an expert opinion *is* sufficient to establish probable cause all by itself, disagreeing with *Dougherty*. I briefly looked for a California case on the issue, and could find none. So unless there's one out there I missed, or a new case comes along, we're stuck with this rule at least for child molest cases. In the narcotics field, the rule is to the contrary. It has been held a number of times that the arrest of a person for selling narcotics, or in the possession of narcotics for purposes of sale, plus an experienced narcotics officer's expert opinion, establishes probable cause to believe he has evidence of this illegal activity *in his home*, including more drugs. (e.g., *People v. Cleland* (1990) 225 Cal.App.3rd 388, 392-393.) The Ninth Circuit doesn't disagree. (*United States v. Pitts* (9th Cir. 1993) 6 F.3rd 1366, 1369; *United States v. Terry* (9th Cir. 1990) 911 F.2nd 272.) So

unless the U.S. Supreme Court helps out and establishes some consistency, it may never be a settled issue.