Law Enforcement Digest

OCTOBER 2009

646th Basic Law Enforcement Academy – April 14, 2009 through August 19, 2009

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Best Academic: Jonathan R. Jones – King County Sheriff's Office
Best Firearms: Tyler A. Kidwell – Mill Creek Police Department
Tac Officer: Cpl. Gary Eggleston – Kirkland Police Department

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U.S. v. Monghur, __ F.3d __, 2009 WL 2434396 (9th Cir. 2009) (decision filed August 11, 2009)

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

On May 9, 2007, Brandon Monghur, a previously convicted felon, was arrested pursuant to a state warrant for attempted murder and the battery of Antoinette Wilson. [Court's footnote: *Wilson is the mother of Monghur's children, all of whom live in Wilson's apartment, which is the residence where the search was conducted.*] Monghur was detained in a segregated cell at Nevada's Clark County Detention Center ("CCDC"). The CCDC has a telephone system that allows inmates to make outbound calls. Next to each telephone is a placard instructing them how to place calls and cautioning that inmate calls are subject to monitoring and recording. A similar auditory warning is also issued to the recipient of each outbound call.

On the day of his arrest, Monghur made several telephone calls from the jail, including three calls to a person named Prince Bousley. In the first call, Bousley asked Monghur if he had been caught with "the thing." Monghur confirmed that he had not, and that "the thing" was hidden in Wilson's apartment, where he stayed "on and off for several months." In the second call, Bousley inquired whether Monghur wanted him to retrieve "the thing" from Wilson's residence. Monghur agreed and told Bousley to come to the CCDC and pick up the key to Wilson's apartment. During the third and final telephone call, Monghur told Bousley that he had put "the thing" in the closet in his room and that it was located "in the green."

FBI Special Agent Gary McCamey, who knew Monghur through an investigation into local gang activity, reviewed the telephone recordings on May 10, 2007. Although neither speaker specifically identified "the thing," Agent McCamey correctly surmised based on his experience and familiarity with "street vernacular" that Bousley and Monghur were referring to a firearm. At least six law enforcement officers immediately proceeded to Wilson's apartment and informed her that they had credible information that there was a handgun in her residence. Wilson, as she had done on a previous visit by officers, expressed no knowledge of any gun on the premises. She readily consented to a search and requested that any firearm found in the apartment be immediately removed out of concern for the safety of her five young children who lived there and were present at the time. She led agents to her son's bedroom, which was the room in which Monghur slept when he stayed with Wilson.

The agents proceeded to the bedroom closet, which contained clothing, shoes, and other items belonging to an adult male. On the shelf was an opaque green plastic storage container. They removed the lid and found a .38 caliber revolver. The agents seized the handgun and removed it from the premises, as Wilson requested. At no point did the agents obtain, or attempt to obtain, a search warrant.

A federal grand jury returned an indictment charging Monghur with one count of being a felon in possession of a firearm, in violation of [federal law] and a related forfeiture count. Monghur moved to suppress the weapon. He argued that the warrantless search of the closed container violated his Fourth Amendment rights, requiring suppression of the fruits of the unlawful search. In response, the Government argued that (1) Wilson had authority to consent to the container search, (2) exigent circumstances justified the warrantless search, and (3) Monghur had no expectation of privacy in the container. [The district court rejected the Government's first two theories, finding that Wilson lacked both

express and apparent authority to consent to the search of the container, and that exigent circumstances did not exist to excuse the warrant requirement. The Government does not challenge these rulings on appeal. The district court concluded, however, that Monghur relinquished any expectation of privacy with respect to the container when he talked about the gun in a non-private conversation lawfully overheard by the Government. Wilson pled guilty but reserved the right to appeal the suppression ruling.]

ISSUE AND RULING: Where the suspect's conversations – with semi-coded messages referring to "the thing" – in phone calls from jail regarding a gun hidden in a container in his apartment were not entitled to privacy protection, and hence the conversations could be lawfully intercepted by law enforcement, did the non-private messages constitute a waiver of the suspect's right to privacy in the contents of a gun case in his residence? (ANSWER: No)

Result: Reversal of U.S. District Court (California) suppression ruling and of conviction under federal statute for being a felon in possession of a gun; case remanded for further proceedings.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> As the parties agree, Monghur, at least initially, held a reasonable expectation of privacy in the closed container that he stored in the closet in Wilson's apartment. The only question raised by this appeal is whether Monghur relinquished, abandoned, or otherwise waived that expectation of privacy by disclosing the handgun's existence and location in jail telephone conversations that he knew were monitored by law enforcement. [Court's footnote: *The Government's only argument on appeal relates to Monghur's expectation of privacy in the closed container. Therefore, we do not address the exigency or consent arguments presented to, and rejected by, the district court.*]
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> Relying on the general principle that "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection," the Government contends that "[b]y making statements to [Bousley], knowing that jailors were listening, [Monghur] disavowed his expectation of privacy in the container, not merely the words he uttered over the telephone." The district court seems to have accepted the Government's analysis. We disagree.
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> The Government's position on appeal, to a large extent, conflates two separate inquiries. Much of its briefing focuses on the reasonableness of Monghur's expectation of privacy in his jail telephone conversations. But Monghur concedes, as he must, that he had no expectation of privacy in those calls. The Government attempts to extrapolate from the undisputed lack of an expectation of privacy in the jail telephone calls to equally apply to the closed container. We are not persuaded. Whether Monghur had a constitutionally protected expectation of privacy in a closed container stored in Wilson's apartment-given his admissions made during telephone conversations with Bousley-is a distinct constitutional question.
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> We have not squarely addressed what effect, if any, a voluntary disclosure might have on a Fourth Amendment analysis in this context. The Seventh Circuit addressed a similar question in United States v. Cardona-Rivera, 904 F.2d 1149 (7th Cir. 1990). Officers arrested a defendant in possession of two conspicuously wrapped packages that they believed were bricks of cocaine. The officers inquired as to the contents, to which the defendant responded, "coke." The

officers then took the packages to the federal building where, without a warrant, they opened them and found cocaine.

On appeal from the denial of a suppression motion, the Seventh Circuit held that officers were not required to obtain a warrant before searching the packages, despite ample time to do so, because the defendant had voluntarily and contemporaneously disclosed to the officers that they contained contraband. The court concluded that the defendant had waived any expectation of privacy in the packages' contents, thus obviating the warrant requirement:

> [H]ere the waiver of privacy was direct and explicit. Asked what the packages contained, Luna said "coke" (he denied this at the suppression hearing, but the judge disbelieved him). He stripped the cloak of secrecy from the package. It was as if he had unwrapped it and pointed. Once Luna admitted that his package contained a contraband substance, no lawful interest of his could be invaded by the officers' opening the packages, whether on the spot or later in their office. No purpose would be served by insisting on a warrant in such a case or by setting aside the conviction because of the absence of a warrant. Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 5.5 (4th ed. 2004) ("[T]he act of stating to police the contents of the container is much like revealing the contents by using a transparent container.").

We think the Seventh Circuit's reasoning in Cardona-Rivera makes perfect sense. When made to a law enforcement officer, an unequivocal, contemporaneous, and voluntary disclosure that a package or container contains contraband waives any reasonable expectation of privacy in the contents. The Constitution does not require the formality of a warrant in such circumstances.

The facts of this case are, however, sufficiently distinguishable from Cardona-Rivera that the logical underpinnings of the principle announced there find no parallel in the instant case. Cognizant that jail personnel might be listening, Monghur attempted to disguise the subject matter by using ambiguous, generic language to describe the handgun and its whereabouts: "the thing" was in a closet, "in the green." It is relevant that Monghur never explicitly identified the contraband at issue. Although Agent McCamey had his reasoned suspicions, "the thing," viewed in context, could have been a number of things, including contraband. Nor did Monghur specifically identify the container itself. Indeed, at the suppression hearing, Agent McCamey testified that based on the conversations he did not know that he was looking for a green plastic container when agents went to Wilson's apartment. Perhaps most significantly, coded language aside, Monghur never made a voluntary disclosure directly to law enforcement. He was informing an associate where to find his gun in the hope that it could be removed before its discovery. That Monghur acted covertly knowing that calls were monitored or recorded - and that law enforcement might review the conversations-is materially different from directly and intentionally admitting to a police officer the contraband contents of a specific package or closed container.

> Nothing about his jailhouse conversations with Bousley, which law enforcement later overheard, operates as a "direct and explicit" waiver of an expectation of privacy in a container hidden elsewhere. Monghur's efforts to conceal the subject matter based on what he said on the phone demonstrate both an objective and subjective intention to preserve privacy-not to relinquish it. We therefore reject the Government's position that Monghur waived his expectation of privacy in the closed container through his statements on the telephone.
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> To be clear, we think based on his admissions in the jail telephone conversations, coupled with Monghur's criminal record for violence and what officers discovered when Wilson invited them to look around, Agent McCamey had probable cause to believe Monghur had a firearm stashed inside Wilson's apartment. Exigency was not established here and is unchallenged on appeal. Therefore, we must presume that, after discovering Monghur's possessions in the closet and identifying the green plastic container (i.e., what they reasonably believed was "the green"), agents could have sealed the apartment and presented their observations from the investigation, Monghur's known criminal history, and Monghur's conversations with Bousley to a neutral and detached magistrate to support a warrant application. But, we find no basis to conclude that Monghur waived his expectation of privacy in the closed container because he made an encrypted, incriminating disclosure that he was warned would be reviewed by law enforcement. Accordingly, the agents' search of his closed container without a warrant violated Monghur's Fourth Amendment rights.

[Some citations and footnotes omitted]

LED EDITORIAL COMMENT: While the Ninth Circuit opinion emphasizes that Monghur talked in semi-code in the phone conversation about the gun, we doubt that even an explicit reference to the gun would be held to be a waiver of his privacy right that would justify a warrantless search of the gun case at the residence.

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

(1) IN CASE RELATED TO FEDERAL INVESTIGATION OF DRUG COMPANY AND PROFESSIONAL BASEBALL STEROIDS SCANDAL, ELEVEN-JUDGE PANEL SETS EXTENSIVE GUIDELINES FOR DRAFTING AND EXECUTING COMPUTER SEARCH WARRANTS IN ORDER TO LIMIT "PLAIN VIEW" SEIZURES OF COMPUTER EVIDENCE – In U.S. v. Comprehensive Drug Testing, Inc. (and two other cases consolidated for appeal), __ F.3d __, 2009 WL 2605378 (9th Cir. 2009) (decision filed August 26, 2009), an eleven-judge panel of the Ninth Circuit reverses the pro-government decision of a three-judge Ninth Circuit panel. The case relates to the federal government's investigation into a drug company's actions relating to steroid use by professional baseball players. The eleven-judge panel essentially reinstates, for the most part, rulings adverse to the federal government by three different U.S. District Court judges.

The majority opinion of the eleven-judge panel thus affirms rulings by two U.S. District Court judges determining that the federal government had not complied with the Fourth Amendment in their execution of search warrants. The federal agents seized – based on would-be "plain view" of intermingled computer records under warrants for drug-testing results on just ten professional baseball players – records relating to drug-testing of many other professional baseball players who were not mentioned in the search warrants. The majority opinion also affirms a ruling by a

third U.S. District Court judge who struck a subpoena by the federal government for the same records (already seized on the basis of "plain view") of those other professional baseball players who were not named under the search warrants.

The majority opinion includes a detailed and comprehensive set of guidelines for administration of search warrants and grand jury subpoenas for electronically stored information. The majority opinion seeks to strike a balance between: (1) the government's legitimate interest in law enforcement, and (2) the people's right to privacy. The majority opinion states that when the government wishes to obtain a search warrant to examine a computer hard drive or electronic storage medium in searching for specific incriminating files, guidelines along the following lines should be followed:

- "[T]he government should, in future warrant applications, forswear reliance on the plain view doctrine or any similar doctrine that would allow it to retain data to which it has gained access only because it was required to segregate seizable from non-seizable data. If the government doesn't consent to such a waiver, the magistrate judge should order that the seizable and non-seizable data be separated by an independent third party under the supervision of the court, or deny the warrant altogether."

- "[W]hile it is perfectly appropriate for the warrant application to acquaint the issuing judicial officer with the theoretical risks of concealment and destruction of evidence, the government must also fairly disclose the actual degree of such risks in the case presented to the judicial officer. . . pledges [from the holder of the data] of data retention are obviously highly relevant in determining whether a warrant is needed at all and, if so, what its scope should be. If the government believes such pledges to be unreliable, it may say so and explain why. But omitting such highly relevant information altogether is inconsistent with the government's duty of candor in presenting a warrant application. A lack of candor in this or any other aspect of the warrant application shall bear heavily against the government in the calculus of any subsequent motion to return or suppress the seized data."

- "[T]he process of sorting, segregating, decoding and otherwise separating seizable data (as defined by the warrant) from all other data must be designed to achieve that purpose and that purpose only. Thus, if the government is allowed to seize information pertaining to ten names, the search protocol must be designed to discover data pertaining to those names only, not to others, and not those pertaining to other illegality."

- "[T]he warrant application should normally include, or the issuing judicial officer should insert, a protocol for preventing agents involved in the investigation from examining or retaining any data other than that for which probable cause is shown. The procedure might involve, as in this case, a requirement that the segregation be done by specially trained computer personnel who are not involved in the investigation. It should be made clear that only those personnel may examine and segregate the data. The government must also agree that such computer personnel will not communicate any information they learn during the segregation process absent further approval of the court.

- "At the discretion of the issuing judicial officer, and depending on the nature and sensitivity of the privacy interests involved, the computer personnel in question

may be government employees or independent third parties not affiliated with the government. The issuing judicial officer may appoint an independent expert or special master to conduct or supervise the segregation and redaction of the data. In a case such as this one, where the party subject to the warrant is not suspected of any crime, and where the privacy interests of numerous other parties who are not under suspicion of criminal wrongdoing are implicated by the search, the presumption should be that the segregation of the data will be conducted by, or under the close supervision of, an independent third party selected by the court."

- "Once the data has been segregated (and, if necessary, redacted), the government agents involved in the investigation may examine only the information covered by the terms of the warrant. Absent further judicial authorization, any remaining copies must be destroyed or, at least so long as they may be lawfully possessed by the party from whom they were seized, returned along with the actual physical medium that may have been seized (such as a hard drive or computer). The government may not retain copies of such returned data, unless it obtains specific judicial authorization to do so."

- "[W]ithin a time specified in the warrant, which should be as soon as practicable, the government must provide the issuing officer with a return disclosing precisely what data it has obtained as a consequence of the search, and what data it has returned to the party from whom it was seized. The return must include a sworn certificate that the government has destroyed or returned all copies of data that it is not entitled to keep. If the government believes it is entitled to retain data as to which no probable cause was shown in the original warrant, it may seek a new warrant or justify the warrantless seizure by some means other than plain view."

The majority opinion is authored by Chief Judge Kozinski and joined in full by seven other judges. Judges Bea, Callahan, and Ikuta each write a separate opinion that dissents either in part or in whole. All three of those judges express disapproval of the majority's effort to establish in this fact-specific case comprehensive and detailed guidelines to govern all future computer search cases.

Result: Reversal in large part of the decision of three-judge Ninth Circuit panel's 2-1 decision in 2006 (Judges O'Scannlain and Tallman were in the majority in that 2006 decision), and essential affirmance of the rulings of the three U.S. District Court (California) judges below.

Status: Time remains for a party to seek reconsideration by the eleven-judge panel, or to ask a larger Ninth Circuit panel to consider the case, or to petition for discretionary U.S. Supreme Court review.

LED EDITORIAL COMMENTS: It is rare for the U.S. Supreme Court to grant discretionary review in any case, but we think that there is a good chance that if the federal government requests review in this case, review will be granted. It seems very unlikely that a majority of the U.S. Supreme Court's justices believe that it is a good idea to use a single computer search case as a tool to create a set of comprehensive and detailed guidelines to apply to the drafting, execution and review of every computer search warrant from now into the forseeable future. That legislation-like approach in the majority opinion in Comprehensive Drug Testing is in this regard in conflict with the U.S. Supreme Court's general, traditional, common law method of deciding cases one at a time depending on their particular facts. That said, Washington law enforcement officers and their agencies are subject to Civil Rights Act lawsuits in federal court in the Ninth

Circuit. For now, Washington officers should strive to comply with the majority's guidelines in the Comprehensive Drug Testing case. Washington law enforcement agencies are urged to consult their local prosecutors and their agency legal advisors.

(2) SECTION 1983 CIVIL RIGHTS LAWSUIT: COURT HOLDS THAT DETECTIVE SHOULD NOT HAVE RELIED ON UNCORROBORATED MARGINAL STORY OF FOUR-YEAR-OLD CHILD AS PROBABLE CAUSE TO ARREST MOLESTATION SUSPECT; ALSO, COURT REMANDS TO DISTRICT COURT TO CONSIDER DETECTIVE'S ALLEGED PROMISES OF LENIENCY TO ALLEGEDLY MENTALLY AND EMOTIONALLY CHALLENGED JUVENILE SUSPECT – In Stoot v. City of Everett, __ F.3d __, 2009 WL 2461901 (2009) (decision filed August 13, 2009), a unanimous 3-judge panel of the Ninth Circuit reverses in part a Western Washington U.S. District Court decision dismissing a federal Civil Rights Act lawsuit against a police detective (who, of course, is being defended by his agency). The lawsuit is based on, among other grounds, the U.S. Constitution's Fourth Amendment (arguing that an arrest was made without probable cause), Fifth Amendment (arguing and alleging that a detective made an improper offer of leniency), and the Fourteenth Amendment (arguing that the alleged improper offer of leniency shocks the conscience and therefore violated constitutional due process requirements).

[LED EDITORIAL NOTE: The LED will not provide a detailed recitation of the factual allegations and procedural developments in this case. We would note, however, that the history of the case includes, at the earlier criminal stage of the case, the unusual circumstance of – (1) a superior court judge making factual determinations determining the 14-year-old suspect to be more credible than the detective regarding what the detective said during an interrogation, and (2) this determination and related suppression of a confession apparently played a significant role in destroying the State's ability to proceed in the criminal case – no doubt laying the foundation for the later Civil Rights Act lawsuit.]

On the Fourth Amendment issue, the Ninth Circuit panel holds that the allegations by the family of a 14-year-old juvenile arrested for child-molestation were sufficient to create a fact question of whether the detective had probable cause to arrest the juvenile suspect. The detective's only witness was a 4 year-old girl (1) who had emotional problems, (2) who raised the accusation of child molestation for the first time over a year after the alleged event, and (3) who was inconsistent in several aspects of her story in the interview by the detective, including naming a different boy as her attacker at one point in the interview. Under all of the circumstances, the Ninth Circuit rules, if the allegations are true, then the detective did not have probable cause to immediately arrest the suspect, and the detective should instead have investigated further to corroborate the 4-year-old's story.

The detective, however, is entitled to qualified immunity, the panel rules, because at the time of the investigation a reasonable officer would not have known under then-existing case law that evidence of this sort does not meet the probable cause standard. But this is a cautionary case, because the next detective who makes an arrest in similar circumstances will not be entitled to qualified immunity.

On the Fifth Amendment issue, because the District Court had found a way to avoid the question, the Ninth Circuit panel does not expressly address the question of whether the allegations by the family regarding the interrogation of the 14-year-old juvenile were sufficient to create Fifth Amendment fact questions. The fact questions are whether: (1) the detective unreasonably assumed the juvenile had the mental and emotional capacity to waive his rights,

or (2) the detective made an impermissible promise of leniency during the interrogation. But acceptance of at least the second point seems implicit in the Ninth Circuit's discussion.

It is not disputed that the detective gave Miranda warnings to the 14 year-old juvenile and obtained an express waiver before questioning him at his school. But the juvenile and the detective have very different accounts of certain aspects of the interrogation that followed the Miranda waiver. There apparently was no else present during the questioning (at least the Ninth Circuit does not mention the presence of anyone else). Also, the Ninth Circuit panel points out that the session was not recorded, and the detective destroyed his notes after writing up his report, as he had after interviewing the alleged victim. While there is no requirement for having another person present, tape recording such sessions, or keeping one's notes, the Ninth Circuit panel seems to have been influenced in its approach to the case by the lack of corroboration of the detective's report.

The detective agrees that the boy initially denied any wrongdoing approximately 13 different times, but the detective contends that the boy ultimately confessed under a reasonable and well-accepted, blame-the-victim, technique of questioning. The detective claims that he made no promises of leniency. On the other hand, the boy, who was not experienced in the criminal justice system, and as to whom later psychological and developmental testing indicated incapacity to understand or assert his legal rights, had a different story. He claims that the detective told him prior to his making of any admissions that (1) if he denied committing the crime, he would later be convicted and sent to jail for up to five months, (2) but if he confessed "no charges will be pressed and [he wouldn't] be going to jail and [he would] only have to see a counselor."

The family's Fifth Amendment theories apparently are (1) that the detective should have been able to determine the juvenile lacked mental and emotional ability to waive his Miranda rights, and (2) that the alleged promise of leniency would make a confession not voluntary, and that either or both circumstances would violate the Fifth Amendment's protection against self-incrimination if the suspect's subsequent confession was later "used against [him]." Such "usage" occurred in this case, the Ninth Circuit holds (contrary to the District Court's interpretation of the law), because the confession was relied upon by the State to file formal charges against the boy, and because the confession was relied upon by the State in addressing pre-trial custody status for the defendant juvenile. **[LED EDITORIAL NOTE: In this part of the ruling, the Ninth Circuit joins the Second and Seventh Circuits in broadly holding for Civil Rights liability under the Fifth Amendment in unlawful-interrogation circumstances; the Third, Fourth, and Fifth Circuits of the Court of Appeals have held, as did the District Court in this case, that under Chavez v. Martinez, 123 S.Ct. 1994 (2003) Sept 03 LED:02, if the Fifth Amendment is the only basis for the claim of a constitutional violation, then the allegedly unlawfully obtained statement of the suspect must have been used in an actual trial, not just in preliminary proceedings, as here. This split of the federal circuit courts of appeal must ultimately be resolved by the United States Supreme Court.]** Accordingly, the Ninth Circuit panel remands the case to the U.S. District Court to review for "qualified immunity" the allegations regarding an alleged Fifth Amendment violation.

On the Fourteenth Amendment Due Process issue, the Ninth Circuit panel rejects the family's argument that they might have a cause of action. The courts are reluctant to give a broad reading to the Due Process clause in light of the separation of powers of the three branches of government and the undefined nature of the clause. Accordingly, the Supreme Court has required that an interrogation method "shock the conscience" in order to violate the Due Process clause. None of the alleged conduct by the detective here – including his use of the accepted, blame-the-victim, technique of questioning – "shock[s] the conscience," the Ninth

Circuit panel rules. The panel also rejects a State-law theory of "outrage" for essentially the same reason.

Finally, the panel rejects the family's argument for "municipal liability." The City of Everett cannot be held liable because there is no evidence in the case that any violation of the 14-year-old's rights resulted from a policy or practice of the City of Everett, and there is no evidence of past unlawful interrogation practices that were ignored with "deliberate indifference" by the agency.

Result: Reversal of U.S. District Court (Western District of Washington) dismissal order; remand of case for determination of whether the detective, who, again, is being defended by his employing agency, is liable to the family of the juvenile suspect for violating the juvenile's right against self incrimination under the Fifth Amendment.

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WASHINGTON STATE SUPREME COURT

SEARCH WARRANT FOR BLOOD ALCOHOL TEST OF DUI SUSPECT MAY BE OBTAINED AFTER THE SUSPECT HAS DECLINED A VOLUNTARY TEST OF BREATH OR BLOOD

City of Seattle v. St. John, __ Wn.2d __, __ P.3d __, 2009 WL __ (2009)

LED INTRODUCTORY EDITORIAL NOTE: The Supreme Court majority opinion that we have excerpted below includes the following footnote explaining the Court's usage throughout the opinion of the phrase "blood alcohol test" instead of the phrase "breath or blood alcohol test":

> **The implied consent statute provides for either a breath or blood alcohol test, depending on the circumstances. RCW 46.20.308(3). For simplicity, we use the term "blood alcohol test" throughout this opinion to refer to any test of blood or breath for the purpose of determining the alcohol concentration or presence of any drug in the blood or breath of a driver.**

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

> St. John was seriously injured in an accident while driving a motorcycle. One of the two emergency workers responding to the scene reported smelling an odor of alcohol, but the other did not. Officer Eric Michl responded to the scene and observed some signs of intoxication, including slurred speech, but did not smell alcohol. A friend of St. John's who arrived at the scene told Michl that St. John had one drink. At the hospital, Michl observed a faint odor of alcohol on St. John's breath. Michl arrested St. John for driving under the influence of intoxicating liquor and gave him the statutory warning regarding implied consent blood alcohol tests. St. John refused the voluntary blood alcohol test. Michl then sought a search warrant for a blood alcohol test. Seattle Municipal Court Judge Michael Hurtado found probable cause and signed a search warrant for a blood alcohol test, which the hospital then conducted.
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> The municipal court held that RCW 46.20.308(5) did not allow a blood alcohol test pursuant to a warrant after a person had declined a voluntary blood alcohol test and suppressed the results of the blood alcohol test. The superior court

> reversed and St. John appealed. The Court of Appeals certified the case directly to [the Supreme Court].

ISSUE AND RULING: Does the plain language of the implied consent statute allow the State to administer a blood alcohol test pursuant to a warrant after a driver has declined a voluntary test of breath or blood for alcohol? (ANSWER: Yes, rules a 7-2 majority; dissenting justices are Jim Johnson and Richard Sanders).

NOTE: In analysis that we will not address in this LED entry, the majority opinion also concludes: (1) that even if the implied consent statute is ambiguous, legislative intent is clearly in support of allowing a search warrant in this circumstance; (2) that constitutional due process protections are not violated by allowing a search warrant; and (3) equitable estoppel principles were not violated by the officer's action, pursuant to the implied consent warnings, of advising the suspect of his "right" to decline the voluntary test.

ANALYSIS: (Excerpted from majority opinion)

> When interpreting a statute, our primary goal is to effectuate legislative intent. Where the statute's meaning is plain and unambiguous, we derive legislative intent from the plain language of the statute. If a statute's language is ambiguous, we construe the statute "'in the manner that best fulfills the legislative purpose and intent.'"
>
> Under the implied consent statute, if a law enforcement officer has reasonable grounds to believe that a motor vehicle driver has been driving under the influence of intoxicating liquor or any drug (DUI), the driver may choose to undergo a blood alcohol test1 or have his or her driver's license suspended for at least one year. RCW 46.20.308(1), 2(b). The statute states that "[n]either consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood." RCW 46.20.308(1). We hold that the legislative intent is plain on the face of the statute that an officer may obtain a blood alcohol test pursuant to a warrant regardless of the implied consent statute.
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> Despite this plain language allowing officers to obtain a search warrant for blood alcohol tests regardless of the implied consent statute, St. John contends that the implied consent statute prohibits the State from obtaining a blood alcohol test pursuant to a warrant once a driver has declined to undergo a blood alcohol test under the implied consent statute. He bases this argument on subsection (5), which states that if a person refuses the blood alcohol test requested by the officer, "no test shall be given except as authorized under subsection (3) or (4)." RCW 46.20.308(5). However, subsection (5) applies to blood alcohol tests given pursuant to the implied consent statute. RCW 46.30.308(5) ("If, following . . . receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test . . . , no test shall be given except as authorized under subsection (3) or (4) of this section" (emphasis added)). We hold that the plain language of subsection (5) prohibits only tests given pursuant to the implied consent statute after a driver has declined, and not blood alcohol tests given pursuant to a warrant. The legislature made its intention regarding blood alcohol tests pursuant to a warrant quite clear: "Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood." RCW 46.20.308(1) (emphasis added).

[Some citations omitted]

LED EDITORIAL NOTE: A set of fill-in-the-blanks, sample documents (affidavit, search warrant, inventory and return) for seeking court approval of taking and testing for blood alcohol is available in WORD format on the internet home page of the Washington Association of Prosecuting Attorneys (WAPA) [http://www.waprosecutors.org/index.html]. Law enforcement agencies should consult agency legal advisors and/or local prosecutors before using the samples.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) DRUG FORFEITURE STATUTE: "KNOWLEDGE" FOR PURPOSES OF "INNOCENT OWNER" CLAIM TO PROPERTY GETS NARROW, ANTI-GOVERNMENT INTERPRETATION – In In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle and In the Matter of the Forfeiture of One 2004 Nissan Sentra, __ Wn.2d __, __ P.3d __, 2009 WL 2783439 (2009), a 5-4 majority of the Supreme Court rules that a party arguing an "innocent owner" exception to vehicle forfeiture under RCW 69.50.505(1)(d)(ii) is not required to prove, under objective analysis of the facts, that he or she could not have known of the illegal use giving rise to forfeiture. The term "knowledge" under the statute means actual (subjective) knowledge, the majority opinion concludes.

The parents of a young adult man, who at various times used two of their cars for drug dealing, argued that they had no actual knowledge that their son was involved in drug dealing. An administrative law judge rejected their argument, concluding that an objective should-have-known standard satisfied the statutory element of knowledge that defeats an "innocent owner" claim. The superior court affirmed, as did the Court of Appeals (see **Nov 07 LED:12**), but the Supreme Court disagrees.

It is not clear whether the Supreme Court majority opinion concludes as a matter of law that there was no proof of "knowledge" in this case, or whether instead the majority opinion is merely offering some guidance in its discussion, and is remanding the case for the hearing officer to make factual findings regarding the parents' alleged "knowledge" of their son's use of the two cars in his drug-dealing activity. The majority opinion is authored by Justice Charles Johnson and concurred in by Justices Stephens, Alexander, Chambers and Sanders. The majority opinion remands the case "for further proceedings," which seems to suggest that the majority opinion expects new fact findings to be entered on remand. But on the other hand, the majority opinion contains the following passage that seems to conclude, as a matter of law, that the evidence in this case could not satisfy the "actual knowledge" standard adopted by the majority opinion:

> [T]he record in the Rooses' case provides many contradictory facts to suggest Alan and Stephne were not actually aware of Thomas' illegal activities involving their vehicles. For example, (1) Thomas did not live at home; (2) Thomas was leading a "secretive" life; and (3) "someone" in the household had been intercepting mail and voicemail, which may have provided Alan and Stephne with more information about Thomas' illegal activities. These facts contradict the idea that Thomas' parents were actually aware of his drug trafficking. . . . [W]e do not have sufficient objective facts here to determine the subjective knowledge of Alan and Stephne during the relevant time period of Thomas' criminal activity involving his parents' vehicles. As such, we cannot agree with the trial court and the Court

> of Appeals that Thomas' parents had actual knowledge but simply stuck their heads in the sand.

[Citations omitted]

Justice Madsen authors an opinion (joined by Justices James Johnson, Owens, and Fairhurst) that concurs in granting the innocent owner defense to the parents as to one of the cars but dissenting as to the other car. It is not clear whether Justice Madsen disagrees with the "actual knowledge" interpretation by the majority justices, or whether instead she merely disagrees with the majority's assessment of the evidence, as a matter of law, under the actual knowledge test. Justice Madsen's opinion includes the following passages assessing the evidence and the majority opinion's interpretation of the "knowledge" element of the "innocent owner" claim:

> I agree with the majority that at the time the first car was seized pursuant to Thomas' arrest, the Rooses had no knowledge that their son was using the family cars to deal drugs. However, when Alan was called to the scene of Thomas' third arrest and shown the various controlled substances the officers retrieved from the car, including a 110-gram brick of cocaine, the Rooses gained knowledge that Thomas was using the family cars to deal drugs. The hearing officer was correct to infer that from that point on, the Rooses' denial of Thomas' drug activity amounted to burying their heads in the sand. From the time of Thomas' third arrest, Alan and Stephne were required to take all reasonable steps to prevent Thomas' further use of the family cars in order to qualify as innocent owners under the statute.
>
> Because the Rooses did not take steps to prevent Thomas' use of the second car, the Chevelle, even after they knew of his arrest in the Nissan with a 110-gram brick of cocaine, I would uphold the hearing officer's forfeiture of the Chevelle.
>
> . . . .
>
> The majority seems to accept the Rooses' assertion that because <u>at the time</u> Thomas was driving around in the Chevelle with numerous controlled substances they had no idea what he was up to, they can qualify as innocent owners. But how is the State to ever rebut the claimant's assertion that he did not know of the illegal activity as it was occurring? The only thing that comes to my mind is for the State to show that the claimant was actually involved in the activity giving rise to the forfeiture. Indeed, this is what the majority appears to suggest the standard of knowledge should be: "Such instances require proof of someone actually doing something to support or facilitate the commission of a crime or actually knowing and assisting in the criminal activity in order to be subject to criminal sanctions." This is not the standard established by the legislature.
>
> The majority's holding significantly alters the statute by allowing any one who did not participate in the crime to automatically qualify as an innocent owner simply by stating she had no knowledge of the activity giving rise to the forfeiture at the time it was occurring. This effectively turns the legislature's adoption of a <u>civil</u> statute into a <u>criminal</u> statute.
>
> . . . .

> The hearing officer made reasonable inferences from the facts established at the hearing to hold, essentially, that the Rooses had "guilty knowledge" and could not avoid this knowledge simply by "[sticking their heads] in the sand." The hearing officer's holding is similar to that in [a federal case, citation omitted by LED, where the court explained] "when there is objective evidence in the record sufficient to support an inference of the claimant's actual knowledge, the claimant must do more than simply deny knowledge in order to meet his or her burden of proof."
>
> The statute placed the burden on the Rooses to disprove they knew of Thomas' drug activity in the family cars. They cannot meet this burden simply by claiming they did not know of the events taking place at the time the car was seized. I would uphold the hearing officer's forfeiture of the Chevelle on the basis of his inference that Alan and Stephne knew of their son's drug activity in the car. The evidence from August 15, 2005, on, supports this inference. Prior to that date, the evidence as to the Rooses' knowledge is insufficient to support a finding of knowledge under the statute. I agree that the Rooses met their innocent owner burden of proof as to the Nissan.

[Citations omitted]

Result: Reversal of decisions of the Court of Appeals, Snohomish County Superior Court, and the administrative law judge who heard the case for the Snohomish County Sheriff's Office; case remanded for further proceedings.

LED EDITORIAL COMMENT: As noted, we are not certain whether the majority opinion in this case intends to preclude a fact finder from determining "actual knowledge" based on objective evidence where the would-be "innocent owner" simply states that he or she subjectively did not know about the illegal activity. Such a rule would defy common sense in our view. Law enforcement agencies should consult their agency legal advisors on this question.

(2) FATHER OF BOY AND GIRL WHO WERE BOTH UNDER AGE EIGHT HELD GUILTY OF INCEST AND CHILD RAPE FOR CAUSING THEM TO HAVE SEX WITH EACH OTHER – In State v. Bobenhouse, __ Wn.2d __, __ P.3d __, 2009 WL 2783435 (2009), the Supreme Court rules unanimously that, where a person is legally accountable for the conduct of another under the accomplice liability statute, RCW 9A.08.020(2)(a), he or she can be found guilty as an accomplice for committing child rape and incest for causing his or her own children to have sexual intercourse with each other. It does not matter how young the children are.

Defendant argued that (1) because both children were under the age of eight, and (2) because under RCW 9A.04.050 children under the age of eight cannot commit crimes, no crime occurred when the children had sexual intercourse in which no other person participated directly. The Supreme Court rejects defendant's argument as failing to grasp the breadth of the accomplice liability statute.

Result: Affirmance of Court of Appeals decision that affirmed the Asotin County Superior Court convictions of Phillip J. Bobenhouse of first degree rape of a child (three counts, one of which was based on his causing his boy and girl to have sex with each other) and of first degree incest (two counts, one of which was based on his causing his boy and girl to have sex with each other).

(3) TRIAL COURT'S JURY INSTRUCTION ON SELF DEFENSE SET THE STANDARD TOO HIGH WHERE ONLY NON-DEADLY FORCE WAS USED BY THE DEFENDANT – In State v. Kyllo, __ Wn.2d __, __ P.3d __, 2009 WL 2783441 (2009), the Supreme Court unanimously rules that the following jury instruction on self defense by use of non-deadly-force imposed too high a burden on the defendant:

> A person is entitled to act on appearances in defending himself, if that person believe in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

The Supreme Court explains as follows that the use of non-deadly-force in self defense is justified by a good faith, reasonable perception of danger of any bodily injury, and the law does not require proof of a perception of a danger of any heightened level of bodily injury:

> Kyllo's claim of self-defense involves his use of nondeadly force against Mickens. RCW 9A.16.020(3) provides that a defendant's use of nondeadly force against another is justifiable when the defendant reasonably believes he is about to be injured and uses no more force than is necessary.
>
> A jury instruction on self-defense that misstates the harm that the person must apprehend is erroneous. Because nondeadly force is at issue in this case, the jury should have been informed, as RCW 9A.16.020(3) provides, that a person is entitled to act in self-defense when he reasonably apprehends that he is about to be injured. One is not required to believe he is about to be grievously harmed or killed. Instruction 13 told the jury, however, that Kyllo was entitled to act in self-defense only if he believed in good faith and on reasonable grounds that he was "in actual danger of great bodily harm." The instruction incorrectly stated that Kyllo had to apprehend a greater degree of harm than is legally required before nondeadly force may be used in self-defense.

[Citation omitted]

Result: Reversal of Court of Appeals that affirmed the Cowlitz County Superior Court conviction of Kenneth Lee Kyllo for second degree of assault; case remanded for re-trial.

(4) DOUBLE JEOPARDY STATUTE DOES NOT PRECLUDE PROSECUTIONS FOR DRUNK DRIVING IN BOTH WASHINGTON AND OREGON ON THE SAME EVENING – In State v. Rivera-Santos, __ Wn.2d __, __ P.3d __, 2009 WL 2529009 (2009), the Supreme Court unanimously rejects a defendant's argument that, because he was convicted in Oregon of driving under the influence for his drunken operation of a vehicle on the night of January 12, 2007, Washington's double jeopardy statute, RCW 10.43.040, bars Washington from prosecuting him for driving a motor vehicle under the influence of alcohol (DUI)(RCW 46.61.502) in Washington. Because the defendant engaged in the act of driving under the influence in both Oregon and Washington, he was not being prosecuted and punished for the exact same action in each state. Therefore, the double jeopardy statute does not apply.

Result: Affirmance of Clark County Superior Court ruling that reversed a Clark County District Court decision and rejected the defendant's motion to dismiss the Washington DUI charge; case remanded for prosecution of Santiago Rivera-Santos for DUI.

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WASHINGTON STATE COURT OF APPEALS

PROBABLE CAUSE FOR SEARCHING HOME COMPUTER FOR (1) NUMEROUS ITEMS OF CHILD PORNOGRAPHY AND (2) INCRIMINATING METADATA HELD NOT STALE DESPITE FIVE-MONTH GAP BETWEEN DETECTIVE'S OBTAINING OF INFORMATION AND THE ISSUANCE AND EXECUTION OF THE SEARCH WARRANT

State v. Garbaccio, __ Wn. App. __, __ P.3d __, 2009 WL 2586915 (Div. I, 2009)

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

> In late May 2006, after a two-week-long investigation, [Detective A of the] Seattle Police Department determined that at least one known video of child pornography had been publicly available earlier that month for download from the Internet Protocol (IP) address assigned to Christopher Garbaccio's home computer. [Court's footnote: *At the time, [Detective A] was assigned to the federal-state interagency Internet Crimes Against Children (ICAC) task force. He was able to determine that a known video of child pornography was available for download from Garbaccio's computer by examining the video file's SHA-1 value, a lengthy alphanumeric code unique to each computer file available for transmission over file-sharing networks, such as Gnutella, which is the network that Garbaccio used in this instance.*] In all, [Detective A] located 195 computer files with titles indicative of pornographic themes available for download from Garbaccio's computer. Of these files, 22 had titles strongly suggestive of pornographic content involving minors.
>
> Five months later, on October 31, 2006, [Detective A] obtained a warrant to search Garbaccio's residence and to seize various computer hardware and software and other evidence of the crime of possession of child pornography. In the affidavit in support of the warrant application, [Detective A] attested that a video file that he had previously identified as depicting minors engaged in sexually explicit conduct, along with 21 other files with titles indicating child pornographic content, had been publicly available on May 3 for download from Garbaccio's computer. Anticipating that the judge reviewing the application might have questions concerning the possible staleness of the previously gathered evidence in light of the five-month time lag between the initial investigation and the warrant application, [Detective A] declared that, even if the files that had been available for download in early May could no longer be obtained from Garbaccio's computer, evidence that Garbaccio once possessed the contraband could still be obtained from the metadata of these files stored on the computer hardware. He further declared that, based on the "very large list of images that were titled as being child pornography" and available for download, he believed Garbaccio to be a collector of child pornography and that, based on his training and experience, he believed Garbaccio had therefore likely retained possession of these images.
>
> On November 1, members of the ICAC task force executed the warrant to search Garbaccio's house. Law enforcement officials seized multiple items of computer hardware located therein. Although Garbaccio was not present when the authorities arrived at his residence, he arrived home from work during the search. [Detective A] then interviewed him, while [a] Special Agent of the United States Bureau of Immigration and Customs Enforcement took notes of the conversation. At the end of the interview, [Detective A] wrote a statement memorializing the

> interview for Garbaccio to sign. The statement included the admission that Garbaccio had downloaded child pornography ten times in the past year but had not kept the files, instead deleting them. Garbaccio refused to sign this statement.
>
> [Seattle PD Detective B], a forensic computer analyst with ICAC, later examined the computer hardware seized from Garbaccio's home. He could not find any files containing viewable images of child pornography on the seized equipment. By examining the metadata of deleted files, however, he was able to determine that, at some point, the known video file that had initially raised [Detective A's] suspicion and the other 21 files with titles strongly suggestive of child pornography listed in the warrant application affidavit had been stored on Garbaccio's computer. Garbaccio was subsequently charged by information with one count of possessing depictions of minors engaged in sexually explicit conduct.
>
> . . . .
>
> The jury subsequently convicted Garbaccio as charged.

ISSUE AND RULING: In light of the nature of child pornography and the tendency of those who collect it to keep it, as well as in light of the likelihood of finding incriminating metadata regardless of whether the suspect had attempted to get rid of the child pornography on his computer, did the probable cause information, including experience-and-training explanations from the detective-affiant become stale in the five months between the gathering of the information and the issuance and execution of the search warrant? (ANSWER: No)

Result: Affirmance of King County Superior Court conviction of Christopher J. Garbaccio for possession of depictions of minors engaged in sexually explicit conduct in violation of RCW 9.68A.070.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Garbaccio first contends that the police lacked probable cause to authorize the issuance of the search warrant because the evidence that Detective Bergmann had initially gathered in May 2006 had become stale by the time he applied for the warrant approximately five months later. We disagree.
>
> In determining the validity of a search warrant, we consider "whether the affidavit on its face contained sufficient facts for a finding of probable cause." "Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." "It is only the probability of criminal activity, not a prima facie showing of it, that governs probable cause. The [issuing judge] is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit ." We review the issuing judge's determination of probable cause for abuse of discretion, resolving all doubts in favor of the warrant's validity.
>
> In some situations, the evidence relied upon in support of a warrant application may become stale so that probable cause no longer exists. As explained in [State v. Smith, 60 Wn.App. 592 (1991)], one factor to consider in assessing whether evidence is stale is the number of days intervening between the date on

which the evidence was gathered and the date on which the warrant was issued. The passage of time, however, is "not controlling." Other factors to be considered include the nature of the crime, the nature of the criminal, the character of the evidence to be seized, and the nature of the place to be searched." Further, an appellate court "looks at the information available to the issuing judge." Facts arising later are immaterial unless they were reasonably inferable at the time the warrant issued."

In this case, it was reasonable for the issuing judge to infer that, based on [Detective A's] supporting affidavit, Garbaccio was probably involved in criminal activity and that evidence of the crime of possession of child pornography would likely be found at his residence. The affidavit established that [Detective A] had located a known video of child pornography publicly available for download from the IP address assigned to Garbaccio. The titles of 21 other files available for download strongly suggested that Garbaccio collected and was in possession of child pornography. That [Detective A] waited five months to apply for a search warrant after he initially investigated Garbaccio's computer use did not eliminate the probative value of this evidence at the time the application was made. [Detective A] stated in his affidavit that, based on his training and experience, collectors of child pornography often retain the contraband. Although [Detective A] employed boilerplate language in making this statement, the statement provided a sufficient basis for the issuing judge to infer that Garbaccio likely still possessed the images, even five months after [Detective A] initiated the investigation. More importantly, as [Detective A] declared in the affidavit, evidence of Garbaccio's possession of contraband, in the form of metadata, would likely be found on his computer hardware, even if the contraband itself could no longer be viewed on his computer.

Garbaccio's discussion of narcotics cases in which courts found that evidence relied upon in support of warrant applications had become stale is not particularly helpful. The nature of drugs and pornography differ. Digital images may be saved for extended periods of time and viewed or copied multiple times without changing their inherent properties. On the contrary, drugs are usually consumed or distributed within a relatively short period of time. Moreover, the five-month delay at issue – which itself is not the controlling factor for determining whether evidence has become stale – was well within the timeframe recognized by numerous courts as being a reasonable period of pre-warrant application delay in the investigation of suspected possession of child pornography. [**LED EDITORIAL NOTE: Here the Court of Appeals cites a dozen child pornography decisions from other jurisdicitions with delays up to two years.**] The supporting affidavit documented [Detective A's] discovery of criminal activity. He applied for a search warrant within a reasonable time period in light of the nature of the offense and of the contraband sought to be seized. The issuing judge properly found the existence of probable cause. There was no error.

[Some citations omitted]

IDENTIFICATION TESTIMONY BY EYEWITNESS BANK TELLER IN ROBBERY TRIAL HELD ADMISSIBLE DESPITE FACT THAT THE WITNESS AGAIN SAW THE DEFENDANT IN A COURTROOM HALLWAY IN HANDCUFFS SHORTLY BEFORE SHE TESTIFIED

State v. Birch, __ Wn. App. __, __ P.3d __, 2009 WL 2437216 (Div. III, 2009)

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

> In 2005, the State charged Mr. Birch with one count of first degree robbery. A November 2007 jury trial produced the following facts.
>
> On January 7, 2003 in the early afternoon, Leona Morales, a teller at Wells Fargo Bank on Northwest Boulevard in Spokane, saw a customer approaching the counter and asked if she could help him. The customer was a male, wearing a black hat, jeans, a red and black sweater, and glasses. Ms. Morales thought the customer was wearing a disguise of glasses connected to a fake nose and mustache. Ms. Morales thought he had a gun because the customer had one hand in his pocket.
>
> Ms. Morales testified the customer threw a black bag down on the counter, along with a note stating "[t]his is a robbery." Ms. Morales filled the bag with cash, and the customer took the bag and the note and left the building. After he left, Ms. Morales activated her alarm system.
>
> Responding law officers were unable to find the suspect, but did locate several items in an a nearby alley including sport goggles, glasses, a black knit hat, a knit glove, a red sweatshirt, and a torn paper with writing on it. DNA found on the glasses, the hat, the glove, and the sweatshirt matched Mr. Birch's DNA sample.
>
> . . . .
>
> Mr. Birch moved to exclude Ms. Morales's in-court identification of him because she had seen him wearing handcuffs in the hallway outside the courtroom with his escort officers. Ms. Morales then told both counsel she would, in court, identify Mr. Birch as the robbery perpetrator. Defense counsel argued Ms. Morales's identification would be tainted by her hallway observations. The trial court denied the exclusion motion, ruling the identification "really goes to the weight of how reliable her recollection and identification is." In court, after questioning about the hallway encounter, Ms. Morales identified Mr. Birch as the perpetrator:
>
> > [The State:] What is it about [Mr. Birch] that makes you think that he was the suspect?
> >
> > [Ms. Morales:] It was his eyes.
> >
> > [The State:] How sure are you that [Mr. Birch] is the person that robbed the bank on that day?
> >
> > [Ms. Morales:] I am sure.
>
> Ms. Morales testified she was approximately three feet away from Mr. Birch during the incident, and although she primarily focused on his chest, she looked at his face for "a good few seconds." In cross-examination, Ms. Morales reviewed her law enforcement report describing some differences in the suspect's age, height, and weight, eye color, hair color, and facial hair. Cross-examination revealed the courtroom encounter was the first time she had seen

> Mr. Birch since the robbery and that she had never been asked to view a line-up, a photomontage, or identify a suspect. Detective Donald Giese testified about Mr. Birch's listed appearance in March 2003 records.

The jury found Mr. Birch guilty as charged.

ISSUES AND RULINGS: (1) Does the mere fact that the eyewitness to the robbery later saw the defendant in handcuffs just before she testified demonstrate suggestiveness regarding her identification testimony? (ANSWER: No);

(2) Even if suggestiveness is assumed, could there be a constitutional Due Process problem here, where the eyewitness: (a) was 3 feet from the perpetrator during the robbery; (b) looked at his face for several seconds; (c) gave police a reasonably close description to defendant immediately after the robbery; and (d) testified at trial that she was "sure" defendant was the robber? (ANSWER: No)

Result: Affirmance of Spokane County Superior Court conviction of Keith Dwain Birch for first degree robbery (his sentence as a persistent offender was affirmed under review not addressed in the LED).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The issue is whether the trial court erred in denying Mr. Birch's motion to exclude his in-court identification. Mr. Birch contends the identification was tainted by Ms. Morales seeing him in the hallway before the in-court identification. We disagree.
>
> Show-up identification is typical shortly after a crime occurs when police show a suspect to a witness or victim. Contrary to the State's argument, a showup identification analysis has been applied to a courtroom identification similar to that found here. See State v. Smith, 36 Wn. App. 133 (1983). In Smith, the witness identified the defendant, and later made an in-court identification of the defendant.
>
> Our issue involves the admission of evidence; our review is for an abuse of discretion. A trial court abuses its discretion when it exercises its discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons."
>
> To meet due process requirements, an out-of-court identification must not be "so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification." State v. Vickers, 148 Wn.2d 91 (2002) **April 03 LED:15**. To make this determination, we employ a two-part test. First, the defendant must show the identification procedure was impermissibly suggestive. Show-up identifications are not per se impermissibly suggestive. If the defendant fails to make this showing, the inquiry ends.
>
> If the defendant proves the procedure was impermissibly suggestive, under the second step of the analysis, "the court then considers, based upon the totality of the circumstances, whether the procedure created a substantial likelihood of irreparable misidentification." To make this determination, courts consider: "(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of

> the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation."
>
> Considering the first prong, Mr. Birch argues Ms. Morales saw him escorted by law officers and wearing handcuffs. But that alone does not demonstrate unnecessary suggestiveness. Without other facts showing impermissible suggestiveness, Mr. Birch fails to meet his burden under the first prong of the analysis. In passing, we note Mr. Birch incorrectly cites to [a decision] which has been overruled, for the premise that the two prongs of the test should be merged.
>
> Moreover, we are satisfied no due process violation occurred. Ms. Morales was approximately three feet away from Mr. Birch during the incident. She looked at his face for "a good few seconds." She gave a description similar to Mr. Birch's age and appearance and testified she was sure Mr. Birch was the perpetrator. Although Mr. Birch suggested other facts bearing on his identification, the fact question was properly left to the jury without a substantial likelihood for misidentification.

[Some citations omitted]

LED EDITORIAL NOTE: For more on identification issues, see the recently updated article, "Lineups, Showups and Photographic Spreads: Legal and Practical Aspects Regarding Identification Procedures & Testimony," on the Criminal Justice Training Commission's internet LED page, https://fortress.wa.gov/cjtc/www/led/ledpage.html. Almost all appellate court decisions involving identification issues are resolved against defendants on the rationale that a defect in the identification procedure was not so significant as to require reversal of a conviction. But it is of course important for officers and other government actors to try to avoid identification problems because such problems allow defense attorneys to argue "reasonable doubt" as a fact question at trial.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) POLICE ENTRY OF AND SEARCH IN COMMON AREA OF SECURED MULTI-UNIT COMMERCIAL STORAGE FACILITY HELD NOT CONSTITUTIONALLY RESTRICTED – In State v. Lakotiy, __ Wn. App. __, __ P.3d __, 2009 WL 2581671 (Div. I, 2009), the Court of Appeals rejects a defendant's argument that police violated the constitution when they entered the common area of a secured commercial storage facility and discovered him committing a crime. The officers were allowed into the facility by a renter who did not have authority to allow others into the secured common area, but that did not matter. The Court of Appeals declares that neither the Washington constitution's article 1, section 7, or under the federal constitution's Fourth Amendment provides any privacy protection for anyone against police entry into, and search of, the outside common area of a commercial storage facility.

Result: Affirmance of King County Superior Court conviction (as juvenile) of Sergey Lyubomir Lakotiy for possession of a stolen motor vehicle (RCW 9A.56.068) and possession of stolen property (RCW 9A.56.140).

LED EDITORIAL COMMENT: The Lakotiy Court discusses state and federal constitutional case law at length. In the Court's discussion of State v. Bobic, 140 Wn.2d 250 (2000) June 2000 LED:14, the Court appears in places in the opinion to say that, even as to the interiors of the individual units in a storage facility, there is no privacy

protection. We do not read Bobic that way. In Bobic, officers obtained lawful consent to enter one storage unit so that they could look with the naked eye with no light enhancement through a preexisting hole in the wall into an adjoining storage unit. That action was held to not violate state or federal privacy protection of the person who was renting that adjoining storage unit. The "open view" ruling in Bobic does not, in our view, mean: (1) that officers (1) could enter that storage unit without a search warrant or justification under one of the exceptions to the search warrant requirement, or (2) even that they could make a hole in order to make the observation.

The Lakotiy Court discusses Fourth Amendment decisions from other jurisdictions where courts have held that tenants in apartment complexes have no right of privacy against police entry without consent into secured common areas. This is a close question. In State v. Houvener, 145 Wn. App. 408 (Div. III, 2008) Aug 08 LED:14, Division Three of the Court of Appeals ruled that under a former WSU residence halls rule (the former WSU residence halls rule emphasized privacy rights), WSU students had a shared privacy right against warrantless, unconsented, non-exigent police entry into residential floor hallways. One out-of-state court decision that the Houvener Court cited disapproved of police entry into the common area of a secured apartment complex. So, while Houvener's focus was on a unique former WSU rule for its residence halls, there is nonetheless an apparent conflict between (A) the Houvener Court's citing of that out-of-state case, and (B) the Lakotiy Court's citing of out-of-state cases that were resolved the opposite way.

(2) NO "INNOCENT OWNER" CLAIM IS AVAILABLE TO ESTATE WHERE MARIJUANA GROWER'S RESIDENTIAL PROPERTY WAS SEIZED PRIOR TO HIS DEATH – In Snohomish Regional Drug Task Force v. Real Property Known As 414 Newberg, __ Wn App. __, __ P.3d __, 2009 WL 2581674 (Div. I, 2009), the Court of Appeals rejects the theory of family members of a deceased marijuana grower whose residential real property was seized for drug forfeiture under RCW 69.50.505 prior to his death. The Court of Appeals summarizes its ruling as follows:

> It has long been the law in Washington that "a devisee [beneficiary of an estate] can take no greater interest in the devised property than the devisor has to devise." In this appeal, the beneficiaries of the estate of Rodney J. Pearson contend that they were entitled to assert the "innocent owner defense" to the forfeiture of a parcel of real property, notwithstanding that the property had been seized prior to Pearson's death based on his use of it for commercial marijuana production. Holding that Pearson was unable to devise a greater interest in his property than he had, that his interest was subject to the forfeiture proceedings as filed, and, thus, that the testamentary transfer of the property could not prevent its forfeiture, we affirm.

[Footnote and citation omitted]

Result: Affirmance of Snohomish County Superior Court summary judgment ruling that rejects claims to otherwise forfeitable property by the estate of Rodney J. Pearson.

(3) DETECTIVE'S TESTIMONY CHARACTERIZING DEFENDANT AS "EVASIVE" HELD TO BE GROUNDS FOR MISTRIAL IN CHILD RAPE CASE – In State v. Hager, __ Wn. App. __, __ P.3d __, 2009 WL 2832088 (Div. II, 2009), the Court of Appeals rules that a child rape defendant's state and federal constitutional rights against self-incrimination were violated when

a detective, after having been warned not to so characterize the defendant's behavior, testified at trial that the defendant had been "evasive" during an interrogation.

P.B., a girl in her early teens reported to a friend that she had been molested by her stepfather. Police and others interviewed her. The Hager Court describes as follows the relevant facts, procedural developments, and testimony that followed:

> After interviewing the girl, Detectives A and B contacted Mr. Hager, P.B.'s stepfather, at his residence. Mr. Hager, who appeared to be on methamphetamine at the time, denied any wrongdoing.
>
> On November 22, 2006, Mr. Hager was charged with one count of first degree rape of a child. Before trial, the trial court conducted an ER 404(b) hearing to determine whether Mr. Hager's alleged prior acts of sexual misconduct against minors should be admitted. The court excluded the evidence. It also excluded any reference to Mr. Hager's evasiveness during police questioning. The matter proceeded to trial and resulted in a hung jury.
>
> The State elected to retry the case and filed an amended information in January 2008, charging Mr. Hager with first degree rape of a child, and in the alternative, child molestation in the first degree.
>
> Before trial, Mr. Hager moved the court for an order prohibiting Detective [A] from testifying about Mr. Hager's deceptive or evasive behavior during police questioning. Defense counsel argued that it was permissible for Detective [A] to state that Mr. Hager appeared to be on methamphetamine and avoided eye contact during questioning, but that it was improper for him to opine that Mr. Hager was evasive. He argued, "You can state the demeanor. You can't say because of that I think he was deceptive or evasive. The jury is to make that conclusion."
>
> The court granted the defense motion, stating that it was relying on the reasoning of the judge in the first trial. . . .
>
> Mr. Hager did not testify at trial. [P.B. testified to the alleged sexual assaults.]
>
> . . . .
>
> During cross-examination, defense counsel elicited numerous inconsistencies in P.B.'s statements to a detective and at the first trial.
>
> [The detectives] described their questioning of Mr. Hager. Detective [B] testified that Mr. Hager denied digitally raping P.B. in 2001 or living in the apartment with P.B. and her mother. Detective [B] testified that during the interview, Mr. Hager appeared to be on methamphetamine – he was jittery, his eyes were dilated, he avoided eye contact, and he spoke loudly and rapidly.
>
> The prosecutor then asked Detective [A], "What was Mr. Hager's demeanor like during the time that you had contact with him that day?" Detective [A] answered, "He appeared to be angry. He was evasive."
>
> Defense counsel moved for a mistrial. The prosecutor explained that "same as last time" he advised the detective to refrain from mentioning Mr. Hager's criminal history but this time he forgot to advise him to avoid using the word "evasive."

The prosecutor conceded that the detective should not have used the word but argued that the error did not justify a mistrial as long as the jury was instructed to disregard the remark.

Defense counsel argued that Mr. Hager's credibility was central to the case "at least insofar as what he told the police officers" and therefore the detective's characterization of Mr. Hager as "evasive" was prejudicial and required a mistrial.

The trial court denied the motion, stating,

> Well, I'm as – probably more so than defense counsel – frustrated over this because of the fact that we took such pains to make these rulings and insure that this was not going to occur. I'm going to deny the motion for mistrial and I'm going to do it on the basis that No. 1, I don't think the officer was acting in bad faith in terms of violating a rule. I think he just was not aware of that from a prior discussion with counsel.

The court then advised the detective that it was permissible to testify about Mr. Hager's physical appearance but prohibited "conclusory remarks regarding your judgment as to his behavior in terms of his testimony or whether he was being truthful with you or not being truthful with you." The court instructed the jury to disregard the detective's comment.

Detective [A] testified without further incident, stating that Mr. Hager denied the rape allegation and pointed to P.B.'s biological father as a suspect.

The jury found Mr. Hager guilty of first degree rape of a child. The court imposed a standard range sentence of 108 months.

Result: Reversal of Pierce County Superior Court conviction of Timothy Edward Hager for first degree rape of a child; case remanded for re-trial.

(4) DEFENDANT MEETS RCW 10.73.170'S TEST FOR P0ST-CONVICTION DNA TESTING – In State v. Gray, __ Wn. App. __, __ P.3d __, 2009 WL __ (Div. I, 2009), the Court of Appeals rules that a rape convict meets the test of RCW 10.73.170 for post-conviction DNA testing. The Gray Court summarizes its decision as follows:

> In 1991, Dennis Gray was convicted of first degree rape and attempted first degree rape. Gray appeals the trial court's denial of his 2007 request, pursuant to RCW 10.73.170, for postconviction DNA testing on the physical evidence used at trial. Gray satisfied the statute because he met the procedural requirements of the statute by demonstrating that DNA testing had advanced since the time of trial, and by demonstrating that the evidence from the DNA testing would be new, significant, and material to the identity of the perpetrator. Gray satisfied the substantive requirement of the statute by demonstrating the likelihood that the evidence would suggest innocence on a more probable than not basis. We reverse and remand.

The Court describes as follows the factual and procedural background that led to the appeal:

Dennis Gray was convicted of first degree rape, attempted first degree rape, and unlawful imprisonment for an incident that occurred on August 7, 1991. Four teenagers, two girls and two boys, were camping near the home of one of the girls when [the rapist] approached their campsite, made some small talk, and asked if they had any marijuana. [The rapist] left, but returned a few moments later, this time carrying a knife with a four to six inch blade. He grabbed R.J., one of the girls, and told the boys to lie down or he would kill her. The boys complied. When R.J. refused to take her clothes off, [the rapist] held her around the throat with the knife to her neck and told C.S., the other girl, to take her clothes off. Without releasing R.J., [the rapist] forced C.S. to perform fellatio on him. [The rapist] pushed C.S. on her back and attempted to vaginally penetrate her. He then anally raped her. At some point during the rape, [the rapist's] grasp loosened on R.J., and she was able to run away. [The rapist] fled.

Police arrived on the scene shortly after the attack and found a truck registered to Gray near the campsite. Police set up surveillance. At about 5:00 a.m., Gray emerged from a field near R.J.'s house, and police arrested him, as he matched the teenagers' description. They described [the rapist] as wearing a black leather biker-type jacket, jeans, and black boots. On the jacket was a distinctive lapel pin. Gray had a beard and long ponytail.

Police brought bloodhounds to the scene of the attack, where they were scented to Gray using clothing Gray was wearing at the time of his arrest. The dogs then located Gray's scent at the rape scene, followed it through a field, out onto the street, and to the spot where police arrested Gray and put him in the patrol car.

Police prepared a photo montage, where Gray's ponytail had been undone. They showed it to the four teenagers. None picked Gray. The two boys, but not the two girls, positively identified Gray in a second montage where his hair was in a ponytail.

Police collected rectal and vaginal swabs; pubic and head combings; and the underpants, bra, shorts, and tights from C.S. The swabs and clothing were tested for semen, with negative results. No DNA (deoxyribonucleic acid) testing was done on the swabs. Police also collected samples from Gray's clothing. In addition, hairs were collected from both victims, including C.S.'s pubic and head combings, the sleeping bags on which the attacks occurred, and Gray's clothing and belongings. Hair comparison analysis presented at trial showed that two of the five hairs recovered from one sleeping bag were dissimilar to all the control hair samples. None of the forensic scientist's analysis conclusively established Gray as the assailant. DNA testing of the hair samples was not conducted.

Gray filed a motion for postconviction DNA testing under RCW 10.73.170 in King County Superior Court on February 13, 2008. Gray moved the court to allow DNA testing on three groups of evidence: (1) clothing worn by C.S. and R.J.; (2) hairs recovered from the scene, the victims, and Gray; and (3) rectal and vaginal swabs taken from C.S. just after she was raped. The trial court denied Gray's motion, stating only that "[d]efendant's Motion is Denied for failure to satisfy the requirements of RCW 10.73.170."

Result: Reversal of King County Superior Court order denying motion by Dennis Gray, aka Dennis Galusha, for post-conviction DNA testing; remanded for further proceedings.

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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]

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