The California Legal Update

Remember 9/11/2001; Support Our Troops

Vol. 20 April 4, 2015 No. 4

Robert C. Phillips (858) 395-0302
Deputy District Attorney (Retired) RCPhill101@goldenwest.net

www.legalupdateonline.com
www.cacrimenews.com
www.sdsheriff.net/legalupdates

This Edition of the California Legal Update is dedicated to, and in memory of, ***Philadelphia Police Officer Robert Wilson III***, murdered in the performance of "*the greatest act of bravery*" while protecting his son and others during an armed robbery. EOW: March 5, 2015.

This Edition of the California Legal Update is also dedicated to, and in memory of, former Chula Vista Police Officer and retired ***San Diego District Attorney Investigator Thomas R. Basinski***; respected and loved for his innovative and creative style. You'll be missed. EOW: March 25, 2015

THIS EDITION'S WORDS OF WISDOM:

"*Bravery is being the only one who knows you're afraid.*" (Col. David Hackworth)

IN THIS ISSUE: Page:

ADMINISTRATIVE NOTES:

***Change of E-Mail Address*:** After years and years of using AOL as my Internet provider, I've finally broken down and am switching to a local (South Dakota) Internet

service, effective immediately. My new e-mail address is now RCPhill101@goldenwest.net. (That's with the letters "*RCPhill*," followed by the numbers "*101*.") Please add this new address to your contacts list. *My reasons, should you ask (or care)*: First, AOL is getting too expensive. Also, I've used AOL for so long now that I'm getting *WAY TOO MANY* junk e-mails. If I'd responded to all the solicitations from every alleged widow, foreign diplomat, crown prince, lottery organizer, and half the population of Nigeria, each one of whom seems to have similar difficulties with English language syntax and punctuation, and who is holding millions of U.S. dollars just for me, I'd be richer than Bill Gates. Also, I'm getting peppered to death with fake notifications that my AOL in-box has exceeded its limits, or that my account is otherwise in need of updating, not to mention the unending e-mails providing other unsolicited services and physical enhancements merely by clicking on the link provided. So, before I fall victim in my advancing senility to one of these ruses, I decided it's time for a change.

***And on the Second Amendment Front*:** For you firearms aficionados, or even if you're merely interested in the Second Amendment right to bear arms debate for nothing more than its intellectual value, there's two big cases you need to watch, both out of the federal Ninth Circuit. *First*, the decision in *Peruta v. County of San Diego* (9th Cir. Feb. 13, 2014) 742 F.3rd 1144, decided over a year ago now, and reported in the *California Legal Update* on November 30, 2014 (Vol. 19, No. 14), has been vacated so that it can be reheard by an en banc (i.e., 11-justice) panel. What *Peruta* had said, in a nutshell, was that San Diego county's "*good cause*" prerequisite for obtaining a CCW permit is unenforceable as being too restrictive and a Second Amendment violation. *Peruta* held that unless you can show "*a set of circumstances that distinguish the applicant from the mainstream and causes him or her to be placed in harm's way*," your CCW application will be denied. Other California counties require only that you demonstrate good moral character (e.g., you're not a felon, mental patient, or beat your wife) and complete a specified training course, then you can get a CCW permit without showing why you think you need one. (And still other states, such as where I now live, don't even require a training course. If you have $15 and are not legally ineligible [e.g., a felon, etc.], the permit is yours.) No matter which way the Ninth Circuit goes on this issue, it is ripe for Supreme Court review in that there is a serious split between the federal circuits on the original *Peruta's* conclusions. *Second*, the Ninth Circuit's decision in *Jackson v. City and County of San Francisco* (9th Cir. Mar. 25, 2014) 746 F.3rd 953, is already being appealed to the U.S. Supreme Court (although there's no decision yet as to whether they will accept it). In *Jackson* (which has *not* been briefed in the *California Legal Update*, . . . yet), the Ninth Circuit upheld a San Francisco ordinance requiring that handguns being kept in one's home be "stored in a locked container or disabled with a trigger lock," at least when not being carried on the person. This, per some experts, is in direct violation of the U.S. Supreme Court's prior decision in *District of Columbia v. Heller* (2008) 554 U.S. 570, which struck down as an overly restrictive Second Amendment violation a Washington D.C. ordinance that required all guns in the home be "unloaded and disassembled or bound by a trigger lock." The core reasoning behind *Heller* was that the Second Amendment requires that you be allowed to keep your firearms in a condition so that they remain "*operable for the purpose of immediate self-defense*." So the issue in

Jackson, should the High Court agree to hear it, will be whether a requirement that you lock your guns away or disable them with a trigger lock prevents you from having them available for "*immediate self-defense*." So stay tuned. This could get exciting.

CASES:

***Searches*: *Use of a Satellite-Based Monitoring Device*:**

Grady v. North Carolina (Mar. 30, 2015) __ U.S.__ [2015 U.S. LEXIS 2124]

Rule: Use of a satellite-based monitoring device, attached to a person's ankle, constitutes a search for purposes of the Fourth Amendment.

Facts: Defendant was convicted in North Carolina of separate sex offenses in 1997 and then in 2006, serving prison time as a result. After completing his sentence for the second offense, he was ordered to appear before the New Hanover County Superior Court for a hearing to determine whether he should be subjected to North Carolina's "satellite-based monitoring" ("SBM") program as a "recidivist sex offender" (apparently something similar to California's "Mentally Disordered Sex Offender" provisions). Defendant did not dispute that his prior convictions rendered him a recidivist, under North Carolina's statutes. He argued, however, that the SBM program, under which he would be forced to wear a tracking device at all times, for the rest of his life, violated his Fourth Amendment right to be free from unreasonable searches and seizures. The trial court citing prior North Carolina case law (i.e., *State v. Jones* (2013) 750 S.E.2nd 883.), to the effect that the SBM program, being civil in nature (i.e., not considered a punishment), and that the Fourth Amendment was therefore not implicated, defendant's objection was over-ruled. He was therefore ordered to enroll in the program so that he could be continuously monitored. On appeal, defendant cited the U.S. Supreme Court decision of *United States v. Jones* (2012) 565 U.S. __ [132 S.Ct. 945] (no relation to North Carolina's Jones) where it was held that attaching a GPS tracking device to a suspect's vehicle constituted a "search" within the meaning of the Fourth Amendment. Per defendant's argument, if attaching a GPS device to a person's car is a "search," then the arguably more intrusive act of affixing an SBM ankle bracelet to an individual must also constitute a search of that individual. The North Carolina's Appellate and Supreme Court's disagreed, affirming the trial court's order that defendant must submit to the SBM program. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a unanimous decision, reversed. The sole issue before the Supreme Court was whether North Carolina's SBM program, where a person is required to wear an SBM ankle bracelet, constitutes a Fourth Amendment search. Contrary to North Carolina case authority, the Supreme Court held that it is. Placing such a monitoring device on a subject's ankle, similar to placing it on his vehicle, for the purpose of monitoring his movements, is a means of obtaining information about that individual. To do so is a governmental physical intrusion into a constitutionally protected area. That is a "search." In addition to *U.S. v. Jones*, the Supreme Court cited *Florida v. Jardines* (2013) 569 U.S. __ [133 S.Ct. 1409], which held that having a drug-sniffing dog nose (literally) around a suspect's front porch was a search "because police had 'gathered . . . information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted

by the homeowner.'" Gathering information by placing a monitoring device on a subject's ankle is no different. "(I)t follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." Lastly, the fact that requiring a person to wear an SBM monitoring device may be "civil in nature" does not mean that it isn't a search. The Fourth Amendment's protections extend beyond the sphere of a criminal investigation. Finding that the SBM monitoring program is plainly designed to obtain information, and that it does so by physically intruding on a subject's body, the Court found that it constitutes a search for purposes of the Fourth Amendment. However, in that the North Carolina Courts did not reach the issue as to whether, as a search, use of such a monitoring device constituted an "*unreasonable*" search, the case was remanded to the state courts for consideration of that issue.

Note: Without researching it, I don't know if California's Mentally Disordered Sex Offender provisions (which is totally different than being on parole or probation and a Fourth waiver) include anything like North Carolina's "recidivist sex offender" SBM program. If it doesn't, then perhaps it should. It might be best, however, to wait and see if such a program is found to constitute an unreasonable search. Pending this case coming up before the Supreme Court again, we really don't know. But the real importance of this case is to note how the constitutional definition of a "search" has been expanded beyond merely looking for something (if it ever was so simple) to anything done to collect information. That, per *Jones*, *Jardines*, and now this new case, includes the use of any device (be it a dog, or a GPS or SBM device) by law enforcement. That doesn't mean that using such information collection methods are illegal. It merely means that we must then proceed to the next step and determine whether it is reasonable under the circumstances then in issue. That, in turn, requires a balancing of the governmental interests with the suspect's reasonable expectations of privacy. No one said this would be simple.

***Warrantless Blood-Draws in a DUI Case*:**

People v. Jones **(Nov. 26, 2014) 231 Cal.App.4th 1257**

Rule: The rule of *Missouri v. McNeely*, requiring a search warrant for a blood-draw in a DUI case absent consent or exigent circumstances, is not retroactive. Also, police may effect a warrantless blood-draw from a DUI arrestee who is subject to "postrelease community supervision" (PRCS) search and seizure conditions even over his objection.

Facts: On September 11, 2012, shortly before midnight, Fairfield police were called to the scene of a two-car collision on Air Base Parkway. While the driver of one of the vehicles, who had sustained "soft-tissue injuries," was at the scene with her vehicle, the driver of the other vehicle, which had rear-ended the victim's car, had fled on foot. Shortly thereafter, some 400 yards from the accident scene, defendant was contacted walking along Air Base Parkway in an area with no sidewalks and where pedestrian traffic was prohibited by a local ordinance. When contacted, defendant was observed to be disheveled and had leaves on his person as if he'd just come out of the bushes. He was also intoxicated. Although he denied having been the driver of the other car in the accident, he admitted to being on active probation with search and seizure conditions. A records check revealed that his "Fourth waiver" was actually pursuant to his postrelease community supervision (PRCS; P.C. §§ 3450 et seq.) requirements, having served a felony term

of imprisonment in county jail. Defendant also had visible on his person a white powder residue similar to that from a vehicle's deployed airbags. Also, he had an ignition key in his pocket which was found to be from the car left at the scene of the accident. After being *Mirandized*, defendant finally admitted to having been the driver of the car that had caused the traffic collision. However, he refused to submit to a breath or blood test. So over his objection, he was transported to a local medical center where a blood sample was drawn at about 1:10 a.m. by a licensed phlebotomist. No search warrant was sought. Subsequent analysis determined that defendant's blood alcohol level was at 0.25%. Charged in state court with a host of felony DUI (V.C. § 23153(a) & (b)) and hit and run (V.C. § 20001(a)) related offenses (with two or more prior DUI convictions in the last ten years (V.C. § 23566(a)) and five prior prison terms (P.C. § 667.5(b)) alleged), defendant filed a motion to suppress his blood/alcohol test results, arguing that the subsequently-decided U.S. Supreme Court decision of *Missouri v. McNeely* (2013) 569 U.S. ___ [133 S.Ct. 1552] mandated that a search warrant be obtained in order to force a blood draw in a DUI case. Both the preliminary hearing magistrate and the trial court judge denied defendant's motion. He thereafter plead no contest in exchange for a stipulated five-year prison term. Defendant appealed.

Held: The First District Court of Appeal (Div. 5) affirmed. Prior to the U.S. Supreme Court's decision in *McNeely* (i.e., April 17, 2013), all binding judicial precedent in California, both at the Supreme Court and intermediate appellate court levels, consistently allowed for warrantless blood draws incident to a valid DUI arrest so long as done in a medically approved manner. Such was the rule as announced in *Schmerber v. California* (1966) 384 U.S. 757, at least as it was interpreted at the time. In *McNeely*, however, the U.S. Supreme Court limited *Schmerber* to its facts and held that the natural dissipation of alcohol in the bloodstream does not, *by itself*, establish a per se exigency justifying an exception to the search warrant requirement for nonconsensual blood draws in DUI cases. The new rule, per *McNeely*, is that: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." The evanescent nature of alcohol in the body as it is metabolized does not, by itself, provide an exigent circumstance sufficient to allow for a warrantless blood-draw. However, recognizing that the purpose behind the application of the Exclusionary Rule is to discourage law enforcement from violating the constitutional protections provided for therein, that purpose is not served when the officers were, in good faith, following binding precedent in effect at the time of the search. The blood-draw in defendant's case occurred some seven months before *McNeely* was decided. The rule of *McNeely*, therefore, not being retroactive, does not provide defendant with grounds to suppress the results of the warrantless blood-draw in his case. Also, and perhaps more importantly, the Court found that defendant's search and seizure conditions, imposed upon him as a condition of this "postrelease community supervision" ("PRCS") requirements, allowed for a warrantless withdrawal of blood in a DUI case, even over his objection. Upon being contacted, officers discovered that defendant was subject to warrantless search and seizure conditions as a condition of his release from county jail where he had served a term of imprisonment following a felony conviction. Pursuant to P.C. § 3453(f), defendant's person, residence, and possessions were subject to search at any time of the day or night, with or without a warrant, by an agent of the supervising county agency or by a peace officer; i.e., a "*Fourth wavier*." Such a condition is automatically imposed upon a PRCS subject without the need for his agreement. Finding that this search condition is similar to that

which all parolees are subjected, the Court found that neither defendant's consent nor an exigency was necessary. The Court further rejected defendant's argument that a blood-draw, as opposed to a mere buccal swab, being more intrusive, should not be included in such a search condition. The Court found, therefore, that the blood-draw in this case was lawful.

Note: This is the first case upholding a warrantless DUI blood-draw where the suspect is subject to PRCS search and seizure conditions. And despite being limited to the PRCS situation, the rule should be no different for any parolee or probationer who is subject to similar conditions. In fact, I've yet to see any case criticizing any form of search or seizure of a suspect on any Fourth waiver, short of the search being arbitrary or for purposes of harassment.

Firearms; Sale to a "Straw Person:"

***Abramski v. United States* (June 16, 2014) __ U.S. __ [134 S. Ct. 2259; 189 L.Ed.2nd 262]**

Rule: Federal law prohibits the sale of a firearm to a "straw person" who intends to sell the weapon to a third person.

Facts: Defendant, a former police officer, offered to purchase a Glock 19 handgun for his uncle, hoping to take advantage of a law enforcement discount. Before any federally licensed firearms dealer may sell a gun, however, the would-be purchaser must provide certain personal information, show photo identification, and pass a computerized background check. So defendant went to a dealer and filled out the necessary forms showing his identity and attesting to the fact that none of the disqualifying factors to gun ownership apply to him (e.g., felon, drug addict, mentally ill, etc.). As a necessary part of the purchasing process, defendant also filled out Form 4472, provided by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Question 11.a. on this forms asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." The accompanying instructions for this question explain what constitutes an "actual transferee/buyer," telling the reader that he is *not* considered to be the actual transferee/buyer if he is buying the firearm for a third party unless he is "legitimately purchasing the firearm *as a gift* for a third party." Despite these instructions, and despite knowing that he was buying the Glock for his uncle who was to pay him for it (i.e., not as a "gift"), defendant answered question 11.a in the affirmative, indicating that he was the "actual transferee/buyer." After responding to this and other questions, defendant signed a certification declaring that his answers were "true, correct and complete." This certification provides that the signator "understand[s] that making any false . . . statement" respecting the transaction—and, particularly, "answering 'yes' to question 11.a. if [he is] not the actual buyer"—is a crime "punishable as a felony under Federal law." After defendant's name cleared the NICS background check, the dealer sold him the Glock. Defendant gave the firearm to his uncle and received $400 in payment for it, depositing the money into his bank account. This transaction was later discovered by the F.B.I. during a separate investigation. As a result, a federal grand jury indicted defendant for violating 18 U.S.C. §§ 922(a)(6) and 924(a)(1)(A) by falsely affirming in his response to Question 11.a. that he was the Glock's actual buyer. Defendant pled guilty and was sentenced to five years of

probation. His conviction was upheld on appeal by the Fourth Circuit Court of Appeal. The United States Supreme Court granted certiorari.

Held: The U.S. Supreme Court, in a split 5-to-3 decision, affirmed. The issue decided is how federal law applies to a so-called "*straw purchaser*;" i.e., a person who buys a gun on someone else's behalf while falsely claiming that it is for himself. Relevant to this issue, 18 U.S.C. § 922(a)(6) provides in part that: "It shall be unlawful . . . for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from [a licensed dealer] knowingly to make any false or fictitious oral or written statement . . . , intended or likely to deceive such [dealer] with respect to *any fact material to the lawfulness of the sale* or other disposition of such firearm or ammunition . . . ." (Italics added) 18 U.S.C. § 924(a)(1)(A) prohibits "knowingly mak[ing] any false statement or representation with respect to the information required by this chapter to be kept in the records" of a federally licensed gun dealer. (1) *18 U.S.C. § 922(a)(6)*: The purpose of this provision is to help make certain that a dealer will receive truthful information as to any matter relevant to a gun sale's legality. On appeal, defendant argued that any misrepresentation on Question 11.a. was not "*material to the lawfulness of the sale*" because his uncle was legally eligible to own a gun. On a broader scope, defendant also argued that federal gun law simply does not care about arrangements involving straw purchasers: So long as the person at the counter is eligible to own a gun, the sale to him is legal under the statute irrespective of whether the ultimate recipient of the gun is legally eligible to own or possess it. Per defendant, not only is a false statement under Question 11.a. not material, but it is also "utterly irrelevant" to the lawfulness of the sale. The Court disagreed. In discrediting defendant's argument on this issue, the Court looked primarily to the purposes behind the statute: "The twin goals of this comprehensive scheme are to keep guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes. (Citations) And no part of that scheme would work if the statute turned a blind eye to straw purchases, . . ." On this issue, the Court made five important points: (a) First, a licensed gun dealer cannot perform his responsibility of selling only to those who can legally own or possess a firearm if the person at the counter is only a conduit through which the gun is going to the ultimate purchaser. (b) Law enforcement would be thwarted in their efforts to solve gun-related crimes if the person who owned or possessed the firearm used is not the person on record as the one who purchased it. (c) Section 923(g)(3) imposes an obligation upon the licensed gun dealer to report persons who buy multiple handguns within five days. This can only be accomplished if the records are accurate as to who took actual control of the purchased firearms. (d) It was noted by the Court that § 922(a)(6) only addresses sales made by licensed dealers, having little if any effect upon a "secondary market," such as when a lawful purchaser later decides to sell or gift his firearm to another person. The straw arrangement at issue here, when one person purchases a firearm from a dealer for the benefit of another, is not part of this secondary market. To this point, Congress has chosen to leave regulation of this secondary market to § 922(d) which prohibits a private party (and not just, as originally enacted, a licensed dealer) from selling a gun to someone he knows or reasonably should know cannot legally possess one. The fact that Congress has largely left the secondary market unregulated is irrelevant to its decision to place strict controls on the original purchase of a firearm from a gun dealer. (e) Lastly, the Court rejected defendant's argument that because his uncle was legally eligible to own or possess a firearm, "all's well that ends well." It is the responsibility of the licensed gun dealer, and not the straw purchaser, to insure that the ultimate

recipient of a firearm is legally eligible to own or possess a gun. (2) *18 U.S.C. § 924(a)(1)(A)*: Defendant's argument on this charge was that the false statement did not violate § 924(a)(1)(A) because a buyer's response to Question 11.a. is not something that is "required . . . to be kept in the records" of a gun dealer. However, the Court noted that section 923(g)(1)(A) mandates that a dealer "maintain such records of . . . sale, or other disposition of firearms at his place of business . . . as the Attorney General may by regulations prescribe." Form 4472 is such a record. Its contents, including the answer to question 11.a., must therefore be maintained in a dealer's records. Defendant was validly convicted of both sections.

Note: In sum, the Court notes that: "No piece of information is more important under federal firearms law than the identity of a gun's purchaser—the person who acquires a gun as a result of a transaction with a licensed dealer." Defendant here was fighting issues he had no way of winning; arguing that it was okay for him to lie in purchasing firearms in the face of statutes that so clearly make it illegal to lie. Whatever your (or my) thoughts may be about the Second Amendment and the hotly contested issues related to the government maintaining records of your ownership of firearms, Congress's obvious intent to insure that certain classifications of people (e.g., felons, mental patients, wife-beaters, etc.) don't have ready access to firearms would certainly be thwarted if you or I could use our eligibility to so easily provide firearms to all our psycho felon friends. You should also note California's laws prohibiting the sale of (or to "supply, deliver, or give") a firearm to prohibited persons, whether you're a licensed gun dealer or not. (P.C. §§27500 et seq.) Also note that even the private transfer of a firearm from one person (i.e., *not* a gun dealer) to anyone else must also be completed through a licensed firearms dealer. (P.C. § 27545) And then, if you (as a California resident) are bringing a firearm in from out of state, you must still bring it to a licensed gun dealer so that he can check out your eligibility to possess it, and then register it in your name. (P.C. § 27585, effective 1/1/2015) One way or another California is going to check out all gun recipients to make sure you're legally entitled to own or possess it.

***Miranda*; *Unequivocal Invocations and Minors*:**

In re Art T. **(Feb. 11, 2015) 234 Cal.App.4th 335**

Rule: Whether or not an interrogated minor's comment about wanting an attorney is a clear and unequivocal invocation requires an objective evaluation of all the surrounding circumstances which include, if known or would have been apparent to a reasonable officer, the minor's age.

Facts: At about 12:40 a.m. on August 18th, 2012, a gang-related shooting occurred at the 1400 block of Alvarado Terrance in Los Angeles. Two shooters put down a barrage of about 14 shots. Three members of the 18th Street gang, while standing on a street corner, were hit by gunfire with two being wounded and a third killed. One of the shooters yelled an obscenity followed by "*La Mara*," a commonly used name for the criminal street gang Mara Salvatrucha, or "M.S." The shooting was recorded live by two nearby surveillance cameras. The ensuing investigation led detectives to 13-year-old Art T, a member of the M.S. 13 Tiny Winos gang who went by the moniker of "Casper." He was brought to the police station where LAPD Detectives interrogated him. For purposes of *Miranda v. Arizona*, it was uncontested that he was in custody. With defendant being under the age of 14, it was first determined that he was capable of understanding

the difference between right and wrong (per P.C. § 26). In an interrogation that was videotaped and later transcribed, defendant was carefully advised of his rights, encouraging him to inquire if he had any questions, and asking after each segment of the admonition whether he understood. Then, without obtaining an express waiver of those rights, the questioning began. Defendant was first told that the officers had talked to a lot of people, that they already knew a lot, and that they were only looking for the truth from him. After hinting that someone had ratted him off, the detectives showed him a video purporting to be of one of the shooters taken by one of the surveillance cameras. One of the detectives told defendant; "*That, my friend, would be you*." Defendant denied that he was the person depicted in the video as the shooter, saying; "*I've never killed anyone before*." Defendant claimed that on the night of the shooting he was with a friend in Arcadia, and then later at home which his mother would verify. He also claimed that he didn't own any clothes similar to what the shooter was wearing in the video. After repeated accusations that he was in fact the shooter as depicted in the video, defendant finally said; "*Could I have an attorney*? *Because that's not me.*" A detective responded with; "*But—okay. No, don't worry. You'll have the opportunity*." The interrogation continued. Soon, defendant was falsely told that his crying mother had identified him in the video. (She'd actually said that the person in the video didn't look like her son.) He was also told that his denials merely made him look like "a cold-blooded gang murderer." Finally, however, some 32 pages later in the transcript, defendant confessed. During that intervening time period, however, before confessing, he made repeated requests to speak either with his mother or his girlfriend, all of which were either ignored or denied. He also said at one point that, "(*I*) *got nothing else to say*," and then later; "*I'm not answering anything, dude, because everything I tell you guys is a lie to you guys*." When defendant finally confessed, he admitted that he and another "homie" shot at a group of men because they thought they were from "Faketeen," a derogatory reference to the 18th Street gang. A Juvenile Court W&I § 602 petition was filed alleging that defendant had committed one count of murder (P.C. § 187(a)) and two counts of a willful, deliberate, and premediated attempted murder (P.C. §§ 664, 187(a)), with gun-use (P.C. § 12022.53(c) & (d)) and criminal street gang (P.C. § 186.22(b)(4)) allegations. Defendant's motion to suppress his confession was denied, the Juvenile Court magistrate finding that under the circumstances, his reference to wanting an attorney was a conditional, rather than unequivocal, invocation of his *Miranda* rights, or just a "statement in passing," and thus the detectives did not have any legal obligation to stop their questioning. At the adjudication hearing, no one was able to identify defendant as the shooter. Also, the magistrate noted that standing alone the videotape was not clear enough to determine beyond a reasonable doubt that it was defendant seen shooting at the victims. In addition to defendant's confession, however, he also apparently made incriminating statements to his girlfriend when finally allowed to call her. However, neither the audiotape nor a transcript of that conversation was provided to the Appellate Court on appeal, although it was introduced into evidence at the adjudication hearing. Based primarily upon defendant's confession, the Juvenile Court magistrate sustained the petition as to all counts and allegations. Defendant was committed to the Division of Juvenile Justice, and appealed.

Held: The Second District Court of Appeal (Div. 7) reversed. The issue on appeal was the admissibility of defendant's confession, i.e., whether the questioning should have ceased once he asked for an attorney ("*Could I have an attorney*? *Because that's not me.*"). The People argued, as the Juvenile Court magistrate had ruled, that that statement did not constitute a clear and unequivocal invocation and that the detectives were therefore not required to end their

interrogation. The Appellate Court disagreed. The rule is simple, even if not always easy to apply. Once an in-custody suspect asserts his right to counsel, even though he had previously waived that right, questioning must cease either until an attorney is present or the subject himself reinitiates the questioning. However, questioning need not cease when the request for counsel is ambiguous or equivocal. The test for determining whether a suspect's attempted request for an attorney is ambiguous or equivocal is how "a reasonable officer in light of the circumstances would have understood" what was intended. The test is an objective one. If a reasonable officer, under the totality of the circumstances, would not have understood the suspect's comments to be a request for counsel, then that officer need not ask for clarification and may continue on with the questioning. While it is arguable that this being an objective test, the suspect's age is *not* to be considered, the U.S. Supreme Court recently held that in determining whether a child is "in custody" for purposes of *Miranda*—also an objective inquiry—a court is to consider the child suspect's age so long as that age was either known to the officer at the time of the questioning or would have been objectively apparent to a reasonable officer. (*J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394, 2398.) The Court here held that the same standard applies when evaluating whether a child suspect's mid-interrogation reference to an attorney was a clear and unequivocal invocation. In sum, a Court is to consider the juvenile's experience, education, background, and intelligence, as well as whether he had the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. This evaluation also includes the suspect's age *if* his age is either known to the officer, or would have been objectively apparent to a reasonable officer. In this case, the detectives knew that defendant was a 13-year-old eighth-grader in middle school. This knowledge, when combined with his repeated requests for his mother, would have made his lack of maturity and sophistication objectively apparent to a reasonable officer. In this context, defendant's statement after viewing the video of the shooting ("*Could I have an attorney*? *Because that's not me*.") was, in the Court's opinion, an unequivocal request for an attorney. The detectives should have ended the interrogation at that point. Any incriminating statements made after this invocation should have been suppressed. Because it is apparent that the only significant evidence to the effect that defendant was in fact one of the shooters, the Juvenile Court magistrate's admission of his confession into evidence was not harmless beyond a reasonable doubt.

Note: What this case seems to tell us is that the younger, and less criminally sophisticated the minor, the more likely an otherwise vague and ambiguous reference to an attorney is to be considered a legally effective invocation. I'm not sure why that is, or whether I agree with it, but that's what the Court seems to be saying. But that's not the only problem with this case. The fact that defendant also apparently made admissions to his girlfriend was not discussed in that no one thought to include that recorded conversation in the appeal package transmitted to the Appellate Court. A confession to his girlfriend, if it happened, would have been relevant to the "harmless error" determination. Also not discussed was whether defendant's comments about; "(*I*) *got nothing else to say*," and then later; "*I'm not answering anything, dude, . . .*" constituted an invocation to his right to silence, probably because it was a moot issue in light of the case being reversed anyway. And while it was mentioned that defendant's repeated requests to talk to his mother (or other adult figure: See *Fare v. Michael C.* (1979) 442 U.S. 707, 725-726.) may in some circumstances be considered an invocation of a minor's right to silence, how that rule might apply in this case was also not analyzed. For a serious case, a lot of unexplained holes were left about which we can now only wonder.