San Diego District Attorney

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Remember 9/11/01; Support Our Troops

Dedicated to the memory of Officer Sergio Carrera Jr., of the Rialto Police Department, murdered in the line of duty on 10/19/07.

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THIS EDITION'S WORDS OF WISDOM:

"*It's a frightening feeling to wake up one morning and discover that while you were asleep you went out of style*." (Erma Bombeck)

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***ADMINISTRATIVE NOTES*:**

The Legal Update: This is the first *Legal Update* I've published since retiring. It is being sent to you via various methods different than those I used when I had direct access to the San Diego Sheriff's e-mail system. You can access the *Update* through any one of the above-listed websites. Those of you who are

already on the previously-maintained e-mail list (to which you can be added upon request) will be noticed to access "*LegalUpdateonline.com*." As of now, this website will only have this *Update*, but will contain much, much more in the near future. CaCrimeNews.com already contains an abundance of other information. SDSheriff.net/legalupdates/ contains Updates dating back to 2001, plus some other stuff. I'm inviting feedback on how this is working and taking suggestions for further improvements. My goal is to make the *Update* as easily accessible to as many people with a constructive interest who want it, but not add to the spam that's already floating around the Internet. Please let me know how we're doing.

CASE LAW:

***Medical Marijuana; Transportation of*:**

People v. Wright **(Nov. 27, 2006) 40 Cal.4th 81**

Rule: The transportation of marijuana (H&S § 11360) is not illegal if the person charged qualifies for limited immunity under Proposition 215, the "*Compassionate Use Act*" (H&S § 11362.5), as expanded by the "*Medical Marijuana Program*" (H&S §§ 11362.7 et seq.).

Facts: In September, 2001, Huntington Beach police officers responded to a tip that a particular Toyota pickup truck at a carwash contained a backpack that "reeked" of marijuana. The truck was observed coming from the carwash and was stopped. The officer could smell the odor of marijuana as he walked up to the window. A backpack was noticed on the seat next to the driver, defendant. Defendant denied that there was any marijuana in his truck. Defendant stepped out of the truck when asked, holding onto the backpack. Defendant denied a second time that there was any marijuana in his truck. A patdown of his person resulted in the recovery of a small baggie of marijuana in his pants pocket. His backpack was found to contain six more marijuana baggies, two large bags of marijuana, and an electronic scale. A larger bag of marijuana, weighing 469.4 grams (slightly more than a pound), was found in his truck. Charged with possession of marijuana for purposes of sale and the transportation of marijuana, defendant asked the trial court for a jury instruction based upon the Compassionate Use Act of 1996 (Proposition 215; H&S §§ 11362.5), telling the jury that if defendant proves by a "*preponderance of the evidence*" (see Note, below) that he was using marijuana in compliance with the Act (i.e., for personal medicinal purposes with a physician's authorization), he must be acquitted. In support of such an instruction, defendant's doctor testified that he had authorized defendant's use of marijuana for various aches and pains. Defendant himself testified that his marijuana was intended for his personal use due to his "chronic pain." He also testified that he prefers to eat the stuff rather than smoke it, which requires he use it in greater than normal amounts. The trial court declined to give the defendant's requested instruction. Law enforcement experts testified that in their respective opinions, based upon the amount of marijuana, its packaging, and the presence of an electronic scale, defendant possessed the marijuana for purposes of sale. Defendant was convicted on both counts and appealed. A divided Fourth District

Court of Appeal ruled that the jury should have been instructed as defendant had requested, and reversed his conviction. The People petitioned to the Supreme Court.

Held: The California Supreme Court in a unanimous decision reversed (reinstating defendant's conviction), six out of the seven justices ruling that while the trial court should have instructed the jury as defendant had requested, the error in not doing so was harmless. The "*Compassionate Use Act*" ("CUA") was passed by Initiative on November 5, 1996, enacting H&S § 11362.5. The Act has three purposes: (1) To ensue that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician; (2) to ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction; and (3) to encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana. But as written, the CUA only provides the user of marijuana and his or her primary caregiver with limited immunity (i.e., an "*affirmative defense*") from prosecution for the simple possession and the cultivation of marijuana. Transporting the marijuana to the user is not exempted from criminal prosecution under the terms of the CUA despite the fact that later appellate court decisions recognized that some movement of the marijuana is necessary to get it to the patient. While the appellate process in this case was pending, the Legislature enacted what is referred to as the "*Medical Marijuana Program*" ("MMP"); H&S §§ 11362.7 et seq.; effective January 1, 2004. Pursuant to the MMP, the limited immunity from prosecution provided for under the CUA is extended to the transportation of marijuana (H&S § 11362.765(a)), at least where the marijuana is intended for the personal use of a "*qualified patient*" as defined in H&S § 11362.7(f). If the jury believed that defendant in this case required the marijuana for his chronic pain, and otherwise met the requirements of the CUA (e.g., physician's authorization, etc.), then he could legally transport it to his home. The Supreme Court ruled that the protections of the MMP are retroactive to cases still pending, including this one. It was error, therefore, not to instruct the jury that transporting marijuana is legal so long as he otherwise qualifies under the CUA. However, with the option of finding defendant guilty of the simple possession of marijuana, the jury chose instead to find him guilty of the greater offense of possessing the marijuana for purposes of sale (H&S § 11359). "Possession for sale" is not a charge included within the limited immunity of the CUA when it is possessed for other than his own personal use. (See H&S § 11362.765(b)(1)) Having found defendant guilty of possession for sale, the jury necessarily found that defendant was not entitled to the protections of the CUA. Defendant, therefore, would have necessarily been found guilty even if the court had given the requested instruction. The error was therefore harmless.

Note: While the majority opinion calls the failure to give the requested jury instruction "error," a dissenting and concurring opinion by Justice Baxter notes that since the MMP did not exist when the trial judge was deciding what instructions were appropriate, he could not have committed error by failing to comply with a statute that did not exist at the time. Justice Baxter also disagrees with the majority's conclusion that the instruction should have been given at all, noting the inconsistencies in the defendant's arguments and

the overwhelming evidence of his guilt. Also note that while defendant argued that the jury should have been instructed that he had a defense to the charges if he could prove "*by a preponderance of the evidence*" that he qualified for immunity under the CUA, the California Supreme Court has since held that a defendant need only "*raise a reasonable doubt*" (*People v. Mower* (2002) 28 Cal.4th 457, 464.), a much easier standard for the defendant to meet. Lastly, this case does not address the continuing inconsistency between state and federal law, the feds still considering marijuana to be illegal no matter what the circumstances. (*Gonzales v. Raich* (2005) 545 U.S. 1.) Whether or not this problem is ever resolved remains to be seen.

***Probable Cause to Arrest*:**

Gillan v. City of San Marino **(Jan. 25, 2007) 147 Cal.App.4th 1033**

Rule: Contrary to the general rule, probable cause to arrest based upon a victim's report of a crime is lacking when the alleged victim's story lacks detail, is inconsistent in the telling, the victim has a motive to lie, and there is no independent corroboration.

Facts: Shortly after her high school graduation, a 17-year-old former member (referred to throughout the appellate court decision as "*the accuser*," as opposed to "*the victim*") of a high school girls' basketball team told her psychiatrist, her mother, and her college basketball coach, that Patrick Gillan, her high school basketball coach, had committed a number of inappropriate sex acts with her over the past year while she was on the team. Eventually, Sgt. Street, a San Marino police officer and friend of the accuser's mother, interviewed her. She described for him several incidents of groping, attempts at oral copulation, and other unconsented to sexual contacts between her and Gillan. Sgt. Street decided to arrange a meeting between the accuser and Gillan with her wearing a listening device. The next day the accuser approached Gillan after a basketball game and asked to speak to him alone. Telling Gillan that she needed to come to terms with the "touching, and things like that," Gillan asked her; "*Touching*? *What do you mean*?" She described for him one alleged incident where she said he put his hand down her shorts. Gillan denied that any such thing had ever occurred and accused her of making up stories. That same evening, Sgt. Street had the accuser telephone Gillan and again attempt to elicit some admissions. Gillan continued to deny any inappropriate contacts with her. Sgt. Street submitted the case to a Los Angeles deputy district attorney who interviewed the accuser. Sgt. Street informed a supervising deputy district attorney that he intended to arrest Gillan for the purpose of publicizing the incident, hoping more victims might come forward. The plan was to book, fingerprint and photograph Gillan, and then release him pursuant to P.C. § 849(b)(1) (i.e., "insufficient grounds for making a criminal complaint against the person arrested"). In the company of his attorney, Gillan turned himself in. He was in fact released after being booked. Upon being released, San Marino Police Department gave him a "Detention Certificate," telling him that being taken into custody was recorded as a "detention only." (See P.C. § 849.5) Gillan was suspended by the school pending an investigation. A press release was prepared, given to a news service, and widely circulated. A press briefing was also held where Gillan was identified by name, announcing that he had been arrested for assault with intent to commit a sex

offense, per P.C. § 220, and that he had "sexually molested a member of last year's girl's basketball team on several occasions," a 17-year-old. No new victims ever came forward. The District Attorney eventually declined to prosecute, noting the "lack of sufficient corroboration." Gillan resumed his coaching job. He eventually sued the City of San Marino and the Police Department (and others) in state court pursuant to Civil Code § 52.1, alleging, among other things, that he had been arrested without probable cause. A jury found for Gillan and awarded him almost 4½ million dollars. Defendants eventually appealed.

Held: The Second District Court of Appeal (Div. 3) affirmed, except to order a new trial as to the compensatory damages and to reverse an award for attorney's fees. The primary issue on appeal was whether there was sufficient probable cause to arrest Gillan. The Appellate Court agreed with the trial court in finding that there was not. "Probable cause exists when the facts known to the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime. [Citation.] '[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . .' [Citation.] It is incapable of precise definition. [Citation.] 'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' and that belief must be 'particularized with respect to the person to be . . . seized.' [Citations.] '[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment'" Typically, information from a victim or a witness to a crime, "absent some circumstance that would cast doubt upon their information," is enough to establish probable cause. A victim or uninvolved witness is generally considered to be reliable. "Information provided by a crime victim or chance witness alone can establish probable cause if the information is sufficiently specific to cause a reasonable person to believe that a crime was committed and that the named suspect was the perpetrator. [Citation.] 'Neither a previous demonstration of reliability nor subsequent corroboration is ordinarily necessary when witnesses to or victims of criminal activities report their observations in detail to the authorities.' [Citation]" In this case, however, the Court noted that the accuser's various accounts of the alleged sex acts "lacked sufficient detail or were inconsistent in the details provided." Referring to the various interviews of the accuser, the Court noted how her descriptions of the events tended to change with each telling. They also noted that before one of their basketball games, Gillan had berated her as "worthless," apparently causing her some embarrassment, and that she had "repeatedly expressed her strong antipathy towards Gillan based on his treatment of her as a player on the basketball team apart from the alleged sexual harassment." Per the Court, probable cause is not established when you take into account the accuser's motive to hurt Gillan, her inconsistent accounts, the lack of detail in her descriptions of the various acts, the lack of any corroboration for her story, and Gillan's repeated denials.

Note: As cops and prosecutors, we tend to get a bit jaded by defense attorneys who predictably argue all of the above in trying to save their useless, perverted, pedophile clients. So our first inclination is to ignore claims that our victims might not be telling the truth and work under the assumption that truth and justice is always on our side. Even here, I can feel myself wondering whether the Appellate Court wasn't sold a bill of

goods that they naively bought, "hook, line and sinker." But you also have to remember that even the police officers in this case didn't believe they had probable cause, as demonstrated by the fact that they releasing him pursuant to P.C. § 849(b)(1) immediately after his arrest. The Court does not tell us whether the L.A. DDA went along with this plan to arrest him solely for the purpose of generating a little publicity. But it seems to me that someone should have felt at least a little uncomfortable with the plan to arrest a man, exposing him publicly to a lot of shame and embarrassment, when they all knew that there wasn't sufficient probable cause to hold him. Memorializing their belief that they lacked probable cause by handing him a "Detention (only) Certificate" as he walked out the door certainly didn't help them in the resulting civil suit. It might have been a better idea to simply write him a 4½ million dollar check right then and there and save everyone a lot of time and effort.

***Trespassing on Commercial Property*:**

***Blankenhorn v. City of Orange* (9th Cir. May 8, 2007) 485 F.3rd 463**

Rule: An arrest for trespassing in a shopping mall is upheld in this case. (*But be careful*.)

Facts: In February, 2001, Gary Blankenhorn, a "known 18th Street gang member," caused some sort of disruption at "The Block;" a shopping mall in the City of Orange. Upon being 86'ed from the mall, he was issued a written "Notice Forbidding Trespass" which informed him that if he returned he would be prosecuted for trespassing. Orange Police Department Sgt. Jeff Gray was present when Blankenhorn was ejected. Almost six months later, Sgt. Gray observed Blankenhorn at the mall and remembered that he'd been ejected some months earlier. He and another officer contacted Blankenhorn so they "could talk to him, identify him and determine whether The Block security wished to have him removed or take some other action." In attempting to detain Blankenhorn—the suspected offense being trespassing per P.C. § 602(j) (now, (k))—he became uncooperative and tried to leave. Although the sequence and nature of the subsequent events was later the subject of some dispute, it was at least agreed that a physically resisting Blankenhorn was eventually subdued and arrested by the officers with the assistance of a security guard. After a struggle, the officers eventually handcuffed him and "secure(d) his wrists and ankles with ripp-hobble restraints." Charged in state court with one count of misdemeanor trespass per P.C. § 602(n) (now, (o)), three counts of resisting arrest, and one count of disturbing the peace (everything but the trespass being charged as felonies through the addition of a gang-related enhancement per P.C. § 186.22(d)), a preliminary hearing was held. After the preliminary hearing, however, the Orange County District Attorney dismissed the entire case against Blankenhorn, citing witness credibility issues as the reason. But by that time, Blankenhorn had already been in jail for three months. Having no sense of humor, Blankenhorn sued the involved officers in federal court for false arrest, excessive force, and malicious prosecution. The federal district court granted the officers' motion for summary judgment, dismissing the civil suit. Blankenhorn appealed.

Held: The Ninth Circuit Court of Appeal affirmed, with a majority (2-to-1) of the Court finding that the officers had probable cause to arrest Blankenhorn, . . . *but barely*. (The Court reversed on the issue of whether the officers had used excessive force, finding enough of a conflict in the evidence to submit that issue to a jury.) In California, "an officer has probable cause for a warrantless arrest 'if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." The issue here is whether the officers had probable cause to arrest Blankenhorn for trespassing (all other charges being dependent upon the legality of the trespass arrest). Blankenhorn had been forbidden from entering The Block some six months before. He knew that he was banned from the mall. The officers, in arresting him, charged him with P.C. § 602(j) (now, (k)). On the state court criminal complaint, the charge was changed to P.C. § 602(n) (now, (o)). So long as either trespass charge (or any other) applies, the arrest was lawful. P.C. § 602(j) requires that there be probable cause to believe that defendant was on the mall's property (1) "for the purpose of injuring any property or property rights or (2) with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of the land, the owner's agent or by the person in lawful possession." The Court here found that the officers were reasonable in believing that a known gang member who had been banned from the mall "*could*" have returned for either of these purposes or intentions. Also, P.C. § 602(n) (now (o)) makes it a trespass to refuse or fail "to leave land, real property, or structures occupied by another and not open to the general public, upon being requested to leave by (1) a peace officer at the request of the owner, the owner's agent, or the person in lawful possession, . . . or (2) (by) the owner, the owner's agent, or the person in lawful possession." The Court here interpreted the "Notice Forbidding Trespass," given to Blakenhorn some six months earlier, as his request to leave. And with that notice, the mall was no longer "open to the general public," at least as far as defendant was concerned. Perhaps recognizing the weaknesses in these arguments for using either of these trespass sections under these facts (i.e., "(I)t appears an actual conviction for trespass might have been difficult without additional evidence."), the Court noted that "*probable cause*" is a far easier standard to satisfy than that of "*beyond a reasonable doubt*." As noted by the Court: "Ultimately, . . . our inquiry is not whether Blankenhorn *was* trespassing. Rather, it is whether a reasonable officer had probable cause to think he could have been." Therefore, despite the unlikelihood of obtaining a conviction, the officers at least had sufficient evidence to satisfy the requirements of a lawful arrest. And even if not, the legal issues involved are so unsettled that the officers were entitled to qualified immunity from civil liability.

Note: While agreeing that the officers are entitled to qualified immunity, the dissenting Justice argued that Blankenhorn did not violate any trespass statute under California law. And I'm afraid I have to agree with the dissent. Just noting the length of the majority's written opinion hints at the difficulty the two majority Justices were having rationalizing away their conclusions that 602(j) and (n) (now (k) and (o)) "*might*" apply. The uselessness of California's P.C. § 602 to most situations, and how easily and often we abuse this Penal Code section by merely labeling a variety of circumstances as a "*trespass*," without concerning ourselves whether we can prove *all* the elements of at least one of the subdivisions of P.C. § 602, is something I've been harping on for some time. And I'd caution you not to use this case decision as authority for using 602(k) or

(o) again in any situation similar to this case. The City of Orange officers got a gift here. The next Court that airs this discussion might not be so generous.

***E-Mail Trap and Trace*:**

United States v. Forrester et al. **(9th Cir. Jul. 6, 2007 [as modified 7/25/07]) 495 F.3rd 1041**

Rule: Installation of a "*mirror port*" (similar to a trap and trace device) to a person's e-mail account is not a search and thus does not require a search warrant.

Facts: Defendants Mark Stephen Forrester and Dennis Louis Alba were the targets of a lengthy government investigation which, at least as far as Alba was concerned, involved investigators using various computer surveillance techniques including the monitoring of Alba's e-mail and Internet activity. This required the government investigators to apply for and receive court permission in an ex parte order (as opposed to a search warrant) to install a "pen register analogue," known as a "*mirror port*," on Alba's computer. (See 18 U.S.C. §§ 3121-3127) The "mirror port" allowed the government to collect the "to" and "from" addresses of Alba's e-mail messages, the IP addresses of the websites he visited, and the total volume of information sent to or from his account. (The government later obtained a search warrant authorizing the use of imaging and keystroke monitoring techniques, but this warrant was not challenged on appeal.) This and other investigative efforts led to evidence that defendants were setting up a major Ecstasy laboratory in Escondido, California, intended to produce approximately 440 kilograms of Ecstasy (with a $10 million profit) per month. Defendants were indicted on various conspiracy charges in federal court and convicted after a jury trial. Both defendants appealed.

Held: The Ninth Circuit Court of Appeal reversed Forrester's conviction, but affirmed Alba's. As for Forrester, his conviction was reversed because when he chose to represent himself at trial, the trial judge failed to apprise him of the charges against him and misinformed him as to the possible maximum sentence. As for Alba, the issue was the legality of the warrantless court order allowing for the use of the "mirror port." In upholding the procedure as used in this case, the Court cited the U.S. Supreme Court case of *Smith v. Maryland* (1979) 422 U.S. 735, which held that the use of a "pen register" (a device that records numbers dialed from a phone line) does not constitute a search for Fourth Amendment purposes, and therefore does not require a search warrant. This is because a person who dials a number understands that these numbers are being sent to a third party, i.e., the telephone company. There is no expectation of privacy in something a person purposely exposes to a third party. The Court found that the use of a "mirror port" is "constitutionally indistinguishable" from the use of a pen register. E-mail and Internet users understand that the "to" and "from" addresses of e-mail messages, the IP address of websites a person visits, and the total volume of information sent to or from an e-mail account, is information conveyed through the equipment of their Internet service provider and other third parties. Voluntarily revealing this information to third parties extinguishes any expectation of privacy a person might otherwise have had in this

information. The Fourth Amendment, therefore, does not prevent the obtaining of such information without having to resort to a search warrant.

Note: Note that this is a federal case, giving us a federal opinion on the legality of a warrantless request for a federal court order to get telephone and e-mail records. Pursuant to federal statutes, all that is necessary is for the investigator to make a request in writing, under oath, to a court of "competent jurisdiction." It is not even necessary that you establish probable cause. (See 18 U.S.C. §§ 3121-3127) The problem is that the California Attorney General is of the opinion that these rules do not apply to state officers engaged in a state investigation. To go after pen register, trap and trace, and, arguably, "mirror port" information, the California Constitution requires that you get a search warrant. (*86 Opinion of Attorney General Bill Lockyer 198* (2003).) So why did I brief this case? Because since 2003, just about everyone who is conversant in this subject has expressed disagreement with the Attorney General, resulting in most judges (at least in San Diego County) totally ignoring him on this issue. If you can find a judge who will sign an ex parte court order for a pen register, trap and trace, or a mirror port, you are not risking the suppression of any evidence. That's because while you "*might*" be violating the California Constitution (which no one but the California A.G. believes), you *are not* violating the Fourth Amendment. It is a rule of law that we only suppress evidence when (1) you violate the U.S. Constitution or (2) the statute dealing with the issue requires suppression of evidence. Per this decision (at p. 1051), failing to follow these federal statutes dealing with pen register, trap and trace, and, arguably, mirror port information, does not require the suppression of any evidence. And since passage of Proposition 8 (June, 1982), violating the California Constitution similarly does not necessitate the suppression of your evidence. So, *go for it*.

***Possession of Burglary Tools, per P.C. § 466*:**

People v. Kelly **(Aug. 29, 2007) 154 Cal.App.4th 961**

Rule: A box cutter and slingshot, with evidence tending to indicate that they are possessed for the purpose of committing vehicle burglaries, are burglary tools per P.C. § 466 even though not specifically listed in the section.

Facts: Defendant, already on probation in a theft case where a charge of vehicle burglary was dismissed as a part of a plea bargain, was observed by San Francisco Police Department Inspector Mark Gamble in the vicinity of a reported "vehicle burglary in progress." Defendant matched the description of the suspect reported to have broken into a white van which Inspector Gamble found with a shattered rear passenger window. Defendant quickly looked away, made a sharp right turn, and walked in the opposite direction when Inspector Gamble approached. Defendant was detained and found to be holding onto two cell phones, at least one of which was stolen. He was carrying a backpack which contained clothing that matched the description originally telephoned into the police dispatcher. In addition to the cell phones, he also had some other items later determined to have been taken from the burglarized van. He also had in his backpack a box cutter, a slingshot, and a flashlight. Inspector Gamble, with experience

investigating vehicle burglaries, opined that these items qualified as burglary tools. A slingshot, per Inspector Gamble, was used with ceramic sparkplug chips to break an automobile window; a technique that "will crack the glass usually on the first hit." The box cutters are used to cut the wires on car stereos. Flashlights are used to see inside the dark interior of a car. A probation revocation hearing was held where it was alleged that defendant had committed a vehicle burglary and was in possession of stolen property and burglary tools. Because the theft victims were not in court, the judge declined to consider evidence of the vehicle burglary and the possession of stolen property. However, with Inspector Gamble's testimony, the Court found that defendant was in possession of burglary tools and revoked his probation. Defendant appealed.

Held: The First District Court of Appeal (Div. 3) affirmed. Penal Code § 466, describing the misdemeanor crime of being in possession of burglary tools, lists various tools commonly used to commit burglaries. The section *does not* mention slingshots, box cutters or flashlights. The section does provide, however, that in addition to the tools specifically listed, any "*other instrument or tool*" can be a burglary tool so long as possessed "*with intent to feloniously break or enter into any . . . vehicle . . . .*" The Court discussed the prior case of *People v. Gordon* (2001) 90 Cal.App.4th 1409, which had held that under a rule known as "*ejusdem generis*," tools not listed cannot be burglary tools unless they are at least of the same type as those that are listed. P.C. § 466 only lists "a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, floor-safe puller, master key, ceramic or porcelain spark plug chips or pieces." Under the rule of "*ejusdem generis*," neither a slingshot nor box cutter would likely be burglary tools. This Court, however, criticized *Gordon*, choosing to ignore that decision's holding when it used the rule of "*ejusdem generis*" to restrict what tools would be included under "*other instrument or tool*." The circumstances of this case clearly show that defendant possessed the slingshot and the box cutters with the intent to commit vehicle burglaries. Such items, therefore, are burglary tools.

Note: *Gordon*, which dealt with whether ceramic sparkplug chips could be burglary tools, was much criticized when it was decided in 2001. Shortly after it was published, the Legislature reacted by amending section 466 to specifically include sparkplug chips, as noted above. This Court points out that the rule of "*ejusdem generic*," as a "rule of construction," is supposed to be used to help interpret the intent of the Legislature, not thwart it. The obvious legislative intent was to include any item or object that is possessed with the intent to assist in the commission of burglaries. The Court here, however, specifically declined to decide whether defendant's flashlight was an "*other instrument or tool*" under the section. (See footnote 4.) My guess would be that under the facts of this case, the flashlight would also qualify as a burglar tool. But please note that you can't go charging anyone and everyone in possession of box cutters, slingshots, or flashlights (or even any of the tools listed in P.C. § 466) with being in possession of burglary tools. You also must be able to prove that your crook possessed them with the intent to do burglaries. This particular defendant, in addition to his criminal history of having committed vehicle burglaries, had just committed new one. The evidence of his reasons for possessing these items was overwhelming.