Law Enforcement Digest

February 2007

601st Basic Law Enforcement Academy – August 10, 2006 through December 19, 2006

President: George Musgrove – Sedro Woolley Police Department
Best Overall: Brooks Laughlin – Bellingham Police Department
Best Academic: Brooks Laughlin – Bellingham Police Department
Best Firearms: Jon Shields – Clark County Sheriff's Office
Tac Officer: Officer Tim Marron – Puyallup Police Department

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NINTH CIRCUIT, U.S. COURT OF APPEALS

PROTECTIVE SWEEP HELD JUSTIFIED UNDER FACTS OF CASE EVEN THOUGH ONE OF TWO ARMED ROBBERY SUSPECTS HAD ALREADY BEEN SEIZED OUTSIDE OF ILLEGAL GAMBLING ROOMS

U.S. v. Paopao, 469 F.3d 760 (9th Cir. 2006) (Decision issued November 22, 2006)

Facts: (Excerpted from Ninth Circuit opinion)

> In late summer 2004, two perpetrators committed a series of robberies of illegal gambling rooms. The robbers posed as police officers and were armed. Based on descriptions provided by victims and information provided by unidentified sources, Honolulu Police Officer Joseph Lum ("Officer Lum") believed that the two robbers were Sam Matamua ("Matamua") and Paopao.
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> On the morning of August 20, 2004, Honolulu Police Detective Brian Lee ("Detective Lee") received a call from a confidential informant who stated that the men responsible for the earlier gambling room robberies were currently at "Charley's Game Room," (the "Game Room") another illegal gambling establishment. When Detective Lee arrived at the intersection near the Game Room, he radioed for assistance. While doing so, he spotted Officer Lum, who was off-duty and happened to be traveling through that area. Officer Lum knew of the Game Room and had been there before; he agreed to assist Detective Lee. When the other officers arrived, Officer Lum told them about the layout of

the apartment the Game Room was located in, that it had only one entrance, and that a robbery might be in progress.

As Officer Lum, Detective Lee and the other officers approached the Game Room, approximately seven individuals exited through the front door. The officers instructed those individuals to lie prone on a walkway a few feet from the door. After giving this direction, Officer Lum saw Paopao, whom he recognized from his mug shot, exit the Game Room. Paopao was carrying a tan bag over his shoulder. Upon seeing the police, Paopao turned about and went back into the Game Room. Officer Lum followed Paopao to the Game Room doorway and peered into the apartment with one eye. He observed Paopao take the bag off of his shoulder, pause for "a brief period," and then place the bag on the floor. Paopao then exited the Game Room and was arrested on an outstanding warrant.

After arresting Paopao, Officer Lum called into the Game Room, announcing his presence and telling anyone inside to come out. Two women exited. Officer Lum testified that he and the other officers then entered the Game Room to conduct a protective sweep. Specifically, based on the tip Detective Lee received, Officer Lum was concerned that the other suspect, Matamua, might still be in the apartment. The Game Room consisted of only three rooms and the protective sweep took less than a minute. As the officers were leaving the apartment, Officer Lum noticed that a gap existed between a sofa and the wall behind it. Concerned that someone could be hiding behind the sofa, Officer Lum went over to look in the gap. Officer Lum did not find anyone hiding in the gap, but as he walked over to the sofa, he noticed that the tan bag Paopao had put on the floor was unzipped. Looking into the bag, Officer Lum saw what he thought to be the handle of a handgun and an ammunition magazine. He seized the bag and its contents, which were later determined to be, in addition to the gun and ammunition magazine, a knife and a black pouch that contained jewels.

Proceedings below: (Excerpted from Ninth Circuit opinion)

> [Paopao] filed a motion to suppress the firearm and ammunition, arguing that the search that resulted in their discovery violated his Fourth Amendment rights. After an evidentiary hearing, the District Court denied the motion to suppress on grounds that the search was justified under the protective sweep and plain view exceptions to the Fourth Amendment. Paopao then pled guilty to violating § 922(g)(1), reserving the right to appeal the . . . suppression motion.

ISSUE AND RULING: Were the officers justified in making a "protective sweep" of the gambling rooms for a second armed robbery suspect after seizing one of the suspects just outside? (ANSWER: Yes)

Result: Affirmance of U.S. District Court conviction and sentence under 18 U.S.C. section 922 (g) and sentence for felon-in-possession of firearm.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> Paopao argues that where the arrest is made outside a premises, the protective sweep exception, as defined by the Supreme Court in Maryland v. Buie, 494 U.S.

325 (1990), never allows for a warrantless entry into the premises. Additionally, Paopao claims that even if it does, the officers did not have justification to enter in this situation.

The Supreme Court in Maryland v. Buie defined a protective sweep to be "a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers and others."

Shortly before Buie, the Ninth Circuit decided United States v. Hoyos, 892 F.2d 1387 (9th Cir. 1989). After applying a similar standard for protective sweeps as was used in Buie, the Hoyos Court upheld the protective sweep of the interior of a house when the defendant had been arrested just outside the door to the house. The court reasoned that "[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another."

Paopao has not shown any reason why the precedent established in Hoyos is no longer good law. The rationale espoused in Hoyos, that an individual within a house can still pose a threat to arresting officers outside of it, remains as true today, post-Buie, as it did seventeen years ago. As other circuits have noted, the location of the arrest, inside or outside the premises, should only bear on the question of whether the officers had a justifiable concern for their safety. *See* United States v. Henry, 48 F.3d 1282 (D.C. Cir. 1995) ("That the police arrested the defendant outside rather than inside his dwelling is relevant[only] to the question of whether they could reasonably fear an attack by someone within it.").

In order to be justified in conducting the protective sweep of the Game Room, the officers must have had a reasonable suspicion of danger. For an officer to harbor a reasonable suspicion of danger there must be "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." In the present case, the officers had received a tip that the two perpetrators from the previous gambling room robberies were in the Game Room. Even though the officers did not provide any detailed information concerning the identity of the informant, they were not required to do so. It was sufficient that the informant had provided Detective Lee "very accurate" information on approximately twenty previous occasions.

Furthermore, the tip itself was reasonably detailed in nature; it identified the nationality of the men, identified that they were under suspicion by the police, identified the name and general location of the Game Room and stated that the men were still in the Game Room. The tip, therefore, was sufficient for the officers to believe that the two robbers they suspected were present in the Game Room.

It is clear that when the officers conducted their sweep, they were justified in believing that at least one of the robbers could still have been in the apartment. Two women had exited when the police announced their presence. The tip stated that both robbers were in the Game Room and the officers had yet to encounter Paopao's suspected confederate, Matamua. The fact that Paopao

was arrested outside the Game Room did not automatically preclude the officers from conducting an appropriate sweep of the interior of the Game Room to dispel this suspicion and protect themselves. Paopao's argument to the contrary is meritless.

Paopao's other claim concerning the protective sweep is that Officer Lum exceeded the permissible scope of the protective sweep when he looked behind the sofa. Paopao argues that once the police had made their initial cursory inspection of the rooms, the protective sweep was complete and Officer Lum no longer had a legal right to be in the room. The Buie opinion emphasized that a protective sweep is "a cursory inspection of those spaces where a person may be found." The protective sweep purposefully does not have hard time constraints associated with it. "The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises."

In the present matter, Officer Lum's search behind the sofa did not exceed the scope of the protective sweep. Particularly instructive in this determination is Officer Lum's testimony that he was not secure in the notion that no one was left in the apartment until after he searched behind the sofa. The District Court found this portion of Officer Lum's testimony credible. The diagram of the Game Room, used by both sides to illustrate the layout of the apartment, showed that the sofa was placed by a wall between the entry room and the room with the gambling machines. This wall would have obstructed the officer's ability to see behind the sofa. As a result, it was reasonable for Officer Lum to suspect that someone still could be hiding behind the sofa, even after the officers had completed their preliminary sweep of the other parts of the apartment. As a result, Paopao's final claim that Officer Lum exceeded the scope of the protective sweep when he looked behind the sofa also fails. Since Paopao has failed to show that the District Court's decision not to suppress the seizure of the gun and ammunition magazine was in error, that decision is affirmed.

[Some citations omitted]

LED EDITORIAL NOTE: This case did not seem like a close call on whether the protective sweep was justified. For two relatively recent Washington Court of Appeals decisions holding that protective sweeps were not justified under the facts of those cases, see: State v. Boyer, 124 Wn. App. 593 (Div. II, 2004) Feb 05 LED:10; State v. Hopkins, 113 Wn. App. 954 (Div. III, 2002) Jan 03 LED:06.

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WASHINGTON STATE SUPREME COURT

IN APPEAL FROM AGGRAVATED FIRST DEGREE MURDER CONVICTION AND DEATH SENTENCE, THE SENTENCE IS REVERSED, BUT CONVICTION IS AFFIRMED, AND: 1) EVIDENCE HELD SUFFICIENT; 2) POLICE INITIATION OF CONTACT WITH CHARGED RAPE DEFENDANT TO QUESTION HIM ON UNRELATED MURDER CASE HELD OK UNDER FEDERAL SIXTH AMENDMENT RIGHT-TO-COUNSEL PROTECTION; AND 3) GOVERNMENT'S INVESTIGATIVE USE IN THE MURDER CASE OF DNA EVIDENCE PREVIOUSLY OBTAINED IN RAPE CASE HELD OK

State v. Gregory, ___ Wn.2d ___ , 147 P.3d 1201 (2006)

Overview of the case and of the Supreme Court rulings: (Excerpted from Supreme Court lead opinion)

> This case involves two consolidated appeals brought by Allen Eugene Gregory. In 2000, Gregory was convicted of three counts of first degree rape for the 1998 rape of R.S (rape case). In 2001, Gregory was convicted of the 1996 aggravated first degree murder of G.H., committed in the course of a rape and robbery (murder case). The jury in the murder case determined that there were not sufficient mitigating circumstances to merit leniency, and Gregory was sentenced to death. Gregory now appeals the convictions and sentences in both cases.
>
> For reasons set forth below, we reverse the rape convictions, holding that the trial court abused its discretion when it declined to review in camera the dependency files of the victim's child for evidence relevant to Gregory's consent defense. Those files reveal information that we have determined would have been material to Gregory's defense, and nondisclosure was not harmless beyond a reasonable doubt. We find no other trial court error in the rape case. We further conclude that none of Gregory's arguments warrant reversal of the aggravated first degree murder conviction, and we affirm that conviction. However, we find that the prosecutor engaged in misconduct during closing arguments in the penalty phase of the murder trial. Because the rape convictions were relied upon in the penalty phase of the murder case and because we find that prosecutorial misconduct occurred in the penalty phase, we reverse the death sentence, and we remand to the trial court for resentencing in the murder case

Facts relating to the premeditation issue:

> On July, 27, 1996, when G.H. did not show up for work at the restaurant where she was employed as a bartender, her coworkers became concerned and sent someone to check on her. A coworker found the back door of G.H.'s residence unlocked. She let herself in, looked through the house, and found G.H.'s body face down on her bed.
>
> The evidence suggested that G.H. had been attacked in her kitchen. She was probably stabbed once in the neck and then dragged into her bedroom. G.H.'s work clothes had been cut off of her and her hands were tied behind her back with apron strings. She was then stabbed three times in the back. In addition she had three deep slicing wounds to the front of her throat. One of the throat wounds was inflicted so violently that a vertebra in G.H.'s neck was broken. The medical examiner concluded that G.H. suffered blunt force trauma to the head and she had several bruises, but the cause of death was multiple sharp force injuries to her back and neck. Semen was found in G.H.'s anal and vaginal swabs, on her thigh, and on the bedspread. The evidence suggested that she was still alive when she was raped. Missing from her home were a pair of diamond earrings, jewelry, and her cash tips from that evening.

Facts and procedural background relating to the right-to-counsel issue:

On November 2, 1998, Gregory was in police custody after arraignment on the R.S. rape charges. Tacoma police detectives transported Gregory from the Pierce County jail to an interview room in a Tacoma police department building. The detectives read Gregory his Miranda rights, questioned Gregory about an unrelated and still uncharged shooting, and then questioned him about the G.H. murder. At the time, Gregory was represented by counsel on the R.S. rape charges, but police did not contact counsel nor invite him to the interview. At trial, one of the detectives testified that during the interview, Gregory refused to be audiotaped, but stated that he thought DNA evidence was good evidence, and became sullen after he was accused of raping and murdering G.H. Gregory also denied ever having sex with G.H. or being in her house. Gregory now argues that the interrogation without his counsel present violated his constitutional rights. **[LED EDITORIAL NOTE: As the Court indicates in its "analysis" below, Gregory raised only an "initiation of contact" issue under the right to counsel provision of the Federal Constitution's Sixth Amendment and the equivalent protection under the Washington constitution. Apparently, Gregory had not previously, during his continuous custody, invoked his right to silence or to an attorney under the Fifth Amendment, so Gregory could not and did not raise a Fifth Amendment Miranda "initiation of contact" issue on appeal.]**

Facts relating to the Fourth Amendment DNA-comparison issue:

After Gregory had been charged in an unrelated rape case, the trial court in that case issued probable cause orders on two occasions permitting the collection of defendant's blood by the State. Later, without a search warrant or court order, the government compared the DNA evidence obtained in the rape case with evidence in the murder case, matching Gregory's DNA profile to evidence seized in the murder investigation.

ISSUES AND RULINGS: 1) Does the evidence – including evidence of motive, multiple attacks, and use of a weapon – support the premeditation element of Gregory's aggravated first degree murder charge? (ANSWER: Yes); 2) Did police violate Gregory's federal Sixth Amendment (or Washington constitutional) right to counsel by initiating contact, obtaining a waiver of rights, and interrogating him where Gregory had already been arraigned and had counsel on a pending rape charge, but the police interrogation related to an unrelated, as-yet-uncharged, murder? (ANSWER: No); 3) Did the government violate Gregory's privacy rights under the Fourth Amendment or Washington constitution when DNA profile information on Gregory obtained by court order in an earlier rape investigation was used, without a search warrant or additional court order, in a murder investigation? (ANSWER: No)

Result: Affirmance of Pierce County Superior Court aggravated first degree murder conviction of Allen Eugene Gregory; reversal of his death sentence and his rape convictions; remand for further proceedings.

ANALYSIS: (Excerpted from Supreme Court lead opinion)

1) Premeditation

The legislature has declared that the premeditation necessary to support conviction for murder in the first degree must "involve more than a moment in point of time." RCW 9A.32.020(1). This court has defined premeditation as

> deliberate formation of and reflection upon the intent to take a human life [that] involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.

Premeditation may be proved by circumstantial evidence where inferences supporting premeditation are reasonable and the evidence is substantial.

This court has found that sufficient evidence supported the jury's finding of premeditation in cases where multiple wounds were inflicted with a knife or other weapon, there were signs of a struggle, the victim was at some point struck from behind, and there was evidence that sexual assault or robbery was an underlying motive. State v. Clark, 143 Wn.2d 731 (2000); State v. Gentry, 125 Wn.2d 570 (1995); State v. Ortiz, 119 Wn.2d 294 (1992) **Sept 92 LED:06**; State v. Ollens, 107 Wn.2d 848 (1987). In Clark, the seven-year-old victim was stabbed at least seven times in the neck, cuts on her hands suggested a struggle, and she was sexually assaulted. In Gentry, the defendant picked up a large rock to use as a weapon, he struggled with the victim over the course of 148 feet of a wooded trail, blows were struck on both sides of the victim's head, and sexual assault was apparently attempted. In Ortiz, the victim was found in her home, defensive wounds indicated a prolonged struggle through more than one room, and the victim had been raped. In Ollens, the victim was stabbed several times with a knife and his throat was then slashed, the victim was struck from behind, and the evidence suggested that robbery was the motive.

The facts in the instant case similarly evince premeditation. There was no sign of forced entry into G.H.'s house, G.H. was stabbed in the throat in her kitchen and then dragged to her bedroom, G.H.'s hands were tied behind her back, her clothes were cut off of her, and G.H. was stabbed three times in the back, her throat was slit three separate times, and a vertebra in her neck was fractured. Despite her severe injuries, G.H. struggled. G.H. was raped both vaginally and anally before she died. Moreover, none of G.H.'s tip money from that evening was found, and the diamond earrings that she always wore were never recovered. Juxtaposing the facts of the instant case with those from the cases discussed above, it is evident that here there was equally substantial evidence from which the jury could have found premeditation. We conclude that there is sufficient evidence to support a finding of premeditation.

2) Initiation of contact with arraigned defendant on uncharged, unrelated matter

In Texas v. Cobb, 532 U.S. 162 (2001) **June 01 LED:02**, the United States Supreme Court held that the Sixth Amendment right to counsel is offense specific, attaching only to "charged offenses," which the Court defined to include any offenses that would amount to the same offense under the Blockburger test. Gregory concedes that under this standard, police could interview him about the murder without violating the Sixth Amendment.

Employing a Gunwall analysis, Gregory asserts that this court should interpret article I, section 22 of the Washington Constitution to provide greater protection than the Sixth Amendment. Specifically, Gregory urges this court to adopt a standard suggested by the Cobb dissenters, which is based upon the federal courts' pre-Cobb test: "[o]nce a charged defendant has requested counsel, he may not be interrogated about *related matters* without counsel's knowledge and consent." The Cobb dissent would have defined "offense" for purposes of the Sixth Amendment right to counsel as "criminal acts that are 'closely related to' or 'inextricably intertwined with' the particular crime set forth in the charging instrument." Prior to Cobb, courts had held that " 'closely related' " offenses involved "the same victim, set of acts, evidence, or motivation."

Even if we were to adopt this "closely related" test as the Washington constitutional test, the R.S. rape and the G.H. rape/murder were not closely related. They involved different victims, they occurred two years apart, and they occurred in different locations. Other than the fact that they both involved rapes, the factual circumstances were distinct. Although Gregory claims that the cases involved the same evidence, namely his DNA, he does not point to a single pre-Cobb case in which the mere fact that the defendant's fingerprints or DNA were collected at both crime scenes rendered two crimes "closely related." In fact, crimes that were deemed closely related, pre-Cobb, involved the same course of conduct, the same cast of characters, were closely related in time, and/or occurred at the same location. Even if a Gunwall analysis were to lead to the adoption of the test suggested by the defendant, there would still be no constitutional violation. Therefore, in this case, we decline to address whether the Washington Constitution should require a different test than the one articulated by the majority in Cobb.

3) Warrantless comparing of DNA obtained under court order in rape case to evidence in murder case

Gregory contends that . . . it violates either the Fourth Amendment or article I, section 7 of the Washington Constitution to use DNA evidence in the State's possession in the rape case, to prove that Gregory committed an entirely separate crime. Essentially, Gregory argues that he has an expectation of privacy in the information contained in his blood, namely his DNA profile, and a separate probable cause determination was required to support its comparison with the semen collected from the G.H. crime scene. Because there was no such independent probable cause determination, he contends that the DNA evidence should have been suppressed in the murder trial.

Fourth Amendment: The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The application of the Fourth Amendment depends upon whether the person invoking its protection can claim a legitimate, objectively justifiable expectation of privacy that has been invaded by the State. Gregory asserts that he has an ongoing privacy interest in the characteristics of his DNA such that the State must obtain a warrant to compare his DNA profile with material collected in connection with an unrelated crime.

While this court has not directly addressed this question, we recently held that once a suspect's property is lawfully in the State's control, the State may perform forensic tests and use the resulting information to further unrelated criminal investigations, without violating the owner's Fourth Amendment rights. State v. Cheatam, 150 Wn.2d 626 (2003) **Feb 04 LED:05.** In Cheatam, the defendant asserted that police violated the federal and state constitutions when, acting without a warrant, they retrieved Cheatam's tennis shoes from a jail property bag several days after Cheatam had been arrested on an unrelated charge. We recognized that most courts have determined that

> once an inmate's property is taken from him or her and inventoried and placed in a property room, the inmate's expectation of privacy is substantially or entirely reduced to the point that no constitutionally protectable interest remains. Thus, a "second look" at an inmate's inventoried property in connection with investigation of a crime unrelated to the one for which the defendant is arrested does not violate the constitution.

Accordingly, we held that "once an inmate's personal effects have been exposed to police view in a lawful inventory search and stored in the continuous custody of the police, the inmate no longer has a legitimate expectation of privacy in the items free of further governmental intrusion."

While unique requirements must be met to support a blood draw, Gregory has failed to adequately explain why, after the blood draw is complete, a DNA profile that is lawfully in the State's possession should be treated differently from other items of a defendant's property with regard to subsequent criminal investigations. Gregory's blood was drawn for the very purpose of conducting DNA analyses and the resulting DNA profile was lawfully in the possession of police, regardless of which evidence that DNA profile was being compared against, swabs from R.S.'s rape kit or samples from the G.H. crime scene. Gregory does not point to any court that has concluded that DNA evidence, lawfully in the possession of the State for the purposes of one criminal investigation, cannot be compared with evidence collected for the purposes of an unrelated criminal investigation. We conclude that once the suspect's DNA profile is lawfully in the State's possession, the State need not obtain an independent warrant to compare that profile with new crime scene evidence.

Article I, Section 7*:* Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs . . . without authority of law." " 'If no search occurs, then article I, section 7 is not implicated .' " Cheatam, 150 Wn.2d at 642. Whether a search has occurred depends upon " 'whether the State has unreasonably intruded into a person's "private affairs." ' " The inquiry is broader under the state constitution than under the Fourth Amendment.

The Cheatam court held that once police have lawful possession of a piece of a suspect's property, "the inmate has lost any privacy interest in those items that have already lawfully been exposed to police view. He or she is no longer entitled to hold a privacy interest in the already searched items free from further governmental searches" The Cheatam court explained that "one's privacy interest does not change depending on which crime is under investigation once

> lawful exposure has already occurred." Because Cheatam's shoes were lawfully searched when booking occurred, Cheatam had no ongoing privacy interest in them, even under the Washington Constitution.
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> We follow the reasoning of Cheatam and conclude that article I, section 7 is not implicated here because no additional search occurs when a defendant's DNA profile already in the State's possession is compared against evidence taken from a new crime scene. Gregory's DNA profile had already been lawfully exposed to the police; thus, its comparison against evidence from a new crime scene did not constitute a search under article I, section 7. Article I, section 7 of the Washington Constitution does not require a different result than our Fourth Amendment analysis in this case.

[Some citations and footnotes omitted]

LED EDITORIAL NOTE: For a review of initiation of contact rules under the Fifth Amendment (not at issue in Gregory), and Sixth Amendment, see AAG Wasberg's article on the Washington Criminal Justice Training Commission internet website, LED page.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) DEFENDANT'S KNOWLEDGE OF CHARACTERISTICS OF FIREARM THAT MAKE IT UNLAWFUL MUST BE PROVEN UNDER RCW 9.41.190 (SHORT-BARRELED RIFLES AND SHOTGUNS), BUT KNOWLEDGE OF WRONGFULNESS OF CONDUCT IS NOT AN ELEMENT OF THE CRIME – In State v. Williams, ___ Wn.2d ___, 2006 WL 3438188 (2006), the Washington Supreme Court makes a split decision (with three separate opinions) that yields a rule of law that to convict a defendant charged with possessing a short-barreled shotgun under RCW 9.41.190 - - 1) the government must prove that the defendant knew, or should have known, the characteristics of the weapon that made the weapon unlawful, but 2) the government need not prove that the defendant knew that his or her conduct in possessing the weapon was unlawful.

The lead opinion for the Supreme Court explains that under the cir circumstances of this case, where (in the view of the justices joining that opinion) the evidence of guilt under this standard was overwhelming, it was harmless error for the trial court to fail to accurately describe this proof requirement to the jury:

> We are not unmindful that the difference between knowing the facts that make a person's conduct illegal and ignorance of the law is a fine distinction. As noted earlier, the State is not required to prove a gun owner knows that possession of a shotgun with a barrel less than 18 inches or a stock and barrel of less than 26 inches is unlawful. The State's burden is to prove that the defendant knowingly possessed an unlawful weapon and that he knew, or should have known, the characteristics that make the weapon unlawful. These facts will be readily apparent in the case of a short-barreled rifle or short-barreled shotgun since, in most cases, the owner of such a weapon can easily determine its length. As stated above, an individual is held to know that possession of such weapons is unlawful and is also held to know the legal definition of a short-barreled shotgun, a short-barreled rifle, or a machine gun. RCW 9.41.010(4), (6), (7). [Court's footnote: *The concurrence apparently wants it both ways. On the one hand, the*

concurrence says that RCW 9.41.190 only requires the State to prove that the defendant knew he possessed the firearm at issue, concurrence at 1, but then, inconsistently, appears to agree the State must prove knowledge of the characteristics rendering possession of the firearm unlawful if those characteristics are not "readily apparent to the naked eye." Concurrence at 2. RCW 9.41.190 either requires the State to prove that the defendant had knowledge of the weapon's illegal characteristics or it does not. The better approach in cases such as the one presented here, where the illegal characteristic is visible, is to give the additional instruction that ignorance of the law is no excuse for possession of an unlawful firearm under RCW 9.41.190.]

Next we must determine if instruction 11 properly informed the jury of the State's burden. Instruction 11 can be read two ways: it can be read to require only knowing possession of the weapon, or it can be read, as defense counsel did, to require both knowledge of possession and knowledge that the weapon is a short-barreled shotgun. Because this instruction has the potential of creating confusion, we conclude that it is deficient. However, as this court has held, " 'not every omission or misstatement in a jury instruction relieves the State of its burden' " so as to require reversal. Thus, we must determine whether the error was harmless.

Under the Neder test for harmless error it must appear beyond a reasonable doubt that the error did not contribute to the ultimate verdict. We believe that instruction 11, while potentially ambiguous, did not mislead the jury as to the State's burden in this case. First, Williams himself argued that instruction 11, coupled with instruction 9, required the State to prove that he knowingly possessed a particular weapon, a short-barreled shotgun. Specifically, counsel told the jury,

> [t]he State would submit to you that he only has to be aware of the fact that it's something. I would submit to you that he has-that knowledge that the fact, in this Instruction Number 9, is the fact of it being a short-barreled shotgun, not that it's illegal, but the fact this it was a short-barreled shotgun.

Secondly, Williams' weapon was considerably modified. The barrel was shortened to only 13 inches and the overall length of the shotgun was only 24 3/8 inches. We think the jury was more than justified in finding that he knew or should have known that the barrel of his shotgun was less than 18 inches (5 inches shorter than the law permits) and thus met the legal definition of a short-barreled shotgun. Accordingly, we find that any error in this case was harmless.

Justice Alexander writes a concurrence joined by Justice Bridge arguing that the standard of proof should be only the defendant's knowledge that he was in possession of the firearm, not knowledge regarding the weapon's characteristics.

Justice Jim Johnson dissents, joined by Justices Sanders and Chambers, arguing that it was not harmless error when the trial court failed to instruct the jury on the knowledge-of-characteristics-of-weapon requirement explained in the lead Supreme Court opinion.

Result: Affirmance of Court of Appeals decision (though on different grounds) that affirmed Kitsap County Superior Court conviction of Matthew Arthur W. Williams, who possessed a shotgun with a barrel shortened to only 13 inches.

(2) UNDER WASHINGTON'S "MEDICAL USE OF MARIJUANA ACT," CALIFORNIA DOCTOR'S PRIOR AUTHORIZATION DOES NOT QUALIFY PATIENT FOR "COMPASSIONATE USE" DEFENSE – In State v. Tracy, ___ Wn.2d __, 147 P.3d 559 (2006), the Washington Supreme Court rejects a defendant's "compassionate use" defense under the Medical Use of Marijuana Act, chapter 69.51A RCW.

Sharon Lee Tracy was suffering from a variety of long-term serious medical problems, and she had medical marijuana authorization from a California doctor at a point in time when Washington law enforcement officers inadvertently discovered that her home contained four growing marijuana plants and approximately 40 grams of marijuana. She was prosecuted, convicted and sentenced for possessing and manufacturing marijuana.

On review in the Washington Supreme Court, a 6-3 majority rules that because the California doctor was not licensed as a doctor in Washington, defendant Tracy did not have a valid defense under the clear language of chapter 69.51A RCW. Justice James Johnson dissents from this interpretation of chapter 69.51A RCW, joined by Justices Barbara Madsen and Richard Sanders.

The Tracy Court also rejects an argument by defendant Tracy that she had authorization that would have been valid under California law, and that denying her "compassionate use" defense somehow violated "full faith and credit" protections under the U.S. constitution. The Court rules that she did not have make an adequate record to make this argument. This leaves to a future case whether such an argument under "full faith and credit" protection might ever succeed under another factual record.

Result: Affirmance of Court of Appeals decision (see Oct 05 **LED**:21) that affirmed the Skamania County Superior Court convictions of Sharon Lee Tracy for manufacturing marijuana and for possessing marijuana.

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WASHINGTON STATE COURT OF APPEALS

KING COUNTY JAIL PHONES PROVIDE CLEAR RECORDED NOTICE THAT ALL INMATE CALLS ARE RECORDED, AND THEREFORE JAIL'S RECORDING OF INMATE CALLS IS HELD BOTH 1) NOT PRIVATE AND 2) CONSENTING; RECORDINGS OF THE CALLS ARE THEREFORE HELD ADMISSIBLE UNDER CHAPTER 9.73 RCW

State v. Modica, ___Wn. App. __, 2006 WL 3772307 (Div. I, 2006)

Fact and Proceedings Below: (Excerpted from Court of Appeals Opinion)

> On the night of May 18, 2005, a physical altercation took place between Modica and his wife. Ms. Modica left the scene of the incident and called 911. Police officers responded to the 911 call and attempted to place Modica under arrest. Modica initially fled from the officers, but was eventually subdued and arrested.

On June 1, 2005, the King County Superior Court issued an order prohibiting Modica from having any contact with his wife.

Modica was detained in the King County Jail for several weeks after his arrest. While there, Modica telephoned and spoke with his grandmother almost daily. During several of these calls, Modica expressed his desire that Ms. Modica not testify against him at trial, and encouraged his grandmother to tell Ms. Modica not to testify.

All telephone calls made by an inmate of the jail to a person other than the inmate's attorney are recorded and subject to monitoring. Signs posted in the jail alert inmates to this fact. Additionally, when a call is initiated by the inmate, a recorded message is played for both the inmate and the call recipient that states that the call is recorded and subject to monitoring. [Court's footnote: *The recorded message states: "Hello, this is a collect call from [Inmate's name as recited by the Inmate], an inmate at King County Detention Facility. This call will be recorded and subject to monitoring at any time. To accept the charges dial 3. To decline the charges dial 9 or hang up now. Thank you for using Public Communication Services. You may begin speaking now." (Emphasis added.) Modica's name, as recited by Modica, was inserted into each of the recorded messages that preceded Modica's conversations with his grandmother.]* A call cannot continue until after the recorded message plays and the call's recipient presses "3" on the recipient's telephone keypad.

Both Modica and his grandmother heard the recorded message before each of their telephone conversations. Modica's grandmother pressed "3" on her keypad in order to commence each conversation. During several of the conversations, Modica stated to his grandmother that the calls were being recorded.

[The State charged Modica with assault in the second degree, assault in the fourth degree, resisting arrest, and tampering with a witness.]

Over Modica's objection, during the course of the trial recording of some of the telephone calls made by Modica to his grandmother were admitted into evidence and played to the jury.

[A jury convicted Modica on all four charges.]

ISSUE AND RULING: Where the King County Jail phones provide a recording announcing that all inmate phone calls are recorded, were the recordings of phone calls of inmate Mr. Modica to his grandmother neither private nor non-consenting under chapter 9.73 RCW, and hence are the recordings admissible against him in his criminal prosecution? (ANSWER: Yes)

Result: Affirmance of King County Superior Court convictions of Desmond Modica for assault in the second degree, assault in the fourth degree, resisting arrest and tampering with a witness.

ANALYSIS (Excerpted from Court of Appeals opinion)

RCW 9.73.030(1) prohibits government interception or recording of private conversations or communication without first obtaining the consent of all the participants or persons engaged in the conversations or communications.

Information obtained in violation of the privacy act is deemed inadmissible in any civil or criminal case. RCW 9.73.050.

We conclude that the trial court did not err by admitting recordings of the conversations between Modica and his grandmother, both because the conversations were not private within the meaning of the privacy act and because Modica and his grandmother consented to the recording of the conversations.

a. "Private" Communication

The term "private" is not defined in the privacy act. The Supreme Court has "adopted the WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1969) definition of 'private' as "belonging to one's self … secret … intended only for the persons involved (a conversation) … holding a confidential relationship to something … a secret message: a private communication … secretly: not open or in public." Lewis v. Dep't of Licensing, 129 Wn.2d 446, **Sept 06 LED:09**; State v. Christensen, 153 Wn.2d 186 (2004) **Feb 05 LED:09**.

A communication is private within the meaning of the privacy act only when (1) the parties to the communication manifest a subjective intention that it be private and (2) where that expectation of privacy is reasonable. State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11**.

Factors bearing on the reasonableness of the expectation of privacy include the duration and subject matter of the communication and the potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. Lewis; State v. Clark, 129 Wn.2d 211 (1996) **July 96 LED:07**. In general, the presence of another person during the conversation means that the matter is neither secret nor confidential.

Here, even if Modica and his grandmother had subjective expectations of privacy in the telephone conversations, those expectations were not reasonable under the circumstances in which the calls were made.

Modica's reasonable expectation of privacy as an inmate was less than that of a free citizen. State v. Rainford, 86 Wn.App. 431 (1997) ("[A]n inmate's expectation of privacy is necessarily lowered while in custody."). See also United States v. Van Poyck, 77 F.3d 285, 290-91 (9th Cir.1996) ("[N]o prisoner should reasonably expect privacy in his outbound telephone calls.").

Furthermore, the recorded message alerted Modica and his grandmother to the fact that the calls were recorded and were subject to monitoring. This gave both of them clear notice that the calls were not private. Modica was provided further notice by the posted signs stating that inmates' calls would be recorded and subject to monitoring. Modica's grandmother's notice was further ensured by the requirement that she press "3" on her telephone keypad after listening to the recorded message and before commencing the telephone discussion. Under these circumstances, neither Modica nor his grandmother could have maintained a reasonable expectation that their conversations were either secret or confidential.

The trial court did not err by admitting into evidence the recording of the telephone calls between Modica and his grandmother. The calls were not private, within the meaning of the privacy act.

b. Consent

Pursuant to RCW 9.73.030, the recording of private communications or conversations does not violate the privacy act when all the participants or parties engaged in the communication or conversation consent to such recording. RCW 9.73.030(1)(a) and (b).

A party to a conversation is deemed to have consented to having his or her communication recorded when the person knows that the recording is taking place. *Townsend* (party deemed to have consented to the recording of e-mail messages because he knew such messages would be automatically recorded on the recipient's computer). See also In re Marriage of Farr, 87 Wn. App. (1997) **April 98 LED:11** (party deemed to have consented to the recording of message when he left the message on an answering machine, the only function of which is to record messages).

Both Modica and his grandmother heard the recorded message alerting them to the fact that the calls were being recorded, and Modica acknowledged during some of his conversations with his grandmother that the calls were being recorded. Thus, both Modica and his grandmother knew that their conversations were being recorded, but nevertheless chose to converse. Accordingly, they each consented to the recordings.

The trial court did not err by admitting into evidence the recording of the conversations. Both Modica and his grandmother consented to the recording of those conversations, within the meaning of the privacy act.

[Some citations, footnotes omitted]

SEARCH WARRANT AUTHORIZING SEARCH FOR "CERTAIN EVIDENCE OF A CRIME, TO-WIT: 'ASSAULT 2ND DV" HELD TO BE TOO VAGUE AS TO ITEMS SOUGHT AND HENCE TO FAIL PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT

State v. Higgins, ___ Wn. App. __, 147 P.3d 649 (Div. II, 2006)

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

After quarreling most of the day and drinking heavily at the 99 Bar, Lloyd and Patricia went home separately. Lloyd locked Patricia out, and she called the police for assistance in entering the home. Officer [A] of the Centralia Police Department responded. He knocked on the front door. When nobody answered, he went around to the side of the house and, seeing Lloyd lying on the bed, knocked on the window, again receiving no response. He borrowed a key from the landlord and let Patricia in through the sliding back door. After returning the key to the landlord next door, he encountered Centralia Police Officer [B] at the

side of the house. [Officers A and B] then heard a gunshot from inside the house.

The officers detained Lloyd and Patricia. Patricia initially claimed that she fired the gun. She later testified that after she had entered the residence, she walked down a hallway toward the bedroom and, reaching the washer and dryer, she looked up and saw Lloyd pointing a gun at her. She heard the gun fire and was grabbed from behind and shoved against the wall, shattering her hip.

[Officer A] obtained a search warrant authorizing seizure of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021." An affidavit describing the underlying incident and establishing probable cause to search for "a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possibly exit point where the bullet struck" was attached to the warrant.

After searching the house under the warrant, [Officer A] found all anticipated items. A 40-caliber handgun and a clip were next to the bed. A spent casing was on the TV stand. There were holes indicating that the bullet had gone through the bedroom wall and through an exterior wall. The bullet was found on the patio.

The State charged Lloyd with second degree assault, "which is a violation of RCW 9A.36.021(1)(c)," alleging that he had assaulted Patricia "with a deadly weapon."

Lloyd moved to suppress evidence seized under the search warrant because the warrant violated the particularity clause of the Fourth Amendment. Specifically, he noted that the warrant did not contain a list of items to be seized, did not incorporate the affidavit by reference, and did not list a subsection of the second degree assault statute. Finding that no subsection of the statute was needed and that the affidavit was attached to the warrant and contained a particular list of items to be seized, the trial court concluded that the warrant satisfied the particularity requirement and denied the suppression motion.

In closing argument, the prosecutor emphasized that the locations where officers found the bullet holes, the gun, and the magazine corroborated Patricia's story. The jury convicted Lloyd on one count of domestic violence second degree assault.

ISSUE AND RULING: Was the authorization in the warrant to search for "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021" sufficiently particular for Fourth Amendment purposes to justify search for, and seizure of, a gun, a bullet, a casing and other evidence? (ANSWER: No)

Result: Reversal of Lewis County Superior Court conviction of Lloyd James Higgins for domestic violence second degree assault.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Lloyd [Higgins] argues that the search of his residence violated the particularity requirement of the warrant clause and that the trial court therefore should have

suppressed the evidence seized. Under the Fourth Amendment, a warrant must describe with particularity the things to be seized. Groh v. Ramirez, 540 U.S. 551 (2004) **April 04 LED:02**; State v. Riley, 121 Wn.2d 22 (1993) **July 93 LED:10**. This requirement serves two functions by "limiting the executing officer's discretion"; and "informing the person subject to the search what items may be seized."

Neither the officer's personal knowledge of the crime nor a proper execution of the search may cure an overbroad warrant. For example, in Riley our Supreme Court held that a warrant authorizing the seizure of "fruits, instrumentalities, and/or evidence of a crime," followed by a list of various items that might fit the description, was overbroad because it did not limit the seizure by stating the crime under investigation. Although the investigator knew that he was seeking items involved in the crime of computer trespass and limited his search accordingly, the Court reversed the conviction. "Because the person whose home is searched has the right to know what items may be seized, an overbroad warrant is invalid whether or not the executing officer abused his discretion."

Three factors are relevant to determine whether a warrant is overbroad: "(1) whether probable cause exists to seize all items of a particular type described in the warrant, (2) whether the warrant sets out objective standards by which executing officers can differentiate items subject to seizure from those which are not, and (3) whether the government was able to describe the items more particularly in light of the information available to it at the time the warrant was issued."

Here, there is no question that the government was able to describe the items more particularly, given that [Officer A's] affidavit used more particular terms: "a Glock pistol, unknown serial number or caliber; a spent casing, bullets, and an entry and possibly exit point where the bullet struck." The warrant could easily have specified these items, rather than the general description of "certain evidence of a crime, to-wit: 'Assault 2nd DV' RCW 9A.36.021."

That the affidavit was attached to the warrant is irrelevant because the warrant did not incorporate the affidavit by reference. In Riley, although the affidavit mentioned computer trespass as the crime under investigation, our Supreme Court held that this could not cure the lack of particularity because the affidavit was neither attached to nor mentioned in the warrant. The Court clarified that both an attachment and suitable words of reference are necessary for an affidavit to cure an overbroad warrant.

In Groh, the United States Supreme Court affirmed the Ninth Circuit's invalidation of a search warrant that had an attached affidavit that was sealed and not given to the homeowner. Only the warrant that did not list what was to be seized was given to the homeowner. The warrant recited that the issuing magistrate found probable cause based on the application, but the United States Supreme Court held this insufficient, stating:

> [U]nless the particular items described in the affidavit are also set forth in the warrant itself (or at least incorporated by reference, and the affidavit present at the search), there can be no written

> assurance that the Magistrate actually found probable cause to search for, and to seize, every item mentioned in the affidavit.

Moreover, the general reference to evidence of domestic violence second degree assault under RCW 9A.36.021 authorized seizure of items for which there was no probable cause. RCW 9A.36.021(1) contains six different means to commit second degree assault, a Class B felony. Here, the State had probable cause to search the premises for evidence under RCW 9A.36.021(1)(c) (assault with a deadly weapon), but it did not have probable cause to search for evidence of violations described in subsections 9A.36.021(1)(a), (b), (d), (e), or (f).

. . .

Finally, the warrant failed to differentiate between items subject to seizure and those that were not. An overbroad reference to the crime can be permitted, for instance, where the authorized search is limited to illicit items. State v. Chambers, 88 Wn. App. 640 (1997) **Jan 98 LED:03**. In Chambers, police had probable cause to search for marijuana, but the trial court suppressed the marijuana seized in the search because the warrant exceeded this scope by authorizing seizure of " 'any and all controlled substances.' " Because the warrant described items that were inherently illegal, we applied more lenient scrutiny than would have applied to a warrant authorizing seizure of inherently innocuous items. The warrant further limited the officers' leeway by including a list of items subject to seizure, confining the search to items relating to controlled substances, drug paraphernalia, drug transactions, or drug manufacture. Noting that such items would have been subject to seizure under the plain view doctrine if police had entered the premises under a warrant authorizing seizure of marijuana, we reversed the suppression order.

A warrant can also be limited by specific examples of items pertinent to the named crime. State v. Reid, 38 Wn. App. 203 (1984). In Reid, the warrant authorized seizure of " 'a shotgun, ammunition for the shotgun, a dark leather or vinyl jacket, a pillowcase or other bedlinen with a pattern of daisies, leaves, and strawberries on it, nitrates, and any other evidence of the homicide. '" Reid challenged his conviction on the ground that the language " 'any other evidence of the homicide' " authorized a general search. Division One rejected this argument, holding that the specific items listed, in conjunction with the limitation to evidence of homicide, provided adequate guidelines for the search.

Here, the warrant in no way limited the search to illicit items. Indeed, the broad reference to RCW 9A.36.021 allowed seizure of such innocuous items as household cleaners, home pregnancy tests, literature with sexual content, and fireplace pokers. And the warrant contained no list of examples to guide the search. Accordingly, the search was executed pursuant to an overbroad warrant and all items seized should have been suppressed.

The failure to suppress was prejudicial. There was conflicting evidence about who had fired the gun. While Patricia testified that Lloyd fired it, she admitted to initially telling the police that she fired it. To bolster the later version, the State relied heavily on the locations of the gun, the magazine, and the bullet hole.

Thus, the State cannot show beyond a reasonable doubt that the jury would have reached the same verdict without the seized evidence.

[Some citations omitted]

FORFEITURE OF $118,134 IN SUSPECTED DRUG CASH FOUND IN CRASHED PLANE UPHELD AGAINST SUFFICIENCY-OF-THE-EVIDENCE CHALLENGE IN LIGHT OF PACKAGING OF CASH, PILOT'S FAILURE TO DECLARE THIS LARGE AMOUNT OF MONEY BEFORE LEAVING ON CANADA-BOUND FLIGHT, PRESENCE OF DRUG LEDGER, PRESENCE OF SMALL AMOUNT OF MARIJUANA, RETROFITTING OF PLANE FOR CARGO, AND LOW ALTITUDE FLYING; ALSO, CLAIMANT'S DUE PROCESS CHALLENGE TO FORFEITURE PROCEEDINGS BASED ON DELAY OF HEARING IS REJECTED

Sam v. Okanogan Cty Sheriff's Office, ___ Wn. App. __, __P.3d __ (Div. III, 2006)

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

On April 18, 2003, Shura Lewton and David Nichols, both California residents, were reported missing while flying a small aircraft in Washington. On August 8, 2003, the airplane was located 14 miles south of the Canadian border in Okanogan County. The remains of Mr. Lewton and Mr. Nichols were found at the scene, as well as $118,134 in cash and other personal items.

On August 19, 2003, Cheryl Rios-Diaz Lewton, Mr. Lewton's former wife, received notice from the Okanogan County Sheriff that he was seeking to forfeit the cash and other items found on the plane. Ms. Rios-Diaz Lewton made a claim. A hearing was set for November 6, 2003.

On October 28, 2003, Anthony Sam notified the Okanogan County Sheriff he was the executor of Mr. Lewton's estate. He demanded that all personal property be returned to the estate and/or requested a hearing in superior court. The Okanogan County Sheriff responded that Mr. Sam's claim was not timely, but informed him of the hearing on November 6. The hearing was later continued until December 9, 2003.

On December 8, 2003, Mr. Sam filed a motion removing the action to superior court. Both parties moved for summary judgment. The court denied the motions. The case proceeded to bench trial in July 2005.

At trial, Detective Kreg Sloan testified he conducted a death investigation at the crash scene. The plane was registered to Mr. Nichols and was found 14 miles south of the Canadian border. Detective Sloan noticed the top portion of the instrument panel where switches were located was broken off. A heat switch, normally turned on during icy conditions, was on as was the propeller ice switch. The transponder was in the off position. The detective noted this was unusual because when flying in poor conditions, it is normal to fly with the transponder on, causing the aircraft to show up as an unidentified blip on radar.

The rear passenger seat had been removed and the airplane had two extra fuel tanks. This suggested the plane was fitted to allow for extra cargo. The extra

fuel tanks allowed them to fly without making suspicious stops. The plane also had smaller than normal identifying letters and numbers, making identification more difficult.

Detective Sloan found a leather bag containing a box with $95,080 in cash. There was an envelope attached to the box with $5,000 more in cash and another bag with $15,000 in cash. $2,474 was found in Mr. Nichols' pants pockets; $580 was found in Mr. Lewton's pants pockets. The money was bundled in groups of $100, $50, and $20 bills. The detective also found a ledger appearing to show drug transactions. One entry read "3100-1 lb," representing the payment of $3,100 for a pound of B.C. Bud marijuana. The date of one entry coincided with an earlier trip made by Mr. Nichols, whose shaving kit contained papers and a small amount of marijuana.

Tyler Morgan, an agent with U.S. Immigration and Customs, testified as an expert witness. He believed the money was "drug money" as evidenced by the manner in which it was packaged. He opined the airplane intended to go into Canada where the men planned to use the money to buy drugs.

Agent Morgan also testified that federal law required the reporting at Customs prior to departure of over $10,000 in cash being transported from the United States to Canada. No such report existed here suggesting the money was for something other than a legitimate business.

Mr. Sam testified and said Mr. Lewton had inherited money from his grandmother and dealt mainly in cash.

The court ordered the seized items to be forfeited.

ISSUES AND RULINGS: 1) Was the delay of more than the statutorily directed limit of 90 days between seizure and hearing a violation of constitutional due process protections? (ANSWER: No, under the circumstances of the delay, which included the claimant's removal of proceedings to superior court, and also included a problem of court congestion, there was no due process violation); 2) In light of evidence regarding a) how the money was packaged, b) the pilot's failure to declare the money before taking off to fly to Canada, c) the presence of a drug ledger, d) the presence of a small amount of marijuana near the money in the crashed plane, e) the low-altitude flying, and f) the retrofitting of the plane to allow it to carry cargo, was there sufficient evidence to support the forfeiture of the $118,134 cash under former RCW 69.505 on grounds that the money was intended to be used in illegal drug activities? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Okanogan County Superior Court forfeiture order.

ANALYSIS BY MAJORITY: (Excerpted from Court of Appeals opinion)

1) Due process

When property is seized under RCW 69.50.505 without a prior adversarial hearing, due process requires that a hearing be held within 90 days.

The Okanogan County Sheriff argues pursuant to former RCW 69.50.505(e) (2001), the 90-day requirement does not apply when a claimant removes a forfeiture action to a court. However, [case law] makes it clear the 90-day requirement applies regardless of the forum chosen by the claimant. Tellevik II, 125 Wn.2d at 372-74.

Relying on Valerio v. Lacey Police Department, 110 Wn. App. 163 (2002) **May 02 LED:12**, and Escamilla v. Tri-City Metro Drug Task Force, 100 Wn. App. 742 (2000) **Jan 01 LED:15**, the Okanogan County Sheriff asserts due process was nevertheless satisfied because a hearing had been scheduled within 90 days. In Valerio, the claimant's hearing was postponed due to his own request that the case be removed to superior court. The court found the claimant could have had a hearing within the 90-day requirement so it was scheduled within the time limits. The hearing was eventually held a little more than two months after the 90-day time limit expired. The court held due process was not violated because the claimant had not shown the superior court could have set an earlier date or the hearing was not held within a reasonable time in light of the superior court calendar. In making this determination, the court considered (1) the length of the delay, (2) the reason for the delay, (3) the claimant's assertion of his right to a hearing, and (4) whether the claimant suffered any prejudice.

In Escamilla, this court followed the Administrative Procedure Act, chapter 34.05 RCW, and held an adjudicative proceeding commences when a party is notified that some stage of the proceeding will be conducted. Because notice of the hearing there was sent within 90 days, due process was satisfied.

Mr. Sam was entitled to a hearing within 90 days of the seizure of the property, regardless of the forum. A hearing was indeed scheduled within the 90-day period and he received notice of the hearing. This satisfies due process under Escamilla and Valerio. Mr. Sam was also the person who requested the removal to superior court, in effect requesting the delay.

We also consider the four Valerio factors. The delay here was long. The reason for the delay was court congestion. Mr. Sam claims he was prejudiced by the delay, but he fails to show how he was prejudiced. Due process was satisfied in these circumstances.

2) Sufficiency of Evidence

Under former RCW 69.50.505(b)(4), the seizing agency had the initial burden of showing probable cause to believe the seized items were the proceeds of or intended to be used in illegal drug activities. Once probable cause was established, the burden shifted to the claimant to prove by a preponderance of the evidence either that the property was not used or intended to be in an illegal drug activity or that it was used without the owner's consent or knowledge.

In 2003, the legislature changed the burden of proof required: “In all cases, the burden of proof is upon the law enforcement agency to establish, by a preponderance of the evidence, that the property is subject to forfeiture.” RCW 69.50.505(5); *see* LAWS OF 2003, ch. 53, § 348. No Washington case addresses this change.

> Federal law, however, went through a similar change and is accordingly instructive. The government may meet its burden through direct or circumstantial evidence. Here, the court based its decision on several facts. First, it noted that the amount of money found on the plane was an unusually large sum. It was considerably more than what is permitted to be transported to Canada without prior reporting. This fact is highly probative of illegal activity and can help establish a link to illegal drug activity.
>
> The money was found close to a small amount of marijuana. This is also circumstantial evidence of illegal drug activity. In addition to the marijuana, the police found a notebook that appeared to be a log of drug transactions. It is also circumstantial evidence the money was connected to illegal drug activity.
>
> There are several other facts proving circumstantial evidence the money was connected to illegal drug activity. The money was bundled and located in several different containers. The plane was retrofitted with extra fuel tanks and cargo storage. The controls on the plane suggested Mr. Lewton and Mr. Nichols were flying low in an attempt to avoid radar detection. Taken as a whole, these facts support the court's finding, by a preponderance of the evidence, that the money was connected to drug activity.

[Some citations omitted]

Judge Schultheis dissents, arguing there was not enough evidence to link the cash to illegal drug activity under the statutory preponderance-of-evidence standard.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) BENCH WARRANT THAT WAS ISSUED WITHOUT A FINDING OF PROBABLE CAUSE HELD INVALID, AND THEREFORE EVIDENCE SEIZED IN A SEARCH INCIDENT TO ARREST IS SUPPRESSED—In State v. Parks, ____ Wn. App. ___, 2006 WL 3704698 (Div. I, 2006), the Court of Appeals rules that a bench warrant issued without a probable cause determination is invalid.

The Parks Court briefly summarizes its decision as follows:

> Tyler Parks failed to appear as promised at a scheduled hearing in municipal court on the charge of minor in possession of alcohol. The court ordered the issuance of a bench warrant for his arrest. During a search incident to the arrest on the bench warrant, the police found cocaine in his pocket. Parks was convicted of possession of a controlled substance after an unsuccessful motion to suppress. Because the record does not show that a court ever found probable cause to support the underlying offence, the bench warrant for his arrest was invalid and the fruits of the search incident to arrest should have been suppressed. The conviction is reversed.
>
> The Parks Court describes as follows the facts and procedural background in the case:

According to the records of the Marysville Municipal Court, Tyler Parks was cited for minor in possession of alcohol, a gross misdemeanor, on January 5, 2003. Filing of the citation the next day initiated the case. The docket shows that Parks, appearing pro se, was arraigned on the charge at a hearing on January 14, 2003. He pled not guilty and waived his right to a jury trial.

At a scheduled pre-trial hearing, Parks confirmed that the case was set for a March 24 trial date. He failed to appear for trial on March 24. The municipal court ordered a bench warrant for failure to appear and set bail at $1,000. Parks was informed of the warrant by telephone. The next day, he came to the clerk's counter and signed a promise to appear on April 1, 2003, for a show cause hearing on the outstanding warrant. When he appeared on April 1, the case was reset for a pre-trial hearing on May 12 and a bench trial on May 19. The bench warrant was recalled.

Parks failed to appear for the May 12 hearing and the process repeated itself. Over the next year, there were several more occasions when Parks failed to appear despite new bench warrants, new bail settings, new promises to appear, and recalling of the warrants. New dates for a pre-trial hearing and trial were set at least three more times.

Finally, when Parks failed to appear on January 12,2004, for a scheduled pre-trial hearing, the court ordered a no recall bench warrant for failure to appear and set bail at $5,000. The municipal court docket shows no further activity on the case for almost a year. Then, on November 23, 2004, Parks was arrested on the warrant. The arrest occurred when a police officer responded to a report of a fight in front of a residence. At the scene the officer detained Parks, checked his driver's license, discovered the Marysville bench warrant, and took Parks into custody. A search incident to arrest turned up cocaine in his pocket.

Charged in superior court with felony possession, Parks moved to suppress. He argues that the police lacked authority to arrest and search him on November 23, 2004. According to Parks, the bench warrant was invalid because there had never been a judicial determination of probable cause on the underlying charge of minor in possession. Counsel for Parks stated that in her experience, some district courts made it a practice to find probable cause on the underlying charge, but Marysville Municipal Court did not. The State responded that the warrant was valid because it was issued under CrRLJ 2.5, a rule that authorizes issuance of a bench warrant for a defendant who fails to appear. The rule does not explicitly require finding of probable cause preliminary to issuance of a bench warrant for failure to appear:

> The court may order the issuance of a bench warrant for the arrest of any defendant who has failed to appear before the court, either in person or by a lawyer, in answer to a citation and notice, or an order of the court, upon which the defendant has otherwise received notice to appear, if the sentence for the offense charged may include confinement in jail.

CrRLJ 2.5.

> The superior court judge observed that "the lower courts are somewhat inconsistent on how they procedurally do this" and recalled her own experience in a lower court "where it was our policy to make a finding of probable cause before the issuance of warrants." While expressing a belief that "the best practice for a lower court is to make a finding of probable cause prior to the issuance of a warrant", the court nevertheless agreed with the State that CrRLJ 2.5 was the controlling rule and its requisites had been satisfied. The court denied the motion to suppress and convicted Parks of cocaine possession on stipulated facts.

As noted above, the Parks Court reverses the Superior Court decision on grounds that there was not a prior probable cause finding to support the bench warrant.

Result: Reversal of Snohomish County Superior Court conviction of Tyler Parks for cocaine possession.

LED EDITORIAL COMMENT REGARDING MAINTAINING THE STATUS QUO AS TO ARRESTING ON BENCH WARRANTS AFTER PARKS: The unanimous view among the several law enforcement agency Legal Advisors who have weighed in on the question is that officers should continue to follow pre-existing procedures in making arrests on bench arrest warrants. We agree with that view, which is that law enforcement officers who get a warrant hit on a bench warrant should confirm the warrant and act on it in the same manner as they have done previously. Thus, only if the warrant-entering agency is not willing or able to confirm the warrant should arrest and booking not be done as it has always been done. Remember, however, that editorial commentary in the Law Enforcement Digest is not legal advice, and that the commentary states only the informal, individual views of the two editors of the LED. Law enforcement agencies are encouraged to should check with their own agency Legal Advisors or local prosecutors for legal advice.

(2) SHERIFF'S OFFICE IS SUBJECT TO CIVIL LAWSUIT FOR NEGLIGENT FAILURE TO INVESTIGATE REPORT OF CHILD SEXUAL ABUSE—LAWSUIT AGAINST AGENCY BY WOMAN WHO WAS ALLEGEDLY VICTIMIZED IN HER CHILDHOOD BY HER UNCLE IS ALLOWED TO GO FORWARD—In Lewis v. Whatcom County, ___ Wn.App ____, ____ P.3d ____, 2006 WL 3787949 (Div i, 2006), the Court of Appeals reverses a trial court summary judgment ruling and holds that a law enforcement agency may be held liable for negligent investigation of alleged sexual abuse in a case where it is alleged that the law enforcement agency received a report that a minor child was being sexually molested by her uncle, and the agency failed to timely follow up.

The Lewis Court describes the facts of the case as follows:

> Lewis alleges she was sexually molested by her uncle, Charles Goldsbury. The Whatcom County Sheriff's Department found out that Lewis was likely being molested in December 1991 while it was investigating another girl's sexual abuse allegations against Goldsbury. A letter from the doctor who interviewed the other girl accusing Goldsbury and a sheriff's department report both discussed the likelihood that he was also abusing Lewis. Both documents state that the other girl's mother said Lewis' mother was aware that Goldsbury was abusing her but did not report it because she needed to have Goldsbury and his wife continue to provide child care. Despite these allegations, the sheriff's department did not

> investigate. Lewis continued to go to Goldsbury's house almost every day, where he allegedly continued to molest her, until the Goldsbury's moved to Alaska in June 1992.

The Court of Appeals summarizes the procedural background and the Court's ruling in the case as follows:

> Stephanie Lewis sued Whatcom County for negligent investigation. She asserted that the county sheriff's department failed to investigate allegations that she was being abused by her uncle and, as a result, he continued to abuse her. The trial court granted summary judgment, adopting the County's argument that it owed her no duty to investigate because the abuse allegations were not against her parent or guardian. But RCW 26.44.050 creates a duty to all children who may be abused or neglected, regardless of the relationship between the child and his or her alleged abuser. The cases on which the County relies focus on the rights of alleged abusers to sue under the statute and do not extend to victims of abuse. We reverse and remand.

Result: Reversal of Whatcom County Superior Court summary judgment for Whatcom County Sheriff's Office; case remanded to Superior court for trial or other resolution of the case.

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NEXT MONTH

The March 2007 LED will include entries on: 1) the January 11, 2007 unanimous Washington Supreme Court decision in State v. Evans - - the Evans Court holds that methamphetamine manufacturing evidence that a locked briefcase seized from defendant's pickup truck could not be deemed to be "abandoned property" where, before police seized the briefcase, defendant told officer that he did not own the briefcase, that he objected to its seizure, and that he was unable to give them permission to open the briefcase; and 2) the January 4, 2007 decision of Division Three of the Court of Appeals in Parker v. Taylor - - the Parker Court holds that when a landlord evicts a tenant from rental property under a writ of restitution, the landlord generally has a duty (presumably at the direction of the sheriff's office personnel executing the writ) to make arrangements for storage of the tenant's property unless the tenant objects to such storage.

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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 website 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/court-rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website 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/opinions.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.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [http://www.law.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 2006, is at [http://www1.leg.wa.gov/legislature]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 proposed WAC amendments is at this address too. 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 [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://insideago].

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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 published as a research source only. The **LED** does not purport to furnish legal advice. **LED**s from January 1992 forward are available via a link on the CJTC Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]