The California Legal Update

Remember 9/11/2001; Support Our Troops; Support Our Cops

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THIS EDITION'S WORDS OF WISDOM:

"*I'm not afraid of death; I just don't want to be there when it happens*." (Woody Allen)

IN THIS ISSUE: **pg.**

ADMINISTRATIVE NOTES:

***Child Pornography as Search Warrant Exhibits*:** In briefing *United States v. Perkins* (9th Cir. Mar. 13, 2017) 850 F.3rd 1109, in the last *Legal Update* (i.e., *California Legal Update*, Vol. 22, #10), in my Note at the end of the case, I make the bold assertion in referring to photos of potential child pornography that "*(t)here was absolutely no reason not to attach the photos . . . to the affidavit as exhibits*." I couldn't have been more wrong! I subsequently (Oct. 16) put out a corrected version of Update #10, but if you downloaded the uncorrected version before the 16th, please note the following: Search warrants, as a rule, are public records (*People v. Hobbs* (1994) 7 Cal.4th 948, 962; P.C. § 1534(a)), open to the inspection of just about anyone who wishes view them. Attaching child pornography to a warrant affidavit, as a public record only serves to expose the victim-child's person to more distribution and exposure than was done by the defendant himself. Also, it arguably puts anyone who views the offending exhibits in violation of state and federal statutes prohibiting the simple possession of child pornography. So while it is still preferable that the search warrant magistrate have the opportunity to view photos alleged to be pornographic, it is suggested that the magistrate also be asked for an order sealing the photos, as allowed under the theory of a "*Hobbs* warrant" (i.e., providing for the sealing of confidential informant information in a warrant affidavit). There is absolutely no reason why the rule of *Hobbs* cannot be expanded to include personally sensitive information such as child (or any other type of) pornography. My thanks to Ronald Wells, Jr., Senior Deputy District Attorney, Fresno County District Attorney's Office, for pointing out this gross error on my part.

***Review Granted in Brady/Pitchess Case*:** On October 11, 2017, the California Supreme Court agreed to hear an appeal in the case of *Association for L.A. Deputy Sheriffs v. Superior Court* [*Los Angeles County Sheriff's Department et al.*] (July 11, 2017) 13 Cal.App.5th 413. I reviewed this case in an Administrative Note in the *California Legal Update*, Vol. 22, #7; July 22, 2017. Basically, in this case the Second District Court of Appeal held that absent a specific criminal defendant complying with the discovery requirements of *Pitchess v. Superior Court* (1974) 11 Cal.3rd 531, the Los Angeles Sheriff's Department *could not* just turn over to various prosecutorial agencies throughout the county a complete list of all sheriff's deputies who had potential *Brady* (*Brady v. Maryland* (1963) 373 U.S. 83) issues in their respective professional careers, as a means of shortcutting the Department's obligation of insuring that prospective defendants received such "*Brady* material" in future cases. This appellate court decision is favorable to the privacy concerns of all law enforcement officers who might have the misfortune of having screwed up to the extent that you have something (typically, but not necessarily limited to, prior acts related to the excessive use of force or acts of dishonesty) in your confidential personnel file that may be discoverable under *Brady* or *Pitchess*. If you are included in your department's (or a prosecuting agency"s) "*Brady* list," you need to watch what the California Supreme Court does with this case. I will certainly report it when the decision comes down.

CASES:

***Vehicle Code § 22520.5(a); Soliciting on Freeway Ramps*:**

People v. Pina **(June 22, 2017) 14 Cal.App.5th Supp. 1**

Rule: Vehicle Code § 22520.5(a) does *not* prohibit the non-commercial solicitation of charitable contributions on freeway ramps.

Facts: Long Beach Police Department Officer Michael Demarco observed defendant walking in lanes of traffic at the Bellflower off-ramp of the 405 Freeway as he solicited and accepted money from motorists who were stopped at the red light at the end of the ramp. Defendant was carrying a sign that said: "*Lost my job. Lost my home. Lost my car. Please pray for me and my family. Thank You. God bless.*" Officer Demarco contacted defendant and ordered him to leave. When defendant refused, Officer Demarco arrested him for violating V.C. § 22520.5(a) which makes it an infraction (for a first violation) to "solicit, display, sell, offer for sale, or otherwise vend or attempt to vend any merchandise or service" in designated locations on and near freeway on-ramps and off-ramps. Searched incident to arrest, defendant was found to have $51.35 on his person. Charged in state court with this offense, defendant was found guilty in a court trial and fined $530. Defendant appealed.

Held: The Appellate Division of the Los Angeles Superior Court reversed. On appeal, defendant argued that there was insufficient evidence of a violation of V.C. § 22520.5(a) in that the section only applies to "commercial transactions." Per defendant, since he received money without selling goods or services, the People had failed to prove that he violated the statute. The issue on appeal, therefore, was one of "statutory construction;" i.e., how the statute should be interpreted. V.C. § 22520.5 provides, in relevant part; "(a) No person shall solicit, display, sell, offer for sale, or otherwise vend or attempt to vend any merchandise or service while being wholly or partly within any of the following (locations)," including freeway on and off-ramps. A first violation of this section is an infraction. A second or subsequent conviction is punished as a misdemeanor. In interpreting this statute, the Court looked to the Legislature's intent.

The primary term at issue was the word "*solicit*." By itself, soliciting would include the asking for money, or "panhandling." While defendant's sign didn't specifically ask for any more than prayers, it could well be interpreted to imply that a financial donation would indeed be appreciated. But in section 22520.5, the word "*solicit*" is immediately followed up by, "*display, sell, offer for sale, or otherwise vend or attempt to vend any merchandise or service*." A "*sale*" or "*to sell*" necessarily involves a transaction involving valuable consideration. By this, the Court found that the intent of the statute, considered as a whole, was to prohibit commercial transactions from taking place in the prohibited areas and not merely the asking for charitable donations unrelated to the sale of merchandize or services.

The Court further found that the history behind the enactment of section 22520.5 in 1981, where its title specifically referred to "*vending*," and where a legislative analysis of the statute when enacted made specific reference to the need to prohibit the sale of merchandise or services within the boundaries of a freeway, all supported the conclusion that simple panhandling was not

intended to be included. In sum, the Court concluded that defendant was correct in his interpretation of section 22520.5(a), ruling that by simply soliciting charitable contributions on a freeway ramp, this statute is not violated.

Note: Defendant also argued that his First Amendment rights were violated by prohibiting him from soliciting money on a freeway ramp. His reasoning behind this argument was not described in the decision in that the Court declined to decide the issue. But it was likely based upon the theory that a person has a First Amendment right to "*solicit alms*;" an argument that has largely been shot down in cases involving the constitutionality of the disorderly conduct statute, P.C. § 647(c); soliciting alms. (See *Ulmer v. Municipal Court* (1976) 55 Cal.App.3rd 263, and *People v. Zimmerman* (1993) 15 Cal.App.4th Supp. 7; holding that the First Amendment is *not* violated by prohibiting the "aggressive" solicitation of money.) In either case, the Court suggested that law enforcement might look to local ordinances in controlling defendant's soliciting activities (e.g., Long Beach Mun. Code, § 9.35.010; and Los Angeles Mun. Code, § 41.59; both barring the aggressive solicitation of money or items of value.) Where defendant does so in a "*non-aggressive*" manner, however, it appears from the above authorities (*Ulmer* and *Zimmerman*) that he's going to be allowed to do so; an issue not discussed in this case.

***Miranda; Anticipatory Invocations in a DUI Context*:**

***Robertson v. Pichon* (9th Cir. Mar 2, 2017) 849 F.3rd 1173**

Rule: In the context of an arrest for driving while intoxicated, a police inquiry as to whether the suspect will take a blood-alcohol test is not typically an interrogation within the meaning of *Miranda*. As such, asking for an attorney at that time does not necessarily preclude questioning of the suspect following a subsequent waiver of rights.

Facts: Defendant partied hard with friends at a restaurant in Palo Alto, California. Twenty-four straight shots of liquor helped wash down mixed drinks over the course of four hours. An intoxicated defendant eventually left the restaurant and attempted to drive home, only to be stopped by Agent Dan Ryan of the Palo Alto Police Department. Agent Ryan had observed defendant cut off another driver. An uncooperative and mouthy defendant did poorly on a field sobriety test and was arrested for driving while under the influence of alcohol. Officer David Guy, who covered Agent Ryan, recovered a billy club lying between the driver and passenger seats of defendant's truck. Upon being take to the police station, defendant refused to take a breath or blood test. At that point Agent Ryan gave Robertson a form issued by the California Department of Motor Vehicles which provided, among other legal consequences for refusing to provide a breath or blood sample, the fact that "(y)ou do not have the right to talk to an attorney or have an attorney present before stating whether you will submit to a test, before deciding which test to take, or during the test. . . ." Defendant read the form and then immediately told Agent Ryan that he wanted to speak with his attorney before submitting to any chemical tests.

Pointing to the part of the form that said he did not have that right, the inebriated defendant told Agent Ryan; "See, I have the right to an attorney right here, and I want my attorney." Agent Ryan tried to correct this misreading of the attorney restriction, but when he asked defendant again to take a breath test, defendant responded: "Absolutely not." In response to another request

to take a blood test, defendant replied: "No, I will not take a blood test." Shortly thereafter Agent Ryan read defendant his *Miranda* warnings. After reading defendant his rights, Agent Ryan asked defendant if the billy club that Officer Guy found in his truck belonged to him. Defendant responded: "Yes, it belonged in the truck." Defendant then asked "if it was a misdemeanor to possess that in California?" Agent Ryan explained to him that it could be charged as a felony or a misdemeanor, showing him a copy of the California Penal Code so he could read the law for himself.

Defendant was subsequently charged in state court with driving while under the influence of alcohol (V.C. § 23152(a)), along with an enhancement for refusing to submit to a chemical test (V.C. § 23577), and one count of the misdemeanor possession of a billy club (P.C. § 12020(a)(1)), as these offenses read in 2006, the year of defendant's arrest. At trial, defendant's admissions related to the billy club were entered into evidence against him. Convicted of both offenses and the enhancement, defendant appealed. Upon denial of his appeals, defendant filed a petition for a writ of habeas corpus in Federal District Court, which was also denied. Defendant appealed to the Ninth Circuit Court of Appeal.

Held: The Ninth Circuit Court of Appeal affirmed. The primary issue raised on appeal was whether defendant's *Miranda* rights had been violated by the state trial court's admission into evidence his statements relative to possession of the billy club. However, on appeal from a denied of a writ of habeas corpus, the issue is not whether the appellate court believes a *Miranda* violation occurred, but rather whether the state court's decision that there was no *Miranda* violation "was contrary to, or involved an unreasonable application of, clearly established Federal law," as determined by the U.S. Supreme Court, or whether it "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Defendant's argument was that the state trial court's failure to suppress his statements regarding the billy club after defendant had clearly stated that "*I want my attorney*" violated his Fifth Amendment rights under the principles set forth by the U.S. Supreme Court in *Edwards v. Arizona* (1981) 451 U.S. 477. Per *Edwards*, once an in-custody criminal suspect specifically asks for the assistance of an attorney, all questioning must cease until he himself reinitiates the questioning, an attorney is provided for him, or he is released. However, the Ninth Circuit pointed out that *Edwards* involved a defendant's invocation to an attorney that occurred while the he was in custody *and* being interrogated. "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." In the current case, defendant was in fact in custody but not yet subject to an interrogation at the time he asked for the assistance of an attorney. "In the context of an arrest for driving while intoxicated, a police inquiry as to whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*." As such, asking for an attorney at that time does not preclude questioning of the suspect following a subsequent waiver of rights.

Although the U.S. Supreme Court has never specifically decided whether asking for an attorney under the circumstances present in this case (i.e., while explaining to him the legal consequences of a blood/alcohol test refusal and how he is not entitled to the assistance of counsel in deciding what to do) constitutes an *Edwards*-invocation, the Ninth Circuit held that a state court could

have reasonably concluded that Agent Ryan's request that defendant submit to chemical testing did not in fact constitute a custodial interrogation. If not an interrogation, then asking for an attorney at that point was premature and legally ineffective. Therefore, defendant's writ of habeas corpus was properly denied by the Federal District Court.

Note: The Court equivocates on the issue of whether the Supreme Court has ever specifically held that asking for an attorney under the circumstances of this case can be a legally effective *Edwards* invocation. I've always believed that the issue was not debatable; i.e., that "anticipatory invocations" (i.e., those made prior to being both in custody and subjected to an interrogation) were legally ineffective. Maybe I'm missing something. But when you consider that whether or not a subject is actually being interrogated is not always clear, then that might explain why this particular case wasn't a slam dunk. An interrogation has been defined as any words or actions which the police should know are reasonably likely to elicit an incriminatory response, even though not in the form of actual questions. An interrogation will sometimes include "the functional equivalent" of an interrogation. (See *Pennsylvania v. Muniz* (1990) 496 U.S. 582; and *Rhode Island v. Innis* (1980) 446 U.S. 291.) In the meantime, you're probably safe doing what Agent Ryan did in this case and not worry about whether a DUI arrestee asking for the assistance of an attorney to help him decide whether to submit to a blood or breath test, but before a *Miranda* admonishment and actual questioning, is an invocation. It shouldn't really be an issue.

***Miranda; the Booking Questions Exception*:**

United States v. Zapien **(9th Cir. July 3, 2017) 861 F.3rd 971**

Rule: Routine booking questions are an exception to the rule that a *Miranda* invocation precludes any further interrogation of an in-custody suspect. However, the trial admissibility of a defendant's responses to what appear to be booking questions is dependent upon whether the officer should have known that his questions were reasonably likely to elicit an incriminating response.

Facts: Beginning with an informant's tip that defendant was a drug dealer, Drug Enforcement Administration (DEA) agents surveilled defendant as he interacted with a confidential informant. Eventually, defendant was observed participating in a drug transaction. Defendant was later stopped by Sahuarita Police Department Officer Carl Navarette, arrested, and brought to the police station where DEA Agent Jerome Souza, DEA Task Force Officer Mark Ramirez, and DEA Special Agent Erika Dorado took over. Less than an hour after his arrest, while seated at a table in a hallway, unhandcuffed, and with Officer Ramirez translating between English and Spanish for the agents, defendant was read his *Miranda* rights which he waived.

For the first five minutes of questioning, defendant denied any involvement in drug trafficking. But then after the agents told him that they had evidence of his involvement in a drug transaction, defendant invoked his right to counsel. All questioning about drug trafficking was ceased at that time. Officer Ramirez told defendant at this point that he was not going to ask anything "about the case, about the evidence," but that he needed some information to "fill out the form;" i.e., a DEA Form 202 used to record biographical information. Officer Ramirez later

testified that he regularly asks DEA Form 202 questions to gather emergency contact information to provide to the Marshals. Pursuant to Form 202, Officer Ramirez asked defendant questions concerning such things as his name, birth date, and residence, and the names of his wife, parents, and children. As he was doing so, however, defendant changed his mind about having invoked and told Officer Ramirez that he wished to give a statement regarding his drug trafficking. The agents immediately reminded defendant of his constitutional rights and told him they did not want to ask any questions because of his earlier request for an attorney. Defendant, however, said he understood those rights, he wanted to waive them, and he wished "to speak to [the agents] without the presence of an attorney." It was only after this exchange that the agents asked about his participation in drug activity. Defendant told the officers that he had been involved "in making phone calls and meeting with an unknown [H]ispanic male, and that he did sell narcotics."

Indicted by a federal grand jury with federal drug possession and distribution charges, defendant's motion to suppress his incriminating statements was denied. With those statements being used against him at trial, defendant was convicted of all charges. He appealed from his conviction and ten-year prison sentence.

Held: The Ninth Circuit Court of Appeal affirmed. Defendant argued on appeal that his incriminating statements, obtained after he had invoked his right to counsel, should have been suppressed. More specifically, he argued that Officer Ramirez's asking of the so-called "biographical" questions was an interrogation and, triggering his subsequent waiver of rights, a violation of *Miranda*. The United States Supreme Court held in *Edwards v. Arizona* (1981) 451 U.S. 477, that once an in-custody suspect invokes his Fifth Amendment right to the assistance of counsel, he is off limits to all further questioning unless and until he himself reinitiates the questioning, he is provided with an attorney, or he is released from custody. In this case, after defendant specifically invoked his right to counsel, Officer Ramirez began asking the questions from the DEA Form 202, which, according to Ramirez, are used only to record biographical information, providing the Marshals' Office with emergency contact information.

Indeed, it has been held that the "routine gathering of background biographical information, such as identity, age, and address, usually does not constitute interrogation," and is thus not protected by the *Miranda* rule. "What is called the 'booking exception' . . . is in fact an 'exemp[tion] "from *Miranda*'s coverage'" for questions posed '"to secure the biographical data necessary to complete booking or pretrial services."'" However, recognizing the potential for abuse by law enforcement officers who might, under the guise of seeking "objective" or "neutral" biographical information, deliberately elicit an incriminating statement from a suspect, the Court held that an "objective" test must be used to determine whether booking questions in any particular case might really be a prohibited interrogation. Therefore, the Court held that the admissibility of a defendant's responses to what appear to be booking questions is dependent upon whether the officer should have known that his questions were reasonably likely to elicit an incriminating response.

In analyzing the circumstances of this case, the Court found no evidence that in asking for biographical information after defendant had invoked his right to counsel, the agents made any reference to defendant's alleged offense for which he had been arrested. The requested

biographical information bore no relationship to defendant's crimes. Also, there was no evidence that the agents "played upon (defendant's) weaknesses," or that defendant was unusually disoriented or upset at the time. Lastly, it did not appear that defendant was particularly susceptible to that line of questioning, or that the agents used the questions as a mere pretext to eliciting incriminating information.

In sum, the record did not show that the agents should have known that their questions were reasonably likely to elicit an incriminating response. As such, the requested DEA Form 202 information was not an interrogation, but rather came within the booking exception to the *Miranda* rule. The Court also noted that the fact that defendant had previously invoked his right to counsel had no bearing on the issue of whether subsequent questioning constitutes booking questions. Defendant's decision to change his mind about wanting an attorney and to waive his rights, which followed the asking of these booking questions, was of his own volition, making his subsequent incriminating statements admissible.

Note: A major exception to the booking questions rule is when a booking officer (or any other officer) asks an incoming inmate or any in-custody suspect questions related to his possible gang affiliation. In *People v. Elizalde et al.* (2015) 61 Cal.4th 523, the California Supreme Court held that questions related to an inmate's possible gang affiliation, commonly asked for purposes of housing the inmate away from other rival gangsters, and thus done for purposes of officer and inmate safety, are questions that the booking officer should know are reasonably likely to elicit an incriminating response. Therefore, the answers to such questions have been held to be inadmissible even though relevant at trial to alleged gang enhancements or other prosecutorial purposes. (See *California Legal Update*, Vol. 20, #7, July 5, 2015, and *Admin Notes* to Vol. 22, #10, Oct. 12, 2017.) The Ninth Circuit is in accord with this rule. (*United States v. Williams* (9th Cir. 2016) 842 F.3rd 1143.) Not being an issue in this case, however, this exception to the booking questions rule was not mentioned. But the gang-affiliation rule does tell us that not all background biographical information-related questions are going to qualify for the booking question exception.

***Trespass, per P.C. § 602.1(a)*:**

***People v. Turner* (July 10, 2017) 13 Cal.App.5th 397**

Rule: Probable cause exists to allow for an arrest for trespass, per P.C. § 602.1(a), where it is shown that a suspect's repeated refusal to leave a business establishment and other aggravating circumstances results in the intentional interference with that business.

Facts: San Pablo Police Officer Greg Niemi responded to a 24-hour Nation's Restaurant in the early morning hours of September 15, 2015, upon receiving a report of a man "refusing to leave." Upon arrival, the restaurant manager directed Officer Niemi to defendant who was "slouched over" in one of the booths, leaning on a duffle bag, with a jacket coving his head; apparently sleeping. Verbal attempts to wake him were unsuccessful. Touching his shoulder resulted in no more than defendant telling the officer to go away. Lifting the jacket off of his head, Officer Niemi recognized him as someone who had been the subject of frequent similar calls at the same restaurant. Officer Niemi told defendant that he had to leave. Instead of

responding, defendant started looking for his cellphone, first around his booth and then in nearby garbage cans and unoccupied booths. About the third time after telling defendant he had to leave, Officer Niemi picked up defendant's duffel bag and carried it outside. Defendant eventually followed the officer, but not before asking the restaurant manager to call his cellphone for him, which she did.

Once outside, Officer Niemi again told defendant to leave. But defendant started to check around planter boxes and looking into the restaurant through its windows. After three or four minutes of this, Officer Niemi told defendant that if he did not leave, he would be arrested. Still ignoring the officer, defendant stopped customers going into the restaurant, asking them "to keep an eye out for his cellphone." He asked at least one customer to call his phone. After these customers went inside, defendant opened the door and asked one of the customers to try to find his phone.

At this point, Officer Niemi asked the restaurant manager if she wanted defendant removed from the property. She told him that she wanted him arrested for trespassing, and signed a form for a citizen's arrest and request for prosecution. She informed Officer Niemi that defendant had been in the restaurant for about eight hours and had been asked to leave approximately four times. Officer Niemi took defendant into custody for trespassing; i.e., interfering with a business establishment, pre P.C. § 602.1(a). Defendant and his duffle bag were transported to the police station where defendant was booked. His duffle bag was eventually subjected to an inventory search, as was the San Pablo Police Department's standard policy, and which is done to protect anything of value in such a container as well as to secure anything that might potentially be dangerous. In the bag was found a fully loaded .38-caliber six-shot revolver that appeared to be functional, a 50-round box containing 44 rounds of .38-caliber ammunition which matched the ammunition in the revolver, and a niacin pill bottle with a white crystalline substance inside that was later determined to be slightly over three grams of methamphetamine.

Charged in state court with P.C. § 602.1(a), as well as being a felon in possession of a firearm and ammunition, and for possession of methamphetamine, defendant filed a motion to suppress the physical evidence at his preliminary examination, then again in the trial court, both motions filed under the theory that he had been unlawfully arrested and that the recovered weapon, ammunition, and contraband was all the product of that illegal arrest. The motions were denied both times. Upon conviction by a jury, defendant was sentenced to three years' probation. Defendant appealed.

Held: The First District Court of Appeal (Div. 1) affirmed. The issue on appeal, as it was in the trial court, was the legality of defendant's arrest for trespass. The parties all agreed that if defendant's arrest was lawful, then the pre-booking inventory search theory applied and no search warrant was necessary. The inventory search theory permits "police to search the personal effects of a person under lawful arrest as part of the routine administrative procedure at a police station house incident to booking and jailing the suspect." (*Illinois v. Lafayette* (1983) 462 U.S. 640.) Defendant's arrest was lawful so long as Officer Niemi had probable cause. Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that an individual is guilty of a crime. The "crime" at issue here was trespass, per P.C. § 602.1(a). Per this section, it had to be shown that defendant intentionally interfered with a lawful business or occupation carried on

by the owner or agent of a business establishment open to the public, by obstructing or intimidating those attempting to carry on business, or their customers, *and* by refusing to leave the premises of the business establishment after being requested to leave by the owner or the owner's agent, or by a peace officer acting at the request of the owner or owner's agent.

It was not an issue that defendant had refused to leave the restaurant at the request of both the manager and by a police officer at the request of the manager. The only issue, therefore, was whether defendant had intentionally interfered with the business of the restaurant by obstructing or intimidating those attempting to carry on the business, or their customers. On this issue, the Court ruled that even assuming that defendant's intent to interfere could not be inferred solely from his refusal to leave**,** there were sufficient other facts known to Officer Niemi to establish probable cause. First, defendant was asked multiple times over a span of hours to leave the restaurant, and he refused to do so. Second, the restaurant's manager had to interrupt her duties not only to ask defendant to leave some four times, but also to call the police, talk to Officer Niemi, and fill out paperwork necessary for a citizen's arrest. Finally, Officer Niemi testified that he had been called to the restaurant several times before because of defendant's reoccurring refusal to leave. These circumstances were sufficient to provide Officer Niemi with the necessary probable cause to believe that defendant was in violation of P.C. § 602.1(a). His arrest, therefore, was lawful.

Note: The Court actually held that Officer Niemi had the necessary "*reasonable suspicion* that defendant was guilty of violating section 602.1(a)." (Italics added.) But it was at the tail end of a protracted discussion of the necessity of showing "*probable cause*." So we have to assume that that is what the Court actually meant. Also, the Court fails to emphasize that 602.1(a) is a "specific intent" crime, and that it is necessary that it be proved that defendant "intentionally interfered with a lawful business or occupation." (See *Dubner v. City and County of San Francisco* (9th Cir. 2001) 266 F.3rd 959, 955.) The Court mentions *Dubner*, citing it for the position that a refusal to leave is legally insufficient by itself to prove an intent to interfere with one's business, but differentiates *Dubner* from the instant case on the more aggravated facts in this case, as listed above. I'm not sure that that isn't a distinction without a difference, however, when discussing whether a defendant had the necessary specific intent.

***Prolonged Detentions*:**
***Fruit of the Poisonous Tree Doctrine*:**
***Coordinated Traffic Stops and the Fourth Amendment*:**

United States v. Gorman **(9th Cir. June 12, 2017) 859 F.3rd 706** [Amended at 2017 U.S. App. LEXIS 18610; Sep. 14, 2017]

Rule: Information gathered during an illegally prolonged traffic detention fails to legitimize a subsequent traffic stop and dog-sniff when the two stops are part of one coordinated traffic stop performed by two officers working together. The Fruit of the Poisonous Tree Doctrine dictates that evidence recovered as a result of the second stop is subject to suppression as the product of an earlier illegally prolonged detention.

Facts: On the morning of January 23, 2013, defendant was driving a motorhome westbound on Interstate-80 near Wells, Nevada, when he attempted to pass a truck by moving into the left of two lanes. Failing to get by the truck, he moved back into the slow lane. Trooper Monroe observed defendant when he was in the fast lane and concluded that this was a "potential . . . left-lane violation." Making a traffic stop, Trooper Monroe contacted defendant and explained to him why he'd been stopped. In response to Monroe's inquiries, defendant explained that he was on his way to visit "his chick" in Sacramento, that he was moving to California, that the motorhome belonged to his brother, and that he earned money by selling paddleboards in Hawaii. Also, defendant answered "yep" when asked whether he intended to work in California.

Trooper Monroe found all these answers to be "suspicious" and "rehearsed." Trooper Monroe also thought it suspicious that defendant didn't know his girlfriend's address and had to look it up on his GPS. And he also thought it suspicious that defendant, whose occupation was selling paddleboards, could afford to drive cross-country in a motorhome, given the large vehicle's poor gas mileage and the cost of gas. Trooper Monroe also noted that defendant's stated destination was Northern California, a place known for cultivating marijuana. All this told Trooper Monroe that defendant was transporting drugs or drug money. Trooper Monroe returned to his vehicle to do a driver's license warrant check and get a criminal history report, while also requesting a drug-detection dog. The Nevada Highway Patrol (NHP) Communications dispatcher responded with negative findings on the checks. The dispatcher also told Trooper Monroe that there were no dogs available in the area.

Knowing that he did not yet have the necessary probable cause to obtain a search warrant, Trooper Monroe initiated a "non-routine record check," asking the El Paso Intelligence Center (a multi-jurisdictional bureau known as EPIC) for information on defendant. This resulted in a Drug Enforcement Agency (DEA) "hit" on defendant involving the transfer of $11,000 in 2006. EPIC also indicated that defendant had entered or exited the United States four times in recent years. Twenty minutes into the traffic stop, Trooper Monroe returned defendant's driver's license to him without issuing a citation. But instead of letting defendant go, Trooper Monroe began questioning him about some of the factors he found to be suspicious. When asked how he could afford to be driving a motorhome across the country, defendant responded; "I don't want to talk about how much I make." When asked directly if there was anything illegal in his motorhome and if he was carrying cash, defendant replied that he had $2,000. Trooper Monroe then asked defendant if he could search the vehicle, to which defendant said no.

Convinced that defendant was lying, and that he was "carrying money," but giving up trying to find a legal way to prove it, Monroe finally let defendant leave. The whole stop took nearly half an hour. But Trooper Monroe was not yet done. He contacted the NHP and suggested that if the Elko County Sheriff's Office had an officer with a dog who could intercept defendant, they "might want to take a second look at the car." Deputy Fisher, with a drug detection dog which had been trained to alert on the odor of tainted currency as well as drugs, was contacted and given the gist of the information obtained from Trooper Monroe. Deputy Fisher and Trooper Monroe subsequently communicated via telephone, Monroe giving Fisher the particulars of his contact with defendant and his suspicions that he might be transporting drug money. Deputy Fisher, who was not patrolling when first contacted, headed out to I-80 to find the motorhome which he subsequently did about an hour after Trooper Monroe's contact with him. Observing

the "problematic traffic violations" of the motorhome's tire partly crossing onto the fog line three times, Deputy Fisher made a traffic stop. Obtaining defendant's license and registration documents, Deputy Fisher initiated the same routine records checks that Trooper Monroe had already done. Awaiting the results (which again turned out to be negative), Deputy Fisher asked defendant if he was opposed to letting his dog sniff around the motorhome. Defendant said that he was opposed to it, "if that means anything." (It didn't.) Running the dog around the exterior of the motorhome, he alerted at a couple of locations. With this probable cause, a search warrant was sought from the Elko County Justice Court. The warrant was obtained some 20 minutes later. A search pursuant to the warrant resulted in the recovery of $167,070 in cash and other items possibly indicative of drug dealing. However, no criminal charges were brought against defendant arising from this incident. Instead, the federal government pursued civil forfeiture of the $167,070. In the forfeiture action, defendant filed a motion to suppress the currency on the ground that it was obtained in violation of the Fourth Amendment. The federal district court agreed and granted defendant's motion. In a separate order, the court awarded defendant $146,938.50 in attorneys' fees. The Government appealed.

Held: The Ninth Circuit Court of Appeal affirmed. Referring to the sequence of events in this case as a single "*coordinated traffic stop*," the Ninth Circuit agreed with the trial court when it determined that pursuant to the "fruit of the poisonous tree" doctrine, the recovery of the money during the second traffic stop was a product of, and tainted by, an illegally prolonged detention as it occurred during the first traffic stop. Without determining the legality of the second traffic stop itself (as performed by Deputy Fisher), the Court evaluated the legality of the first traffic stop (as effected by Trooper Monroe) and its legal effect on the eventual discovery of the currency.

First, it was noted that "(t)raffic stops are 'presumptively temporary and brief.'" Traffic stops, to be lawful, may last only as long as is reasonably necessary to carry out the "mission" of the stop, absent some independent reason (typically developed during the stop) to detain the motorist longer. The "mission" of a stop includes the officer's right to determine whether to issue a traffic ticket, to check the validity of the driver's license, to determine whether there are outstanding warrants against the driver, and to inspect the automobile's registration and proof of insurance. It typically takes no more than ten minutes to accomplish all this. To extend a traffic stop beyond this requires the development of some independent legal justification for prolonging the stop. Failure to do so results in an unlawfully prolonged detention; i.e., an unlawful seizure under the Fourth Amendment. Any evidence of criminal activity recovered during this period of an unlawfully prolonged traffic stop is subject to suppression.

Non-routine record checks and dog sniffs, as activities aimed at detecting evidence of ordinary criminal wrongdoing and not typically part of the "mission" of a lawful traffic stop, are examples of activities that may not be performed if to perform them prolongs an otherwise lawful roadside traffic stop. In this case, Trooper Monroe's detention of defendant for nearly thirty minutes was unlawfully prolonged, as conceded by the Government. The potential issue as to the legal sufficiency of his suspicions concerning what defendant might be transporting (i.e., illegal drug money) was not discussed, no doubt due to the Government's concession that the stop was illegally prolonged.

The Ninth Circuit agreed that Trooper Monroe's suspicions were not enough to support the extension of the detention beyond the ten minutes or less it should have taken him to check defendant's documentation, explain the violation, do routine radio checks, and cite or release defendant. During this additional period, Trooper Monroe performed non-routine investigative inquiries and questioned defendant about matters unrelated to the traffic infraction. These actions and inquiries fell beyond the scope of the stop's "mission." Per the Court, they were, instead, impermissibly "aimed at detect[ing] evidence of ordinary criminal wrongdoing." However, the currency in question in this case was not recovered during this concededly illegally prolonged detention. The true issue in this case is what legal effect, if any, Trooper Monroe's illegal detention had on the recovery of the currency during the second traffic stop, as performed by Deputy Fisher.

Under the "fruit of the poisonous tree" doctrine, the exclusionary rule encompasses not only the direct products of an illegal detention, but any indirect products as well. In this case, the Court tied Trooper Monroe's illegal acts during the first traffic stop to the eventual recovery of the currency in question by tying the two stops together in what the Court referred to as a single "*coordinated traffic stop*." "Here, there is an indisputable 'causal connection' between (defendant's) concededly unlawful detention and the dog sniff and its fruits. . . . The detention unquestionably served as 'the impetus for the chain of events leading to' the discovery of the currency." Deputy Fisher's acts as they related to defendant and his motorhome were the direct result of a request made by Trooper Monroe, and were based upon information at least partially accumulated during the unlawful extension of defendant's detention (e.g., the DEA "hit"). Deputy Fisher and his dog would never have had any contact with defendant had it not been for information supplied by Trooper Monroe. As such, the two traffic stops are inextricably tied together, thus triggering the protections of the fruit of the poisonous tree doctrine.

After rejecting the applicability of the traditional exceptions to the fruit of the poisonous tree doctrine (i.e., the "independent source" exception, the "inevitable discovery" exception, and in particular, the "attenuated basis" exception), the Court ruled that the currency recovered by Deputy Fisher was justifiably suppressed by the federal district court judge as the fruit of Trooper Monroe's illegally prolonged detention.

Note: The only exception to the fruit of the poisonous tree doctrine that the Court found even worth discussing was the "attenuation doctrine." Indeed, it is not a stretch to argue that Deputy Fisher's observation of defendant's infraction of hitting the fog line a couple of times (even though referred to by the Court as a "problematic," or "trivial" violation, at worst) justified the stop with or without any information from Trooper Monroe. But per the Court, this exception was overshadowed by the simple fact that Deputy Fisher never would have made any stop, or even been in the vicinity, had it not been pushed for by Trooper Monroe. The value of this case is its discussion of the so-called "*coordinated traffic stop*," involving two stops that are closely tied together factually. It makes sense, in theory. We'll have to wait and see whether the idea catches on in future cases.