Law Enforcement Digest

March 2005

576th Basic Law Enforcement Academy – September 9, 2004 through January 20, 2005

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Best Academic:	Jeffery Gann – Castle Rock Police Department
Best Firearms:	Larrick Winslow – Whatcom County Sheriff's Office
Tac Officer:	Corporal Donna Rorvik – Kirkland Police Department

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UNITED STATES SUPREME COURT

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Illinois v. Caballes, 125 S.Ct. 834 (2005)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

> Illinois State Trooper Daniel Gillette stopped Caballes for speeding on an interstate highway. When Gillette radioed the police dispatcher to report the stop, a second trooper, Craig Graham, a member of the Illinois State Police Drug Interdiction Team, overheard the transmission and immediately headed for the scene with his narcotics-detection dog. When they arrived, Caballes's car was on the shoulder of the road and Caballes was in Gillette's vehicle. While Gillette was in the process of writing a warning ticket, Graham walked his dog around Caballes's car. The dog alerted at the trunk. Based on that alert, the officers searched the trunk, found marijuana, and arrested Caballes. **[LED EDITIORIAL NOTE: Illinois law includes the Fourth Amendment "Carroll Doctrine," which permits warrant-less, non-consenting, full car searches based on probable cause to search. Washington law does not include the "Carroll Doctrine." See State v. Ringer, 100 Wn.2d 686 (1983).]** The entire incident lasted less than 10 minutes.
>
> Caballes was convicted of a narcotics offense and sentenced to 12 years' imprisonment and a $256,136 fine. The trial judge denied his motion to suppress the seized evidence and to quash his arrest. He held that the officers had not unnecessarily prolonged the stop and that the dog alert was sufficiently reliable to provide probable cause to conduct the search. Although the Appellate Court affirmed, the Illinois Supreme Court reversed, concluding that because the canine sniff was performed without any " 'specific and articulable facts' " to suggest drug activity, the use of the dog "unjustifiably enlarg[ed] the scope of a routine traffic stop into a drug investigation."

ISSUE AND RULING: Where a routine traffic stop was not extended in duration beyond the time necessary to issue a warning ticket, did another officer's use of a narcotics-detection dog to sniff the exterior of the stopped vehicle implicate the Fourth Amendment such as to require "reasonable suspicion" justification for using the dog to investigate for possible possession of illegal drugs? (ANSWER: No, rules a 6-2 majority)

Result: Reversal of Illinois Supreme Court decision that reversed the conviction of Roy Caballes for possession of a large quantity of marijuana.

ANALYSIS BY MAJORITY: (Excerpted from Supreme Court majority opinion)

> The question on which we granted certiorari, [review] is narrow: "Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a

drug-detection dog to sniff a vehicle during a legitimate traffic stop." Thus, we proceed on the assumption that the officer conducting the dog sniff had no information about Caballes except that he had been stopped for speeding; accordingly, we have omitted any reference to facts about Caballes that might have triggered a modicum of suspicion.

Here, the initial seizure of Caballes when he was stopped on the highway was based on probable cause, and was concededly lawful. It is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution. United States v. Jacobsen, 466 U.S. 109 (1984). A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while Caballes was being unlawfully detained.

In the state-court proceedings, however, the judges carefully reviewed the details of Officer Gillette's conversations with Caballes and the precise timing of his radio transmissions to the dispatcher to determine whether he had improperly extended the duration of the stop to enable the dog sniff to occur. We have not recounted those details because we accept the state court's conclusion that the duration of the stop in this case was entirely justified by the traffic offense and the ordinary inquiries incident to such a stop.

Despite this conclusion, the Illinois Supreme Court held that the initially lawful traffic stop became an unlawful seizure solely as a result of the canine sniff that occurred outside Caballes's stopped car. That is, the court characterized the dog sniff as the cause rather than the consequence of a constitutional violation. In its view, the use of the dog converted the citizen-police encounter from a lawful traffic stop into a drug investigation, and because the shift in purpose was not supported by any reasonable suspicion that Caballes possessed narcotics, it was unlawful. In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed Caballes's constitutionally protected interest in privacy. Our cases hold that it did not.

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed "legitimate," and thus, governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest." This is because the expectation "that certain facts will not come to the attention of the authorities" is not the same as an interest in "privacy that society is prepared to consider reasonable." United States v. Place, 462 U.S. 696 (1983), we treated a canine sniff by a well-trained narcotics-detection dog as "*sui generis* " because it "discloses only the presence or absence of narcotics, a contraband item." see also Indianapolis v. Edmond, 531 U.S. 32 (2000) **Jan 01 LED:02**. Caballes likewise concedes that "drug sniffs are designed, and if properly conducted are generally likely, to reveal only the presence of contraband." Although Caballes argues that the error rates, particularly the existence of false positives, call into question the premise that

> drug-detection dogs alert only to contraband, the record contains no evidence or findings that support his argument. Moreover, Caballes does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.
>
> Accordingly, the use of a well-trained narcotics-detection dog--one that "does not expose noncontraband items that otherwise would remain hidden from public view," [Place] -- during a lawful traffic stop, generally does not implicate legitimate privacy interests. In this case, the dog sniff was performed on the exterior of Caballes's car while he was lawfully seized for a traffic violation. Any intrusion on Caballes's privacy expectations does not rise to the level of a constitutionally cognizable infringement.
>
> This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful search. Kyllo v. United States, 533 U.S. 27 (2001) **Aug 01 LED:07**. Critical to that decision was the fact that the device was capable of detecting lawful activity--in that case, intimate details in a home, such as "at what hour each night the lady of the house takes her daily sauna and bath." The legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from Caballes's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

[Some citations omitted]

DISSENTING OPINIONS:

Justice Souter and Justice Ginsburg author separate dissenting opinions (Justice Rehnquist did not vote in this case due to his illness, though it seems highly likely based on his past voting that he would have sided with the majority).

Justice Souter's dissent argues that the fallibility of drug-sniffing dogs requires that the Court reconsider the rationale of its 1983 decision in Place, where the Court concluded that an investigative dog-sniff should not be considered a "search" under the Fourth Amendment because an alert will not intrude upon the privacy rights of innocent persons. Justice Souter would change the rules to treat all investigative dog-sniffing as "searches" subject to Fourth Amendment restriction, though in a footnote he leaves room in his analysis for the Court to develop a special rule distinguishing sniffs by drug-detection dogs from sniffs by dogs trained to detect explosives or chemical weapons or biological weapons.

Justice Ginsburg's dissent (which is joined by Justice Souter) complains that the majority opinion appears to reject the federal cases that have interpreted Terry v. Ohio to hold that there is both: 1) a duration restriction on investigative stops (such as traffic stops), and 2) a scope-of-investigation restriction that is independent of the duration restriction. She argues in vain that the Court should have held that the use of the dog here impermissibly expanded the scope of investigation, and that the dog's use made the circumstances more "adversarial" and created a likelihood of "embarrassment" and "intimidation" that was inconsistent with the atmosphere that is appropriate for a routine traffic stop. Like Justice Souter, she also leaves room in her analysis

for the Court to develop a special rule distinguishing sniffs by drug-detection dogs from sniffs by dogs trained to detect explosives or chemical weapons or biological weapons.

LED EDITORIAL COMMENTS (MORE NEXT MONTH):

We are working on an article comprehensively addressing the ramifications of Caballes for state and local Washington law enforcement officers, who must worry about both the Fourth Amendment of the federal constitution and about article 1, section 7 of the Washington constitution. There is no Washington appellate court decision squarely on point on the facts involved in Caballes, so Washington officers would not be acting in derogation of established case law if they were to act as did the Illinois officers in the Caballes case. However, our guess is that the Washington appellate courts will ultimately impose a reasonable suspicion restriction on bringing drug-sniffing dogs to routine traffic stops. We will try to explain ourselves more fully and to provide analysis of the relatively sparse relevant Washington case law in next month's LED.

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NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

AGGRESSIVE "FELONY STOP" MEASURES WERE JUSTIFIED BY REASONABLE SAFETY CONCERNS AND DID NOT CONVERT TERRY SEIZURE INTO AN ARREST

U.S. v. Sandoval, 390 F.3d 1077 (9th Cir. 2004)

Facts: (Excerpted from Ninth Circuit's opinion)

> At approximately 7:40 a.m. on September 20, 2002, the Yakima police received an anonymous phone call reporting that a 24-year-old Hispanic male with bushy hair known as "Budda" was pointing a gun at a 33-year-old white female named Michele Harris in front of Room 217 of the Red Apple Motel in Yakima. Several officers arrived at the motel less than five minutes later.
>
> Officers Masters, Sanchez, and Fuehrer were the first to arrive. Officer Masters spoke with the manager, who told him that room 217 was on the back side of the motel. Officer Masters went through the breezeway, while Officers Sanchez and Fuehrer headed directly to room 217. All the officers had their weapons drawn as they moved.
>
> As Officers Fuehrer and Sanchez approached the room, they saw a male and a female in a blue Lexus sedan that was slowly backing up outside of room 217 as if to leave the motel's parking lot. The man, Jose Alberto Sandoval, was in the passenger seat; the woman, Michele Harris, was in the driver's seat. Through an open window, the officers saw Sandoval waving his arms around. They could hear him yelling at Harris to "just go." Harris had her hands in plain view. Sanchez ordered Harris to turn the car off, but she did not. Officer Sanchez saw a dark object on Sandoval's lap, and began screaming that Sandoval had a gun. The car was revving loudly and the engine was smoking. The officers saw Sandoval reaching over and trying to get the car moving by pulling on the gear selector and pressing on the gas pedal with his hands. The occupants of the car did not comply with the three officers' repeated commands to turn off the ignition and show their hands. Soon Officer Sanchez succeeded in reaching through the open window to turn off the ignition.

> Officer Dahl and Sergeant Hester arrived on the scene. Dahl tried to break in the passenger window by kicking it and then by hitting it with the butt of his shotgun, but the window would not fully break. Sergeant Hester opened the passenger door and ordered Sandoval to get out of the car at gunpoint. Hester saw a small semi-automatic pistol on the passenger side floorboard at Sandoval's feet and yelled out the gun's location. Still, Sandoval would not get out of the car. He continued to try to get the car in gear, and resisted Hester and Dahl's efforts to pull him out. So Officer Fuehrer grabbed Sandoval by the hair and, with the help of Hester and Dahl, pulled Sandoval out. Sandoval refused to comply with the officers' commands to drop to the ground and put his hands behind his back. Officer Dahl punched Sandoval in his right rear kidney; Officer Masters struck him on the top of his head; and Sandoval was subdued. The officers found a bag of methamphetamine in Sandoval's left front shirt pocket.
>
> Meanwhile, Officer Sanchez removed Michele Harris out of the driver's side of the vehicle and handcuffed her. Officer Sanchez found three bags of methamphetamine and two pipes in Harris's purse. After she was read her rights, Harris told Officer Sanchez that Sandoval was her ex-boyfriend and that he had pulled a gun on her. She said she had called a friend and told the friend to call the police. Officer Sanchez confiscated the pistol, which was not loaded. He found another bag of methamphetamine nearby on the ground of the parking lot.

Procedural background:

Sandoval was tried and convicted in federal district court for being a felon in possession of a firearm and ammunition.

ISSUE AND RULING: Were the "felony stop" procedures justified by reasonable safety concerns, and hence is the seizure's lawfulness to be determined under the reasonable suspicion standard for "Terry stops" and not under the probable cause standard for arrests? (ANSWER: Yes, and the seizure here was lawful).

Result: Affirmance of federal firearms law conviction of Jose Alberto Sandoval; (sentence ordered reduced on a question not addressed in this **LED** entry).

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> Under the Supreme Court's Fourth Amendment jurisprudence, an investigatory Terry stop is justified if there is reasonable suspicion that the suspect is engaged in, or is about to engage in, criminal activity, considering the totality of the circumstances.
>
> A number of events and circumstances combined to provide the officers with a particularized and objective basis for suspecting Sandoval of criminal activity: the telephone tip; the short interval of time between the telephone call and the officers' arrival; Sandoval's location in front of room 217 in the motel's parking lot; his evasive actions in the car; his refusal to obey the officers' commands; and his possession of a weapon. The police tactics, while aggressive, did not convert the Terry stop into an arrest. The tactics constituted a reasonable response to legitimate safety concerns that resulted from Sandoval's uncooperative actions and possession of a weapon. Because the officers acted reasonably under the

circumstances, the district court correctly denied Sandoval's motion to suppress the evidence.

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BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

HATCHBACK AREA OF CAR IS SEARCHABLE UNDER FOURTH AMENDMENT "SEARCH INCIDENT" RULE FOR VEHICLES – In U.S. v. Mayo, 394 F.3d 1271 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals rules consistently with federal courts in other jurisdictions that police officers were entitled to search the cargo area behind the rear seat of hatchback vehicle as part of a search incident to the defendant's arrest for felony violation of the state vehicle code, regardless of whether that hatchback cargo area was covered or uncovered. The Court upholds the search and discovery of stolen mail in the hatchback area of the Honda Civic by noting that this area meets the criterion for automobile searches under New York v. Belton, 453 U.S. 454 (1981), because it is accessible to an arrestee from the passenger area of the vehicle.

Result: Affirmance of California federal district court conviction of Eric Alan Mayo for possessing stolen mail.

LED EDITORIAL NOTE: The Fourth Amendment rule is consistent with the Washington constitution on the issue addressed in the Mayo case. Thus, in State v. Johnson, 128 Wn.2d 431 (1996) March 96 LED:06, the Washington Supreme Court followed the case law from other jurisdictions on hatchbacks and open areas of station wagons in holding under article 1, section 7 of the Washington constitution that the sleeper portion of a long-haul truck cab, accessible through an open boot, was subject to search incident to arrest. The Johnson Court explained:

> **The sleeper was not a separate, closed compartment area like the trailer section of the tractor-trailer or the trunk of an automobile. The sleeper compartment of the cab, as is the hatch area of a hatchback or the rear section of a station wagon, is a "space reachable without exiting the vehicle." (internal citation omitted)**

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WASHINGTON STATE SUPREME COURT

"ARMED WITH A DEADLY WEAPON" EVIDENCE HELD SUFFICIENT TO SUPPORT SENTENCING ENHANCEMENT UNDER RCW 9.94A.602 IN RELATION TO CONVICTIONS FOR BURGLARY AND THEFT

State v. Willis, ___ Wn.2d ___, 103 P.3d 1218 (2005)

Facts and Proceedings below: (Excerpted from Supreme Court's majority opinion)

> [Eyewitnesses reported suspected burglars taking items out of an apartment.] Later that evening, police officers stopped the car [the eyewitnesses] had described. [Defendant Bilal] Willis, Debbie Gaiter, Kelvin Wilson, and Alicia-Renee Ford were in the car. Willis was the driver. [The eyewitnesses] were taken to a local parking lot where [one of the eyewitnesses] identified the vehicle, the young woman, and [a male suspect]. The police officers detained the four

and searched the car. They found a box of .32 caliber ammunition on the right rear floorboard as well as a gun holster and a loaded handgun underneath the backseat.

At trial, Gaiter admitted that she went to [the victim's] apartment in a gold Oldsmobile on March 22, 2002, along with Willis, "DV," and "CK." She testified that Willis kicked in the apartment door and that Willis, "DV," and "CK" went inside the apartment. According to Gaiter, when the three came out, Willis was carrying a game system. After that, they stopped at Willis's sister's house for a while. After they left the house, one man got out of the car. Shortly thereafter, the police pulled the car over. Gaiter said that Willis took the handgun from under his seat and handed it to Ford when the police pulled the car over. Ford then passed it to Gaiter, who put it under the backseat.

Willis admitted that he had gone to Preacely's apartment with Gaiter, Wilson, and a man named "Devious" on March 22, 2002. However, he denied his involvement in the burglary. Willis stated that he remained in the car while Gaiter, Wilson, and "Devious" walked to the apartment. According to Willis, the three came back in a hurry and only "Devious" was carrying something. "Devious" ordered Willis to drive. Willis stated that "Devious" got out of the car, taking some of the items before Willis stopped at his sister's place. As to the handgun, Willis admitted that he handled it in the car on his way to [the burglarized] apartment. However, he insisted that the gun belonged to "Devious."

When the police officers searched Willis's sister's house, they found a box of .380 caliber bullets, a box of .32 caliber bullets, and a handgun instruction manual for the same type of firearm as the one found in the car. They also found a Nintendo 64 and some games.
Willis was charged with burglary in the first degree, theft in the second degree, and unlawful possession of a firearm. The State also alleged that Willis was armed with a deadly weapon. By special verdict, the jury found Willis guilty on all counts and found that he was armed with a firearm at the time of the commission of the burglary and the theft.

ISSUE AND RULING: Is the evidence sufficient to support the sentencing enhancement under RCW 9.94A.602 for being "armed with a deadly weapon" during the commission of the crimes here of burglary and theft? (ANSWER: Yes)

Result: Affirmance of Court of Appeals' decision that had affirmed as to Bilal Haneff Willis the Thurston County Superior Court convictions (for burglary in the first degree, theft in the second degree, and unlawful possession of a firearm) and the sentencing enhancement (for being "armed with a deadly weapon" during the burglary and the theft).

ANALYSIS: (Excerpted from the Supreme Court majority opinion)

RCW 9.94A.602 authorizes a special allegation when a defendant is armed during the commission of a crime. It provides in pertinent part:

> In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of the crime ... if a jury trial is had, the jury shall, if it find[s] the defendant guilty, also find a special verdict as to whether or not the

> defendant or an accomplice was armed with a deadly weapon at the time of the commission of the crime.
>
> ... The following instruments are included in the term deadly weapon: ... pistol, revolver, or any other firearm....

RCW 9.94A.602 [Emphasis added for LED entry]. An affirmative finding on the special verdict results in an increase of the defendant's sentence pursuant to RCW 9.94A.510(3).

The test for determining when a defendant is "armed" was set out by this court in State v. Valdobinos, 122 Wn.2d 270 (1993). In Valdobinos, the police found cocaine and an unloaded rifle under a bed in the defendant's home while searching for evidence of delivery and possession of cocaine. Following trial, the defendant was convicted of delivery of cocaine while armed with a deadly weapon. On review, we held that a person is "armed" for the purpose of a deadly weapon enhancement if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes. We determined that evidence of an unloaded rifle under the bed, without more, was insufficient to show that the defendant was "armed" for the purpose of a deadly weapon enhancement, and invalidated the portion of the defendant's sentence based on the enhancement.

Subsequent cases have reaffirmed the holding in Valdobinos that the mere presence of a deadly weapon at the crime scene is insufficient to show that the defendant is "armed." The Court of Appeals refined the analysis, requiring that there be a nexus between the defendant, the crime, and the weapon. In State v. Mills, 80 Wn. App. 231 (1995), the police arrested the defendant outside his home for possession of methamphetamine and found a motel key while searching his car. After obtaining a warrant, the police searched the motel room to which the key belonged and found a gun along with narcotics. The defendant was convicted and the court added a deadly weapon enhancement to his sentence. The Court of Appeals reversed the deadly weapon enhancement, holding that the evidence must establish a nexus between the defendant and the deadly weapon in order to find that the defendant is "armed" for the purpose of a deadly weapon enhancement.

Similarly, in State v. Johnson, 94 Wn. App. 882 (1999), the Court of Appeals held that the State must prove a nexus between the defendant, the crime, and the weapon. In Johnson, when conducting a search of defendant's apartment the police found the defendant in bed in the bedroom, half asleep. The police discovered heroin and arrested the defendant. Later, in response to questioning, the defendant told officers there was a gun in a coffee table drawer. At the time of the statement, the defendant was handcuffed and the gun was five to six feet away from him. The defendant was convicted and the jury found he was armed with a deadly weapon. On appeal, the Court of Appeals held that a nexus between the crime and the weapon is required, pointing out that without such a nexus, courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime. The court reversed, finding that no nexus existed.

We recently examined the Court of Appeals' requirement that the State prove that a nexus exists between the defendant, the crime, and the weapon before a sentence may be enhanced pursuant to RCW 9.94A.510. In State v. Schelin, 147 Wn.2d 562 (2002) **Feb 03 LED:07**, the police searched the defendant's

> home and found the defendant in the basement where the police later discovered marijuana and a loaded revolver on the wall. The revolver was some 6 to 10 feet away from where the defendant had been standing. By special verdict, the jury found the defendant was armed with a deadly weapon. We approved the developments in Mills and Johnson and held that there must be a nexus between the defendant, the crime, and the deadly weapon in order to find that the defendant was "armed" under the deadly weapon enhancement statute. The evidence was sufficient to support the special verdict.
>
> Willis argues that there is insufficient evidence to support the special verdict. He maintains that the evidence does not establish the required nexus and, more particularly, that it does not establish he himself was armed. He reasons that while a firearm enhancement may be imposed if the jury finds that the defendant or an accomplice was armed, RCW 9.94A.602, instruction 29 omitted the phrase "or an accomplice." Thus, he contends, under the doctrine of the law of the case, the State was required to prove that Willis himself was armed.
>
> The doctrine of the law of the case provides that a jury instruction not objected to becomes the law of the case. In a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction. By failing to include the phrase "or an accomplice," instruction 29 required the State to prove that Willis himself was armed.
>
> When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. [Schelin] Willis does not dispute that there was a weapon in the vehicle or that he handled it on the way to [the burglarized] apartment. Further, Debbie Gaiter testified that Willis broke down the door to [the burglarized] apartment and removed items. Police found a .32 handgun in the vehicle. Later, at Willis's sister's home they recovered a number of the stolen items, along with a box of .380 caliber bullets, a box of .32 caliber bullets, and a handgun instruction manual for the same type of firearm as the one found in the car.
>
> We conclude there is sufficient evidence to find that the handgun was easily accessible and readily available for Willis's use, either for offensive or defensive purposes, and that there was a nexus between Willis, the crimes, and the handgun. Accordingly, there is sufficient evidence to support the special verdict.

[Some citations omitted]

DISSENT: Justice Sanders writes a dissent that is joined by Justices Alexander and Chambers. The dissent disagrees with the majority's analysis regarding the wording of the "armed with a deadly weapon" jury instruction. This **LED** entry did not address the jury instruction issue. The dissent does not opine regarding the sufficiency-of-the-evidence analysis of the majority addressed in this **LED** entry.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SENTENCING ENHANCEMENTS FOR BEING ARMED WHILE COMMITTING CRIME OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE DOES NOT HAVE PROOF "ELEMENT" OF KNOWLEDGE OF PRESENCE OF FIREARM – In State v. Barnes, __Wn.2d __, 103 P.3d 1219 (2004), the Washington Supreme Court rules, 6-3, that a defendant's knowledge of the presence of a firearm during the commission of a crime is not an

essential element of proof to establish a firearm sentence enhancement. In order to meet its burden on a firearm enhancement allegation, the State is required only to prove that the defendant was within the proximity of an easily and readily available firearm for offensive or defensive purposes, and that a nexus exists between the defendant, the crime, and the firearm. Justices Sanders, Alexander and Chambers dissent.

Result: Affirmance of Court of Appeals decision that affirmed the Snohomish County Superior Court's firearm enhancement to the sentence of Erik Vincent Barnes on his conviction for possession of a controlled substance.

(2) "RECKLESSLY" FINDINGS BY TRIAL COURT SUPPORT ITS CONCLUSION OF LAW THAT DEFENDANT COMMITTED "RECKLESS ENDANGERMENT" IN RELATION TO AUTO ACCIDENT – In State v. Graham, ___ Wn.2d ___, 103 P.3d 1238 (2005), the Washington Supreme Court rules that the following findings of fact by a juvenile court support the juvenile court's conclusion of law that the defendant committed the crime of reckless endangerment:

> 12. Prior to the accident, the respondent had passed driver's education, in which the respondent had been instructed as to the hazards of driving at excessive speeds, in an inattentive manner, and recklessly. *She knew that not following these instructions created a dangerous situation.* She had driven on numerous occasions, and was considered a safe driver. The respondent testified that prior to March 16, 2001, she had on occasion been a passenger in her boyfriend's car while he was speeding down straight roads, and that his excessive speed on those instances made her fearful. Given the instruction she received, her previous history of safe driving, and her prior experiences, *the respondent knew the risks inherent in driving fast or in an unsafe manner.*
>
> 13. Although *the respondent knew that driving at high speeds, not paying attention to the road, and playing games with the wheel were unsafe and could cause an accident,* the Court cannot find that she had actual knowledge of the risks inherent in the *particular* dangerous situation she created on March 16th.
>
> 14. A reasonable person in a similar situation would have recognized the risks inherent in the driving behavior in which the respondent engaged. As such, even if she did not have actual knowledge of the *specific* risks, she had constructive knowledge of those risks.

The Graham Court explains as follows why the findings that the defendant was driving at high speed, playing with the wheel, and not paying attention to the road support defendant's reckless endangerment conviction:

> The juvenile court thus explicitly found that Graham "*knew* that" driving at high speeds, inattentively, or recklessly "created a dangerous situation"; that she "*knew* the risks inherent in driving fast or in an unsafe manner"; and that she "*knew* that driving at high speeds, not paying attention to the road, and playing games with the wheel were unsafe and could cause an accident." The findings that Graham "knew" that her conduct "created a dangerous situation" and "could cause an accident" satisfy the knowledge component of the statutory definition of recklessness: "A person ... acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur." RCW 9A.08.010(1)(c).
>
> Graham incorrectly claims that "[t]he juvenile court found that [she] did not understand the risks involved in her driving." Graham's characterization of the

> juvenile court's findings rests on the court's unnecessary distinction between, on the one hand, Graham's actual knowledge of the risks inherent in high-speed, inattentive, and foolhardy driving and, on the other hand, Graham's lack of actual knowledge as to how "the *particular* dangerous situation she created on March 16th" would unfold. In other words, while RCW 9A.08.010(1)(c) requires actual knowledge "that a wrongful act [here, the loss of control over the automobile] may occur," the statute does not require actual knowledge that the loss of control will result in the skidding and rolling of the car and the violent ejection of its passengers. The juvenile court provided the unnecessary conclusion that, even if it could not find that Graham knew the "specific risks," "[a] reasonable person in a similar situation would have recognized the risks inherent in the driving behavior in which the respondent engaged." For purposes of the subjective knowledge component of recklessness, this additional finding that Graham also had constructive knowledge of the "particular" or "specific" accident is not essential. It has no effect on the very clear findings that Graham "knew" that her conduct--"playing with the steering wheel ... coupled with her speed and inattention to the road"--"could cause an accident." Such knowledge meets the statutory requirements of RCW 9A.08.010(1)(c).

Result: Affirmance of Court of Appeals decision that affirmed the King County Juvenile Court adjudications of Audrey E. Graham for vehicular homicide and three counts of reckless endangerment, all arising from a one-car accident.

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WASHINGTON STATE COURT OF APPEALS

STATIONHOUSE QUESTIONING OF 17-YEAR-OLD HELD "CUSTODIAL" FOR MIRANDA PURPOSES, BUT COURT'S OPINION FAILS TO PROVIDE A DESCRIPTION OF ALL OF THE FACTS RELEVANT TO DETERMINING MIRANDA "CUSTODY"

State v. Daniels, ___ Wn. App. ___, 103 P.3d 249 (Div. II, 2004)

Facts and Proceedings below:

After the death of the 9-week-old child of 17-year-old Carissa Daniels, medical examiners determined that the child was likely the victim of criminal homicide. Daniels was a suspect. The Court of Appeals describes as follows the police questioning of Daniels:

> On September 20, City of Lakewood detectives interviewed Daniels at the precinct station; Daniels's boyfriend and father accompanied her. The detectives declined to allow Daniels's father to be present during the interview.
>
> The detectives interviewed Daniels for more than one and one-half hours before advising her of her Miranda rights. Toward the end of the interview, when the detectives advised Daniels of her Miranda rights, she waived them. Shortly thereafter, Daniels became upset and asked for an attorney. The detectives ceased questioning her and she gave no further statements. The detectives told Daniels that she would be placed in a holding cell until she calmed down. Daniels remained in the holding cell while the detectives spoke with her boyfriend. The two then left.

The State charged Daniels with 1) homicide by abuse, and 2) murder in the second degree (felony murder), with the felony murder charged based on either a) second degree assault or b)

first degree criminal mistreatment. Prior to her jury trial, the superior court suppressed statements Daniels made to the officers in the interrogation session because she was not first advised of her Miranda rights.

The jury ultimately acquitted Daniels of homicide by abuse but convicted her of second degree murder (the verdict did not specify whether the felony-murder predicate was assault 2 or criminal mistreatment or both).

ISSUE AND RULING: Under all the of circumstances, was Daniels in "custody" when questioned at the stationhouse; i.e., would a reasonable person have believed that she was being subjected to the functional equivalent of arrest? (ANSWER: Yes)

Result: Suppression ruling by Pierce County Superior Court upheld; conviction of Carissa Daniels for second degree murder reversed based on In re Andress, 147 Wn.2d 602 (2002) **Dec 02 LED:16.** Case remanded for possible re-trial for second-degree felony murder based exclusively on the felony-murder predicate offense of criminal mistreatment. Note: The Andress-based, felony-murder analysis by the Daniels Court is not addressed in this **LED** entry.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The State also argues that the trial court erred in excluding Daniels's statements to the police made on September 20, 2000, before she received her Miranda warnings. The State asserts that Daniels knew she was not in custody and that Miranda did not apply.
>
> The Fifth Amendment right against compelled self-incrimination requires police to inform a suspect of his or her Miranda rights before a custodial interrogation. The Miranda exception applies when the interview or examination is (1) custodial, (2) through interrogation, and (3) by a state agent.
>
> A suspect is deemed in custody for Miranda purposes as soon as his or her freedom is curtailed to a degree associated with formal arrest. Berkemer v McCarty, 468 U.S. 420 (1984). Two discrete inquiries are essential to the determination of whether a suspect was in custody at the time of an interrogation: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate interrogation and leave. An interrogation occurs when the investigating officer should have known his or her questioning would provoke an incriminating response. State v. Sargent, 111 Wn.2d 641 (1988).
>
> Here, 17-year-old Daniels spent more than one and one-half hours in the precinct station where detectives asked her questions knowing that their questioning could provoke an incriminating response. And the detectives declined to allow Daniels's father to remain with her. These circumstances sufficiently demonstrate that Miranda applied. The trial court properly suppressed any Daniels's statements.

LED EDITORIAL COMMENT: Whether a person is in Miranda "custody" is determined under the totality of the circumstances. Age of the suspect is probably a factor, though the Washington Supreme Court has not expressly ruled on that factor, and the United States Supreme Court has not definitively resolved the question either, at least in our assessment of the cases. See the extensive discussion regarding age and other factors as custody factors in the August 2004 LED entry regarding the U.S. Supreme Court

decision in the Yarborough case and in the September 2004 LED regarding the Washington Supreme Court decision in the Heritage case.

The Court of Appeals does not explain whether or not the officers told Daniels before questioning: 1) that she did not have to answer their questions, or 2) that she was free to go at any time. If the officers told her these things before questioning, then these circumstances arguably present a non-custodial situation, although placing Daniels in a holding cell after questioning, even though only temporarily, tends to push the balance toward a "custodial" finding. Generally, if officers wish to make stationhouse questioning non-custodial, they should give the above-referenced admonitions and should be prepared, as to any such suspect, to allow the suspect to leave when he or she wishes. We do not think, however, that merely excluding a parent or other person from the room during questioning makes the circumstances custodial, though it probably depends on what the officers say and, of course, upon all other attendant circumstances.

TWO RULINGS: 1) MIRANDA WAIVER AND CONFESSION WERE "VOLUNTARY"; AND 2) WHILE TRIAL JUDGE SHOULD NOT HAVE ALLOWED DETECTIVE TO GIVE OPINION TESTIMONY THAT DEFENDANT HAD GIVEN "INCONSISTENT" ANSWERS DURING INTERROGATION, THE JUDGE'S ERROR WAS "HARMLESS"

State v. Saunders, 120 Wn. App. 800 (Div. II, 2004)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> On the evening of February 29, 2000, Marcia Ann Carlson-Grissett gave Leanna Bessie Williams, a ride to the home of Ray Saunders. On March 5, Grissett's dead body was found on Saunders' living room floor. The State later charged Saunders and Williams with multiple felonies for the events that occurred after Grissett made the fatal mistake of accepting Williams' invitation to enter Saunders's home for a drink. The evidence presented at Saunders' separate trial portrayed the relevant events as set forth below.
>
> Williams, who had been staying at Saunders' home, went out drinking with Saunders during the evening of February 29, 2000. As they were returning home in separate cars, Williams's car broke down and Grissett, a passerby, offered Williams a ride. Williams then invited Grissett into Saunders' home.
>
> Saunders, Williams, and Grissett consumed "whiskey and vodka" for some time. Saunders then asked Williams to persuade Grissett to participate in a sexual threesome. Grissett refused.
>
> Williams began to beat Grissett about the back of her head while Saunders watched. [Saunders] then went to his bedroom where he obtained handcuffs and leg shackles. Either Saunders or Williams or both placed these devices on Grissett. At some point, Saunders tried to force Grissett to perform oral sex on him; however, she continued to resist and she bit him.
>
> Saunders then obtained a knife from the kitchen. When he came back into the living room, Grissett was on the floor and Williams was anally raping her with a television antenna; blood was coming from Grissett's anus.

Saunders moved toward Grissett and stabbed her in the chest with the knife; in addition, either he or Williams strangled her. Grissett died from the stabbing and the simultaneous asphyxia from strangulation.

At some point during the struggle, Saunders, Williams, or both had attempted to apply duct tape to Grissett's mouth to keep it closed. And Grissett's ankles were bruised from the leg shackles. Saunders had the keys to the shackles on a key chain in his home.

Saunders and Williams left Grissett's body on Saunders's living room floor where it remained until Sunday afternoon, March 5. At that time, a visitor looking for Saunders entered the house through the unlocked back door and discovered Grissett's body. The visitor called the police.

The police immediately commenced an investigation. First, they found an intoxicated Saunders at the Western R Cafe and asked him a few brief questions. Detective [1] then took him to the police station to speak to Detective [2] but Detective [2] was not available at that time. While the police waited for Detective [2], they attempted to "sober [Saunders] up" by giving him coffee and engaging him in discussion unrelated to the crime.

Detective [2] arrived about four hours later, at about 2:30 a.m. on March 6. He read Saunders his Miranda rights, which Saunders voluntarily waived, and he then questioned Saunders and obtained his consent to tape further questioning. Eventually, Detective [2] placed Saunders under arrest. The following afternoon, Detective [2] again advised Saunders of his rights, again obtained a voluntary waiver of those rights, and continued the questioning.

The police later arrested Williams. She was wearing a watch that had belonged to Grissett.

In a second amended information, the State charged Saunders with intentional murder in the first degree or, in the alternative, felony murder based on rape, robbery, and kidnapping. It also charged him in separate counts with first or second degree robbery, first or second degree rape, and first or second degree kidnapping.

Following a preliminary hearing, the trial court ruled that after being advised of his Miranda rights, Saunders voluntarily, intelligently and knowingly waived those rights and made his statements without coercion. Consequently, it ruled that Saunders's post-Miranda statements were admissible along with the statements that he had made before the police took him into custody and the spontaneous statements he made before the police advised him of his Miranda rights.

The jury found Saunders guilty of murder under the felony murder alternative. It also found him guilty of first degree rape, first degree robbery, and first degree kidnapping. The trial court then imposed an exceptional sentence based on victim vulnerability and gratuitous cruelty.

ISSUES AND RULINGS: 1) Does substantial evidence in the record support the trial court's ruling that Saunders' Miranda waiver and his statements to the police were voluntary, even though: a) Saunders was intoxicated when questioning began; b) he was fed coffee and questioned through the night; and c) the interrogation room was windowless? (ANSWER: Yes, substantial evidence supports the ruling that Saunders both voluntarily waived his rights and voluntarily confessed); 2)

Was it harmless error for the trial court to admit into evidence the detective's inadmissible opinion testimony that Saunders had given "inconsistent" answers during interrogation? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Ray Saunders for felony murder, first degree rape, and first degree kidnapping; reversal of sentence and remand for a new hearing based on a ruling on a sentencing issue not addressed in the **LED**.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Voluntariness of defendant's statements to police

> Saunders assigns error to the admission of the statements he made after he received Miranda warnings, claiming that the police obtained his consent to questioning through coercion. He supports this assignment with claims that he was intoxicated, detained in a windowless room, and provided coffee by the police throughout the night to keep him awake.
>
> Here, substantial evidence supports the trial court's finding. After Detective [2] advised Saunders of his Miranda rights, Saunders indicated that he wished to voluntarily answer the detectives' questions and he signed a waiver form to that effect. After Detective [2] orally interrogated Saunders, Saunders consented to a taped interview.
>
> On the tape, Detective [2] again advised Saunders of his Miranda rights and asked if Saunders understood those rights and voluntarily wished to answer questions. In each case, Saunders replied, "Yes, I do." When asked: "You're aware that this is being recorded?", he responded, "Yes I am." And he said that the police had his permission to record the interview.
>
> The following afternoon, after the police had finally arrested Saunders for murder, the detectives advised him of his constitutional rights for a third time. Saunders once again responded that he would willingly answer questions and he did so.
>
> Inebriation is a factor that we consider when determining whether a defendant voluntarily waived his rights, but inebriation is not dispositive. The trial court noted in its findings that Saunders appeared inebriated during the interrogation sessions, but that the way he responded made it clear that he understood the questions.
>
> The taped interview occurred seven hours after Saunders had his last alcoholic drink. By the time of the third interview, at least 15 hours had elapsed since Saunders had consumed alcohol. His responses to Detective [2]'s questions during the taped interview appear knowing, voluntary, and intelligent.
>
> The police made no threats or promises to induce Saunders' statements. And Saunders never asked for an attorney or invoked his right to silence. He was cooperative and gave clear answers throughout the interrogation process. Thus, the record supports the finding that Saunders made his statements voluntarily.

2) Harmless error in allowing detective to opine about defendant's credibility

> Saunders cites to four occasions on which he contends that Detective [2] gave inadmissible opinion testimony.

> Saunders challenges Detective [2]'s comment that Saunders' answers to questions "weren't always truthful." In determining whether this statement is improper opinion testimony, we consider the totality of circumstances in the case, including: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact."
>
> Detective [2] is a police officer whose testimony may particularly influence the jury because of its "special aura of reliability." And Detective [2]'s testimony deals directly with Saunders' credibility in a case involving serious charges. But the record contains a considerable amount of untainted evidence indicating that Saunders was guilty of the crimes as charged.
>
> We agree that Detective [2]'s statement about Saunders' failing to always give truthful answers was improper opinion testimony, and that the admission of this evidence was constitutional error. But even a constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable jury would have reached the same result in the absence of the error.
>
> Here, there is overwhelming untainted evidence that Saunders was responsible for the murder, rape, robbery and kidnapping of Grissett. Further, we are satisfied that the jury would have reached the same conclusion without the admission of Detective [2]'s statement that Saunders was not always truthful in his answers to the police. Thus, the admission of Detective [2]'s statement was harmless beyond a reasonable doubt.

[Citations omitted]

LINEUP WAS NOT IMPERMISSIBLY SUGGESTIVE EVEN THOUGH DEFENDANT WAS DISTINGUISHABLE FROM OTHERS BY HIS BLACK EYE AND BY THE ORANGE COLOR OF HIS JAIL UNIFORM

State v. Ratliff, 121 Wn. App. 642 (Div. II, 2004)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

> On July 13, 2000, a man robbed a Little Caesar's pizza store in Clark County, Washington. During the robbery, which lasted 5-10 minutes, the robber was close to the three employees present. He carried a long-barreled handgun, wore a dark sweatshirt with the hood up, dark jeans, dark sunglasses, and had a mustache and "bright blue eyes." The robber took $750. Heidi Ammons, the store manager, testified that at first she thought the robber was the store's owner "just playing around." Ammons also testified that the robber wore "[r]eally dark sunglasses."
>
> Ratliff was later arrested by an officer from the Hillsboro, Oregon Police Department. The officer found a handgun similar to the one used in the robbery on the floorboard of the car that Ratliff was driving.
>
> After he was arrested, 12 days after the robbery, Ratliff participated in a six-man line up at the Washington County [Oregon] jail. The participants stood in an enclosed, lighted room separated from the witnesses by a one-way window. The witnesses were no more than ten feet from the participants. The officers who

conducted the line up did not tell the witnesses that one participant was a robbery suspect, and they said nothing to suggest choosing Ratliff.

All the participants were white males with mustaches. Participant number four, however, did not have a "bushy" mustache as the witnesses had described. The participants wore prison uniforms, but Ratliff's was the only orange uniform. The others wore pink or blue uniforms. Finally, Ratliff was the only participant with a black eye. The witnesses identified Ratliff.

The State charged Ratliff with first degree robbery. A jury convicted him on that charge after hearing testimony from the three employee witnesses (two of whom identified Ratliff in court), the officer who conducted the line up, and Ratliff's girlfriend who presented an alibi defense. The conviction was Ratliff's third for a "most serious offense;" accordingly, the trial judge imposed a life sentence.

ISSUE AND RULING: Was the lineup impermissibly suggestive where defendant was distinguishable from the others in the lineup by his black eye and by the orange color of his jail uniform (the other men in the lineup wore blue or pink jail uniforms)? (ANSWER: No)

Result: Clark County Superior Court conviction of Michael Kevin Ratliff for first degree robbery reversed on grounds not addressed in this **LED** entry (Note: the reversible error was that the judge improperly responded to juror questions); case remanded for retrial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Ratliff bears the burden of proving that the line up was impermissibly suggestive. If he proves impermissible suggestiveness, he must then establish that, the "suggestiveness created a substantial likelihood of irreparable misidentification." Important factors are (1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the degree of certainty demonstrated at the line up, and (5) the time between the crime and the line up.

Ratliff argues that several aspects of the line up rendered it impermissibly suggestive: "(1)[his] mid line up at position 3; (2) he was the only line up participant wearing bright orange jail clothing; and (3)[he] was the only line up participant with a black eye."

Ratliff fails to explain how his mid line up positioning suggests that he was the perpetrator. And we can think of none.

Ratliff's orange jail uniform and black eye were, however, characteristics that distinguished him from other members of the group. But all the line up participants wore colored jail uniforms; two of the others wore dark blue and three wore orange or pink. We find nothing in Ratliff's orange colored suit to suggest that he was the robber.

And no witness described the robber with a black eye. Thus, Ratliff's black eye does not point to him as the robber.

Ratliff draws an analogy between his line up and the suggestive identification procedures in State v. Traweek, 43 Wn. App. 99 (1986) and State v. Maupin, 63 Wn. App. 887 (Div. III, 1992) **Sept 92 LED:20**. In Traweek, witnesses described the perpetrator as a blonde male, and the defendant was the only blonde in the line up; in Maupin, a photo montage with just one photo was the basis for the witness's identification. Thus, Traweek and Maupin are dissimilar.

> Finally, no witness at the line up was apparently influenced by the color of Ratliff's suit, his black eye, or his position. Ammons based her choice on his "build," his "hair color," and his "facial structure." And Kerri Walker was influenced by Ratliff's bright blue eyes. We conclude that the line up was not impermissibly suggestive.

[Some citations omitted]

LED EDITORIAL NOTE: See the article, "Lineups, showups and photographic spreads; legal and practical aspects regarding identification procedures and testimony," located on the Criminal Justice Training Commission's Internet LED webpage.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) FINANCIAL NOTE WAS A "SECURITY" WITHIN THE MEANING OF CHAPTER 21.20 RCW AND THEREFORE SECURITIES FRAUD CONVICTION IS UPHELD – In State v. Pedersen, 122 Wn. App. 759 (Div. I, 2004), the Court of Appeals rejects a defendant's theory on appeal from his conviction for securities fraud under chapter 21.20 RCW. Defendant's theory on appeal was that the financial note involved in his scheme was a mere "commercial note" and not a "security" within the meaning of RCW 21.20.005(12).

The definition of "security" is similar to that under federal law and reflects a flexible principle. The Court of Appeals says that the definition must be adaptable to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits, and thus when determining whether a transaction is a security, courts must look at the substance of the transaction and the emphasis should be on economic reality. The Pedersen Court holds that, as a matter of law, the financial instrument involved in this case was a "security" in light of: 1) the investors' understanding that they were essentially purchasing accounts receivable for investment purposes and could expect a profit; 2) the fact that nothing in the loan agreement between the investors and Pedersen prohibited his sale or assignment of the investors' interest; and 3) the need for protection of risk by securities laws, since the accounts receivable in this case, which had previously been assigned to other creditors and investors, were actually unavailable as collateral.

Result: Affirmance of King County Superior Court conviction of Stephen L. Pedersen for securities fraud under chapter 21.20 RCW.

LED EDITORIAL NOTE: We recognize that few of our readers will ever get involved in looking at a securities fraud case, and we also recognize that the very brief summary above (which, due to LED space limits, does not include the complicated factual background in the case) is not a very useful explanation of the particular decision or of securities law in general. We would guess that a case of this sort would quickly be referred to the prosecutor's office, and that many prosecutors' offices themselves would quickly look for assistance from the few experts in the state on this area of law. On balance, however, we decided that a short piece on this decision and area of law might be of some marginal use to some of our readers.

(2) PROSECUTORIAL MISCONDUCT OF WITHHOLDING EXCULPATORY EVIDENCE FROM DEFENSE HELD TO BE SO EGREGIOUS AS TO REQUIRE DISMISSAL OF CHARGES AND TO BAR RE-TRIAL – In State v. Martinez, 121 Wn. App. 21 (Div. III, 2004), the Court of Appeals rules that the prosecutor's withholding of exculpatory evidence for several months until past the mid-point of a criminal jury trial was so repugnant to principles of

fundamental fairness that it constituted a violation of constitutional due process protections. The Martinez Court holds that this prejudicial violation of the defendant's rights: 1) justified dismissal of the charges, and 2) precluded a re-trial.

In Martinez, a key witness testified on an important factual question in a way that was in direct conflict with her account of events to police investigators several months earlier. But the prosecutor did not reveal this key exculpatory evidence (i.e., her earlier story to the police) to the defense until just before the State rested its case. This conduct was so egregious as to require dismissal and bar re-trial, the Martinez Court holds.

Result: Affirmance of Yakima County Superior Court order dismissing charges against Alexander Martinez for assault, burglary, kidnapping and robbery, all in the first degree.

(3) BASED ON AGENCY RELATIONSHIP CREATED UNDER INTERLOCAL COOPERATION AGREEMENT, SNOHOMISH COUNTY SHERIFF'S OFFICE CAN BE CIVILLY LIABLE FOR ACTS OF "SNOPAC" IN E911 CASE INVOLVING ISSUES OF "FAILURE TO PROTECT" AND "PUBLIC DUTY DOCTRINE" – In Harvey v. County of Snohomish (and others), ___ Wn. App. ___, 103 P.3d 836 (Div. I, 2004), the Court of Appeals holds that, even though SNOPAC is an independent legal entity, the County of Snohomish, which combined with other agencies in an interlocal cooperation agreement to create SNOPAC, can be liable for SNOPAC's actions. SNOPAC is the County's "agent" for civil liability purposes.

Another issue addressed in the Harvey decision is whether an E911 operator gave a caller sufficiently express assurances to make the government agencies civilly liable, despite the limits of the liability exposure under the "public duty doctrine." The Harvey Court summarizes the facts as follows:

> Robert Harvey, his infant son, and his friend Alex Keltz were outside Harvey's apartment building in Snohomish County when a man drove up to the building. The man appeared intimidating; his eyes were large and red, his face was painted white, and he told Harvey and Keltz that he was "[t]here to serve God." Harvey took his son and fled to his apartment along with Keltz, and locked the door. They ran upstairs, called 911, and Harvey went to his back bedroom to retrieve his pistol.
>
> Keltz reported to the 911 operator that the man was trying to break into the apartment. The man was hitting the door, shaking the doorknob, and screaming, "[L]et me in, I'm here to serve God." During the next 15 minutes, the man tried persistently to break into the apartment. He finally broke a window, entered the apartment, and ran toward Harvey with his arms up, screaming. Harvey shot the man several times in self defense and physically struggled with him before Harvey was able to grab his son and escape with Keltz through the front of the apartment and out to the street.
>
> During the 15-minute ordeal, the 911 operator first kept Keltz, and then Harvey on the telephone, assuring them that she had reported the break-in to law enforcement. In response to several questions by Harvey to the effect of whether the police were there at his location, the operator told him yes. But in fact, until at least two minutes after Harvey and the others escaped to the street, the officers were not at Harvey's apartment; they were staging hundreds of yards away.

The Harvey Court summarizes the applicable legal framework for this case as follows:

" 'Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)." ' "

"There are four exceptions to the public duty doctrine in which the governmental agency acquires a special duty of care owed to a particular plaintiff or a limited class of potential plaintiffs. These exceptions include (1) legislative intent; (2) failure to enforce; (3) the rescue doctrine; and (4) a special relationship." "The question [of] whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff."

Only the special relationship exception is at issue in this case. " 'The special relationship exception is a "focusing tool" used to determine whether a local government "is under a general duty to a nebulous public or whether that duty has focused on the claimant." ' " A special relationship arises where:

" '(1) there is direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives [sic] rise to justifiable reliance on the part of the plaintiff.' "

Result: Reversal of Snohomish County Superior Court order granting summary judgment to Snohomish County and the Snohomish County Sheriff's Office and SNOPAC; case remanded for possible trial.

LED EDITORIAL NOTES: Among other previous decisions discussed by the Harvey Court regarding whether express-assurances were given by E911 personnel such as to create a special duty for failure-to-protect, civil liability purposes are the following cases: Beal v. City of Seattle, 134 Wn.2d 769 (1998) Jan 99 LED:07; Noakes v. City of Seattle, 77 Wn. App. 694 (Div. I, 1995) Oct 95 LED:21.

(4) TO PROVE HEARSAY EXCEPTION FOR "EXCITED UTTERANCE" BASED ON A STARTLING EVENT, THE HEARSAY REGARDING THE UTTERANCE CAN BE THE SOLE EVIDENCE THAT ESTABLISHES THAT THE STARTLING EVENT OCCURRED – In State v. Young, 123 Wn. App. 854 (Div. I, 2004), the Court of Appeals holds that a trial court has discretion to admit hearsay uttered spontaneously in reaction to a startling event, even when the hearsay itself is the exclusive evidence as to whether the startling event occurred. Accordingly, the Young Court upholds a conviction for attempted child molestation based on neighbors' hearsay testimony regarding an 11-year-old child-victim's "excited utterances," even though the child later had recanted her story by the time of trial.

Result: Affirmance of King County Superior Court conviction of Henry Eugene Young for attempted child molestation.

(5) EVIDENCE OF DRIVER'S REFUSAL TO TAKE BREATH TEST IS ADMISSIBLE AS EVIDENCE OF GUILTY KNOWLEDGE EVEN WHERE BREATH TEST, IF TAKEN, WOULD NOT HAVE BEEN ADMISSIBLE – In State v. Cohen, __Wn. App. __, 104 P.3d 70 (Div. I, 2005), the Court of Appeals holds that a defendant's refusal to take a breath test was admissible in a DUI prosecution as evidence of guilty knowledge, notwithstanding the fact that, unknown to anyone at the time of the refusal, the results of the test would not have been admissible because a required quality assurance procedure had not been performed on the breath machine. Under RCW 46.61.517, a refusal to submit to a breath test is admissible in criminal prosecutions. The Cohen Court explains that the relevant fact was not the condition of the machine, but the driver's refusal to take the test. The evidentiary value of the driver's

refusal to submit to a breathalyzer test is that the refusal itself demonstrates the driver's consciousness of guilt.

Result: Reversal of King County Superior Court decision suppressing evidence of Robin D. Cohen's refusal to take the breath test; case remanded for trial.

(6) DEFENDANT MAY BE CONVICTED OF ATTEMPTED POSSESSION OF CHILD PORNOGRAPHY BASED UPON THE DEFENDANT'S POSSESSION OF MATERIALS THAT APPEAR TO BE CHILD PORNOGRAPHY BUT MAY IN FACT NOT DEPICT ACTUAL MINORS – In State v. Luther, __Wn. App. __, __ P.3d__, 2005 WL 50112 (Div. I, 2005), the Court of Appeals rules that Washington statutes that prohibit 1) attempt crimes generally and 2) possession of depictions of minors engaged in sexually explicit conduct, are not unconstitutionally overbroad when applied together. In acquitting Luther of an actual possession charge, the trial court ruled that the State could not prove beyond a reasonable doubt that the images obtained from Luther's computer were depictions of actual minors. The Court of Appeals does not overturn that ruling. The Court of Appeals agrees with the further ruling of the trial court, however, that the evidence was sufficient to support a conviction for attempted violation of RCW 9.68.070. A person may be convicted of "attempt" to commit a crime even if the actual commission of the crime was factually or legally impossible. Thus, even if the people depicted in the images of sexually explicit conduct were not minors, it was not a valid defense to a charge of attempted violation of RCW 9.68.070 that the crime was legally or factually impossible to commit under the attendant circumstances.

Because the crime of attempted possession of child pornography requires a specific intent to possess materials depicting minors engaged in sexually explicit conduct and a substantial step toward possession of such specific materials, the Court of Appeals finds no merit in the defendant's overbreadth argument, under which he asserted that the statute might be used to criminalize possession of constitutionally-protected adult pornography. The Luther Court concludes that the defendant's conviction was clearly supported by facts that: (1) Luther engaged in sexual-content conversations via the Internet with persons who portrayed themselves as minors, and (2) Luther sought out and received sexually explicit pictures of persons who claimed to be minors and appeared to be minors.

Result: Affirmance of King County Superior Court conviction of Ronald Joseph Luther for attempted possession of depictions of minors engaged in sexually explicit conduct.

(7) PROOF OF KNOWLEDGE THAT WEAPON IS ILLEGAL TO POSSESS IS NOT NECESSARY TO SUPPORT CONVICTION FOR POSSESSION OF UNLAWFUL FIREARM– In State v. Williams, __ Wn. App. __, 103 P.3d 1289 (Div. II, 2005), the Court of Appeals holds that a defendant's alleged lack of knowledge that the firearm in his possession was a "short-barreled shotgun" was not a defense to the charge of possession of an unlawful firearm. Following the rationale of State v. Warfield, 119 Wn. App. 871 (Div. II, 2004) **Feb 04 LED:17**, the Court of Appeals concludes that, while the State must prove that the defendant knowingly possessed the firearm, the State need not prove that the defendant knew the illegal qualities of the firearm.

Result: Affirmance of Kitsap County Superior Court conviction of Matthew Arthur W. Williams for possessing an unlawful firearm.

(8) "WASHOUT" PROVISIONS OF SENTENCING LAWS IRRELEVANT TO QUESTION OF WHETHER PERSON HAS PREDICATE "CONVICTION" FOR PURPOSES OF "UNLAWFUL POSSESSION OF A FIREARM" LAW; ALSO, A JUVENILE ADJUDICATION IS A "CONVICTION" UNDER RCW 9.41.040, AND EXPANSION OF RCW 9.41.040 IN 1990'S DID NOT VIOLATE CONSTITUTIONAL DUE PROCESS PROTECTIONS – In State v. Sweeney, ___ Wn. App. ___, 104 P.3d 46 (Div. III, 2005), the Court of Appeals reverses a trial

court decision that improperly considered a juvenile sentencing law "washout" provision as to whether a defendant had prior convictions for purposes of the firearms law's "unlawful possession of a firearm" provision at RCW 9.41.040. The Court of Appeals summarizes the factual and procedural background and its ruling in the case as follows:

> An adult or juvenile who possesses a firearm after being convicted of any serious criminal offense is guilty of first degree unlawful possession of a firearm. RCW 9.41.040(1)(a). James William Sweeney pleaded guilty to second degree burglary, a serious offense, when he was a minor. Twelve years later, he was arrested and charged for unlawfully possessing a rifle. The trial court found that the juvenile burglary had washed out and therefore could not serve as the predicate offense for unlawful possession of a firearm. The State appeals the dismissal of the charge against Mr. Sweeney, contending the trial court erred in applying the offender score rules of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, to the elements of the criminal statutes. We agree, reverse, and remand for trial.

Citing several Washington decision on point, the Sweeney Court also rejects defendant's argument that it violated his constitutional due process rights to convict him where the 1994 Legislature broadened the prohibitions on firearms possession but neither the courts nor anyone else thereafter gave him notice that he had lost his right to possess a firearm. In rejecting the latter argument, the Sweeney Court discusses, among other precedents: State v. Reed, 84 Wn. App. 379 (Div. II, 1997) (knowledge of unlawfulness is not an element of the offense under RCW 9.41.040); State v. Leavitt, 107 Wn. App. 361 (Div. II, 2001) **Nov 01 LED:17** (where defendant was expressly misled into believing this conviction did not bar possession of firearms, RCW 9.41.040 did not apply); and State v. Krzeszowski, 106 Wn. App. 638 (Div. I, 2001) **Nov 01 LED:18** (amendments expanding restrictions of unlawful possession law at RCW 9.41.040 did not violate constitutional ex post facto protections, and defendant could not assert an equitable estoppel defense against prosecution under RCW 9.41.040 because no government official made an affirmative representation that he was allowed to possess firearms); and State v. Locati, 111 Wn. App. 222 (Div. III, 2002) **Aug 02 LED:21** (although defendant's CCO had told him that he was allowed to possess firearms, two police officers subsequently told him otherwise, and therefore he could not raise an equitable estoppel or a constitutional due process argument in his prosecution under RCW 9.41.040.)

Finally, citing State v. Cheatham, 80 Wn. App. 269 (Div. I, 1996) **Aug 96 LED:20** and State v. McKinley, 84 Wn. App. 677 (Div. I, 1997) the Sweeney Court rejects defendant's argument that a juvenile adjudication does not qualify as a "conviction" for purposes of RCW 9.41.040.

Result: Reversal of Spokane County Superior Court order dismissing firearms charge against James W. Sweeney, aka William James Sweeney; case remanded for trial.

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NEXT MONTH

The April 2005 LED will include entries on:

1) a February 8, 2005 decision from Division Two of the Court of Appeals in **State v. Cook**, __Wn. App. __, 2005 WL 288796 (Div. II, 2005), ruling, 2-1, that the limitations period for a charge against a police officer for second degree domestic violence assault (a crime allegedly committed in 1997) was ten years under RCW 9A.04.080(1)(b)(i), because the officer's alleged felony assault would have violated his 1996 oath of office to refrain from committing any crimes; and 2) a February 7, 2005 decision from Division One

of the Court of Appeals in **Lewis v. DOL**, __ Wn. App. __, 2005 WL 281085 (Div. I, 2005), ruling that: (A) even if officers violate the in-car recording provisions of RCW 9.73.090(1)(c), the audio and video recording is nonetheless admissible because on-the-street conversations of police with DUI suspects are not "private conversations" within the meaning of chapter 9.73 RCW (the Privacy Act); and (B) an officer's warning under the in-car recording provisions of RCW 9.73.090(1)(c) that the detainee was "being recorded" was sufficient even though the advisement did not specifically warn that both audio and video recording was taking place.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at [http://www.supremecourtus.gov/opinions/02slipopinion.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.://www.ca9.uscourts.gov/] and clicking on "Opinions." Federal statutes can be accessed at [http://www.://www4law.cornell.edu/uscode]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's home page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office home page is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to [ledemail@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The **LED** is

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