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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*One man alone can be pretty dumb sometimes, but for real bona fide stupidity, there ain't nothin' can beat teamwork.*" (Edward Abbey 1927-1989)

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***ADMINISTRATIVE NOTES*:**

Telephonic Search Warrants: The Sheriff's recording system used for San Diego telephonic search warrants is presently broken and completely non-functional. As a result, until replaced with an undated system, both the District Attorney duty deputy *and* the officer seeking a warrant are being asked to record the oral affidavit, with the officer's tape being the primary record of what is said. Both the duty deputy and the officer must then, on the next business day, deliver

their respective tapes to the judicial secretary at the court branch to which the duty deputy is assigned. It is the duty deputy's responsibility to notify the judicial secretary that the tapes are coming.

CASE LAW:

***Financial Elder Abuse and Consent*:**

People v. Catley **(Mar. 9, 2007) 148 Cal.App.4th 500**

Rule: Evidence that an elder adult does not have the mental capacity to consent supports a conviction for financial elder abuse, per P.C. § 368(e).

Facts: Defendant was hired in April, 2004, as a caretaker for 68-year-old Edward Walsh who suffered from a number of physical and mental ailments. Walsh's adult daughter, Stephanie Hill-Aikins, had a power of attorney for his financial affairs. Defendant asked Stephanie for a larger car for transporting Walsh to his medical appointments, but she refused. At some point after Walsh's car was damaged in a traffic accident, defendant showed up in a new SUV. When Walsh asked her where she got the new car, defendant told him that he had given it to her as a gift for performing tasks above and beyond her agreed-upon duties. Walsh, however, did not remember ever agreeing to buy her a new car. And despite his signature being on a check for $17,365.61, he didn't remember ever signing the check. Stephanie fired defendant and called police when she discovered what had occurred. When interviewed by an investigator, defendant continued to claim that Walsh gave her the car. Specifically, defendant claimed that she took Walsh to his bank where he transferred $20,000 from his saving to his checking account and then wrote her a check for the SUV. Walsh continued to deny any recollection of having participated in these events. Walsh was medically evaluated shortly thereafter and determined to have cognitive impairment, including problems with short-term memory and a limited attention span, all caused by Parkinson's disease and the medications he was taking. He also suffered from depression and hallucinations. The doctor, later testifying as an expert, opined that Walsh was vulnerable to financial abuse. Defendant was convicted by a jury of theft by a caretaker from an elder, per P.C. § 368(e), and appealed.

Held: The Fourth District Court of Appeal (Div. 3) affirmed. Defendant argued on appeal that the evidence was insufficient to prove the theft element of financial elder abuse in that Walsh had consented to her taking the money. In rejecting this argument, the Court noted that among the elements that the prosecution had to prove was that Walsh did not consent to the taking of his money. Any alleged consent by the victim must be obtained "*freely and unconditionally*." The issue for the jury was whether Walsh was mentally capable of giving such a consent. Based upon the facts of this case, the Court found that the jury's conclusion that Walsh, given his Parkinson's disease and its effect upon his mental capabilities, did not have the mental capacity to consent was supported by the evidence. Defendant also complained about the jury being instructed pursuant to CALCRIM No. 331, telling them, in effect, not to discount the victim's testimony just because he has some cognitive impairment: "In evaluating the testimony of a person with

a cognitive impairment, consider all the factors surrounding that person's testimony, including his or her level of cognitive development," The jury was also instructed that just because the victim might be impaired "does not mean he or she is any more or less credible than another witness." Also: "You should not discount or distrust the testimony of a person with a cognitive . . . impairment solely because he or she has such a[n] impairment." (See also P.C. § 1127g) Noting that a similar instruction dealing with the testimony of child victims (see P.C. § 1127f) has been approved in prior cases, the Court held that it is not improper to tell a jury that one's mental impairments is but one factor to consider when evaluating the credibility of that witness. With the jury properly instructed, defendant's conviction for financial elder abuse was upheld.

Note: The only reason I briefed this case was to highlight the necessity of taking an aggressive posture on elder abuse (financial or physical) cases. Our elder and dependent adults (as defined in P.C. § 368(g) & (h)) are, next to children, probably some of the most vulnerable victims with whom we, as law enforcement officers and prosecutors, have to be concerned. (The fact that the victim in this case is only 6 years older than me has *absolutely* nothing to do with this sentiment.) Like children, these victims can sometimes make for some very difficult witnesses, given the mental impairments that are often involved. The Orange County District Attorney's Office could have easily written this case off as unprovable due to the victim's inability to remember what he had done. But they didn't. To the contrary. The Court cited the victim's memory issues as relevant to his inability to consent to the defendant's request for a new car. Good work, Orange County. Prosecutors should also note that a trial court *must* give CALCRIM No. 331 (Testimony of Person With Developmental, Cognitive, or Mental Disability) when requested to do so. It's a great instruction that helps insure that a victim's mental issues can't be used by the defense as an excuse to discount out of hand his or her testimony.

***Medical Marijuana and the Common Law Defense of Necessity*:**

Raich v. Gonzales **(9th Cir. Mar. 14, 2007) __ F.3rd __ [2007 DJDAR 3462]**

Rule: While a medical "necessity" may supply an affirmative defense to federal marijuana possession and use charges, the possibility of such a defense does not justify a court granting declaratory or injunctive relief prohibiting the enforcement of the law.

Facts: Appellant Angel McClary Raich, a California resident and plaintiff in this civil action for declaratory and injunctive relief, was diagnosed with no less than ten serious medical conditions for which, according to her doctor, the ingestion of marijuana was the only viable treatment. In August, 2002, state and federal authorities raided the home of a former plaintiff in this law suit, Diane Monson (who has since withdrawn from the lawsuit) and seized six marijuana plants. Local law enforcement officers determined that Monson was legally authorized to have the plants pursuant to California's "Compassionate Use Act of 1996" (i.e., Proposition 215, H&S § 11362.5). Federal Drug Enforcement Administration (DEA) agents, however, disagreed, and after consultation with the U.S. Attorney and a determination that possession of the plants violated the federal "Comprehensive Drug Abuse Prevention and Control Act of 1970" (21 U.S.C. §§

801-971), destroyed the plants. Fearing future raids, Monson and Raich (along with other plaintiffs who were caregivers and who grew the marijuana for Monson and Raich) sued the U.S. Attorney General and the DEA, seeking a court determination that enforcement of the federal restrictions against them, particularly in light of California state laws allowing for the use of marijuana for medical purposes, violated the U.S. Constitution. In December, 2003, the Ninth Circuit Court of Appeal ruled for the plaintiffs, holding that the federal statutes outlawing the possession of marijuana were unconstitutional as a violation of Congress's powers under the Commerce Clause. The U.S. Supreme Court reversed this decision, holding that Congress did in fact have the power under the Commerce Clause to regulate marijuana (*Gonzales v. Raich* (2005) 545 U.S. 1.), and remanded the case back to the Ninth Circuit to consider plaintiffs' remaining arguments.

Held: The Ninth Circuit Court of Appeal, on this go-around, ruled against plaintiffs. Raich's primary argument was that under the "*common law doctrine of necessity*," the federal statutes outlawing the possession and use of marijuana cannot be enforced against her. The necessity defense typically involves a situation where a person is forced to choose between "*the lesser of two evils*." "(W)here physical forces beyond the actor's control rendered illegal conduct the lesser of two evils," leaving the actor with "no reasonable legal alternative to violating the law," the necessity defense may excuse the breaking of the law. There are four legal prerequisites to invoking the common law defense of necessity: (1) The person, faced with a choice of evils (e.g., using the marijuana or suffering from her illnesses), chose the lesser evil; (2) the person acted to prevent imminent harm; (3) the person reasonably anticipated a causal relation between her conduct and the harm to be avoided; and (4) there were no other legal alternatives to violating the law. In this case, Raich alleged that she was being forced to either violate the federal restrictions on the possession and use of marijuana or suffer "excruciating pain and possibly death." In evaluating Raich's particular circumstance, the Court ruled that it appears she satisfies all the necessary legal requirements for invoking the necessity defense. However, the Court declined to grant Raich the injunctive relief she requested, which would have had the effect of forbidding federal law enforcement from enforcing the law in her case. It is a rule of law that a court should not prospectively enjoin the enforcement a criminal statute. The necessity defense is an "*affirmative defense*," which means that Raich must wait until she is actually arrested before trying to invoke it. Claiming a necessity defense now, without pending criminal charges, is premature because it cannot be said that Raich's doctors won't find some other legal alternative to using marijuana, or that she won't experience a "miraculous recovery" in the meantime. If and when faced with an actual criminal prosecution, she may then argue that, as her condition then exists, the necessity defense applies to her case. Until then, she is not entitled to any judicial protection from being arrested and prosecuted. The Court further ruled that the federal restrictions on the possession and use of marijuana do not violate Raich's due process rights (Fifth and Ninth Amendments), nor infringe upon California's sovereign powers as protected under the Tenth Amendment.

Note: And so continues what is becoming a perpetual tug-of-war between California's medical marijuana statutes (H&S §§ 11352.5, 11352.7 et seq.), allowing for the cultivation and use of marijuana when necessary for medicinal purposes, and the federal

laws imposing a blanket ban on the same activities. At some point either the feds or the state is going to have to blink. Until then, no one really seems to know what to do. This situation is neither fair to those who truly need marijuana for the relief of a serious ailment (my complaint being that California's medical marijuana statutes are so poorly written that they are easily abused) nor to the well-intentioned law enforcement officers who are attempting to no more than control a very serious drug problem in this country.

***Accessory After the Fact, Per P.C. § 32*:**

People v. Plengsangtip **(Mar. 19, 2007) 148 Cal.App.4th 825**

Rule: Affirmative (as opposed to passive) lies to a police officer may, in some circumstances, be a violation of P.C. § 32; Accessory After the Fact.

Facts: Kim Mektrakarn, a Thai national, owned a food processing business in Ontario, California, in 1966. Defendant, who was also from Thailand, was a friend of Kim's. The victim, Luis Garcia, worked for Kim. In October, 1996, Garcia threatened to report Kim to the state labor commission for failing to pay his employees overtime unless Kim agreed to give Garcia $5,000. Kim agreed to the blackmail. On November 23, 1996, Garcia was to meet Kim at Kim's place of business to receive a partial payment of $3,000. Defendant was present during the meeting. Garcia was never seen nor heard from again following this meeting. Kim fled to Thailand shortly thereafter. A murder investigation ensued with evidence (e.g., blood stained carpet, clothing being burnt and discarded in the trash, Garcia's car being seen at the scene and then later found abandoned elsewhere, a van rented by Kim, smelling of bleach when later found in Las Vegas) being developed indicating that Kim had murdered Garcia in his office. However, no charges were filed. Eight years later, with the advent of DNA, the investigation was begun anew. It was determined through DNA analysis that the blood recovered from Kim's office was Garcia's. Defendant was interviewed at this time. He admitted to investigators that he had been in Kim's office on the afternoon of Garcia's disappearance, but claimed that he never saw Garcia there, that Kim was in and out of his office as though conducting business as usual, that he did not see Kim murder Garcia, and that nothing unusual happened. Defendant's statement conflicted with the physical evidence and eyewitness accounts. As a result of this interview, defendant was charged with being an "accessory after the fact" to a murder, for having "harbor(ed), conceal(ed) or aid(ed) a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment . . . ." (P.C. § 32). After being held to answer on this charge following a preliminary examination, a superior court judge granted defendant's motion to dismiss (per P.C. § 995), ruling that merely denying any knowledge about an alleged felony is legally insufficient to constitute being an accessory after the fact. The People appealed.

Held: The Fourth District Court of Appeal (Div. 2) reserved. The criminal offense of being an "*accessory after the fact*," per P.C. § 32, consists of the following elements: (1) Someone (i.e., a "principal," other than the defendant) has committed a specific, completed felony; (2) the defendant harbored, concealed, or aided the principal; (3) with

the knowledge that the principal committed the felony or has been charged or convicted of the felony; and (4) the defendant had the specific intent that the principal avoid or escape from arrest, trial, conviction, or punishment. Prior case law has established that certain lies, or "*affirmative falsehoods*," made to authorities, if made with the requisite knowledge and intent, may constitute the aid or concealment contemplated by P.C. § 32. On the other hand, one who does no more than "passively" fail to reveal a known felony, refuse to give information to authorities, or deny any knowledge of a felony when motivated by self-interest, *cannot* be guilty of being an accessory. Falsely claiming not to know anything about a crime is nothing more than a "passive" refusal to reveal information, and not a violation of P.C. § 32. In this case, however the preliminary hearing magistrate reasonably concluded that Kim murdered Garcia in his office in November, 1966, that defendant was present at that time, and that defendant affirmatively lied to investigators when he told them that he had not seen Garcia that day, that nothing unusual had happened, and, more to the point, that Kim did not murder Garcia. The superior court judge erred in his conclusion that defendant's lies under these circumstances did not constitute an "*affirmative falsehood*." "A statement that a person was not involved in the commission of a crime, if false, is an affirmative falsehood." The charge of being an "*accessory after the fact*," therefore, was reinstated.

Note: Interesting case. Most of us are aware that it's a violation of federal law to lie to a federal investigator. But who would have thunk to use P.C. § 32 on a person suspected of lying to a state investigator, at least with facts similar to this case. Not me, anyway. This may be because we have grown so accustomed to people lying to us that it's now a bit like water off a duck's back. That's really quite sad, when you think about it. Just remember, however, that there is a thin line between "passive" and "affirmative" lies. Denying any knowledge of a crime, or otherwise refusing to cooperate, is the former, and not illegal. But falsely providing an alibi for someone is the later, and, if the other elements of P.C. § 32 can be proved, a crime. Where to draw the line between these two extremes is just something with which we will have to deal when the issue comes up.

***Proposition 215; Medical Marijuana*:**

People v. Strasburg **(Mar. 22, 2007) 148 Cal.App.4th 1052**

Rule: An officer's probable cause to believe that a person is in illegal possession of marijuana is not diminished just because the person produces a medical marijuana identification card or a physician's authorization.

Facts: Napa County Deputy Sheriff Aaron Mosely observed defendant and another person sitting in a vehicle in a gas station parking lot. The deputy parked his patrol unit and walked up to defendant's vehicle, immediately detecting the odor or burning marijuana. Upon making contact, defendant admitted that he had been smoking marijuana but claimed that he had a "medical marijuana card" allowing him to do so. Ignoring this comment, the deputy asked defendant if he had marijuana in the car. Defendant handed him a baggie containing ¾ of an ounce of marijuana. A second baggie containing 2.2 grams of marijuana was observed in plain sight as defendant, at the

deputy's request, stepped out of his car. Defendant told the officer again that he had a medical marijuana card and asked him to look at it. The deputy refused, telling defendant; "We don't buy that here in Napa Valley." Putting the then-detained defendant in the back seat of his patrol car, the deputy asked if there was any more marijuana in the car. Defendant responded that there was. A full search of the car was conducted with 23 more ounces of marijuana being found along with a scale. Defendant was arrested. After a motion to suppress the marijuana was denied, he pled guilty and appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. Defendant's argument on appeal was that once he attempted to produce a medical marijuana card (which, as it turned out, was apparently only a physician's authorization to use marijuana and not the "identification card" provided for in H&S § 11362.7(g)), the deputy had no legal cause to detain him or search his car. The Court rejected this argument. On November 5, 1996, the voters approved by initiative California's "Compassionate Use Act of 1996" (i.e., Proposition 215, H&S § 11362.5). Then, in 2003, the Legislature enacted H&S §§ 11362.7 et seq., providing for a voluntary program for the issuance of a medical marijuana identification card by the State Department of Health Services. Under the terms of these new sections, defendant, as a "*qualified patient*" (for which an identification card is not necessary; H&S § 11362.7(f)), was permitted to possess up to no more than 8 ounces of dried marijuana. (H&S § 11362.77(a)) Defendant argued that at that point when he was detained and his car searched, Deputy Mosely only knew that defendant possessed just over ¾ of an ounce of marijuana, with no reason to believe that he possessed it unlawfully. However, the California Supreme Court has previously noted that the medical marijuana provisions do not confer a complete immunity from prosecution. A "qualified patient" may raise the issue as an affirmative defense at trial or as grounds to set aside an accusatory pleading prior to trial. But he is not immune from investigation or arrest. Under the circumstances of this case, Deputy Mosely had probable cause to search defendant's car at that point when he first smelled the odor of marijuana coming from the car. Defendant's admission that he had been smoking marijuana and the deputy's observation of two baggies only served to strengthen that probable cause. Whether or not defendant possessed a medical card or a physician's authorization (inappropriately referred to as a "prescription" in the case decision) does not detract from that probable cause nor shield defendant from a reasonable investigation. "An officer with probable cause to search is not prevented from doing so by someone presenting a medical marijuana card or a marijuana prescription." The deputy was entitled to continue the investigation and conduct a search to "determine whether the subject of the investigation is in fact possessing the marijuana for personal medical needs, and is adhering to the eight-ounce limit on possession (as provided for in H&S § 11362.77(a))." He was therefore lawfully detained and his car was lawfully searched.

Note: I am often asked what an officer can (or should) legally do when someone who is caught in possession of a small amount of marijuana immediately pulls out a doctor's authorization and/or a medical marijuana identification card, either of which is some proof that the person is in lawful possession of the marijuana. Different law enforcement sources have suggested different ways to handle this type of situation. My advice has always been: "*Do whatever you think is appropriate*." This case illustrates one

alternative, telling us that because the lawfulness of marijuana is an "*affirmative defense*" for which the defendant, in court, has the burden of proof, you have the right to totally ignore the person's protestations and continue the search. Because California's medical marijuana statutes are so poorly written and easily abused, this tactic might be what's most appropriate in many (if not most) cases. But by the same token, it might not be in other cases. In those cases where you believe the person's claim to a legal right to possess the marijuana, and it does not appear that that right is being abused, then you have the option of just backing off and leaving the guy alone. I, for one, believe that justice is best served by allowing you, as the man or woman on the scene and best able to make the call, to exercise your common sense and well-reasoned discretion and, as I've said before; "*do whatever you think is appropriate*."

***Indian Law Enforcement Officers and Search & Seizure*:**

People v. Ramirez **(Mar. 28, 2007) 148 Cal.App.4th 1464**

Rule: The Exclusionary Rule is applicable to illegal searches conducted by Indian law enforcement officers on a reservation, at least when litigated in state court.

Facts: Two uniformed officers of the Jackson Rancheria Tribal Police Department were patrolling a parking garage at the tribe's casino in Amador County. The officers observed two persons sitting in a parked car. Defendant, the passenger, was seen "digging through the center console" while a woman in the driver's seat was "nervously" looking around. "With little further ado," the officers got both subjects out of the car and searched it. Finding heroin, methamphetamine, marijuana and drug paraphernalia in the car, the Amador County Sheriff's Department was summoned. Charged in state court with possession of the drugs for purposes of sale, defendant filed a motion to suppress. Conceding that the search was illegal, the prosecutor argued that Indian law enforcement officers are not bound by the Fourth Amendment and that, pursuant to Cal. Const. sec.22 28(d) (California Constitution's "Truth in Evidence" provisions, enacted in 1982 as a part of Proposition 8), the evidence was therefore admissible. The trial court, however, invoked section 1302(2) of the Indian Civil Rights Act and the Fourteenth Amendment due process clause, and suppressed the evidence. The People appealed.

Held: The Third District Court of Appeal affirmed. The Court conceded that "(g)enerally, 'The provisions of the Constitution of the United States have no application to Indian nations or their governments . . . .'" An exception to this rule exists where the provisions of the Constitution are expressly made applicable to the Indians by an act of Congress. Section 1302 of the Indian Civil Rights Act is one such act. Per paragraph (2) of section 1302: "No Indian tribe in exercising powers of self-government shall . . . violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures . . . ." The similarity between this language and that of the Fourth Amendment evidences Congress's intent to extend the protections of the Fourth Amendment to persons on Indian reservations. The only issue is whether in so doing, Congress also intended to attach an "Exclusionary Rule" to section 1302 as well. In analyzing this "issue of first impression," the Court here answered the question

in the affirmative. "We are offered no reason to believe Congress assessed the presumed deterrent effect of the exclusionary rule differently (than under the Fourth Amendment rules) when it incorporated the basic prohibition of the Fourth Amendment against unreasonable searches and seizures into the Indian Civil Rights Act." And because Congress intended the exclusionary rule to apply, California's Constitutional section 28(d) (Truth in Evidence) does not prevent the suppression of illegally obtained evidence.

Note: It's hard for me to criticize this decision when I can't say that I've ever been able to figure out Indian law as it relates to California jurisprudence. When the issue comes up, I typically stick my head in the sand and pass the buck to one of my office's Indian law experts. This case, however, is consistent with a federal case out of an Arizona Indian reservation. (See *United States v. Becerra-Garcia* (9th Cir. 2005) 397 F.3rd 1167.) California's situation may be complicated even further due to the applicability of the so-called Public Law 280, which is not even mentioned in this decision. All I can say is that by one vehicle or another, you should probably assume that the Exclusionary Rule is going to be applied in any criminal case prosecuted in state court *except*, perhaps, when it is a purely non-law enforcement officer (e.g., Indian casino private security guard) that violates the rules. At least, I think so.

***Use of Force to Obtain Fingerprints*:**

People v. Herndon **(Apr. 3, 2007) 149 Cal.App.4th 274**

Rule: Using five officers to force a resisting defendant to provide fingerprints, when done in a courtroom and with less violent alternatives available, is force that "shocks the conscience" and a 14th Amendment due process violation.

Facts: Defendant robbed a beauty salon owner, Donna Dang, at gunpoint. Witnesses chased defendant from the scene as he escaped with Dang's purse, which contained over $1,000, and her cell phone. Defendant's pursuers ended the chase when defendant stopped and pointed his gun at them. Responding police officers renewed the foot pursuit some 20 to 30 minutes later, and a quarter of a mile away, eventually taking defendant into custody with the help of a K-9. Dang was brought to the scene of the arrest where she identified defendant in a curbstone lineup, although she noted that he was by then wearing different clothing. $109.29 was recovered from defendant's person. The rest of the money, Dang's purse, and the cell phone were never found. In a later live lineup, one of the two pursuers picked defendant out with the other identifying someone else. At trial, with defendant representing himself, Dang and the one pursuer identified defendant as the robber. The prosecution attempted to introduce expert testimony that a latent fingerprint left at the scene of the robbery matched defendant's known prints taken at the time of his booking. However, the trial judge sustained defendant's objection to the admission of this evidence when the prosecution was unable to authenticate the known prints (i.e., show that the booking prints were in fact defendant's). As a result, the prosecutor asked the court to order defendant to submit to the taking of another set of fingerprints in the courtroom. Defendant "strenuous(ly)" objected, noting that, "They had my print already." The judge told defendant in response, "You don't have the right

to refuse printing. I have these deputies here." Accepting the challenge, defendant told the court: "They can do what they want. We can tear this courtroom up, you honor, with all due respect to the justice system. But for them to take may prints forcefully, that's how they gonna have to get it. We can get cracking." The judge therefore ordered the bailiff to roll a new set of prints, a procedure to which defendant again "vociferously and vigorously objected." Four more deputy sheriffs had to be called in to hold defendant down as a left thumbprint was eventually obtained. This all occurred in the courtroom, outside the presence of the jury. Expert testimony subsequently matched this print to a latent print left at the robbery scene. Convicted of armed robbery and two counts of assault with a firearm, defendant appealed.

Held: The Second District Court of Appeal (Div. 7) found this method of obtaining defendant's fingerprints to be a violation of his 14th Amendment "*due process*" rights, as force that "*shocks the conscience*," but found the error to be harmless. His conviction, therefore, was affirmed. The U.S. Supreme Court held long ago that "the use of 'force so brutal and so offensive to human dignity' as to 'shock the conscience'" is a 14th Amendment, due process violation. (*Rochin v. California* (1952) 342 U.S. 165; a stomach pumping case.) In this case, the Court found "(t)he image of five deputy sheriffs wrestling the defendant to the ground and prying open his clenched fists to roll his fingerprints (to be) repugnant to say the least." Referring to the trial judge's "decision to put (defendant's) threat (i.e., to 'tear this courtroom up') to the test," the Court held that the decision to physically force defendant to submit to the taking of his fingerprints, particularly when done in the courtroom where the judge is responsible for maintaining order and proper decorum, was both "reckless and unreasonable." It was "reckless" because someone could have gotten hurt. It was "unreasonable" because there were other less violent alternatives available, such as to require the prosecutor to put on the proper foundation for the admission of defendant's fingerprints taken at the time of his booking. The error, however, was harmless. Aside from the defendant bringing the violence on himself, he also made a "judicial admission" when he admitted, in argument, that the booking prints were his. With such a "judicial admission," the trial court could have overruled defendant's objection to the admission of the original booking prints. Being harmless error, defendant's conviction was upheld.

Note: In *Rochin*, the Supreme Court criticized as "too close to the rack and the screw" the officers' actions when they forcefully made the defendant summit to having his stomach pumped for evidence that he'd swallowed. I don't see holding this particular defendant down so that fingerprints could be obtained as anything close to the use of "the rack and the screw." Maybe these judges should go on a ride-along someday and experience the real "rack and screw" type of violence police officers are victims of almost everyday in the field. But take this case for what it's worth: Sometimes, even "using the least amount of non-deadly force possible" to take evidence from a resisting suspect isn't going to pass constitutional muster. Just know that if less violent alternatives are available, seek to use them first. And then do what you need to do and we'll just have to see how it all comes out in the wash when tested in the courtroom.