Law Enforcement Digest

AUGUST 2011

Law enforcement officers: Thank you for your service, protection and sacrifice.

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AUGUST 2011 LED TABLE OF CONTENTS

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ANNOUNCEMENT: THE 2011 EDITION OF "CONFESSIONS, SEARCH, SEIZURE AND ARREST: A GUIDE FOR POLICE OFFICERS AND PROSECUTORS" BY WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS (WAPA) STAFF ATTORNEY PAMELA B. LOGINSKY, IS NOW AVAILABLE ON THE LED WEBPAGE UNDER THE SPECIAL TOPICS HEADING

Most LED readers are familiar with the excellent and comprehensive summary on law-enforcement-related law topics by Pam Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys (WAPA). Ms. Loginsky updates the summary annually. The May 2011 version of her summary (313 pages) is now available (along with several additional, relatively-current, other-source summaries and outlines of interest to law enforcement) on the Criminal Justice Training Commission's internet LED page under a link at: **"Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors May 2011."** Information is provided on topics of interest to law enforcement in addition to the topics noted in the title. Also included, as the closing item, is a table of comparison of arrest, search and seizure case law under the Washington and federal constitutions.

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WASHINGTON STATE SUPREME COURT ACCEPTS REVIEW IN ROBB V. CITY OF SEATTLE – The Washington State Supreme Court has accepted review of the Court of Appeals decision in Robb v. City of Seattle, 159 Wn. App. 133 (Div. I, 2011) **Feb 11 LED:13** (Supreme Court Docket No. 85658-3). The Court's issue statement reads as follows: "Whether the city of Seattle may be liable in an action for wrongful death brought by the survivor of a murder victim based on the failure of police to confiscate ammunition while detaining the murderer for questioning just before the murder occurred." The shotgun shells at issue were lying on the ground near where the eventual murderer was standing while officers were questioning him about a burglary.

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UNITED STATES SUPREME COURT

MIRANDA "CUSTODY" TEST: WHERE AN OFFICER KNOWS OR SHOULD REASONABLY KNOW THAT THE SUSPECT BEING QUESTIONED IS A JUVENILE, THE SUSPECT'S AGE IS AN OBJECTIVE FACTOR THAT MUST BE CONSIDERED – THE QUESTION IS HOW A TYPICAL JUVENILE OF THAT AGE WOULD PERCEIVE THE DETENTION

J.D.B. v. North Carolina, ___ U.S. ___, 2011 WL 2369508 (2011)

Facts: (Excerpted from Supreme Court majority opinion)

> J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.
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> This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother – his legal guardian – as well as his aunt.
>
> Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and seen in J.D.B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer [an SRO]), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J.D.B.'s grandmother. **[LED EDITORIAL COMMENT: Nothing in the majority opinion's legal analysis suggests that the fact of either contacting or not the guardian is relevant to the custody question; we think it is not relevant to custody, at least where the juvenile to be questioned is, as here, not aware of the fact.]**

> The uniformed officer [the SRO] interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither Miranda warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.
>
> Questioning began with small talk – discussion of sports and J.D.B.'s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D. B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to "do the right thing," warning J.D.B. that "the truth always comes out in the end."
>
> Eventually, J.D.B. asked whether he would "still be in trouble" if he returned the "stuff." In response, DiCostanzo explained that return of the stolen items would be helpful, but "this thing is going to court" regardless. ("[W]hat's done is done[;] now you need to help yourself by making it right"). DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that "it's where you get sent to juvenile detention before court."
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> After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator's questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo's request. When the bell rang indicating the end of the school day, J.D.B. was allowed to leave to catch the bus home.

Proceedings below: After the juvenile court denied his Miranda-based motion to suppress his confession, the court adjudicated that J.D.B. had committed larceny and breaking and entering. On appeal, a majority of the North Carolina Supreme Court affirmed the adjudication, agreeing with the juvenile court that J.D.B. had not been in custody at the time of the police questioning, and therefore that Miranda warnings and waiver were not required for police questioning.

ISSUE AND RULING: The 1966 Miranda decision requires that a law enforcement officer obtain a Miranda waiver before questioning a suspect who is in "custody" – i.e., a suspect who is under arrest or in the functional equivalent of arrest (as opposed to being subject only to the brief detention of a Terry seizure). The test for such custody status under prior case law considers the totality of the objective circumstances in a given case, including but not limited to location, length and tenor of questioning, what was said, and any physical restraints. The custody question is whether a reasonable person would feel free to end the questioning and leave. Where a child's age is either known to an officer at the time of an interview or would be

objectively apparent to a reasonable officer, must the officer and reviewing court take into account the typical, reasonable perception of a child of that age in determining whether the juvenile was in custody for Miranda purposes? (ANSWER: Yes, rules a 5-4 U.S. Supreme Court majority)

Result: North Carolina Supreme Court decision reversed; case remanded to North Carolina courts for a determination of whether J.D.B. was in custody at the time of questioning.

ANALYSIS BY MAJORITY JUSTICES:

Justice Sotomayor authors the majority opinion joined by four other justices. Her opinion begins by noting that the 1966 Miranda decision imposed the warnings-and-waiver requirement based on a recognition that custodial interrogation entails "inherently compelling pressures," that can induce people to confess to crimes that they did not commit. The J.D.B. majority opinion notes that some recent studies suggest that the risk of a false confession is particularly significant when the subject of custodial interrogation is a juvenile.

The majority opinion recognizes that there must be custodial arrest or its equivalent (as opposed to just a brief detention) to trigger the Miranda requirement, and the opinion acknowledges that the question of whether a suspect is "in custody" for Miranda purposes is a strictly objective determination involving two separate inquires. First, what were the objective circumstances surrounding the interrogation. Second, given those circumstances, would a reasonable person have felt that he or she was at liberty to terminate the interrogation and leave. The police and courts must examine all of those objective circumstances surrounding the interrogation, including those that would have affected how a reasonable person in the suspect's position would perceive his or her freedom to leave. However, the test does not ever take into account subjective elements, such as the particular state of mind of the suspect or of the officers involved in the questioning. By limiting the analysis to objective circumstances, the majority opinion explains, the test avoids burdening police with the task of guessing at each suspect's idiosyncrasies and trying to determine how those particular traits affect that suspect's subjective state of mind.

In some circumstances, the majority opinion asserts, a child-suspect's age will affect how a reasonable person in the suspect's position would perceive his or her freedom to leave. Courts can account for that reality without doing any damage to the objective nature of the custody analysis, the J.D.B. majority opinion says. A child's age is an objective fact that generates commonsense conclusions about behavior and perception, which conclusions apply broadly to children as a class. Children generally are less mature and responsible than adults. They often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them. They are more vulnerable or susceptible to outside pressures than adults. In the specific context of police interrogation, events that generally would leave an adult cold and unimpressed can overawe and overwhelm a juvenile. The majority opinion notes that in other legal contexts, statutes and case law have historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. The opinion supports this by pointing out that legal disqualifications on children as a class – for instance, limitations on their ability to marry without parental consent – exhibit the settled societal understanding that the differentiating characteristics of youth are universal.

Accordingly, the majority opinion concludes, so long as a juvenile suspect's age was known to the officer at the time of the interview, or would have been objectively apparent to a reasonable officer, the officer and the courts must include consideration of the typical, reasonable reaction

of a suspect of that age as part of the custody analysis. This consideration does not, the majority opinion contends, impermissibly require officers either (1) to consider circumstances unknowable to them, or (2) to anticipate the frailties or idiosyncrasies of the particular suspect being questioned. Because childhood yields objective conclusions, the majority opinion insists, considering typical age-based perception in the custody analysis does not involve a determination of how youth affects a particular child-suspect's subjective state of mind. In fact, the majority opinion contends, if the Court were to preclude taking J.D.B.'s youth into account, the Court would be forced to evaluate the circumstances here through the eyes of a reasonable adult, when some objective circumstances surrounding an interrogation at school are specific to children.

These conclusions are not undermined by the Court's observation in the Court's decision in Yarborough v. Alvarado, 541 U.S. 652 (2004) **Aug 04 LED:04** that accounting for a juvenile's age in the Miranda custody analysis "could be viewed as creating a subjective inquiry." The majority opinion explains away that prior quoted passage, in part by asserting that the Court there said nothing about whether such a view would be correct under the law.

The majority opinion in J.D.B. emphasizes that the ruling does not mean that a child's age will be a determinative, or even a significant, factor in every case. In this regard, the majority opinion indicates that the closer a juvenile is to age 18, the less impact the suspect's juvenile status will have. But the juvenile's age, if known or reasonably knowable, is a reality that courts cannot ignore. The Supreme Court therefore remands the case for the North Carolina courts to determine if J.D.B. was in custody when he was interrogated, taking into account all relevant circumstances, including the typical reaction of a person of his age at the time of questioning.

DISSENTING OPINION:

Justice Alito authors a dissent joined by three other justices. The primary concerns of the dissenting opinion are that requiring consideration of a child-suspect's age (1) is in part incorporating a subjective consideration; (2) is highly fact-based, and therefore difficult to apply; (3) requires officers to attempt to determine the age of a suspect in order to factor in the typical reaction of a person of that age; and (4) contrary to the majority opinion's contention that the ruling is limited to the unique youthfulness consideration, will encourage defense attorneys to urge that in assessing the Miranda-custody question courts should take into account IQ level, education, psychological makeup, cultural background and other circumstances of adult suspects that purportedly make them unusually meek or compliant.

LED EDITORIAL COMMENTS:

1) This decision seems expressly limited to the age/youth issue

We have no doubt that criminal defense attorneys will – as the dissent in J.D.B. theorizes in its criticism of the majority's ruling – seek to extend this ruling to factors other than youth that purportedly make a suspect more meek or compliant. But we think that the J.D.B. majority opinion is clear that the ruling is limited to the youth question and cannot be readily extended to other circumstances. The Washington Supreme Court has to date held that the Washington constitution does not impose greater restrictions on Washington law enforcement officers in relation to Miranda requirements. So, we would hope that the J.D.B. decision will not be expanded by the Washington appellate courts to address purported categorical meekness or compliance factors other than youthfulness.

2) This decision was not a complete surprise

We would have liked to see a different result in this case, but we have been suggesting in the LED for some time that officers should – as they now must do under J.D.B. – take the age of a juvenile suspect into account in assessing whether custody exists under Miranda. See the following cases that were addressed in the LED:

In State v. D.R., 84 Wn. App. 832 (Div. III, 1997) May 97 LED:10, Division Three of the Washington Court of Appeals held that an officer's un-Mirandized questioning of a 14-year-old student in the assistant principal's office was "custodial." Although the officer told the student (D.R.) that the student did not have to answer the officer's questions, the officer did not tell the student he was free to leave, and the officer's questions were pointedly accusatory. In ruling that the questioning session was "custodial," The D.R. Court took into account the age of the suspect. We indicated in our comments on D.R. that officers should do likewise.

In Yarborough v. Alvarado, 541 U.S. 652 (2004) Aug 04 LED:04, the U.S. Supreme Court rejected a habeas corpus petition and suggested that age might not be an appropriate factor to consider in determining Miranda custody. Our editorial comments suggested that this outcome was in part affected by the standard of review applicable to habeas corpus review, and that officers should nonetheless take a juvenile's age into account in determining whether Miranda custody exists.

In State v. Heritage, 152 Wn.2d 210 (2004) Sept 04 LED:12, the Washington Supreme Court stated that it would not make a ruling one way or the other in that case on the question of whether the age of a suspect can be a relevant factor in determining whether the suspect is in custody. We stated in our editorial comments on the Heritage decision that the legally safest approach for investigators is to assume that age of a suspect is relevant both for determining whether "Miranda custody" exists, as well as for determining whether a valid waiver of Miranda rights can be given by a youthful suspect.

In State v. Daniels, 160 Wn.2d 256 (2007) Sept 07 LED:14, in cursory analysis, the Washington Supreme Court appeared to take into account the juvenile status of a suspect at the time of police questioning in determining that the suspect was in custody for Miranda purposes. In our comments, we again suggested that officers should take the age of a juvenile into account is assessing whether there exists Miranda custody.

3) General comments about "tactical" un-Mirandized questioning

We recognize that officers will sometimes make a considered decision, based on all of the circumstances and on their wealth of experience, that un-Mirandized questioning will be more fruitful. This is a difficult decision for officers, because the test for "custody" is an unpredictable, totality of the circumstances test.

When officers make that difficult decision, extra effort must be made to make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, we think that officers are on pretty thin ice – regardless of the age of their suspects – in conducting such un-Mirandized interrogations at the police station unless they first tell their suspects (who, by definition under our assumed scenario, are voluntarily there in the first place) that the suspects do not have to answer the questions and that they can leave at any time. Officers conducting such "tactical" un-Mirandized questioning should be prepared to allow the suspect to leave after the questioning is completed. Also, in light of some discussion tying the "custody" question to officer-deception in past

Washington appellate court decisions (see, for instance, State v. Hensler, 109 Wn.2d 357 (1987) (non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (ok to engage in non-deceptive, non-custodial questioning of suspect as scene of MVA), officers probably should not use deception that would be permissible with a Mirandized suspect. The Washington appellate courts 1) have only occasionally talked about would-be "deception-custody" test; 2) have never explained the source of the test or its specifics for application; and 3) have never excluded a statement based on deception during non-custodial questioning. Nonetheless, the above-noted decisions lead us to suggest that deception be avoided in tactical, non-custodial interrogations.

4) Custody-determination factors

We close this LED entry with a non-exhaustive list of some of the things, in addition to age of a juvenile suspect, that courts consider in trying to determine whether, balancing all of the objectively evaluated circumstances in their totality, Miranda custody exists –

- **Whether the officers informed the suspect that he was not under arrest and was free to leave;**
- **Whether the officers informed the suspect that he or she did not have to answer their questions;**
- **The place (e.g., how private or public was the setting);**
- **The announced or objectively obvious purpose of the questioning;**
- **The length of the interrogation;**
- **The manner of interrogation (e.g., friendly and low key vs. accusatory);**
- **Whether the suspect consented to speak with law enforcement officers;**
- **Whether the suspect was involuntarily moved to another area prior to or during the questioning;**
- **Whether there was a threatening presence of several officers and/or a display of weapons or physical force;**
- **Whether the officers deprived the suspect of documents or other things he needed to continue on his way;**
- **Whether the officers' express language or tone of voice would have conveyed to a reasonable person that they expected their requests to be obeyed;**
- **Whether the officers revealed to the suspect that he was the focus of their investigation and/or confronted him with the incriminating evidence;**
- **Whether the officers used deception in the questioning;**
- **Whether the officers allowed the suspect to leave at the end of the questioning.**

FOURTH AMENDMENT ARGUMENT THAT OFFICERS CREATED EXIGENCY IN KNOCKING AND ANNOUNCING THEIR PRESENCE AT DRUG SUSPECT'S DOOR IS REJECTED IN CATEGORICAL RULING THAT APPARENTLY PRECLUDES SUCH A THEORY IF OFFICERS DID NOT OTHERWISE ACT UNLAWFULLY; WASHINGTON CONSTITUTION MIGHT BE INTERPRETED MORE RESTRICTIVELY AGAINST LAW ENFORCEMENT

Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849 (2011)

Facts: (Excerpted from Supreme Court majority opinion)

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex.

Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to "hurry up and get there" before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door "as loud as [they] could" and announced, "'This is the police'" or "'Police, police, police.'" Cobb said that "[a]s soon as [the officers] started banging on the door," they "could hear people inside moving," and "[i]t sounded as [though] things were being moved inside the apartment." These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they "were going to make entry inside the apartment." Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent's girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation.

Proceedings Below: Hollis King was charged with drug crimes. He pleaded guilty subject to his right to appeal the issue of legality of the entry of his apartment by police. The trial court rejected his suppression motion, ruling (1) that police had exigent circumstances (reasonable belief that illegal drugs would be destroyed if they did not enter immediately) that justified forcibly entering his apartment without a search warrant, and (2) that police did not impermissibly create the exigent circumstances.

A Kentucky intermediate appellate court agreed, but the Kentucky Supreme Court reversed. The Kentucky Supreme Court expressed some doubt as to whether the circumstances were truly exigent, but the Court declared that it need not resolve that question, because the Court concluded that the police impermissibly created the exigency by going to the apartment door and loudly seeking entry rather than maintaining surveillance and seeking a search warrant.

ISSUE AND RULING: Assuming that exigent circumstances existed based on the noises inside the apartment that the officers heard after knocking and announcing their presence, did the officers impermissibly create the exigency where they did not engage in any otherwise unlawful

conduct before they heard the noises? (ANSWER BY SUPREME COURT MAJORITY: No, rules an 8-1 majority in an opinion whose analysis will make it generally very difficult to pursue such a creation-of-exigency argument in future cases).

Result: Reversal of Kentucky Supreme Court suppression decision; remand of case to the Kentucky Supreme Court to address the question of whether the officers were presented with exigent circumstance of imminent property destruction when they forced entry of the apartment.

ANALYSIS:

The basic rule articulated in the U.S. Supreme Court majority opinion in King is that the exigent circumstances rule applies so long as officers do not create the exigency by engaging or threatening to engage in conduct that independently violates the Fourth Amendment.

The majority opinion begins by noting that the reasonableness requirement of the Fourth Amendment is met where officers conduct a warrantless search or seizure under one of the recognized exceptions the Fourth Amendment's search warrant requirement. One exception is the exigent circumstances exception, and one recognized exigency is the objectively reasonable need under the totality of the circumstances to prevent the imminent destruction of evidence.

Some state and lower federal courts have developed variations on a police-created-exigency doctrine, which those courts have developed as an exception to the exigent circumstances rule. Under these lower court rulings, exigent circumstances do not justify a warrantless search when the exigency was "created" or "manufactured" by the conduct of the police. The lower courts have not agreed, however, on the test for determining when police impermissibly create an exigency.

The King majority opinion concludes that most of those lower court rulings have been too restrictive on law enforcement. That is because those lower courts have ruled incorrectly that otherwise lawful law enforcement actions are unlawful merely because officers were one of the factors in the development of exigent circumstances. The proper test, the King majority concludes, follows from the principle that permits warrantless searches. Warrantless searches are allowed when the circumstances make the search reasonable under the Fourth Amendment. Thus, a warrantless entry based on exigent circumstances is reasonable when the police did not create the exigency by engaging or threatening to engage in conduct otherwise violating the Fourth Amendment (for instance, threatening to kick the door in without justification). A similar approach, the King majority explains, has been taken in other cases involving warrantless searches. For example, officers may seize evidence in plain view if they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made; there is no "inadvertent discovery" rule for plain view seizures under the Fourth Amendment.

Some courts, including the Kentucky Supreme Court in the King case, have imposed additional requirements – asking whether officers, while acting otherwise lawfully, "'deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement.'" (Emphasis in original.) The reasoning of the Kentucky Court and some other mistaken courts has been that police may not rely on an exigency if "'it was reasonably foreseeable that [their] investigative tactics . . . would create the exigent circumstances.'" The mistaken courts have faulted officers for knocking on a door when the officers had sufficient evidence to seek a warrant but did not do so. Other lower courts have ruled that officers created or manufactured an exigency when their investigation was contrary to standard or good law enforcement

practices. The King majority opinion concludes that such requirements are unsound and thus must be rejected.

Another theory by the defendant in the King case was that an exigency is impermissibly created when officers engage in conduct – here the loud knocking and announcement of police presence – that would cause a reasonable person to believe that entry was imminent and inevitable, but that approach is also flawed. The ability of officers to respond to an exigency cannot turn on such subtleties as the officers' tone of voice in announcing their presence and the forcefulness of their knocks. A forceful knock may be necessary to alert the occupants that someone is at the door, and unless officers identify themselves loudly enough, occupants may not know who is at their doorstep. Defendant King's test would make it extremely difficult for officers to know how loudly they may announce their presence or how forcefully they may knock without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed, the King majority declares.

For the above reasons, the King majority concludes that, assuming that an exigency existed here, there is no evidence that the officers either violated the Fourth Amendment or threatened to do that prior to the point when they heard the noises inside the apartment.

The majority opinion therefore reverses the Kentucky Supreme Court decision and remands the case for that Court to determine if the officers were faced with exigent circumstances at the point when they heard the noises and forcibly entered the apartment without a search warrant.

LED EDITORIAL COMMENT: The Washington appellate courts have not yet addressed whether article I, section 7 of the Washington constitution requires a different approach to the police-created-exigency doctrine. However, in light of the Washington Supreme Court's "independent grounds" approach to pretext and officer state of mind in several other search and seizure contexts, we are not confident that the King rule will be the Washington rule if and when the Washington appellate courts address the issue under article I, section 7.

In light of this concern, Washington officers should tread cautiously in circumstances where the issue of police-created exigency does not require a stretch of the imagination to conclude that police did not create the exigency. In a comment at page 9 of the April 2002 LED in follow-up to an entry on a Ninth Circuit decision, we suggested that the following scenario (slightly edited here) might be found to be improperly "created" exigent circumstances: Detectives develop some evidence that three housemates committed the "President's masks" bank robbery one month previously. A few days later, without an arrest warrant or a search warrant (and without presently existing exigent circumstances), the officers set up surveillance on the suspects' residence. During the early evening hours, while the lights are still on in the house, one of the suspects emerges from the front door onto the porch. The officers immediately run to arrest him as he heads down the front steps. As the officers grab him on the steps, the suspect yells, "it's the cops," and the officers hear panicky shouts and other loud noises coming from inside the house. We think that a Washington appellate court would be sorely tempted to hold under article I, section 7 that these circumstances do not justify forced entry because the officers created the exigency.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT LAWSUIT: SUPREME COURT SETS ASIDE 2009 NINTH CIRCUIT RULING THAT AN UNLAWFUL FOURTH AMENDMENT "SEIZURE" OCCURRED WHEN A SOCIAL SERVICES CASEWORKER AND A LAW ENFORCEMENT OFFICER INTERVIEWED A POSSIBLE CHILD SEX ABUSE VICTIM AT HER ELEMENTARY SCHOOL WITHOUT PARENTAL CONSENT, COURT ORDER, OR EXIGENT CIRCUMSTANCES – In Camreta v. Greene, ___ U.S. ___, 131 S. Ct. 2010 (2011), the U..S. Supreme Court vacates – but does not address the merits of – the constitutional-violation part of the 2009 Ninth Circuit U.S. Court of Appeals decision in Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2011). See **February 2010 LED** at pages 5 through 12. This means that there is no longer a Ninth Circuit precedent addressing whether conducting a child-victim interview under the circumstances of Greene violates the Fourth Amendment of the U.S. constitution.

In Greene, an Oregon state child protective services worker (Camreta) and a county deputy sheriff (Alford), interviewed a 9-year-old girl, S.G., at her Oregon elementary school. They asked S.G. about allegations that her father had sexually abused her. Camreta and Alford did not have a court order or parental consent to conduct the interview. S.G. eventually stated during the approximately two-hour interview that she had been abused by her father. Her father stood trial for that abuse, but the jury failed to reach a verdict, and the charges were later dismissed.

S.G.'s mother, subsequently sued Camreta and Alford on S.G.'s behalf for damages under the federal Civil Rights Act, alleging that the in-school interview violated the Fourth Amendment's prohibition on unreasonable seizures. The U.S. District Court granted summary judgment to the officials. As reported in the **February 2010 LED**, the Ninth Circuit affirmed on qualified immunity grounds. The Ninth Circuit first ruled that under the totality of the factual circumstances (with concessions from the government officials), the interview with S.G. absent a court order, parental consent, or exigent circumstances was a seizure that violated the Fourth Amendment.

The Ninth Circuit further held, however, that the officials were entitled to qualified immunity from damages liability because no clearly established law had warned them of the illegality of their conduct. The Ninth Circuit explained that it had chosen to rule on the merits of the seizure issue so that government officials would be on notice when conducting child-victim interviews in similar circumstances in the future. Although the bottom line of the judgment entered was in their favor (i.e., granting qualified immunity and hence insulating them from any damage award), Camreta and Alford petitioned the U.S. Supreme Court to review the Ninth Circuit's ruling that their conduct violated the Fourth Amendment. The Greene family did not cross-petition for review of the Ninth Circuit decision that the officials have immunity.

The lead opinion of the U.S. Supreme Court is supported by five of the nine justices and therefore sets precedent on the non-substantive issues addressed. The lead opinion first rejects an argument of the Greenes that the Supreme Court may not review a circuit court's constitutional ruling at the request of government officials who have won final judgment on qualified immunity grounds. Statutory and constitutional and court-made policy bars to the Supreme Court issuing advisory opinions are not violated by allowing the government officials to challenge the constitutional ruling – here the Fourth Amendment ruling – the lead opinion concludes. The lead opinion notes on this issue that so long as the underlying constitutional ruling in a Civil Rights Act case remains good law, an official who regularly engages in the

challenged conduct as part of his or her job must either change the way the official performs his or her duties or risk a meritorious damages action in a future case. The official thus can demonstrate that the appeal is not merely asking the Supreme Court for an advisory opinion.

The lead opinion in Greene goes on, however, to conclude that a separate jurisdictional problem – mootness relating to the plaintiff – requires the Court to dismiss this particular case. S.G. can no longer claim the plaintiff's usual stake in preserving the court's holding because she no longer needs protection from the challenged interview practice, the lead opinion concludes. She has moved to Florida and is only months away from her 18th birthday and, presumably, from her high school graduation. When "subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," there is no live controversy to review."

Finally, the lead opinion follows the established practice of the Supreme Court when a civil suit becomes moot pending appeal. That practice is to vacate all or part of the judgment below to ensure that those who have been prevented from obtaining the review to which they are entitled are not treated as if there had been a review. The point of vacation is to prevent an unreviewable decision from spawning any legal consequences. A constitutional ruling (here, the ruling that the interview violated the Fourth Amendment) in a case where qualified immunity is ultimately granted is a legally consequential decision.

Accordingly, the lead opinion in Greene concludes that because mootness has frustrated a government official's ability to challenge the circuit court's ruling that the official must obtain a court order before interviewing a suspected child abuse victim at school, that part of the Ninth Circuit's decision must be vacated.

Result: Vacation of that part of the Ninth Circuit's decision that addressed the Fourth Amendment seizure issue; case remanded for further proceedings consistent with the Supreme Court's decision.

LED EDITORIAL COMMENTS: In the February 2010 LED entry digesting the 2009 Ninth Circuit decision in Greene, we included a number of comments on the decision. It is our understanding that since that time, many law enforcement agencies, prosecutors' offices, social services agencies, and schools have developed policies and practices to address the Ninth Circuit's Fourth Amendment ruling in Greene. Because the U.S. Supreme Court vacated the Ninth Circuit decision only on mootness grounds and did not address the merits of the case, it may be the best practice for those entities to continue to follow the policies and practices that have been developed in response to the Ninth Circuit's 2009 decision. As always, we suggest that law enforcement officers and agencies consult their agency legal advisors and local prosecutors.

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WASHINGTON STATE SUPREME COURT

KNIFE POSSESSED DURING BURGLARY WAS NOT PROVEN TO HAVE BEEN USED, ATTEMPTED TO BE USED, OR THREATENED TO BE USED, AND THEREFORE FIRST DEGREE BURGLARY CONVICTION MUST BE REVERSED

In re Personal Restraint of Martinez, ___ Wn.2d ___, 2011 WL 1587122 (2011)

Facts: (Excerpted from Supreme Court opinion)

> In the early hours of the morning of February 17, 2004, a burglar alarm at an uninhabited farm shop in rural Grant County alerted law enforcement officers of a potential break-in. [A deputy sheriff] arrived on the scene about 5 or 10 minutes later. He parked his marked patrol car in front of the shop, shined his headlights and spotlights in the direction of the shop, and noticed that the door of the shop had been forced open. He could hear someone moving about inside, and he immediately alerted another officer by radio that the door had been forced open. At that time, Mr. Martinez opened the door and stepped out of the building. The deputy, who was in full uniform, shined his flashlight on Mr. Martinez, drew his gun, and commanded Mr. Martinez to stop. Mr. Martinez fled immediately. [The deputy] began chasing Mr. Martinez and was able to catch up to him when Mr. Martinez ran into a barbed wire fence, fell, did a somersault, and then continued running.
>
> Once [the deputy] caught up to the defendant, he "tackled him to the ground." After handcuffing the defendant, [the deputy] patted him down and noticed an empty knife sheath on his belt. When [the deputy] about the missing knife, Mr. Martinez said that it "should be in the sheath and that it must have fallen out while he was running." He provided no further explanation. Later, law enforcement officers retraced the path on which the chase had occurred and located a knife in the mud, about 15 feet from the farm shop. Mr. Martinez identified the knife as his own. The knife had a fixed blade and was about three-and-a-half to four inches long.

Proceedings Below: Mr. Martinez was charged and convicted of burglary in the first degree, among other crimes. After a long series a procedural developments, Mr. Martinez succeeded in obtaining Washington Supreme Court review of his conviction of burglary in the first degree.

ISSUES AND RULINGS: 1) Does the first degree burglary statute's use of the phrase "armed with deadly weapon" require proof as to non-firearm, non-explosives weapons that the weapon was used, attempted to be used, or threatened to be used in relation to the burglary? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court)

2) Was the knife that Mr. Martinez possessed during the burglary used in a manner that supports his conviction of burglary in the first degree? (ANSWER BY SUPREME COURT: No, rules a unanimous Court)

Result: Reversal of unpublished decision of the Court Appeals that rejected Mr. Martinez's collateral attack on his conviction.

ANALYSIS: (Excerpted from Supreme Court opinion)

> First degree burglary under RCW 9A.52.020 requires the State to prove, among other elements, that the defendant was armed with a deadly weapon or assaulted another person. Mr. Martinez does not dispute that he was "armed." Instead, he argues that the evidence was insufficient to support the "deadly weapon" element of first degree burglary. The term "deadly weapon" is defined in RCW 9A.04.110(6), which supplies definitions for Title 9A, Washington's criminal code.

> "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6) (emphasis added). This definitional statute creates two categories of deadly weapons: deadly weapons per se, namely "any explosive or loaded or unloaded firearm" and deadly weapons in fact, namely "any other weapon, device, instrument, article, or substance . . . which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm." State v. Taylor, 97 Wn. App. 123 (1999). If Mr. Martinez's knife is a deadly weapon for purposes of first degree burglary, it must fall within the latter category.

The language of RCW 9A.04.110(6) is unambiguous. Under the plain meaning of this statute, mere possession is insufficient to render "deadly" a dangerous weapon other than a firearm or explosive. To interpret the statute otherwise would eliminate the distinction between deadly weapons per se (firearms and explosives) and deadly weapons in fact (other weapons).

Likewise, it would render meaningless the provision as to the circumstances of use, attempted use, or threatened use. Thus, we hold that RCW 9A.04.110(6) requires more than mere possession where the weapon in question is neither a firearm nor an explosive. In accordance with the plain meaning of this statute, unless a dangerous weapon falls within the narrow category for deadly weapons per se, its status rests on the manner in which it is used, attempted to be used, or threatened to be used. RCW 9A.04.110(6).

While this court has not addressed the definition of deadly weapons under RCW 9A.04.110(6), the Court of Appeals has addressed this subject at length. **[LED EDITORIAL NOTE: At this point, the Supreme Court discusses a number of Court of Appeals opinions. Among the decisions that the Court cites with approval are State v. Skenadore, 99 Wn. App. 494 (Div. II, 2000) Sept 00 LED:19 and State v. Shilling, 77 Wn. App. 166 (Div. I, 1995) Oct 95 LED:12. The Court disapproves of one court of appeals decision, State v. Gamboa, 137 Wn. App. 650 (Div. III, 2007) Jan 08 LED:16 "to the extent that [Gamboa] rejected a totality of the circumstances test for determining whether a weapon other than a firearm or explosive is deadly under the first degree burglary statute. By characterizing a machete as a deadly weapon on the sole basis of its dangerousness and without regard to its actual, attempted or threatened use, the Gamboa court essentially read the circumstances provision out of the statute and treated the machete as if it were a deadly weapon per se."]**

Next, we must determine whether the facts of this case, viewed in the light most favorable to the State, could lead a rational fact finder to find beyond a reasonable doubt that Mr. Martinez met the requirements of RCW 9A.04.110(6). Specifically, as Mr. Martinez correctly notes, neither actual nor threatened use is at issue here, so the relevant inquiry is whether the State presented sufficient evidence to prove attempted use.

> Even when viewed in the light most favorable to the State, the evidence in this case cannot support such a finding. No one saw Mr. Martinez with the knife, and he manifested no intent to use it. Furthermore, no one saw Mr. Martinez reach for the knife at any time after he was apprehended. . . . Indeed, when Mr. Martinez was apprehended, he did not reach for his knife, but rather, he fled. By one account, he raised his hands before fleeing, suggesting that he was not holding his knife at that time.
>
> Though Mr. Martinez struggled when [the deputy] tackled him to the ground, the knife was found along the path of the chase about 15 feet from the farm shop, suggesting that Mr. Martinez did not have access to the knife during the scuffle with [the deputy]. Viewed in the light most favorable to the State, the only evidence that Mr. Martinez attempted to use the knife was the unfastened sheath. This evidence is insufficient to lead a rational fact finder to find intent to use the weapon beyond a reasonable doubt.

[Footnotes and some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) WASHINGTON'S MEDICAL USE OF MARIJUANA ACT ("MUMA") (CHAPTER 69.51A RCW) DOES NOT PREVENT AN EMPLOYER FROM DISCHARGING AN EMPLOYEE FOR DRUG USE AND DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST THE EMPLOYER – In Jane Roe v. TeleTech Customer Care Mgmt. (Colorado), L.L.C., ___ Wn.2d ___, 2011 WL 2278472 (2011), the plaintiff, an authorized medical marijuana patient, failed a drug test and was terminated. An 8-1 majority of the Court holds that "MUMA does not prohibit an employer from discharging an employee for medical marijuana use, nor does it provide a civil remedy against the employer. MUMA also does not proclaim a sufficient public policy to give rise to a tort action for wrongful termination for authorized use of medical marijuana."

Dissent: Justice Chambers dissents arguing that MUMA creates a sufficient public policy in favor of medical marijuana use to support a tort action for wrongful termination.

Result: Affirmance of Court of Appeals' decision affirming Kitsap County Superior Court's summary judgment dismissal of Jane Roe's lawsuit against her former employer.

(2) PROSECUTOR'S IMPROPER INJECTION OF RACIAL PREJUDICE INTO TRIAL FOUND NOT HARMLESS – In State v. Monday, ___ Wn.2d ___, 2011 WL 2277151 (2011), among other things, the prosecutor referred to the police as "poleese" when questioning African American witnesses during trial. A majority of the Court finds that "the only reason to use the word 'poleese' was to subtly, and likely deliberately, call to the jury's attention that the witness was African American and to emphasis the prosecutor's contention that "black folk don't testify against black folk."

A 5-3-1 majority of the Court holds that "when a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, [the court] will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict."

Concurrence: Justice Madsen writes a concurrence joined by two other justices.

Dissent: Justice Jim Johnson dissents arguing that there is overwhelming evidence of the defendant's guilt (including a videotape of the shooting).

Result: Reversal of Kevin L. Monday Jr.'s convictions of one count of first degree murder and two counts of first degree assault stemming from a shooting in Pioneer Square in 2006.

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WASHINGTON COURT OF APPEALS

SEARCH BY SCHOOL RESOURCE OFFICER HELD TO QUALIFY AS SCHOOL SEARCH UNDER THE LOWER STANDARDS FOR SCHOOL SEARCHES OF THE STATE AND FEDERAL CONSTITUTIONS

State v. J.M., ___ Wn. App. ___, 2011 WL 1949571 (Div. I, 2011)

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

> On February 4, 2009, [a Bellevue police officer] was on duty as an SRO at Robinswood High School in Bellevue, Washington *[Court's footnote: The SRO's salary was paid by the Bellevue Police Department, which was partially reimbursed for [the SRO's] services by the Bellevue School District.*] He had worked as an SRO for approximately 12 years, assisting with discipline matters and exercising arrest powers. His primary duties were to maintain a safe, secure, and orderly learning environment, and he rarely handled nonschool-related calls while on duty as an SRO.
>
> That day, while checking one of the school's restrooms, [the SRO] saw J.M., a student, standing at a sink, holding what appeared to be a baggie of marijuana and a medicine vial. Next to J.M. was a blue backpack. As [the SRO] approached J.M., he smelled a strong odor that he recognized as that of marijuana. [The SRO] seized the suspected marijuana, vial, and backpack and took J.M. to the dean of students, Phyllis Roderick. Roderick sat at her desk while [the SRO] and J.M. sat facing her with J.M.'s backpack between them. [The SRO] explained to Roderick what he had observed. He then informed J.M. that he was under arrest and called for another officer to come to the school to assist him.
>
> [The SRO] sought to search J.M.'s backpack, which had a padlock running through the pull tabs on the zipper to the main compartment. Despite the lock, [the SRO] was able to unzip the compartment wide enough to get his hand inside and withdraw a few items. He asked J.M. for the key to the lock, but J.M. said he had left it at home. [The SRO] was suspicious as to why J.M. would bring a locked backpack to school and not have a key. [The SRO] handcuffed and searched J.M., finding keys in his jacket. He used one key to open the backpack and discovered an air pistol inside. [A second Bellevue P.D. officer] arrived shortly thereafter. [The SRO] read J.M. his Miranda rights, and J.M. indicated he did not wish to answer any questions. [The second officer] took J.M. to the precinct for booking.

J.M. was charged with one count of carrying a dangerous weapon at school and one count of possession of less than 40 grams of marijuana. J.M. filed a motion to suppress the air pistol, arguing that the search of his backpack violated his constitutional privacy rights. The court commissioner denied the motion, entering findings of fact and conclusions of law. J.M. agreed to an adjudication on stipulated facts, and the trial court found him guilty as charged. J.M. challenged the commissioner's suppression ruling in a motion for revision. The superior court judge denied the motion and imposed a standard range disposition.

ISSUES AND RULINGS: 1) Was the search by the SRO a "school search" subject to the special "reasonable grounds" standard for warrantless searches by school officials? (ANSWER: Yes);

2) Assuming for the sake of argument that the search qualified as a school search, do the facts meet the reasonable grounds standard for such searches? (ANSWER: Yes)

Result: Affirmance of King County Superior Court juvenile court adjudications for possessing marijuana under 40 grams and for possessing a dangerous weapon.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) SRO search as school search

> One exception to the warrant requirement, under both the federal and state constitutions, is a search conducted in a school setting by school authorities.
>
> Under the "school search" exception, school officials may search a student's belongings without a warrant if, under all the circumstances, the search is reasonable. A search is reasonable if it is justified at its inception and the scope of the search is reasonably related to the reasons justifying it. The constitutionality of [the SRO's] search of J.M.'s backpack depends in part on whether the school search exception to the warrant requirement applies. *[Court's footnote: J.M. argues that if the school search standard does not apply, the search was per se unreasonable because post-arrest searches of locked containers must be authorized by a valid search warrant. The State does not dispute this.*]
>
> J.M. argues that the school search exception does not apply because [the SRO] was not a "school official" at the time of the search. He cites State v. McKinnon, 88 Wn.2d 75 (1977), arguing that under that case, [the SRO's] duties showed that he was not a school official but rather a "police officer acting within police authority." He contends that [the SRO] was mainly responsible for maintaining a "safe learning environment," and preventing and discovering crime at Robinswood. He points out that [the officer's] duties as an SRO did not preempt his law enforcement duties and that [the officer] was available to assist other police officers with matters unrelated to the school even during his shift as an SRO. Moreover, he contends that [the SRO] was paid by the Bellevue Police Department, not by the Bellevue School District.
>
> We hold that under the facts of this case, [the SRO] was acting as a school official and the reasonable grounds standard applied. As the parties acknowledge, Washington courts have not decided whether SROs are school

officials for purposes of conducting student searches, but we find guidance in decisions from other jurisdictions.

The Illinois Supreme Court, in People v. Dilworth, 169 Ill.2d 195, 661 N.E.2d 310 (1996), held that the search of a student by a "liaison officer," a police officer employed by the police department and assigned full-time to an alternate high school, was governed by the reasonable suspicion standard rather than probable cause. The court noted that decisions from various jurisdictions [issued since the U.S. Supreme Court decided New Jersey v. T.L.O., 469 .S. 325 (1985) that involved police officers in school settings could generally be separated into three categories: "(1) those where school officials initiate a search where police involvement is minimal, (2) those involving school police or liaison officers acting on their own authority, and (3) those where outside police officers initiate a search." It noted that in cases involving the first or second category, most courts have applied the reasonable suspicion standard, while in cases involving the third category, most courts have required probable cause. The court held that the reasonable suspicion standard applied where the case was "best characterized as involving a liaison police officer conducting a search on his own initiative and authority, in furtherance of the school's attempt to maintain a proper educational environment."

Similarly, the Indiana Court of Appeals, in S.A. v. State, 654 N.E.2d 791, 795 (Ind. Ct. App. 1995) (overruled on other grounds, Alvey v. State, 911 N.E.2d 1248 (Ind. 2009)), rejected the argument that the school search standard did not apply to the search of a high school student's book bag because the police officer who conducted it was not a school official:

> While Officer Grooms is a trained police officer, he was acting in his capacity as security officer for the [Indianapolis Public School] schools. Grooms is employed by the [Indianapolis Public School Police Department] and as such, his conduct regarding student searches on school premises is governed by the test announced in [T.L.O.].

We hold that, like the officers in Dilworth and S.A., [the SRO here] was acting as a school official when he searched J.M.'s backpack. He was on duty as an SRO and acting under his authority as an SRO when he personally observed the activity that formed the basis for his search of J.M. Furthermore, though the McKinnon court did not address the issue of who can be considered a school official, its decision did suggest that the difference between a school official and law enforcement is that the latter is chiefly concerned with discovering and preventing crime. Because it is undisputed that [the SRO's] primary duties as an SRO were to maintain a safe, secure, and orderly learning environment, it is reasonable to infer that his chief duty was not the discovery and prevention of crime. Under these facts, the reasonable grounds standard applies.

2) Reasonable grounds to search

J.M. argues that even if [the SRO] was acting as a school official, he lacked reasonable grounds to search J.M.'s backpack. J.M. points out that, at the time of the search, (1) he had already been arrested and handcuffed; (2) the officer had already seized the backpack; and (3) he had no way to access the contents

of the backpack, so there was no reason to fear he might remove its contents, destroy them, or use them against anyone. J.M. argues that the search violated his privacy rights because there were no exigent circumstances justifying an immediate search, and an immediate search was not necessary to further the purpose of maintaining school discipline and order.

The State argues that [the SRO] had reasonable grounds to conduct the search because (1) he saw J.M. holding marijuana while standing only a foot away from his backpack and (2) the backpack had a padlock on it, justifiably arousing [the SRO's] suspicion of contraband, particularly when J.M. falsely claimed he did not have the key to the lock. The State also contends that there were exigent circumstances to make the search without delay because schools need the freedom to act swiftly to maintain discipline and order on school grounds. Moreover, the State argues, even if there were no exigent circumstances, there is no authority stating that all of the McKinnon factors must be met for a search to be found reasonable.

It is well settled that in the school search context, a reasonable search is one that is justified at its inception and reasonably related in scope to the facts that justified the interference in the first place. Ordinarily, "a search is justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." TLO. A search is "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." TLO.

Similarly, [the Washington] Supreme Court has held that "the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order." McKinnon. In determining whether a school official had reasonable grounds to search, Washington courts consider (1) the student's age, history, and school record; (2) the prevalence and seriousness of the problem in the school to which the search was directed; (3) the probative value and reliability of the information justifying the search; and (4) the exigency to make the search without delay. While all the factors need not be found, their total absence will render the search unconstitutional.

We hold that [the SRO here] had reasonable grounds to search J.M.'s locked backpack. [The SRO's] search was justified at its inception because, once [the SRO] observed J.M. standing at a sink with a medicine vial with what appeared to be marijuana in his hand, [the SRO] had reason to suspect that the backpack next to him also contained marijuana in violation of the law and school regulations. The search was permissible in its scope because [the SRO's] action in opening J.M.'s locked backpack was reasonably related to his objective to discover whether it contained additional marijuana.

In addition, at least two of the four McKinnon factors are met: (1) [the SRO] and dean of students Roderick noted the prevalence and seriousness of the drug problem at the school (both recalled five or six incidences in the past year alone where illegal substances were found), and (2) the probative value and reliability

of the information justifying the search was high, because [the SRO] personally saw J.M. holding what appeared to be marijuana while standing a foot away from his backpack. The record contains no evidence regarding J.M.'s age, history, and school record. Nor is there evidence in the record that exigent circumstances existed to conduct the search of the backpack immediately. *[Court's footnote: While the State argues that the need to maintain discipline and school order is an exigent circumstance justifying the search of J.M.'s backpack, it does not explain how, on the facts of this case, an immediate warrantless search furthered the school's interest in maintaining discipline and order on school grounds. This bald assertion, without more, is insufficient to establish an exigency justifying an immediate search.*]

But while the absence of those factors has some bearing on the reasonableness of the search, it does not, in and of itself, render the search unconstitutional. J.M. cites State v. Slattery, 56 Wn. App. 820, 787 P.2d 932 (1990) and State v. B.A.S., 103 Wn. App. 549 (2000) **Feb 01 LED:13** to argue that the absence of exigent circumstances made the search of his backpack unlawful. But his reliance on these cases is misplaced. In Slattery, school officials acted on a tip from a student that Slattery was selling marijuana in the school parking lot. They first searched Slattery, who was carrying $230 and a paper with a pager number written on it. They then searched his car, where they found a pager and a notebook with names and dollar amounts written inside. Inside the locked trunk they found a locked briefcase. Slattery first claimed that he did not know who owned the briefcase, but then said it belonged to a friend and that he did not know the combination. A security officer pried open the briefcase and found what appeared to be marijuana inside.

Slattery argued that the search of his car and the locked briefcase was unreasonable because the school search exception was limited and applied only to "unintrusive" searches. We disagreed, holding that school officials had reasonable grounds for suspecting that a search of Slattery would reveal evidence he had violated the law and that the search of his car and locked briefcase were reasonably related in scope to the circumstances justifying the initial interference. We noted that the presence of three out of four McKinnon factors supported our conclusion that the search was reasonable: (1) the information leading to the search was reliable, (2) there was a serious drug problem at the school, and (3) an exigent circumstance existed because Slattery or a friend could have removed the car and the evidence from school grounds.

J.M. correctly points out that here, there were no exigencies to make the search without delay, because he was already arrested and in handcuffs at the time of the search and could not access his backpack. But his argument that the search of his backpack was unlawful for that reason does not follow, and nothing we said in Slattery suggests otherwise. Indeed, the relevance of Slattery, as it pertains to this case, is that while we did not identify any exigencies with regard to the search of Slattery's locked briefcase, we nonetheless concluded that the search was justified. We found the search lawful because school officials had reasonable grounds to suspect that Slattery was in possession of marijuana and the search of the locked briefcase was within the scope of reasonable places to search for evidence of it. Likewise, in this case, we conclude that the search was justified because there were reasonable grounds to believe that J.M. was in

possession of marijuana, and the search of J.M.'s locked backpack was a place here evidence of more contraband was likely to be found.

Finally, B.A.S. does not, as J.M. contends, stand for the proposition that the search of a student is reasonable only if there is a reasonable concern of criminal conduct and there is an immediate need to determine whether those concerns are founded. Our ruling in B.A.S. that the search of a student was not supported by reasonable grounds was based mainly on our conclusion that there was no nexus between the suspected violation of the school's closed campus policy and the likelihood that the student had brought contraband onto campus. We noted that other factors "[lent] further support" to our conclusion that the search was not justified, only one of which was the lack of exigent circumstances. B.A.S.

In sum, we hold that [the SRO here] was acting as a school official during his search of J.M.'s backpack and that the reasonable grounds standard applied to the search. We further hold that under that standard, the search was constitutional.

[Some footnotes and citations omitted]

LED EDITORIAL COMMENT: This decision is the first in Washington addressing whether an arrest and search by a school resource officer acting independently in the school can qualify as a school search under special, relaxed state and federal constitutional rules for such searches. The decision appears to be consistent with decisions under the Fourth Amendment in other jurisdictions. At this time, the Washington courts have interpreted article I, section 7 of the Washington constitution as containing the same school search rule as that under the Fourth Amendment of the federal constitution. See State v. B.A.S., 103 Wn. App. 549 (Div. I, 2000) Feb 01 LED:13. But there is always the possibility that the Washington appellate courts will interpret article I, section 7 differently than the Fourth Amendment in the school search area of the law. As always, law enforcement officers and agencies are urged to consult with their legal advisors and/or prosecutors.

CORPUS DELICTI OF FIRST-DEGREE CHILD MOLESTATION ESTABLISHED

State v. Grogan, 158 Wn. App. 272 (Div. III, 2010)

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

In summer 2001, Sandra Holloway, Mr. Grogan's stepdaughter, was bathing six-year-old M.L. and M.L.'s sister at the Grogans' home. M.L. told Ms. Holloway, "Pap-pa or Pop-pa has touched me down there." When Ms. Holloway asked M.L. where she meant, M.L. pointed toward her vagina and pointed toward Mr. and Mrs. Grogan. Ms. Holloway removed M.L. from the home and reported her statements to [a police department detective].

On November 24, 2001, M.L. and her mother, Sandra Bowyer, were found murdered. In February 2003, Mr. Grogan voluntarily came in during the murder investigation for a polygraph examination conducted by [a detective]. Before and after the exam, Mr. Grogan was read and signed a waiver of rights form. [The detective] told Mr. Grogan he thought he was lying. He was then interviewed by

detectives without Miranda warnings. Mr. Grogan's statements included his sex-offense history and thoughts of molesting M.L.

In May 2006, the State charged Mr. Grogan with one count of first degree child molestation of M.L. Mr. Grogan's statements were allowed in evidence after a lengthy CrR 3.5 voluntariness hearing where custody was the sole dispute. The court held a pretrial child-hearsay hearing under RCW 9A.44.120, concluding M.L.'s statements to Ms. Holloway were admissible.

Ronald Bowyer (M.L.'s stepfather, Ms. Holloway's brother, and Mr. Grogan's stepson) testified that after M.L.'s funeral, Mr. Grogan told him, "I touched [M.L.] inappropriately."

Mr. Grogan did not call witnesses. The jury found Mr. Grogan guilty as charged. The court sentenced Mr. Grogan to life in prison without the possibility of release as a persistent offender. He appealed and this court affirmed [in its Grogan I decision reported in the **January 2009 LED** starting at page 2; in Grogan I, the Court of Appeals declined to address Mr. Grogan's corpus delecti].

Background regarding Washington Supreme Court remand order: After the Court of Appeals decided Grogan I, the Washington Supreme Court granted Grogan's petition for discretionary review, and the Supreme Court remanded the case for the Court of Appeals to consider whether the corpus delicti ruling of the Supreme Court in State v. Dow, 168 Wn.2d 243 (2010) **May 10 LED:21** was controlling in Mr. Grogan's favor.

ISSUE AND RULING: Where the child victim's admissible hearsay statement accused defendant Grogan of touching her vagina, and where defendant Grogan admitted to the child's stepfather that Grogan touched the child "inappropriately," was the corpus delicti of child molestation established such that Grogan's admissions to detectives could be used to support his conviction? (ANSWER BY COURT OF APPEALS: Yes – but see our LED Editorial Comment below regarding reliance on Grogan's statement to the child's stepfather as corroboration)

Result: Affirmance of Spokane County Superior Court conviction of Clifford James Grogan for first-degree child molestation.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The corpus delicti rule does not merely set a standard for the admission of [out of court] statements into evidence; it establishes that an uncorroborated confession is insufficient evidence to sustain a conviction as a matter of law unless independent proof shows that a crime occurred. State v. Aten, 130 Wn.2d 640 (1996). **March 97 LED:06**. "[T]he State must still prove every element of the crime charged by evidence independent of the defendant's statement." [State v. Dow, 168 Wn.2d 243 (2010) **May 10 LED:21**].

In 2003, our legislature enacted RCW 10.58.035, which modified the corpus delicti rule. This statute provides, "where independent proof of the corpus delicti is absent, and the alleged victim of the crime is dead or incompetent to testify, a lawfully obtained and otherwise admissible . . . statement of the defendant shall be admissible into evidence if there is substantial independent evidence that would tend to establish the trustworthiness of the . . . statement." RCW

10.58.035(1). The legislature provided a non-exclusive list of factors to consider in determining trustworthiness:

> (a) Whether there is any evidence corroborating or contradicting the facts set out in the statement, including the elements of the offense;
>
> (b) The character of the witness reporting the statement and the number of witnesses to the statement;
>
> (c) Whether a record of the statement was made and the timing of the making of the record in relation to the making of the statement; and/or
>
> (d) The relationship between the witness and the defendant.

RCW 10.58.035(2).

In Dow, the [Supreme] Court addressed whether RCW 10.58.035 changes the corpus delicti rule. Mr. Dow was charged with first degree child molestation. The victim was a three-year-old child, and the State conceded she was too young to testify. Consequently, her statements to others about the alleged offense were inadmissible. Mr. Dow and the child were the only people present at the time of the alleged offense. During a recorded police interview, Mr. Dow made statements regarding the events surrounding the alleged molestation. Mr. Dow moved to exclude his statements, arguing they were inadmissible for lack of corpus delicti (no such motion was made by Mr. Grogan.) The trial court found these statements to be inadmissible. Mr. Dow's case was dismissed. The State appealed. The Court of Appeals reversed [**see May 08 LED:22**] and the Supreme Court granted Mr. Dow's petition for review. Our Supreme Court held that RCW 10.58.035 pertained "only to admissibility and not to the sufficiency of evidence required to support a conviction." Thus, a statement may be admissible because it is trustworthy under RCW 10.58.035, but the State still has the burden of establishing all the elements of the crime.

To convict a defendant of first degree child molestation, the State must prove the defendant had "sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

Here, six-year-old M.L. confided to Ms. Holloway that "Pap-pa" touched her "down there." When Ms. Holloway asked M.L. where she meant, M.L. pointed to her vagina and then pointed to Mr. Grogan. These statements were found admissible in Grogan I. This evidence in conjunction with Mr. Bowyer's testimony that Mr. Grogan admitted inappropriately touching M.L. provide the necessary corroborative independent evidence of the corpus delicti of first degree child molestation. Because RCW 10.58.035 pertains to "when independent proof of the corpus delicti is absent," this statute does not apply. Thus, unlike in Dow, where no independent proof was present, the State has met its burden, providing evidence of each element of the crime charged independently of Mr. Grogan's

statement. Mr. Grogan's jury accepted this evidence as proof of his guilt beyond a reasonable doubt.

[Some citations omitted]

LED EDITORIAL COMMENT: The child victim's hearsay was sufficient by itself as corpus delicti corroboration. See, for example, State v. Biles, 73 Wn. App. 281 (Div. III, 1994) Nov 94 LED:19. So we think that the Court of Appeals made the correct ruling on corpus delicti. But we think that the Grogan Court went too far in asserting that the out-of-court admission of inappropriate touching by defendant Grogan to the child victim's stepfather was corroboration for corpus delicti proof purposes. The corpus delicti rule requiring proof that a crime occurred – independent of a defendants' out-of-court statements – applies to all out-of-court statements by a defendant to all other persons. The rule is not limited just to confessions to law enforcement officers. Defendant Grogan's admission to the child victim's stepfather is an out-of-court statement subject to the same corpus delicti independent proof requirement as the admission defendant Grogan made to the police. See, for example, State v. Ray, 130 Wn.2d 673 (1996) March 97 LED:11; State v. Neslund, 50 Wn. App. 531 (Div. I, 1988).

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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 (CJTC) 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 edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor 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 CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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