# *San Diego District Attorney*

## *D.A. LIAISON LEGAL UPDATE*

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

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

"*Expecting the world to treat you fairly because you are good is like expecting the bull not to charge because you are a vegetarian.*" (Dennis Wholey)

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**ADMINISTRATIVE NOTES:**

***Fourth Amendment Search and Seizure Manual*:** The Seventh Edition of the Fourth Amendment Search and Seizure Manual I produce every year will be out in a couple of weeks. I still have a half dozen or so Fourth Amendment cases from December to brief and plug into the manual. If you're on the Legal Update e-mail list, you will get the manual automatically when it's ready to go.

**CASE LAW:**

***Traffic Stops; Questioning Beyond the Scope of the Stop*:**

***United States v. Mendez*** **(9th Cir. Oct. 30, 2006) 467 F.3rd 1162**

**Rule:** Expanding the scope of a traffic stop by questioning a detained person about criminal activity not related to the traffic stop, and for which there is no particularized suspicion, is a Fourth Amendment violation, per the Ninth Circuit.

**Facts:** In December, 2003, defendant was stopped one evening by two detectives in a "*gang area*" of Phoenix, Arizona, because his vehicle didn't have a visible license plate or temporary registration tab. When contacted, defendant also didn't have a driver's license. Asked to step out of the car, he was patted down for weapons; an action the legality of which was not challenged. While patting Mendez down, a gang-affiliated tattoo was observed on his left hand. When asked where he was from, defendant responded that he was "from the Latin Kings;" a street gang the detectives knew to operate out of Chicago. As one detective checked for warrants, the other continued the conversation with Mendez about his tattoos, eliciting comments about having left the Latin Kings "in good standing," moving to Arizona "to get away from all that; to turn (his) life around," and about having done some prison time. Asked why he had been in prison, Mendez responded that it was for a weapons offense. When asked whether he had any weapons in his car, Mendez became agitated and protested that he was a good father (having his kids in the car) and was just trying to make a good life for himself in Arizona. He then gave up and admitted to having a gun in the "driver's side handle." The detectives arrested Mendez and recovered a loaded, small caliber semiautomatic pistol in the driver's side armrest; apparently a must-have implement for any "good father." Charged in federal court with being a felon in possession of a firearm, Mendez filed a motion to suppress the gun arguing (1) that the detectives improperly interrogated him about matters unrelated to the purposes of the traffic stop, and (2) that the gun was the product of an unlawfully prolonged detention. The federal district court denied Mendez's motion, specifically finding that the questioning about Mendez's gang-affiliations was justified by the discovery of the tattoo and the other circumstances of the stop. Mendez appealed from his subsequent conviction and 4½-year prison sentence.

**Held:** The Ninth Court of Appeal, in a split two-to-one decision, reversed. Never even reaching the issue of the possibility of a prolonged detention, the Court held simply that the detectives were "not justified in expanding (their) questioning of (defendant) to topics beyond the scope of the traffic stop," and that the information gleaned from defendant concerning his past gang membership and prior prison commitment "[did] not give rise to the requisite type of particularized suspicion necessary to expand the scope of the interrogation." Having expanded the "*scope of the interrogation*" into areas not justified by a "*particularized suspicion*," asking questions related to his gang affiliation and weapons possession was improper and a violation of the Fourth Amendment. As such, the gun should have been suppressed.

**Note:** *This decision is just wrong*, and directly contrary to decisions from both the U.S. Supreme Court and California authority. I only briefed it so that when somebody tries to tell you that this is the law, you will know that it is not. In support of its position on this issue, the Ninth Circuit cites its own prior decisions plus one case out of the Eleventh Circuit. These decisions, in turn, are either devoid of any authority from the Supreme Court, or cite seriously antiquated dicta taking the High Court's language completely out of context. The correct rule is this: So long as the detaining officers are not engaging in what is commonly referred to as a "*prolonged detention*" (i.e., holding onto a detainee for longer than is justified by the then-existing reasonable suspicion), the Fourth Amendment is *not* implicated merely because an officer asks questions that go beyond the scope of the original purposes of the stop. There are a number of U.S. Supreme Court decisions that specifically say this (all of which I can send you if you ask), but they are all summed up in the following quote from the Court's recent decision of *Muehler v. Mena* (2005) 544 U.S. 93: "We have 'held repeatedly that mere police questioning does not constitute a seizure.' [Citations.] '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.' [Citation.] As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment (by questioning her about her immigration status). Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status. . . . [W]e [have] rejected the notion that 'the shift in purpose' 'from a lawful traffic stop into a drug investigation' was unlawful because it 'was not supported by any reasonable suspicion.' [Citation.] . . . We certainly did not, as the (Ninth Circuit) Court of Appeals suggested, create a 'requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status.' [Citation.]" California cases are in accord: "Questioning during the routine traffic stop on a subject unrelated to the purpose of the stop is not itself a Fourth Amendment violation. Mere questioning is neither a search nor a seizure. [Citation.] While the traffic detainee is under no obligation to answer unrelated questions, the Constitution does not prohibit law enforcement officers from asking. [Citation.]" (*People v. Brown* (1998) 62 Cal.App.4th 493; see also *People v. Gallardo* (2005) 130 Cal.App.4th 234.) There being contrary California authority, not to mention the U.S. Supreme Court's contrary opinion on the issue, *this Ninth Circuit decision can be, and should be, ignored*.

***Recording an Inmate's Telephone Calls; Implied Consent*:**

***People v. Windham*** **(Dec. 14, 2006) 145 Cal.App.4th 881**

**Rule:** The telephone calls of a county jail inmate may be lawfully monitored and recorded, at least when the inmate is on notice that his calls may be monitored.

**Facts:** Defendant, shopping with his girlfriend, asked her to loan him some money. She refused, angering him. He followed her out to her car and drove her away. While in the car, he grabbed her purse, breaking the strap in taking it from her. He then struck her in the neck and pulled a gold chain off her neck. He parked next to a cliff and told her to

get out. When she refused, he drove further only to stop again where he demanded sex. She finally agreed after he threatened to beat her and abandon her by the side of the road. He also told her he would kill her if she reported him to the police. A passing police officer interrupted the assault and arrested defendant. The victim suffered a severe eye injury and a swollen lip. While in jail and awaiting trial on a host of felony charges, defendant attempted to call the victim on the telephone some 83 times, getting through to her 12 times, all of which were monitored and recorded. In these calls, defendant incriminated himself. His motion to suppress these admissions was denied. Defendant thereafter pled no contest to causing corporal injury to a cohabitant (P.C. § 273.5) and was sentenced to three years in prison. Defendant appealed.

**Held:** The First District Court Appeal (Div. 5) affirmed. Defendant argued on appeal that the jail's policy of monitoring and recording all telephone calls from the jail violated both the federal wiretapping statutes (Title III of the Omnibus Crime Control and Safe Streets Act of 1968; 18 U.S.C. §§ 2510 et seq.) and the California Invasion of Privacy Act (P.C. §§ 630 et seq.). The federal statutes allow "a person acting under color of law to intercept a wire, oral, or electronic communication" where at least one party to the communication has given his consent. (18 U.S.C. § 2511(2)(c)) Jail and prison inmates have impliedly given consent so long as the inmate has been given "*meaningful notice*" that his telephone calls are subject to monitoring. In this case, the jail had posted a sign by the telephones that phone calls might be monitored. Also the telephone system played a message at the beginning of each call stating that calls might be monitored and recorded. Lastly, information about the jail telephone monitoring policy was included in the jail rules distributed to all inmates. This is enough to cause any "reasonable inmate" to understand that his telephone calls would be monitored and recorded. Similarly, monitoring and recording defendant's telephone calls did not violate California's Invasion of Privacy Act. California law is stricter than the federal rules, requiring all parties (as opposed to just one) to the conversation to know that a telephone call is being monitored for it to be lawful (P.C. § 632). An exception, recognized by both statute (P.C. § 633) and as the law was interpreted prior to enactment of the statutes (1967), is for law enforcement to monitor and record otherwise private conversations with the consent of one of the parities. Where defendant impliedly consented to the monitoring, section 633 allows a law enforcement officer, "acting within the scope of his or her authority," to monitor and record defendant's telephone calls. Lastly, the Court also noted that the Fourth Amendment is not violated by the monitoring and recording of a jail inmate's telephone calls (i.e., no "*reasonable expectation of privacy*"). Evidence of defendant's calls to the victim was therefore properly admitted into evidence against him.

**Note:** I found the Court's discussion in this case, at least as it relates to the applicability of California's Privacy Act rules, to be a little confusing. P.C. § 633 does not actually say on its face that law enforcement can eavesdrop on telephone calls such as the ones in question here, even with the inmate's implied consent. What it does say is that P.C. § 632 (making it a felony to eavesdrop on confidential communications) does not apply to a law enforcement officer eavesdropping on telephone conversations so long as the law enforcement officer "could lawfully overhear or record (such calls) prior to the effective date of (the Privacy Act; i.e., 11/8/1967)." Referencing case law, the Court then notes

that a law enforcement officer eavesdropping on telephone calls with the knowledge and consent of one of the parties (even if that consent is only implied) was lawful prior to 11/8/1067. The federal statute also has a "*law enforcement exception*," per 18 U.S.C. § 2510(5)(a)(1), applicable so long as the officer acts in the "ordinary scope of his or her duties" and pursuant to an established policy. Several federal circuits have chosen to rely upon this exception to allow for jail telephone monitoring in circumstances as present in this case. (See fn. 3.) But whatever justification you use, the surreptitious eavesdropping upon the telephone calls by law enforcement, made to and from inmates in both a county jail and a state prison, where the inmate is on notice that his conversations may be monitored, is lawful. *Note*, however, that this *does not* authorize a law enforcement officer to eavesdrop on an inmate's (or anyone else "who is in the physical custody of a law enforcement officer or other public officer, or who is on the property of a law enforcement agency or other public agency) conversations with his *attorney*, *religious advisor* or *physician*. P.C. § 636 makes this practice a felony and is a serious no-no.

***Warrantless Entry Into A Residence*:**

***Frunz v. City of Tacoma*** **(9th Cir. Nov. 13, 2006) 468 F.3rd 1141**

**Rule:** With information that a possible burglar is really no more than an ex-spouse possibly violating a restraining order by being in the former couple's house, police breaking in the door and confronting the occupant at gun point is not warranted.

**Facts:** A complainant in Tacoma, Washington, called police to report that his neighbor's ex-wife (plaintiff in the resulting lawsuit) was in the neighbor's house and her car was parked out front. The complainant/neighbor had been asked by plaintiff's ex-husband, who was himself out of town, to watch his house for him. Responding police arrived within a few minutes but could not find any signs of a break in and no one would answer the door. They told the neighbor to call again should plaintiff return. An hour and a half later, the neighbor called again to say that plaintiff had returned, was in the house, and that she had answered the door to visitors. The neighbor also told police that he believed that plaintiff was subject to a restraining order which prohibited her from being at the husband's residence. (Unbeknownst to the neighbor, plaintiff had been given the house in the divorce and had been living there for a week, with the husband moving to California.) This time it took officers some 40 minutes to get to the house. But rather than just knocking as they had done before, they surrounded the house and broke in the back door. Inside, plaintiff was confronted at gunpoint in the kitchen, "slammed . . . to the floor" along with her visitors, and handcuffed. She was released after about an hour when the officers finally reached her divorce lawyer who confirmed that she was the lawful owner of the house. Plaintiff sued the officers in federal court (42 U.S.C. § 1983). A jury found for the plaintiff, awarding her $27,000 in compensatory damage and $111,000 in punitive damages. The officers (and the City of Tacoma) appealed.

**Held:** The Ninth Circuit Court of Appeal, in a blistering decision, affirmed. On appeal, the officers argued that the forced entry into plaintiff's home, drawing their weapons, handcuffing the occupants, and doing a protective sweep, was all justified in that they

reasonably believed that a burglary was in progress and that plaintiff was the burglar. The Ninth Circuit didn't buy it. The officers knew ahead of time that the person in the house was the ex-wife of the person who they thought was the owner. When the officers responded the first time, no one felt the need to draw their guns or to break into the house. They knocked on the door in an attempt to talk to who they believed was merely the owner's ex-wife. When they returned after the second call, there were still no signs of a break-in. Other than the fact that the ex-wife appeared to be in the house, nothing else had changed. There was no reason to believe that they had anything worse than "some sort of spousal property dispute." Simply knocking again, contacting the plaintiff, and asking her why she was there was all that the circumstances called for. Breaking in with guns drawn and taking the plaintiff into custody was clearly unreasonable.

**Note:** Generally, when discussing a civil case, you can't give a rendition of the facts very much credence in that normal pre-trial procedural appellate rules require the Court to assume that the plaintiff's allegations are true without the benefit of knowing the defendant officers' version of what really happened. But in this case, a jury had already found these officers liable and there seems to be little dispute as to what happened. The Ninth Circuit was so upset by the officers' actions in this case that they imposed monetary sanctions on the City of Tacoma for filing a frivolous appeal. (See 2007 WL 117944, 1/16/07) So assuming these officers did everything that the jury apparently found that they did, we need to view this case as a lesson-learned. Most burglars don't park their car in the front, come back for multiple visits, and admit visitors who come knocking at the door. Certainly, when you are told by the reporting party that a possible "burglar" is no more than an ex-wife, and the circumstances indicate that she is maybe guilty of no more than a restraining order violation and/or a trespass, or at worst exercising a little self-help to the community property, I really wouldn't recommend that you crash the doors and stick a gun in her face. That is just asking to get sued and really not good police work.

***Protective Sweeps in a Business*:**

***United States v. Paopao*** **(9th Cir. Nov. 22, 2006) 469 F.3rd 760**

**Rule:** A protective sweep of a business, after an arrest is made just outside of the business, is justified by a reasonable suspicion to believe that there might still be someone inside who constitutes a danger to the officers.

**Facts:** Defendant was one of two suspects in a series of armed robberies of illegal gambling rooms in Honolulu, Hawaii, where the perpetrators posed as police officers. While this investigation was going on, a Honolulu police detective received a call from a tested, reliable, confidential informant that the robbers in this series were currently at "Charley's Game Room." Charley's Game Room was actually an apartment converted into an illegal gambling establishment. The detective went to the area near Charley's and called for assistance. Another detective who was assigned to investigate the robbery series happened to be nearby, and responded. This detective was familiar with Charley's and its layout, knowing that it had only one exit. Suspecting that the perpetrators might

be inside preparing to rob the place, the officers approached the door to the apartment. As they did so, seven individuals came out and were all detained. Defendant, who the detectives recognized as one of the suspects in the robbery series, also came out, saw the officers, and immediately went back inside. One of the detectives looked into the open door of the apartment and observed defendant set a tan bag he was carrying on the floor in the middle of the room. Defendant then came back out and was immediately arrested on an outstanding arrest warrant. Fearing that the second robber might still be inside, the detectives then called into the room, announcing their presence, and commanding everyone to come outside. Two women came out. Believing that the second robbery suspect might still be inside, one of the detectives then entered and did a protective sweep of the apartment's three rooms, taking less than a minute to do so. As the detective walked by the open tan bag still sitting on the floor he observed in it what appeared to be a handgun and an ammunition magazine. The bag was seized and later found to in fact contain a gun and ammunition along with some other stuff. Defendant was charged in federal court with being a felon in possession of a firearm and ammunition. His motion to suppress these items was denied by the trial court, it being held that the protective sweep for the other robbery suspect was lawful and that the gun and ammunition were observed in plain sight in the process. Defendant pled guilty and appealed.

**Held:** The Ninth Circuit Court of Appeal affirmed. The Court first noted that Charley's was a commercial establishment for which defendant was not an employee, had no possessory interest, and was there for no more than a commercial or possibly criminal purpose. As such, defendant did not have any legal "*standing*" (i.e., no "*expectation of privacy*") to challenge the officer's entry and protective sweep of the apartment. But even if he did have standing, the protective sweep (and thus the plain sight observation of the gun and ammunition) was legal. The fact that the arrest was made outside of the business is not relevant. Also, the detective here had information from an informant with a history of providing reliable information that the two robbery suspects might be in Charley's. One of the two suspects (defendant) had already been found there and arrested, corroborating the informant. This in more than sufficient to meet the "*reasonable suspicion*" standard necessary to believe that the other robbery suspect might still be inside, justifying a protective sweep for him. The protective sweep, therefore, was lawful.

**Note:** The Court didn't make a big deal of it, but this case is also important from the standpoint that that it involved the protective sweep of a business establishment. Almost all (if not all) previous cases on this issue have dealt with a protective sweep of a residence. But there is no reason why the rules should be any different. It is also important that the arrest occurred outside the business. This issue has, in the past, generated some debate. The Court, however, goes through a pile of federal circuit court cases saying that if there exists the necessary reasonable suspicion to believe someone is inside who might constitute a danger to the officers, then a protective sweep is lawful whether the arrest is inside or outside of the place to be swept. The corresponding California cases are rare, but consistent with this conclusion. (e.g., see *People v. Maier* (1991) 226 Cal.App.3rd 1670, 1675.)

***First Degree Burglary of, and First Degree Robbery in, an Inhabited Dwelling*:**

***People v. Villalobos et al.*** **(Nov. 30, 2006) 145 Cal.App.4th 310**

**Rule:** A motel room, even though rented for one night and for an illicit purpose, is an "*inhabited dwelling*" for purposes of first degree burglary and first degree robbery.

**Facts:** Roy Miller rented a room at the Peppertree Motel in Ontario for one night, hoping to "party" with a girlfriend, Jeanette Howard. As he awaited Jeanette's arrival, doing a little smoking and doping in preparation, he got a call on his cell phone from co-defendant Bernadette Osika who wanted to come over and party with him and Jeanette. Miller at first said no, but after a three-way phone conversation with Osika and Jeanette, perhaps seeing the possibilities here, he agreed. Shortly after Osika arrived, but still with no Jeanette, someone knocked on the motel room door. Miller looked out the window and saw defendant Villalobos and another man. He told Osika that he was not going to let them in. However, commenting that defendant was her boyfriend, Osika opened the door and let them in as she simultaneously stepped outside. Defendant and the other man immediately told Miller at knife point that they were there to rob him, taking his money ($500 to $700), cell phone and methamphetamine. When they left, Miller saw the two of them drive away in a pickup truck. He then noticed that Osika was also gone, along with his car keys and his car. Miller called Jeanette and complained about being robbed and told her that if he didn't get his car and other property back he was going to call the police. Jeanette, who just happened to be acquainted with both Villalobos and Osika, told him not to call the police; that she would get his car back for him. Miller, finally figuring out that he'd been set up by the three of them (although Jeanette was never charged), called the police. Villalobos and Osika were charged with a host of criminal offenses including *first degree robbery* in concert with other persons in an inhabited dwelling (P.C. §§ 211, 212.5(a), & 213(a)(1)(A)) and *first degree burglary* of an inhabited dwelling with a person present (P.C. §§ 459, 460(a), & 667.5(c)(21)). Defendants, convicted by a jury, appealed, arguing that a motel room rented for one night was not an "*inhabited dwelling*;" a necessary element of both of these charges.

**Held:** The Fourth District Court of Appeal (Div. 2) affirmed. One of the ways to prove both a first degree burglary and a first degree robbery is through proof that the location of each was in an "*inhabited dwelling*" or the "*inhabited portion of any other building*." (P.C. §§ 460(a), 212.5(a), respectively.) The issue raised by defendants was whether a motel room, rented but for one night (i.e., on a "*transient or temporary basis*"), could be considered an "*inhabited dwelling*" for purpose of these two crimes. Defendants' argument that a motel room was not an inhabited dwelling under these circumstances was based upon case law that has held that "a structure is an inhabited dwelling if 'a person with possessory rights uses the place as sleeping quarters *intending to continue doing so in the future*.'" (See *People v. Fleetwood* (1985) 171 Cal.App.3rd 982.) This definition, however, comes from other cases cited in *Fleetwood* where the issue was whether a residence, temporarily unoccupied but to which the owners intended to return, is still an inhabited dwelling (holding that it is). That was not the issue in this case. The Court reviewed the history of the burglary (and robbery) statutes, noting the Legislature's (and

Common Law's) intent to give greater protection to a place where one resides, even temporarily. "The proper question is whether the nature of a structure's composition is such that a reasonable person would expect some protection from unauthorized intrusion." Noting that prior case law has given such protection to temporary abodes such as a weekend fishing retreat (*United States v. Graham* (8th Cir. 1992) 982 F.2nd 315.), a hospital room (*People v. Fond* (1999) 71 Cal.App.4th 127.), and even a jail cell (*People v. McDade* (1991) 230 Cal.App.3rd 118.), certainly a motel room which the victim intended to use as a private place in which to shack up with a girlfriend as they smoked and doped would qualify. Defendants, therefore, were properly convicted of both first degree burglary and first degree robbery.

**Note:** These two defendants got 15-to-life and 16-to-life, respectively, for this little dope rip off. This is known in the trade as a "*three-for*," i.e., three for the price of one. Miller not only got stood up but lost his dope and money in the process, and two crooks are going away a long time for their efforts. *Great day*. But note the more important point to this case, and that is to give the term "*inhabited dwelling*" a very broad application for these two offenses.

***Juvenile Search and Seizure Probationary Conditions*:**

***In re Jaime P.*** **(Nov. 30, 2006) 40 Cal.4th 128**

**Rule:** The rule that a belatedly discovered Fourth Wavier search and seizure condition will not validate an otherwise unlawful search applies to juveniles as well as adults.

**Facts:** Defendant was stopped in Fairfield while driving a motor vehicle for what the police officer believed was a violation of V.C. § 22107 (failing to signal). However, the prosecution later conceded that section 22107 was not violated in that there was no "other vehicle (that) may be affected by the movement," as the section requires. Three other persons were in defendant's car at the time. When asked for a driver's license, defendant could produce only a school identification card. While talking to defendant, the officer noticed a box of ammunition on the car's front floorboard. Patting everyone down, however, failed to reveal the presence of any firearms. When it was determined that no one had a driver's license, the officer impounded the car. An impound inventory search resulted in recovery of a loaded .44 caliber handgun beneath a rear passenger seat. Defendant later admitted that one of his companions brought the gun into the car but that they had all passed it around. It was later determined that defendant, an admitted gang member, was on probation and subject to search and seizure conditions (i.e., a "*Fourth Waiver*"). Defendant was charged by petition in Juvenile Court with possession of a loaded firearm (P.C. § 12031(a)(1)), among other charges. His motion to suppress the gun was denied despite the fact that the officer didn't know about defendant's Fourth Waiver until after the stop and search. Defendant appealed. The District Court of Appeal affirmed, noting California Supreme Court precedent holding that a belatedly discovered Fourth Waiver imposed on a juvenile probationer will justify an otherwise unlawful search. (*In re Tyrell J.* (1994) 8 Cal.4th 68.) The minor petitioned the California Supreme Court for a reconsideration of this issue.

**Held:** The California Supreme Court, in a 6-to-1 decision, reversed, holding that the rule of *In re Tyrell J.* is no longer valid. *Tyrell J* was based upon the premise that requiring a police officer to have advance knowledge of a Fourth Waiver search condition imposed on a minor would be inconsistent with the "*special needs*" of the juvenile probation scheme, including the "goal of rehabilitating youngsters who have transgressed the law." *Tyrell J.* also noted the reduced expectation of privacy that a probationer enjoys, as well as how suppressing evidence in such a case would not advance the purposes of the Exclusionary Rule. Since *Tyrell J.* was decided, however, the Supreme Court ruled in *People v. Sanders* (2003) 31 Cal.4th 318, that the residence of an adult parolee (who is on a Fourth Wavier merely by virtue of being a parole) was not lawfully searched when the fact of the Fourth Wavier condition was not discovered until some time after the warrantless search. The Court's reasoning in *Sanders* was that to allow a search under these circumstances (i.e., no warrant and no exigent circumstances) "would legitimize unlawful police conduct." Since *Sanders*, and to some extent even before, many legal commentators have questioned the continuing validity of *Tyrell J.* asking why the rule should be any different for juveniles than it is for adults. The Court here re-analyzed the three justifications for Fourth Wavier searches (i.e., (1) "special needs," (2) a reduced expectation of privacy, and (3) advancing the purposes of the Exclusionary Rule, including the need to deter police misconduct), as such justifications apply to juveniles. In so doing, it was determined that the theory of *Tyrell J.* was no longer valid. "(D)evelopments occurring subsequent to our *Tyrell J.* decision convince us that it was incorrectly decided, and that it has generated and will continue to generate inequitable and legally unjustified results unless we overrule it." In re-analyzing the above three factors, the court determined the following: (1) *Special Needs*: "(I)f an officer is unaware that a suspect is on probation and subject to a search condition, the search is not justified by the state's interest in supervising probationers or by the concern that probationers are more likely to commit criminal acts." (2) *Reduced Expectation of Privacy*: While someone on probation (or parole) has a reduced expectation of privacy, that expectation has not been totally eliminated. A probationer has the right to expect that he won't be searched randomly, at will, by any officer who didn't honestly believe he was doing so lawfully. (3) *Purposes of the Exclusionary Rule*: Encouraging officers to do searches illegally in the hope that it might later be justified by a belatedly discovered search condition does not advance the purposes of the Exclusionary Rule. Based upon this, it is now the rule that in order for a Fourth Wavier search to be valid, no matter what the circumstances and whether the target is an adult or a juvenile, the officer conducting the search must be aware of the existence of the search condition beforehand.

**Note:** This is no surprise, and has been on the horizon for some time. The Fifth District Court of Appeal predicted it over a year ago in *In re Joshua J.* (2005) 129 Cal.App.4th 359, and many other legal scholars have been dumping on *Tyrell J.* even before *Sanders* was decided. The lesson learned here is that if you wish to search a person, his car, his residence, or anywhere else, and you are not sure of your probable cause or whether you have the necessary exigent circumstances to justify doing it without a warrant, take the time *before you search* to check for a Fourth Wavier.