The California Legal Update

Remember 9/11/2001: Support Our Troops; Support our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*Never trust people who smile constantly. They're either selling something or not very bright*." (Laurell K. Hamilton)

IN THIS ISSUE:

ADMINISTRATIVE NOTES:

The Governor's Moratorium on Death Penalty Executions*:** California voters have twice voted to continue the use of the death penalty; in 2012 and again in 2016 (**Prop. 66**). Shortly after being elected Governor of the State of California, and after making campaign promises that despite his misgivings about the death penalty he would not interfere with the will of the voters, Governor Gavin Newsom signed Executive Order N-09-19 effecting a moratorium on capital punishment in California. In so doing, Governor Newsom lied. He also violated the California Constitution, Article 5, Section 1, where it is mandated that a governor is bound to "see that the law is faithfully enforced." But the Governor's dishonesty and lack of integrity aside, you might be concerned with how this moratorium affects death penalty cases, new and existing, in California? The bottom line is that the death penalty in California is still alive, even if not so well. Governor Newsom did not grant any of California's 737 existing death row inmates a reprieve, pardon, or commutation in that to do so—at least in any case where the inmate has two or more felony convictions (which is virtually everyone on death row)—a majority of the California Supreme Court has to give their approval (Cal. Const., Art 5, § 8). So it is pretty much understood that Governor Newsom's moratorium on executions in California exists only so long as he occupies the Governor's mansion. (See concurring opinion in ***People v. Potts (Mar. 28, 2019) __ Cal.5th __ [2019 Cal. LEXIS 2044].) When he goes away, the moratorium goes away (depending upon the proclivities of whoever takes his place). There are even some good arguments to the effect that specific provisions in his moratorium (e.g., repealing California's lethal injection protocol and closure of San Quinton's death chamber) are illegal and unenforceable; issues that have yet to be tested. In the meantime, the moratorium does nothing to prevent all the existing death penalty verdicts from continuing their slow crawl through the appellate court system. It also does not prevent prosecutors from seeking death sentences in new cases. All the moratorium does is aggravate the already excruciatingly slow death sentence appellate procedures with a bottleneck of the existing death penalty verdicts at the (temporarily dismantled) death chamber's door, waiting until a new governor is elected who determines to carry out the will of the people.

CASE LAW:

***Nakedness, the Fourth Amendment, and the Right to Privacy*:**
***Qualified Immunity vs. Civil Liability*:**

Ioane v. Hodges **(9th Cir. Sept. 10, 2018) 903 F.3rd 929**

Rule: Forcing a non-detained person to expose herself to a law enforcement officer, even of the same sex, without any articulable suspicion that he or she may be armed or probable cause to believe he or she is secreting evidence, is a Fourth Amendment violation.

Facts: Michael Ioane, Sr., was the subject of an IRS criminal fraud investigation. On June 8, 2006, IRS agents executed a search warrant at his home as a part of that investigation. IRS Supervisory Special Agent Jean Noll was a part of the team executing the warrant. Ioane's wife, Shelly, was home at the time. It was known prior to the execution of this search warrant that the Ioanes owned registered weapons (firearms?) and that those weapons were likely in the home although the search was limited to, among other things, records, computers, computer-related equipment, and computer storage devices. Upon execution of the warrant, the IRS agents informed the Ioanes that they could remain on the premises if they cooperated with the agents conducting the search. However, if they chose to leave the premises, they were told that they would not be allowed to return until the search was completed.

The Ioanes chose to remain on the premises, sitting in the kitchen while the agents conducted the search. At some point early in the search, Michael Ioane asked for permission to use the bathroom. A male agent escorted Michael to the bathroom and conducted a quick search of the bathroom area—opening a couple of drawers and looking in the shower—before exiting and closing the door behind him. The male officer stood outside the closed bathroom door while Michael relieved himself. Shortly thereafter, Shelly Ioane asked if she also could use the bathroom. Agent Noll escorted Shelly to the bathroom. As Shelly stepped inside and started to close the door, Agent Noll told her that she (the agent) would have to come inside with her. Despite being asked to wait outside, Agent Noll insisted on coming in with her. In the bathroom (which was apparently large enough to hold at least two people), Agent Noll told Shelly to remove her clothing so that she could make sure she did not have anything hidden on her person. When Shelly objected, Agent Noll explained that she needed to make sure Shelly did not hide or destroy anything, and that this was standard procedure. Shelly, who was wearing a long sundress, pulled up her dress so Agent Noll could see that she was not hiding anything. According to Shelly, Agent Noll made Shelly hold up her dress with one hand while she relieved herself, using her other hand to pull her underwear down. Agent Noll faced Shelly while Shelly used the toilet. When Shelly was finished, Agent Noll escorted her back to the kitchen. Not accustomed to having anyone watch her while she peed, Shelly Ioane filed suit for damages in federal court under 42 U.S.C. § 1983, the civil defendants being the I.R.S. along with Agents Noll, Jeff Hodges, and others. Prior to trial, Agent Noll moved for summary judgement. Upon the trial court judge denying Noll's motion, she appealed.

Held: The Ninth Circuit Court of Appeal affirmed. A determination of whether or not a law enforcement officer is entitled to qualified immunity from civil liability requires a balancing of the interests involved; i.e., a private citizen's right "to hold public officials accountable when they exercise power irresponsibly" with the government's "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." The legal analysis for determining whether a law enforcement officer is entitled to "qualified immunity" is well settled: An officer is entitled to qualified immunity *unless* (1) the facts, construed in the light most favorable to the plaintiff, demonstrate that the officer's conduct violated a constitutional right, *and* (2) the right was clearly established at the time of the asserted violation.

If whatever the officer did was constitutional, then the inquiry is over. But if the officer's actions were unconstitutional, then it must be determined whether the officer should have been

aware of the illegality of his or her act; i.e., was the law concerning the right violated clearly established in the law at the time. In evaluating a possible Fourth Amendment violation, it is recognized that the "touchstone of the Fourth Amendment is reasonableness." In this case, the question is whether Agent Noll's insistence upon actually viewing Shelly Ioane as she relieved herself in the bathroom reasonable under the circumstances? In evaluating these circumstances, a court is to consider four factors; "(1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, and (4) the place in which it is conducted."

The Court first noted that it is in fact a violation of one's right to bodily privacy to require that person to expose him or herself to an officer, whether of the same sex or not. In fact, under the circumstances of this case, while recognizing that the "naked body" is the most "basic subject of privacy," the Court specifically found that "the scope of the intrusion into Shelly's bodily privacy here was significant." In evaluating Agent Noll's attempt to justify her actions, the Court first noted that Shelly Ioane was not detained at the time, being free to leave whenever she wished. More importantly, there was no reason to believe that she might have any weapons (which, if there had been a reasonable suspicion, would have allowed for a patdown) or evidence (e.g. "floppy disks, etc.) on her person. The warrant itself authorized a search of the premises only, and not of either Shelly or her husband. The lack of any official concern that she or Michael Ioane might be a danger or could destroy evidence if left alone in the bathroom was demonstrated by the fact that another agent allowed Michael Ioane to use the bathroom in private.

Lastly, it was noted that all this occurred in the Ioane's home, a place of heightened privacy rights. Therefore, "(w)eighing the scope, manner, justification, and place of the search, a reasonable jury could conclude that Agent Noll's actions were unreasonable and violated Shelly's Fourth Amendment rights." Finding the law on this issue to be "clearly established," in that a reasonable officer in Agent Noll's position should have known that such a significant intrusion into bodily privacy, in the absence of any legitimate government justification, was unlawful, the Court affirmed the trial court's ruling that she was not entitled to qualified immunity.

Note: This decision is hard to argue with. When you remember that even a patdown for weapons requires at the very least a "reasonable suspicion" to believe that a detained person may be armed, and that it requires full probable cause to actually search a person for evidence, making an un-detained person disrobe in front of an officer with no articulable suspicion that she had any weapons on her, or that she was hiding any seizable evidence, clearly violated the Fourth Amendment. Also note that the Court gave little weight to the fact that a female agent was used. Providing an officer of the same sex as the person being asked to expose him or herself does not automatically make it okay.

***Traffic Stops and Prolonged Detentions*:**
***Consent Searches*:**

People v. Arebalos-Cabrera **(Sept. 14, 2018) 27 Cal.App.5th 179**

Rule: A lawful traffic stop can become an illegal detention if prolonged beyond that time period reasonably necessary to complete the tasks associated with the purposes of the traffic stop itself. The line between a detention and a subsequent consensual encounter depends upon when and if a reasonable person under the circumstances would feel free to leave. A non-coerced consent to search obtained during a consensual encounter is lawful.

Facts: A multiagency regional narcotics suppression program involved the surveillance by police of a group of individuals believed to be trafficking in narcotics. On August 24, 2012, defendant was observed by this taskforce to be engaged in suspicious behavior. The California Highway Patrol (CHP) was asked to watch for defendant and his tractor-trailer. As a result, CHP Officer Roberto Adelmann, who was a part of a special CHP enforcement unit focusing on drug interdiction and who had a narcotics detection dog with him, observed defendant on a freeway near Barstow at about 10:00 pm. Watching defendant's tractor-trailer for any excuse to make a traffic stop, defendant was observed to be speeding (62 in a 55 mph zone) and weaving across the white lane lines approximately three times. Officer Adelmann stopped defendant for these violations. Checking defendant's commercial logbook and paperwork for his trip, it was noted that defendant had not made any trips for almost a month, which the officer found to be unusual. Officer Adelmann also noted that defendant appeared to be nervous. A field sobriety test failed to show any signs of impairment. Officer Adelmann gave defendant his documents back and told him he was free to leave (apparently without having cited him). The stop, at this point, had lasted about 15 to 20 minutes. However, as defendant approached his truck (having taking approximately 5 to 6 steps in that direction), Officer Adelmann asked him for consent to search the tractor. Defendant agreed, both verbally and in writing.

After examining the tractor with his police dog, Officer Adelmann found two secret compartments, both of which had been modified to transport narcotics. One was empty. The other, however, was found to contain over 10 kilograms of heroin and over four kilograms of methamphetamine in separately wrapped packages, with a total value of about $500,000. Defendant was arrested. At the time of his arrest, defendant admitted that he was the sole owner of the tractor and he never lent it to anyone. Charged in state court with multiple drug-related trafficking offenses, defendant later testified at trial that he did not own the tractor, did not know it was registered to him, and had not seen it for several weeks. He claimed not to know about the narcotics or the secret compartment in which they were found. He also claimed that his consent to search the truck was obtained under duress. His motion to suppress the evidence recovered from his truck was denied. After two trials (the first being hung by one hold-out juror), defendant was convicted and sentenced to prison for 17 years and four months. He appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. Defendant's primary contention on appeal was that his consent was invalid because he was the victim of an illegal detention at the time he gave it. Conceding that the traffic stop itself was legal (admitting to doing 62 mph in a 55 mph speed zone), his argument was that the stop was unlawfully prolonged beyond the time

it took to simply cite and release him and that his consent was the product of this illegally prolonged detention. The Court disagreed, holding that defendant was no longer being detained by the time he was asked for consent to search his truck. After reviewing the law on the "three broad categories" of police contacts (i.e., "consensual encounters," "detentions," and "arrests"), the Court noted that defendant was in fact detained when initially stopped for speeding and weaving. The case law is very clear that a traffic stop-related detention is valid only for that period of time that is necessary for the police to complete the tasks generally associated with a traffic stop. Extending a traffic stop beyond this theoretical time period without having already developed additional reasonable suspicion justifying that extension constitutes an illegally prolonged detention.

The question here was whether defendant was still being detained at that point in time when asked for consent to search. Officer Adelmann testified (and defendant admitted) that after completing the tasks associated with the purposes of the stop, he returned defendant's paperwork to him and told him he was free to leave. The Court held that it was at this point that defendant was no longer being detained. Noting that "mere police questioning does not constitute a seizure," and that whether or not a person is detained depends upon whether a reasonable person would feel free to leave under the circumstances, the Court held that asking defendant for his consent to search his truck, after having been told that he was free to leave, did not itself constitute a renewal or prolongation of the detention. Per the Court: "A police officer's questioning of a defendant after the stop has ended is consensual, and does not implicate the Fourth Amendment, unless a reasonable person would not have felt free to leave or otherwise terminate the questioning."

In this case, the Court agreed with the trial court that having been given back his paperwork and told that he was free to leave are circumstances dictating the conclusion that no reasonable person would feel like he was still being detained. No longer being detained, it cannot be argued that his consent was the product of an illegal detention. While defendant also argued that despite having signed a written consent form, he really didn't feel like he had a choice, the Court noted that the trail court did not believe him on this point; a ruling that was supported by the evidence. In sum, it was held that defendant was *not* subjected to an illegally prolonged detention, his consent was obtained during a consensual encounter, and the consent he gave was voluntary.

Note: These are pretty good facts, some of which were admitted to by the defendant, illustrating where (and how) to draw the line between a traffic stop-related detention and a follow-up consensual encounter. It was also wise for Officer Adelmann to get the consent in writing. Without such documentation of the voluntariness of a consent-to-search, it becomes the officer's word against the defendant's on this issue, and courts (and juries) don't always side with the officer in today's distrusting world. Written documentation of a defendant's consent often constitutes that one little bit of extra evidence needed to sway a fact-finder.

***First Degree Murder Liability for an Aider and Abettor*:**
***Aiding and Abetting Under the "Natural and Probable Consequences" Doctrine*:**

In re Loza **(Sept. 28, 2018) 27 Cal.App.5th 797**

Rule: Aiding and abetting under the "natural and probable consequences" doctrine is no longer a viable legal theory for finding premeditated first degree murder liability.

Facts: Defendant Cesar Loza, a member of Orange County's Southside Raza (SSR) criminal street gang, got into a verbal altercation in front of his apartment with rival members of the Family Mob (FM) gang. The FM gangsters chased defendant into his apartment where (defendant being a minor) he lived with his mother and younger brother, Luis. Defendant and Luis continued this verbal back-and-forth nonsense through the safety of the apartment's locked doors and windows, demanding that the FM gangsters stop "disrespecting" their home. The FM gangsters, in return, threated to kill defendant. Eventually tiring of all this mutual disrespecting, the FM gangsters got into their cars and drove away. Feeling that all this "disrespecting" required retaliation, the Loza brothers called their fellow SSR members. Eventually, SSR members Oscar Andrade, Peter Rizo, and Oscar Flores, showed up. A la "Westside Story," everyone carried bats and knives (no chains, however) except Flores, who made the soon-to-be-fatal mistake of bringing a .38-caliber semiautomatic handgun with him. The FM gangsters eventually returned with their own bats and knives, and at least one set of brass knuckles (still no chains), ready to rumble.

The two sides faced off on a nearby grassy knoll with puffing chests and bloated egos, each attempting to out-macho the other. At some point, Flores (apparently having had second thoughts about shooting anyone) passed his gun off onto defendant who discovered to his dismay that that damn thing didn't even work when he tried to shoot it. So defendant passed the seemingly useless pistol to Andrade who, probably to his surprise, found that it *did* work, shooting FM gangster Edward Rendon square in the chest; killing him. That apparently ended the confrontation. With defendant, Luis Loza, and Oscar Andrade all being under the age of 18 years, and the crime occurring in February, 2004, all three defendants—at the DA's discretion—were charged in adult court with first degree premeditated murder and related charges. (What happened with Peter Rizo and Oscar Flores is not discussed.) Everyone was convicted of all charges with related gang and firearm enhancements. Sentenced to prison for a term of 50 years to life (mom must be so proud), defendant appealed. His conviction was upheld on appeal. (Luis Loza's and Oscar Andrade's sentences and the results of any appeals on their part is also not discussed.) However, as a result of a change in the law on aiding and abetting (as explained below), defendant filed a petition for writ of habeas corpus in the Court of Appeal.

Held: The Fourth District Court of Appeal (Div. 3) reversed, granting defendant's petition for writ of habeas corpus. Defendant's primary issue raised in his petition was that the jury was misinstructed on the available theories by which he could be found guilty of first degree murder. Because defendant was not the person who actually pulled the trigger that resulted in the death of another human being, two separate legal theories were presented to the jury, either one of which the jury was told could be used in order to find defendant guilty of first degree murder; i.e., (1) as a direct "aider and abettor," and (2) based upon the "natural and probable consequences"

doctrine. The problem is that since defendant was convicted, the California Supreme Court has held that the natural and probable consequences doctrine can no longer support a first degree premeditated murder conviction. (*People v. Chiu* (2014) 59 Cal.4th 155.) Prior to *Chiu* being decided, premeditated first degree murder liability could attach to either the actual perpetrator or to an aider and abettor. The aiding and abetting theory was broken down into two categories; i.e., (1) where the defendant intentionally aided and abetted in the commission of the "target offense" (e.g., a murder, as in this case), *and* (2) where the defendant's participation resulted in the commission of a crime (e.g., murder) that was not intended, but was reasonably foreseeable under the circumstances; i.e., a "non-target offense."

This second theory is known as the "*natural and probable consequences*" doctrine. The Supreme Court in *Chiu* held, however, that the "natural and probable consequences" doctrine is no longer a viable legal theory upon which to base a first degree murder conviction. Specifically, the High Court found that premeditation and deliberation "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death." The Court further held that under the natural and probable consequences theory "the connection between the [aider and abettor's] culpability and the (actual) perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder." Thus, in announcing a new (not surprisingly pro-defendant) rule of law, the Supreme Court ruled in *Chiu* that in order for an aider and abettor to be liable for a premeditated murder, his liability must be based on more than just the fact that the offense committed was reasonably foreseeable, but rather that the aider and abettor actually intended to aid and abet in the commission of the targeted offense—what the Court refers to as "direct aiding and abetting principles."

Defendant Loza's trial court instructed the jury on the law of aiding and abetting as it applied prior to the *Chiu* decision, giving the jury the option of finding defendant guilty of first degree murder either as a direct aider and abettor, or where the victim's death was a "natural and probable consequence" of the defendant's acts. This was error, as it turns out after *Chiu* was decided. Applying this new rule retroactively, and because the Court here could not determine from the record which theory (i.e., as a direct aider or abettor or under the natural and probable consequences doctrine) the jury might have used in convicting defendant of first degree murder, the case was remanded to the trial court, giving the district attorney the option of retrying defendant for first degree murder as a direct aider and abettor, or accepting defendant's conviction as a (non-premeditated) murder in the second degree.

Note: I make light of the facts in this case, intending only to highlight the absurdity of America's youths running around in criminal street gangs all macho-like, treating any indication of disrespect from others as acts warranting all sorts of violence up to and including murder. I *do not* make light of the gang problem as it exists in our big cities today, particularly in considering the fact that many of the victims of gang violence are innocent bystanders. But I do not even pretend to have a solution to this problem; at least one that would pass constitutional muster. New statutes mandating the wholesale rounding up of all gang members, permanently expelling them to some remote and inaccessible penal colony in the middle of the Pacific Ocean (as the British used to do) where they could fight it out to the last man standing, would likely

never pass California's criminal-friendly Legislature nor survive *Emperor** Newsom's inevitable veto.

* Stealing (or borrowing) LA DDA Michele Hanisee's [President of the Association of Los Angeles Deputy District Attorneys] description of the new Governor's title with which he was knighted upon announcing his "moratorium" on death sentence executions in California. (See Administrative Note, above).

***Searches of Abused Minor Children under the Fourth Amendment*:**
***Warrantless Physical Exams of Minor Children*:**
***A Parent's Fourteenth Amendment Substantive Due Process (Privacy) Rights*:**
***Special Needs Searches in Child Abuse Cases*:**

Mann v. County of San Diego **(9th Cir. Oct. 31, 2018) 907 F.3rd 1154**

Rule: (1) A County violates a minor child's parents' Fourteenth Amendment substantive due process rights when it performs medical examinations upon a child without notifying the parents about the examinations, without obtaining either the parents' consent or judicial authorization, and without allowing the parents to be present. (2) In order to be constitutional under the Fourth Amendment, investigatory physical examinations of a minor must be done under the authority of a search warrant, or with parental consent, or under circumstances justifying the finding of exigent circumstances. In balancing the privacy rights of the minors with the government's interest in investigating potential child abuse cases under the "Special Needs" doctrine, the children's interest in being free from intrusive physical examinations outweigh the governmental interests.

Facts: Plaintiffs Mark and Melissa Mann are the parents of four children. In April, 2010, when the children were 6 and 4 years old (the four-year-olds being triplets), a preschool director noticed a red mark on the lower back of one of the triplets. When asked about it, Mark Mann admitted that he had struck the child the night before with a wooden spoon in a "misguided" effort to calm her. As a mandatory reporter, the preschool director reported this incident to the San Diego County Health and Human Services Agency (HHSA). HHSA social workers contacted the plaintiffs, interviewing them in their home several days later. It was noticed at this time that one of the triplets had a bruise on his forehead that Melissa claimed was caused by him hitting his head on a kitchen countertop. Plaintiffs agreed to receive supportive services, signing a voluntary safety plan which, among other things, prohibited Mark from using physical discipline on the children and required the presence of a third party when help was needed to adequately care for the children. Although Melissa Mann protested when a social worker attempted to photograph the bruise, plaintiffs later agreed to take the triplets to Rady Children's Hospital for a "suspected child physical abuse and neglect examination." The next day, the children's examining physician concluded that the wooden spoon injury was consistent with Mark's explanation and that the bruised forehead was "most likely accidental." Despite the plaintiffs' cooperation, the social workers decided to prepare a dependency application in order to remove the children from their home. Allegedly omitting certain exculpatory facts (such as the plaintiffs' agreement to take the children to Rady Children's Hospital and to their physician), while describing Melissa as being "confrontational and hostile" (erroneously claiming she "had refused to cooperate" with the social workers), and containing other disputed facts, this petition

(later described as "flawed") was submitted to a Juvenile Court magistrate who issued a warrant authorizing the removal of the children from the plaintiffs' home. The social workers therefore seized the children and took them to the Polinsky Children's Center where, upon their admission, they met with a nurse who performed a cursory examination, checking the children's vital signs and their heads for lice, as well as made sure they had no urgent medical needs. (The legality of this admissions physical exam was not contested.)

The next day, plaintiffs appeared at a detention hearing at the juvenile court where the County asked them to sign a "Consent for Treatment — Parent" form. This standardized form authorized treatment only if the treatment was "recommended by a licensed physician . . . ." They signed the form, but checked the box indicating that they preferred any such treatment to be provided by the children's private physician at Scripps Health. Meanwhile, however, while plaintiffs were busy in court, a Polinsky-employed doctor (Nancy Graff) performed a ten- to fifteen-minute medical examination of each of the plaintiffs' children that included a twenty-two point assessment of general appearance, behavior, mental status, and specific parts of the body (e.g., skin, head, and eyes). The examination also included a gynecological and rectal exam which involved a visual and tactile inspection of the children. For the gynecological exam, Dr. Graff testified that she asked the girls to "kind of drop their legs into a frog leg situation," and "separate[d] the labia and look[ed] at the hymen . . . ." Staff also administered tuberculosis tests, requiring pricks of the children's skin. Also, the children were required to give blood and urine samples for drug screening. Such an examination was the County's routine practice. Other than the problems noted above (i.e., the red mark and the bruise), no evidence of abuse was found. No one notified Mark and Melissa that their children were examined. They didn't find out about the examination until much later when one of their children told them about it.

Afterwards, the children were released to the custody of their grandmother (whole lived with the plaintiffs until these proceedings were resolved) where they remained until months later when the Juvenile Court, after an evidentiary trial, concluded that the dependency petition was unsupported by the evidence. Upon dismissal of the petition, the plaintiffs filed a 42 U.S.C. § 1983 civil suit in federal court alleging violations of the children's Fourth Amendment (unreasonable searches) rights and the plaintiffs' Fourteenth Amendment (due process) rights for (1) performing the medical examinations in the absence of exigency, valid parental consent, or court order specific to the child examined, and (2) failing to notify the parents of the examinations so that they could be present. The district (trial) court determined that the County had a policy of barring parents from the Polinsky medical examinations. The district court concluded that the Fourteenth Amendment required the County to notify a child's parents of the Polinsky medical examinations and to allow them to be present during the examinations. However, the court also concluded that the County was not constitutionally obligated to obtain the parents' consent or a court order to conduct the examinations. The parties appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part and reversed in part. The issue on appeal was whether the County's practice of not notifying parents, and not obtaining either parental consent or judicial authorization in advance of the Polinsky medical examinations, violated the Fourth (as to the children) and Fourteenth (as to the parents) Amendments.
Substantive Fourteenth Amendment Due Process Rights: The plaintiffs argued on appeal that the Polinsky medical examinations violated their privacy rights which are protected as a matter of

substantive due process under the Fourteenth Amendment. The Court agreed. Per the Court: "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." (*Wallis v. Spencer* (9th Cir. 2000) 202 F.3rd 1126, 1141; *Parham v. J.R.* (1979) 442 U.S. 584, 602.) Absent a "reasonable concern" that material physical evidence might dissipate, or that there exists an urgent medical problem requiring immediate medical attention, the state is required to notify a child's parents and obtain either their consent or judicial approval before the child is subjected to an investigatory physical examination. Neither of these exceptions to the rule existed in this case.

While the initial "cursory examination" of the children upon first arriving at the Polinsky Center was legally appropriate, the later more thorough physical medical examination conducted by Dr. Graff was indeed "investigatory" in that she was looking for "signs of physical and sexual abuse." Whether or not the latter examinations might have had some dual purpose is irrelevant. Therefore, the district (trial) court was wrong in concluding that parental consent was unnecessary in this case, the Ninth Circuit overruling the trial court on this issue.

Fourth Amendment Search Rights: The plaintiffs' four children (through a guardian ad litem) argued that the medical examinations conducted at the Polinsky Center violated their constitutional right to be free from unreasonable searches under the Fourth Amendment. Recognizing that children possess a Fourth Amendment right to be secure in their persons against unreasonable searches and seizures, and noting that the medical examinations conducted by Dr. Graff were at the very least partially investigatory, such examinations were found by the Court to be "well within the ambit of the Fourth Amendment." To be constitutional, such investigatory examinations must be done under the authority of a search warrant, or with parental consent, or under circumstances justifying the finding of an exigent circumstance. No such exceptions are present in this case. The County argued, however, that the "special needs" exception to the warrant requirement was applicable to this case. "Special needs" cases are those in which certain articulable "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." In such a case, a court may replace the warrant and probable cause requirements with a balancing test that looks to the "nature of the privacy interest," "the character of the intrusion," and "the nature and immediacy of the government's interest."

Assuming, without deciding, that the "special needs" doctrine applies to medical examinations of children suspected of having been molested, the Ninth Circuit concluded that the physical examinations of the plaintiffs' children in this case were unconstitutional under the special needs balancing test in that they were performed without the necessary notice to the children's parents and their consent. The giving of such notice and obtaining consent were found *not* to be "impractical" under the circumstances. In reaching this conclusion, the Court balanced the children's expectation of privacy in their own bodies against the government's interest in conducting the Polinsky Children's Center medical examinations, and found the former—given the significant intrusiveness of such examinations (i.e., visual and tactile inspections of their external genitalia, hymen, and rectum, as well as potentially painful tuberculosis and blood tests)—to outweigh the latter despite the obvious importance of the children's welfare where child abuse is suspected. As such, and with no finding of any exigencies, "special needs" did not

relieve the County of its Fourth Amendment obligations to obtain a warrant or the parents' consent.

Note: One might justifiably have concerns with the Court's conclusion that the government's interest in investigating child abuse cases, done for the benefit of a potentially abused child, *does not* outweigh the child's personal privacy rights. But under the maxim that bad facts make for bad case law, testing this issue was probably not a good idea in a case where the likelihood that the children were being physically abused (based upon the admittedly one-time "misguided" use of a wooden spoon to administer discipline, plus a simple bruise on the forehead of another child) was minimal at best, particularly where the petition filed by the County Health and Human Services Agency was "flawed" in its omissions and misstatements of certain relevant facts. This isn't the first time San Diego County has gotten into trouble over its policies and procedures in child abuse cases. (See *Parkes v. County of San Diego* (S.D. Cal. 2004) 345 F.Supp. 2nd 1071, 1091-1095, concluding that the County's policy of failing to notify or obtain consent from the children's parents to conduct the Polinsky Medical Center examinations violated the Fourth and Fourteenth Amendments; and *Reynolds v. County of San Diego* (S.D. Cal. 2016) 224 F.Supp.3rd 1034, 1062-1069, concluding that the County's policy of excluding parents from the Polinsky medical examinations was unconstitutional.) But all this has since (or, actually, while this new case was pending) been resolved as the result of another similar lawsuit in *Swartwood v. County of San Diego* (S.D. Cal. 2014) 84 F.Supp.3rd 1093, where San Diego County finally agreed to rewrite its policies. As a result of the *Swartwood* case, which was not appealed, San Diego county agreed to adopt revised procedures for notification to parents and guardians of their right to be present at their child's Polinsky Center physical exams, adopting procedures and modifying the Polinsky Children's Center's facilities to allow for a parent's observations of such exams, and modifying the format for San Diego County Health and Human Services Agency's requests to the Juvenile Court for child-specific orders authorizing exams and treatment of children in those cases where the parents refuse to consent to the examinations.

Assuming the County follows these modified rules and procedures, we shouldn't see any more of these types of lawsuits out of San Diego County. Lastly, the Court included a section (not discussed above) on the county's civil "*Monell*" liability (*Monell v. Department of Social Services of the City of New York* (1978) 436 U.S. 658.) under state (as opposed to federal) law. In this section, it was noted that the Court need not apply a "*shocks the conscience*" standard in order for the parents of children taken by the County in child abuse cases to establish the parents' Fourteenth Amendment substantive due process claim. A *Monell* claim may be based on the County's undisputed policy or practice of failing to notify parents of medical examinations of the children, for which the parents are only required to prove that the County acted with "the state of mind required to prove the underlying violation." Here, it was ruled that the County's deliberate adoption of its policy or practice "establishes that the municipality acted culpably." This state liability theory should also go away under San Diego County's newly adopted procedures in such cases.