Law Enforcement Digest

AUGUST 2009

643rd Basic Law Enforcement Academy – February 18, 2009 through June 24, 2009

President:	Jimmy Welsh – Tacoma Police Department
Best Overall:	Trevor G. Eades – Longview Police Department
Best Academic:	Jeffery B. Yoder – Bellingham Police Department
Best Firearms:	Josh H. Tapec – Black Diamond Police Department
TAC Officer:	Officer Rick Bourns – Seattle Police Department

644th Basic Law Enforcement Academy – March 3, 2009 through July 8, 2009

President:	Natalie D'Amico – Redmond Police Department
Best Overall:	Aaron A. Dalan – Seattle Police Department
Best Academic:	Timothy P. Nunn – Auburn Police Department
Best Firearms:	Nicholas S. Wong – Federal Way Police Department
TAC Officer:	Deputy Tamara DeVries – King County Sheriff's Office

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

(1) STRIP SEARCH BY MIDDLE SCHOOL STAFF OF 13-YEAR-OLD STUDENT TO LOOK FOR PRESCRIPTION-STRENGTH IBUPROFEN HELD TO VIOLATE FOURTH AMENDMENT UNDER THE TOTALITY OF CIRCUMSTANCES/REASONABLENESS STANDARD FOR

SEARCHES BY K-12 SCHOOL AUTHORITIES – In Safford Unified School District # 1 v. Redding, __ S.Ct. __ , 2009 WL 1789472 (2009), the U.S. Supreme Court rules in a civil rights lawsuit under 42 U.S.C. section 1983: 1) that a search of the outer clothing of a 13-year-old female student by female staff members (at the direction of the vice principal) in an Arizona middle school was justified by reasonable suspicion that the girl was in possession of prescription-strength pain killers (ibuprofen) in violation of school rules; but 2) that a strip search, though conducted in a reasonable manner by female staff, was not justified under the totality of the circumstances. But the Supreme Court extends qualified immunity to the school's vice principal and the staff members.

All nine of the justices agree that the vice principal was justified under the relaxed reasonable suspicion standard for non-police, school searches in deciding to conduct an outer clothing search for the prescription-strength drugs. The vice principal had reasonable suspicion that the student was distributing the drugs based on: 1) staff knowledge generally that students had been regularly bringing such drugs onto the school campus, 2) a statement from another student caught with such drugs that she had gotten the drugs from the target student, and 3) knowledge of the close friendship of the target student and the student who was caught with drugs and made the statement.

On direction by the vice principal, the female staff persons doing the search (conducted in an area where the girl was not exposed to others) did not stop with searching outer clothing. They directed the girl to strip down to her underclothes, and they then directed her to pull out the elastic of her underpants, as well as to pull out her bra. The purpose of this was to determine if anything was hidden in her underclothes. This step partially exposed her breasts and pelvis to the same-sex searchers. Nothing was found in this "strip search."

The majority opinion takes into account: the nature of the drugs being sought (prescription-strength pain relievers, not a more dangerous drug); the lack of suspicion of a large-scale distribution operation; and the lack of particularized reasonable suspicion that this target student was using her underclothes as a hiding place. As noted above, on the totality of the circumstances, the majority opinion rules that these circumstances did not justify a strip search.

Six of the justices vote, however, to give qualified immunity to the vice principal and the searchers acting at his direction. They grant qualified immunity on the rationale that a reasonable person at the time of the search would not have known under existing case law that the Fourth Amendment clearly prohibited a strip search in this factual context.

The Court remands the case to the Ninth Circuit for a determination of whether the school district itself should be held liable for having an unconstitutional policy under the standard for agency liability established in Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978). That may require remand to the federal district court for taking evidence on the school's policy.

Two of the justices, Stevens and Ginsburg, disagree with giving qualified immunity to the vice principal who made the decision to do the search. Justice Thomas is the lone justice who would have upheld the search as constitutional.

Result: Reversal in part (regarding qualified immunity) and affirmance in part (regarding lack of justification for the strip search) of Ninth Circuit en banc panel decision that reversed a U.S. district court (Arizona) decision granting summary judgment to the school personnel; case

remanded for a determination of whether the school district is liable for having an unconstitutional policy that drove the actions of its staff.

LED EDITORIAL NOTE: In this civil rights lawsuit, the plaintiff's case was dismissed by summary judgment at the trial court level. On review of a summary judgment dismissal, the subsequent reviewing courts are essentially required to take the allegations of the plaintiff as true, even if those allegations are disputed in some respects by the government.

LED EDITORIAL COMMENT: The majority ruling that the strip search was not justified is based on the totality of the circumstances. The Court does not state a blanket prohibition on strip searches by k-12 school personnel. But the Court gives little guidance regarding what factual circumstances will justify a strip search by school authorities in a k-12 schools.

Readers should note that search rules are relaxed for k-12 school authorities. Ordinary search rules apply to searches conducted by or at the direction of law enforcement personnel in a school setting

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NINTH CIRCUIT, U.S. COURT OF APPEALS

BRIEF SEIZURE OF EXPRESS MAIL PACKAGE FOR CANINE SNIFF DID NOT VIOLATE FOURTH AMENDMENT BECAUSE PACKAGE WAS DELIVERED ON TIME

U.S. v. Jefferson, 566 F.3d 928 (9th Cir. 2009) (decision filed May 26, 2009)

Facts: (Excerpted from Ninth Circuit decision)

> On the morning of April 6, 2006, an express mail package addressed to John Jefferson arrived at the United States Post Office in Juneau, Alaska. The package was sent from Oregon on April 5 and delivery was guaranteed by 3:00 p.m. on April 7. The postal clerk processing the package telephoned a postal inspector in Anchorage. The inspector had previously instructed clerks to notify him if any packages arrived that were to be delivered to Jefferson's address. The inspector told the clerk to detain the package overnight.
>
> The inspector arrived in Juneau the morning of April 7 along with a law enforcement team and a narcotics-detection canine. The inspector visually inspected the outside of the package and submitted it to a canine sniff. The canine alerted to narcotics. Law enforcement applied for a search warrant, which the magistrate judge granted at 11:55 a.m. Law enforcement opened the package and discovered 253 grams of methamphetamine. At approximately 1:30 p.m., law enforcement obtained a beeper warrant and placed a beeper inside the package. Around 5:00 p.m., law enforcement made a controlled delivery of the package to Jefferson's address. The beeper soon went off and law enforcement arrested Jefferson.

Proceedings below:

The U.S. Attorney charged Jefferson with 1) attempted possession of methamphetamine with intent to distribute and 2) simple attempted possession of methamphetamine. The jury convicted on the second charge but could not agree on the more serious charge. What happened next is described by the Ninth Circuit panel as follows:

> After the court dismissed the jury, the government announced that it would retry Jefferson on the intent to distribute offense. Jefferson moved to dismiss his retrial based on double jeopardy, which the district court summarily denied. Jefferson entered a conditional guilty plea on the intent to distribute offense, preserving for appeal the denial of his suppression motion and double jeopardy motion.

ISSUE AND RULING: Did Jefferson's possessory interest in the package give him a right to have the express mail package delivered before the guaranteed delivery time of 3:00 p.m. on April 7? (ANSWER: No, and therefore the temporary detainment of the package for a canine sniff prior to the guaranteed delivery time was lawful)

Result: Affirmance of U.S. District Court (Alaska) denial of Jefferson's motion to suppress and motion to dismiss based on double jeopardy.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> Jefferson argues that his possessory interest in "timely" delivery arose on April 6, "[a]t the time the package was removed from the mail stream and not delivered in the normal fashion along with the other Express Mail packages." In United States v. Hoang, 486 F.3d 1156 (9th Cir. 2009) we explicitly left unanswered whether a contractually guaranteed delivery time affects the Fourth Amendment possessory interest of a package's sender or recipient. *[Court's footnote: In this case, we observe no Fourth Amendment distinction between public and private package carriers.]* The United States Court of Appeals for the First Circuit answered this question almost twenty years ago in United States v. LaFrance, 879 F.2d 1 (1st Cir.1989).
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> In LaFrance, per the instructions of law enforcement, a Federal Express employee alerted law enforcement that a package had arrived addressed to LaFrance. The package had arrived in the morning and delivery was guaranteed by 12:00 p.m. that day. Law enforcement directed the employee to deliver the package to the police department instead of LaFrance. The package arrived at the police department around 12:45 p.m., hence 45 minutes after the guaranteed delivery time. At about 1:15 p.m., the package was subjected to a narcotics-detection canine sniff and the canine alerted to contraband. LaFrance presented essentially the same arguments for suppression as those Jefferson now advances.
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> The First Circuit observed that "a possessory interest derives from rights in property delineated by the parameters of law, in this case, contract law." The First Circuit noted the hornbook contract law principle "that where a delivery time is agreed upon, a court should not intrude to imply a (different) reasonable time for delivery."

> The First Circuit held that "the only possessory interest at stake before Thursday noon was the contract-based expectancy that the package would be delivered to the designated address by morning's end. FedEx obligated itself to no more than that." In addressing the time period "[f]rom noon until 2:15 p.m.," during which time LaFrance had a possessory interest in the package but law enforcement had yet to establish probable cause, the First Circuit concluded that the detention was reasonable based on the circumstances.
>
> The reasoning of LaFrance is convincing. We hold that an addressee has no Fourth Amendment possessory interest in a package that has a guaranteed delivery time until such delivery time has passed. Before the guaranteed delivery time, law enforcement may detain such a package for inspection purposes without any Fourth Amendment curtailment. Once the guaranteed delivery time passes, however, law enforcement must have a "reasonable and articulable suspicion" that the package contains contraband or evidence of illegal activity for further detainment.
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> In this case, the post office guaranteed that Jefferson would receive his package by 3:00 p.m. on April 7. Any expectation that Jefferson or the post office may have had that the package could arrive earlier is irrelevant. The postal inspector did not need any suspicion to detain Jefferson's package overnight on April 6 because Jefferson did not yet have a possessory interest in the package. By the time "the constitutional chemistry was altered" at 3:00 p.m. on April 7, law enforcement had already established probable cause to seize Jefferson's package. Thus, law enforcement acted well within the bounds of the Fourth Amendment in detaining, seizing and then searching Jefferson's package.
>
> In sum, we hold that a package addressee does not have a Fourth Amendment possessory interest in a package that has a guaranteed delivery time until the guaranteed delivery time has passed. Jefferson had no Fourth Amendment possessory interest in the "timely" delivery of his package until 3:00 p.m. on April 7. We need not weigh the public interest in the package's detainment against the protected private interest because probable cause was established before Jefferson gained a possessory interest in the package.

[Some citations omitted]

LED EDITORIAL COMMENTS:

1. Timely delivery of temporarily seized package. No reported Washington appellate court search and seizure decision has addressed the issue addressed in Jefferson, but we believe that the procedure followed by the law enforcement officers in Jefferson would be approved by Washington courts.

2. Warrantless canine sniffing. The Jefferson Court does not address the privacy aspect of the conducting a canine sniff of a package in these circumstances. That is likely because it is well settled under the Fourth Amendment case law that use of a dog to sniff the ambient air surrounding a package does not constitute a search. The Washington Supreme Court has never weighed in on the dog-sniffing-as-search question in any factual context.

Several decisions from our intermediate Court of Appeals have found no privacy violation in the sniffing of a shipped package taken from transit. The Court of Appeals ruled in State v. Dearman, however, that under article 1, section 7 of the Washington constitution it is a search requiring a search warrant to take a drug-sniffing dog near enough to a residence to sniff for drugs See State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov 98 LED:06 (discussing and distinguishing the packages-in-transit cases and a bank-safety-deposit-box sniff. No Washington decision has yet addressed privacy considerations in relation to using a drug dog to sniff an occupied car at a traffic stop, something that under Fourth Amendment case law is deemed not a search.

CONSENT BY RESIDENTIAL CO-OCCUPANT # 1 AFTER HER RELEASE FROM HANDCUFFS HELD VOLUNTARY; ABSENCE OF ARRESTED RESIDENTIAL CO-OCCUPANT # 2 AT TIME OF POLICE REQUEST TO CO-OCCUPANT # 1 FOR CONSENT HELD NOT PRETEXTUAL CIRCUMSTANCE BECAUSE OFFICERS DID NOT PURPOSELY ORCHESTRATE THE ABSENCE OF CO-OCCUPANT # 2 TO PREVENT HIS OBJECTION

U.S. v. Brown, 563 F.3d 410 (9th Cir. 2009) (decision filed April 17, 2009)

Facts and Proceedings below: (Excerpted from Ninth Circuit opinion)

> On April 3, 2007, Special Agent Dale Watson of the Bureau of Alcohol, Tobacco, Firearms and Explosives received information from a confidential informant that Brown, wanted on an outstanding warrant for the felony offense of second degree assault, was staying at 807 East Augusta Avenue (the "East Augusta Residence") in Spokane, Washington, and was in possession of two firearms. Agent Watson and several members of the Spokane Gang Enforcement Team set up surveillance in the neighborhood and soon spotted Brown walking with Lacie Rishel. The officers approached with guns drawn. Both Brown and Rishel were ordered to the ground, handcuffed, and patted down for weapons. No firearm was found on Brown's person. The officers arrested Brown on the outstanding warrant, placed him in a squad car, and eventually transported him to the Spokane County Jail. At no time did Agent Watson ask Brown for permission to search the East Augusta Residence.
>
> Agent Watson initiated a discussion with Rishel while she was in handcuffs. The parties dispute how long Rishel was in handcuffs and when during her exchange with Agent Watson they were removed. Because the district court denied Brown's suppression motion, we interpret the evidence from the suppression hearing in the light most favorable to the government absent a contrary factual finding by the court. Rishel informed Agent Watson that she lived at the East Augusta Residence with her boyfriend, Devion Tensley, and that Brown had been sleeping on their couch for the past few nights as their guest. At the suppression hearing, Agent Watson and Rishel offered conflicting testimony on how the discussion progressed thereafter.
>
> Agent Watson testified that after informing Rishel that Brown was likely in possession of two firearms and that these were probably located at the East Augusta Residence, Rishel "adamantly denied" this and stated, "Well, you know what, you can come down and look if you want." On cross-examination, Agent Watson repeatedly denied that he or any other officer told Rishel either that they

had enough evidence to get a search warrant or that they would "mess [the] house up" and "slice [the] couches" if forced to obtain one.

During direct and redirect examination, Rishel denied inviting Agent Watson to search the East Augusta Residence. To the contrary, Rishel claimed that the officers threatened not only to lock her out until they obtained a search warrant, but also to "tear [the] place apart" if forced to take that route. She stated that she only agreed to the search because of these threats. Upon cross-examination, however, Rishel also admitted to Agent Watson's version of the events. . .

The district court found that Rishel spontaneously volunteered consent without any prompting by Agent Watson.

The parties agree that after her exchange with Agent Watson, Rishel walked back to the East Augusta Residence alone. Agent Watson testified that because Rishel expressed concern that her landlord would be upset by law enforcement activity, the officers removed some police insignia before meeting Rishel at home. Rishel denied making such a request, and further claimed that the officers were already waiting for her outside the East Augusta Residence when she arrived.

Agent Watson's and Rishel's accounts of the search itself are mostly in accord. After entering the apartment, Agent Watson asked if he could search the area where Brown had slept, and Rishel consented. Agent Watson found a semiautomatic pistol under a couch cushion. Upon probing by the agents, Rishel revealed that the revolver was likely in the bedroom she shared with Tensley. After Agent Watson asked Rishel if he could search the bedroom and she consented, he found a .357 caliber revolver in a chest of drawers.

Tensley, Rishel's boyfriend, arrived at the East Augusta Residence after the officers had finished their search. Agent Watson explained that Brown had been arrested on an outstanding warrant, that Rishel had consented to a search of the East Augusta Residence, and that two firearms had been found. Because Rishel expressed fear of Tensley's reaction should he learn of her cooperation, Agent Watson also asked Tensley not to be upset with Rishel for consenting to the search – adding that he believed he had probable cause for a search warrant and likely would have applied for one had he needed to do so.

Brown was charged by indictment with being a felon in possession of a firearm and ammunition in violation of 18 U.S.C. §§ 922(g)(1) and 924. After hearing testimony, the district court denied Brown's motion to suppress the two firearms and ammunition. The court found that Rishel gave knowing and voluntary consent to search the apartment. The court also concluded that the officers did not violate the mandate of Georgia v. Randolph, 547 U.S. 103 (2006) **May 06 LED:05**, because Brown was placed in the police car pursuant to his arrest and prior to any discussion between Agent Watson and Rishel. Brown pleaded guilty but reserved the right to appeal the district court's ruling.

ISSUES AND RULINGS: 1) Where residential co-occupant Lacie Rishel was uncuffed and told she was not under arrest before the ATF agent requested her consent to search her residence, did she give a voluntary consent to a search of the residence, considering all of the

circumstances, even though the ATF agent did not tell her she could refuse consent to search? (ANSWER: Yes)

2) Where the residential co-occupant defendant, David Brown, had been formally arrested and placed in the back of a patrol car before officers asked his residential co-occupant Lacie Rishel for consent to search, was her consent to search invalid as to him? (ANSWER: No, because his absence at the time of the consent request was not purposely orchestrated by officers).

Result: Affirmance of U.S. District Court (Spokane, Washington) conviction of David T. Brown under federal law for being a previously convicted felon in possession of a firearm.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) Voluntariness of co-occupant Lacie Rishel's consent

We consider five factors in determining voluntariness:

> (1) whether the [consenting individual] was in custody; (2) whether the arresting officers had their guns drawn; (3) whether Miranda warnings were given; (4) whether the [consenting individual] was notified that she had a right not to consent; and (5) whether the [consenting individual] had been told a search warrant could be obtained. These factors serve merely as guideposts, "not [as] a mechanized formula to resolve the voluntariness inquiry." Moreover, no one factor is determinative.

With respect to the first factor, a seizure occurs "when, 'taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " The Ninth Circuit has identified five factors that aid in determining whether a person's liberty has been so restrained:

> (1) the number of officers; (2) whether weapons were displayed; (3) whether the encounter occurred in a public or non-public setting; (4) whether the officer's officious or authoritative manner would imply that compliance would be compelled; and (5) whether the officers advised the detainee of his right to terminate the encounter.

Taking into account all of the circumstances surrounding her encounter with Agent Watson, we conclude that Rishel was not in custody. Although Brown and Rishel were admittedly approached by five or six officers with guns drawn-and were both ordered to the ground, handcuffed, and patted down for weapons-all these events occurred in a public setting and there is no evidence that police continued to display their weapons after Brown and Rishel were safely secured. Moreover, subsequent events would have communicated to a reasonable person that she was free to terminate the encounter. Paramount among these is that the officers treated Brown and Rishel very differently. Brown was arrested, placed in a squad car, and driven to the Spokane County Jail. By contrast, before Rishel consented to search of the East Augusta Residence, Agent Watson had released

her from handcuffs and informed her that she was not under arrest. He retrieved the key to the East Augusta Residence from Brown's front pocket and gave it to Rishel, who returned to the apartment alone. According to Agent Watson, at Rishel's request, police removed their insignia before joining her at the apartment to conduct the search. Once inside the East Augusta Residence, Agent Watson specifically sought Rishel's consent to search the room where Brown had slept as well as the bedroom occupied by Rishel and Tensley. This police conduct would not have communicated to a reasonable person that she was not at liberty to ignore the police presence and go about her business.

The remaining voluntariness factors do not tip the scales in Brown's favor. While officers first approached both Brown and Rishel with guns drawn, Brown does not contend that those weapons were still displayed after he and Rishel had been handcuffed. Rishel was not in custody, so "Miranda warnings were inapposite." Although Agent Watson admittedly did not notify Rishel that she had a right not to consent to search, this factor is not an absolute requirement for a finding of voluntariness, and also seems inapposite given that Rishel volunteered consent without any prompting whatsoever. Finally, although the district court made no express finding with respect to whether either Agent Watson or another officer informed Rishel that they could obtain a warrant, the evidence does not support this contention. During cross-examination, Agent Watson denied that any officer threatened to obtain a warrant. He also admitted telling Tensley *after* the search that he had probable cause to obtain a warrant, but implied that he did so because Rishel feared her boyfriend's reaction should he discover that she voluntarily consented to the search. Rishel's testimony expressly supports this motivation.

2) Not asking co-tenant defendant for consent

In Georgia v. Randolph, **May 06 LED:05**, the Supreme Court held that an occupant's consent to the warrantless search of a residence is not valid as to a physically present co-occupant who expressly refuses consent. In so holding, the Supreme Court distinguished and expressly preserved its prior holdings in United States v. Matlock, 415 U.S. 164 (1974), and Illinois v. Rodriguez, 497 U.S. 177 (1990).

The second loose end is the significance of Matlock and Rodriguez after today's decision. Although the Matlock defendant was not present with the opportunity to object, he was in a squad car not far away; the Rodriguez defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent cotenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's

permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

Seizing on the emphasized language, Brown argues that officers placed him in the squad car in order to avoid his possible objection to a search of the East Augusta Residence.

The record does not support Brown's claim. While Agent Watson admitted focusing on Rishel rather than Brown in his effort to access the East Augusta Residence and secure the firearms in Brown's possession, Brown's claim that he was intentionally removed to avoid his objection during the consent colloquy with Rishel is mere speculation. Officers placed Brown in the squad car pursuant to his lawful arrest on the assault charge and to transport him to the Spokane County Jail. Brown points to no evidence to the contrary.

Brown nonetheless relies on United States v. Murphy, in which we held that "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made." 516 F.3d at 1124-25 (emphasis added). But we said this in the context of the same Randolph passage quoted above, and were thus referring to a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search. Again, there is no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane a felon wanted on an outstanding warrant for second degree assault and reportedly in possession of firearms. Moreover, the emphasized language is dictum as the arrestee in Murphy had in fact refused consent to search; the search conducted was predicated on consent obtained two hours later from a co-tenant.

That Agent Watson retrieved from Brown's pocket the key to the East Augusta residence after obtaining Rishel's consent, and thus had an additional opportunity to obtain Brown's consent, does not alter the fact that Brown was justifiably absent from the search colloquy. Moreover, in light of the policy justifications provided in Randolph for the "fine line" drawn therein, Agent Watson's decision not to seek consent from Brown does not invalidate the consent spontaneously volunteered by Rishel.

Seeking Brown's consent would have "needlessly limit[ed] the capacity of the police to respond to ostensibly legitimate opportunities in the field." Agent Watson encountered two such opportunities on the day he arrested Brown – he encountered Brown in the company of a co-occupant, and that co-occupant later spontaneously volunteered consent to a search of the shared residence. These two legitimate opportunities allowed Agent Watson to remove from a felon's possession both a semiautomatic pistol and a revolver. Moreover, a contrary finding would open the door to turning every such case "into a test about the adequacy of the police's efforts to consult with a potential objector."

Finally, the Supreme Court noted in Randolph that

> [t]he pragmatic decision to accept the simplicity of this line is . . . supported by the substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.
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> Even if, upon retrieving the key, Agent Watson had asked Brown for permission to search the East Augusta Residence, it is possible that Brown would have granted his consent, his current claims to the contrary notwithstanding.
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> We thus agree with the district court that Agent Watson did not violate the Supreme Court's mandate in Randolph.

[Some citations omitted; subheadings added]

LED EDITORIAL COMMENTS: We believe that the Washington constitution's article 1, section 7, while broader in some respects regarding third party consent searches, does not require different analysis than that followed by the federal court here in Brown interpreting the Fourth Amendment. For residence consent searches in Washington, under article 1, section 7 of the Washington constitution, a consent search is not valid against any present co-occupant who does not individually give consent. See State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02. Under the Washington case law, any co-occupant who is present and does not give consent to a residence search can successfully exclude any evidence seized in the ensuing "consent" search. See State v. Morse, expanding on analysis in a prior Washington Supreme Court decision in State v. Leach, 113 Wn.2d 735 (1989). (NOTE: The Morse-Leach all-present-parties-consent rule does not apply to motor vehicle consent searches. See State v. Cantrell, 124 Wn.2d 183 (1994) Sept 94 LED:05)

Unlike Washington's constitution, the Fourth Amendment apparently accepts as lawful a search conducted with the consent of one co-occupant where a present co-occupant stands by and does not object to the search, even if that other co-occupant is not asked for consent. The Fourth Amendment does give the present co-occupant authority to object, and thus preclude, as against him or her, a search despite the consent given by another co-occupant. Georgia v. Randolph, 126 S.Ct. 1515 (2006) May 06 LED:05.

In the Brown case, defendant Brown was not present on the street when the officers requested consent from the other co-occupant to search the residence, so, if this had been a state court prosecution in a Washington court, the Leach-Morse rule likely would not have applied.

Of course, Washington officers should note that the Brown Court upheld the procedure followed in the case only because the judges concluded that the officers did not act pretextually when they arrested Brown and placed him in the backseat of a patrol car before asking Lacie Rishel on the street for consent to search the co-occupied residence. That is, the Ninth Circuit panel concluded that the officers did not purposefully orchestrate the events so that the co-occupant, Brown, would not be present outside the vehicle to object to the residence search when the request was made to his co-occupant. Different judges occasionally will draw different conclusions from the same facts when presented with pretext arguments. The circumstances of this case seem to be subject to

a different interpretation on the pretext question than was reached by the Brown Court. If the officers had probable cause to search the residence, their legally safer option would have been to seek a search warrant in addition to first asking Lacie for consent.

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

(1) DISTINCTION BETWEEN FOURTH AMENDMENT CONCEPTS OF SEARCH WARRANT "PARTICULARITY" AND "OVERBREADTH" EXPLAINED; COURT ALSO ADDRESSES WHETHER SEARCH WARRANT SHOULD SPECIFY WHAT CRIMES ARE SUSPECTED – In U.S. v. SDI Future Health, __ F.3d __, 2009 WL 1508763 (9th Cir. 2009) (amended decision filed June 1, 2009), the Ninth Circuits addresses several issues relating to a search warrant for corporate files for evidence of Medicare fraud. Along the way, the Court explains the distinctions between the concepts of search warrant "particularity" and search warrant "overbreadth" under the federal constitution's Fourth Amendment. This LED entry will excerpt from the decision to address only the Court's explanation of those distinctions, plus the Court's footnote addressing the question of whether a search warrant should specify what crimes are suspected:

> Evaluating the warrant (including the affidavit) to determine whether it met the demands of the Fourth Amendment, we start with the relevant language, which, of course, provides that "no Warrants shall issue, but upon probable cause ... and particularly describing the place to be searched, and the persons or things to be seized." Our cases describe this requirement as one of "specificity" and we have distinguished its "two aspects": "particularity and breadth . . . Particularity is the requirement that the warrant must clearly state what is sought. Breadth deals with the requirement that the scope of the warrant be limited by the probable cause on which the warrant is based."
>
> Particularity means that "the warrant must make clear to the executing officer exactly what it is that he or she is authorized to search for and seize." "The description must be specific enough to enable the person conducting the search reasonably to identify the things authorized to be seized." "However, the level of detail necessary in a warrant is related to the particular circumstances and the nature of the evidence sought." Indeed, "[w]arrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible."
>
> Particularity is not the problem with the warrant in this case. Even the most troubling items on the list, such as "[r]olodexes, address books and calendars," are particular in that they "enable the person conducting the search reasonably to identify the things authorized to be seized." The officers could tell from the warrant that, should they happen upon a rolodex, they should seize it. Because the warrant was not vague as to what it directed law enforcement officers to search for and to seize, we are satisfied that it did not lack particularity for Fourth Amendment purposes.
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> The district court only made one inquiry, which explicitly conflated particularity and overbreadth. The court found that the warrant "at issue here was unconstitutionally overbroad because the lack of particularity provided no

guidance in limiting the search and no direction to government agents regarding the purpose of the search or what types of records were within its scope." This error is quite understandable, given that some of our own opinions have been unclear on the difference between particularity and overbreadth. However, we now insist that particularity and overbreadth remain two distinct parts of the evaluation of a warrant for Fourth Amendment purposes.

A warrant must not only give clear instructions to a search team, it must also give legal, that is, not overbroad, instructions. Under the Fourth Amendment, this means that "there [must] be probable cause to seize the particular thing[s] named in the warrant." "[P]robable cause means a fair probability that contraband or evidence of a crime will be found in a particular place, based on the totality of circumstances." . . . "[P]robable cause means 'fair probability,' not certainty or even a preponderance of the evidence." "The number of files that could be scrutinized ... is not determinative. The search and seizure of large quantities of material is justified if the material is within the scope of the probable cause underlying the warrant."

[Court's footnote: *Although we have historically preferred that a warrant describe the specific crimes of which the government suspects the defendants, the [U.S.] Supreme Court's recent Grubbs opinion [U.S. v. Grubbs, 547 U.S. 90 (2006)* ***May 06 LED:04*** *may affect that preference. Grubbs, 547 U.S. at 98 (internal quotation marks omitted) (observing that the Fourth Amendment "specifies only two matters that must be 'particularly describ[ed]' in the warrant: 'the place to be searched' and 'the persons or things to be seized[;]' [and that the Court has] previously rejected efforts to expand the scope of this provision to embrace unenumerated matters"). We decline to consider here the effect of this language because the warrant [in the* SDI Future Health *case] incorporated the affidavit, which did describe the specific crimes the government suspected the defendants of committing.*]

[Footnote, some citations omitted]

Result: Reversal in part and affirmance in part of U.S. District Court (Nevada) suppression ruling; the baby need not be thrown out with the bathwater; only certain seized items for which probable cause to seize was not established are ordered suppressed; seized items for which the affidavit did establish probable cause for seizure are held admissible.

LED EDITORIAL COMMENT: We caution readers regarding the Ninth Circuit's footnote (see the italicized final paragraph of excerpted text above). The footnote suggests that the particularity requirement for search warrants may not require that a warrant describe the specific crimes suspected by the government. The law is not settled on this point under either the federal or Washington constitutions. To be legally safe, those who prepare search warrants are best advised to describe the specific crimes for which evidence is sought under the warrant.

(2) BRADY PROBLEM OF PROSECUTOR NOT SHARING WITH THE DEFENSE ATTORNEY EVIDENCE INDICATING QUESTIONABLE CREDIBILITY OF THE GOVERNMENT'S STAR WITNESS REQUIRES REVERSAL OF CONVICTION, REGARDLESS OF WHETHER OR NOT THE LEAD DETECTIVE GAVE THE INFORMATION TO THE PROSECUTOR – In U.S. v. Price, 566 F.3d 900 (9th Cir. 2009) (decision filed May 21,

2009), the Ninth Circuit rules that it does not matter whether or not the lead detective in a case shared critical impeachment information with the prosecutor regarding the prosecution's star witness. Either way, the Ninth Circuit rules, the defendant was entitled under constitutional due process requirements to have the prosecutor's office share possibly exculpatory evidence with him. That right was violated in this case, the Court concludes.

The Price Court summarizes the case and its ruling as follows:

> Delray Price was convicted of being a felon in possession of a firearm after Portland police officers found a gun hidden beneath the driver's seat of a car in which he was riding in the rear. Although the government presented circumstantial evidence that Price placed the firearm under the seat as the car was being pulled over, the evidence that sealed his fate at trial was testimony from a witness named Antoinette Phillips. Phillips testified that approximately fifteen minutes before Price was pulled over he was with her and some friends at her aunt's home when she saw a gun tucked into the waistband of his pants. Price's defense attorney vigorously attacked other aspects of the government's case at trial, but he could not overcome this direct evidence of Price's guilt. Price was convicted and sentenced to nearly eight years in prison.
>
> What Price and his attorney did not know is that Antoinette Phillips has a lengthy history of run-ins with the Portland police that suggests that she has little regard for truth and honesty. In addition to being convicted of theft, she has been arrested multiple times for shoplifting and police records show at least one act of "theft by deception." She has also been convicted several times for fraudulently using false registration tags on her vehicle-a violation she continued to commit after each conviction, stopping only when a frustrated police officer finally scraped the false tags off of her license plates himself.
>
> Price did not know about Phillips' multiple acts of fraud or dishonesty reflected in police reports, as well as in her police record-and therefore could not impeach her with that information-because the prosecutor never disclosed it to defense counsel. Price's counsel explicitly requested from the prosecutor "any evidence that any prospective Government witness has engaged in any criminal act, whether or not resulting in conviction," but all he received was evidence of Phillips' single conviction for second-degree theft. It is not clear whether the prosecutor himself ever possessed information that would have revealed Phillips' various acts of misconduct; at Price's new trial hearing, the prosecutor testified only that he did not "have [a] specific recollection" as to what information he personally possessed. However, what *is* clear is that, regardless of his own personal knowledge, the prosecutor utterly failed in his "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." Kyles v. Whitley, 514 U.S. 419 (1995) (emphases added).
>
> There is no doubt that the prosecutor instructed his lead investigative agent, a member of the Portland Police Department, "to run a criminal history check on Ms. Phillips." It is also beyond doubt that, in the prosecutor's own words, "the Portland Police Data System, generally will reflect any police contacts that [an] individual has had." However, as the prosecutor's testimony further reveals, he did not know or recall the results of the investigation that he directed his agent to

> undertake. Rather, when asked if the agent had in fact uncovered the details of Phillips' criminal history, the prosecutor could only respond, "He may have . . . I can't say for sure."
>
> Under longstanding principles of constitutional due process, information in the possession of the prosecutor and his investigating officers that is helpful to the defendant, including evidence that might tend to impeach a government witness, must be disclosed to the defense prior to trial. It is equally clear that a prosecutor cannot evade this duty simply by becoming or remaining ignorant of the fruits of his agents' investigations. Because, here, the prosecutor failed to fulfill his duty to learn of and disclose favorable evidence that likely was in the possession of his lead investigating officer, and because the evidence of Phillips' criminal history is material, we hold that the prosecutor violated Price's rights under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny. Accordingly, we reverse the denial of Price's motion for a new trial.

Result: Reversal of U.S. District Court (Oregon) conviction of Delray Price for being a felon in possession of a firearm; remand for new trial.

(3) SEARCH WARRANT HELD OVERBROAD, BUT OFFICERS ARE HELD IMMUNE FROM CIVIL RIGHTS LIABILITY WHERE A DEPUTY PROSECUTOR APPROVED THE WARRANT BEFORE THE JUDGE SIGNED IT, AND WHERE THE OFFICERS WERE REASONABLE IN THEIR BELIEF THAT THE WARRANT WAS SUPPORTED BY PROBABLE CAUSE – In Millender v. County of Los Angeles, 564 F.3d 1143 (9th Cir. 2009) (decision filed May 6, 2009), a 3-judge Ninth Circuit panel rules 2-1 that Los Angeles County deputy sheriffs are entitled to qualified immunity for their conduct in obtaining and executing a search warrant that was overbroad (not supported by probable cause) in two respects.

Deputies investigated a report that a man had shot at his girlfriend's car with a sawed-off shotgun with pistol grip. They obtained a picture of the shotgun. There was no evidence that any other firearms or ammunition were involved, or that the crime had any relation to the perpetrator's gang membership. Nonetheless, the deputies obtained a search warrant for the perpetrator's residence (which he shared with his 74-year-old foster mother) to search for, among other things, 1) all firearms and all firearms-related items, and 2) all evidence of gang membership. The search warrant and affidavit were reviewed and approved by a sergeant, lieutenant, and a deputy district attorney before being reviewed and signed by a state court judge. The search under the warrant yielded a different shotgun (belonging to the foster mother) and some .45-caliber ammo, plus some personal papers of the perpetrator.

The foster mother later sued regarding the breadth of the search warrant. The U.S. District Court (California) ruled for the foster mother and denied qualified immunity to the deputies. They appealed to the Ninth Circuit. The Ninth Circuit majority assumes for argument's sake that the warrant was overbroad both as to "all firearms" and "gang membership" evidence. But the majority judges conclude that the deputies are entitled to qualified immunity because 1) the warrant was approved by a district attorney and a judge, and 2) the deputies' assessment of probable cause was not "entirely unreasonable."

Result: Reversal of U.S. District Court (California) decision denying qualified immunity to the deputy sheriffs.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "INTENT" IN WASHINGTON'S FIRST DEGREE ASSAULT STATUTE INCLUDES THE BROAD CONCEPT OF "TRANSFERRED INTENT" – In State v. Elmi, __ Wn.2d __, 207 P.3d 439 (2009), a 6-3 majority of the Washington Supreme Court holds that "intent" under RCW 9A.36.011 (first degree assault) includes a broad concept of "transferred intent" that supports defendant Elmi's multiple convictions for first degree assault.

Ali Elmi fired gunshots from outside a home through a living room window. He thought his estranged wife was alone in the room, but in fact three young children (including two of his own) were also in the room. No one was hurt in the attack.

Elmi was convicted of attempted murder and first degree assault for shooting at his wife (the assault merged into an attempted murder conviction), and he was also convicted of one count of first degree assault for each child who had been in the room. On appeal, he argued that the Legislature did not intend to allow multiple first degree assault convictions where there is proof only that (1) the single person the defendant intended to harm was in fact assaulted, and (2) no unintended victim received injury.

Washington's criminal code does not contain a definition of "assault." The Washington Supreme Court has held that all three "common law" (case law) definitions of assault apply under chapter 9A.36 RCW. Roughly summarized, the three common law types of "assault" are: (1) intentional, non-consenting, and offensive touching (also known as "battery"); (2) a non-consenting unsuccessful attempt to inflict bodily injury, with apparent capacity to do so (also known as "attempted battery"); and (3) a non-consenting act done with intent to create, and in fact creating, apprehension of imminent bodily injury, even though the actor did not actually intend to inflict bodily injury.

The dispute between the six majority justices and the three dissenting justices in Elmi is largely over whether the doctrine of "transferred intent" is expressly incorporated in the statutory scheme and applies to all three types of "assault." The majority justices answer that it does, and that therefore Elmi's convictions should stand. The majority opinion summarizes the analysis as follows:

> Where a defendant intends to shoot into and to hit someone occupying a house, a tavern, or a car, she or he certainly bears the risk of multiple convictions when several victims are present, regardless of whether the defendant knows of their presence. And, because the intent is the same, criminal culpability should be the same where a number of persons are present but physically unharmed.
>
> In this case, Elmi intended to inflict bodily injury upon Aden or to put her in apprehension of bodily harm. Elmi made that attempt when he opened gunfire into the living room that Aden and the children occupied. Also, viewing the evidence in the light most favorable to the State, there is sufficient evidence that the children were in fact put in apprehension of harm. When Elmi fired the gunshots, the children were sitting in the living room, watching television. Bullets pierced the living room window, curtains, and television screen. At the beginning of the 911 tape, the children are screaming and crying, and, as the Court of Appeals noted, the children continue to make intermittent sounds of distress throughout the duration of the 911 call. Whether or not the children

> comprehended that a gun was being fired, we could infer from this evidence that the children were put in apprehension of bodily harm. This specific intent to harm Aden transferred to the children under RCW 9A.36.011. Finding the intent element is satisfied as to the children, we affirm Elmi's first degree assault convictions.

In the majority are Justices Charles Johnson, Jim Johnson, Alexander, Owens, Stephens, and Chambers. Justices Madsen, Sanders, and Fairhurst dissent.

Result: Affirmance of Division One Court of Appeals decision that affirmed Ali Elmi's King County Superior Court convictions for one count of attempted first degree murder and four counts of first degree assault with a deadly weapon (one of which merged with the attempted first degree murder conviction).

(2) STATUTE AUTHORIZING POST-CONVICTION TESTING OF DNA EVIDENCE AT DEFENSE REQUEST GETS A RELATIVELY NARROW INTERPRETATION – In State v. Riofta, __ Wn.2d __ , __ P.3d __ , 2009 WL 1623427 (2009), the Washington Supreme Court votes 6-3 to narrowly construe RCW 10.73.170(3), which grants a defendant a right to post-conviction DNA testing of evidence in some circumstances. The majority opinion's concluding two paragraphs summarize the ruling as follows:

> RCW 10.73.170 allows a convicted person to request DNA testing if he can show the test results would provide new material information relevant to the perpetrator's identity. However, a trial court must grant the motion only when the petitioner "has shown the likelihood that the DNA evidence would demonstrate innocence on a more probable than not basis." RCW 10.73.170.
>
> In this case, the trial court properly concluded Riofta failed to satisfy the statutory standard, considering the strength of the eyewitness identification, the evidence of motive, and the limited probative value of the DNA evidence sought. Because the trial court did not abuse its discretion in denying Riofta's motion for post-conviction DNA testing, we affirm.

Justices Madsen, Alexander, Owens, Fairhurst, and James Johnson, along with pro tem Justice Bridge, are in the majority. Justices Charles Johnson, Chambers and Sanders dissent.

Result: Affirmance of Pierce County Superior Court decision denying post-conviction motion of Alexander Nam Riofta for DNA testing.

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WASHINGTON STATE COURT OF APPEALS

INFORMANT-BASED REASONABLE SUSPICION STANDARD OF TERRY V. OHIO MET TO JUSTIFY SEIZURE OF DRUG SUSPECT; ALSO, MIRANDA WARNINGS WERE NOT REQUIRED BEFORE TERRY STOP QUESTIONING

State v. Marcum, 149 Wn. App. 894 (Div. I, 2009)

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

An informant agreed to assist [officer A] in obtaining information about three drug dealers in exchange for [officer A] not pursuing criminal charges against him based on an unrelated incident. By December 2006, the informant had provided [officer A] with two potential targets and participated in controlled buys of narcotics from those targets. The information that the informant had provided to [officer A] during those investigations had been accurate, although [officer A] had not yet arrested anyone based on it. By providing one more tip, the informant fulfilled his contract with [officer A].

The informant's final tip resulted in the arrest and prosecution that is the subject of this case. Around December 1, 2006, the informant contacted [officer A], telling him that he had known Marcum for some time, and had purchased drugs from him before. The informant told [officer A] Marcum's name and described Marcum, stating his height, weight, and the fact that he was balding. The informant also gave [officer A] directions to Marcum's home and described Marcum's truck – a green Ford Ranger with a canopy. [Officer A] confirmed through the county assessor's website that a "Jeffrey Marcum" lived at the address provided by the informant.
On December 14, 2006, [officer A] and other police officers devised a plan to catch Marcum dealing marijuana. The plan called for the informant to telephone Marcum and arrange to buy marijuana from him. Once Marcum left his home to make the deal, detectives would detain him while a canine officer used a dog to sniff the outside of his truck for the scent of drugs. Other officers would be ready to provide assistance.

The operation went as planned. The previous night, the informant had telephoned Marcum and arranged to purchase a quarter pound of marijuana from him. During that conversation, Marcum told the informant that he would have the marijuana ready the following day.

The next day, after the police officers had taken their positions, [officer A] directed the informant to telephone Marcum with the message that he was ready to conclude the deal. A few minutes after the informant placed the call to Marcum, the officers observed a green Ford Ranger with a canopy leave Marcum's home.

At [officer A]'s direction, uniformed officers followed the truck in their patrol car and initiated a traffic stop. Marcum pulled his truck into a Fred Meyer store parking lot, and several police vehicles pulled up behind him, blocking his truck into a parking spot. [Officer B] then approached the truck. Marcum was in the driver's seat.

[Officer B] told Marcum that he had been speeding. Marcum had, in fact, been driving under the speed limit, and he told [officer B] as much. Nevertheless, [officer B] requested Marcum's driver's license and vehicle registration (which Marcum provided) and returned to his patrol car, where he performed his usual checks on the documents. He then radioed [officer A], who in turn radioed the canine officer and informed [officer B] that that officer was on his way. [Officer B] then exited his patrol car and walked back to Marcum's truck.

[Officer B] testified that as he returned to Marcum's truck and began speaking with Marcum, he "detected an odor" emanating from the open driver's-side window, which he "was able to identify as marijuana." He then asked Marcum why he "was smelling marijuana in the vehicle." Marcum responded that he did not know why [officer B] was smelling marijuana. [Officer B] asked if someone might have left marijuana in the truck. Marcum responded that he did not know. [Officer B] then inquired if Marcum smoked marijuana. Marcum responded that he did. [Officer B] then asked when the last time was that Marcum had done so. Marcum responded that he had smoked marijuana that morning. [Officer B] asked him if he was wearing the same clothes he had been wearing when he had smoked marijuana that morning. Marcum responded that he was. [Officer B] asked if perhaps that was why he was smelling marijuana. Marcum responded that it was possible.

At this point, [officer B] directed Marcum to exit the truck. According to [officer B]'s testimony, he did so because he "wanted to differentiate the odor, make sure if it was his person, not the car." [Officer B] testified that he "didn't have a reason to arrest him for the odor, if it was off his person." Thus, [officer B] "wanted to separate him from what I thought was the odor coming from the car." [Officer B] then had Marcum stand approximately 15 feet from the truck, where he smelled him. He detected no odor of marijuana. [Officer B] then told Marcum, "the jig is up" and, "I know it's in the car."

There was varying testimony as to what occurred next. [Officer B] testified that he then arrested Marcum and searched Marcum's truck, after which the canine officer arrived. However, both [officer A] and Marcum testified – and the trial court found-that what in fact occurred next was the arrival of the canine officer. The officer arrived and had the dog sniff around Marcum's truck, at which point the dog indicated that drugs were present within. When this occurred, Marcum stated, without prompting, "You've got me. I have drugs," or something similar.

The police officers then placed Marcum in [officer B]'s patrol car, searched Marcum's truck, and discovered four ounces of marijuana in a small cooler on the front passenger seat. Marcum was then told that he was under arrest, given Miranda warnings, and taken to jail. Both en route and while at the jail, Marcum made additional incriminating statements.

Pursuant to CrR 3.5 and CrR 3.6, Marcum moved to suppress the physical evidence obtained by the police, as well as his incriminating statements. The trial court suppressed both, ruling that (1) "[t]he confidential informant's tip lacked sufficient indicia of reliability to justify the defendant's stop on suspicion that the defendant possessed a controlled substance," and (2) "[b]ecause the defendant was not advised of his Miranda Rights in a timely fashion, his statements to the investigating officers should be suppressed."

[Footnote omitted]

ISSUES AND RULINGS: (1) Where the confidential informant – (A) had previously provided accurate information to the police regarding criminal activity; (B) had previously participated in two controlled drug buys with targets that the informant picked out; (C) was motivated to tell the truth because he was trying to work off a possible charge; and (D) called the suspect, Marcum,

to place an order for illegal drugs, and the suspect left his home just a few minutes later in his vehicle – did the officers have reasonable suspicion that Marcum was in possession of illegal drugs, thus justifying a Terry stop of the suspect's vehicle? (ANSWER: Yes)

(2) Where the officer who seized suspect Marcum had not done or said anything that would cause a reasonable person to believe that he was under custodial arrest, was the officer required to give Marcum Miranda warnings before asking him any questions? (ANSWER: No)

(3) Even if the seizing officer should have given Marcum Miranda warnings before asking him if he had recently smoked marijuana (see Issue 2 above), is the Miranda issue irrelevant because the smell of marijuana coming from a vehicle that is occupied by only one person provides a law enforcement officer with probable cause to arrest the occupant and search the passenger compartment of the vehicle incident to arrest? (ANSWER: Yes)

Result: Reversal of Snohomish County Superior Court suppression order; case remanded for trial on a charge of possession of marijuana.

ANALYSIS:

1. Informant-based reasonable suspicion of drug possession justified Terry stop

The Court of Appeals engages in detailed analysis in explaining why the superior court erred in concluding that the seizing officer did not have reasonable suspicion that Marcum was in possession of illegal drugs. Reasonable suspicion is determined on the totality of the circumstances, and a factor in the analysis is the experience and training of officers involved. Under the totality of the circumstances, the Court concludes, the officers had reasonable suspicion that Marcum was in possession of illegal drugs.

Here, the reasonable suspicion factors to consider, in addition to the officer's experience and training, were that the confidential informant: (1) had previously provided accurate information to the police regarding criminal activity; (2) had previously participated in two controlled drug buys with targets that the informant picked out; (3) was motivated to tell the truth because he was trying to work off a possible charge; and (4) called the suspect, Marcum, to place an order for illegal drugs, and the suspect left his home just a few minutes later in his vehicle. These facts added up to reasonable suspicion that Marcum was in possession of illegal drugs, thus justifying a Terry stop of the suspect's vehicle, the Court of Appeals holds.

2. No Miranda custody in Terry stop

In key part, the analysis by the Court of Appeals on this issue is as follows:

> Contrary to the trial court's ruling, the fact that numerous police vehicles surrounded Marcum in the grocery store parking lot did not convert the investigatory detention of Marcum into a custodial arrest. By definition, someone subject to a Terry investigative detention is not "free to leave." On the contrary, a person subject to a vehicular Terry stop "is seized ... 'from the moment [a car stopped by the police comes] to a halt.' " Provided the stop is justified by reasonable suspicion and does not exceed its allowable purpose, the presence of numerous officers does not convert it into a custodial arrest. The trial court's observation that "what occurred after Mr. Marcum was stopped for the traffic stop was not consistent with the routine traffic stop," is beside the point. Marcum was

> not stopped for a traffic violation, nor was the stop "routine," in the sense that it was the result of a patrol officer investigating potentially unlawful conduct observed by happenstance. The purpose of the stop was to investigate whether Marcum was engaged in dealing drugs.
>
> During such a seizure, suspects need not "feel that they were free to leave." On the contrary, it is now well established that "[f]or the duration of a traffic stop . . . a police officer effectively seizes 'everyone in the vehicle.' " Marcum was not free to leave. But that does not convert his investigatory detention into a custodial arrest for purposes of the Fifth Amendment. Rather, a "detaining officer may ask a moderate number of questions during a Terry stop to determine the identity of the suspect and *to confirm or dispel the officer's suspicions* without rendering the suspect 'in custody' for the purposes of Miranda." State v. Heritage, 152 Wn.2d 210 (2004) (**Sept 04 LED:12**). Such questioning is precisely what occurred here.
>
> During that questioning, Marcum admitted that he had smoked marijuana that day. To the extent that this statement was incriminatory, its suppression was not required. After the canine officer's dog alerted to the presence of marijuana, Marcum blurted out-not in response to any question-that he had drugs. Marcum was not yet in custody at this time. The suppression of this statement was improper as well. Marcum was *then* placed under arrest. At that point, Miranda warnings were required and any statements made without the required warnings having been given would have been properly subject to suppression. But warnings *were* given. Thus, to the extent the trial court's suppression ruling covered statements made after Marcum's arrest, it was, again, improperly ordered.

[Footnote, some citations omitted]

3. Smell of marijuana coming from motor vehicle with one occupant was probable cause to search motor vehicle

The Court of Appeals addresses an issue that apparently was not addressed by the Superior Court – whether the seizing officer had authority to arrest Marcum and search his vehicle as soon as the officer smelled the odor of marijuana emanating from the vehicle that was occupied solely by Marcum. The Court of Appeals explains its answer "yes" as follows:

> Marcum was the only person in his truck. The odor of marijuana emanating from the truck could not be associated with anyone other than Marcum. As such, the odor created sufficient individualized probable cause for [officer B] to believe that Marcum possessed marijuana for [officer B] to arrest Marcum and search his truck incident to that arrest. Compare State v. Grande, 164 Wn.2d 135 (2008) **Sept 08 LED:07**. Nothing that followed [officer B]'s sensing the odor of marijuana in any way served to negate the establishment of probable cause, or made the discovery of the marijuana in the truck dependent on incriminating statements by Marcum.

LED EDITORIAL COMMENTS:

1. The informant-based reasonable suspicion standard was clearly met here.

We are surprised that the experienced Superior Court judge in this case ruled that the seizing officer did not have reasonable suspicion for a stop for drug possession. We think that the information that the officers received from the informant in this case even met the significantly higher standard of probable cause.

2. The Court of Appeals likely got it right in distinguishing State v. Grande and holding that the smell of marijuana coming from a motor vehicle occupied by just one person provided probable cause to arrest that person.

In State v. Grande, 164 Wn.2d 135 (2008) Sept 08 LED: 07, the Washington Supreme Court held that the smell of marijuana coming from a vehicle occupied by a driver and one or more passengers does not, by itself during a routine traffic stop, justify arresting a passenger. That is because the smell of marijuana coming from the vehicle does not necessarily point to the passenger as the possessor of the marijuana. In the Marcum decision, as quoted above, the analysis by the Court of Appeals suggests that the Supreme Court's analysis in Grande supports the idea that when a vehicle is occupied by only one person, the smell of marijuana coming from the vehicle gives officers automatic probable cause to arrest that lone occupant, search his person, and search the passenger compartment. We think that is correct, but we think that the officer took the correct course in this case, first getting the lone occupant out of and away from the vehicle to see if the smell was coming from the occupant's clothing or instead from the vehicle.

3. The search incident to arrest in this case should meet the test of Arizona v. Gant.

In Arizona v. Gant, 129 S.Ct. 1710 (2009) June 09 LED:13, the U.S. Supreme Court created a new rule for searches of vehicles incident to custodial arrest of an occupant. In the June 2009 LED, we summarized the new rule as follows: After officers have made a custodial arrest of a motor vehicle occupant and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may automatically search – without a search warrant and without need for justification under any other exception to the search warrant requirement – the passenger compartment of the vehicle and any unlocked containers in that compartment if and only if (A) they proceed without unreasonable delay; and (B) they have a reasonable belief that the passenger compartment contains evidence of: (1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.

In Marcum, the officers clearly had a reasonable belief (whether that standard is probable cause or something lower) that the vehicle contained evidence (marijuana) of the crime (marijuana possession) for which they had authority to arrest Marcum. So there should no problem under Gant with the search incident to arrest in the Marcum case.

14-YEAR-OLD RAPE SUSPECT WHO WAS QUESTIONED WITH HIS MOTHER PRESENT IN HIS NEIGHBOR'S BEDROOM WAS NOT IN MIRANDA CUSTODY; COURT ALSO RULES THAT VICTIM WAS COMPETENT TO TESTIFY

State v. S.J.W., 149 Wn. App. 912 (Div. I, 2009)

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

W.M. is developmentally delayed due to a seizure disorder and requires constant supervision. From about September 2007 until the beginning of November 2007, W.M.'s parents paid S.J.W., who was a neighbor and friend of W.M., to watch him once a week. At the time of the incident, both were 14 years old.

On October 3, 2007, S.J.W. watched W.M. for about 45 minutes until W.M.'s father returned from work about 5:50 p.m. W.M.'s father heard S.J.W. leaving the house and found his son in the bathroom dressing himself. When asked by his father what he was doing, W.M. replied, "I'm getting dressed. Like [S.J.W.]." Then he told his father S.J.W. had "stuck his pee-pee in his butt." W.M. repeated this when his father asked him a second time.

After receiving a call from W.M.'s father, S.J.W.'s mother returned with S.J.W. to W.M.'s house around 6:15 p.m. W.M.'s father phoned the police and spoke with [a law enforcement officer]. [The officer] also spoke with S.J.W. over the phone, and according to [the officer], S.J.W. admitted having sexual contact with W.M. When [the officer] arrived at the house, W.M.'s father stated that he wanted to file a report but not do "anything further." [The officer] then asked to speak with S.J.W. and his mother privately, and W.M.'s father showed them to the master bedroom. S.J.W.'s mother closed the door, and she and [the officer] stood a few feet from S.J.W., who sat on the bed.

[The officer] testified that he read S.J.W. his Miranda rights before questioning him. But W.M.'s father and S.J.W.'s mother testified that [the officer] advised S.J.W. of his Miranda rights after questioning him, and the court found their testimony credible. At the interview, S.J.W. chose not to answer some of [the officer]'s questions, but he admitted having oral and anal intercourse with W.M. He also told [the officer] that he "knew he could take advantage of [W.M.] because he was retarded." Later in the interview, S.J.W.'s mother became upset so she opened the door and asked W.M.'s father to come inside. W.M.'s father remained in the room. Towards the end of the interview, [the officer] stated he was not taking S.J.W. into custody and asked him to make a written statement. S.J.W.'s mother refused to allow [the officer] to obtain a written statement and terminated the interview.

[The officer] next interviewed W.M. and both of his parents in the bedroom. [The officer] testified that he asked as few questions as possible to avoid "lead[ing] [W.M.] in any direction." W.M. told [the officer] that S.J.W. "made me lick his penis" and then directed him to lie down on the bed. When W.M. said he did not want to continue, S.J.W. responded, "Just be quiet and do it." W.M. said S.J.W. then "put his penis in my butt."

At the CrR 3.5 confession hearing on May 2, 2008, the court ruled that [the officer]'s interview with S.J.W. was noncustodial based on the following facts: (1) S.J.W. was in a private residence; (2) S.J.W. did not answer some of [the officer]'s questions; (3) S.J.W.'s mother was present during the interview; (4) S.J.W.'s mother shut the bedroom door at the start of the interview and later opened the door to call W.M.'s father into the room when she became upset; (5) W.M.'s father remained in the room; and (6) S.J.W.'s mother terminated the interview when [the officer] attempted to obtain a written statement. The court

concluded that S.J.W.'s statements at the interview were voluntary and admissible.

The court found S.J.W. guilty of third degree rape under RCW 9A.44.060(1)(a).

ISSUE AND RULING: Under the totality of the circumstances, including the facts – 1) that questioning was done in a non-coercive manner in a private-home setting familiar to the 14-year-old suspect, S.J.W., 2) that S.J.W.'s mother was present, and (3) that the officer did not phrase or present his questions in an aggressively accusatory way, but (4) the officer did not tell S.J.W. that he did not have to answer questions and was free to leave at any time – was the questioning "custodial" such that Miranda warnings and waiver were required? (ANSWER: No; the questioning was not custodial, and Miranda warnings were not required)

Result: Affirmance of Island County Superior Court Superior Court (Juvenile Court) conviction of S.J.W. for third-degree rape.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under the federal and state constitution, a juvenile possesses rights against self-incrimination. Miranda warnings protect these rights when a defendant is in police custody. But outside the context of custodial interrogation, Miranda does not apply. Our courts determine whether an interrogation is custodial using an objective standard, which is "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." A trial court's custodial determination is reviewed de novo.
>
> S.J.W. contends that the interview was custodial because no reasonable person would have believed he was free to leave under the circumstances. Relying on State v. D.R., 84 Wn. App. 832 (Div. III, 1997) **May 97 LED:10**, S.J.W. points out that [the officer] did not tell him that he could leave or refuse to answer questions. [The officer] also stood in front of the doorway and frequently rested his hand on the butt of his gun.
>
> But D.R. is distinguishable. In that case, a detective interviewed 14-year-old D.R. regarding allegations of incest with his sister. The interview was conducted in the assistant principal's office, with the assistant principal and a social worker present. While the detective did not give D.R. Miranda warnings, he told D.R. he did not have to answer questions. During the interview, the detective asked leading questions and made accusatory statements such as, " '[w]e know you've been havin' [sic] sexual intercourse with your sister' " and " '[w]e know already because [your sister] told us.' " On appeal, Division Three held that the interrogation was custodial due to the detective's "failure to inform him he was free to leave, D.R.'s youth, the naturally coercive nature of the school and principal's office environment for children of his age, and the obviously accusatory nature of the interrogation."
>
> Although S.J.W. was not told he could leave, unlike the "naturally coercive setting" in D.R., the interview here took place in a private residence familiar to S.J.W. In addition, S.J.W.'s mother was present. Significantly, she called W.M.'s father into the room when she became upset, and she terminated the interview when [the officer] attempted to obtain a written statement. While [the officer] did

> not tell S.J.W. that he could refuse to answer his questions, S.J.W. chose not to answer some of [the officer]'s questions. Finally, unlike the interrogation in D.R., [the officer]'s interview was not "obviously accusatory" in nature. Under these circumstances, we conclude that the interview was noncustodial for the purposes of Miranda and that S.J.W.'s statements were admissible.

[Some citations and footnotes omitted]

LED EDITORIAL COMMENT: Because of the young age of the suspect, this is a close case on the Miranda custody issue. We think that it is advisable, even in this circumstance of tactically non-Mirandized questioning in such a relatively comfortable setting, for an officer to preface any questioning by telling a youthful suspect that he or she is free to go at any time and does not have to answer any questions.

LED EDITORIAL NOTE: The defendant also challenged the competency of the victim to testify. In salient part, the Court's explanation for its rejection of this challenge is as follows:

> Here, W.M.'s trial testimony shows that he met all five Allen factors. [State v. Allen, 70 Wn.2d 690 (1967)] W.M. responded affirmatively when asked by the prosecutor whether he promised to tell the truth, satisfying the first factor, an understanding of the obligation to speak the truth on the witness stand. W.M.'s initial report to [the officer] and his specific recollections about the incident eight months later at trial demonstrated that he had the mental capacity at the time of the incident to receive an accurate impression of it, satisfying the second factor. For example, W.M. was able to specifically recall that on the day of the incident, [the officer] arrived at his house after school to ask him questions about the alleged rape. W.M. also remembered that his father, S.J.W., and S.J.W.'s mother were at the house when [the officer] arrived. In addition to this testimony, the trial court was able to observe W.M.'s overall demeanor and manner and infer that the second factor was met. W.M.'s recollections of the incident also satisfy the third factor, a memory sufficient to retain an independent recollection of the occurrence. W.M. testified consistently that anal intercourse occurred and that he told S.J.W. to stop. Finally, W.M.'s answers to the prosecutor's questions showed that he had the capacity to express his memories of the incident and to understand questions about it, thus meeting the fourth and fifth Allen factors.

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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. 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 own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are 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 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "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 LED 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.gov].

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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]. 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. LEDs 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]