# San Diego District Attorney

## *LEGAL UPDATE*

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

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**THIS EDITION'S WORDS OF WISDOM:**

"*Whatever you are, be a good one.*" (Abraham Lincoln.)

**IN THIS ISSUE:**



**ADMINISTRATIVE NOTES:**

*Incompetence of Defense Counsel at the Plea Bargaining Stage*: Prosecutors need to be aware that the United States Supreme Court has recently ruled in a pair of new decisions that a defense attorney's incompetence at the plea bargaining stage may result in a reversal of a conviction. In *Missouri v. Frye* (Mar. 21, 2012) __ U.S. __ [132 S. Ct. 1399], it was held that a defense attorney must communicate plea offers to his client. If he doesn't, and if the defendant can later

show that he was prejudiced by this failure to communicate, he may be allowed a second opportunity to accept the offer made by the prosecution. Then, in *Lafler v. Cooper* (Mar. 21, 2012) __ U.S. __ [132 S. Ct. 1376], it was held that a defense attorney's erroneous advice as to whether to accept an offered plea bargain, resulting in the defendant's prejudice (e.g., a greater sentence), may result in the defendant getting a second opportunity to get the benefit of the original plea offer. In either case, the People are going to lose the benefit of their hard work. It might be necessary, therefore, to insure that all pre-trial defendants are advised on the record in open court of the important aspects of any offered plea bargain and the potential consequences of refusing to accept it.

*Changes or Additions to the Legal Update E-Mail List*: If you have notified me that your e-mail address has changed, but the *Update* continues to be sent to your old address, please don't hesitate to let me know. I won't bore you with what might have gone wrong, but suffice it to say that I attempt to make all such changes effective immediately. Also, if you've unsuccessfully attempted to get onto the *Update* e-mail list and appear to have been ignored, again it could have been my error. But I also get a request or two a month to be added where the listed address is given to me wrong (as noted when it bounces back on me). When that happens, I usually have no way of figuring out the requestee's correct address. Lastly, if you have been dropped from the *Update* e-mail list without having asked to be dropped, it's usually because I'm getting a non-delivery notice. Please let me know that you wish to remain on the e-mail list and then contact your office's IT section to get the *Update* cleared, or check you spam file.

**CASE LAW:**

***Miranda; Reinitiation of Questioning after an Invocation*:**
***The Vienna Convention on Consular Relations*:**

***People v. Enraca*** **(Feb. 6, 2012) 53 Cal.4th 735**

**Rule:** An arrested suspect may validly reinitiate questioning after an invocation so long as done on his own initiative. Violating the advisal provisions of the Vienna Convention does not require the suppression of a resulting confession.

**Facts:** Maile Gilleres, Jenny Hyon, Ignacio Hernandez, and Dedrick Gobert all went to a late night illegal street race. Hernandez and Gobert were members of a Crips street gang. Hernandez and an Asian got into a fight during one of the races. Everyone dispersed, however, when the police responded. Gilleres, Hyon, Hernadez and Gobert drove to a nearby pizza parlor where Gobert got into a confrontation with a group of 15 to 35 Asians. These particular Asians, which included defendant, were members of the "Akraho Boyz Crazzys (ABC)" gang which is affiliated with the Bloods. Defendant was armed with a .38 caliber revolver and was high on methamphetamine. Gobert walked up to the Asians flashing Crips gang signs and saying, "What's up, cuz?" This being interpreted as an insult requiring a physical response, a fight ensued as the Asians

attacked Gobert. Hernandez and Hyon attempted to intervene. The sequence of events that followed were reported differently by different witnesses. But the net result was that defendant ended up shooting Hernandez in his back and the back of his head. He also shot Gobert in the back of the head. Both subjects died at the scene. Hyon was shot in the neck and was paralyzed from the chest down. Defendant fled and wasn't arrested until two weeks later. When arrested, he was advised of his *Miranda* rights and waived them. After 20 minutes of denying culpability for the shooting deaths, defendant was confronted with the fact that several witnesses had identified him as the shooter. When challenged to produce the witnesses, the apparently frustrated Detective Shultz told defendant that he'd "about had it up to here you cuz you're full of shit and that's it." This caused defendant to invoke his right to counsel. Questioning was immediately ended with the detective telling defendant he was going to jail for a double homicide. Detective Shultz also told defendant that "from now on you are to shut your mouth, . . . I don't want to hear another word out of you, . . ." Defendant asked when he would be allowed to see his attorney. He was told that he'd see his lawyer at his arraignment. Detective Shultz then handed defendant off to Deputy Spidle for booking, telling Spidle that defendant had invoked. During the booking interview, defendant interrupted Deputy Spidle several times to ask questions and make comments. Spidle reiterated that he'd be appointed an attorney at his arraignment in 48 to 72 hours. Defendant finally said, "You know, it's not how it went down." Deputy Spidle told defendant that; "Once you ask for a lawyer we're not going to question you any further about how it went down." When defendant asked, "What if I say what happened?" Spidle told him again that he wouldn't be questioned, but that if he wished to make a statement, he would record it and give it to the prosecutor's office. Defendant said that that was what he wanted to do. He also stated that he had already been advised of his rights and did not need to hear them again. With a tape recorder running, defendant confessed in a 35-page statement, reiterating at the beginning and the end that he was voluntarily making the statement without being asked to do so by law enforcement. Although defendant is a Filipino national, he was never advised of his right to contact the Philippine Consulate. Defendant did not testify at trial. His confession was admitted into evidence against him. Found guilty of two counts of first degree murder (plus other charges) with special circumstances, defendant was sentenced to death. His appeal to the California Supreme Court was automatic.

**Held:** Defendant's conviction and sentence was upheld in a unanimous decision by the California Supreme Court. Among the issues on appeal was the admissibility of his confession. Defendant argued that once he invoked his right to counsel, any further questioning was improper. But here, defendant himself chose to reinitiate the questioning. So long as a suspect's decision to reinitiate questioning is of his own volition, and not as a result of any encouragement on the part of law enforcement, subsequent questioning is lawful. Here, Detective Shultz specifically told defendant in no uncertain terms to keep his mouth shut. Deputy Spidle also told defendant that because of his prior invocation, he would not be questioned further. But he insisted on making a statement. Defendant himself reinitiated the questioning of his own accord despite his prior invocation. The Court also noted that there is no obligation on the part of law enforcement to provide defendant with an attorney immediately upon his request for the assistance of counsel. He was correctly told that he would see his appointed attorney at his arraignment.

Defendant also argued that failing to advise him of his right to have the Philippine Consulate notified of his arrest, in violation of the Vienna Convention on Consular Relations as well as the bilateral consular convention between the United States and the Philippines, required the suppression of his confession. The Court agreed that the officers were in violation of Article 36, paragraph 1(b) of the Vienna Convention by failing to advise him of this right. However, "(t)he failure to inform a defendant of his Article 36 rights is unlikely . . . to produce unreliable confessions," and therefore "(s)uppression would be a vastly disproportionate remedy." For this reason, the Vienna Convention does not require the suppression of a defendant's confession. Lastly, the Court rejected defendant's contention that reversal of his conviction is required because the trial court neglected to inform him of his right to testify and to obtain an express waiver of that right. A trial court does not have a duty to make any such advisal or to obtain a waiver. Defendant's conviction and death sentence, therefore, was upheld.

**Note:** The booking deputy in this case (Deputy Spidle) did an excellent job of ensuring that no one could later accuse him of doing or saying anything that improperly persuaded defendant to change his mind about invoking. Apparently not too sure of the rules, and thus erring on the side of extreme caution, Spidle bent over backwards to make sure it was clear, in a tape-recorded statement, that it was defendant's idea to revoke his prior invocation and make a statement. Also, all departments should have in place procedures for complying with the Vienna Convention. If your department does not, let me know and I'll send you all the rules, at least in abbreviated, outline form. Even though violating the Vienna Convention (see also P.C. § 834c(a)(1)) does not require the suppression of a confession, the rules are there to follow. So follow them. Also, several of the U.S. Supreme Court justices in their various rulings on this issue have expressed the opinion that violations should be treated more seriously. So the rule of non-suppression might flip on us some day. Don't let it be your case where that happens.

***Vehicle Searches*; *Warrantless Searches of its Contents*:**

***United States v. Ewing*** **(Apr. 7, 2011) 638 F.3rd 1226**

**Rule:** The warrantless search of lawfully observed evidence in a vehicle, when that evidence constitutes a part of the probable cause to search the car itself, is lawful.

**Facts:** Los Angeles Sheriff's Deputy Jeffrey Doke stopped a vehicle with an expired registration. Sandra Vera, who owned the car, was driving. Michael Smith was in the right front passenger's seat. Defendant was in the back seat. Upon contacting Vera, Deputy Doke asked if anyone present was on probation or parole. Smith "quickly and loudly" announced that he was on parole. Doke walked around the vehicle and contacted Smith. Deputy Doke noticed that Smith appeared nervous and had difficulty keeping still, with "fast and rapid speech." He suspected that Smith was under the influence of a stimulant (which, in fact, he was. It was later determined that Smith had recently ingested methamphetamine). While talking to Smith, Deputy Doke noticed some partially visible folded $20 bills stuffed into the weather stripping between the passenger door and the window. Believing this to be an unusual place to keep money, but knowing

that drug traffickers commonly hide their contraband in such places, and because of Smith's parole status, his being under the influence, and his mannerisms, Deputy Doke suspected that the subjects were involved in drug trafficking. He therefore retrieved the folded bills, unfolded and examined them, and noted that some of the serial numbers were identical, indicating that they were counterfeit. All three subjects denied knowing anything about the bills. But once they were all detained, Smith ratted out defendant, telling Deputy Doke that defendant gave him the folded bills as they were being stopped, telling him that they were counterfeit. Smith tried to hide them by stuffing them into the weather stripping. A consent search of the car resulted in the recovery of two suitcases which Vera told the deputy belonged to defendant. Defendant consented to the search of the suitcases. In the suitcases was found printing equipment, a paper cutter, and more counterfeit bills. Defendant confessed to having counterfeited the bills. He was charged in federal court with several counterfeiting-related charges. When his motion to suppress the evidence was denied by the trial court, defendant pled guilty, and appealed.

**Held:** The Ninth Circuit Court of Appeal affirmed. Defendant argued on appeal that when Deputy Doke unfolded and examined the counterfeit bills, he was conducting a search separate from their seizure, and that such a "secondary search" requires separate probable cause from that justifying the search of the vehicle itself. This argument was based upon U.S. Supreme Court authority holding that exigent circumstances allowing for a warrantless entry into a residence did not justify the moving of stereo equipment for the purpose of finding and inspecting serial numbers. For such a secondary search to be lawful, there would have had to have been independent probable cause justifying inspection of the stereo equipment. (*Arizona v. Hicks* (1987) 480 U.S. 321.) In the search conducted in this new case, however, the issue is not whether unfolding the bills constituted a new invasion of defendant's privacy rights, but rather whether justification for a search of the car itself extended to the bills. Based upon what Deputy Doke had observed (e.g., Smith being a parolee, his mannerisms and drug influence, the money stuffed into an unusual location with the knowledge that drug traffickers commonly put contraband in a car's door panels), the Court found that there was a "*fair probability*" (i.e., "*probable cause*") that the money was involved in drug trafficking and that a search of Vera's car *and* its contents would lead to evidence of that crime. Unfolding the bills after seizing them was not a "secondary search" as described in *Hicks*. The visible money was a part of the probable cause (i.e., "the *central factor*") justifying the search of the car itself. "Deputy Doke therefore was justified in seizing the bills, which were suspected drug proceeds, and did not require any new or separate reason to examine them."

**Note:** In other words, based upon what Deputy Doke had observed up to the point he seized and unfolded (i.e., searched) the bills, he had probable cause to search the car itself and all its contents. Obtaining consent to search the car and the suitcase in the car was really unnecessary, but still a good idea whenever an officer is unsure whether he really has probable cause or not. The difference between *Hicks* and this case is that in *Hicks*, the stereo equipment the officers turned around to find serial numbers (i.e., searched) was unrelated to the original justification (i.e., exigent circumstances) for the entry into the residence. In this new case, the money was a part of the officer's probable cause to search the car itself. Probable cause to search a car justifies a warrantless search of the

car "and its contents that may conceal the object of the search." The Court also noted that the fact that the crime Deputy Doke suspected defendant and his cohorts of committing—drug trafficking—was the wrong offense, is irrelevant. The issue is whether there was probable cause to believe defendant was engaged in some sort of criminal activity, justifying the warrantless search of the vehicle and the contents of that vehicle.

***Probation Fourth Waiver Searches*:**

***People v. Downey*** **(Aug. 18, 2011) 198 Cal.App.4th 652**

**Rule:** A warrantless Fourth waiver search of a probationer's residence is lawful so long as officers have a "*reason to believe, less than probable cause*" that the probationer does in fact live there.

**Facts:** Riverside Police Gang Detective Kevin Townsend planned a probationary Fourth waiver search of George Roussell. The problem was locating where Roussell lived. Knowing that probationers and parolees often provide false addresses in order to avoid warrantless searches, Detective Townsend checked a number of sources looking for Roussell's most current address. The probation department had Roussell living in Moreno Valley. The court showed him living in Corona. DMV listed his address on Gould Street in Riverside. Utility bills, however, showed an address at an apartment on Magnolia Avenue, in Riverside. This coincided with information from the telephone company. Because, in Detective Townsend's opinion, the general public is generally unaware that the police have access to utility bills, and because the Magnolia Avenue address had come up more than once, he considered this source as probably the most reliable. Townsend never checked to see who had paid these bills, however, and the other addresses listed for Roussell were never checked. The apartment manager's records showed that defendant (not Roussell) and defendant's ex-wife were the only ones on the lease and that no one else was supposed to be living there. However, the manager indicated that any number of people stayed there. She didn't know whether Roussell might be one of them. Based upon this information, Townsend and other officers conducted a probation search of the Magnolia Avenue apartment. After complying with "knock and notice," when no one answered, the front door was forced open. Roussell was not there. Defendant and three others were the only people present, none of whom were subject to Fourth waiver searches. The search of the apartment resulted in the recovery of a loaded semiautomatic handgun with a round in the chamber and some other ammunition in the kitchen. Paperwork in defendant's name was found, along with photographs of defendant holding the gun that was found in the kitchen. The only indication of Roussell's presence were utility bills for April and May in his name. Defendant asked why they were searching his apartment and was told that they were conducting a probation Fourth wavier search on Roussell. Defendant told the officers that Roussell had moved out three months earlier. Roussell's criminal file, which also had not been checked beforehand, indicated that his address had been updated within the three days prior to the search. Charged in state court with being a felon in possession of a firearm, defendant's motion to suppress was denied. He pled guilty and appealed.

**Held:** The Fourth District Court of Appeal (Div. 2) affirmed. Defendant's argument on appeal was that Detective Townsend didn't have sufficient probable cause to believe that Roussell lived in defendant's apartment, making the warrantless Fourth waiver search unlawful. The trial court had held that despite the fact that Roussell had moved out sometime prior to the search, the officers reasonably believed that he was still living there. The Court of Appeal found that the trial court's ruling on this issue was supported by substantial evidence, which is all that is needed by an appellate court. With evidence that utility records, which the detective believed to be a reliable source and which were corroborated by the telephone company, showing that Roussell resided in the apartment, the officers had enough evidence to believe that Roussell was a resident of the apartment and that they could therefore lawfully conduct a warrantless Fourth waiver search. The fact that the officers could have taken additional steps to verify where Roussell lived "does not undermine (the trial court's) conclusion that the officers acted reasonably based on the information they already had when they acted." Also, it is irrelevant that other persons who were not subject to Fourth waivers lived there. The firearm in question was found in a common area (the kitchen) that would have been open to Roussell had he in fact still been living there. Lastly, and perhaps most importantly, the Court found the standard of proof on the issue of whether Roussell lived there to be a "*reason to believe, less than probable cause*." Contrary to some prior authority, full probable cause was not necessary. The search of defendant's apartment was a lawful Fourth waiver search.

**Note:** At various points, the Court also referred to this standard of proof as a "*reasonable belief*," or an "*objectively reasonable grounds to conclude.*" All these phrases are generally considered to be the equivalent of a "*reasonable suspicion*." Prior to this case, we all followed the Ninth Circuit's lead, as announced in *United States v. Gorman* (9th Cir. 2002) 314 F.3rd 1105, that an officer needed full "*probable cause*" to believe that the subject lived there before conducting a Fourth waiver search, or that a subject is at home at the time when officers attempt to execute an arrest warrant. Also, the California Supreme Court's decision in *People v. Jacobs* (1987) 43 Cal.3rd 472, has been widely interpreted as requiring probable cause. The Court here points out that among the federal circuit courts, the Ninth Circuit is the only one so holding, five other circuits being satisfied with the lower standard of proof. Also, footnote 4 (pg. 479) of *Jacobs* makes it clear that California's High Court was *not* deciding this issue at all. Downey's petition to the California Supreme Court being denied (Nov. 2, 2011), the rule is now clear that the standard of proof is a *reasonable suspicion* to believe the subject lives there, when conducting a Fourth waiver search, or that the subject is home at the time, when executing an arrest warrant. Good case. 0

***V.C. § 23123; Cell Phone Use While Driving*:**

***People v. Nelson*** **(Nov. 14, 2011) 200 Cal.App.4th 1083**

**Rule:** Using a cell phone while driving, in violation of V.C. § 23123(a), includes a "fleeting pause" of the movement of the vehicle, such as while stopped at a red light.

**Facts:** Defendant was stopped at a red light in his car in Richmond, California, with his engine running and in gear. A motorcycle officer pulled up next to him while he was dialing a "flip-type" cell phone and placing it to his ear. Defendant looked over at the officer, removed the cell phone from his ear (nonchalantly, no doubt), and closed it. When the light turned green, defendant drove through the intersection but was immediately pulled over by the officer. Defendant was cited for a violation of V.C. § 23123(a). Challenging his ticket before a Contra Costa County Superior Court traffic commissioner, defendant testified that he had merely checked his e-mail while stopped at the red light and had not used it at any time while his car was moving. Defendant was found guilty, the verdict being upheld by the Appellate Department of the Superior Court. The case was certified to the Appellate Court.

**Held:** The First District Court of Appeal (Div. 2) affirmed. The issue on appeal was whether the terms "*driving*" and "*while driving*," as used in V.C. § 23123, requires contemporaneous movement of the motor vehicle as an element of the offense. Defendant's argument was that there was no proof that he used his cell phone at any time other than while stopped at a red light. He cited *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3rd 753, a "driving under the influence" (V.C. § 23152(a)) case, for the proposition that "*driving*" requires proof of some "*volitional movement*" of the vehicle. V.C. § 23123 states that "(a) person shall not *drive* a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner *while driving*." (Italics added) The Court had little trouble differentiating section 23123 from *Mercer*. Here, defendant was using his cell phone with his hands while driving on a public roadway even though it was when paused momentarily at a red light. In *Mercer*, the defendant was found "asleep at the wheel" (i.e., passed out drunk) in his vehicle that was lawfully parked at the curb in a residential area, with engine running and lights on, but with no evidence of driving. (The fact that his driving could have been inferred circumstantially was not an issue in *Mercer*.) With no definition for the term "*driving*" (or "*while driving*") in section 23123, the Court here had to revert to the rules of statutory interpretation. In doing this, the Court first found section 23123, with no definition of "driving" provided, to be too ambiguous to resolve this issue. When a statute is ambiguous, as it is here, the legislative history has to be considered. The legislative history behind section 23123 indicates strongly that it was intended to include a "*fleeting pause*" in the definition of "*driving*." But if the legislative history doesn't answer the question, "reason, practicality, and common sense" must be applied. This means that a Court is to consider such factors as "context, the object in view, the evils to be remedied, the history of the times and of legislation upon the same subject, public policy and contemporaneous construction." In other words, what are the consequences of applying one interpretation verses another? The Court determined that defendant's interpretation of the statute was unworkable, and would defeat the intent, primarily as it relates to safety, of the Legislature. Based upon all this, the Court determined that the Legislature intended section 23123(a) to include those who, like defendant, "may pause momentarily while doing so in order to comply with the rules of the road." Defendant, therefore, was properly convicted of violating section 23123.

**Note:** This could have gone either way, in my opinion. But the Court did an amazing job doing its own research (aided, I'm sure, by the Attorney General's Office) and extensive analysis (29 pages worth) of the meaning behind a very poorly worded statute (as evidenced by the finding that section 23123 is ambiguous). But the result is really a necessary one to avoid making an already poorly written statute even harder to enforce.

***Expectation of Privacy and the Doctrine of Abandonment*:**

***People v. Thomas*** **(Oct. 28, 2011) 200 Cal.App.4th 338**

**Rule:** Testing of DNA from saliva deposited on the mouthpiece of a PAS device obtained during a lawful DUI traffic stop, connecting a suspect with other crimes, is not an illegal search. The "doctrine of abandonment" negates the suspect's expectation of privacy in his own saliva.

**Facts:** Defendant was the suspect in a string of residential burglaries. Genetic material was left at the scene of five of these burglaries. Defendant was identified by a witness to a sixth burglary through the use of a photographic lineup. He therefore was placed under surveillance by the police. He was eventually stopped for committing some traffic infractions. When it was noticed that his eyes were bloodshot and watery, a field sobriety test for alcohol influence was administered. To test for a blood/alcohol level, defendant consented to blowing into a PAS (i.e., "Preliminary Alcohol Screening") device. He was released after passing all the tests. But instead of discarding the mouthpiece of the PAS device, the police preserved it for DNA testing. The DNA profile derived from the mouthpiece linked defendant to two of the burglaries. A DNA sample obtained after his arrest matched genetic material recovered from five of the burglaries. Additional evidence implicating defendant in the burglaries was found when police searched his home pursuant to a search warrant. Charged in state court with six first degree residential burglaries, defendant's motion to suppress the DNA sample obtained from the PAS device was denied by the trial court. He therefore pled no contest and was sentenced to prison. Defendant appealed.

**Held:** The Second District Court of Appeal (Div. 4) affirmed. Defendant argued on appeal that seizing his DNA was unlawful, and that the testing of the PAS device mouthpiece for DNA was a search that required a warrant. The Court disagreed. A search occurs only when a government activity intrudes on an individual's reasonable expectation of privacy. Whether or not such an expectation of privacy is one that the Constitution protects is determined by evaluating the individual's "*subjective*" (i.e., in his own mind) expectation of privacy in the item being searched in light of society's "*objective*" recognition of the reasonableness of the individual's subjective expectations. The case law is clear that the retrieval, and testing, of discarded items does not intrude upon the privacy interest of the person who abandoned the item. Defendant argued that he could not have abandoned a part of a testing device supplied by the police, nor could he have abandoned the DNA he deposited on it unconsciously. And in fact, abandonment does require a voluntary and conscious act. But in this case, the Court found that defendant did not have a privacy right in the mouthpiece of the PAS device, which was

provided by the police, and that he voluntarily and consciously abandoned any expectation of privacy in the saliva he deposited on this device when he failed to wipe it off. The officer who administered the PAS test testified that used mouthpieces are normally discarded in the trash. Thus, any subjective expectation defendant may have had that the saliva he left on the PAS device remained private was unreasonable. Defendant further argued that he cannot be held to have abandoned his saliva without being first advised that the police intended to analyze it for his DNA. The Court, however, declined to allow defendant to "circumscribe the doctrine of abandonment" by imposing on it an express consent requirement. Defendant next cited out-of-state authority for the argument that blood/alcohol testing, obtained under a state's implied consent law (to submit to blood testing as a condition of the privilege to drive; V.C. § 23612(a)(1)), does not include one's consent to have that blood used for other purposes such as genetically testing it. But defendant's saliva left on the PAS device mouthpiece was merely incident to the PAS test. His saliva not the material collected for the limited purpose of the implied consent statute (such as in the case of a blood draw), and its subsequent testing was not dependent on defendant's express or implied consent. Lastly, defendant argued that the police should not be allowed to obtain a DNA sample through "fraud and deceit." However, courts have allowed the use of ruses to obtain DNA so long as the ruse used was not coercive. The Court held that using defendant's DNA taken from the PAS device, such device being used with his consent, was not a coercive ruse, and therefore lawful. Therefore, based upon the above, defendant did not have a legitimate privacy interest in the saliva he deposited on the mouthpiece of the PAS device. Also, absent a reasonable privacy interest in that saliva, testing it for DNA was not a search. Seizure and testing of defendant's saliva, therefore, was lawful.

**Note:** Two important issues are highlighted in this case, both of which we only have out-of-state authority to guide us. *First*, it is not illegal to use a non-coercive ruse to obtain a DNA sample to use for other undisclosed criminal investigative purposes. While this case (which never really said that getting defendant's DNA off the PAS device was an intentional ruse) is the closest thing we have in California on this issue, other jurisdictions have made it clear that there is no constitutional impediment to this investigative technique. (See *Commonwealth v. Perkins* (Mass. 2008) 883 N.E.2nd 230; and *Commonwealth v. Bly* (Mass. 2007) 862 N.E.2nd 341; testing cigarette butts and a soda can left behind after an interview with police. *Commonwealth v. Ewing* (Mass 2006) 67 Mass.App.Ct. 531; offering defendant cigarettes and a straw during an interrogation. *People v. LaGuerre* (2006) 29 A.D.3rd 822 [815 N.Y.S.2nd 211]; obtaining a DNA sample from a piece of chewing gum defendant voluntarily discarded during a contrived soda tasting test. *State v. Athan* (Wash. 2007) 158 P.3rd 27; DNA obtained from defendant's saliva from licking an envelope he mailed to detectives in a police ruse.) *Secondly*, this rule probably *does not apply* to using a blood test from a DUI arrest for anything other than determining the arrestee's blood/alcohol level (See *State v. Binner* (Ore. 1994) 131 Ore.App. 677, 682-683; *State v. Gerace* (Ga. 1993) 210 Ga.App. 874, 875-876 [437 S.E.2nd 862, 863.), except for using the saliva left on a PAS device, as noted in this case. Until we get a California case on point with either of these issues, the above out-of-state authority may, at the very least, be used for guidance.