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Remember 9/11/01; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*A simple way to take measure of a country is to look at how many want in ... And how many want out*." (Tony Blair)

IN THIS ISSUE: Page:

ADMINISTRATIVE NOTES:

***P.C. § 288.7: Correction*:** It was pointed out to me that the title of the new section, P.C. § 288.7, as described in *Legal Update*, # 12, at pg. 2, where it said "*Sex Acts with Child 10 years or Younger Than Suspect*," is incorrect. As indicated in the description of the elements, "*than suspect*" is incorrect and should

be deleted so that it reads simply: "*Sex Acts with Child 10 years or Younger*." My thanks to the LAPD sex crimes detective, whose name I neglected to write down, who pointed this out to me.

CASE LAW:

***Assaults and Attempts*:**

People v. Chance **(Jul. 20, 2006) 141 Cal.App.4th 618**

Rule: An "*assault*" requires a "*present ability*" to complete the intended harm, while an "*attempt*" merely requires no more than some direct, ineffectual act done toward the commission of the intended offense.

Facts: El Dorado County Sheriff's deputies were attempting to serve felony arrest warrants on defendant at his home when he saw them coming and ran. Sergeant Tom Murdoch, while in full uniform including a vest displaying a gold badge, insignia and "Sheriff" written on it, gave chase. With Sgt. Murdoch yelling "*Sheriff's Department, stop*!" and while in hot pursuit but some 40 or 50 feet behind, defendant was observed pulling out a nine-millimeter semi-automatic handgun. Defendant ran around the front of a travel trailer parked in the driveway, and out of sight. Not wanting to get shot, Sgt. Murdoch stopped, and with his own gun drawn, slowly moved in the opposite direction around the back of the trailer. When Sgt. Murdoch got to the rear of the trailer, he looked around its corner on the opposite side and saw defendant, with his chest pushed up against the trailer's side, looking toward its front. Defendant was holding his gun out in a shooting position, supported by his opposite hand, pointing it towards the front of the trailer from where he expected Sgt Murdoch to be coming. Sgt. Murdoch moved up behind the unsuspecting defendant until defendant turned and saw him coming. Sgt. Murdoch did not shoot defendant at that point only because he knew that defendant couldn't shoot first without changing his position. Defendant at first ignored the sergeant's command to drop his gun. But, in what seemed like a "long time," he eventually lowered his gun and dropped it. He attempted to take off running again, but was quickly captured. The gun was found to be fully loaded with 15 rounds in the magazine, but with the chamber empty. In order to shoot the gun, the defendant would have had to pull the slide all the way back before pulling the trigger. Arrested for a host of criminal charges, defendant was convicted (among other offenses) of both attempted premeditated murder of a peace officer (P.C. §§ 664/187) and assault with a deadly weapon on a peace officer. (P.C. § 245(d)(1)) He appealed his 70-years-to-life sentence.

Held: The Third District Court of Appeal (El Dorado) affirmed in part and reversed in part. As to the charge of Assault with a Deadly Weapon ("ADW"), P.C. § 245(d)(1) makes it a 4, 6 or 8-year felony to commit an assault with a firearm upon a police officer. P.C. § 240 defines an "assault" as an unlawful attempt, "*coupled with a present ability*," to commit a violent injury on the person of another. Evaluating the Common Law and recent case authority, the Court held that the need for a "*present ability*" requires that the assault be some act that is "*immediately precede*(*nt to*) *a battery*." Prior case law has

upheld assaults where a defendant is pointing a gun at an intended victim with nothing left to do but to pull the trigger. Here, however, the defendant was facing the wrong direction. To shoot Sgt. Murdoch, defendant would have had to reverse his entire body position, turn the gun 180 degrees, chamber a round, and then pull the trigger. Even Sgt. Murdoch conceded that defendant never would have had the opportunity to do that without being shot first. As such, defendant did not have the "*present ability*" to shoot Sgt. Murdoch. However, for an attempted murder it is only required, along with the defendant's intent to kill, that there be committed some direct, ineffectual act done toward the commission of the intended offense. A "*present ability*," as required for an assault, is not an element of an attempt. In this case, defendant was poised to kill Sgt. Murdoch, frustrated in his attempt only through Murdoch's foresight in coming around behind him. The fact that there was no bullet in the chamber of the defendant's gun is not sufficient to negate the jury's conclusion that defendant did in fact attempt to murder Sgt. Murdoch. So, while the ADW charge must be reversed, the premeditated attempted murder charge was upheld.

Note: The principle value of this case is the Court's comparison of an "*assault*" and an "*attempt*." While their discussion of the elements of an assault is excellent, their analysis of what it takes to commit an attempt is a bit weak. But the Court's conclusion that the line for any attempt is crossed a lot sooner than it is for an assault is an important point. To put their analysis in other words, while an attempt does not require that the defendant commit the last act possible before he commences the intended offense, an assault probably does. Also, for an assault, impossibility of completion (i.e., no "*present ability*") is a defense. For an attempt, where the "*apparent ability*" is enough, it is irrelevant that it might have been impossible for the defendant to ever complete his intended crime.

***Pat Downs on a High School Campus*:**

In re Jose Y. **(Jul. 21, 2006) 141 Cal.App.4th 748**

Rule: A pat down of a person on a high school campus who appears to have no business there does *not* require a reasonable belief that he may be armed and dangerous.

Facts: A campus security officer observed three minors sitting on the grass in front of South Gate High School. Not recognizing them as students at that school, the security officer told Officer Tommy Chung; a Los Angeles Police Officer assigned to that school. Officer Chung contacted the three minors and asked them for identification. All three said that they had no identification, although defendant produced a registration form from another school with his name on it. Officer Chung decided to take the three minors to his office in order to verify their identities and determine what school they attended. But because he was alone, he decided to pat the three minors down for his own safety. In so doing, he recovered a "locking blade knife," a violation of P.C. § 626.10, from defendant's pants pocket. Defendant was charged by petition in juvenile court. His motion to suppress the knife was denied and the petition was sustained.

Held: The Second District Court of Appeal (Div. 4) affirmed. While not even deciding whether the officer had cause to believe defendant might be armed, the court held that when confronted with a person on a high school campus who appears to have no business there, a reasonable belief that he may be armed and dangerous is not necessary in order to justify a pat down for weapons. Balancing the governmental interest in maintaining a safe and orderly environment for learning on a high school campus with a suspect's privacy rights, the former will take precedence over the relatively limited intrusion of a pat down for weapons and its "minimal invasion of (defendant's) privacy rights." Patting defendant down for weapons, therefore, was lawful.

Note: Not discussed here is the fact that a "*school resource officer*," although employed by a municipal police department, need only comply with the relaxed search and seizure standards applicable to school officials when working on campus and helping to enforce school rules as well as Penal Code violations. (*In re William V.* (2003) 111 Cal.App.4th 1464.) In this era of seemingly random school shootings and similar violence, such a relaxed legal standard is a good thing. Whoever came up with the idea that juvenile delinquents should have constitutional rights anyway, should have his head examined. But at least on a K through 12th grade school campus, law enforcement has been given the green light, short of an arbitrary, capricious, or harassing manner (*In re Randy G.* (2001) 26 Cal.4th 556.), and within reasonable limits, to do what is necessary to insure the safety of our children's teachers and the students themselves.

***Child Pornography and Computers*:**
***Border Searches*:**

United States v. Romm **(9th Cir. Jul. 24, 2006) 455 F.3rd 990**

Rule: (1) Knowing possession of child pornography in one's computer is sufficient to prove the receipt and possession of that pornography despite efforts to delete it. (2) A computer is subject to a warrantless, suspicionless search at an International Border.

Facts: Defendant, while on probation on a Florida state child pornography case, used his laptop computer to "google" his way into a couple of child pornography websites. Viewing the resulting downloaded images for a limited time (just sufficient for him to take care of some personal self-gratification needs, per his later statement), a procedure that automatically resulted in a copy of each image being saved in his "Internet cache," he would then delete the images. Shortly thereafter, defendant traveled to Kelowna, British Columbia, on business, where he was detained by Canada's Border Services Agency when it was discovered that he had a criminal record and was on probation. Defendant's computer was checked. When the computer's internal "Internet history" showed several visits to some child pornography websites, defendant was put on the next flight back to the States. Bound for the Seattle-Tacoma airport, the Canadian officials warned U.S. Immigration and Customs Enforcement ("ICE") agents of defendant's impending arrival. Defendant was therefore detained by U.S. ICE agents when he got off the plane. When interviewed (subsequent to a *Miranda* admonishment and wavier), defendant admitted that he had "drifted" away from his "therapy," and had experienced

"occasional lapses" during which he would view child pornography. His laptop was taken from him and subjected to a warrantless forensic analysis. Although denying that he had any child pornography on his computer, the preliminary analysis revealed ten images of previously deleted child pornography, including a couple of "thumbnail" images which defendant had at some point enlarged, and information about when the files were created, accessed, or modified. When confronted with this evidence, defendant admitted to being a bad boy. A more thorough forensic analysis was done and resulted in the recovery of 42 child pornography images that, despite having been deleted after defendant viewed them, were recoverable from the computer's hard drive. Expert testimony explained how such deleted files can be retrieved and saved. Defendant's motion in federal court to suppress the files recovered from his computer was denied, and he was convicted by a jury of both possessing and receiving child pornography. Sentenced to 10 and 15-year concurrent terms, defendant appealed.

Held: The Ninth Circuit Court of Appeal affirmed. The Court first rejected defendant's argument that his computer could not be searched without probable cause and a search warrant. As a "*border search*," a lower standard of proof is applicable (see *Note*, below) and a search warrant was not needed. Secondly, despite defendant's argument that because he never "legally" crossed into Canada, the Court ruled that defendant had "physically" been to Canada, and that was enough to allow for his search upon his return. Although he was never out of official restraint while in Canada, and thus never had the opportunity to obtain any contraband while there, defendant was still subject to search upon returning to the United States. Next, the Court rejected defendant's argument that by merely *viewing* the child pornography, it cannot be said that he "*possessed*" or "*received*" it. Downloading the pornographic images, thereby having the ability to copy, print or e-mail them to others, is sufficient dominion and control over the images to be said to have both "*possessed*" and "*received*" them. Defendant also argued that the deleted pictures in his computer, until converted into something you can see on his screen, are not "*visual depictions*," as required by the pornography statutes. The Court rejected this argument as well, noting that a "*visual depiction*" includes "data stored on computer disks or by electronic means which is capable of conversion into a visual image." Forensic experts testified to how, despite defendant's attempts to delete the images, they could still be retrieved and converted to a visual image. Lastly, defendant argued that it was not proved that he ever "*knowingly possessed*" the pornographic images, or had "*dominion and control*" of them. Defendant, by his own admissions, however, admitted to having downloaded the images onto his computer and viewing them, albeit for a limited time. Defendant's conviction, therefore, was upheld.

Note: I really got lost in the arguments being made in this case. If you're a computer nerd, and deal with having to search computer files for pornography, then you might want to read the whole case. You'll probably get more out of it than I was able to explain above. But it appeared to my simple mind that what defendant was trying to say was that carrying around a computer with child pornography contained in the computer's cached Internet files is neither "receiving" nor "possession" of child pornography until you retrieve and open those files in preparation for drooling over them. The Court wasn't buying this argument at all, at least when he had already cop'd to having purposely

downloaded the images. Also, defendant argued that subjecting his laptop to a forensic analysis was a "*non-routine*" (requiring a reasonable suspicion) border search, as opposed to a "*routine*" (requiring no suspicion) search. But having failed to raise this issue in the trial court, defendant was held to have waived it. However, in footnote 11, the Court hinted very strongly that had they decided the issue, it would have been found to be merely a "*routine*" search and therefore lawful even with no suspicion.

***Pretext Stops, Based on a Civil Parking Violation*:**

***United States v. Choudhry* (9th Cir. Aug. 25, 2006) 461 F.3rd 1097**

Rule: The "*pretext stop*" theory of *Whren v. U.S.* applies to civil parking violations.

Facts: Two patrol officers observed a car illegally parked in a marked "no stopping/tow away" zone in a "high-crime area" of San Francisco, just after midnight; a municipal code civil infraction (S.F. Traffic Code, § 32). Unable to determine whether the car was occupied, one of the officers lit it up with his spotlight, causing its two occupants to engage in some "hurried movements." Suspecting that some sort of illegal activity was afoot, the officers got out of their car to make contact with the vehicle's occupants. As they did so, the car's driver started the engine and began to drive off. She stopped, however, when commanded to do so by the officers. While one officer contacted the driver (who was found to be driving on a suspended license and had two outstanding arrest warrants), the other contacted the passenger; defendant Choudhry. Upon smelling the faint odor of marijuana, the officer ordered defendant out of the car. A pat down for weapons prompted defendant's admission that he had marijuana in his pocket. Upon recovering the marijuana and putting him in the patrol car, defendant, apparently predisposed to his fate, also volunteered that he'd "found" a pistol and that he'd put it in the car. A pistol was in fact recovered from under the seat. Defendant, a convicted felon, was charged in federal court with being a felon in possession of a firearm (18 U.S.C. § 922(g)). Arguing that a traffic stop for a violation of a "civil traffic regulation" is a violation of the Fourth Amendment, defendant's motion to suppress the gun was denied by the trial court. He pled guilty and appealed from his 57-month prison sentence.

Held: The Ninth Circuit Court of Appeal affirmed. The U.S. Supreme Court determined some 10 years ago that a police officer may stop and detain someone for a simple traffic offense, even if the officer's real interest was concerning some greater offense, but for which the officer did not have sufficient reasonable suspicion. (*Whren v. United States* (1996) 517 U.S. 806; i.e., "*pretext stops*.") Defendant argued that this rule applies only to a traffic offense which is criminal in nature. In California (since 1992), all non-misdemeanor parking violations are subject to civil penalties only, and administered through separate civil administrative procedures. (V.C. §§ 40200 et seq.) According to defendant's argument, therefore, stopping and detaining a person for nothing more than a civil parking violation did not come within the rule of *Whren* and violated the Fourth Amendment. The Court, however, disagreed. *Whren* allows for a pretext stop for any "*traffic violation*." It is not limited to criminal acts. "(A) stop is 'reasonable' where an officer suspects an individual has committed a traffic violation." The only real issue is

whether a civil parking violation should be lumped together with other "traffic violations" for purposes of *Whren* and the "*pretext stop*" theory. After reviewing such concepts as the power of police officers to cite for both criminal and civil violations, plus the continued inclusion of the civil parking violations as well as a provision giving a municipality the power to enact local parking regulations in the same chapter of the Vehicle Code as other "*Rules of the Road*," the Court answered this question in the affirmative. Therefore, it was lawful to use San Francisco's local municipal code civil parking violation as the legal justification to detain defendant and his companion.

Note: The trial court in this case denied defendant's motion to suppress based upon the "*totality of the circumstances*:" I.e.; (1) the lawfulness of a stop for a parking violation *when combined with* (2) the suspects' "hurried" movements in the car when the officers lit them up, (3) their brief attempt at "flight," and (4) the nature of the area as a "*high crime*" area. The Ninth Circuit did not even get into these other issues, being satisfied with using *Whren* as their sole justification for defendant's detention. Either way, these officers' actions were on pretty solid constitutional grounds. (E.g., see *Illinois v. Wardlow* (2000) 528 U.S. 119; flight from a "*high narcotics*" area sufficient to justify a detention.) But it never would have even occurred to me that we couldn't use a parking violation as a legal justification for a traffic stop, so it's good to have this issue settled.

***Residential Entries and Answering the Telephone*:**

People v. Ledesma **(Aug. 17, 2006) 39 Cal.4th 641**

Rule: (1) A guest in a residence who has the run of the house in the occupant's absence has the authority to give consent to the police to enter the area where a visitor normally would be received. (2) Probable cause to believe a fugitive will be calling on a particular telephone line, with the exigent circumstance of not having the opportunity to obtain a search warrant, justifies answering the telephone.

Facts: Defendant and another robbed a gas station in the City of San Jose. The victim gas station attendant, Mr. Flores, got the license number of the motorcycle the two suspects were riding and provided that information to the responding police officers. The police were able to determine from this defendant's identity and where he lived. Proceeding to defendant's apartment, officers knocked. A person who claimed to be merely a visitor answered the door. The visitor admitted that defendant did in fact live there but said that he was not home at the moment. However, he consented to allowing the officers in to check for defendant. Defendant was not found. Another visitor in the house told the officers that defendant had telephoned earlier and was expected to call back. The telephone rang. One of the officers answered the phone and pretended to be one of the visitors. Defendant, after identifying himself, told the officer (who he thought was one of his friends) that he was "hot," that the police were looking for him, and that she should lock up the apartment and his car that was in the driveway and take a walk. Defendant was not apprehended at that time. Three days later, the gas station attendant, Mr. Flores, was shown a photographic lineup. He tentatively identified defendant as one of the robbers. A warrant was obtained for defendant's arrest. A few days later, the

police went back to defendant's apartment. He still was not home, but Jesse Perez, who closely resembled the second robber, was. Perez was told that a warrant had been issued for defendant's arrest. After questioning Perez about his possible involvement, he was told that his photograph was going to be shown to the victim. He was then released. A few days later, Mr. Flores disappeared. (*Could you not see this coming*?) Three days later, his body with four bullet and two stab wounds was found in a ravine in the nearby city of Gilroy. Defendant, who had fled to Utah, was arrested on the outstanding arrest warrant some six months later. Although no physical evidence connected him to either the robbery or the murder, defendant had bragged to enough people about his involvement in both crimes to provide for a parade of witnesses at his trial, all testifying to his admissions. After two trials (the first resulting in a reversal by the Supreme Court due to some issues not relevant here), defendant was convicted of first degree murder and other charges, with special circumstances. His appeal from a judgment of death, to the California Supreme Court, was automatic.

Held: The California Supreme Court unanimously affirmed. Among the multitude of issues common to most death penalty cases, defendant argued that the police officers violated the Fourth Amendment in both entering his apartment and, while concealing their identity, intercepting his telephone call, and that evidence of his conversation with the officer about the fact that the police were looking for him, etc., should have been suppressed. Noting that generally a search warrant is required to enter a person's residence and to intercept telephone calls, the Court determined that the prosecution had been successful in overcoming the presumption of unlawfulness. As to the officers' entry into the apartment, it must be proved that the police reasonably and in good faith believed that the visitor who answered the door had the authority to consent to their entry. On this issue, the Court noted cases from other jurisdictions which have held that "a guest who has the run of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received." In this case, there was nothing said or done that would have indicated to the officers that the visitors in defendant's apartment didn't have such authority. The entry, therefore, was lawful. As to the interception of the telephone call, the officers had probable cause to believe that defendant was going to be calling soon, based upon what they were told by the two people present in defendant's apartment. When he did, there (obviously) wasn't time to get a search warrant without losing the opportunity to quickly determine his whereabouts that intercepting the call could provide. The circumstances here constituted an "*exigent circumstance*." The officers, therefore, lawfully answered the telephone. The content of defendant's statement to the officer over the phone was properly admitted into evidence.

Note: We've kind of gotten into the habit of answering a suspect's telephone, at least when we're already lawfully in his residence serving a search warrant or making an arrest, without considering the fact that to do so is a search in itself. This fact, I think, is slowly developing into the general belief that we have a right to do so without a court's authorization. But the general rule is that, as a type of search, a search warrant is normally going to be required. (See *People v. Harwood* (1977) 74 Cal.App.3rd 460.) Also, the right of a police officer to enter into at least "an area (of the house) where a visitor normally would be received," based upon no more than the consent of a "guest

who has the run of the house in the occupant's absence," is apparently an issue of first impression in California. This is a good rule to know. But don't assume that this rule gives you the right to ignore indications that maybe this particular guest does *not* have the authority to grant you consent to enter. This whole topic comes under the title of "*apparent authority*," and necessitates a determination, based upon the circumstances, that you "*reasonably*" believed that the person giving consent had the authority to do so. (*United States v. Fiorillo* (9th Cir. 1999) 186 F.3rd 1136.) "*Reasonable*" is the operative word here.

***P.C. § 803(g) Statute of Limitations Extensions*:**
***Impeachment with Statements Obtained in Violation of Miranda*:**

People v. Riskin **(Sept. 22, 2006) 143 Cal.App.4th 234**

Rule: (1) Extensions of a statute of limitations, and its necessary elements, need not be proved beyond a reasonable doubt. (2) Statements taken in violation of *Miranda* are properly admitted into evidence when used to impeach a defendant who testifies falsely.

Facts: Defendant was convicted of a number of child molest-related offenses involving both his daughter (aggravated sexual assault of a child under 14, and 10 or more years younger that defendant, per P.C. § 269(a); felony forcible child molest, per P.C. § 288(b)(1)), and his son (felony child molest, per P.C. § 288(a)). The jury found as true a "One-Strike" allegation (per P.C. § 667.61(b), (c)(4), & (e)(6)) for having tied or bound his daughter during the P.C. § 288(b)(1) child molest. The jury also found that each counts' allegation of an extension of the statue of limitations (per former P.C. § 803(g)) were true. The facts and circumstances underlying these offenses were not discussed in the court's written opinion. Defendant was sentenced to 30 years to life and appealed.

Held: Except to find that use of the One-Strike statute (P.C. § 667.61) was improper, it not having been proved that the daughter's forcible child molest occurred prior to enactment of the One Strike, and thus requiring the case to be remanded to the trial court for resentencing, the Fifth District Court of Appeal otherwise affirmed. The Court first rejected defendant's argument that his due process rights had been violated by the trial court's refusal to require the jury to find "*beyond a reasonable doubt*" that; (1) the P.C. § 803(g) extension of the statute of limitations applied to this case, and (2) there was independent corroboration of the victims' accusations. The statute of limitations, which had expired for each of the charged sex offenses, is normally six years. (P.C. § 800) Pursuant to P.C. § 803(g), however, as written at the time of this offense, the statute of limitations was subject to being extended if the prosecution could prove to the jury "*by a preponderance of the evidence*" (as opposed to "*beyond a reasonable doubt*") each of the following elements: That (1) the victim made a report to law enforcement while still under the age of 18; (2) a complaint accusing the defendant of the crimes was filed within one year after the crimes were reported; (3) the crimes involved "*substantial sexual conduct*" (as that term is defined in the statute); (4) the normally applicable six-year statute of limitations expired prior to the complaint being filed; and (5) there was independent evidence that "*clearly and convincingly*" (as opposed to "*beyond a*

reasonable doubt") corroborates the victims' allegations. The United States Constitution requires the prosecution to prove "*beyond a reasonable doubt*" "every fact necessary to constitute the crime with which (the defendant) is charged." Also, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum (i.e., *sentence enhancements*), must be proven beyond a reasonable doubt. However, none of the facts relevant to the extension of the statute of limitations pursuant to P.C. §803(g), nor to the independent corroboration of a child's accusation, are "fact(s) necessary to constitute the crime with which (defendant) was charged," nor are they relevant to any enhancements. The Constitution does *not* require that a statute of limitations extension be proved by proof greater than a "*preponderance of the evidence*," nor that corroboration for a child molest victim be proved by greater than "*clear and convincing*" evidence. Defendant's due process rights, therefore, were not compromised by these lesser standards of proof on these issues. In a separate issue, defendant complained of the use during trial of his statements obtained by law enforcement during a pretext telephone call set up with his daughter. Defendant apparently (the facts underlying this issue not being described in the decision) testified at trial, and was then impeached by an officer's testimony concerning the content of the pretext telephone call with his daughter. Defendant contended that these statements were obtained in violation of his Fifth Amendment right to silence and his Sixth Amendment right to counsel. Despite case authority from the U.S. Supreme Court to the effect that statements taken in violation of *Miranda* are usable as impeachment evidence (i.e., *Harris v. New York* (1971) 401 U.S. 222.), defendant argued that *Harris* was overruled in *Missouri v. Seibert* (2004) 542 U.S. 600, where the Supreme Court criticized the use of a suspect's statements, obtained in violation of *Miranda*, to prod the suspect into later waiving her rights and giving a second, full confession. The Court here rejected defendant's argument, noting that *Seibert* did not involve a *Harris* issue. Statements taken in violation of *Miranda* (so long as not "coerced") are usable by the prosecution for purposes of impeachment, should a defendant testify and lie. Lastly, the Court further noted that because the pretext telephone call in issue occurred prior to defendant being arraigned on the instant charges, defendant's Sixth Amendment right to counsel, which is generally not triggered until arraignment, was not violated.

Note: In this decision, written without describing the facts or circumstances underlying the various legal issues, I can only surmise that defendant had already been arrested, or was at least in physical custody, when the officers set up the pretext telephone call with his daughter, and that he had either just recently been arrested, or had previously invoked his *Miranda* rights. A pretext telephone call does not necessarily trigger a *Miranda* advisal and waiver requirement, even if the target of the call is in jail. (See *People v. Anthony* (1986) 185 Cal.App.3rd 1114.) The Court just assumed, without discussing the issue, that his *Miranda* rights had been violated by the pretext telephone call. But that having been said, the decision makes it clear that the impeachment rule of *Harris* is still alive and well. Although, *again*, do not take this case as the Court's blessing to you to purposely violate *Miranda*. It is still my position that such a tactic is unprofessional, unethical, and, if done intentionally, will someday provoke the courts into imposing on us a new exclusionary rule. "*Bad facts make for bad case law*."