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THIS EDITION'S WORDS OF WISDOM:

"*Government is like a baby: An alimentary canal with a big appetite at one end and no sense of responsibility at the other.*" (Ronald Reagan)

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***Case Law*:**

CASE LAW:

***Entry of a Residence; Exigent Circumstances*:**

Brigham City v. Stuart **(May 22, 2006) ___ U.S. ___ [164 L.Ed.2nd 650]**

Rule: Exigent circumstances justify a warrantless entry into a residence when police have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury.

Facts: Four Brigham City, Utah, police officers responded to a "loud party" call at a residence at 3:00 a.m. Upon arrival, they could hear an altercation occurring which they described as "loud and . . . tumultuous," and consisted of "thumping and crashing" and people yelling "stop, stop" and "get off me." They looked into a front window but could see nothing. Because the noise seemed to be coming from the back of the house, they proceeded down the driveway towards the backyard to investigate. Upon doing so, two juveniles drinking beer were observed in the backyard. As the officers entered the backyard they observed through a screen door and the windows of the kitchen an altercation between four adults and a juvenile. The four adults appeared to be attempting, "with some difficulty," to restrain the juvenile. The juvenile, however, broke free and, swinging his fist, struck one of the adults in the face. As that adult was spitting blood into the sink, the other adults held the juvenile up against a refrigerator with such force so as to cause the refrigerator to move across the floor. At this point, one of the officers opened the screen door and announced their presence. "Amid the tumult, nobody noticed." The officer therefore entered the kitchen and again announced his presence, causing the fight to subside. Everyone got busted with the adults being charged with contributing to the delinquency of a minor, among other charges. Challenging the legality of the officers' entry, the defendants brought a motion to suppress all the evidence recovered in the house. The trial court agreed and granted the motion. The Utah Appellate Court affirmed. The Utah Supreme Court also agreed, holding that the injury caused by the juvenile's punch was insufficient to trigger the so-called "emergency aid doctrine," and that exigent circumstances did not justify the entry because the potential harm involved was insufficient to justify a warrantless entry into a residence. The United States Supreme Court granted certiorari.

Held: The United States Supreme Court, in a unanimous decision, reversed, finding that what the officers observed did in fact provide them with an objectively reasonable basis for believing that an occupant of the house was seriously injured, or imminently threatened with such injury. As such, *exigent circumstances* justified the warrantless entry. Defendants argued on appeal that the officers were more interested in making arrests than quelling violence and were not primarily motivated by a desire to save lives and property. To this, the Court noted that the officers' subjective intent is irrelevant. "An action is 'reasonable' under the Fourth Amendment regardless of the individual officer's state of mind, 'as long as the circumstances, *viewed objectively*, justify [the] action.'" (Italics in original) Defendants also argued that their own conduct in the house was not serious enough to justify the officers' intrusion into the home, citing authority for the proposition that the gravity of the underlying offense must be balanced with the privacy rights involved, in determining the reasonableness of a governmental intrusion. The Court didn't buy it. Where police officers are confronted with *ongoing* violence within a home, as occurred in this case, an immediate entry is "plainly reasonable under the circumstances." Knocking at the front door would have been a futile act, with the apparent altercation coming from the rear of the house. And then upon observing the fight going on in the kitchen, "(n)othing in the Fourth Amendment required them to wait until another blow rendered someone 'unconscious' or 'semi-conscious' or worse, before entering." Lastly, the Court rejected the defendant's argument that the officers violated the "knock and announce" rules, noting that standing at the screen door and announcing

their presence "was at least equivalent to a knock on the screen door." When their first attempt to get the defendants' attention was ignored, the officers had no choice but to make an immediate entry, it "serv(ing) no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence." A warrantless entry into the residence, therefore, was lawful.

Note: I held off briefing this case, letting it wait its turn, thinking that nothing new was discussed here. But after having briefed it, I have to admit that I underrated its importance. When and how police may make a warrantless entry into a residence is a subject about which the lower courts are in complete disarray, with vain attempts to classify the multitude of varying circumstances under different legal theories. Here, the Supreme Court did not even consider whether this circumstance came within some so-called "emergency aid doctrine," as argued by the parties in the lower courts, or perhaps a "community caretaking" theory, or something else. *It's just called "exigent circumstances*." It's that simple. Think about it. What were these cops to do; just walk always when no one responded to their first attempt to get their attention? Should they have gone away, sought a warrant, and then come back later to see who might be left alive? The officers here did the only thing that was reasonable under the circumstances.

***Child Endangerment, per P.C. § 273a*:**

People v. Wilson **(Apr. 25, 2006) 138 Cal.App.4th 1197**

Rule: Acts "likely to produce great bodily injury or death," for purposes of the child endangerment statute, P.C. § 273a(a), are those that create a substantial danger, i.e., a serious and well-founded risk.

Facts: Defendant announced to her 10-year-old son that they were going to "do a 211" (i.e., "rob") at the house next door. Her son reacted by getting upset and almost crying, which prompted defendant tell him to "stop being a punk." She threatened him with going to jail where he would be raped by "all those men in there." She also called him a number of derogatory, sexually oriented names, finally causing him to cry. Having effectively traumatized her son, she then took him next door and lifted him, head first, through a bathroom window. In the window, he was able to turn around so he could jump down into a bathtub without falling on his head. He then opened the front door for defendant, enabling her to burglarize the home. Once they got back to their own home, defendant, who was apparently dissatisfied with her son's performance, choked him and pushed him hard up against a refrigerator. When he fell down, crying, she told him to "(g)et up and stop acting like a punk." Defendant finally stood him up and hit the wall with a mop about four inches from his head. Defendant was later arrested for residential burglary (P.C. §§ 459/460(a)), two counts of felony child endangerment (P.C. § 273a(a)), and a count of contributing to the delinquency of a minor. (P.C. § 272) After being convicted on all the above charges, defendant appealed, arguing that the evidence was insufficient to sustain the two counts of felony child endangerment.

Held: The Fourth District Court of Appeal (Div. 1), in the published portion of the decision, upheld the applicability of the felony child endangerment statute in these circumstances, but reversed defendant's conviction due to errors in the jury instructions. In describing felony child endangerment, subdivision (a) of P.C. § 273a says: "Any person who, *under circumstances or conditions likely to produce great bodily harm or death*, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered" is guilt of a felony. (Italics added.) Defendant contended that what she did to her son was not "*likely*" to "produce great bodily harm or death." At worst, per defendant's argument, she was only guilty of subdivision (b) of P.C. § 273a, subjecting her son to actions "*other than those likely* to produce great bodily harm or death;" a misdemeanor. The Court disagreed. Citing prior cases debating various definitions of "the troublesome word '*likely*,'" the Court noted how this word has been referred to in terms of "*more likely than not*," "*greater than five on a scale of one to ten*," somewhere between "*possible and probable*," "*a strong possible but a weak probable*," and a number of variations of each. The Court finally found that "*likely*" means; "*a substantial danger, i.e., a serious and well-founded risk, of great bodily harm or death*." Using this definition, the Court found the evidence of both defendant's acts perpetrated upon her son (i.e., (1) pushing him through the bathroom window in the perpetration of a burglary and (2) choking him, throwing him up against a refrigerator and then hitting the wall near his head with a mop) were sufficient to sustain the jury's finding of acts "*likely to produce great bodily harm or death*."

Note: Despite the Court's ruling finding the evidence sufficient to convict, it reversed the jury verdicts as to the two 273a counts in the unpublished portion of the decision because the trial court failed to instruct the jury "*sua sponte*" (i.e., on its own, without a defense request) on the "*lesser included offense*" of misdemeanor child endangerment (P.C. §273a(b)). Because a jury might have gone either way on this issue, the jury really should have been given the option of convicting her on the lesser charges only. Too bad. This piece of garbage certainly deserves the 8 years, 4 months, she got after her first trial. Hopefully, she'll be retried and still do the full time. But setting emotions aside, I briefed this case to illustrate the difference between the felony and misdemeanor subdivisions to the child endangerment statute. Aside from getting him involved in an historically "inherently dangerous felony" (i.e., the burglary), pushing him through a window under circumstances where he could have been seriously injured, the physical and verbal abuse she perpetrated on her 10-year-old son is something that certainly deserves some serious punishment.

***Traffic Stops for Offenses Not Occurring in the Officer's Presence*:**

United States v. Miranda-Guerena **(9th Cir. Apr. 25, 2006) 445 F.3rd 1233**

Rule: Making a stop for a traffic violation that *did not* occur in the officer's presence, so long as based upon a reasonable suspicion, is constitutional.

Facts: Officers of the Tucson Police Department initiated an investigation of defendant's alleged narcotics trafficking. As a part of that investigation, Officer Michael Hammarstrom surveilled defendant's home for about three days, noting activity he believed was consistent with conducting narcotics transactions. Finally, while following defendant and his girlfriend as they drove through Tucson, Officer Hammarstrom observed them commit a couple of traffic infractions. Deciding to use these violations as an excuse to stop and talk to defendant, the officer radioed for a marked patrol unit to make a traffic stop. A uniformed officer, without having personally observed the violations nor knowing anything about the on-going narcotics investigation, stopped defendant and his girlfriend. During this stop, Officer Hammarstrom conducted a search (conceded on appeal as lawful) of defendant's vehicle and discovered cocaine. Charged in federal court with a number of counts related to the illegal possession and distribution of cocaine, defendant's motion to suppress was denied. He pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Defendant's argument on appeal was that Arizona statutes required a peace officer to personally observe a traffic violation in order to lawfully stop and detain the vehicle's driver. While first noting that a different Arizona statute allows for such a traffic stop even though it did not occur in the officer's presence, the Court ruled that what Arizona statutes say is really not the issue. The issue is whether the Fourth Amendment was violated. Under the Fourth Amendment, as interpreted by the courts, investigative detentions, including traffic stops, only require that the officer have a reasonable suspicion that some offense has occurred. It is not necessary for the offense to have occurred in the officer's presence. And it does not matter whether the officer had sufficient reasonable suspicion that defendant was engaged in narcotics trafficking, the stop being justified by the traffic violations; i.e., a "*pretext stop*." Defendant's detention was therefore lawful.

Note: This case merely reiterates the rule that just because a police officer has violated some state procedural statute (i.e., misdemeanor occurring in other than the officer's presence, in this case), does not require the suppression of the evidence unless the Fourth Amendment was also violated. The "misdemeanor in your presence" rule is not a constitutional rule. Therefore, so long as the necessary "reasonable suspicion" of some criminal activity exists, a detention (which includes a traffic stop) is lawful. *And*, as the Court noted, it matters not that the officer's true motive for the stop was other than a concern about the defendant minor traffic offenses. Using a traffic infraction as a pretext to stop and talk to a suspect about some more serious offense is lawful. (*Whren v. United States* (1996) 517 U.S. 806.)

***Miranda* and "*Custody*:"**

***People v. Pilster* (Apr. 27, 2006) 138 Cal.App.4th 1395**

Rule: Handcuffing a suspect at the scene of a crime creates an "*assumption*" that he is in custody for purposes of *Miranda*, absent any other evidence to the contrary.

Facts: Defendant and his friends were patronizing a Laguna Beach brewery at about 1:00 a.m. one morning, doing whatever Laguna Beach yuppies do at 1:00 a.m. in those places, when the victim-to-be, Stephen Hurley, walked in. While the various accounts differed, it was agreed that defendant and Hurley physically bumped into each other. This resulted in a Laguna Beach, yuppie-style confrontation where both parties felt obligated to engage in a little machismo-induced chest pounding. (It's kind of a "*man thing*.") A couple of "*what's your problem*?," "*I don't like the way you're looking at me*," and "*let's step outside and settle this like men*," were exchanged. Eventually, defendant's buds, an equal number of Hurley's buds, and a couple of brewery bouncers, got involved in a certain amount of "grabbling." Taking advantage of the distraction, defendant, experiencing a momentary, alcohol-induced flash of bravery, blindsided Hurley with a beer bottle across the head. The resulting wound later took some 6 sutures to close. The responding Laguna Beach police officers immediately separated the warring parties, sitting defendant down on the curb outside. He remained there like a good boy for about three minutes before he was handcuffed by a Laguna Beach police officer. A police sergeant approached defendant a few minutes later and questioned him as to the events of the evening. Defendant, although playing down his culpability, made certain incriminating admissions. At no time was he advised of his *Miranda* rights. Upon being charged in state court with assault with a deadly beer bottle, defendant testified to a version of the facts that included a denial that he had hit Hurley at all. The prosecution, in rebuttal, presented the testimony of the sergeant describing defendant's statements to him that he had at least swung the beer bottle (although defendant claimed it was a water bottle; Laguna Beach yuppies apparently drink bottled water in their breweries; not beer) at Hurley, and even "possibly" hit him with it. The defense requested that because defendant had been questioned while in custody, but never *Mirandized*, the jury be instructed that the sergeant's testimony could be considered on the issue of defendant's credibility only, and not as substantive evidence of his guilt. (See CALJIC No. 2.13.1; now CALCRIM No. 356) The trial judge, ruling that defendant had been "*detained*" only and that a *Miranda* admonishment and waiver were therefore unnecessary, declined to so instruct the jury. Defendant was convicted and appealed.

Held: The Fourth District Court of Appeal (Div. 3) held that defendant had in fact been in custody when questioned, and that the trial court therefore erred when it failed to give the requested limiting jury instruction. However, finding the error to be "harmless," defendant's conviction was affirmed. The law is clear that statements obtained from an in-custody criminal suspect who has not been advised of, and waived, his *Miranda* rights, are *not* admissible against him at trial in the People's case-in-chief. However, so long as the defendant's statements were not otherwise involuntarily obtained, they *are* admissible in the People's rebuttal case for purposes of impeachment should defendant testify in a manner that is inconsistent with what he told the interrogating officers. (*Harris v. New York* (1971) 401 U.S. 222.) In this case, the prosecution presented the testimony of the police sergeant in its rebuttal case, contradicting defendant's denial that he hit Hurley with a bottle. If when the sergeant questioned defendant at the scene he was "*in custody*," then defendant was entitled to have the jury instructed that this rebuttal evidence could only be considered on the issue of his credibility, and not as substantive evidence of his guilt. The issue here, therefore, is whether defendant was "*in custody*."

The trial court ruled that he was not. The appellate court disagreed. The test for determining whether a person questioned by police is "*in custody*" is an objective one: "Would a reasonable person interpret the restraints used (if any) by the police as tantamount to a formal arrest?" The answer to this question can only be resolved by considering the "*totality of the circumstances*," taking into account the following factors: (1) Whether the suspect had been formally arrested; (2) absent a formal arrest, the length of the detention; (3) the location; (4) the ratio of officer(s) to suspect(s); (5) the demeanor of the officer(s), including the nature of the questioning; (6) whether the suspect agreed to the interview and was informed he or she could terminate the questioning; (7) whether the police informed the person he or she was considered a witness or a suspect; (8) whether there were restrictions on the suspect's freedom of movement during the interview; (9) whether the police officers dominated and controlled the interrogation or were aggressive, confrontational, and/or accusatory; (10) whether they pressured the suspect; and (11) whether the suspect was arrested at the conclusion of the interview. No one factor is controlling. In this case, defendant was not formally arrested. He was detained only 3 to 5 minutes before questioning, and then was questioned by only one officer while sitting on the sidewalk in front of the bar. Also, the questioning was done in a conversational tone without any confrontational questions or pressure. *However*, defendant was never informed that he was not under arrest, was not a suspect, or that he didn't have to answer questions. In fact, he was formally arrested immediately afterwards. "*Most important(ly)*," defendant remained in handcuffs the entire time. In the Court's opinion, these circumstances were "tantamount to a formal arrest." In reaching this conclusion, the Court rejected as irrelevant case law that allows for handcuffing when necessary to defuse a potentially dangerous situation without necessarily converting a detention into an arrest, noting that such cases involve a Fourth Amendment seizure issue. "In contrast, Fifth Amendment *Miranda* custody claims do not examine the reasonableness of the officer's conduct, but instead examine whether a reasonable person (in the defendant's position) would conclude the restraints used by police were tantamount to a formal arrest." Per the Court, when the police handcuff a person immediately upon arrival, it generates an "*assumption*" that the suspect is in custody for purposes of *Miranda*. Nothing was said or done subsequent to defendant being placed in handcuffs to negate this assumption. Defendant, therefore, should have been read his *Miranda* rights and a waiver obtained before being questioned.

Note: I'm not sure I agree with this analysis. After listing some eleven factors to consider, the Court seems to put just about all its eggs into the "handcuffing" basket, totally ignoring the counterbalancing effects of factors 1 through 5, 9 and 10. With the questioning here being relatively low key and unaccusatory, all while in a public place, I would have predicted that we would have won this one. But I did find interesting and instructive the Court's discussion about "*custody*" for purposes of *Miranda*, under the Fifth Amendment, involving a different analysis than "*custody*" for purposes of a detention or arrest under the Fourth Amendment. It makes perfect sense that the former (Fifth Amendment-*Miranda*) is analyzed from the perspective of what a reasonable person in the suspect's shoes would have believed, while the later (Fourth Amendment, search and seizure) be evaluated from the perspective of what is reasonable for the officers to do under the circumstances, including a consideration of the safety issues. The

net result might be a finding that a suspect is in custody for purposes of *Miranda*, but only detained for purposes of the Fourth Amendment; a conclusion that is contrary to the general rule that detentions don't require a *Miranda* admonishment. Also note the interesting comment, relegated to a footnote (fn. 1) for some reason, that the test for "*custody*" for purposes of *Miranda* "is *not* whether a reasonable person would believe he was not free to leave, but rather whether such a person would believe he was in police custody of the degree associated with a formal arrest." (Italics in original) People who have been merely detained are not "*free to leave*," but do not necessarily believe they are about to go to jail. Under such a circumstance, *Miranda* does not apply; a fact that many a defense attorney has a hard time understanding.

***Possession of a Short-Barreled Rifle, per P.C. § 12022(a)(1)*:**

People v. King **(May 15, 2006) 38 Cal.4th 617**

Rule: The illegal possession of a short-barreled rifle requires proof of the defendant's actual knowledge that the illegal rifle is "*unusually short*."

Facts: San Francisco police executed a search warrant on defendant's home. Along with a bunch of methamphetamine, a loaded rifle with the stock "*crudely sawn off*" was recovered from the garage. The overall length of the rifle as it was altered was 24 1/8 inches. Defendant admitted knowing it was there and that he had "probably" handled it at one time, but denied ownership. Charged with possession of a short-barreled rifle, per P.C. § 12020(a)(1) (plus some narcotics and other offenses), the trial court instructed the jury that to find defendant guilty, they must find either actual or constructive possession of the rifle, and that the overall length of the rifle was less than 26 inches. The court failed to instruct the jury on any specific knowledge the defendant was required to have concerning the rifle or its shortness. Defendant was convicted and appealed. The Appellate Court reversed defendant's conviction for this offense, ruling that the jury should have been told that the prosecution must prove that defendant knew, or reasonably should have known, the illegal characteristics of the rifle. The People appealed.

Held: The California Supreme Court, in a unanimous decision, reversed the Court of Appeal, reinstating defendant's conviction while holding that although the trial court's instructions were legally insufficient (although not for the reasons given by the Appellate Court), the error was harmless. The Attorney General argued on appeal that possession of a short-barreled rifle, per P.C. §12020(a)(1), was a "*public welfare offense*," i.e., one that does not require any particular culpable mental state on the part of the defendant, but rather imposes "strict liability." A "*strict liability*" offense is one which imposes criminal liability upon a defendant for violating the statute irrespective of the defendant's lack of intent or other guilty knowledge. While noting that no particular culpable state of mind is specifically written into section 12020(a)(1), the Court engaged in a bit of judicial legislating by finding that the some form of guilty knowledge is implied. Public welfare offenses are typically limited to crimes that are regulatory (as opposed to penal) in nature, seek to protect the health and safety of the public, carry light penalties, and involve little if any "moral obloquy or damage to reputation." ("*Obloquy*" is defined as a "strongly

condemnatory utterance." I had to look it up.) The felony offense of possessing a short-barreled rifle clearly is *not* such an offense, so some form of guilty knowledge is necessary. The lower Appellate Court had ruled that defendant must be proven to have known, or "*reasonably should have known*," of the illegal characteristics of the rifle, in order to be found guilty. The Supreme Court, however, determined that violations of P.C. § 12020(a)(1) impose a different, stricter standard. In a prosecution for possession of a short-barreled rifle, the prosecution must prove; (1) that the item had the necessary characteristic to fall within the statutory description (i.e., under 26 inches in overall length), and (2) that the defendant had *actual knowledge* of this characteristic. *However*, "*actual knowledge*" does not require proof that the defendant was aware of the exact dimensions of the rifle, but rather only than he knew that it was "*unusually short*." Circumstantial evidence of this element, of course, is admissible. In this case, defendant admitted to having seen the rifle, and even that he "probably" handled it. Under these circumstances, the evidence is undisputed that defendant had to have known, with its stock so "*crudely sawn off*," that it was "*unusually short*." So while the trial court failed to instruct the jury concerning this knowledge requirement, the error was harmless. Defendant's conviction, therefore, stands.

Note: The lower Appellate Court's erroneous ruling was based upon the rule of *In re Jorge M.* (2000) 23 Cal.4th 866, where the Supreme Court held that in a prosecution for the possession of an illegal assault weapon (P.C. §§ 12275-12290), it is implied that the offender must know, "*or reasonably should have known*," that the firearm had characteristics that made it an assault weapon. So we apparently have one rule for assault weapons, as described in *Jorge M.*, and a different rule for P.C. § 12020(a)(1) weapons, as described here. In either situation, however, these cases make it clear that in order to successfully prosecute an illegal weapons case it, is incumbent upon the arresting or investigating officer to collect any available evidence tending to show that a suspect was aware (or, for an assault weapon, "*reasonable should have been aware*") of the characteristics of the weapon that make it illegal. For a sawed-off rifle or shotgun, or any other weapon where its reduced size is what makes it illegal, this element is satisfied with evidence that the defendant actually knew of its "*unusual shortness*."

***Standing, and Rented Vehicles*:**

United States v. Thomas **(9th Cir. May 18, 2006) 447 F.3rd 1191**

Rule: A person who is not authorized under the terms of a rental agreement for a vehicle does *not* have standing to challenge the search of that vehicle absent evidence that he was at least driving it with the permission of an authorized renter.

Facts: A confidential informant provided Michael Bahr, a Spokane, Washington, police officer and DEA task force officer, with information concerning defendant's on-going narcotics activity, transporting crack cocaine from Long Beach, California, to Spokane. The general scheme was for defendant to either rent a car in Spokane, or have someone rent it for him, and then drive to Long Beach to purchase the cocaine before transporting it back to Spokane. The informant had done this once with defendant several years

earlier. Defendant continued to make similar trips every six to eight weeks. In November, 2002, the informant told Officer Bahr that defendant purchased cocaine for an individual that the officer knew had been arrested for distributing cocaine. The individual who rented the car for defendant was one of his known associates. In December, 2002, the informant told Bahr that defendant was preparing to again rent a car and make another trip, using that same associate to rent the vehicle for him. When it was determined where the associate intended to rent the car, arrangements were made with the rental agency to put a tracking device in it. When the car was rented in early March, the associate signed a document to the effect that no unauthorized persons were allowed to drive the car. Defendant was not listed as an authorized driver. On March 8, 2005, the tracking device alerted police that the rented car had returned to Washington State where waiting state troopers stopped it. Defendant was discovered to be the sole occupant of the car. He was arrested on an outstanding warrant and the car was searched, resulting in recovery of nearly 600 grams of cocaine, 25 grams of heroin and $1,200 in cash. Charged in federal court with a number of drug related charges, defendant made a motion to suppress the evidence recovered from the car. During the hearing on the motion, defendant failed to present any evidence concerning his authority to be driving the car. The trial court denied defendant's motion to suppress under a number of theories (see below), including that as an unauthorized driver of the vehicle, he lacked standing to challenge the legality of the search in the first place. Defendant pled guilty and appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Before a defendant can even litigate the lawfulness of a search, he must first establish that he has "standing;" i.e., a legitimate expectation of privacy in the place or thing being searched. Failing to do so deprives him of the right to challenge the searching officers' actions. After reviewing the law from other federal circuits on the issue of standing and rental vehicles, the Court ruled first that just because the defendant was not an authorized driver under the terms of the rental agreement did not deprive him of standing to challenge the legality of the search of the vehicle. Even if defendant was not an authorized driver, he still retained some degree of a privacy expectation in the vehicle. "It cannot be said that a defendant's privacy interest is dependent simply upon whether the defendant is in violation of the terms of his lease agreement." But as an unauthorized driver, defendant only has standing to challenge the search of a rental vehicle if he received permission to use the rental car from the authorized renter. Defendant, who had the burden of proof on this issue, failed to present any evidence of such permission. His motion to suppress the evidence seized from the vehicle, therefore, was properly denied.

Note: The trial court further upheld the installation of a tracking device in the car, the stop, and the search of the car, upon a number of theories; i.e., that the tracking device put on the rental vehicle was authorized by a search warrant supported by probable cause (as well as by the consent of the rental company), monitoring defendant's movements in public was not a search, a "*Terry* stop" was warranted under the circumstances, the "automobile exception" to the search warrant requirement to search the rental car applied, and that the discovery of the dope was inevitable in any event. Failing to establish his standing to litigate these issues, however, the Ninth Circuit didn't even get into them. But it was apparent that one way or the other, defendant was destined to lose this one.