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

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THIS EDITION'S WORDS OF WISDOM:

"*How many times is it appropriate to say "What?" before you just nod and smile because you still didn't hear or understand a word they said*?" (Anonymous)

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ADMINISTRATIVE NOTES:

***Petty Theft with a Prior, per P.C. § 666*:** Note that effective August 20, 2010, the "*Petty Theft with a Prior*" section (P.C. § 666) has been amended in subdivision (a) to require, along with at least one jail term, *three* prior convictions for petty theft, grand theft, auto theft per V.C. § 10851, burglary, carjacking, robbery, or a felony violation of P.C. § 496, instead of just one. Subdivision (b) further provides, however, that *one* prior conviction will do it if the person described in subdivision (a) also has a prior serious or violent felony conviction, per P.C. §§ 667.5(c) or 1192.7(c). Meeting the requirements of either of the above

subdivisions converts a new petty theft offense into a felony (wobbler), punishable by up to one year in county jail, or 16 months, 2 or 3 years in prison.

***Solicitors on Private Property*:** I've been told that there is a former law enforcement officer providing training on how you (as a police officer) should handle a complaint of unwanted solicitors who set up a table and collect signatures in front of stores such as Target, Wal-Mart or Home Depot. This is a situation where I've been advising law enforcement for years *not* to get involved (absent a fist fight or other overt criminal violation), but rather to send the warring parties to a civil court to seek a resolution. The gist of this new training, however, is that there is a new case that "completely changes everything;" that such signature collectors are trespassing and that law enforcement should arrest them if they refuse to leave. The alleged "new case" is *Van v. Target Corp.* (2007) 155 Cal.App.4th 1375. But when you read this case, it is nothing new and changes nothing. To the contrary, it reaffirms what I've been telling you; i.e., that such a situation is a civil issue that must be evaluated by a civil court; not the cop on the beat. The Court in *Van v. Target* did in fact rule that the signature collectors did not have the right to do their thing in front of Target, Wal-Mart or Home Depot, but it did not even suggest that arresting the signature collectors is how you should handle it. The civil court did what no police officer is equipped to do; i.e., it balanced the competing constitutional rights of the parties under the unique circumstances of that particular case, after an evidentiary court hearing, and ruled in favor of the stores. Had it ruled in favor of the signature collectors, it would then have had to consider what "reasonable time, place and manner restrictions" might apply to that situation; again, something a police officer responding to a similar situation cannot do. What you *can* do is, should these particular signature collectors who were the subject of this particular law suit (i.e., *Van* and the other listed plaintiffs) return to Target, Wal-Mart or Home Depot, you may then (and only then) cite them for a violation of a court order, per P.C. § 166(a)(4). But remember; only the parties to an already adjudicated civil suit are bound by the court's ruling in that suit. Until you get to that stage, however, there is absolutely nothing criminal occurring. There is no trespass statute that applies. If you want a copy of the extensive memo I've written on this subject, you need merely ask.

CASE LAW:

***Parole Searches of Automobiles*:**

People v. Schmitz **(Aug. 18, 2010) 187 Cal.App.4th 722**

Rule: A parolee who is a mere passenger in a car, without any evidence giving a police officer a reasonable belief that the parolee has authority over the interior of the car, does *not* justify a search of the interior of the car pursuant to the parolee's Fourth wavier.

Facts: Orange County Deputy Sheriff Mihela Mihai observed defendant's vehicle wandering in the area of a condominium complex. Thinking the driver might be lost (or,

more likely, having the inherent curiosity of any good cop), she followed him. Defendant made a u-turn causing the two cars to approach each other. When Deputy Mihai stopped, defendant did as well, resulting in the two of them being parallel to each other. Two other adults and a child were in the car with defendant driving. In response to Deputy Mihai's question, defendant said he was not lost, that he merely pulled onto that street to make a u-turn, and that he didn't need directions. Deputy Mihai parked her car and got out. Defendant remained where he was despite not being blocked in. Deputy Mihai approached defendant and asked him where he was from. Defendant responded that he was from Long Beach. Deputy Mihai then asked him if he minded showing her his driver's license. As he retrieved his license, Deputy Mihai noticed abscesses on his arms, indicative of possible drug use. In response to further questioning, defendant denied that he was on probation or parole, but acknowledged that his front seat passenger was a parolee. Deputy Mihai then asked defendant if she could search his car. He did not respond. So based upon the parole status of the front seat passenger, Deputy Mihai searched the entire car including a purse belonging to a female passenger in the back seat. A syringe cap was found in the purse, two syringes were in a chip bag on the floor of the back seat, and some methamphetamine was in a shoe on the floor of the back seat. Defendant (and presumably everyone else) was arrested. Charged in state court, defendant's motion to suppress all the evidence was denied. He pled guilty to a number of misdemeanors and appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed. Defendant's argument on appeal was that the parole status of the front seat passenger (being subject to search and seizure conditions) in a vehicle who claims neither a possessory nor property interest therein, does not provide the necessary "common authority" over the vehicle which would give the officer the right to search it. The Court agreed. First, however, the Court determined that defendant was not detained, but rather the target of a "*consensual encounter*" only. He was never told he couldn't leave. His car was not blocked in. Believing that it would be rude to leave while the deputy was talking to him did not convert the contact into a detention. As such, no suspicion of criminal activity was necessary. As for whether the passenger's parole status justified the warrantless, non-consensual search of defendant's car, the Court first noted that a parolee, who is subject to search and seizure conditions (i.e., a "*Fourth Waiver*"), may be searched without probable cause or even a reasonable suspicion. As a parolee who remains in the legal custody of the Department of Corrections, it has been held that searching him and the areas over which he has at least "common authority" does not violate any expectation of privacy he might have. But whether the search of the entire car in which the parolee is merely a passenger violates the privacy rights of the owner/driver of the car (i.e., defendant in this case) is another question. More specifically: Does "the parolee's mere presence as a passenger in a vehicle confer upon him the requisite "*common authority*" to justify its search"? The general rule is that common areas may be searched when any one of the co-occupants is subject to a Fourth wavier. This theory is based upon the "mutual use of the property by persons generally having joint access or control for most purposes so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." More specifically, as it relates to

this case, "the police may only search those portions of the [property] they reasonably believe the probationer (or parolee) has *complete or joint control over*." While third parties assume the risk that those with whom they share property might be subject to search and seizure conditions, they do not give up all their rights. For instance, third parties retain a reasonable expectation of privacy in their own bodies, as well as in areas excusive to their own control, possession, or use. In this case, there was no evidence to the effect that defendant, merely by allowing a parolee into his car, ceded to that parolee any authority over the interior of his car. Except for the front passenger seat area where the parolee was sitting, defendant retained a reasonable expectation of privacy in the rest of the interior of his vehicle. As such, the warrantless, non-consensual search of his car was illegal. The evidence found in the back seating area should have been suppressed.

Note: I've often been asked whether a parolee's (or probationer's, with a 4th waiver) presence in a vehicle opened the entire car up to a search, and I've typicaly answered in the affirmative, at least when it can be shown that the parolee had access to the entire car. Well, that answer is a bit over-simplified. And this case makes a lot of sense when you analyze it. Common authority over, as opposed to mere "access" to, is the legal requirement. The Court did note that; "(h)ad (defendant) left the vehicle in the parolee's possession, or allowed him to drive it," the result would have been different. But that's not what we had here. It all comes down to the question whether the parolee, under the circumstances, could be said to have at least the "*apparent authority*" to allow strangers (including police) into the car. There was no evidence of such authority in this case. Also note that the search of the backseat passenger's purse was similarly illegal under prior existing case law, *People v. Baker* (2008) 164 Cal.App.4th 1152, absent evidence that the parolee had joint possession or control over it. As for the parolee himself, he has no standing to contest the search of defendant's car, and has waived his right via his Fourth wavier to contest the search of his person and the area where he was sitting. So this same evidence would be admissible against him.

***Anonymous Informants and Probable Cause*:**

***United States v. Jennen* (9th Cir. 2010) 596 F.3rd 594**

Rule: Anonymous information demonstrating a knowledge of inside information, describing ongoing criminal activity, and sufficiently corroborated, will justify the issuance of a search warrant.

Facts: The Spokane Police Department (SPD) received an anonymous tip to the effect that defendant and his girlfriend were using illegal drugs, including methamphetamine and cocaine, in the presence of their children. The tipster also disclosed that where defendant lived, that he had weapons and surveillance cameras in the house, and that he seemed to know whenever the police were coming and would disappear accordingly. Defendant also claimed to have dynamite under his house. Based upon this information, SPD detectives sent in a confidential informant (CI) to make a controlled purchase of methamphetamine. Following the purchase of a baggie of meth, the CI reported back that defendant did in fact live there with his girlfriend and children, and that defendant had

surveillance cameras and weapons in the house, thus corroborating the anonymous informant. The CI also provided SPD with defendant's phone number which records showed belonged to defendant's girlfriend. Based upon the above information, a search warrant for defendant's home was obtained. The warrant affidavit contained the above information as well as the fact that the CI had prior arrests for crimes of dishonesty and that he was receiving compensation for his cooperation in this case, but that he'd proved to be reliable in prior investigations. Four days later, but before the search warrant was executed, a second controlled buy was attempted. However, defendant told the CI that he was suspicious of "activity in a field to the north" of his house and that he was "out" of methamphetamine anyway. The search warrant was executed the next day. Some methamphetamine, several firearms, ammunition, drug paraphernalia and packaging materials were all recovered. It was also noted that defendant had set up surveillance cameras for both the front and back yards that could be viewed on several TV screens in the house. Indicted in federal court on felon in possession of a firearm charges (we're not told why the dope wasn't charged), defendant filed a motion to suppress. Upon denial of his motion, defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Noting that an anonymous tip by itself may not be "given weight," it may still justify a finding of probable cause whenever the officers can "provide some basis to believe that the tip is true." There must be found to be additional evidence that shows the tip to be reliable. For instance, (1) the tip must provide a "range of details," or (2) the future movements must be corroborated by independent police observation. In this case, there were both forms of corroboration. First, the tipster provided a "range of details" that constituted more than just "easily observed facts and conditions." Such details included the fact that defendant and his girlfriend were doing drugs in front of his children. The tipster also knew defendant's address and the type of drugs they were using, that defendant possessed weapons and cameras, and that he always knew when the police were coming. Secondly, the tipster described continuing illegal conduct and that it was occurring in defendant's residence. Third, the tipster's information was all corroborated by the CI. The Court also rejected defendant's argument that the CI's arrest record and being paid for his services negated the value of his information. With the affiant including in the affidavit the fact that the CI had proved reliable in past investigations, the negative information was not sufficient to negate the probable cause.

Note: The fact that the controlled buy alone would have been sufficient to justify the issuance of a search warrant was never mentioned, the Court apparently being bent on discussing the law on anonymous informants. But whether you consider this case as one dealing with the corroboration of an anonymous informant, or the combination of anonymous information and a controlled buy, there was clearly probable cause sufficient to justify the issuance of a search warrant. Note also the detective/affiant's intentional inclusion in the affidavit that the CI had an arrest record (for crimes of dishonesty, no less) and was being paid for his services. When you're up front with that type of information, it seldom hurts us. It's only when the defense has to bring that kind of negative stuff out for the first time that we get into trouble. Never play "hide the ball" with a judge (or a prosecutor). It only comes back to bite us in the end (so to speak).

***Miranda and Pre-Admonishment Questioning*:**

Thompson v. Runnel **(9th Cir. Sep. 8, 2010) __F.3rd __ [2010 U.S. App. LEXIS 18750]**

Rule: *Miranda* warnings are ineffective when police deliberately withhold the warnings until after an in-custody confession is obtained.

Facts: Defendant was 18 years old and had a "sometimes" relationship with 17-year-old Arie Bivins. However, attempts by Bivins to break off the relationship typically ended with defendant losing his cool and resorting to violence. On June 22, 1998, defendant and Bivins were seen together at around 1:30 p.m. outside his house. At some point, Bivins apparently left. Defendant also disappeared at some time around 2:00 p.m, and didn't return until 4:00 when he asked his father to drive him to Bivins' home saying that he was worried about her. Together, they found Bivins' body, stabbed in the chest and with her throat slit, on the floor of her home. The police were called. Asked to come to the police station for an interview, defendant was uncooperative until told how important it was for him to help. At the station, defendant was put into a break room and left alone for six hours while the police continued their on-the-scene investigation. He was then moved into an interview room. He was never handcuffed and didn't ask to leave. No *Miranda* admonishment was given even though, by this time, the detectives considered him to be a prime suspect. Given the option of submitting to an interview either then or at a later time, defendant agreed to talk with the officers. He initially denied any involvement in Bivins' murder, claiming that he had not been at her home that day until 4:00 p.m. when he and his father found her body. Soon, however, the tone of the interrogation became more confrontational. As an interrogation technique, the officers falsely told defendant that an eyewitness had seen him at Bivins' house at around 2:30 p.m. Also, in an admitted attempt to "minimize the moral blameworthiness," he was told that his denial that he'd been at her house was "understandable" given his youth. Still with no *Miranda* admonishment, the officers then falsely told defendant that they'd found blood on one of his shirts and his fingerprint in blood at Bivins' home. Little by little defendant began to cave, moving from a complete denial, to admitting that he'd found her body before he went there with his father, to finally copping out to having killed her himself by stabbing her in the chest and slitting her throat. However, still with no *Miranda* admonishment, the detectives continued to seek more details. Finally, after those details were obtained, defendant was finally read his *Miranda* rights. He was then asked to repeat his confession. During this portion of the interview, detectives would correct him by referring to this first confession when his story differed from what he'd said before. After a total of about two hours of interrogation, defendant was handcuffed and taken to look for the murder weapon. He spent the rest of the night in a "safety cell" on suicide watch, stripped to his underwear and shackled to the floor. In the morning, after a second *Miranda* admonishment, he was brought back to Bivins' home where he participated in a reenactment of the murder. At trial, the first confession was suppressed, the trial court finding that defendant was "in custody" for purposes of *Miranda* at some point between when he admitted to going to Bivins' home before 4:00 p.m. and his first confession. The second confession and crime scene reenactment, however, were admitted into evidence against him. He was convicted of first degree murder. His

appeals in the state courts were all denied as was a habeas corpus petition filed in federal court. He appealed the denial of his habeas corpus petition.

Held: The Ninth Circuit Court of Appeal, in a two-to-one split decision, reversed defendant's conviction. At issue in this case was the use of the so-called "*two-step*" interrogation technique where an un-*Mirandized* confession is followed by a proper *Miranda* advisal and a second confession. Subsequent to defendant's trial in this case, the United States Supreme Court decided the case of *Missouri v. Seibert* (2004) 542 U.S. 600, where it was held that purposely interrogating an in-custody defendant without a *Miranda* advisal and waiver, getting a confession from the suspect, and then advising him of his rights followed by a second interrogation and a repeat of the confession, violates the principles of *Miranda*. More specifically, the delayed *Miranda* wavier is not "*knowingly and voluntarily*" made because a suspect typically isn't going to understand the implications of waiving his rights under these circumstances. In this case, it was agreed between the parties that defendant was "in custody" for purposes of *Miranda* at that point in the questioning where he began to make incriminating admissions. But no *Miranda* admonishment was given until defendant went so far as to makes a full confession by admitting to having cut Bivins' throat. After the *Miranda* warnings were finally administered, a second confession was solicited. When defendant would change his story to any degree, the officers would remind him about what he'd said earlier, using his first, illegally-obtained confession, to keep the two stories consistent. From this scenario, "(t)he only reasonable inference from this interrogation sequence is that the officers deliberately withheld *Miranda* warnings until after obtaining a confession." The issue then becomes whether the delayed *Miranda* warnings effectively appraised defendant of his rights. In other words, after having confessed once, did he understand the implications of giving a second confession when the first could not be used against him? Pursuant to *Seibert*, certain factors must be considered in answering this question: (1) The completeness and detail of the pre-warning interrogation; (2) the overlapping content of the two rounds of interrogation; (3) the timing and circumstances of both interrogations; (4) the continuity of police personnel; (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first; and (6) whether any curative measures were taken. While the lack of "curative measures" may be enough by itself to find the *Miranda* admonishment insufficient, the Court decided it didn't need to reach this question here in that all six factors weigh in favor of suppressing the second confession as well as the first. In summary, the Court noted that: "The pre-warning interrogation was highly confrontational and detailed; the two sessions took place in the same small interrogation room, back-to-back, with no break at all; the police personnel were exactly the same; and . . . the officers' questioning treated the two sessions as continuous and drew, in one instance, on Thompson's pre-*Miranda* statement during the second session to ensure that the earlier inculpatory material was reiterated after the requisite warnings were given. And the police took no curative measures whatsoever. The post-confession *Miranda* warnings could not have been effective in meaningfully apprising Thompson of his rights and enabling him to invoke them." And while the second *Miranda* advisal, administered just prior to the reenactment of the murder, posed a closer question, the Court determined that the rule of *Seibert* required suppression of that evidence as well. The reenactment was too closely

associated with the two prior confessions to find that defendant would suddenly understand the implications of waiving his rights at that point. "Thompson would have perceived the invocation of his rights as even more futile . . . ." As such, none of defendant's statements should have been admitted into evidence against him.

Note: The dissenting justice argued that procedurally, *Seibert*, decided in 2004, didn't take effect until after defendant's conviction was final. However, even if the rule of *Seibert* does apply, the rule is that *Seibert* requires the suppression of the second confession only where the violation was intentional and there were no curative steps taken. Here, according to the dissent, there was no evidence that the violation was intentional. The difference between *Seibert* and the instant case is that in *Seibert* the two-step interrogation procedure was done according to an established official policy of the officers' police department. Also, Ms. Seibert was under arrest from the very beginning. Here, Thompson was not in custody until midway through the interrogation. Also there was no showing that the two-step procedure was used intentionally or was part of an official department policy. The prior Supreme Court decision of *Oregon v. Elstad* (1985) 470 U.S. 298, found that some minimal pre-admonishment questioning is not necessarily inappropriate. In *Elstad*, detectives asked two innocuous questions and made one very brief comment to the suspect in a residential burglary, 18-year old Michael Elstad, as they got him out of bed and slapped on the cuffs: "*Do you know why we're here*?", "*Do you know* (*the victim*)?", and "*I think you were involved*." Elstad's responses where just as brief but nonetheless incriminating when he admitted that; "*Yes, I was there*." Certainly, there was nothing close to a full, formal interrogation. Where, and how, you draw the line between the two cases (i.e., *Elstad* verses *Seibert*) is the issue and will surely be the subject of many more cases in the future. So my advice to you is not to let the next test case be yours. Keep the pre-admonishment questioning to a minimum. And remember that anything you do to water down the significance of a *Miranda* admonishment and wavier, as they did in this case, is going to be viewed with distrust by the courts.

***Search Warrants; The Specificity Requirement*:**

Millender v. County of Los Angeles **(9th Cir. Aug. 24, 2010) __ F.3rd __ [2010 U.S. App. LEXIS 17673]**

Rule: A search warrant may not include items or evidence for which there is no probable cause to believe exists or for which there is no evidence to believe is relevant to the case.

Facts: Jerry Ray Bowen, at member of the Mona Park Crips street gang, had a "dating relationship" (shacking up) with Shelly Kelly. Tired of being physically abused, Kelly decided to end the relationship. She sought the help of Los Angeles County Sheriff's Department deputies to protect her as she moved her property out of the apartment the two of them shared. Bowen was not there when Kelly began removing her property. However, 20 minutes into the move the deputies received an emergency radio call. They left, telling Kelly they'd be back as soon as they handled the call. As soon as they left, Bowen came out of the woodwork and physically assaulted Kelly; screaming at her that he'd warned her never to call the police on him. Bowen attempted to throw her off the

second story landing and then, after biting her, drag her by her hair into the apartment. Slipping out of her shirt, Kelly managed to get away and get into her car. Bowen came after her with a "black sawed-off shotgun with a pistol grip," shooting it at her. He fired it four more times as Kelly sped off, missing every time. Detectives (defendants in this civil suit) obtained an arrest warrant for Bowen, listing his home address as 2234 E. 120th Street, in Los Angeles, which, aside from being his last known address, was actually the home of Bowen's foster mother, Augusta Millender (plaintiff in this civil suit). The detectives also sought a search warrant for that address, listing as the "property to be seized" the black sawed-off shotgun with a pistol grip described by Kelly and as shown to them in a picture she had of defendant with the gun. Also listed as property to be seized was the following: "*All handguns, rifles, or shotguns of any caliber, or any firearms capable of firing ammunition, or firearms or devices modified or designed to allow it to fire ammunition. All caliber of ammunition, miscellaneous gun parts, gun cleaning kits, holsters which could hold or have held any caliber handgun being sought. Any receipts or paperwork, showing the purchase, ownership, or possession of the handguns being sought. Any firearms for which there is no proof of ownership. Any firearms capable of firing or chambered to fire any caliber ammunition*." Also requested was any "(*a*)rticles *of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips*'," then listing items that might be possessed by gang members. Also requested was evidence of dominion and control over the premises. With the help of a SWAT team, the search warrant was executed at 5:00 a.m. one morning (night service having been approved). Plaintiffs (Augusta Millender and other family members) were rousted out of the house while the warrant was served. Neither Bowen nor the black sawed-off shotgun were found. (Bowen was arrested two weeks later at another location.) A letter addressed to Bowen at that address was recovered. The only firearm recovered was a lawful shotgun that belonged to Augusta Millender. Plaintiffs sued the Los Angeles Sheriff's Department and the officers involved in federal court. The civil trial judge ruled that the arrest warrant was valid and granted the civil defendant's summary judgment motion regarding the legality of the seizure of the letter with Bowen's name and address on it. But the court granted the plaintiffs' summary judgment motion as to the allegation that the search warrant was unconstitutionally overbroad, and rejecting the officers' argument that they were entitled to qualified immunity. The officers appealed.

Held: The Ninth Circuit Court of Appeal, in a 9-to-2 en banc decision, affirmed. At issue was the legality of including in the search warrant the request to look for and seize (1) any an all firearms and ammunition and (2) evidence of defendant's gang affiliation. As for the guns, the issue was the "*specificity*," or lack thereof, of the detective's request. The Fourth Amendment requires as a general rule that a searches be made with a warrant, "*particularly describing the place to be searched* and *the persons or things to be seized*." This has been interpreted as requiring search warrants to describe the property to be searched for and seized with "*specificity*." "*Specificity*" has itself two aspects; "*particularity*" and "*breadth*." "*Particularity*" is the requirement that the warrant must clearly state what is sought. "*Breadth*" deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based. In determining whether a search warrant is sufficiently specific, one of the factors to be considered is

whether probable cause exists to seize the items listed in the warrant. There was no argument that there was probable cause to seize the black sawed-off shotgun with the pistol grip and any ammunition for that weapon and any documentation related to the ownership or possession of that weapon. The victim very specifically described this shotgun as the weapon used by Bowen, even showing the detectives a picture of it in Bowen's possession. But the affiant in this case went well beyond that, asking to seize any and all firearms without limitation as to what might be in the house. On this issue, the Court found that there was absolutely no evidence to indicate that any weapon other than the black sawed-off shotgun was relevant to any crimes, or even existed. On this issue, the Court conceded that warrants may sometimes authorize a search for classes of generic items, but only if the affiant is unable to describe the items more particularly in light of the information available at the time. But in this case, the officers had a detailed description, complete with a photograph, of the gun. The Court further rejected the argument that because defendant was a convicted felon, a known gang member, and a dangerous person, that the officers had the right to search for other weapons. There was simply no probable cause to support the belief that despite being a felon, a gang member, and a dangerous person, that there were any other firearms in the house. Also, whether or not finding other weapons might assist in Bowen's prosecution is irrelevant. The Fourth Amendment does not allow for "fishing expeditions" absent probable cause. As for searching for evidence of defendant's gang membership, it was agreed that this was not a gang-related case. It is not illegal to be a member of a gang. Gang membership is only relevant when the underlying criminal act is for the benefit of, at the direction of, or in association with, a group that meets the specific statutory conditions of a criminal street gang, and when the act is done with the specific intent to promote, further, or assist in any criminal conduct by gang members. While gang membership may very well be relevant to the dangerousness of attempting to search for or arrest defendant, it is not relevant to this case. As such, inclusion in the search warrant of an authorization to search for gang-related evidence was illegal. The trial court was correct in determining that as to these two aspects ([1] firearms and all calibers of ammunition, and [2] gang-related evidence), the warrant was overbroad and violated the Fourth Amendment. Also, the officers/defendants should have known this and are therefore not entitled to qualified immunity. The plaintiffs, therefore, have a valid cause of action in civil court.

Note: This case has caused a lot of consternation, apparently, which is why I'm briefing it even before it is final and ahead of some other cases. But quite frankly, it is "*spot on*." It is also consistent with pre-existing California authority. (See *People v. Ulloa* (2002) 101 Cal.App.4th 1000; things the affiant "*hopes to find*," but for which there is no articulable "fair probability" that they will be found, should not be listed in the search warrant.) I have long encouraged officers not to use language like: " . . . *including, but not limited to*, . . .", because this turns a warrant into a "*general warrant*," a "*breadth*" problem, and in violation of the Fourth Amendment. You can only search for what you have probable cause to believe actually exists and for which there is at least circumstantial evidence to support a finding of a fair probably of its presence. In this warrant, the facts just didn't support the argument that any other guns existed or that gangs were somehow involved. We already all know this, but I think we've gotten a bit lax in this area as we've tried not to overlook anything.