San Diego District Attorney

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Remember 9/11/01*: *Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*Not all chemicals are bad. Without hydrogen or oxygen, for example, there would be no way to make water, a vital ingredient in beer*." (Dave Berry)

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***ADMINISTRATIVE NOTES*:**

Limiting the Legal Advice (*Continued*): In the last Legal Update (Vol. 14, No. 8, July 11, 2009), I was severely critical of a particular officer for what I perceived to be "*DA shopping*," and playing one deputy district attorney off against another, while failing reveal what was really going on and who all was involved. In

criticizing this officer, I used such phrases as "*purposeful dishonesty*" and "*game playing*." I've since talked to him (via e-mail) and his supervisors (via e-mail and telephone) and have concluded that while there was in fact some DA shopping going on, which is never cool, and that I was purposely left with only a vague and somewhat misleading idea of the circumstances behind his request, the officer involved *did not* act in a manner that I can in good conscience label as malicious or purposely dishonest. There was apparently a lot more going on, generating a situation in which this officer found himself in the middle, and which, when considered in context, greatly mitigates what he did. While I still believe the situation needed to be dealt with and resolved, I no doubt over-reacted to some degree by referring to this officer's actions as dishonest or that he was intentionally playing games. So my apologies to the officer to the extent that I did over-react. But the lesson to be learned is still there. Had I known all the relevant circumstances up front, I would not have reacted at all, or at least to the extent I did. *So*, when asking me, or any other prosecutor (retired or not) for advice, and you are already dealing with another prosecutor (or DA Investigator), or have a contrary opinion from any other source, that fact needs to be revealed up front. When there is an active dispute going on with a prosecutor, another agency, or even your own superiors, that fact needs to be revealed up front. Or when there is anyone else I should be talking to before rendering an opinion, that fact needs to be revealed up front. When in doubt, "*full disclosure*" is the rule, and will go a long way in avoiding hard feelings and unnecessary embarrassment.

Easy Way to Destroy Your Credibility and Your Career: The Los Angeles Sheriff's Department recently published a newsletter (*Field Operations Support Services*; Vol. 09, No. 07, dated May 27, 2009) warning officers to use a little common sense when posting self-descriptive materials on social network websites such as Facebook or MySpace. The newsletter cites several examples of cops (all back East, fortunately, before you start looking at your partner) doing stupid stuff such as posting an entry bragging about being a "*rogue cop*," and referring to the movie "*Training Day*" (where deception, murder, and other illegal acts were the norm) as depicting "*proper police procedure*." Another officer described himself as a "*garbage man, because I pick up trash for a living*." Whether or not intended to be funny, or mere "*locker room bravado*," your admission to such beliefs, preserved forever on the Internet, may be admissible against you in court as impeachment evidence whenever you testify. It may even become "*Brady material*" (i.e., *Brady v. Maryland* (1963) 373 U.S. 83.); information a prosecutor must reveal to the defense in any case where your credibility (or other negative character traits; e.g., excessive force, etc.) is an issue, *for the rest of your career*. So *THINK*. If you'd like a copy of the newsletter, I can e-mail it to you on request. (My thanks to Laurie Berry, Oceanside P.D., for pointing this out to me, and John Satterfield, LASD, for permission to publicize it.)

CASE LAW:

***Parole Searches and Harassment*:**

People v. Sardinas **(Jan. 22, 2009) 170 Cal.App.4th 488**

Rule: A parole search that can be justified by the circumstances fails to establish a search that is unreasonable despite numerous prior contacts.

Facts: City of Pomona Police Officer Todd Samuels had had contacts with defendant a half dozen times or more in the officer's five years with the police department. He knew defendant to associate with cocaine addicts and that he was on parole from a narcotics-related conviction. When Officer Samuels joined the major crimes task force dealing with street level narcotics and criminal street gangs, his contacts with defendant became more frequent. On December 20, Samuels stopped defendant because the taillights on his van weren't working. Pursuant to defendant's parole conditions, Officer Samuels searched defendant's van, but found nothing illegal or suspicious. Officer Samuels and another officer then drove defendant to his home and searched it, again finding nothing. Defendant was released. The following evening, Officer Samuels observed defendant walking through a convenience store parking lot, across the street from an apartment complex known for its narcotics sales. Officer Samuels knew that defendant lived some three and a half to four miles away. He contacted defendant and asked him what he was doing in the area. Defendant said that he was "just walking through." Officer Samuels conducted a parole search of his person and found several pieces of individually packaged rock cocaine in his front waistband. He was arrested and charged with possession for sale of cocaine base, per H&S § 11351.5. Defendant's motion to suppress the evidence was denied by the trial court. He was convicted by a jury and appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. Defendant's argument on appeal was that even though he was subject to warrantless searches as a condition of his parole, the officer here was engaging in "*harassment*," thus violating his Fourth Amendment rights. The Court noted that a parolee, despite waiving his rights against warrantless searches and seizures (see P.C. § 3067(a)), does in fact retain some privacy rights under the Fourth Amendment, even if "somewhat diminished." Therefore, while a police officer does not need to have any suspicion of renewed criminal activity to justify a warrantless search of a parolee, such a search becomes "*unreasonable*" if done in an "*arbitrary, capricious or harassing*" manner. A parole search may become constitutionally "unreasonable" if done too often, or at an unreasonable hour, or if unreasonably prolonged, or for other reasons establishing arbitrary or oppressive conduct by the searching officer. In this case, however, there were specific and justifiable reasons for the search: I.e., it was conducted directly across the street from an apartment complex known to Officer Samuels as a location where drug trafficking was common, and miles from his home. It was also known that defendant was on parole for a narcotics-related offense and that he continued to associate with drug addicts. Further, there was no evidence that Officer Samuels, who worked on a team tasked with investigating drug-related offenses, harbored any animus toward defendant. Therefore, Officer Samuels was

acting with a legitimate law enforcement purpose when he searched defendant, recovering the cocaine. His suppression motion, therefore, was properly denied.

Note: Interestingly enough, the Court only concerned itself with the search that resulted in the recovery of the cocaine and not whether any of the prior contacts were unlawful. This is as it should be in that even if one or more of the prior contacts had resulted in an arbitrary or harassing search, it cannot be said that the cocaine recovered in this case was the product of anything that occurred prior to this particular search. The Court also discounted, however, defendant's argument that the number of prior contacts showed a pattern of harassment. But it was hinted that the Court reached this conclusion only because the defense failed to present any specific details related to the prior searches, except for the particular search the night before. Bottom line is this: If the defense had showed a pattern of repeated harassing contacts and arbitrary searches, the result might have been different. In this case, there was no such evidence presented to the trial judge. To the contrary, even though we don't normally have to justify a parole search with probable cause or even a reasonable suspicion, Officer Samuels was able to testify to specific reasons why this particular search was reasonable. So don't read this case to say that you are entitled to stop, detain, and search a parolee every time you see him. Use a little common sense and be ready to show the court why it was reasonable for you to search a parolee or probationer under the particular set of circumstances you happened to find him. That's good police work that leads to good case decisions.

***Pandering, per P.C. § 266i(a)(2)*:**

People v. Wagner **(Jan. 22, 2009) 170 Cal.App.4th 499**

Rule: A pimp attempting to enlist a person who is already a prostitute into his own employ is not a violation of P.C. § 266i(a)(2), *Pandering*.

Facts: Santa Ana Police Officer Roger Tolusa, working in an unmarked car on a section of Harbor Boulevard known as a "track" for prostitutes, observed 17-year-old J.H. talking to the occupants of various cars. Officer Tolusa, posing as a potential "John," concluded from her actions that J.H. was a prostitute looking for a customer. As Officer Tolusa positioned his car in an attempt to make contact with J.H., he noticed a blue Toyota approach her. The driver of the Toyota apparently said something to J.H., causing her to walk away at a fast pace. Based upon these actions, Officer Tolusa concluded that J.H. did not consider the driver of the Toyota to be a potential customer, and that he might be a pimp instead. The Toyota followed J.H., with its driver again attempting to say something to her. J.H. looked at the Toyota, and then made eye contact with Officer Tolusa, and got into Tolusa's car while telling him; "Let's get out of here." Other officers stopped the Toyota and contacted its driver; defendant. Defendant had in his car paraphernalia consistent with that of being a pimp. J.H. told the officers that when defendant attempted to contact her, "he was talking like a pimp." Defendant was charged with pandering, per P.C. § 266i(a)(2), which specifically prohibits "caus(ing), induc(ing), persuad(ing) or encourage(ing) another person to become a prostitute." At the prosecutor's request, citing prior case authority, the trial judge altered the standard jury

instruction defining pandering by adding a phrase to the effect that pandering also "applies to cases in which a defendant solicits one who he believes to be a prostitute to change her business relations." Defendant was convicted and appealed.

Held: The Fourth District Court of Appeal (Div. 3) reversed. All parties agreed that J.H. was already a prostitute. Defendant argued on appeal that pandering, as described in P.C. § 266i(a)(2), does no more than prohibit one from "caus(ing), induc(ing), persuad(ing) or encourage(ing) another person *to become* a prostitute." (Italics added) Therefore, because J.H. was already a prostitute, he didn't do anything to make her "*become*" a prostitute. The Court agreed. The Court analyzed the prior case law cited by the prosecution to the effect that the statute should be interpreted to include the causing of a person who is already a prostitute "*to change her business relations*," and found the authority unpersuasive. Rather, it found the statute to be clear on its face, intending only to criminalize the causing of a person who is not already a prostitute to become one. Absent some ambiguity in the statute—where here there is none—the Court must give a statute an interpretation that is consistent with the apparent legislative intent. And if the statute were ambiguous, the so-called "*rule of lenity*" requires that it be interpreted in the defendant's favor. Had the Legislature intended the statute to include those who are already prostitutes, it could have said so. A court does not have the right to rewrite the statute. Defendant in this case did no more than attempt to enlist J.H., who admittedly was already a prostitute, into his employ. That activity does not violate P.C. § 266i(a)(2).

Note: This case seems fairly straight forward. I didn't do a lot of Vice cases as a cop or a prosecutor, so I don't know how much of a shock this decision might be to those of you who do. And I haven't taken the time to go back and read the cases the prosecution argued in support of its argument, so I don't have an opinion whether this Court is correctly interpreting them. But in reading the statute, the decision appears to be fair. If you Vice prosecutors and cops have a different opinion, let me know and I'll research the issue further with your concerns in mind.

***Standing, as it Applies to One's Residence*:**

United States v. $40,955 in United States Currency **(9th Cir. Jan. 27, 2009) 554 F.3rd 752**

Rule: The owner and occupier of a house has standing to challenge the search of his or her adult son's bedroom, absent evidence showing that the room has been physically separated from the rest of the house and/or the son is a tenant paying rent.

Facts: Oceanside Police Department's narcotics unit executed a search warrant at a residence belonging to Basel and Fatima El Farra ("*Claimants*" in this federal forfeiture civil suit), targeting in particular the bedroom of the El Farras' adult son, Mohammad. The bedroom had an outside exit, allowing for people to come and go without entering the main part of the house, but otherwise was not locked off from the rest of the house. The search resulted in the recovery of a pound and a half of marijuana, paraphernalia used in the packaging and sale of the marijuana, and a safe containing $40,955.

Mohammed told police that everything was his, including the money in the safe, most of which, he admitted, was from the sale of marijuana. A complaint was filed in state court against Mohammed where he eventually pled guilty to possession of the marijuana for purposes of sale. The United States then filed this federal civil complaint for "*forfeiture in rem*" against the $40,955 as proceeds of Mohammad's marijuana sales. Basel and Fatima and their adult daughter, Rawia, filed claims for the seized monies. As a part of these proceedings, claimants filed a motion to suppress the evidence seized during the search. Basel and Fatima argued that they had "*standing*" (i.e., a personal "*reasonable expectation of privacy*" that was violated by the search of the residence) to file such a motion under the theory that they owned and occupied the entire house, retaining the right to admit or deny entry to Mohammed's room. Rawia argued that she had standing in that although she didn't live there any more, she had a key to the house and stored property there. The district (trial) court judge denied the claimants' motion to suppress, finding that none of them had the legal standing to challenge the search of Mohammed's bedroom. After a trial, a jury found that all $40,955 constituted proceeds from marijuana sales, and the court entered a judgment and order of forfeiture on that amount. Claimants Basel, Fatima and Rawia all appealed.

Held: The Ninth Circuit Court of Appeal reversed in part and affirmed in part. The Court first noted that Basel and Fatima did in fact have a reasonable expectation of privacy in their own home, and thus had standing to challenge the legality of the search. While ownership of the items seized does not automatically confer standing on the person claiming such ownership, the ownership and possession, and access to, the area from which the items were seized, are important factors in determining whether a person has a legitimate expectation of privacy. And it's not necessary for the claimants to have an exclusive possessory interest in the place being searched. The trial court failed to consider these factors. Mohammed's bedroom, despite having an outside entrance, was not sufficiently separate from the rest of the house; e.g., the door between his bedroom and the rest of the house was not locked off and Mohammed was not paying rent as a tenant. Mohammed's bedroom being a part of their house, Basel and Fatima, therefore, had standing, entitling them to litigate the constitutionality of the search. But as for Rawia, having a key to the house and storing personal items there is not sufficient to confer on her an expectation of privacy in the house when she did not also live there. She, therefore, did no have standing to challenge the search. The case was therefore remanded back to the trial court for further proceedings on Basel's and Fatima's claims.

Note: Now before you get too excited about this, note that merely having standing to challenge the legality of the search does not mean that they (Basel and Fatima) will be successful. All this means is that the trial judge should have allowed them to test the legality of the search. I briefed this case mainly because all the rules on "*standing*," or, more correctly; whether a person has a "*legitimate expectation of privacy*" in the place being searched, is all judge-made, and can only be learned on a case-by-case basis. I have a whole section in my Fourth Amendment Search and Seizure manual on standing which, if you don't already have it, I can send you. Also, see the next case.

***Standing, as it Applies to a Large Business*:**
***Search Warrants*; *Overbreadth*, *Incorporation*, *Copies at the Scene*, *Good Faith*, *and Consent Obtained as the Product of an Unlawful Search Warrant*:**

United States v Future Health, Inc. **(9th Cir. June 1, 2009) 568 F.3rd 684**

Rule: (1) Being the owner and/or manager of a large business does not, by itself, give a person "*standing*" to challenge the legality of the search of the whole business. (2) An overly broad search warrant may be saved if the affidavit sufficiently limits the items to be seized and is incorporated into the warrant itself. (3) Defendant at the scene need not be provided with copies of the affidavit. (4) Items to be seized are "*overly broad*" unless sufficiently limited to prevent the seizure of items for which there is no probable cause to believe they are connected to the alleged criminal conduct. (5) "*Good faith*" does not apply unless it can be shown that the searching officers relied upon the contents of the judicially approved warrant. (6) Only those items determined to be illegally seized must be suppressed if the warrant is not wholly lacking in particularity. (7) A consent to search obtained as the product of a partially invalid search warrant may not be invalid.

Facts: The IRS and other federal and Nevada state agencies conducted a two-year investigation of SDI Future Health, Inc. (SDI), a Nevada corporation. Also investigated were two of the company's officers and part owners, Todd Kaplan and Jack Brunk. In a nutshell, it was determined that the defendants enlisted physicians and cardiac diagnostic companies to defraud Medicare by charging for services never rendered, sometimes billing twice for the same service, and then providing kickbacks to the physicians who participated in the fraud. As a result of the investigation, it was also believed that the company, as well as Kaplan and Brunk as individuals, engaged in tax fraud by failing to report a significant amount of earned income. Based upon the information gathered, IRS Special Agent Julie Raftery put together a search warrant to search SDI's business premises. The search warrant itself consisted of the warrant, an incorporated affidavit, and two attachments describing the premises to be searched (i.e., SDI's corporate headquarters, principal business offices, and computers) and listing 24 categories of items to be seized. A federal magistrate judge approved the warrant after amending it to protect the confidentiality of patient medical information. The affidavit itself was sealed. The day before the warrant was to be served, Special Agent Raftery met with the 42 agents who would make up the search team. Copies of the affidavit were distributed and read by the agents. A verbal briefing was then conducted explaining the probable cause for the search warrant along with the evidence that was to be seized. Upon execution of the warrant the next day, SDI's executive officers were contacted and given a copy of the search warrant. They were not given a copy of the affidavit because it was sealed, although each of the search team members had a copy available to them. During the search, Kaplan gave the agents permission to search an off-site storage facility that apparently was not listed in the warrant, but which contained company records. Three years after the search, Kaplan, Brunk, and SDI were indicted by a federal grand jury in Nevada, alleging numerous conspiracy and other charges related to the above described crimes. Defendants later filed a motion to suppress, arguing that the search warrant was vague and overbroad. After finding that Kaplan and Brunk had standing to challenge the

entire search (SDI's standing was not contested), the district court granted the defendants' motion to suppress the evidence in its entirety. The Government appealed.

Held: The Ninth Circuit Court of Appeal affirmed in part, reversed in part, and remanded the case back to the trial court for further proceedings. (1) *Standing*: One's "*standing*," or right to challenge the lawfulness of a search, depends upon whether his "*reasonable expectation of privacy*" has been infringed upon. While a homeowner typically has standing to challenge the search of his home, the rules are different for a business. "Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property." A business owner may challenge the search of his own office. And the owner of a small, family-run business may generally challenge the search of his whole business where it is shown that he exercises daily management and control. But whether a corporate officer has standing to challenge the search of a large business is more complicated. "*For starters*," to establish standing, it must be shown that "the place searched be 'given over to [the defendant's] exclusive use.' . . . (M)ere access to, and even use of, the office of a coworker 'does not lead us to find an objectively reasonable expectation of privacy." Also, managerial authority alone is not sufficient to establish Fourth Amendment standing. Lastly, security measures taken to guard the business's records or materials are only relevant to the corporation's standing (which was not contested here); not the corporation's officers. In evaluating standing, the Court listed three factors to consider: Whether (1) the item seized is personal property or otherwise kept in a private place separate from other work related material; (2) the defendant had custody or immediate control of the item when officers seized it; and (3) the defendant took precautions on his own behalf to secure the place searched or things seized from any interferences without his authorization. Because the trial court decided that Kaplan and Brunk, as officers and part owners, automatically had standing to challenge the search of their business without consideration of the above, this issue must be remanded to the trial court for further hearings. (2) *Incorporation of the Affidavit*: A warrant that is overly broad in the list of items to be seized (see below) may still be lawful if the affidavit sufficiently restricts those items and is "*incorporated*" into the warrant. The trial court determined here that the affidavit was not incorporated by reference into the warrant. The Ninth Circuit disagreed. "A warrant expressly incorporates an affidavit when it uses '*suitable words of reference*.'" In this case, the warrant explicitly stated: "*Upon the sworn complaint made before me there is probable cause to believe that the* [*given*] *crime . . . has been committed, . . .*" This same wording, making reference in the warrant to the probable cause described in the affidavit, has been held to be sufficient to incorporate the affidavit into the warrant in prior cases. (3) *Providing Defendants with a Copy of the Affidavit*: Defendants complained that they were not provided with a copy of the affidavit at the scene. However, the U.S. Supreme Court has previously held that there is no such requirement. The affidavit, describing the probable cause for a search, is a means of providing a "deliberate, impartial judgment of a judicial officer between the citizen and the police," not to give property owners "license to engage the police in a debate over the basis for the warrant." (4) *Items Listed to be Seized as* "*Overbroad*." The defendants challenged various items in the list of property to be seized, arguing that they were too broad and thus lacked in "*particularity*." The Court agreed as to several items (e.g., "Documents relating to nonprivileged internal

memoranda and Email. Documents relating to bank accounts, brokerage accounts, trusts. Checking, savings, and money market accounts, including check registers, cancelled checks, monthly statements, wire transfers, and cashier's checks. Documents relating to personnel and payroll records. Rolodexes, address books and calendars.) These items were all held to be "*overbroad*" in that they allowed for the seizure of items for which there was insufficient probable cause connecting them to the listed crimes. All the other listed items (some 19 of them) were sufficiently restricted to records related to the alleged crimes. (5) *Good Faith*: The Government attempted to save the suppressed items by arguing the "*good faith*" of the agents involved in their seizure. The Court rejected this argument, noting that for "*good faith*" to apply, in addition to a judge approving the affidavit, and the agents having read it, there must be evidence to the effect that the searching agents actually "*relied*" on the contents of the affidavit in determining what to search for and seize. There was no such evidence in this case. (6) *Remedy*: Having found that 19 of the 24 listed items in the warrant were lawfully seized, with only 5 items being suppressed, the issue is then whether it is necessary to quash the entire warrant. The trial court had determined that everything should be suppressed. The Ninth Circuit noted, however, that the "*doctrine of severance*" is appropriate when it is not the whole warrant that is "*lacking in particularity*." With only some of the items being suppressed, this warrant was not "*wholly lacking in particularity*." It is not necessary, therefore, to quash the entire warrant. (7) *Validity of the Consent to Search the Storage Facility*: Kaplan gave his oral consent for the agents to search an off site storage facility that was not listed in the warrant. Generally, a consent obtained as a direct product of an illegal search, without subsequent events to "*purge the taint*," will negate what otherwise would have been a valid consent. Here, the search warrant was not wholly illegal. The Court, therefore, remanded this issue back to the trial court to determine whether Kaplan's consent was in fact tainted by the illegal aspects of this search.

Note: I have absolutely nothing to say about all this, mainly because I've pretty much said it all above, but also because I'm out of space. But there are obviously a lot of issues discussed above. If you do searches (or prosecutions) of big businesses, this case is one you need to study. Also read *United States v. Gonzalez* (9th Cir. 2005) 412 F.3rd 1102, which deals with the "*family-owned*" small business the Court compared to this case. In *Gonzalez*, the company had some 25 employees. SDI had twice that. Where you draw the line between the two can only be determined by analyzing the factors listed above.

***Attempting to Manufacture Dope*:**

People v. Luna **(Jan. 22, 2009) 170 Cal.App.4th 535**

Rule: Collecting the tools necessary to set up a drug lab does not, by itself, constitute an attempt to manufacture a controlled substance.

Facts: Defendant was stopped for a traffic violation in Mendocino County, during which he consented to a search of his pickup truck. The officer found equipment which included everything needed to manufacture concentrated cannabis, or hashish. This included PCV pipe, PVC glue, couplings, fittings, adapters, Teflon tape, Pyrex bowls, a

butane burner, rubbing alcohol, activated carbon filters, and a metal spigot with an open/close valve. Also found were 299 bottles of butane, a small amount of marijuana, and $1,200 in cash. Defendant was arrested and charged with attempting to manufacture hashish; H&S § 11379.6(a), P.C. § 664. At trial, experts testified that the only additional thing needed to set up a lab for manufacturing hashish using the "butane extraction method" was the marijuana itself; "*grocery bags full*" of it. Defendant testified at trial, admitting to having purchased the listed items with the intent to set up a hashish lab. But he also claimed that he had not yet engaged in its actual production. The jury convicted him of attempting to manufacture a controlled substance. Defendant appealed.

Held: The First District Court of Appeal (Div. 4) reversed, agreeing with defendant that he had not yet gone far enough toward setting up his hashish lab for him to have "*attempted*" the manufacture of a controlled substance. In order for there to be an attempted crime, two elements must be proved: (1) A specific intent to commit the crime, and (2) a direct but ineffectual act done towards its commission that goes beyond mere preparation. (P.C. § 21a) There is no issue in this case that defendant had the necessary intent, admitting as much in his testimony. The issue here is whether he went far enough toward his ultimate goal of manufacturing hashish to constitute an attempt. The Court here said that he had not. The line between "*a direct but ineffectual act*" and "*mere preparation*" is indeed a thin one, and often difficult to ascertain. To help find the line in this case, the Court noted that "preparation consists of devising or arranging the means or measures necessary for the commission of the offense." On the other hand, an "attempt is the direct movement towards its commission after the preparations are made." Further, an attempt requires that "the acts of the defendant (went) so far that they would result in the accomplishment of the crime unless frustrated by extraneous circumstances." "(T)here must be some appreciable fragment of the crime committed [and] it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter." In this case, defendant had collected all the necessary tools (except for the marijuana) needed to accomplish his illegal goal (i.e., "preparation"), but he had not yet committed any acts that can be regarded as an "unequivocal overt act which can be said to be a commencement of the commission of the intended crime." As such, he cannot be said to have committed the crime of attempted manufacturing of a controlled substance.

Note: How far a criminal suspect must go before crossing that line between "*mere preparation*" and a completed "*attempt*" is always an interesting issue, and one where many people (not the least of whom are your trial judges) have a hard time figuring out. But the law is clear that an attempt does not require the defendant to have committed the last act possible. So with that in mind, how far would Mr. Luna have had to go before being guilty of an attempt? While an "*overt act*" is not a necessary element of an attempt (as it is in a conspiracy), the Court noted that an "unequivocal overt act which can be said to be a commencement of the commission of the intended crime" would certainly have done it. But that's obvious. That overt act need not be something moving him to the brink of actually starting the manufacturing process. The "overt act" might very well be him setting up the lab, showing that he really intended to go through with the crime. But merely possessing the tools needed to set it up doesn't do it. There, arguably, is the line.