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THIS EDITION'S WORDS OF WISDOM:

"*The trouble with having an open mind, of course, is that people will insist on coming along and trying to put things in it*." (Terry Pratchett)

IN THIS ISSUE:

CASE LAW:

***Burglary Tools, per P.C. 466*:**

People v. Diaz **(June 28, 2012) 207 Cal.App.4th 396**

Rule: "Other instrument or tool," for purposes of P.C. § 466, is limited to those items that are similar to the instruments or tools specifically listed in the section, and that can be used in the actual breaking and entering into a structure or a vehicle.

Facts: On the afternoon of June 29, 2009, 82-year-old Frances Painter was home alone in her residence in Buena Park when defendant approached the front door and rang the

doorbell. Ms. Painter typically would not respond to people at her door unless, looking through a window, she knew them. Ms. Painter did not recognize defendant. Defendant persisted, however, ringing the doorbell at least ten times. She finally gave up and left, but soon returned and began ringing the doorbell again. Eventually, defendant walked around the house, scaling a wall, and entered the back yard. Ms. Painter called 9-1-1. Defendant pried off a screen door, but couldn't get through the locked sliding glass door. Continuing her efforts to make entry into the house, defendant turned her attention to the kitchen door when the police arrived and arrested her. The officers found a large black bag in the backyard containing blue latex gloves which defendant later admitted belonged to her. Defendant initially provided a false name and birthdate. At trial, an officer testified that the gloves were used by burglars to avoid leaving fingerprints or DNA at their crime scenes. The bag could be used to carry and conceal items stolen by the burglar. Defendant was convicted of residential burglary (P.C. §§ 459/460(a)), providing a false name (P.C. § 148.9), and possession of burglary tools (P.C. § 466). On appeal, defendant contested her conviction on the burglary tool charge.

Held: The Fourth District Court of Appeal (Div. 3) revered defendant's conviction on the charge of possession of burglary tools, affirming as to the other charges. Penal Code section 466 provides in pertinent part: "Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool* with intent feloniously to break or enter into any building . . . or vehicle . . . is guilty of a misdemeanor." (Italics added.) The section obviously does not specifically list either gloves or bags. The issue, therefore, is whether such items come with the section as an "*other instrument or tool*." In discussing this issue, the Court analyzed two conflicting prior court decisions. The Fourth District Court of Appeal (Div 1), for instance, determined in *People v. Gordon* (2001) 90 Cal.App.4th 1409, that pursuant to the so-called "doctrine of *ejusdem generis*," the items in question (gloves and bag in this case) must be similar to those that are specifically listed in the section. *Gordon* held that the test is not whether a device can accomplish the same general purpose as the tools enumerated in section 466, but rather whether the device itself is *similar* to those specifically listed. Defendant's bag and gloves obviously fail this test. The contrary decision considered by the Court was *People v. Kelly* (2007) 154 Cal.App.4th 961, decided by the First District Court of Appeal. Disagreeing with *Gordon*, the *Kelly* court ruled that evidence tending to prove (e.g., an expert officer's opinion) that an item can be used in the commission of a burglary is sufficient to satisfy the "*other instrument or tool*, element of section 466. *Kelly* further found that the more restrictive rule of *Gordon* only serves to thwart the intent of the Legislature by preventing certain items commonly used in burglaries from being illegal under 466. This Court, however, disagreed with *Kelly*, finding that "the obvious legislative purposes of section 466 includes tools that the evidence shows are possessed with the intent to be *used* for burglary; i.e., an "instrument or tool" that can be used to "*break or enter*" into a structure or a vehicle. "The tool must be for the purpose of breaking, entering, or otherwise gaining access to the victim's property." Further, the Court found that contrary to the People's argument, the legislative intent is more in accord with the doctrine of *ejusdem*

generis, as determined in *Gordon*. In this case, "there was no evidence that common latex gloves or the bag in which they were found could be used or were intended to score a breach in Painter's home defenses or otherwise gain (defendant) entry or access to Painter's property, nor that these items were in any way similar to items the Legislature has set apart in section 466 for additional punishment when possessed as burglary tools." For these reasons, defendant's gloves and bag were not burglary tools under P.C. § 466. Her conviction on that charge, therefore, was reversed.

Note: This case, however, does not resolve the split of opinion between the Fourth District Court of Appeal, as described here and in *Gordon*, and the First District Court of Appeal, in *Kelly*. The Legislature in effect overruled *Gordon* in 2002 by simply adding the item in issue (i.e., "ceramic or porcelain spark plug chips or pieces," used for breaking car windows) to section 466. But that act was really no more effective than a bandaide, leaving undecided whether the doctrine of ejusdem generis is something with which we really should be concerned in attempting to interpret the Legislature's ambiguous statutes. Maybe this new case will motivate the Legislature to save the rest of us all a lot of time and effort and amend section 466 again, this time by describing exactly what they mean when they say, "*other instrument or tool*."

***Flight and Detentions*:**

People v. Rodriguez **(July 30, 2012) 207 Cal.App.4th 1540**

Rule: Flight, plus other suspicious circumstances, provides sufficient reasonable suspicion to justify a detention.

Facts: Defendant was the passenger in a car that was observed by a police officer making an illegal turn in front of another vehicle. When the officer attempted to initiate a traffic stop, the driver accelerated away, resulting in a high speed chase. At one point, the car slowed sufficiently to allow defendant to jump out and flee on foot. With defendant's description being broadcast, another officer, Officer Rothermel, observed him a minute later, and a half block away, walking down the street. When Officer Rothermel shined his spot light on him and got out of his car, defendant fled again. Officer Rothermel chased defendant on foot while ordering him to stop. As the officer chased him, defendant was observed taking something from his pocket and tossing it over a chain link fence. Officer Rothermel finally caught defendant and attempted to subdue him. However, defendant resisted, attempting to pull the officer's gun from its holster. With the help of a second officer, defendant was finally taken into custody and handcuffed. Officer Rothermel suffered some lacerations on his right hand and shin in his attempt to subdue defendant. The item defendant tossed was recovered and found to be a digital scale with a white powder reside on it that was consistent with methamphetamine. Defendant was tried and convicted of resisting an officer by force and violence, per P.C. § 69. Sentenced to four years in prison, defendant appealed.

Held: The Second District Court of Appeal (Div. 6) affirmed. Defendant's argument on appeal was that Officer Rothermel did not have sufficient cause under the circumstances

to stop and detain him. In that a violation of P.C § 69 requires that as an element of resisting an officer by force and violence that the officer was acting in the lawful performance of his duties, Rothermel's illegal attempt to detain him, not being "in the lawful performance of his duties," makes a conviction under this section impossible. The Court disagreed. The rule is that flight alone is insufficient to justify a detention. But in this case, Officer Rothermel wasn't acting on defendant's flight alone. Noting that "(h)eadlong flight—wherever it occurs—is the consummate act of evasion" and suspicious in itself, in this case there was other evidence of criminal activity in addition to defendant's flight. Here, the car defendant was in attempted to evade the police, following which defendant abandoned the car and then attempted to flee on foot. Also, while failing to heed Officer Rothermel's demand that he stop, defendant tossed something over a chain link. All these factors when added together provided more than enough reasonable suspicion to justify Officer Rothermel's attempt to detain him. Being a lawful detention, the officer was in fact acting in the lawful performance of his duties. In fact, as noted by the Court, "(h)e would have been derelict in his duties had he not attempted to detain (defendant)." Defendant was therefore properly convicted of resisting an officer by force and violence pursuant to P.C. § 69.

Note: It is indeed a constitutional rule that flight alone is insufficiently suspicious to justify a detention. But, flight plus very little else *is* enough. (*Illinois v. Wardlow* (2000) 528 U.S. 119; flight in a "high narcotics area.") What the Court didn't explain is that no detention occurred in this case until the officer finally caught defendant. Merely chasing a suspect is not a detention. A detention does not occur, and the Fourth Amendment is not even implicated, until the officer actually catches the suspect, or he actually submits. There is no such thing as an "*attempted illegal detention*." (*California v. Hodari D.* (1991) 499 U.S. 621.) In this case, the Court seemed to say that having just been in a car that failed to submit to a traffic stop by initiating a high speed pursuit, plus defendant's own flight on foot after jumping from the car, might have been enough by itself. But if it wasn't, certainly after defendant was observed throwing something over a fence during the foot pursuit he could be lawfully detained. *Moral to this story*: If you want to chase someone who does nothing more than run from you, don't catch him until he does something else that adds to the suspicion. In fact, you might even yell to the fleeing suspect; "*Throw the dope*! *Throw the dope*!" Having thus been reminded of a neat plan he probably wasn't thinking about in the heat of the moment, he might just comply and provide you with the reasonable suspicion you need.

***Delaying Medical Treatment as a Constitutional Violation*:**
***Detentions of Witnesses*:**
***Use of Force on Witnesses*:**

Maxwell v. County of San Diego **(9th Cir. Sept. 13, 2012) __F.3rd __ [2012 U.S.App. LEXIS 19225]**

Rule: Delaying medical treatment may be a Fourteenth Amendment due process denial of "bodily security." Detaining witnesses to a crime for five hours is unreasonable and

illegal. The use of pepper spray on a witness in an attempt to control him is an unreasonable use of force.

Facts: San Diego County Deputy Sheriff Lowell Bruce lived with his wife, Kristin and their children in the home of her parents, Jim and Kay Maxwell, the primary plaintiffs in this civil action. Kay's father also lived with them. At about 10:50 p.m., on December 14, 2006, Lowell and Kristin had a violent argument that resulted in Lowell shooting Kristin in the jaw. Despite her injury, Kristin was able to call 9-1-1 and report the shooting. Lowell also called 9-1-1, admitting to the dispatcher that he had shot Kristin. Sheriff's deputies began arriving at the scene within three minutes of the shooting. The first deputy at the scene, Jeffrey Jackson, found Kristin sitting in a chair and still talking to the 9-1-1 dispatcher. Deputy Jackson took Lowell's cell phone from him and told the 9-1-1 dispatcher to send the fire department. Jackson then took Lowell to his patrol car where he was secured. A neighbor who happened to be a nurse entered the home at about 10:58 and checked Kristin's condition. She found Kristin to be sitting in a chair, conscious, alert and oriented. Two minutes later, an Alpine Fire Protection District fire truck arrived with two emergency medical technicians. These EMTs checked Kristin and found her vital signs and motor responses to be normal and that she was able to communicate. But noting an airway obstruction, they placed a c-spine collar on her. They also determined that Kristin should go to a trauma center quickly. So they requested an air ambulance. They were told that it would take 25 minutes to get the air ambulance to a landing zone some 10 miles away. The air ambulance was equipped to deal with trauma patients. Meanwhile, Lowell's gun was recovered and secured. Around 11:08 p.m., an ambulance from the Viejas Band of Kumeyaay Indians Tribal Fire Department arrived. The plan was that this ambulance would transport Kristin to the landing zone to be air-lifted to a trauma center. At the time, Kristin's vital signs were still within normal limits. At about 11:15, Kristin was finally put on a backboard, taped into place, and carried out to the ambulance. She began exhibiting signs of distress, expelling blood from her mouth. The backboard was therefore tilted up to allow the blood to drain. The blood was also suctioned and other efforts were made to assist her. During all this, at about 11:16, Sgt. Michael Knobbe arrived at that scene and took charge. He began assigning tasks to individual deputies, ordered the evacuation of the house, and arranged for the separation of the various family members pending interviews. Kay Maxwell, her father, and the children were all put into the family's motor home in the driveway. Jim Maxwell was allowed to remain outside at the front of the driveway where he nervously paced. Jim and Kay's request to be allowed to remain together, and to follow Kristin to the hospital, was refused pending being interviewed. Kristin was placed into the ambulance at some time between 11:18 and 11:25 p.m. However, Sgt. Knobbe refused to allow the ambulance to leave the scene because he viewed the area as a crime scene and thought that Kristin should be interviewed first. As a result of the delay, the ambulance did not leave until 11:30 p.m. with the air ambulance already at the landing zone. However, by the time the Viejas Fire ambulance got to the landing zone, 11 minutes later, Kristin had died. The cause of death was blood loss from her gunshot wound. According to the San Diego County medical examiner, Kristin's injuries were repairable. When told of his daughter's death, Jim Maxwell demanded to see his wife. This request was denied. He therefore told officers that, "*You are gonna have to shoot me, I'm going to see my*

wife!" To stop him, deputies had to spray him three times with pepper spray, hit him in the leg with a baton, and handcuff him. He soon settled down, however, and the handcuffs were removed. A search warrant was obtained authorizing the search the house. Family members were not allowed to regroup until after the interviews were complete; about 5:00 a.m. The Maxwells eventually sued everyone involved in federal court. The officers' motion for summary judgment, asking that the case be dismissed as to them based upon a claim of qualified immunity, was denied. They appealed.

Held: The Ninth Circuit Court of Appeal affirmed in a split 2-to-1 decision. Qualified immunity protects government officers from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. To determine whether or not an officer is entitled to qualified immunity, it must be determined (1) whether the officers' alleged misconduct violated a statutory or constitutional right and, if it did, (2) whether the right was clearly established at the time of the alleged misconduct. For a statutory or constitutional right to be clearly established, "its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Plaintiffs first argued that delaying Kristin's ambulance violated the Fourteenth Amendment's due process clause. Prior authority has held that the due process clause does in fact guarantee one's right to "bodily security." The Maxwells contended that the Sheriff's deputies violated Kristin's right to bodily security by delaying her ambulance and thus ensuring her death. The Ninth Circuit agreed. When an officer's actions affirmatively put a person into a position where they are in more danger than they were when the officers originally found them, that person's bodily security is threatened, creating potential civil liability. Impeding access to medical care amounts to leaving a victim in a more dangerous situation. In this case, Kristin faced a preexisting danger from her gunshot wound. By purposely preventing the ambulance from leaving for a given amount of time, the officers affirmatively increased that danger. This arguably left Kristin worse off than if the ambulance had been allowed to bring her to the air ambulance that had advanced medical capabilities, and that was ready to fly her to a trauma center. The plaintiffs next alleged that their five-hour detention and separation violated the Fourth Amendment's restrictions on unreasonable seizures. Again, the Ninth Circuit agreed. Generally, victims and witnesses cannot be lawfully detained for investigatory purposes. In determining whether an exception is to be allowed, "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty" must be considered. Also, although the detention of witnesses for investigative purposes may be allowed in certain circumstances, such detentions must be minimally intrusive. In this case, five hours was found to be too long when dealing with the detention of persons who were not themselves suspects of a crime. The Sheriff's deputies should have known that such a detention was unreasonable. The dissent argued that detaining witnesses is lawful when necessary to prevent the potential destruction of evidence pending the obtaining of a search warrant, as occurred in this case. The majority, however, found that where the perpetrator is already in custody and the scene has been secured, the integrity of the crime scene is sufficiently protected without having to detain the family members. Lastly, plaintiffs complained that the force used on Jim Maxwell, done to prevent him from meeting with his wife prior to

any interviews, was excessive under the circumstances. The Court again sided with the plaintiffs, noting that Jim Maxell had in effect been arrested. There being no probable cause, such an arrest was necessarily unlawful. Also, in evaluating the lawfulness of the degree of force used, the courts must consider (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape. None of these factors allowed for the force used on Jim Maxwell. In this case, the use of pepper spray alone was excessive, not to mention hitting him with a baton. The above issues must necessarily be considered while assuming that non-moving parties' (i.e., the Maxwells) description of the facts is true. With this standard in mind, the Court determined that these issues must necessarily be decided by a jury. As such, the officers' motion for summary judgment was properly denied.

Note: The Court also decided some other civil issues that aren't important enough for our purposes to get into here. For instance, it held that several higher ranking officers, who upon arriving at the scene maybe should have been supervising Sgt. Knobbe, may also be civilly liable. The Court further held in a long involved discussion that the Viejas defendants were not immune from civil liability merely because of their claimed Indian tribal sovereign immunity. Offices and prosecutors who have to deal with issues on Indian Reservations might want to take the time to read the Court's detailed analysis of this problem. It might also be worthwhile to read the very well-written dissenting opinion, citing a number of cases more on point with the circumstances of this case, and finding the officers' actions to be reasonable based upon what they knew at the time. Per the dissent, the officers were entitled to qualified immunity from civil liability. The dissent also noted the U.S. Supreme Court's prior "reprimand(s)" of the Ninth Circuit "for judging the reasonableness of officers' conduct 'with the 20/20 vision of hindsight' rather than 'from the perspective of a reasonable officer on the scene,'" which she believed applicable here as well. Good point.

***Residential Burglary and the Entry of Internal Rooms*:**

In re M.A. **(Sep. 13, 2012) 209 Cal.App.4th 317**

Rule: Entering a closet contained in an inhabited dwelling with the intent to steal, even when the intent did not exist upon initially entering the residence itself, is a first degree residential burglary.

Facts: Defendant, a minor, entered a house with the permission of the occupant. At the time he entered the house, defendant did not intend to commit any crimes. However, while in the house, he learned that there were guns in an open gun safe in the entryway closet. He decided to take some of them. With that purpose in mind, he entered the closet and stole several of the guns, taking them without the consent of the owner. A petition was filed in Juvenile Court alleging a residential first degree burglary and the grand theft of a firearm. The Juvenile Court magistrate made a true finding as to both allegations. Defendant was adjudged to be a ward of the court. He appealed.

Held: The Fourth District Court of Appeal (Div. 1) affirmed. Defendant's contention on appeal was that, as a matter of law, it is not a residential burglary to enter the closet of a home even with the intent to steal or to commit a felony. The Court rejected this argument. Penal Code § 459 provides in pertinent part that a burglary is committed when, among other things, a person "enters any house, *room*, apartment, … store, … or other building … with intent to commit … larceny or any felony." (Italics added.) The issue in this case is whether an entry into a closet of an inhabited dwelling constitutes entry into a "*room*" within the meaning of section 459. While noting that the courts have broadly defined what constitutes a room, the Court looked at prior cases involving various types of enclosures contained within other structures. For instance, a ticket office, the walls of which did not reach all the way to the ceiling, but that was contained in a railway station (*People v. Young* (1884) 65 Cal. 225.), an enclosed office area set off by a waist-high counter about 2½ feet wide in the lobby of a building (*People v. Mackabee* (1989) 214 Cal.App.3rd 1250.), an enclosed storage cage within a liquor store (*People v. Garcia* (1963) 214 Cal.App.2nd 681.), and the storage room of a cafe (*People v. Gaytan* (1940) 38 Cal.App.2nd 83.), were all held to be rooms contained within other structures, and which were subject to being burglarized separate from the structure itself. Particularly instructive is the case of *People v. Sparks* **(**2002) 28 Cal.4th 71, where it was held that the entry into a bedroom within a single-family house, when done with the requisite intent, is a burglary. *Sparks* further held that the intent to steal or commit a felony may be formed after the burglar enters the house, so long as it is formed before entering the "room" in question. The court in *Sparks* also discussed the policies behind the burglary statute. "Just as the initial entry into a home carries with it a certain degree of danger [to personal safety], subsequent entries into successive rooms of the home raise the level of risk that the burglar will come into contact with the home's occupants with the resultant threat of violence and harm." (*Id*., at p. 82.) Treating a defendant's entry into a closet contained within a residence as an entry into a room for the purpose of the burglary statute is fully consistent with the personal security concerns behind the statute. When a defendant, without permission, enters a closet in a home, he creates the risk that he will come into contact with the occupants of the home who object to his entry into the closet, either during his perpetration of the crime or his escape, and that violence will ensue. Further, as *Sparks* recognized, another policy behind the burglary statute is to prevent intrusion into an area of the home in which the occupants "reasonably could expect significant additional privacy and security." (*Id*., at p. 87.) Applying this reasoning, a closet must be treated as a room for the purposes of section 459. The Court further held that treating a closet as a room is also consistent with the common definition of the word "room." Lastly, defendant argued that a hallway closet is not an "inhabited dwelling," and thus cannot be the subject of a first degree burglary. (See P.C. § 460(a)) The Court similarly rejected this argument, noting that it need only be shown that the closet was contained within an inhabited dwelling, as it was in this case. This is because "a closet is functionally interconnected and contiguous to the portions of a residence in which people carry out activities of everyday living." The allegation that defendant committed a first degree burglary of an inhabited dwelling, therefore, was properly found to be true.

Note: Good case, and very helpful in clarifying the concept of entries into internal rooms of a residence or any other building. It is also consistent with the concept that if residential burglaries are to be treated more seriously than second degree burglaries, thefts and felonies perpetrated in residences should all be treated the same as any other first degree burglary whenever possible under the applicable statutory definition.

***Consent to Search*; *Groin Searches*:**

United States v. Russell **(9th Cir. Jan. 5, 2012) 664 F.3rd 1279**

Rule: Consent to be searched, given freely and voluntarily, justifies a warrantless search of the person. A search of the groin area comes within the scope of that consent when narcotics are suspected and the defendant is aware of what the officer is looking for.

Facts: An airport ticket agent reported to Officer Matt Bruch, a Port of Seattle Police Officer assigned to a task force with the Drug Enforcement Administration at the Seattle-Tacoma International Airport, that a suspicious person was about to board an Anchorage-bound airliner. The person, defendant in this case, was suspicious because he paid cash for a last minute, one-way ticket, he was traveling alone, and he did not have any checked luggage. Officer Bruch recognized this scenario as one indicative of a drug courier. He therefore proceeded to the boarding area for defendant's plane. Before contacting defendant, Officer Bruch also learned that defendant had a prior drug and firearm-related conviction and had been implicated in a prior drug investigation in Alaska. Officer Bruch approached defendant and, while displaying his badge, identified himself as a police officer investigating narcotics. Bruch told defendant that he was "free to go and he wasn't under arrest." He then asked defendant for permission to search a bag he was carrying and his person. Defendant consented. After handing the bag to another officer, Officer Bruch made a second request for permission to search his person. Defendant consented again, and in fact spread his arms and legs to facilitate the search. Officer Bruch started the search by patting down defendant's outer clothing ("using his 'standard operating procedure' for a frisk") in the area of the ankles, working his way up. He squeezed defendant's shins, knees and then thighs. Reaching the groin area, Officer Bruch "lifted up to feel" in the groin area. In so doing, he felt something hard and unnatural. Apparently recognizing this in his training and experience as indicative of contraband (my words, not the Court's), Officer Bruch arrested defendant. Presumably, defendant was searched more thoroughly in private (also not discussed by the Court), resulting in the discovery of 700 Oxycodone pills found in his underwear. The initial patdown search occurred entirely outside the clothing. Charged in federal court, defendant's motion to suppress was denied. Defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. It is well-established that consent is a recognized exception to the Fourth Amendment's protection against unreasonable searches and seizures. However, it is the government's burden to show consent was given "freely and voluntarily." In evaluating whether a suspect's consent was given freely and voluntarily, a court should consider at least five factors: (1) Whether defendant was in custody; (2) whether the officers had their guns drawn; (3) whether *Miranda* warnings

had been given; (4) whether the defendant was told he had a right not to consent; and (5) whether defendant was told a search warrant could be obtained. The fact that some of these factors are not established does not automatically mean that consent was not voluntary. In this case, defendant was not in custody. Nor did the officers either draw or even display their firearms. *Miranda* was a non-issue in this case because defendant was not under arrest, or even detained. Next, while defendant *was not* told that he had a right to refuse, he *was* told that he was not under arrest and that he was free to leave; the next best thing. Finally, the officers did not threaten defendant with the possibility of getting a search warrant if he refused to consent. The trial court's finding that defendant affirmatively consented to the search, coupled with consideration of this five-part inquiry, supports the trial court's conclusion that the consent was free and voluntary. However, despite giving consent, defendant also argued that it was not reasonable to assume that he was agreeing to having his groin area searched as well. The question here is whether a request to conduct a search of the person for narcotics reasonably includes the groin area. In other words, when defendant consented to a search of his person**,** was it reasonable for Officer Bruch to assume the consent included the groin area? The Court concluded that it was. The Court reached this conclusion based upon the following facts. First, defendant understood that Officer Bruch was looking for narcotics. To assist the officer in this endeavor, defendant lifted his arms and spread his legs. Also, with Officer Bruch starting at the ankles and working his way up, defendant had ample opportunity to object, but didn't. Based upon these circumstances, Officer Bruch reasonably concluded that defendant's groin area came within the scope of his consent. Defendant's motion to suppress was appropriately denied.

Note: No surprises in this decision. There was never anything indicating anything less than a free and voluntary consent, other than the fact that most of us are somewhat reluctant to let strangers grope our private parts. What would have been interesting is what Officer Bruch could have legally done had defendant denied the officer's request for a consent search. Even though defendant met the profile of a drug courier and had a criminal history to match, there probably was not enough to justify any more than a temporary detention for investigation, and therefore not enough for a non-consensual search. But how about the fact that defendant was found in the restricted area of an airport. Such a warrantless search, with less than probable cause, may under some circumstances be justified as an "*administrative search*," i.e., done for the purpose of keeping weapons off an airplane. (See *People v. Hyde* (1974) 12 Cal.3rd 158.) But administrative searches may not be conducted for the purpose of collecting evidence for a criminal prosecution. It's also been held that persons who have already passed through the initial screening station at an airport have a lessened expectation of privacy. (See *United States v. Marquez* (9th Cir. 2005) 410 F.3rd 612; a second, more intense, yet random screening of passengers as a part of airline boarding security procedures, held to be constitutional.) Absent valid security concerns, stopping and randomly searching potential drug couriers is likely illegal, even in an airport. Defendant's search, however, was not done randomly. I would like to have seen some discussion on how being in an airport might have affected defendant's right to refuse a consent search under these circumstances. Maybe next time.