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**One death, 12 deputies, two trials, \$85 million: inside  
a record-setting civil rights case**



A jury determined the San Diego Sheriff's Department was responsible for Lucky Phounsy's death and awarded the family \$85 million. (United States District Court)

The verdict came after a trial in which San Diego County was admonished for violating its legal duty to turn over information to lawyers for the family of Lucky Phounsy

BY GREG MORAN

MARCH 26, 2022 5 AM PT

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The events surrounding the death of Lucky Phounsy began as a family celebration — a birthday party for his 2-year-old son. They ended nearly a decade later in a San Diego federal courtroom, when a jury determined the San Diego Sheriff's Department was responsible for Phounsy's death and awarded the family a record \$85 million.

The jury’s monetary award is not only the largest civil rights verdict against the county, but may be the largest ever in the nation for a civil rights case about a death at the hands of law enforcement.

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The trial that ended March 15, after barely a day of deliberations by the jury, also revealed a series of violations by county lawyers that the judge in the case called “shocking, and disturbing.”

U.S. District Court Judge Marilyn Huff concluded the actions of county lawyers were bad enough that she instructed jurors they could disbelieve the county’s version of events in several critical areas of the case.

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It took nearly seven full years from the confrontation inside Phounsy’s home — which involved a dozen deputies at one point — to the jury verdict. Lawyers for the family

plowed through reams of documents and conducted more than 70 depositions.

The case twice went to the 9th U.S. Circuit Court of Appeals, as county lawyers fought for qualified immunity — legal protection from lawsuits that government officials can claim — for the deputies and officials involved in the death.

Both attempts failed, but they added years, and perhaps hundreds of thousands in costs, to the case. In September, the case finally went to trial — but ended up with a hung jury. A second trial began in February and this time ended with the \$85 million verdict.

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Phounsy died after a struggle during which deputies put him in maximum restraints — a way of immobilizing someone by binding their ankles with a strap and tethering it to a second strap around the waist.

The way Phounsy was restrained, and that deputies did not properly monitor his condition for nearly 30 minutes and that his head was forcibly pressed down while he was in an ambulance to the hospital by another deputy, caused him to slowly suffocate, lawyers for the family said.

Now the county is faced with a staggering payment, unless the government appeals the verdict and gets either a reduction in the amount paid or another trial. No decision has yet been made, according to a county spokesman.

Mark Fleming, one of the lawyers for Phounsy's family, said that the verdict should put agencies on notice about using maximum restraints.

"We want municipalities around the country to stop binding people's hands and feet behind their back," he said. "If the size of the verdict gives us the opportunity to advocate for that change, that would be a legacy to Lucky."

## **Fatal encounter**

The 32-year-old Phounsy had gone to a music festival four days before the April 13, 2015, confrontation, where he ingested the drug Ecstasy, court records say. He returned home but, perhaps because of the effects of the drug, he was unable to sleep for three days.

On the day of his son's birthday he became more erratic and paranoid, Fleming said. His wife Loan and other family members said he should go to the hospital. But as they readied for the trip, Phounsy called 911 himself and told the dispatcher that his family was in danger, and someone was trying to harm them.

His wife then got on the phone and told the dispatcher Phounsy was unarmed. Two deputies arrived, went inside and began to speak with him. When one tried to handcuff him, getting one cuff on his wrist, Phounsy became alarmed. A deputy fired a Taser, and Phounsy began to fight back.

Soon 10 more deputies had arrived. They tackled him and Tasered him twice more, and struck him several times with batons. Phounsy was put in the restraints, taken outside the home and eventually to the hospital.

In the ambulance, former Deputy Richard Fischer held Phounsy's head down toward his chest for nearly the entire ride, the restraints still in place. Fisher later said he did so because Phounsy was continuing to struggle.

When Phounsy arrived at the hospital his heart had stopped. A week later he was removed from life support and died.

Years after the incident, in 2019, Fischer pleaded guilty to battery charges in an unrelated case following accusations brought by 16 women who said he had fondled, hugged or tried to kiss them. He was fired from the department, which has since paid out nearly \$5 million in settlements from those cases.

## Focus on training

The county contended that Phounsy died from the combination of drug use and the toll of the exertion from the struggle with the deputies, not from the restraints or any excessive force.

That has been an issue in several deaths nationwide of people who died while in police custody and in the resulting lawsuits. Defenses have laid blame for the deaths on “excited delirium” — a controversial conclusion that supposedly arises after a person becomes agitated because of drug use, mental health issues or other health problems.

The restraints and how they were used became a major issue before the second Phounsy trial. For years plaintiff’s lawyers had asked the county for all information on the use of restraints, and how deputies are trained.

After the first trial ended in September, Fleming and a second trial lawyer Timothy Scott, found out from another lawyer who had sued the county in a different case about a 2007 training video the Sheriff’s Department used on maximum restraints.

Stunned, the lawyers said they had never heard or seen it. They quickly got a copy.

In the video, instructors say that the strap should run up the front of the body, over the crotch to the waist, said Fleming. While still dangerous, Fleming said in that position a

person is less likely to suffocate.

But in Phounsy's case the deputies ran the strap behind his back, across his buttocks and connected to handcuffs behind his back in a hogtie manner.

The restraints were also very tight on Phounsy, so that his wrists and ankles were only one to two inches apart. "This is far more dangerous," Fleming said, "and clearly deviated from the training video."

Furthermore, the training video did not train deputies that they should monitor vital signs of the person they restrain, put them in a recovery position enabling them to breathe, and immediately get medical assistance.

In Phounsy's case, he remained in a face-down position with deputies laying on his back for nearly 10 minutes, Fleming said. While awaiting an ambulance, Phounsy was carried outside and dropped on the driveway, again face-down, for many more minutes. No one monitored his vital signs.

## **'That's a problem'**

The plaintiff's lawyers now had evidence from the county, years later, that the deputies involved in Phounsy's death had not followed their own training on the use of restraints — and that the training was inadequate because it did not instruct on monitoring the person's medical condition.

In assembling the case, lawyers for Phounsy had specifically asked for all materials related to training or procedure for the use of maximum restraints. Under the rules of discovery, the county was obligated to produce all those materials, and keep doing so up to the trial.

Scott and Fleming asked Huff before the second trial to penalize the county by telling jurors the county had withheld the information.

County lawyers countered that several times in the numerous depositions taken in 2017 some deputies referred to online training or in a few cases a video, and the lawyers should have asked for it then.

“The Plaintiffs were aware of the existence of the Sheriff’s video since at least 2017,” County Counsel Lonnie Eldridge said in a statement last week. “There was no surprise to the Plaintiffs at trial.”

Judge Huff rejected that line of argument, noting the effect that not having the video may have had on the first trial.

“So, I’m very concerned about this,” she said at a pretrial hearing on Feb. 14. “I think the course of the trial would have been very different, and I also believe from my recollection of the summary of the evidence ... that the training that was done in the video is not what the testimony was, and that’s a problem.”

## **Missing test results**

It was not the only problem. Deputies who took the maximum-restraint training were required to take tests afterward to assess what they learned. Since 2016, lawyers had sought those test results for all the deputies involved in the struggle with Phounsy. None were produced — until Feb. 24, 2022, shortly before the second trial. Under the same discovery rules, they ought to have been turned over years earlier.

And the county produced no results for how Fischer — whom the jury found used excessive force in the death — had fared on the tests. They had either been lost or destroyed, according to Fleming.



And there was yet one more problem that surfaced during the second trial.

The county had steadily argued that Phounsy's death was the result of drug use and the struggle with the deputies, and pointed to toxicology tests taken at the time of death that showed trace amounts of Ecstasy and some marijuana. An expert testified for the family that the amount of Ecstasy was what would be there several days after ingesting.

In the first trial, Fleming said the county had contended that testing technology of 2015 perhaps had missed other drugs Phounsy might have taken. In October, after the first trial, the county again tested some of the blood preserved from the autopsy for drugs. That test came up negative for any additional drugs.

The Phounsy lawyers did not know of this extra test result until the lunch break on March 4, in the middle of the trial.

On all three of those violations, Huff gave special instructions that jurors could "distrust Defendant County of San Diego's evidence" as it related to the training deputies received on maximum restraints, and to Phounsy's drug use.

In the end, the jury found Phounsy could not be held responsible for any part in his death and put all the blame on Fischer and the county.

The verdict stands in sharp contrast to the department's own conclusion: no deputies were ever disciplined for the fatal fracas, according to Fleming.

"The Sheriff's Department absolved the deputies of any negligence, said this was a drug-induced fatality, and Lucky was the cause of his own death," he said. "That was simply a lie."

# Shift in jury sentiment?

In a statement, Phounsy's family said they mourned his loss but were "grateful that the jury saw the truth" about how he died.

"We pray some good will come of Lucky's death and that this verdict may spare other families from the unbearable suffering we have experienced," they said.

If it stands, the verdict will reverberate, said Julia Yoo, a longtime San Diego civil rights lawyer who has sued the county over excessive force, jail deaths and other policing issues. She is also the president of the National Police Accountability Project, a group that focuses on holding law enforcement accountable for civil rights violations.

"This is national news," she said. San Diego juries are widely perceived as siding with law enforcement in these kinds of cases, she said, but this verdict shows that perception is no longer as valid. Jurors are more attuned to law enforcement excesses in the years since Phounsy's death, she said.

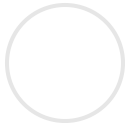
"To have this verdict come from what many people nationally assume is a conservative district, where we have not seen this type of a verdict, is a game changer," Yoo said.

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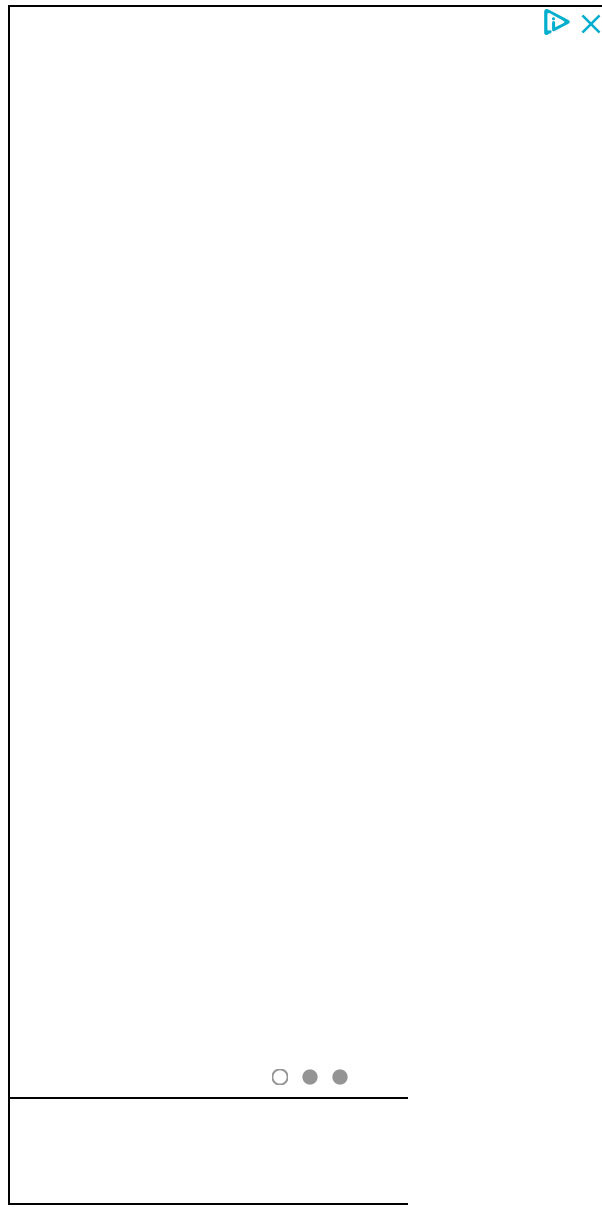
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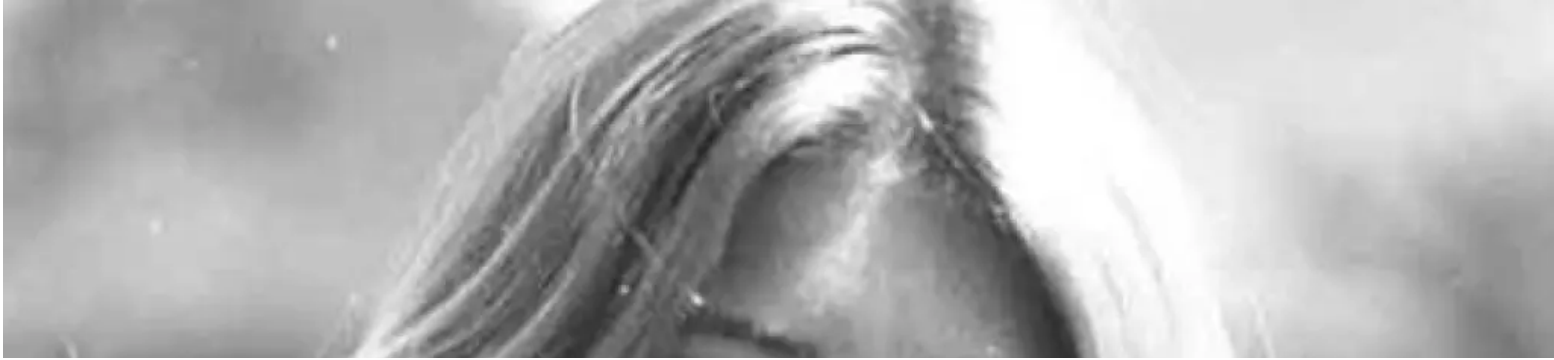
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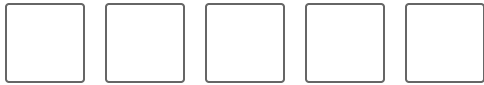
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