Law Enforcement Digest

MAY 2008

621st Basic Law Enforcement Academy – November 6, 2007 through March 20, 2008

President: Brian R. Lewis – Kent Police Department
Best Overall: Nicholas Briggs – Eastern Washington University Police Department
Best Academic: Nicholas Briggs – Eastern Washington University Police Department
Best Firearms: Nicholas Briggs – Eastern Washington University Police Department
Tac Officer: Russell Hicks – Fife Police Department

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LAW ENFORCEMENT MEDAL OF HONOR AND PEACE OFFICERS' MEMORIAL CEREMONY IS SET FOR FRIDAY, MAY 2, 2008 IN OLYMPIA AT 1:00 P.M.

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 2, 2008, commencing at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus, which is adjacent to the Supreme Court Temple of Justice. This is the second year that the Medal of Honor and Peace Officers' Memorial ceremonies will be a combined program. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all

law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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PART ONE OF THE 2008 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part One of what likely will be a two-part compilation of 2008 State of Washington legislative enactments of interest to law enforcement. Part Two will appear next month and will include an index to the two parts.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2008 regular session take effect on June 12, 2008 (90 days after the end of the legislative session). For some acts, different sections have different effective dates. We have generally indicated the effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and worker benefits.

Text of each of the 2008 Washington acts is available on the Internet at [http://apps.leg.wa.gov/billinfo/]. Use the 4-digit bill number for access to the enactment.

Thank you to Tom McBride and Pam Loginsky of the Washington Association of Prosecuting Attorneys for providing helpful information.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED regarding either legislation or court decisions do not constitute legal advice, express only the views of the editors, and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

REQUIRING, AMONG OTHER THINGS, THAT OUT-OF-STATE RECIPIENTS RESPOND TO SEARCH WARRANTS AND OTHER LEGAL PROCESS FROM WASHINGTON COURTS

Chapter 21 (HB 2637) Effective Date: June 12, 2008

The Final Bill Report describes the background and provides a summary of the content of the bill as follows:

> **Background:** When a crime is committed in this state, witnesses or evidence related to that crime may be located outside the state. Criminal investigators, prosecutors or defense attorneys may have to employ one or more of several methods in attempting to get testimony or other evidence into the state. Warrants, summons, subpoenas, or other legal process may be issued directing an out-of-state (foreign) witness to appear in the state or a foreign entity to send or bring evidence to the state. Legal process may be issued by a Washington court. In other instances, a legal process may be issued by a court in the foreign state at the request of a Washington court.

Washington has adopted the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. This law applies reciprocally in states with similar provisions. It allows a Washington court, upon petition by either the prosecution or defense, to recommend to a foreign court that a witness be compelled to appear in a Washington grand jury proceeding or a criminal trial. While a witness is in the state under this procedure, he or she is immune from prosecution or civil or criminal process for matters that arose before his or her appearance. Without foreign court involvement, enforcement of out-of-state orders may be problematic, and obtaining foreign court involvement may be time consuming, expensive, and difficult.

In certain kinds of criminal cases such as identity theft, it is common for relevant records to be held in a foreign state. Entities doing business in this state may have headquarters and record-keeping facilities in another state. The foreign custodian of those records may be reluctant to comply with a Washington court's legal process for the production of such records. If the custodian is required to accompany the records in order to authenticate them, the time and expense involved may be a deterrent to cooperation. A relevant business record is admissible in a criminal case if: (1) the custodian of the record testifies to its identity and mode of preparation, (2) it was made in the regular course of business at or near the time of the event in question, and (3) the court determines that the record's sources and method and time of preparation justify its admission.

Summary: Procedures are established for the production of records through search warrants, subpoenas, and any other criminal process issued by a superior court in any criminal investigation or trial. A law enforcement officer, prosecutor, or defense attorney may apply to a superior court for criminal process ordering the production of records. The procedures apply to records held inside or outside the state by a business that has conducted business in this state, any natural person, and, where relevant, a corporation, joint stock association, or unincorporated association.

Time to Comply. When properly served, the recipient of the criminal process must produce the records within 20 business days, unless a shorter period is indicated in the process, or if the court finds reason to suspect an "adverse result." Compliance after 20 days may be granted, upon a showing of good cause, if a recipient requests a longer period to respond and the court finds that an extension would not cause an adverse result.

Motion to Quash. A recipient's motion to quash the process must be made in the issuing court and within the time that is required for the recipient's response to the process. The court must hear and decide the motion to quash no later than five court days after the motion is filed.

Authentication. The applicant for a criminal process may request, or the issuing court may order, that the recipient verify the authenticity of the records by providing an affidavit, declaration, or
certification attesting to the following:

• that the record was made at or near the time of the event in question or, if later, was made by a person with knowledge of the matter in question;
• that the record was made in the regular course of business; and
• that any duplicate produced is an accurate reproduction of the original.

An affidavit, declaration or certification that includes the foregoing information satisfies, without the need for testimony from the custodian of records, the requirements of RCW 5.45.020 addressing the admission of business records as evidence. A party offering a verified record must give opposing parties sufficient notice to allow a challenge. A party may challenge the admissibility of a verified record, but only if the offering party is given sufficient notice to allow an opportunity to produce the record custodian.

Reciprocity and Immunity. A recipient of foreign criminal process served in Washington must comply with its terms if it appears on its face to be valid criminal process. Recipients of criminal process are granted civil and criminal immunity for complying with the process and for any failure to notify a person affected by a disclosure made by the recipient. The immunity provisions apply to foreign state recipients of Washington criminal process and Washington recipients of foreign state criminal process.

"WEAPON" GETS SPECIAL DEFINITION FOR PURPOSES OF RESTRICTION ON WHAT MAY BE BROUGHT INTO BUILDINGS FOR COURT PROCEEDINGS
Chapter 33 (SSB 6322) Effective Date: June 12, 2008

Amends RCW 9.41.300, which restricts non-exempted persons from bringing "weapons" into certain places. Prior to this 2008 amendment, the definition of "weapon" was the same for all of the restricted places; that definition provides as follows: "'Weapon' as used in this section means any firearm, explosive as defined in RCW 70.74.010, or instrument or weapons listed in RCW 9.41.250." The 2008 amendment does not change that definition for places other than court proceeding facilities, but the amendment inserts a special definition of "weapon" exclusively applicable to subsection (1)(b) relating to court proceeding facilities. The new provision reads as follows:

For purposes of this subsection (1)(b), "weapon" means any firearm, explosive as defined in RCW 70.74.010, or any weapon of the kind usually known as slung shot, sand club, or metal knuckles, or any knife, dagger, dirk, or other similar weapon that is capable of causing death or bodily injury and is commonly used with the intent to cause death or bodily injury.

CRIMINALIZING MAKING A FALSE OR MISLEADING MATERIAL STATEMENT THAT RESULTS IN AN AMBER ALERT
Chapter 91 (ESHB 2774) Effective Date: June 12, 2008

Adds a new section to chapter 9A.76 RCW making it a class C felony to make a false or misleading material statement that results in an Amber Alert.

ADDRESSING TRAINING AND ACTIONS OF BAIL BOND AGENTS AND BAIL BOND RECOVERY AGENTS
Chapter 105 (ESSB 6437) Effective Date: June 12, 2008

Amends provisions in chapter 18.185 RCW relating to “bail bond agents” and “bail bond recovery agents.” The Final Bill Report summarizes the effect of the amendments as follows:

> Before adopting or amending the prelicensing training or continuing education requirements for bail bond agents, the Director of the Department of Licensing (Director), or the Director's designee, must consult with representatives of the bail bond industry and associations. Employment for at least 18 consecutive months as a bail bond agent or submitting proof of having previously met training required prior to 1994 does not fulfill prelicensing training requirements. The rules adopted by the Director establishing prelicense training and testing requirements for bail bond recovery agents must include no less than 32 hours of field operations classes.
>
> A bail bond recovery agent is required to notify the Director within ten business days after a forced entry for the apprehension of a fugitive criminal defendant, whether the forced entry is planned or not. Before a bail bond recovery agent may apprehend a person subject to a bail bond in a planned forced entry, the agent must have reasonable cause to believe the defendant is inside the dwelling or other structure. During the actual planned forced entry, the bail bond recovery agent must display a badge with the words "BAIL ENFORCEMENT" or "BAIL ENFORCEMENT AGENT."
>
> Performing the functions of a bail bond recovery agent without exercising due care to protect the property and safety of persons other than the defendant constitutes unprofessional conduct. It is also unprofessional conduct for a bail bond recovery agent to use a dog in the apprehension of a fugitive criminal defendant.
>
> An applicant for a bail bond recovery agent license must not have had certification as a peace officer revoked or denied, unless certification has subsequently been reinstated. The applicant must also have a current license or equivalent permit to carry a concealed pistol.
>
> Any law enforcement officer who assists in or is in attendance during a planned forced entry is immune from civil action for damages arising out of the actions of the bail bond recovery agent or agents.
>
> The Department of Licensing is directed to convene a work group to evaluate whether bail bond agents and bail recovery agents should provide proof of financial responsibility to obtain a license.

CRIMINALIZING UNCONSENTED REMOTE SCANNING OF OTHERS’ IDENTIFICATION DEVICES FOR ILLEGAL PURPOSES

Chapter 138 (ESHB 1031) Effective Date: June 12, 2008

Among other things, this act creates a new chapter in Title 19 RCW and creates a number of definitions. The act also creates a Class C felony as follows:

> A person that intentionally scans another person’s identification device remotely, without that person’s prior knowledge and prior consent, for the purpose of fraud, identity theft, or for any other illegal purpose, shall be guilty of a class C felony.

CRIMINALIZING REMOTE CAPTURE OF INFORMATION ON IDENTIFICATION DOCUMENTS
Chapter 200 (SHB 2729) Effective Date: June 12, 2008

Among other things, this act creates a new chapter in Title 9A RCW and creates a number of definitions. It also creates a Class C felony as follows:

> (1) Except as provided in subsection (2) of this section, a person is guilty of a class C felony if the person intentionally possesses, or reads or captures remotely using radio waves, information contained on another person's identification document, including the unique personal identifier number encoded on the identification document, without that person's express knowledge or consent.
>
> (2) This section does not apply to:
> (a) A person or entity that reads an identification document to facilitate border crossing;
> (b) A person or entity that reads a person's identification document in the course of an act of good faith security research, experimentation, or scientific inquiry including, but not limited to, activities useful in identifying and analyzing security flaws and vulnerabilities; or
> (c) A person or entity that unintentionally reads an identification document remotely in the course of operating its own radio frequency identification system, provided that the inadvertently received information:
> (i) Is not disclosed to any other party;
> (ii) Is not used for any purpose; and
> (iii) Is not stored or is promptly destroyed.

ADDING TO THE PUNISHMENT FOR FELONY ELUDING WHERE THE PERPETRATOR ENDANGERS OTHER PERSONS
Chapter 219 (ESHB 1030) Effective Date: June 12, 2008

This act is known as the "Guillermo 'Bobby' Aguilar and Edgar F. Trevino-Mendoza Public Safety Act of 2007. Section 2 of the act adds a section to the criminal sentencing provisions of chapter 9.94A RCW. Subsection (2) of section 2 provides:

> In a criminal case in which there has been a special allegation, the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing officer. The court shall make a finding of fact of whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered at the time of the commission of the crime, or if a jury trial is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether or not one or more persons other than the defendant or the pursuing law enforcement officer were endangered during the commission of the crime.

Section 3 of the act amends RCW 9.94A.533 to impose additional punishment where there has been a special finding or special verdict as described under section 2.

CRIME OF FAILURE TO TRANSFER MV TITLE MADE A "CONTINUING OFFENSE"

Chapter 316 (SSB 6527) Effective Date: June 12, 2008

Amends subsection (6) of RCW 46.12.101 so that its final two sentences provide:

> Failure or neglect to make application to transfer the certificate of ownership and license registration within forty-five days after the date of delivery of the vehicle is a misdemeanor and a continuing offense for each day during which the purchaser or transferee does not make application to transfer the certificate of ownership and license registration. Despite the continuing nature of this offense, it shall be considered a single offense, regardless of the number of days that have elapsed following the forty-five day time period.

This amendment is intended to overturn the restrictive effect of the appellate court decisions in two separate cases that had struck down an arrest and a Terry stop, respectively, on grounds that violation of RCW 46.12.101 is not a "continuing" offense. See State v. Green, 150 Wn.2d 740 (2004) **March 04 LED:08** (arrest); State v. Walker, 129 Wn. App. 572 Div. III, 2005) **Nov 05 LED:22** (Terry stop).

NOTE REGARDING 2007 ENACTMENTS WITH 2008 EFFECTIVE DATES - - CELL PHONE USAGE AND TEXT MESSAGING WHILE DRIVING

We remind LED readers of 2007 Washington legislative enactments that had 2008 effective dates. The acts were digested in the June 2007 LED at pages 7-8. Chapter 417 (codified at RCW 46.61.668) made it an infraction - - enforceable only as a secondary action - - to send, read or write a text message while driving; it took effect on January 1, 2008. Chapter 416 (codified at RCW 46.61.667) makes it an infraction - - enforceable only as a secondary action - - to hold a wireless communications device to one's ear while driving; it takes effect July 1, 2008.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

BRIEF EXPANSION OF DURATION OF TRAFFIC STOP TO ASK ABOUT POSSIBLE ILLEGAL DRUGS OK UNDER FOURTH AMENDMENT DESPITE OFFICER'S LACK OF REASONABLE SUSPICION REGARDING DRUGS - - WASHINGTON CONSTITUTION MIGHT REQUIRE A DIFFERENT RESULT IN LIGHT OF OFFICER'S EXPANSION OF SCOPE OF INVESTIGATION

U.S. v. Turvin, 517 F.3d 1097 (9th Cir. 2008) (decision filed 2-26-08)

LED INTRODUCTORY EDITORIAL NOTE: See the LED EDITORIAL COMMENTS below regarding the question of whether the Washington constitution, article 1 section 7, requires a different search-and-seizure analysis from the Fourth Amendment search-and-seizure analysis provided by the Ninth Circuit in this case.

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

> On the evening of November 20, 2005, Alaska State Trooper Christensen stopped a white pickup truck based on the truck's unusually loud exhaust, rapid acceleration around a turn involving minor skidding, and driving six miles over the speed limit in snowy conditions. When he approached the truck, which had entered a gas station parking lot, the Trooper observed that neither occupant appeared to be wearing a seatbelt and that the truck's registration was expired. He asked the occupants for identification; the driver was Sean T. Turvin and the

occupant was Corina L. Cunningham. The Trooper talked to them for three or four minutes about the violations he had observed and then returned to his police vehicle, where he radioed headquarters to conduct a warrant and license check. The response informed him that Turvin's driver's license was current and valid.

About ten minutes after the stop began, while Christensen sat in his vehicle writing out traffic citations, Trooper Powell arrived at the scene. Powell had heard Christensen on the police radio and recognized Turvin's name because he knew that a "rolling methamphetamine laboratory" had been found in Turvin's vehicle following a traffic stop earlier that year.

When Powell arrived, he recognized Turvin and Turvin's truck, and informed Christensen about the prior incident. Christensen then stopped writing out the traffic citations, turned on his tape recorder, and stepped out to speak with Turvin, who was still in his truck. Powell positioned himself at the rear of Turvin's truck to assist if needed.

Upon approaching the truck, Christensen told Turvin that he knew about the rolling methamphetamine laboratory, which Turvin acknowledged. Christensen then observed something in plain view behind Turvin's seat, which Turvin identified as a speaker box. Christensen then asked Turvin if he would mind if Christensen searched his vehicle because the speaker box, Christensen said, "look[ed] very odd." The conversation was calm and relaxed, and Turvin consented to the search without equivocation.

The search ultimately yielded a sawed-off shotgun 1 inches below the minimum legal length and a small cup containing packages of a crystal substance determined by field test to be methamphetamine. Turvin was placed in custody when the methamphetamine packages were discovered.

Turvin and Cunningham were cited for not wearing seatbelts, and Turvin was cited for his truck's loud exhaust. Cunningham was arrested based on her proximity to the drugs found in the cup. A search of Cunningham revealed $773 in cash. Later, when police examined the cash at the police station, they found mixed in among the bills a plastic bag containing a substance suspected to be methamphetamine.

Turvin and Cunningham were indicted for conspiracy to traffic methamphetamine and possession with intent to distribute five grams or more of methamphetamine. Turvin was also indicted for possession of a prohibited firearm. Turvin filed a motion to suppress, which Cunningham joined, arguing that "the police had no reasonable suspicion for the prolonged detention," and that Turvin's consent to the search of his truck was involuntary.

The district court granted Turvin's motion to suppress, adopting the magistrate judge's (MJ) recommendation that, though the initial traffic stop was lawful and based on probable cause that a traffic violation had occurred, Christensen "exceeded the scope of the traffic stop" by "investigat[ing] into suspected drug activities beyond the scope of the traffic stop during the time that Turvin was not free to leave." The MJ and district judge agreed that this investigation violated Turvin's Fourth Amendment rights as explained by us in United States v. Chavez-Valenzuela, 268 F.3d 719 (9th Cir.2001). Turvin's consent to the search, the MJ

> reasoned, did not render the search lawful because it was obtained during "an extended and an unlawful detention arising from a traffic stop." The district judge denied the government's motion for reconsideration and the government timely appealed.

ISSUE AND RULING: Under the Fourth Amendment, during a traffic stop, officers may expand the scope of the investigation to other matters even if they do not have reasonable suspicion to support the expansion, so long as this does not expand the duration of the stop. Here, the officer who was writing the traffic ticket briefly ceased doing that to ask a few questions about possible illegal drugs. Was this a Fourth Amendment violation where the officer lacked reasonable suspicion regarding illegal drugs at the time he asked the questions? (ANSWER: No, rules a 2-1 majority, because the expansion of the duration of the stop was only brief and did not make the duration unreasonable)

Result: Reversal of U.S. District Court (Alaska) ruling; case remanded for trial.

ANALYSIS:

In U.S. v. Mendez, 476 F.3d 1077 (9th Cir. 2007) **April 08 LED:02**, the Ninth Circuit rejected a Fourth Amendment challenge despite the fact that police had, without reasonable suspicion, asked a traffic stop detainee criminal investigatory questions unrelated to the traffic violation. Similarly here, relying on rulings by the U.S. Supreme Court in Illinois v. Caballes, 543 U.S. 405 (2005) **March 05 LED:03, April 05 LED:02**, and Muehler v. Mena, 544 U.S. 93 (2005) **May 05 LED:02**, the Ninth Circuit recognizes in Turvin that there is no restriction under the Fourth Amendment, despite lack of separate reasonable suspicion, on expanding the scope of investigation at a traffic stop. The Turvin majority opinion then addresses the brief expansion in Turvin of the duration of the stop, concluding that the officers acted lawfully:

> [W]e must examine the "totality of the circumstances" surrounding the stop, and determine whether Christensen's conduct was reasonable.
>
> In Mendez, we identified the overall length of the stop, observing that the eight-minute stop was not beyond the time normally required to issue a citation. We also pointed out that Jaensson and Bracke did not intentionally delay the stop but diligently pursued their investigation into the purpose of the stop.
>
> As in Mendez, the circumstances surrounding the brief pause here were reasonable. The total duration of the stop up to the point at which Turvin consented to the search was, according to Christensen's uncontested testimony, about fourteen minutes. This is no longer than an ordinary traffic stop could reasonably take, and we do not agree with the dissent that evidentiary findings are necessary to demonstrate the sensible observation that fourteen minutes is not unreasonably long for a traffic stop. Of that time, it took Christensen perhaps four minutes to speak with Powell and then to walk to Turvin's vehicle and ask him about the rolling methamphetamine laboratory and for consent to search. This was reasonable for him to do based on Powell's arrival and information about a rolling methamphetamine laboratory involving the same vehicle and the same person.
>
> Moreover, that Christensen observed the speaker box prior to requesting consent to search buttresses the conclusion that his request was reasonable under the circumstances. Christensen knew of a prior rolling methamphetamine laboratory,

which could have been contained in something like the speaker box, justifying further inquiry. The speaker box observation is significant. The [magistrate judge's] initial findings of fact indicated that Christensen did not see the box behind Turvin's seat until after he sought consent to search. We agree with the government that this finding is clearly erroneous; the audio recordings of the stop show that Christensen did observe the box before requesting consent to search. This fact is relevant in establishing the circumstances in which Christensen asked for consent to search. Just as it was reasonable in Mendez for officers to ask questions based on information learned during the course of the stop, Christensen's question and request to search were reasonable based on facts learned and observations made after he stopped Turvin.

Sister circuits have adopted the same analysis: brief pauses to ask questions during traffic stops, even if those questions are unrelated to the purpose of the stop, may be permissible under Muehler. [Discussing cases]

Christensen's brief pause in the ticket-writing process was reasonable, as was the duration of the detention until consent was given. We will not accept a bright-line rule that questions are unreasonable if the officer pauses in the ticket-writing process in order to ask them. The Supreme Court has "consistently eschewed bright-line rules [in the Fourth Amendment context], instead emphasizing the fact-specific nature of the reasonableness inquiry." It is true that in Mendez, the officers managed to ticket and question detained drivers simultaneously. . . . It does not follow, however, that those are the *only* circumstances in which it is reasonable to ask unrelated questions. The Supreme Court does not set such a narrow rule, and neither do we. An officer who asks questions while physically writing a ticket will likely be slowed down just as an officer who briefly pauses to do so. There is no principled reason why the second situation is unconstitutional but not the first.

The present case illustrates the irrationality of the distinction Turvin and the dissent offer. Under their proposed brightline rule, Christensen's questions may have been permissible in a number of scenarios materially indistinguishable from what happened here: if Christensen had asked about drugs when he originally stopped Turvin, or as he was handing the ticket to Turvin, or if Christensen had asked Powell to continue writing the ticket while he approached Turvin, or if Powell had asked the questions while Christensen wrote the ticket. Permitting those scenarios but not the reasonable actions that Christensen chose to take would draw an arbitrary and unjustified line between constitutional and unconstitutional conduct. Rather than bright-line simplification, the Constitution requires a reasonableness analysis.

. . .

We hold that Mendez's conclusion that officers do not need reasonable suspicion to ask questions unrelated to the purpose of an initially lawful stop applies here because Christensen's question and request for consent to search did not unreasonably prolong the duration of the stop. Because we decide on this basis, we do not reach the issue of whether reasonable suspicion supported Christensen's questioning.

[Some citations omitted]

LED EDITORIAL COMMENTS:

1. Is the Turvin analysis consistent with the requirements of article 1, section 7 of the Washington constitution*?*

In the April 2005 LED, in an article at pages 2-6, we discussed questions relating to expanding the scope of investigation during a traffic stop even if the duration of the stop is not extended by the inquiry. We suggested there that this question has not been finally settled as a matter of Washington constitutional law by the Washington appellate courts. We acknowledged in the article that there are several Washington Court of Appeals decisions - - but no Washington Supreme Court decisions - - holding stops unlawful based on expansion of the scope of investigation of a traffic stop regardless of whether the duration of the stop was extended.

We were recently reminded of the fact that in State v. Allen, 138 Wn. App. 463 (Div. II, 2007) the Washington Court of Appeals extended some of the analysis by the Washington Supreme Court in a pretext-stop case to address expanding of scope of investigation in this traffic stop context. The Court of Appeals in Allen thus invoked "independent grounds" under article 1, section 7 of the Washington constitution and rejected the Fourth Amendment approach that is reflected in the Turvin decision. Allen was digested in the July 2007 LED, starting at page 21, but we did not excerpt or address the scope-of-investigation portion of the Allen analysis. The Allen Court stated that, when an officer questioned a driver about her passenger, the questioning was not lawful because the questioning was not within the scope of the traffic stop investigation. Allen declared that, to be lawful (1) such questioning was required to be "within the scope of the original traffic stop," or (2) "[the officer] must have acquired lawful reasonable suspicion to further investigate [the driver]." Allen cited the Washington Supreme Court's pretext decision of State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05.

While a scope-of-investigation question was not squarely before the Washington Supreme Court in Ladson, there is discussion in both the majority and dissenting opinions in Ladson that supports the "independent grounds" view stated in Allen. Thus, a fairly strong argument can be made that the Washington Supreme Court will adopt, per an "independent grounds" rationale under article 1, section 7 of the Washington constitution, a rule that precludes expansion of the scope of investigation, of a traffic stop (even if the duration is not expanded) where the further investigation is not supported by reasonable suspicion. But we also continue to believe that the issue has yet been finally resolved by the Washington Supreme Court. As always, we urge our law enforcement readers to consult their local prosecutors and agency legal advisors.

2. Is the Turvin Court's analysis of the duration question - - in light of the Turvin facts - - consistent with the Fourth Amendment?

We have our doubts whether the majority opinion in Turvin is correct that the duration of the traffic stop was not impermissibly extended under the Fourth Amendment where the officer writing the traffic ticket (1) completely stopped his traffic-ticket task, (2) got out of his car, and (3) asked the driver some questions relating to the suspected drug crime.

PROBABLE CAUSE TO ARREST LONG-TIME FIFTH GRADE TEACHER FOR SEXUAL ASSAULT ON STUDENT PRECLUDES TEACHER'S CIVIL RIGHTS SUIT THAT CHALLENGED HER BEING ARRESTED AND TAKEN OUT OF THE SCHOOL IN HANDCUFFS

John v. City of El Monte, 505 F.3d 907 (9th Cir. 2007) (decision filed 9-26-07; amended 2-05-08)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

> Margaret John, a fifth-grade public school teacher, intercepted notes written by her ten-year-old student Ashley to Ashley's friend. In the notes Ashley stated that she "hop[ed] Ms. John dies today like poisoning her or something," and that John was "a fucken [sic] perv" and a "lesbian bitch." Five days later, after John had shown those notes to the school principal, the latter requested a police investigation.
>
> The appellant, Eric Youngquist, a police officer with ten years experience on the city police force, conducted the investigation. Youngquist had had extensive training, including courses in child abuse (which included interviewing suspects) and advanced interviewing techniques.
>
> When Youngquist interviewed Ashley at the school, she was unresponsive. Youngquist asked her whether she would prefer that the discussion take place at the police station. When she indicated that she would, he took her there and continued the interview. According to Youngquist's declaration, Ashley then told the following story:
>
> > A few weeks earlier, John had imposed detention on her and six other students, and had required them to stay after class. After all the other students (whom she could not identify) had left the room Ms. John came up and stood behind her.
> >
> > That without any words being spoken, Ms. John placed her right hand on her left shoulder area of her shirt and then moved her hand down and began caressing her left breast with her hand.
> >
> > That Ms. John rubbed on the outside of her clothing in an upward and downward motion on her left breast.
> >
> > After rubbing her breast area she began moving her hand down near her vaginal area on the outside of her pants.
> >
> > She stated that Ms. John left her hand on the outside of her crouch [sic] area adjacent to her vagina on the outside of her clothing. Her hand remained there for approximately one minute.
>
> Youngquist further stated:
>
> > Prior to her description of the touching, she became very quiet. She stopped communicating momentarily. She provided short word descriptions. This is consistent behavior of a victim of sexual abuse. I would then have her point, for example, to the area where she just described having been touched. She would then point to the area where she just described. This was done for purposes of looking for deception. A deception might be shown if a description and then a physical act of pointing to another area was given.

> I would continue to validate the information by providing her false or exaggerated facts into her descriptions of the incident. Each time she would correct me and would stay consistent with her original description. This was done to allow her to embellish or fabricate the facts regarding the events. She would not allow it.
>
> I believed her to be a mature 10 year old. Her description of the events, her consistency and accuracy without any detection of exaggeration, fabrication, or deception was paramount for me to form the belief that she was a genuine victim.
>
> Likewise, the notes themselves provide independent corroborating evidence that the act occurred. For example, the notes call the plaintiff a "lesbian" and "perv." (assuming pervert). These words support the activity she now describes. They were written within a short time after the incident. They were written (in secret) to a friend, not with the intent to cause "trouble" for Ms. John. Necessarily, the notes, or words taken from the notes support the belief of the truth of her account. In other words, it was highly probable that the described activity occurred.
>
> Based upon all the information I had received, I believed I had legal, sufficient and reliable information to support probable cause to arrest Ms. John for California Penal Code section 288(a)(c) (Lewd and Lascivious Acts with a child under the Age of 14 Years).

Following this interview, Youngquist attempted to interview John at the school. Prior to the interview John had a telephone conversation with a lawyer, who also spoke to Youngquist. In her declaration, John stated that her attorney "told me that if I choose to speak with the police, I should at least ask the police to make a record that I requested an attorney. When I hung up the phone and returned to the conference room with Officer Youngquist, he asked me what I decided to do, and I told him I wanted him to make a record of my request to have an attorney present. However, before I could also inform him of my decision to co-operate, he said that because I had asked for an attorney, he could not question me, and had "no choice" but to arrest me. Obviously, I was shocked and greatly dismayed."

Youngquist then arrested John, handcuffed her, and led her handcuffed out of the school. She was confined for 36 hours, and released after the district attorney declined to prosecute her.

John then filed the present damage suit in the United States District Court for the Central District of California under 42 U.S.C. section 1983, against Youngquist, the city and other city officials. She contended that Youngquist violated her constitutional rights by arresting her without probable cause.

The district court denied cross motions for summary judgment. It held that Youngquist had not established probable cause for the arrest because the

> evidence "could lead a fair-minded jury to conclude that Officer Youngquist did not act reasonably." The court further held that Youngquist did not have qualified immunity because Ninth Circuit precedent "would have put any reasonable officer on notice that he could not rely solely on the police station interview of ten-year-old A.M. to establish probable cause to arrest plaintiff."

ISSUE AND RULING: Did the arresting officer, as a matter of law, have probable cause to arrest the teacher in light of the facts that the officer: (1) had extensive training in interviewing child victims of sexual abuse; (2) interviewed the student carefully and used his extensive experience and training to evaluate the student's story, which included a detailed account of the alleged abuse; (3) tested the veracity of the student's account by providing her with some false or exaggerated descriptions of her story, which the student consistently corrected; and (4) reasonably concluded that student was telling the truth? (ANSWER: Yes)

Result: Reversal of U.S. District Court (Central District of California) ruling that had denied summary judgment to the City of El Monte.

ANALYSIS:

The Ninth Circuit rules that the District Court should have granted summary judgment to the City of El Monte. The Court holds that the arresting officer had probable cause to support the arrest of the teacher for sexual abuse of a 10-year-old student because the officer: (1) had extensive training in interviewing child victims of sexual abuse; (2) interviewed the student carefully and used his extensive experience and training to evaluate the student's story, which included a detailed account of the alleged abuse; (3) tested the veracity of student's account by providing her with false or exaggerated descriptions of her story, which the student consistently corrected; and (4) reasonably concluded that student was telling the truth.

The Court does criticize the officer, although the criticism has no apparent legal effect:

> We do not minimize the serious effect this unfortunate incident must have had upon John. She had been a teacher for thirty years, was highly regarded and had an unblemished record. To be escorted by the police out of the school in handcuffs and confined for 36 hours must have had a devastating impact upon her and upon her professional and personal reputation.
>
> Moreover, [Officer] Youngquist appears to have acted with unseemly haste in arresting her. Had he investigated the matter further before doing so, he might not have taken that action at all. His stated reason for arresting her at that time - - to prevent her from engaging in similar misconduct against other students - - is unconvincing, because, in his presence, John had been placed on administrative leave when he informed the school authorities of the investigation. Indeed, John's statement about what happened immediately before her arrest - - which we accept for summary judgment purposes - - suggests that Youngquist's arrest of her at that time may have been prompted by her stated wish to have a lawyer present during the interview.
>
> That being said, however, the probable cause inquiry is an objective one: whether the information Youngquist had when he made the arrest could have led a reasonable officer to believe that John had committed an offense against Ashley. For the reasons given, we answer that question affirmatively.

NO CIVIL RIGHTS ACT LIABILITY UNDER FOURTEENTH AMENDMENT EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT THE OFFICER'S DECISION TO JOIN A HIGH SPEED CHASE AND HIS METHOD OF EXECUTION IN DOING SO SHOWED POOR JUDGMENT

Bingue v. Prunchak, 512 F.3d 1169 (9th Cir. 2008) (decision filed 1-15-08)

Facts: (Excerpted from Ninth Circuit opinion)

> At approximately 3:41 p.m., on November 29, 2003, officers with the Las Vegas Metropolitan Police Department ("LVMPD") attempted to pull over a stolen Toyota Camry. When the driver refused to stop, a police chase ensued. The chase would last an hour, cover nearly 90 miles, and involve at least a dozen units and a helicopter. Officer Eli Prunchak was at a car dealership "ordering a new door panel for [his] patrol vehicle" when he "heard radio traffic that units were in pursuit of a stolen vehicle . . . heading southbound on Boulder Highway." Based on the radio traffic, Prunchak "thought that [he] was close enough to the pursuit that [he] had a good chance of catching up to it and assisting other officers in apprehension of the suspects." Ten minutes after LVMPD first attempted to stop the Toyota, it entered the southbound lanes of the U.S. 95, a major north-south freeway. At that point, Prunchak "still thought that [he] was close enough to help and did not know at the time how many other units were in pursuit." Calculating that he was "still approximately a half mile to a mile behind the pursuit," Prunchak, with emergency lights active, entered the left lane of southbound U.S. 95.
>
> At about the same time, Edwige Bingue, and her mother, Marjorie Bingue (collectively "Bingue"), were traveling on southbound U.S. 95 when they saw several police units in pursuit of the Toyota. Bingue moved to the right to avoid those units, and the units safely passed. Minutes later, Prunchak approached-traveling "somewhere around 100 miles per hour" - and while rounding "a long, wide, left curve. . . felt [his] tires slip from underneath [him] and [his] patrol vehicle. . . drift[ ] into the number-two lane." Though there were no cars in the number two lane when Prunchak attempted to regain control of his car, he quickly drifted into the number-three lane and "sideswiped" the driver's side of Bingue's Mercedes. Both vehicles spun out of control and came to rest on the divider between the north and southbound lanes of the freeway. Realizing he was not seriously injured, Prunchak immediately moved to assist Bingue, who was "extremely shaken up, but did not appear to have serious injuries." Shortly after, another unit arrived and relieved Prunchak. Police ultimately stopped the Toyota with spike strips just a few miles from the California border and arrested its three occupants.

Proceedings:

The Bingues sued in the California state court on grounds of 1) common law negligence and 2) a federal civil rights claim that alleged violation of their constitutional due process rights. After the case was removed to federal court, officer Prunchak moved to dismiss the civil rights claims, but the district court denied the motion.

ISSUE AND RULING: Civil rights act liability in a high speed chase circumstance cannot be based on the Fourteenth Amendment due process clause unless there is evidence of a law

enforcement officer's intent to harm. Here, there is no evidence that officer Prunchak acted with intent to harm in his decision to join the high speed chase and his execution of that choice. Must the civil rights claim against him be dismissed? (ANSWER: Yes)

Result: Reversal of U.S. District Court order that declined to dismiss the civil rights action; case remanded to the U.S. District Court.

ANALYSIS:

The opening paragraph of the Bingue opinion sums up as follows the Ninth Circuit 3-judge panel's decision dismissing the civil rights claim:

> In Onossian v. Block, we applied the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833 (1998) [**July 98 LED:16**], and held that a police officer in a high-speed chase - whether he injures the fleeing suspect or a bystander - is entitled to qualified immunity unless his behavior "shocks the conscience" because it demonstrates an intent "to cause harm unrelated to the legitimate object of arrest." We were not called upon to consider whether the district court must apply this "intent to harm" standard to *all* high-speed chases, or only those chases that involve "emergencies" or "split-second decisions." Today we refine our Onossian analysis and hold, following the Eighth Circuit, that police officers involved in all high-speed chases are entitled to qualified immunity under 42 U.S.C. § 1983 unless the plaintiff can prove that the officer acted with a deliberate intent to harm. The officer involved in the high-speed chase in this case is entitled to summary judgment based on step one of the qualified immunity analysis as set forth in Saucier v. Katz, 533 U.S. 194 (2001). We thus reverse the judgment of the district court.

The final two paragraphs of the Bingue opinion further summarize the Court's analysis of the Fourteenth Amendment due process issue:

> Applying the "intent to harm" standard to the case at hand, we conclude that Prunchak did not act with the requisite intent to harm. The police report filed immediately after the accident reveals that Prunchak joined the high-speed chase in an attempt to do his job and help apprehend the fleeing suspect who posed a danger to the community. He stated that he "heard radio traffic that units were in pursuit of a stolen vehicle." Shortly thereafter he heard additional traffic that the vehicle was entering U.S. 95, near where Prunchak was parked. He wrote that he "thought that [he] was close enough to help and did not know at the time how many other units were in pursuit." The police incident recall logs support Prunchak's statement. Nowhere in the record is there any indication that Prunchak acted with an intent to harm, or had any motive other than a desire to do his job. With the benefit of hindsight, Prunchak's decision to join the pursuit may have been ill-advised and his execution may have been careless, but we cannot say that, from the moment Prunchak heard the call over the radio, he did not believe he was responding to an emergency and acted accordingly; poor judgment alone in a high-speed chase does not violate the Fourteenth Amendment. Because Prunchak's actions do not meet the "intent to harm" standard, he is entitled to judgment under step one of the Saucier analysis.
>
> We conclude that high-speed police chases, by their very nature, do not give the officers involved adequate time to deliberate in either deciding to join the chase or how to drive while in pursuit of the fleeing suspect. We hold, therefore, that

> Lewis requires us to apply the "intent to harm" standard to *all* high-speed chases. Since Prunchak's actions do not meet this stringent standard, Bingue's claim fails under the first step of the Saucier analysis and Prunchak is entitled to dismissal. Consequently, we reverse the judgment of the district court and remand for an entry of judgment for Prunchak on the § 1983 claims.

LED EDITORIAL NOTE: Beware! The Ninth Circuit does not address Bingue's claim of common law negligence which, unlike the civil rights claim, would not require proof of "intent to harm."

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

RESIDENTIAL ARREST UNDER THE FOURTH AMENDMENT - - PANEL OF FIFTEEN TO RE-HEAR THE FISHER CASE IN WHICH A 3-JUDGE PANEL APPLIED THE PAYTON RULE TO A BARRICADE/STANDOFF CIRCUMSTANCE - - In Fisher v. City of San Jose, the original 2 to 1 decision by a 3-judge panel was filed January 16, 2007 and was reported at 475 F.3d 1049. We reported the January 16, 2007 decision in the **March 2007 LED.** On November 20, 2007, the majority and dissenting judges on the 3-judge panel issued slightly revised opinions. The revised opinions are reported at 509 F.3d 952. We did not report those revised opinions in the LED. The majority opinion for the 3-judge panel - - in both the majority opinion of January 16, 2007 and the majority opinion of November 20, 2007 - - extended to a standoff situation the rule of Payton v. New York that, in non-exigent circumstances, requires an arrest warrant (or search warrant) before officers may (1) make a forcible entry of private premises to arrest or (2) order an arrestee to come out of private premises. As reported in the **March 2007 LED**, the 3-judge panel held that at some point early in the process of dealing with the barricaded man, the police, in their warrantless display of force, in effect violated Payton.

On March 14, 2008, the Ninth Circuit entered an Order reading as follows: "Upon the vote of a majority of nonrecused active judges, it is ordered that [the Fisher] case be reheard en banc pursuant to Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit."

"Reheard en banc" effectively means "reheard by a larger panel of judges." Currently, the Ninth Circuit is using 15 judges on its en banc panels. The final ruling of the 15-judge Ninth Circuit panel will be reported in the LED contemporaneous with its issuance.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) BURDEN-SHIFTING JURY INSTRUCTIONS WERE REQUIRED IN ORDER TO PROTECT ORCHARDIST'S CONSTITUTIONAL RIGHT TO PROTECT HIS TREES FROM MARAUDING ELK – In State v. Vander Houwen, ___ Wn.2d ___, 177 P.3d 93 (2008), the Washington Supreme Court reverses a Court of Appeals decision (see February 2005 **LED**) and holds that under the particular facts of the Vander Houwen prosecution, based on the Washington state constitution, the jury should have been instructed both 1) along the lines that one who kills elk in defense of his or her property is not guilty of violating the law if such killing was reasonably necessary for such purpose; and 2) the State must prove beyond a reasonable

doubt that the killing of elk in this particular case was not reasonably necessary to protect Vander Houwen's property.

The majority opinion for the Court is authored by Justice James Johnson and is joined by five other justices. The majority opinion describes as follows the facts that required the burden-shifting instructions:

> Vander Houwen owns cherry and apple orchards in the Tieton area of eastern Washington. In the westernmost portion of his land he grew a 37-acre block of cherry trees. During 1998 and the fall of 1999, herds of elk repeatedly came through inadequate fences constructed by the Department [of Fish and Wildlife] to prevent damage to the Vander Houwen's orchard. The elk caused substantial damage, with Vander Houwen's expert assessing his actual past losses at $13,488, potential tree loss at $6,375 and future cherry production losses at $236,000. The State did not object to or contradict these estimates at trial.
>
> In 1998 and 1999, due to the failure of the State to act, Vander Houwen repaired the fences previously built by the Department and used feeding hay in an attempt to minimize the damage to his property caused by the elk. In the fall of 1999 and winter of 2000, the elk continued to migrate through his orchard, feeding on his orchard trees. During this time period, Vander Houwen contacted the Department on four different occasions to seek its assistance in stopping the substantial damage that the elk were causing. Despite Vander Houwen's repeated requests, the Department did nothing to address the problem.
>
> On January 12, 2000, Vander Houwen again contacted the Department and told Officer Bereis that there had been about 40 elk in his orchard on the previous two days. He explained that shooting over their heads was not deterring the elk, and they were continuing to eat his trees. The officer's response was that he would attempt to organize Department efforts to help, but that he could not do anything for about a week due to the upcoming Martin Luther King, Jr., holiday. Vander Houwen told the agent that he could not continue to wait, and that he would have to start shooting directly at the elk.
>
> On January 27, two weeks later, the Department received a report that dead elk were seen in the vicinity of Vander Houwen's orchard. The Department had taken no further action in the intervening weeks. Two officers went to the orchard where they found 10 dead elk. Using a metal detector, they found .270 caliber slugs in two of the elk. Vander Houwen admitted that he shot at the elk and that he owned a .270 caliber rifle, but that he was unable to tell whether he had killed any of the elk.

Justice Chambers authors an opinion, joined by Justices Madsen and Fairhurst. The concurrence agrees with the result of reversal but argues in vain that the majority opinion should not have held that the burden of proof for the constitutional protection-of-property-from-animals defense can be shifted to the State.

Result: Reversal of Court of Appeals decision that affirmed the Yakima County Superior Court convictions (two counts) of Jerrie L. Vander Houwen for unlawful hunting of elk.

(2) THERE IS NO SUCH CRIME AS "ATTEMPTED FELONY MURDER" UNDER TITLE 9A RCW – In In re Personal Restraint of Richey, 162 Wn.2d 865 (2008), the Washington Supreme Court holds, in a case involving a defendant's challenge to his 1987 conviction based on his guilty plea, that there is no such crime as "attempted felony murder" under the Washington criminal code, Title 9A RCW. The unanimous Court rules, however, in analysis of an issue that we will not digest in the **LED**, that defendant's 1987 guilty plea nonetheless should be upheld.

Result: Denial of personal restraint petition of Thomas W. S. Richey seeking to vacate his 1987 Pierce County Superior Court conviction and exceptional sentence for attempted first degree murder.

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WASHINGTON STATE COURT OF APPEALS

WITNESS TAMPERING - - WHERE EVIDENCE SHOWED THAT DEFENDANT WHO WAS CHARGED WITH VIOLATING A NO-CONTACT ORDER (1) CALLED A PROTECTED PERSON AND A POTENTIAL WITNESS AND (2) INSTRUCTED ONE TO WITHHOLD INFORMATION AND THE OTHER TO STAY AWAY FROM COURT, EVIDENCE WAS SUFFICIENT TO SUPPORT CONVICTIONS; BUT CONVICTIONS ARE REVERSED BASED ON JURY INSTRUCTION ERROR

State v. Lobe, 140 Wn. App. 897 (Div. II, 2007)

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

> On May 16, 2005, Olympia Police Officer Brian Henry responded to a domestic violence call placed from a Thurston County courthouse pay phone. When he arrived at the courthouse, he found Pappas crying, with red marks on her face. She informed Officer Henry that she had been visiting with Lobe across the street at his apartment, and he had assaulted her. Officer Henry then went to Lobe's apartment and arrested him for violation of a no-contact order/domestic violence felony. Three days later, Lobe was charged with assault in violation of a no-contact order.
>
> Pappas and Lobe dated for a short time in 2003, after which time she obtained a no-contact order to protect her and her son. They restarted their relationship in March 2005. She moved in with Lobe, but split her time between Lobe's apartment and her friend's (Attouf's) house "[b]ecause . . . there was a no-contact order." After Lobe attacked her, Pappas moved to Lewis County, but remained in contact with Attouf.
>
> Attouf later testified that Sara Gregoire, Lobe's new girlfriend, called her around July 18, 2005. During the call, Attouf informed Gregoire that she had a voice mail from an attorney trying to get Pappas's new contact information. Lobe then got on the phone and warned Attouf that if she gave Pappas's contact information to "them" and Pappas did not appear in court, "that she [Pappas] would be in trouble and that he [Lobe] didn't want to see her get in trouble." "[H]e basically was saying make sure that she doesn't go to court because it's just . . . it's going to go away . . . and just basically to not give the contact information."

> Pappas also testified that on July 21, 2005, Gregoire called her and then put Lobe on the phone. According to Pappas, Lobe then told her to tell Attouf to conceal Pappas's contact information from the prosecuting attorney. Lobe also asked Pappas not to show up to court, and "[h]e kept repeating it to [her]." After speaking with Lobe, Pappas called Attouf and informed her of what Lobe had said.
>
> On October 26, 2005, Lobe was charged by third amended information with violation of a no-contact order-assault (count I), third or subsequent violation of a no-contact order (count II), and two counts of witness tampering (count III-tampering with Pappas; count IV-tampering with Attouf). A jury trial followed.
>
> . . . .
>
> The jury convicted Lobe on all counts, but entered a special verdict finding that the violation of the no-contact order was not an assault. The court sentenced Lobe within the standard range for each offense, with all of the sentences running concurrently.

ISSUE AND RULING: Where the evidence showed that the defendant contacted witnesses and, among other things, urged one not to give certain information to the prosecutor and the other not to appear in court, was the evidence sufficient to support Lobe's convictions for witness tampering? (ANSWER: Yes, but the convictions for witness tampering are reversed on other grounds).

Result: Reversal (based on error in jury instructions not addressed in this LED entry) of Thurston County Superior Court convictions of David Jonathan Lobe for witness tampering in violation of RCW 9A.72.120; case remanded for possible re-trial on witness tampering charges; the conviction for the no-contact order violation is not reversed.

ANALYSIS:

The Lobe Court explains in the following detailed analysis its view that the evidence was sufficient as tampering with witness Attouf:

> Lobe first argues that the evidence presented was insufficient to prove beyond a reasonable doubt that he committed witness tampering with respect to Attouf . . . . Specifically, he claims that the State did not prove either (1) that Attouf was to be called as a witness, or that Lobe had reason to believe that she would be called as a witness, or (2) that Lobe directed Attouf to testify falsely, withhold information, or absent herself from an official proceeding. [Court's footnote: *Lobe's phone conversation with Attouf took place on July 18; the record does not contain a witness list from the State until July 22, 2005. The witness list includes both Attouf and Pappas*.]
>
> The State concedes that no evidence showed Lobe attempting to induce Attouf to testify falsely or absent herself from the proceeding, but it argues that the evidence was sufficient to convince a reasonable trier of fact that Lobe had reason to believe that Attouf might have information relevant to the investigation and attempted to induce her to withhold that information.

> The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in the State's favor and interpreted most strongly against the defendant.
>
> Attouf testified that, as she told Gregoire that the prosecution had left her a message (asking for Pappas's updated contact information), she could hear Gregoire relaying that information to Lobe. After Lobe heard this information, he personally spoke to Attouf and ordered her not to tell the prosecution how to contact Pappas.
>
> Viewing this evidence in the light most favorable to the prosecution, it is clear that a rational trier of fact could have found Lobe guilty of witness tampering beyond a reasonable doubt. He had reason to believe that Attouf had information relevant to the prosecution, as he had just heard that the prosecution contacted her to attempt to locate the main witness in the case (Pappas). He then attempted to persuade her to withhold that information. The evidence was sufficient to support a conviction under the third alternative for witness tampering, an attempt to induce a person to withhold information from a law enforcement agency. There was clearly sufficient evidence to convict Lobe on witness tampering.

The Lobe Court also notes briefly as to witness Pappas that Lobe both (1) attempted to persuade Pappas to absent herself from the proceedings, and (2) attempted to persuade her to tell her friend to withhold contact information from investigators. This would have been sufficient evidence to support a tampering conviction if the jury had been properly instructed, the Court holds.

IT WAS NOT "LURING" WHERE (1) ADULT STRANGER GESTURED TO AN 11-YEAR-OLD GIRL TO COME OVER TO HIS CAR, AND (2) AFTER THE GIRL KEPT WALKING AND DID NOT APPROACH THE STRANGER'S CAR, HE THEN CONTINUED A SHORT DISTANCE IN HIS CAR IN THE SAME DIRECTION AS THE GIRL WAS WALKING

State v. McReynolds, __ Wn. App. __, 176 P.3d 616 (Div. III, 2008)

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

> At about 5:30 p.m. on September 1, 2005, 11-year-old L.S. was walking home from volleyball practice at her school in Union Gap, Washington. She first saw Jesse McReynolds, whom she did not know, at a stop sign at Third and Pine Streets when he stopped to wait for her to cross so that he could turn left onto Pine Street.
>
> After turning, Mr. McReynolds drove up to L.S. and slowed down. When Mr. McReynolds was three to four feet from L.S., who was walking on the gravel shoulder, he signaled to L.S. to come over. She glared at him because she was tired and hungry and in a bad mood from volleyball practice. L.S. did not feel that Mr. McReynolds was attempting to prevent her from going home when he motioned to her; she just ignored him because she did not feel well and she wanted to get home.

Mr. McReynolds drove to the end of the block and stopped at the next stop sign, at Second and Pine Streets. L.S. became frightened when she saw him at this stop sign and thought he was waiting for her. When she passed him at the stop sign, she ran the rest of the way to her house on Pine and First Streets. L.S. did not look at Mr. McReynolds after he first signaled to her. She heard his truck go down the street as she ran into her yard and she saw him turn on First Street.

L.S. ran into the house, crying hysterically, and told her mother that she was being followed. L.S.'s mother called police. Union Gap Police Officer Robert Almeida located Mr. McReynolds from L.S.'s description of his truck. L.S. then personally identified Mr. McReynolds and his vehicle at the spot where he was detained.

Mr. McReynolds was charged with one count of luring a child. A trial was held on November 2 and 3, 2005.

. . .

The [trial] court asked for the State's argument on the motion to dismiss [for insufficient evidence], explaining that in order to obtain a conviction for luring, according to State v. Dana, 84 Wn. App. 166 (1996) **June 97 LED:13**, "the State has to show some additional conduct or action that constitutes enticement or attempted enticement in order to prove the case.... 'Luring "requires something more than an invitation." An enticement by words or conduct must accompany an invitation.' " The judge stated that he had heard all of the evidence, and he wanted the State to identify the evidence that showed enticement or attempted enticement.

The State argued that it had evidence that Mr. McReynolds had followed the girl. The trial court informed the State that the act of following does not constitute enticement, and that there was no evidence of any words or gestures to engage the girl, beyond the initial invitation, that would constitute enticement. . . . The judge stated that he did not believe that Officer Almeida, an after-the-fact witness, could add to the enticement issue. . . .

The trial court ruled:

> I said it had to be conduct or action that constituted enticement, that's my interpretation of the law. So for that reason, because I'm not aware of any other evidence that the State would put on or that there was something that Officer Almeida might have testified to, I don't find that there was something more than an invitation in this case. And I think under the facts that have been presented, it's appropriate for the reasons that I've already stated to dismiss this case.

The court entered a written order of dismissal and released the defendant on the charge.

ISSUE AND RULING: Can McReynolds be prosecuted for "luring" under these facts (i.e., gesturing to child to come over to his car, and, after she did not approach his car, continuing briefly in her direction but not attempting to entice her)? (ANSWER: No)

Result: Affirmance of Yakima County Superior Court order dismissing luring charge against Jesse Alan McReynolds.

ANALYSIS: (Excerpted from Court of Appeals opinion

> A person commits the crime of luring if the person:
>
> > (1)(a) Orders, lures, or attempts to lure a minor . . . into a motor vehicle;
> >
> > (b) Does not have the consent of the minor's parent or guardian . . .; and
> >
> > (c) Is unknown to the child.
>
> RCW 9A.40.090.
>
> The terms "lure" and "luring" are not defined in the statutory scheme. Division One of this court, when addressing a vagueness challenge, used dictionary terms to conclude that a commonly understood use of "lure" is to "entice." Dana. **June 97 LED:13**. The Dana court continued: "[T]he connotation of the word 'lure' amplifies that meaning by implying that one who lures another leads that person into a course of action that is wrong or foolish under the circumstances." Therefore, under Dana, luring is more than an invitation alone; enticement, by words or conduct, must accompany the invitation.
>
> Here, Mr. McReynolds signaled to L.S. for her to come over to him. This gesture is insufficient in and of itself to prove that Mr. McReynolds was trying to get L.S. into his truck. But he also braked at the stop sign and continued on the same street as L.S. There is no evidence that Mr. McReynolds said anything at all or made any gestures beyond the initial signaling. And L.S. never looked at Mr. McReynolds again after he made the first gesture. There is insufficient evidence to constitute luring in this case.

LED EDITORIAL COMMENT: This decision was about the sufficiency of evidence to convict under the beyond-a-reasonable-doubt standard. We think that the evidence here would be sufficient to meet the reasonable suspicion standard for a Terry stop (and likely even the probable cause standard for an arrest) if the officer was able to explain how the officer applied experience and training to infer that the gesture by the stranger was an offer to entice the child with a ride in the car. Ideally, officers dealing with similar circumstances will have something more that will support a conclusion that enticement occurred.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) RCW 10.58.035'S RELAXING OF CORPUS DELICTI RULE HELD CONSTITUTIONAL, BUT THE STATUTE MAY BE REDUCED TO LITTLE EFFECT – In State v. Dow, ___ Wn. App. ___, 176 P.3d 597 (Div. II, 2008), in a 2-1 vote, Division Two of the Court of Appeals upholds the constitutionality of RCW 10.58.035, adopted in 2003. The statute 1) relaxes the corpus delicti rule and 2) makes a defendant's out-of-court admission or confession

admissible as substantive evidence where the alleged victim of the crime has died or Is incompetent to testify at trial, so long as the statement is found trustworthy under a totality-of-the-circumstances test outlined in the statute. But the three separate opinions issued by the three judges in the case leave considerable doubt regarding the effect or usefulness of the statute.

Dow was a first degree child molesting prosecution. The trial court held that the four-year-old victim, who was three at the time of the alleged offense, was incompetent to testify. The trial court also ruled that the child's out-of-court statements were inadmissible. Defendant then successfully moved prior to trial to suppress his statement to police interrogators, arguing that under the corpus delicti rule there was no evidence corroborating his admissions to police. The State argued to the trial court that defendant's statement was admissible under RCW 10.58.035, adopted by the Washington Legislature in 2003. The statute provides in relevant part as follows:

> (2) In determining whether there is substantial independent evidence that the confession, admission, or other statement of the defendant is trustworthy, the court shall consider, but is not limited to:
>
> (a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;
>
> (b) The character of the witness reporting the statement and the number of witnesses to the statement;
>
> (c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or
>
> (d) The relationship between the witness and the defendant.

Each of the three judges of the Court of Appeals writes an opinion. All three agree that the statute is not unconstitutional, but all three also appear to agree that, under the common law corpus delicti rule of Washington, a confession alone will never support a finding of guilt.

Result: Reversal of Cowlitz County Superior Court order dismissing first degree child molestation charges against Keith Ian Dow; case remanded for hearing to determine admissibility of Dow's statement to police under RCW 10.58.035.

(2) VOYEURISM STATUTE UPHELD AGAINST VAGUENESS CHALLENGE IN CASE INVOLVING "UPSKIRT" PHOTOGRAPHING BY HIGH SCHOOL CUSTODIAN – In State v. Boyd, 137 Wn. App. 910 (Div. II, 2007), a convicted voyeurism defendant argues that the "intimate areas" element of the voyeurism statute is unconstitutionally vague and overbroad.

The Boyd Court's description of the facts and procedural background is in part as follows:

> Boyd worked as a part-time custodian at Port Angeles High School. In April 2004, students began to hear rumors that he was trying to look up girls' skirts and take pictures. Two students saw him follow a girl, who was wearing a skirt, up the stairs as he held a camera. When the students got the girl's attention, Boyd turned around and pretended to pick something up, hiding the camera. The students reported the incident to the principal.

> The principal met with Boyd to discuss the allegations. She explained what the students had told her and asked if he had a camera. He admitted he did and gave it to the assistant principal, showing him how to work the camera to view the images.
>
> The camera contained several "upskirt" photographs of young female students. He claimed that he had brought the camera to school to take pictures of students misbehaving, but he admitted that he did not have any photographs of student misconduct. He also said he had never done anything like that before, that it was a "spur of the moment thing."
>
> The police arrested Boyd and the State charged him with one count of voyeurism and five counts of attempted voyeurism. Each count alleged an incident involving a different girl.
>
> A jury trial ensued. In support of the charges, the State presented copies of the photographs recovered from Boyd's camera. Each photograph depicted a different girl, except exhibits 7 and 8, which showed the same victim.
>
> . . .
>
> The jury convicted Boyd of voyeurism and one count of attempted voyeurism and he appeals.

In key part, the Boyd Court's response to Boyd's vagueness arguments is as follows:

> Boyd suggests that because a person must intend to protect an intimate area from public view, the clothing alone insufficiently gives notice of what is prohibited. For example, he argues that a high school student and a prostitute may wear the same short skirt, but one will intend to keep her underwear hidden while the other will not.
>
> But we construe the term "intimate areas" in the context of the entire statute. The unwanted viewing of intimate areas is prohibited only when it occurs under circumstances where the person has a reasonable expectation of privacy. RCW 9A.44.115(2)(b). Thus, when a student dons a skirt, the scope of her expectation of privacy depends on the circumstances. If she climbs a flight of stairs, she may reasonably expect that people standing beneath her may incidentally glimpse parts of her body above the hemline. By wearing a skirt, she does not implicitly authorize others to attempt to view the hidden parts of her body. The statute simply effectuates the commonsense notion that "a woman who wears a skirt possesses a reasonable expectation, regardless of whether she is in a closed changing room or in a public shopping mall food court, that technology will not be used to catch a glimpse of her underwear."
>
> . . .
>
> In this case, the student victims all wore skirts that covered their underwear and thighs. Their choice of clothing put the public on notice that they intended to keep the covered areas private, and their expectation of privacy was reasonable. The testimony, and the photographs themselves, suggest that Boyd went to extraordinary lengths to position himself and his camera so that he could peer up

> the students' skirts. His conduct falls squarely within the statutory prohibition and we reject his vagueness challenge.
>
> . . .
>
> [Boyd also] argues that he could not have "knowingly" viewed another's intimate area because the viewfinder of his camera was not visible when he took the pictures. He also contends that the requirement that the viewing take place for the purpose of sexual gratification requires speculation into his intentions. Last, he questions how a person who wears a skirt can have a reasonable expectation of privacy while ascending a staircase. Because his additional arguments lack merit, we reject them without further discussion.

Result: Affirmance of Clallam County Superior Court convictions of Gary Alan Boyd for voyeurism and attempted voyeurism.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, 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 internet 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://www.atg.wa].

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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 Criminal Justice Training Commission's Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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