Law Enforcement Digest

DECEMBER 2009

650th Basic Law Enforcement Academy – June 16, 2009 through October 21, 2009

President:	Carlo R. Pace – Redmond Police Department
Best Overall:	Russ T. Leighton – Mount Vernon Police Department
Best Academic:	Derek R. Tiplin – Redmond Police Department
Best Firearms:	Russ T. Leighton – Mount Vernon Police Department
Tac Officer:	Officer Mike O'Neill – Olympia Police Department

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2009 LED SUBJECT MATTER INDEX

2009 LED SUBJECT MATTER INDEX – LED EDITORIAL NOTE: Our annual LED subject matter index covers all LED entries from January 2009 through and including this December 2009 LED. Since 1988, we have published an annual index each December. Also, since establishing the LED as a monthly publication in 1979, we have published

several multi-year subject matter indexes: a 10-year index of LEDs from January 1979 through December 1988; a 5-year subject matter index from January 1989 through December 1993; a 5-year index from January 1994 through December 1998; a 5-year index from January 1999 through December 2003; and a 5-year index from January 2004 through December 2008. The 1989-1993, 1994-1998, 1999-2003, and 2004-2008 indexes, as well as monthly issues of the LED starting with January of 1992, are available on the "Law Enforcement Digest" internet page of the Criminal Justice Training Commission (CJTC) – go to CJTC Home Page at: https://fortress.wa.gov/cjtc/www and click on "Law Enforcement Digest."

ACCOMPLICE LIABILITY (RCW 9A.08.020)

Accomplice liability statute does not make unarmed rioter guilty of felony riot. State v. Montejano, 147 Wn. App. 696 (Div. III, 2008) – March 09:25

Where motor vehicle passenger was injured in a DUI crash, she was a "victim" under RCW 9A.08.020(5), and therefore she could not lawfully be convicted of DUI as an accomplice. City of Auburn v. Hedlund, 165 Wn.2d 645 (2009) – July 09:19

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. State v. Bobenhouse, 166 Wn.2d 881(2009) – October 09:14

ARREST, STOP AND FRISK

Car frisk for gun was reasonable after cuffing suspect beside the car from which he was seized. State v. Chang, 147 Wn. App. 490 (Div. I, 2008) – January 09:03

Asking occupants of a legally parked car what they were doing and requesting identification was not a "seizure." State v. Afana, 147 Wn. App. 843 (Div. III, 2008) – January 09:07 Status: The Washington Supreme Court has granted review.

Under totality of circumstances, passenger in legally parked car was "seized" where officer told driver that she was not free to leave, and then told passenger that his laundry story was "suspicious" and asked him for identification. State v. Beito, 147 Wn. App. 504 (Div. III, 2008) – January 09:09

Officer had reasonable suspicion for a Terry stop in light of his corroboration of frightened woman's report that two men had asked her to get into their car to go with them to smoke crack cocaine. State v. Lee, 147 Wn. App. 912 (Div. I, 2008) – February 09:11

Arizona officer had Fourth Amendment Terry frisk authority during traffic stop while questioning passenger about possible gang affiliation (Washington law likely differs, however). Arizona v. Johnson, 129 S.Ct. 781 (2009) – March 09:03

Where police are merely negligent in failing to update police computer re arrest warrant, exclusionary rule of Fourth Amendment does not require suppression of evidence seized in search incident to arrest (Washington law likely differs, however). Herring v. U.S., 129 S.Ct. 695 (2009) – March 09:03

"Fellow Officer Rule," plus flimsiness of suspect's claim that she thought a casino ticket had been abandoned, add up to probable cause to arrest her for theft of the casino ticket. State v. Wagner-Bennett, 148 Wn. App. 538 (Div. I, 2009) – March 09:15

Ninth Circuit 3-judge panel reverses itself and holds officers had qualified immunity from Civil Rights Act liability in arrest of person who passed a $100 bill that appeared to be counterfeit, but turned out to be real. Rodis v. City and County of San Francisco, 558 F.3d 964 (9th Cir. 2009) (decision filed March 9, 2009) – April 09:04

Less-than-two-minute visit to known drug house at 3:20 a.m. by person unknown to police officer held to provide officer with reasonable suspicion that justified stopping the suspect's car as he drove away. State v. Doughty, 148 Wn. App. 585 (Div. III, 2009) – April 09:14 Status: The Washington Supreme Court has granted review.

Frisk held not supported by reasonable belief of danger, and therefore officer held not entitled to qualified immunity from civil liability under 42 U.S.C. Section 1983 (Federal Civil Rights Act). Ramirez v. City of Buena Park, 560 F.3d 1012 (9th Cir. 2009) (decision filed March 25, 2009) – May 09:08

Bench warrant for failure to obey sentencing to work crew did not require new probable cause determination or sworn statement; warrant also was not stale. State v. Bishop, 149 Wn. App. 439 (Div. II, 2009) – May 09:14

Seizure of drugs based on "plain feel" through coin pocket of pants held unlawful because officer manipulated baggie after determining with his sense of touch that the baggie was not a weapon, and that it did not contain a weapon. State v. Garvin, 166 Wn.2d 242 (2009) – July 09:18

Informant-based reasonable suspicion standard of Terry v. Ohio met to justify seizure of drug suspect; also, Miranda warnings were not required prior to questioning Terry stop detainee. State v. Marcum, 149 Wn. App. 894 (Div. I, 2009) – August 09:17

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. Stoot v. City of Everett, 2009 WL 2461901 (2009) (decision filed August 13, 2009) – October 09:08 (amended decision filed September 18, 2009, reported at 582 F.3d 910 – none of the amendments were of significance)

Facts similar to those in Terry v. Ohio support stop and frisk. U.S. v. Johnson, 584 F.3d 994 (9th Cir. 2009) (decision filed September 10, 2009) – November 09:02

Extraterritorial arrest: reckless driving does not qualify per se as an "emergency involving an immediate threat to human life or property" under RCW 10.93.070(2). State v. King, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3298059 (2009) – December 09:21

ARSON (Chapter 9A.48 RCW)

Dead body is not a "human being" under first degree arson statute. State v. Bainard, 148 Wn. App. 93 (Div. III, 2009) – March 09:24

ASSAULT AND RELATED OFFENSES (Chapter 9A.36 RCW)

Rough "rabid dog" game in which father bit and bruised his 4-month-old child's face results in second degree assault conviction. State v. Hovig, 149 Wn. App. 1 (Div. II, 2009) – May 09:21

"Intent" in Washington's first degree assault statute includes the broad concept of "transferred intent." State v. Elmi, 166 Wn.2d 209 (2009) – August 09:15

Floor can be an "instrument or thing likely to produce bodily harm" under third degree assault statute where there is evidence that defendant had his arm around victim's neck and rode him to the floor. State v. Marohl, 151 Wn. App. 469 (Div. II, 2009) – September 09:23

BAIL JUMPING (RCW 9A.76.170)

Bail jumping is classified for sentencing purposes based on charge existing at time of jump, not on ultimate disposition of that charge. State v. Coucil, 151 Wn. App. 131 (Div. I, 2009) – September 09:19

BURGLARY (Chapter 9A.52 RCW)

Burglary of mother's locked bedroom – evidence of implied bar to son's entry of room can support burglary charge. State v. Cantu, 156 Wn.2d 819 (2006) – March 09:13

"Abandoned building" defense held not applicable in prosecution for second degree burglary. State v. Jensen, 149 Wn. App. 393 (Div. II, 2009) – May 09:18

Phrase, "fenced area," in RCW 9A.04.110(5)'s definition of "building" receives a narrowing construction in a burglary case; area (a) must be "curtilage" or its non-dwelling-building equivalent, and also (b) must be completely enclosed (1) by fencing alone or (2) a combination of fencing and a structure that meets the ordinary sense of "building." State v. Engel, 166 Wn.2d 572 (2009) – September 09:10

Previously "trespassed" person caught shoplifting held guilty of burglary, not just trespassing, for two alternative reasons. State v. Morris, 150 Wn. App. 927 (Div. II, 2009) – September 09:13

CIVIL LIABILITY

The proof standard in section 1983 federal civil rights case involving officer's urgent use of deadly force focuses on whether officer "acted with a purpose to harm . . . unrelated to legitimate law enforcement objectives." Porter v. Osborn, 546 F.3d 1131 (9th Cir. 2008) (decision filed October 20, 2008) – January 09:02

Washington State Patrol may be liable for damages based on former WSP policy of mandatory impound of vehicles of suspended drivers. Potter v. Washington State Patrol, 165 Wn.2d 67 (2008) – January 09:03

County government is civilly liable for workplace discrimination by its elected prosecutor because the county is a single unit of government. Broyles v. Thurston County, 147 Wn. App. 409 (Div. II, 2008) – January 09:23

Civil Rights Act: No qualified immunity in case where plaintiffs allege detectives violated Brady due process requirement that officers share exculpatory evidence with

prosecutor's office re pending criminal case. Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) (decision filed December 8, 2008) – February 09:05

Case must go to trial on issue of whether officer violated First Amendment when he ordered voter-registrant/signature-gatherer to move her table from a public sidewalk where a specially permitted "cook-off" was being held by a private business. Dietrich v. John Ascuaga's Nugget, 548 F.3d 892 (9th Cir. 2008) (decision filed December 1, 2008) – March 09:09

Free speech: Seattle's parade ordinance that limits marching in the street held to give police chief too much discretion. Seattle Affiliate Of The October 22nd Coalition To Stop Police Brutality, Repression And Criminality Of A Generation v. City of Seattle, 550 F.3d 788 (9th Cir. 2008) (decision filed December 12, 2008) – March 09:09

Ninth Circuit 3-judge panel reverses itself and holds officers had qualified immunity from Civil Rights Act liability in arrest of person who passed what appeared to be a counterfeit bill. Rodis v. City and County of San Francisco, 558 F.3d 964 (9th Cir. 2009) (decision filed March 9, 2009) – April 09:04

Payton rule requiring warrant before officers make forcible arrest from residence held not applicable to 12-hour standoff because for standoffs exigency is deemed to exist from start to finish. Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) (decision filed March 9, 2009) – April 09:04

No qualified immunity from federal Civil Rights Act liability for officer alleged to have deliberately fabricated evidence. McSherry v. City of Long Beach, 560 F.3d 1125 (9th Cir. 2009) (decision filed March 30, 2009) – May 09: 06 – Note that the 3-judge panel subsequently reversed itself in superseding decision filed October 20, 2009; see below this topic.

Frisk held not supported by reasonable belief of danger, and therefore officer held not entitled to qualified immunity from civil liability under 42 U.S.C. Section 1983 (Federal Civil Rights Act). Ramirez v. City of Buena Park, 560 F.3d 1012 (9th Cir. 2009) (decision filed March 25, 2009) – May 09:08

Search warrant overbroad but officers are held immune from Civil Rights liability where deputy prosecutor had approved it, and officers' belief warrant was supported by probable cause was reasonable. Millender v. County of Los Angeles, 564 F.3d 1143 (9th Cir. 2009) (decision filed May 6, 2009) – August 09:15 Status: This decision by a 3-judge panel is being reconsidered by an 11-judge panel.

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. Stoot v. City of Everett, 2009 WL 2461901 (2009) (decision filed August 13, 2009) – October 09:08 (amended decision filed September 18, 2009, reported at 582 F.3d 910 – none of the amendments were of significance)

3-judge panel reverses itself and grants summary judgment to detective and his law enforcement agency in Civil Rights Act case where plaintiff alleges that detective fabricated evidence. McSherry v. City of Long Beach, ___ F.3d ___, 2009 WL 3353043 (9th Cir. 2009) (decision filed October 20, 2009) – December 09:17

CORPUS DELICTI RULE (Common law and RCW 10.58.035)

Corpus delicti rule does not bar from evidence defendant's admission to police regarding a gun being in his residence – other evidence supported the conclusion that the gun was there at the time. State v. Page, 147 Wn. App. 849 (Div. II, 2008) – March 09:23

Corpus delicti rule: Child's testimony that defendant attempted to have intercourse was sufficient corroboration to support admission into evidence of defendant's confession to penetration. State v. Angulo, 148 Wn. App. 642 (Div. III, 2009) – September 09:24

CRIMINAL RULE 4.7

While charges are pending, court may lawfully order taking of defendant's DNA based on probable cause – warrant not required in addition to the court order. State v. Garcia-Salgado, 149 Wn. App. 702 (Div. I, 2009) – November 09:14 Status: The Washington Supreme Court has granted review.

DISCOVERY OF EVIDENCE BY DEFENDANT

Defendant entitled to better access to his computer records. State v. Dingman, 149 Wn. App. 648 (Div. II, 2009) – May 09:22

DOUBLE JEOPARDY

Double jeopardy statute does not preclude prosecutions for drunk driving in both Washington and Oregon on the same evening. State v. Rivera-Santos, 166 Wn.2d 722 (2009) – October 09:15

DOMESTIC VIOLENCE (INCLUDING PROTECTION ORDER VIOLATIONS)

DVPA protection order cannot be issued to protect 14-year-old because definition of "family or household member" not met. Neilson v. Blanchette, 149 Wn. App. 111 (Div. III, 2009) – April 09:21

DUE PROCESS, INCLUDING BRADY REQUIREMENTS ON GOVERNMENT

Civil Rights Act: No qualified immunity in case where plaintiffs allege detectives violated Brady due process requirement that officers share exculpatory evidence with prosecutor's office re pending criminal case. Tennison v. City and County of San Francisco, 548 F.3d 1293 (9th Cir. 2008) (decision filed December 8, 2008) – February 09:05

Brady problem of prosecutor not sharing with the defense attorney evidence indicating questionable credibility of the government's star witness requires reversal of conviction regardless of whether or not the lead detective gave the information to the prosecutor. U.S. v. Price, 566 F.3d 900 (9th Cir. 2009) (decision filed May 21, 2009) – August 09:13

Federal constitution's due process clause does not provide a right to post-conviction DNA testing; statutes provide the only remedies. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S.Ct. 2308 (2009) – September 09:03

ELECTRONIC SURVEILLANCE AND RECORDING (Chapter 9.73 RCW)

Under State v. Modica, pre-trial detainee had no privacy protection against recording of phone call from King County Jail. State v. Archie, 148 Wn. App 198 (Div. I, 2009) – March 09:22

EVIDENCE LAW

No "custody" and hence no need for Miranda warnings to suspected child molester who came to station voluntarily for polygraph; also, hearsay re statement of deceased six-year-old determined reliable. State v. Grogan, 147 Wn. App. 511 (Div. III, 2008) – January 09:11

14-year-old rape suspect who was questioned with his mother present in his neighbor's bedroom was not in Miranda custody; Court also rules that victim was competent to testify. State v. S.J.W., 149 Wn. App. 912 (Div. I, 2009) – August 09:22

Witnesses who were previously acquainted with defendant lawfully testified that he was the shooter in cab surveillance photos; also, defendant's privacy rights did not preclude state from presenting evidence that defendant had refused to provide a voice exemplar. State v. Collins, 216 Wn. App. 463 (Div. I, 2009) – November 09:11

Trial court's admission of child hearsay statements upheld under analysis of the 9 Ryan factors. State v. Kennealy, 151 Wn. App. 861 (Div. II, 2009) – November 09:18

Gang affiliation evidence held inadmissible under ER 404(b) because such evidence was not shown to be a reason or a motive for the crimes that the state was prosecuting. State v. Scott, 151 Wn. App. 520 (Div. III, 2009) – November 09:22

EX POST FACTO LAWS (CONSTITUTIONAL PROTECTION AGAINST)

Federal law for sex offender registration: Retroactive application held to violate constitutional ex post facto protection. U.S. v. Juvenile Male (S.E.), 581 F.3d 977 (9th Cir. 2009) (decision filed September 10, 2009) – November 09:09

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION (NON-INTERROGATION CIRCUMSTANCES)

Detective's testimony characterizing defendant as "evasive" held to be grounds for mistrial in child rape case. State v. Hager, ___ Wn. App. ___, 216 P.3d 438 (Div. II, 2009) – October 09:22

FIREARMS LAWS (Chapter 9.41 RCW) AND OTHER WEAPONS LAWS

Juvenile court adjudication as class a felony sex offender permanently precludes restoration of firearms rights under RCW 9.41.040. State v. Hunter, 147 Wn. App. 177 (Div. I, 2008) – January 09:25

Corpus delicti rule does not bar from evidence defendant's admission to police regarding a gun being in his residence – other evidence supported the conclusion that the gun was there at the time. State v. Page, 147 Wn. App. 849 (Div. II, 2008) – March 09:23

Federal statute that bars possession of guns by those convicted of "a misdemeanor crime of domestic violence" does not require that the underlying misdemeanor crime

have as an element a domestic relationship between the perpetrator and the victim. U.S. v. Hayes, 129 S.Ct. 1079 (2009) – April 09:03

In unlawful possession prosecution under RCW 9.41.040, antique replica gun held to be a "firearm" as defined in RCW 9.41.010(1), despite fact that defendant was not in possession of flint, flint-wrap, gunpowder, ball shot and wadding. State v. Releford, 148 Wn. App. 478 (Div. I, 2009) – April 09:22

Retail store loses federal license to sell firearms, in part because store did not send purchasers' handgun applications to chief of police or to sheriff of purchaser's place of residence per RCW 9.41.090(5). The General Store v. Van Loan, 560 F.3d 920 (9th Cir. 2009) (decision filed March 31, 2009) – May 09:11

FORCED USED BY LAW ENFORCEMENT (**See "Civil Liability")**

FORFEITURE LAW (See also "Uniform Controlled Substances Act")

No attorney fee award in drug forfeiture case – family of deceased was not "prevailing party" where family won as to car and $9342 in cash, but lost as to another $57,990 in cash. Guillen v. Contreras, 147 Wn. App. 326 (Div. III, 2008) – January 09:22 Status: The Washington Supreme Court has granted review.

Drug forfeiture statute: "knowledge" for purposes of "innocent owner" claim to property gets narrow, anti-government interpretation. In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle and In the Matter of the Forfeiture of One 2004 Nissan Sentra, 166 Wn.2d 834 (2009) – October 09:12

No "innocent owner" claim is available to estate where marijuana grower's residential property was seized prior to his death. Snohomish Regional Drug Task Force v. Real Property Known As 414 Newberg, 151 Wn. App. 743 (Div. I, 2009) – October 09:21

"In pari delicto" theory justifies government's retention of money that criminal paid for documents in sting. Kardoh v. U.S., 572 F.3d 697 (9th Cir. 2009) (decision filed July 10, 2009) – November 09:10

FREEDOM OF SPEECH (FIRST AMENDMENT)

Case must go to trial on issue of whether officer violated First Amendment when he ordered voter-registrant/signature-gatherer to move her table from a public sidewalk where a specially permitted "cook-off" was being held by a private business. Dietrich v. John Ascuaga's Nugget, 548 F.3d 892 (9th Cir. 2008) (decision filed December 1, 2008) – March 09:09

Free speech: Seattle's parade ordinance that limits marching in the street held to give police chief too much discretion. Seattle Affiliate Of The October 22nd Coalition To Stop Police Brutality, Repression And Criminality Of A Generation v. City of Seattle, 550 F.3d 788 (9th Cir. 2008) (decision filed December 12, 2008) – March 09:09

GAMBLING (Chapter 9.46 RCW)

Prohibition of internet gambling does not violate commerce clause of federal constitution. Rousso v. State of Washington, 149 Wn. App. 344 (Div. I, 2009) – May 09:23

"Honor-based" internet betting service is not engaged in: (1) "gambling" because the service requires all users to agree that all bets are non-binding; or (2) "bookmaking" because the service does not take a position on the bets. Internet Community & Entertainment Corp. v. State of Washington, 148 Wn. App. 795 (Div. II, 2009) – May 09:23

GOVERNMENTAL MISMANAGEMENT OF PROSECUTION

Robbery and other charges dismissed for government mismanagement of case and for discovery violations. State v. Brooks, 149 Wn. App. 373 (Div. I, 2009) – May 09:22

HARASSMENT (Chapter 9A.46 RCW) (See also "Telephone Harassment")

Defendant's challenges to his telephone harassment convictions for voicemail message to police officer rejected. State v. Alphonse, 147 Wn. App. 891 (Div. I, 2008) – March 09:23

IMPLIED CONSENT, BREATH AND BLOOD TESTS FOR ALCOHOL

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 ___, 215 P.3d 194 (2009) – October 09:10

INDIANS (NATIVE AMERICANS) AND LAW ENFORCEMENT

Tribal officers have authority to pursue non-Indian traffic law violators from reservation and to make a stop off the reservation to hold for city, county or State agency officers. State v. Eriksen, ___ Wn.2d ___, 216 P.3d 382 (2009) – November 09:11

INTERROGATIONS AND CONFESSIONS (See also "Sixth Amendment Right to Counsel)

No "custody" and hence no need for Miranda warnings to suspected child molester who came to station voluntarily for polygraph; also, hearsay re out-of-court statement of six-year-old (who died before trial) determined reliable. State v. Grogan, 147 Wn. App. 511 (Div. III, 2008) – January 09:11

Warrantless emergency home search to look for child sex victim ok, as was protective sweep, but follow-up warrantless entry and pre-warrant walk-through not ok; also, detective's post-Miranda-invocation statements to suspect: 1) telling suspect that officer would be seeking a search warrant, and 2) stating age of victim were not "interrogation," so incriminating response was volunteered. State v. Sadler, 147 Wn. App. 97 (Div. I, 2008) – January 09:18

Custodial suspect's ambiguous statements regarding his attorney's advice did not constitute invocation of Miranda rights. Sechrest v. Ignacio, 549 F.3d 789 (9th Cir. 2008) (decision filed December 5, 2008) – February 09:02

Confession by inexperienced 17-year-old suspect in mass murder case held involuntary where the 4 questioning officers: 1) chose not to involve his parents, 2) downplayed the Miranda warnings, 3) questioned him through the night for 12 hours straight, 4) for an extended period continued asking him essentially the same questions despite his silence, and 5) told him numerous times that he "had to" answer their questions. Doody v. Shriro, 548 F.3d 847 (9th Cir. 2008) (decision filed November 20, 2008) – March 09:04 (Note

that on May 12, 2009, the Ninth Circuit withdrew the November 20, 2008 decision of the 3-judge panel and set this case for review by an 11-judge panel.)

Even though interrogating officer's promise to suspect that the suspect would not be charged with vandalism was not proper, that fact alone did not make the suspect's confession involuntary. State v. Unga, 165 Wn.2d 95 (2008) – March 09:15

2-1 majority rules in a "close case" that there was no Miranda custody in questioning of suspect at his place of work. U.S. v. Bassignani, 560 F.3d 989 (9th Cir. 2009) (decision filed March 25, 2009) – May 09:10

Sixth Amendment initiation-of-contact rule of Michigan v. Jackson is eliminated in a 5-4 decision. Montejo v. Louisiana, 129 S.Ct. 2079 (2009) – July 09:15

Informant-based reasonable suspicion standard of Terry v. Ohio met to justify seizure of drug suspect; also, Miranda warnings were not required before Terry stop questioning. State v. Marcum, 149 Wn. App. 894 (Div. I, 2009) – August 09:17

14-year-old rape suspect who was questioned with his mother present in his neighbor's bedroom was not in Miranda custody; Court also rules that victim was competent to testify. State v. S.J.W., 149 Wn. App. 912 (Div. I, 2009) – August 09:22

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. Stoot v. City of Everett, ___ F.3d ___, 2009 WL 2461901 (2009) (decision filed August 13, 2009) – October 09:08 (amended decision filed September 18, 2009, reported at 582 F.3d 910 – none of the amendments were of significance)

INTIMIDATING A PUBLIC SERVANT (RCW 9A.76.280)

Evidence of attempt-to-influence element of "intimidating a public servant" held sufficient to prosecute man threatening to "kick [arresting officer's] ass." State v. Montano, 147 Wn. App. 543 (Div. III, 2008) – February 09:18 Status: The Washington Supreme Court has granted review.

LEGISLATIVE UPDATE FOR 2009 WASHINGTON LEGISLATURE

Part One – May 09:03

Part Two – June 09:01

Part Three – July 09:02

Year 2009 Washington Legislative Update Index – July 09:12

LINEUPS, PHOTO IDS, SHOWUPS, AND OTHER WITNESS ID ISSUES

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, 151 Wn. App. 504 (Div. III, 2009) - October 09:18

MEDICAL USE OF MARIJUANA (See "Uniform Controlled Substances Act")

MINOR IN POSSESSION (RCW 66.44.270)

Evidence held not sufficient to support possession element of minor in possession by consumption charge. State v. Francisco, 148 Wn. App. 168 (Div. III, 2009) – April 09:18

MUTUAL AID PEACE OFFICER POWERS ACT (Chapter 10.93 RCW)

Extraterritorial arrest: reckless driving does not qualify per se as an "emergency involving an immediate threat to human life or property" under RCW 10.93.070(2). State v. King, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3298059 (2009) – December 09:21

OUTRAGEOUS GOVERNMENT MISCONDUCT

No outrageous government misconduct in: 1) alleged deception by detective in talking to victims, witnesses and their family members; or in 2) alleged coaching of witnesses by victims' advocate. State v. Wiatt, 151 Wn. App. 22 (Div. II, 2009) – November 09:16

POSSESSING STOLEN PROPERTY (Chapter 9A.56 RCW) (See also "Theft")

Possessing stolen checking account numbers constituted possession of stolen access devices. State v. Chang, 147 Wn. App. 490 (Div. I, 2008) – January 09:03

POST-CONVICTION DNA TESTING RIGHT

Statute authorizing post-conviction testing of DNA evidence at defense request gets a relatively narrow interpretation. State v. Riofta, 166 Wn.2d 358 (2009) – August 09:16

Federal constitution's due process clause does not provide a right to post-conviction DNA testing; statutes provide the only remedies. Dist. Attorney's Office for the Third Judicial Dist. v. Osborne, 129 S.Ct. 2308 (2009) – September 09:03

Defendant meets RCW 10.73.170's test for post-conviction DNA testing. State v. Gray, ___ Wn. App. ___, 215 P.3d 961 (Div. I, 2009) – October 09:23

PREEMPTION BY STATE LAW OF LOCAL ORDINANCES

City littering ordinance, which has criminal sanctions, held not preempted by state littering law, which has only civil sanctions. State v. Kirwin, 165 Wn.2d 818 (2009) – May 09:13

PUBLIC RECORDS ACT (Chapter 42.56)

Public records request must be sent to agency's designated person. Parmelee v. Clark, 148 Wn. App. 748 (Div. I, 2008) – April 09:23

Oral request can constitute a public records request under chapter 42.56 RCW, but in Beal case a request at a public meeting for information did not constitute a request for public records. Beal v. City of Seattle, 150 Wn. App. 865 (Div. I, 2009)) – September 09:20

RAPE AND OTHER SEX OFFENSES (Chapter 9A.44 RCW)

Consenting sexual intercourse between a high school teacher and his 18-year-old student held not criminal; court dismisses charge of first degree sexual misconduct with a minor. State v. Hirschfelder, 148 Wn. App. 328 (Div. II, 2009) – March 09:21 Status: The Washington Supreme Court has granted review.

"Detained" under custodial sexual assault statute gets broad reading. State v. Torres, 151 Wn. App. 378 (Div. I, 2009) – September 09:19

Corpus delicti rule: Child's testimony that defendant attempted to have intercourse was sufficient corroboration to support admission into evidence of defendant's confession to penetration. State v. Angulo, 148 Wn. App. 642 (Div. III, 2009) – September 09:24

Evidence held to be sufficient to support conviction for attempted second degree rape of a child. State v. White, 150 Wn. App. 337 (Div. II, 2009) – September 09:25

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. State v. Bobenhouse , 166 Wn.2d 881 (2009) – October 09:14

RES JUDICATA AND COLLATERAL ESTOPPEL

Acquittal in criminal prosecution under beyond-a-reasonable-doubt proof standard does not preclude probation revocation based on same conduct but determined under lower proof standard. City of Aberdeen v. Regan, 147 Wn. App. 538 (Div. II, 2008) – April 09:17

SEARCHES (See also "Arrest, Stop and Frisk")

Community caretaking exception to warrant requirement

Warrantless emergency home search to look for child sex victim ok, as was protective sweep, but follow-up warrantless entry and pre-warrant walk-through not ok; also, detective's post-Miranda-invocation statements to suspect: 1) telling suspect that officer would be seeking a search warrant, and 2) stating age of victim were not "interrogation," so incriminating response was volunteered. State v. Sadler, 147 Wn. App. 97 (Div. I, 2008) – January 09:18

Where uncle was outside hotel room he was sharing with his nephew when uncle complained to police about nephew, community caretaking exception to constitutional warrant requirement did not support forcible police entry; also, uncle's consent did not support entry of room without nephew's consent. State v. Williams, 148 Wn. App. 585 (Div. II, 2009) – April 09:05

Consent search exception to warrant requirement

Washington Department of Fish and Wildlife officer's consent request while in suspect's driveway asking to see cow elk carcasses did not need Ferrier warnings.
State v. Overholt, 147 Wn. App. 92 (Div. III, 2008) – January 09:15

2-1 majority holds Ferrier warnings were required to obtain consent to search house for person that officer believed had been involved in a 3 a.m. one-car rollover accident. State v. Freepons, 147 Wn. App. 689 (Div. III, 2008) – February 09:14

Where uncle was outside hotel room he was sharing with his nephew when uncle complained to police about nephew, community caretaking exception to constitutional warrant requirement did not support forcible police entry; also, uncle's consent did not support entry of room without nephew's consent. State v. Williams, 148 Wn. App. 585 (Div. II, 2009) – April 09:05

Consent by residential co-occupant # 1 after her release from handcuffs held voluntary; absence of arrested residential co-occupant # 2 at time of police request to co-occupant # 1 for consent held not pretextual circumstance because officers did not purposely orchestrate the absence of co-occupant # 2 to prevent his objection. U.S. v. Brown, 563 F.3d 410 (9th Cir. 2009) (decision filed April 17, 2009) – August 09:06

Consent by conditional use permit holder to future administrative searches by county staff held voluntary. Bonneville v. Pierce County, 148 Wn. App. 500 (Div. II, 2009) – September 09:23

Emergency and exigent circumstances exceptions to warrant requirement (See also "Community Caretaking" subtopic under "Searches")

Warrantless emergency home search to look for child sex victim ok, as was protective sweep, but follow-up warrantless entry and pre-warrant walk-through not ok; also, detective's post-Miranda-invocation statements to suspect 1) telling suspect that officer would be seeking a search warrant and 2) stating age of victim were not "interrogation," so incriminating response was volunteered. State v. Sadler, 147 Wn. App. 97 (Div. I, 2008) – January 09:18

Exigent circumstances: Officers at residence investigating theft of tanker truck carrying anhydrous ammonia were justified in warrantless residence search for disappearing gun and for possible third methamphetamine manufacturing suspect. State v. Smith, 165 Wn.2d 511 (2009) – March 09:10

Probable cause as to DUI, plus the scientific fact that alcohol dissipates in the body over time, held not to add up to exigent circumstances supporting reaching through doorway to arrest man suspected of being intoxicated and of having driven drunk about one hour earlier. State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) – July 09:20

Entry of private premises to arrest (Payton/Steagald rules)

Payton rule requiring warrant before officers make forcible arrest from residence held not applicable to 12-hour standoff because for standoffs exigency is deemed to exist from start to finish. Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) (decision filed March 9, 2009) – April 09:04

Exclusionary rule

2-1 majority rules that subjective intent of officers at the time that they unlawfully searched car's trunk precludes application of "independent source" exception to the exclusionary rule. State v. Perez, 147 Wn. App. 141 (Div. II, 2008) – January 09:24

Where police are merely negligent in failing to update police computer re arrest warrant, exclusionary rule of Fourth Amendment does not require suppression of evidence seized

in search incident to arrest (Washington law likely differs, however). Herring v. U.S., 129 S.Ct. 695 (2009) – March 09:03

Fourth Amendment "good faith" exception to exclusionary rule held not applicable to a search incident to arrest in violation of the rule announced in Arizona v. Gant. U.S. v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) (decision filed August 24, 2009) – November 09:10

Impound/inventory exception to warrant requirement

Washington State Patrol may be liable for damages based on former policy of mandatory impound of vehicles of suspended drivers. Potter v. Washington State Patrol, 165 Wn.2d 67 (2008) – January 09:03

Incident to arrest (MV) exception to warrant requirement

Car search held not lawfully incident to arrest because record from suppression hearing failed to show how close defendant was to car at time of arrest. State v. Webb, 147 Wn. App. 264 (Div. I, 2008) – January 09:23

"Bright line" rule of Fourth Amendment for search incident to arrest recent MV occupant disappears – if officers have secured the arrestee, then, unless officers have "reason to believe" evidence of the particular offense for which arrest is made is in the vehicle's passenger compartment, they may not search that area incident to arrest. Arizona v. Gant, 129 S.Ct. 1710 (2009) – June 09:13

Police entry into "immediately adjoining area" held lawful as incidental to arrest per Buie, and plain view seizure of gun upheld. U.S. v. Lemus, 582 F.3d 958 (9th Cir. 2009) (decision filed September 22, 2009) – November 09:05

Retroactivity of Arizona v. Gant and waiver addressed in conflicting Division Two Court of Appeals decisions. State v. McCormick, ___ Wn. App. ___, 216 P.3d 475 (Div. II, 2009); State v. Millan, 151 Wn. App. 492 (Div. II, 2009) – November 09:21

Article I, section 7 of the Washington constitution held to contain the search-incident rule of Arizona v. Gant. State v. Patton, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 (2009) – December 09:17

Overbreadth

Distinction between Fourth Amendment concepts of search warrant "particularity" and "overbreadth" explained; Court also addresses whether search warrant should specify what crimes are suspected. U.S. v. SDI Future Health, 568 F.3d 684 (9th Cir. 2009) (amended decision filed June 1, 2009) – August 09:12

Particularity requirement

Search under warrant upheld: warrant's description of shed was adequate, and the informant-based probable cause test was met. State v. Danielson, 148 Wn. App. 666 (Div. II, 2009) - April 09:12

Distinction between Fourth Amendment concepts of search warrant "particularity" and "overbreadth" explained; Court also addresses whether search warrant should specify

what crimes are suspected. U.S. v. SDI Future Health, 568 F.3d 684 (9th Cir. 2009) (amended decision filed June 1, 2009) – August 09:12

Plain view

Intercepted non-private phone call from jail in which felon talked in semi-code about gun at residence did not waive his fourth amendment privacy interest against a search at the residence; court distinguishes past decisions holding that telling police the contents of a nearby container is like placing the contents in a transparent container. U.S. v. Monghur, 576 F.3d 1008 (9th Cir. 2009) (decision filed August 11, 2009) – October 09:02

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. U.S. v. Comprehensive Drug Testing, Inc. (and two other cases consolidated for appeal), 579 F.3d 989 (9th Cir. 2009) (decision filed August 26, 2009) – October 09:06

Privacy expectation

Fourth Amendment does not permit officers to forcibly take a cheek swab from a pre-trial indecent exposure detainee for DNA testing to help solve "cold cases" where the officers do not have a search warrant, court order, express statutory authority or even reasonable suspicion of any specific crime under investigation. Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009) (decision filed June 23, 2009) – September 09:03

Intercepted non-private phone call from jail in which felon talked in semi-code about gun at residence did not waive his fourth amendment privacy interest against a search at the residence; court distinguishes past decisions holding that telling police the contents of a nearby container is like placing the contents in a transparent container. U.S. v. Monghur, 576 F.3d 1008 (9th Cir. 2009) (decision filed August 11, 2009) – October 09:02

Police entry of and search in common area of secured multi-unit commercial storage facility held not constitutionally restricted. State v. Lakotiy, 151 Wn. App. 699 (Div. I, 2009) – October 09:21

Witnesses who were previously acquainted with defendant lawfully testified that he was the shooter in cab surveillance photos; also, defendant's privacy rights did not preclude state from presenting evidence that defendant had refused to provide a voice exemplar. State v. Collins, 216 Wn. App. 463 (Div. I, 2009) – November 09:11

Probable cause

Supreme Court avoids issues related to bringing drug dog to traffic stop; also, court holds test for probable cause for search warrant for car not met in combination of driver's nervousness, large amount of cash, conflicting stories of driver and passenger about purpose of cash and trip, empty baggies, and driver's prior conviction for heroin delivery. State v. Neth, 165 Wn.2d 177 (2008) – February 09:6

Search under warrant upheld: warrant's description of shed was adequate, and the informant-based probable cause test was met. State v. Danielson, 148 Wn. App. 666 (Div. II, 2009) – April 09:12

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, 151 Wn. App. 716 (Div. I, 2009) – October 09:15

Protective sweeps

Warrantless emergency home search to look for child sex victim ok, as was protective sweep, but follow-up warrantless entry and pre-warrant walk-through not ok; also, detective's post-Miranda-invocation statements to suspect 1) telling suspect that officer would be seeking a search warrant and 2) stating age of victim were not "interrogation," so incriminating response was volunteered. State v. Sadler, 147 Wn. App. 97 (Div. I, 2008) – January 09:18

Retroactivity of appellate court decisions

Retroactivity of Arizona v. Gant and waiver addressed in conflicting Division Two Court of Appeals decisions. State v. McCormick, ___ Wn. App. ___, 216 P.3d 475 (Div. II, 2009) – November 09:21

School searches by school personnel

Strip search by middle school staff of 13-year-old student to look for prescription-strength ibuprofen held to violate Fourth Amendment under the totality of circumstances/reasonableness standard for searches by K-12 school authorities. Safford Unified School District # 1 v. Redding, 129 S.Ct. 2633 (2009) – August 09:02

Scope of search under warrant

In searching for methamphetamine and sales records and other records under warrant that did not expressly authorize a computer search, officers were not justified in searching suspect's computer. U.S. v. Payton, 573 F.3d 859 (9th Cir. 2009) (decision filed July 21, 2009) – September 09:06

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. U.S. v. Comprehensive Drug Testing, Inc. (and two other cases consolidated for appeal), 579 F.3d 989 (9th Cir. 2009) (decision filed August 26, 2009) – October 09:06

Seizure of package in transit

Brief seizure of Express Mail package for canine sniff did not violate Fourth Amendment because package was delivered on time. U.S. v. Jefferson, 566 F.3d 928 (9th Cir. 2009) (decision filed May 26, 2009) – August 09:04

SELF DEFENSE

Trial court's jury instruction on self defense set the standard too high where only non-deadly force was used by the defendant. State v. Kyllo, 166 Wn.2d 856 (2009) – October 09:14

SENTENCING

Constitution precludes court order banishing defendant from entire county; the order was tied to a SSOSA, so case must be remanded for resentencing. State v. Sims, ___ Wn. App. ___, 216 P.3d 470 (Div. II, 2009) – November 09:21

SEX OFFENDER REGISTRATION (RCW 9A.44.130-145)

Sex offender registration: Statutory scheme delegating to sheriff the setting of classification level for sex offender held to violate constitutional separation of powers doctrine. State v. Ramos, 149 Wn. App. 266 (Div. II, 2009) – May 09:16

Federal law for sex offender registration: Retroactive application held to violate constitutional ex post facto protection. U.S. v. Juvenile Male (S.E.), 581 F.3d 977 (9th Cir. 2009) (decision filed September 10, 2009) – November 09:09

SEXUAL EXPLOITATION OF CHILDREN (Chapter 9.68A RCW)

Webcam viewing is "photograph[ing]" under sexual exploitation of a minor statute. State v. Ritter, 149 Wn. App. 105 (Div. III, 2009) – April 09:20

Child porn sting: Prohibition on communicating for immoral purposes with someone a person believes to be a minor by sending an electronic communication held not to be unconstitutionally overbroad or unjustifiably burdensome on free speech. State v. Aljutily, 149 Wn. App. 286 (Div. III, 2009) – May 09:21

SIXTH AMENDMENT RIGHT TO CONFRONTATION

Sixth Amendment right to confrontation: lab analyst must be made available for cross examination by defendant in drug case. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) – September 09:02

Sixth Amendment right to confrontation: Statements of robbery victim (who later died prior to trial) to responding officers held "testimonial," and hence inadmissible, under Crawford-Davis confrontation standard. State v. Koslowski, 166 Wn.2d 409 (2009) – September 09:12

SIXTH AMENDMENT RIGHT TO COUNSEL

Sixth Amendment initiation-of-contact rule of Michigan v. Jackson is eliminated in a 5-4 decision. Montejo v. Louisiana, 129 S.Ct. 2079 (2009) – July 09:15

STALKING

Two incidents of "criminal harassment" of same person support a conviction for "stalking" along with criminal harassment convictions. State v. Haines, 151 Wn. App. 428 (Div. I, 2009) – September 09:22

TELEPHONE HARASSMENT (RCW 9.61.230)

Defendant's challenges to his telephone harassment convictions for voicemail message to police officer rejected. State v. Alphonse, 147 Wn. App. 891 (Div. I, 2008) – March 09:23

Telephone harassment: Where target heard shouted threat, it did not matter that someone else was holding the phone receiver. State v. Sloan, 149 Wn. App. 736 (Div. II, 2009) – September 09:21

TRAFFIC (Title 46 RCW)

Probable cause as to DUI, plus the scientific fact that alcohol dissipates in the body over time, held not to add up to exigent circumstances supporting reaching through doorway to arrest man suspected of being intoxicated and of having driven drunk 1 hour earlier. State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) – July 09:20

UNIFORM CONTROLLED SUBSTANCES ACT (Chapter 69.50 RCW) (See also "Forfeiture Law")

No attorney fee award in drug forfeiture case – family of deceased was not "prevailing party" where family won as to car and $9342 in cash, but lost as to another $57,990 in cash. Guillen v. Contreras, 147 Wn. App. 326 (Div. III, 2008) – January 09:22 Status: The Washington Supreme Court has granted review.

Citation for "possession of drug paraphernalia" fails "essential elements" test; also, proximity of pipe to back seat passenger held insufficient alone to satisfy constructive possession standard. State v. George, 146 Wn. App. 906 (Div. I, 2008) – February 09:20

For would-be medical marijuana caregiver, the necessary "Medical Use of Marijuana Act" documents must already exist at the time of first police contact, but the would-be caregiver need not have the documents on his or her person and need not present the documents at the time of that first police contact. State v. Adams, 148 Wn. App. 231 (Div. III, 2009) – March 09:18

Evidence held to support convictions for possessing marijuana with intent to deliver and conspiracy for that same crime. State v. Valencia, 148 Wn. App. 302 (Div. II, 2009) – September 09:14

No "innocent owner" claim is available to estate where marijuana grower's residential property was seized prior to his death. Snohomish Regional Drug Task Force v. Real Property Known As 414 Newberg, 151 Wn. App. 743 (Div. I, 2009) – October 09:21

Drug forfeiture statute: "knowledge" for purposes of "innocent owner" claim to property gets narrow, anti-government interpretation. In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle and In the Matter of the Forfeiture of One 2004 Nissan Sentra, 166 Wn.2d 834 (2009) – October 09:12

VOYEURISM (RCW 9A.44.115)

Peeping on two persons having sex supports two voyeurism convictions regardless of whether defendant claims he derived "sexual gratification" from watching only one of the participants. State v. Diaz-Flores, 148 Wn. App. 911 (Div. I, 2009) – May 09:19

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

3-JUDGE PANEL REVERSES ITSELF AND GRANTS SUMMARY JUDGMENT TO DETECTIVE AND HIS LAW ENFORCEMENT AGENCY IN CIVIL RIGHTS ACT CASE WHERE PLAINTIFF ALLEGES THAT DETECTIVE FABRICATED EVIDENCE – In McSherry v. City of Long Beach, ___ F.3d ___, 2009 WL 3353043 (9th Cir. 2009) (decision filed October 20, 2009), a three-judge panel of the Ninth Circuit withdraws its own March 30, 2009 decision (digested in the **May 2009 LED**). The withdrawn opinion held that a section 1983 Civil Rights

Act case must go to trial on a fact dispute regarding whether a City of Long Beach, California, detective fabricated evidence against a criminal defendant through, among other things, alleged shading of witness/victim descriptions in reports and through alleged suggestiveness in ID procedures.

The criminal case involved a 1988 kidnapping and rape of a six-year-old girl. When McSherry was arrested in 1988, he had been registered in California as a child sex offender since 1971, with several convictions between 1971 and 1988. Almost fourteen years after his conviction in the 1988 kidnapping-rape case, he was exonerated by DNA evidence. He then sued the lead detective and his agency.

The superseding opinion holds that there is no basis for a Civil Rights Act trial in this case because: (1) any alleged fabrication of evidence (which had nothing to do with the DNA evidence or any other physical evidence) occurred after McSherry was arrested, and hence could not have been the basis for his arrest; and (2) the assigned deputy prosecutor in the criminal case so thoroughly interviewed witnesses and so carefully reviewed reports and evidence that the deputy prosecutor's judgment to proceed with the prosecution was independent of and not tainted by any alleged fabrication of evidence by the detective.

Result: Affirmance of U.S. District Court (California) grant of summary judgment to the detective and to the City of Long Beach, California.

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WASHINGTON STATE SUPREME COURT

ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION HELD TO CONTAIN SEARCH-INCIDENT RULE OF ARIZONA V. GANT

State v. Patton, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 (2009)

Facts and Proceedings below: (Excerpted from Supreme Court's lead opinion)

> The underlying facts are set forth in the unchallenged findings of fact determined at the hearing on Patton's motion to suppress evidence. On March 19, 2005, [a deputy sheriff] was watching Patton's trailer in the hope of locating Patton to arrest him on an outstanding felony warrant. He ran the license on a blue Chevy parked in the driveway and confirmed that the car belonged to Patton. [The deputy] called for backup.
>
> After waiting a short time, [the deputy] saw the dome light illuminate in the parked car and saw someone generally fitting Patton's description "rummaging around" inside the car. Concerned the person might try to drive away, [the deputy] activated his lights and pulled into the driveway behind the car. He approached Patton, announced that he was under arrest, and ordered him to put his hands behind his back. Patton, who still had his head inside the car when [the deputy] spoke, stood up and ran inside the trailer. He did not respond to the deputy's verbal commands to exit the trailer.
>
> After two other backup deputies arrived, they entered the trailer and found Patton hiding behind a bedroom door. Patton was taken into custody, handcuffed, and placed in the back of [the deputy]'s patrol car. The deputies then searched

> Patton's vehicle, where they found two baggies of methamphetamine and $122 cash under the driver's seat.
>
> The State charged Patton with one count of unlawful possession of methamphetamine and one count of resisting arrest. Patton moved under CrR 3.6 to suppress the evidence obtained from his vehicle. The trial court granted the motion, concluding that the search was not incident to arrest because Patton was not arrested until he was taken into physical custody in the trailer. The State appealed, arguing the arrest occurred beside the car and therefore the search was valid incident to the arrest. The Court of Appeals agreed and reversed the trial court.

[Footnote omitted]

ISSUES AND RULINGS: 1) Under the totality of the circumstances, was Patton under "arrest" for purposes of the search-incident rule before he tried to flee from the officers? (ANSWER: Yes)

2) In Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**, the U.S. Supreme Court held, under the Fourth Amendment of the U.S. Constitution, that law enforcement initiation of a search of a vehicle incident to arrest of a recent occupant is unlawful unless, at the time the search begins, officers have a reasonable basis to believe either: a) that the arrestee poses a safety risk, or b) that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed. Does the rule of Gant apply under article 1, section 7 of the Washington constitution? (ANSWER: Yes)

Result: Reversal of unpublished Court of Appeals decision that reversed the Skamania County Superior Court's order granting the motion of Randall J. Patton to suppress evidence seized in a warrantless search of his vehicle.

ANALYSIS:

1) Patton was arrested before he fled

The lead opinion's analysis on the point-of-arrest question under the Washington constitution is as follows:

> The trial court concluded Patton was not arrested until he was placed under physical control in the trailer. We disagree. "An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." Royce A. Ferguson, Jr., Washington Practice: Criminal Practice and Procedure § 3104, at 741 (3d ed. 2004) (footnote omitted). *[Court's footnote: The Court of Appeals suggested that, when an arresting officer has explicitly informed the suspect he is under arrest, consideration of the other factors indicating arrest is "superfluous." Whether an officer informs the defendant he is under arrest is only one of all of the surrounding circumstances, albeit an important one.]*
>
> Although Patton was not physically restrained until the police caught up with him in the trailer, [the deputy] pulled into the driveway behind Patton's car with his

> lights activated. He immediately approached Patton, told him he was under arrest and to put his hands behind his back. Under an objective evaluation of all the surrounding circumstances, an arrest occurred. The fact that Patton chose to flee does not undermine the validity of the arrest.
>
> We have seen recently a number of Court of Appeals cases in which a suspect flees from a car prior to being arrested, and the question arises whether a subsequent search of the car is valid incident to the arrest. State v. Adams, 146 Wn. App. 595 (Div. I, 2008) **Nov 08 LED:11**; State v. Quinlivan, 142 Wn. App. 960 (Div. III, 2008) **March 08 LED:02**; State v. Rathbun, 124 Wn. App. 372 (Div. II, 2004) **Jan 05 LED:08**; State v. Perea, 85 Wn. App. 339 (Div. II, 1997) **June 97 LED:02**. In each of these cases except Adams, the Court of Appeals invalidated an automobile search incident to arrest because law enforcement officers did not initiate an arrest before the suspect exited and left the area of the car. See Quinlivan, 142 Wn. App. at 962-63 (noting no dispute over when suspect was arrested, some distance from car); Rathbun, 124 Wn. App. at 378-79 (distinguishing cases in which the arrestee fled from his vehicle, and noting Rathbun was far from his vehicle at the time police initiated the arrest); Perea, 85 Wn. App. at 344-45 (noting that Perea was not arrested until after leaving and locking his car and that his actions in fleeing "[did] not diminish the lawfulness of the act of locking his car").
>
> These cases should not be read broadly to suggest that the initiation of an arrest is ineffective so long as the fleeing suspect eludes physical restraint. To adopt Patton's argument that he was not arrested until he was chased down and restrained would send a dangerous message and jeopardize peaceable arrest. It would encourage flight as the means to avoid a search incident to arrest and concomitantly encourage greater force by law enforcement at the first moment of the arrest process to eliminate flight as an option. We have previously held that under article I, section 7, an individual cannot avoid seizure by failing to yield to a show of authority. State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**. We conclude the same is true of attempts to avoid arrest by fleeing instead of yielding to an officer's exercise of authority to arrest. The Court of Appeals correctly held that Patton was placed under arrest as he stood beside his car.

[Footnote and some citations omitted]

2) The search violated Gant's search-incident rule

After discussing search-incident rulings in a number of Washington Supreme Court decisions (including State v. Ringer, 100 Wn.2d 686 (1983) and State v. Stroud, 106 Wn.2d 144 (1986)), the lead opinion turns to the question of whether the Washington constitution's limit on law enforcement's initiation of a search incident that the U.S. Supreme Court adopted under the Fourth Amendment in Arizona v. Gant:

> [W]e are here concerned with the preconditions to a valid search incident to arrest, rather than the scope of such a search once allowed. We cannot presume that every time a car is present at the scene of an arrest, a search of the car falls within the scope of Stroud's bright line rule. The question before us, then, is whether it would stretch the search incident to arrest exception beyond its justifications to apply it where the arrestee is not a driver or recent occupant of the vehicle, the basis for arrest is not related to the use of the vehicle, and the

arrestee is physically detained and secured away from the vehicle before the search. We believe it would.

Unfortunately, the scope of the search incident to arrest exception under our article I section 7 has experienced the same sort of progressive distortion that the United States Supreme Court recently recognized resulted in the unwarranted expansion of the search incident to arrest exception under the Fourth Amendment. Arizona v. Gant, 129 S. Ct. 1710 (2009) **June 09 LED:13**. In Gant, the court observed that many lower courts have followed the broadest possible reading of the search incident to arrest exception as articulated in New York v. Belton, 543 U.S. 454 (1981) with the result that it has come to be regarded as "'a police entitlement rather than as an exception justified by the twin rationales of Chimel.'" [Chimel v. California, 395 U.S. 752 (1969)]. Recognizing that the decision in Belton itself purported to follow Chimel, the Court in Gant issued a necessary course correction to assure that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment takes place "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."

Article I section 7 requires no less. We have long recognized that our constitution's express regard for an individual's "private affairs" places strict limits on law enforcement activities in the area of search and seizure. Today we hold that the search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search. While we believe this holding is consistent with the core rationale of our cases, we also recognize that we have heretofore upheld searches incident to arrest conducted after the arrestee has been secured and the attendant risk to officers in the field has passed. Today, we expressly disapprove of this expansive application of the narrow search incident to arrest exception.

Under a proper understanding of the search incident to arrest exception, the circumstances here simply do not involve a search incident to arrest. Patton was not a driver or recent occupant of the vehicle searched. There is no indication in the record that Patton even had keys to the vehicle. No connection existed between Patton, the reason for his arrest warrant, and the vehicle. Rather, Patton's warrant was for failure to appear in court for a past offense unrelated to the eventual drug charge that arose from the car search. Thus, there was no basis to believe evidence relating to Patton's arrest would have been found in the car. Nor did Patton's brief proximity to the car give rise to safety concerns upon his arrest. At the time of the search, Patton was secured in the patrol car, some distance from his vehicle. Further, the record does not indicate that prior to the search there was any evidence of the crime of arrest or contraband in the car, as in Stroud. In the end, the only evident connection between the car and Patton's arrest was that [the deputy] chose the moment at which Patton went to his parked car to execute the outstanding arrest warrant. That he may have had good reason to do so is not questioned, but to deem the vehicle search here "incident" to Patton's arrest "stretches [the exception] beyond its breaking point." *[Court's footnote: Because we resolve this case on independent and adequate state grounds under article I section 7, it is not necessary to reach Patton's*

argument under the Fourth Amendment. We are mindful, however, that our decision is consistent with the United States Supreme Court's recent holding in Gant, under which the Fourth Amendment also disallows a vehicle search conducted after the arrestee has been secured and is no longer within reaching distance of the passenger compartment of the vehicle.]

[Some citations omitted]

LED EDITORIAL COMMENT:

The Supreme Court's ruling that defendant Patton was under arrest before he fled the area near his car means mean that in circumstances where the Gant rule does permit search of the vehicle for evidence of the crime of arrest, such a search is lawful even though the arrestee flees from the car or area near the car after being told that he or she is under arrest.

EXTRATERRITORIAL ARREST: RECKLESS DRIVING DOES NOT QUALIFY PER SE AS "AN EMERGENCY INVOLVING AN IMMEDIATE THREAT TO HUMAN LIFE OR PROPERTY" UNDER RCW 10.93.070(2)

State v. King, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3298059 (2009)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion authored by Justice Sanders)

On April 5, 2006, Tyler King rode from Vancouver to a Longview shop where a friend worked, to see if he could get his motorcycle repaired. King said the repairs, which included fixing the speedometer and odometer, were too expensive, so he rode the bike home. King was riding southbound on I-5 in the middle lane and saw a Dodge Durango truck on his left, in the fast lane. King said he stood on his motorcycle's pegs for three to five seconds to stretch out and also to allow the driver of the large truck to see him. King testified that on other occasions drivers had abruptly pulled over into his lane without seeing him on motorcycle, and he was worried about getting run over. Because he was wearing a full-face helmet, King turned his head to the left to see the truck, and thinking he was in the driver's blind spot, he sped up to pass the Durango. King testified that after he passed the truck, he slowed down to the speed of the traffic around him. He said he told [the officer] that he stood up on the bike's pegs to relieve his numb buttocks and that he thought it was safer to get away from the large truck.

Meanwhile, [an off-duty officer] of the Vancouver Police Department had entered I-5 at the La Center Road on-ramp at milepost 16. [The officer] testified he was driving his assigned patrol car, a black, unmarked Ford Crown Victoria, southbound to report to work. He said he saw King stand on his motorcycle for three to four seconds while he was going about 70 m.p.h. The speed limit on that stretch of I-5 is 70 m.p.h. The officer saw King look to his left at the blue Dodge Durango and "thought [King] was taunting the vehicle . . . the driver of the vehicle." [The officer] said King then sat down on his motorcycle, changed lanes, and accelerated away at a high rate of speed, which [the officer] estimated at 100 m.p.h.

[The officer] said he didn't use his radar to check King's speed, and "it may not even have been on at the time." On cross-examination, [the officer] said radar and laser were routinely used to confirm visual estimates of a driver's speed but could not recall if his department required officers to verify their estimates with those devices before writing a ticket. [The officer] said he accelerated to catch up with King and signaled for him to pull over. King pulled over without delay. [The officer]'s patrol car was equipped with a video camera, and the officer had activated it. But by the time the camera started recording, the video only shows [the officer] driving quickly past King, who had pulled over, and the officer then backing up on the shoulder to reach the motorcyclist. [The officer] cited King for reckless driving on I-5, near milepost 14, north of Vancouver's city limits. On cross-examination, the officer agreed he had written on the citation that King was standing on the seat of his motorcycle, not its pegs. However, he said he could not testify as to whether King had stood on the seat or not.

According to the State, defense counsel attacked the officer's credibility regarding what part of the bike King stood on; what [the officer] wrote on the ticket; that he did not have video, radar, or laser readings to verify King's speed; and [the officer]'s inexperience with motorcycles, among other issues. The State raises this line of questioning in connection with [the officer]'s offering opinion testimony. Before that cross-examination, however, the prosecutor had asked [the officer] his opinion about King's driving, and [the officer] replied, "I felt that the entire act of what he had done was reckless in my viewpoint." The prosecutor asked [the officer] whether he had been trained on the elements of reckless driving, and [the officer] replied he had. The prosecutor then asked whether the officer felt King's driving was within those elements, and [the officer] replied, "I did." King's lawyer did not object. In closing argument the prosecutor reiterated, "[the officer] said here today[, ']I thought it was dangerous and I felt it was reckless to me[']. Therefore, I would just ask that you convict the Defendant of reckless driving."

On November 21, 2006, the jury unanimously convicted King of reckless driving. The judge sentenced King to two days of community service and two years of probation, and ordered him to pay $446 in fines and take a defensive driving course. The Clark County Superior Court affirmed the conviction on appeal. The court agreed that an arrest for reckless driving was justified under the emergency exception of RCW 10.93.070(2), allowing officers to arrest across jurisdictional boundaries. The court also ruled that [the officer]'s opinion testimony had not denied King a fair trial and that his counsel was not ineffective for failing to object to that testimony.

King sought discretionary review in the Court of Appeals, renewing his arguments that the officer cited him without authority and improperly commented on his guilt. But the commissioner denied review, reasoning that since King had not objected to the opinion testimony at trial, he was foreclosed from raising it on appeal since he could not show any court ruling that conflicted with appellate court decisions. As to the second issue, the commissioner concluded King failed to show the interpretation of the emergency exception in RCW 10.93.070(2) was an issue of public interest warranting review. The commissioner also said King's actions were similar to the erratic driving that previously justified an

extraterritorial arrest in another Court of Appeals case, City of Tacoma v. Durham, 95 Wn. App. 876 (Div. II, 1999) **Sept 99 LED:11**. King's motion to modify the commissioner's ruling was denied, with one judge dissenting.

ISSUE AND RULING: Did the conduct that the off-duty, out-of jurisdiction officer observed qualify as "an emergency involving an immediate threat to human life or property" under RCW 10.93.070(2)? (ANSWER: No, rules a 7-2 majority, Justices Madsen and Alexander dissenting) (NOTE: The Supreme Court also discusses an issue of whether the arresting officer should not have testified as to his opinions on certain matters, but the Supreme Court ultimately does not rule on that issue, and we do not address the issue in the LED.)

Result: Reversal of Clark County District Court conviction of Tyler Sherwood King for reckless driving.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> King contends that [the officer] could not arrest him for reckless driving because the officer had no authority under a valid interlocal agreement, and the emergency exception to territorial jurisdiction did not apply. The district court found the State had not established there was such an agreement authorizing the arrest under RCW 10.93.070(1) (allowing Washington police to enforce traffic and criminal laws across boundaries "[u]pon the prior written consent of the sheriff or chief of police" in the area where the offense occurs). But an officer can also make an arrest in other circumstances enumerated in the statute, including, "[i]n response to an emergency involving an immediate threat to human life or property." RCW 10.93.070(2). The district court read this exception broadly and concluded it necessarily covers reckless driving, defined as "willful or wanton disregard for the safety of persons or property." RCW 46.61.500(1); (RCW 10.93.070(2) is "broad enough to include reckless driving"). The Clark County Superior Court and the Court of Appeals agreed.
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> To date, no decision has turned on the application of this exception, but a plain reading indicates King's driving does not qualify as an emergency involving an immediate threat to life or property. Durham is illustrative. There a man was spotted driving erratically in south Tacoma, running a red light, nearly hitting a transit supervisor's car, weaving across the center line, and rolling backward at a stop light. A Tacoma police officer heard about the man's dangerous driving over radio dispatch, caught up with him in Lakewood, and arrested him on suspicion of driving under the influence. The defendant argued the officer lacked authority for the arrest. The Court of Appeals held the officer was justified in making the extraterritorial arrest under the "fresh pursuit" exception in RCW 10.93.070(6). See also RCW 10.93.120 defining "'fresh pursuit.'" *[Court's footnote: Here, there was no claim, nor do the facts support, that King's arrest fell under the "fresh pursuit" exception of RCW 10.93.070(6).]*
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> The Durham court also noted that the emergency exception of RCW 10.93.070(2) provided independent justification for the DUI arrest. 95 Wn. App. at 881. "Officer Quinn was responding to a 911 call by Stewart, who observed Durham's car weaving across the center line after it ran a red light and nearly

struck his car. Clearly, this situation presented an emergency, and Quinn reasonably responded across jurisdictional lines."

But here the district court merely took the definition of reckless driving and concluded that it automatically fit within the emergency exception. However King's actions did not reach the level of erratic driving that constitutes "an emergency involving an immediate threat to human life or property." RCW 10.93.070(2). Unlike Durham, King did not nearly hit another car, nor run a light, nor weave across traffic lanes. He did not pop a wheelie, cut off another car, nor, for that matter, drive in reverse along the shoulder. *[Court's footnote: [The officer]' video recording of the King stop shows the officer driving past the motorcyclist, who had pulled over, and then driving in reverse on the shoulder to reach him.]* At most, King glared at the driver of the large truck, stood on his foot pegs for three to five seconds, and accelerated at high speed past the truck. As aforementioned, [the officer] could not verify that King accelerated away at what he thought was 100 m.p.h. Even so, the officer testified King slowed down as he approached other traffic and pulled over immediately when [the officer] signaled him to do so. King may have exceeded the speed limit by a considerable margin, but his driving was not anywhere near as dangerous as that of the intoxicated defendant in Durham, 95 Wn. App. 876. Moreover, there was no eyewitness account here indicating an immediate threat, unlike Durham where the transit supervisor reported he was almost hit. The record shows King's actions did not constitute an immediate threat to life or property as required under RCW 10.93.070(2). We choose not to broaden or water down the meaning of this emergency exception to include speeding such as King's. Furthermore, we note that police officers are still authorized to effect extraterritorial arrests in circumstances where a valid interlocal agreement between jurisdictions exists or where the fresh pursuit exception applies.

[Some citations omitted]

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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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