Law Enforcement Digest

SEPTEMBER 2009

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) SIXTH AMENDMENT RIGHT TO CONFRONTATION: LAB ANALYST MUST BE MADE AVAILABLE FOR CROSS EXAMINATION BY DEFENDANT IN DRUG CASE – In Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009), the U.S. Supreme Court rules 5-4 that a criminal defendant's right to confront witnesses against him includes the right to cross examine a lab analyst. The majority opinion concludes that defendant's right in a drug trafficking case to confront was violated when a lab analyst's certificate of analysis of alleged cocaine was admitted into evidence without giving the defendant the opportunity to cross examine the analyst. Justice Scalia writes the majority opinion and is joined by justices Stevens, Souter, Thomas and Ginsburg.

Result: Reversal of Massachusetts state appellate court decision that had rejected the Sixth Amendment challenge by the drug trafficking defendant; case remanded for re-trial.

LED EDITORIAL NOTE: The Melendez-Diaz majority opinion states that "notice-and-demand" laws (see, for example, Washington's Criminal Rule 6.13) under which a defendant is given reasonable notice of an expert's certified report and the right to demand that the expert appear at trial, will generally satisfy Confrontation Clause requirements.

(2) FEDERAL CONSTITUTION'S DUE PROCESS CLAUSE DOES NOT PROVIDE A RIGHT TO POST-CONVICTION DNA TESTING; STATUTES PROVIDE ONLY REMEDIES – In District Attorney's Office for the Third Judicial District v. Osborne, 129 S.Ct. 2308 (2009), the U.S. Supreme Court rules 5-4 that the federal constitution's Due Process clause does not provide a right to post-conviction DNA testing of evidence in possession of the government. Federal and state statutes (including Washington's RCW 10.73.170) provide for post-conviction DNA testing. In this case, after being denied such relief in the Alaska state court system, the defendant sought DNA testing over and above that provided for under an Alaska statute. The majority justices conclude that the Court should not invoke the Due Process clause to involve the courts in this particular subject area, but should instead leave it to the state and federal legislative bodies to develop rules to govern the subject area. Justice Roberts writes the majority opinion and is joined by justices Thomas, Scalia, Alito, and Kennedy.

Result: Reversal of decision of Ninth Circuit, U.S. Court of Appeals, thus reinstating a U.S. District Court (Alaska) order denying prisoner William G. Osborne's request for an order for post-conviction testing of semen evidence seized in the investigation of the crime. Osborne remains in prison in Alaska under a conviction and sentence for rape at gunpoint and other offenses.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

FOURTH AMENDMENT DOES NOT PERMIT OFFICERS TO FORCIBLY TAKE A CHEEK SWAB FOR DNA TESTING TO HELP SOLVE "COLD CASES" WHERE THE OFFICERS DO NOT HAVE A SEARCH WARRANT, COURT ORDER, STATUTORY AUTHORITY, OR EVEN REASONABLE SUSPICION OF A CRIME UNDER INVESTIGATION

Friedman v. Boucher, 568 F.3d 1119 (9th Cir. 2009) (decision filed June 23, 2009)

Facts and Proceedings below:

LED EDITORIAL NOTE RE FACTUAL DESCRIPTION: In this civil rights lawsuit, the plaintiff's case was dismissed by summary judgment at the trial court level. On review of a summary judgment dismissal, the appellate court is generally required to take all of the allegations of the plaintiff as true, even if, as in this case, the allegations are disputed in some respects by the government.

In 2003, Las Vegas officers were working on "cold cases" together with a deputy district attorney. Together with the deputy DA, they decided to get a cheek swab for DNA testing from Kenneth Friedman (there was a dispute factually in the summary judgment declarations whether she in fact directed the officers to obtain the cheek swab from Friedman).

The officers and deputy DA had no search warrant, no court order, and no statutory authority to take the cheek swab. Also, they had no individualized suspicion that Friedman had committed any of the cold-case crimes or any other crime under investigation for which DNA might be relevant evidence. The officers knew that Friedman had been in prisons most of his adult life. He had served several years in an Ohio prison in the 1970s on a rape conviction; he had been in prison in Montana from 1980 to 2001 on two forcible rape convictions; and he was presently in jail on pre-trial detention in Las Vegas on charges of indecent exposure and lewd conduct. Friedman refused the officers' request for consent to give them a cheek swab for DNA testing purposes. They then grabbed him and, in the words of the Ninth Circuit opinion, "forced his jaws open" (the opinion does not explain how that was done), and took a cheek swab.

Contending that this was a Fourth Amendment violation, Friedman filed a civil rights lawsuit against the officers in federal court under 42 U.S.C. section 1983. The federal district court in Nevada ruled by summary judgment that the officers were entitled to qualified immunity on the rationale that, even if their actions violated the Fourth Amendment, reasonable officers would have believed their actions to be lawful under existing case law at the time of the taking of the cheek swab.

ISSUES AND RULINGS: 1) Where the officers and deputy DA did not have even reasonable suspicion that Friedman had committed any crime for which they wished to use his DNA, and where no statute, court order or search warrant authorized them to take DNA, did they violate Friedman's Fourth Amendment rights as a pre-trial detainee by forcing open his jaws and taking a cheek swab for use in solving cold cases? (ANSWER: Yes, rules a 2-1 majority)

2) Should qualified immunity be denied to the officers on the rationale that reasonable officers would have known that forcibly taking a cheek swab in this circumstance was a violation of the Fourth Amendment? (ANSWER: Yes, rules a 2-1 majority)

Result: Reversal of U.S. District Court (Nevada) order dismissing lawsuit on grounds of qualified immunity; case remanded for trial.

ANALYSIS:

The key portion of the majority opinion's Fourth Amendment analysis reads as follows:

> Defendants' final argument is that the search was "reasonable," contending that pre-trial detainees have limited privacy rights that must yield to the desires of law

enforcement to collect DNA samples for use in law enforcement databases. Thus, the reasoning goes, the government has the inherent right, without a search warrant and without suspicion of criminal activity, to extract DNA forcibly from pre-trial detainees. However, neither the Supreme Court nor this Court has ever ruled that law enforcement officers may conduct suspicionless searches on pretrial detainees for reasons other than prison security.

Indeed, as the Supreme Court stated emphatically in [Schmerber v. California, 547 U.S. 843 (2006)]*:* "The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained." In contrast to the government's position in this case, which would endorse routine, forcible DNA extraction, the Court concluded: "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." Schmerber.

We have long recognized that pre-trial detainees retain greater privacy interests, for the purposes of Fourth Amendment analysis, than do persons who are incarcerated pursuant to a valid conviction. . . .

We have also carefully confined administrative searches at detention facilities to those reasonably related to security concerns. In [Kennedy v. LAPD*,* 901 F.2d 702 (9th Cir. 1990)] for example, we held unconstitutional a blanket strip search policy which subjected all felony arrestees to a visual body cavity search. We noted that "the enacted policy, if it is to be constitutional, must be 'reasonably related' to the penal institution's interest in maintaining security."

Neither the Supreme Court nor our court has permitted general suspicionless, warrantless searches of pre-trial detainees for grounds other than institutional security or other legitimate penological interests. Thus, there is no support for the government's contention that Friedman's status as a pre-trial detainee justifies forcible extraction of his DNA.

Defendants cite a number of appellate cases that uphold the constitutionality of state DNA bank laws. Not one of those cases involved a search of a pretrial detainee – as opposed to a convicted prisoner – or a state law that mandated searches of pretrial detainees. None of these cases uphold a search similar to the suspicionless one of a pretrial detainee in this case.

In [U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) **Oct 04 LED:02**] and [U.S. v. Kriesel, 508 F.3d 941 (9th Cir. 2007)], we upheld against Fourth Amendment challenges a federal DNA profiling law and amendments extending that law. However, both of those cases concerned extracting DNA from convicted felons still under state supervision. See Kriesel (Kriesel was on probation); Kincade (Kincade was on parole). The law at issue required DNA samples "to be collected from individuals in custody and those on probation, parole, or supervised release after being convicted of qualifying Federal offenses." Kriesel. The [United States] Supreme Court articulated the rationale for sustaining these types of searches in Samson v. California*,* in which the Court upheld a search on the basis of the plaintiff's status as a parolee, citing the requirement of "intense

> supervision" of such persons and the problems of "re-integration" of parolees into society. 547 U.S. 843, 854 (2006).
>
> However, the considerations underlying Sampson, Kincade, and Kriesel are absent here. Friedman was not on parole. He had completed his term of supervised release successfully and was no longer under the supervision of any authority. The Nevada authorities extracted the DNA from Friedman not because they suspected he had committed a crime, nor to aid in his reintegration into society, nor as a matter of his continuing supervision. Their purpose was simply to gather human tissue for a law enforcement databank, an objective that does not cleanse an otherwise unconstitutional search.

[Footnote, some citations omitted]

The final section of the majority opinion analyzes the qualified immunity issue and concludes that reasonable officers would have known at the time of the search in this case that, under then-existing case law, it violated the Fourth Amendment to do what they did.

The dissenting opinion argues both that there was no Fourth Amendment violation, and that, even if there was, the officers should be given qualified immunity.

LED EDITORIAL COMMENTS: In the absence of an express statute, court order, or search warrant authorizing the forcible taking of DNA by inside-cheek swab, we have concerns about officers doing so. Even probable cause may not be enough. There are no published Washington appellate court decisions on this point. Also, in our research, which was not exhaustive, we were unable to find support for forcible administration of a cheek swab in case law nationally where the basis for the cheek swab was probable cause, and no statute, search warrant or court order expressly authorized the cheek swab. The standard practice is to seek consent in such circumstances. As always, we urge law enforcement agencies to consult their own legal advisors and local prosecutors on this and other legal questions.

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, __ F.3d __, 2009 WL 2151348 (9th Cir. 2009) (decision filed June 21, 2009)

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

> In 2004, a California Superior Court judge issued a search warrant for a house in Merced County where Payton resided. Police believed that the occupants were selling drugs. The warrant directed officers to search for any item listed in "Attachment A," which included methamphetamine and materials used to cut and package it. Attachment A also included, among other things, "[s]ales ledgers showing narcotics transactions such as pay/owe sheets" and "[f]inancial records of the person(s) in control of the residence or premises, bank accounts, loan applications, [and] income and expense records." The warrant did not explicitly authorize the search of computers.

> During the execution of the search, the officers found no evidence of drug sales. Officer Horn found a computer in Payton's bedroom with the screen saver activated. He moved the mouse, which removed the screen saver, and clicked open a file. It disclosed an image that he thought was child pornography. This and images like it eventually led to Payton's charge for possession of child pornography. Payton moved to suppress the evidence, challenging the search on the two grounds he raises on appeal. First, he argued that the warrant lacked probable cause because it relied on a misrepresentation of a neighbor's complaint. [**LED EDITORIAL NOTE: We have omitted from this LED entry most of the Ninth Circuit's discussion of the misrepresentation/probable cause issue. The Court ultimately concluded on that issue that the officer-affiant had misrepresented the content of the neighbor's complaint, but that the remainder of the affidavit was sufficient to establish probable cause.]** Second, he argued that the search of the computer exceeded the scope of the warrant. After the district court rejected these challenges and denied the motion to suppress, Payton entered a conditional guilty plea and was sentenced.
>
> To establish probable cause, the warrant incorporated by reference Officer Horn's affidavit, which included Officer Horn's statement of probable cause. This statement requested permission to search any computer within the residence, although Officer Horn did not have any particular reason to believe that a computer would be found in the house. The Superior Court judge testified at the suppression hearing that he had intended to authorize the search of any computer found in the residence, but the warrant as issued did not explicitly direct a search for, or search of, any computers.
>
> The district court . . . held that the search of the computer was valid because the failure to include the word "computers" in Attachment A was an oversight cured by the issuing judge's testimony of his intent. Accordingly, it dismissed the motion to suppress the evidence of child pornography obtained as a result of the search. We agree with the district court that the search warrant was supported by probable cause despite Officer Horn's misrepresentation of a neighbor's report. We conclude, however, that the search of the computer violated Payton's Fourth Amendment rights. Accordingly, we reverse the denial of the motion to suppress, and remand with instructions to permit Payton to withdraw his conditional guilty plea.

ISSUE AND RULING: Where the search warrant authorized the officers to search for and seize "[s]ales ledgers showing narcotics transactions such as pay/owe sheets," as well as "[f]inancial records of the person(s) in control of the residence or premises, bank accounts, loan applications, [and] income and expense records," did a search of the contents of the computer exceed the scope of the warrant? (ANSWER: Yes)

Result: Reversal of U.S. District Court (California) conviction of Michael Clay Payton for possession of child pornography; case remanded to District Court with direction to allow Payton to withdraw his guilty plea.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> There is no question that computers are capable of storing immense amounts of information and often contain a great deal of private information. Searches of

computers therefore often involve a degree of intrusiveness much greater in quantity, if not different in kind, from searches of other containers. Such considerations commonly support the need specifically to authorize the search of computers in a search warrant, as Officer Horn requested in the present case. Despite his request, the warrant did not explicitly authorize the search of Payton's computer, and it incorporated Officer Horn's affidavit only to support probable cause, not to describe the objects to be searched or searched for. The after-the-fact testimony of the issuing judge that he intended expressly to authorize the search of computers could not cure the failure of the warrant to authorize the search of computers, because one purpose of a warrant is to inform the person subject to the search just what may be searched.

The search warrant did explicitly authorize a search of Payton's premises to find and seize, among other things, "[s]ales ledgers showing narcotics transactions such as pay/owe sheets," and "[f]inancial records of the person(s) in control of the premises." The crucial question is whether these provisions authorized the officers to look for such records on Payton's computer. We conclude that, under our recent and controlling precedent of United States v.Giberson, 527 F.3d 882 (9th Cir. 2008) **Aug 08 LED:03**, to the circumstances of this case, they did not.

In Giberson, officers discovered that Giberson had used false identification and was delinquent in his child support payments. They obtained a search warrant authorizing a search of his residence for, among other things, " 'records, documents or correspondence ... related to the use or attempted use' of other individual's identities." During the search, the officers discovered a computer on a desk in Giberson's bedroom; the computer was connected to a printer on a dresser. Next to the printer, the officers found a sheet of what appeared to be fake identification cards that were not of high quality and looked as if they could have been printed on the adjacent printer. In and on the desk, the officers found other documents evidencing the production of false identification, including fake Social Security cards and birth certificates. Acting on the advice of an Assistant U.S. Attorney who had been contacted, one of the officers secured the computer until the agents could obtain a second search warrant authorizing search of the computers for such documents. The computer was sent to a forensic laboratory, and a now-authorized search for false identification documents revealed images of child pornography, for receipt and possession of which Giberson was later charged. He challenged the seizure of his computer in the initial search of his residence.

We stated the question that Giberson presented and our answer to it as follows:

> We have not yet had occasion to determine, in an opinion, whether computers are an exception to the general principle that a warrant authorizing the seizure of particular documents also authorizes the search of a container likely to contain those documents. We hold that, in this case, where there was ample evidence that the documents in the warrant could be found on Giberson's computer, the officers did not exceed the scope of the warrant when they seized the computer.

As we read this passage, it holds that under certain circumstances, computers

are not an exception to the rule permitting searches of containers to find objects specified in a warrant. A reasonable negative inference is that, absent those circumstances, a search of a computer not expressly authorized by a warrant is not a reasonable search. Those circumstances are absent in the present case. The search of Payton's residence for evidence of drug sales produced none. There was nothing in the neighborhood of Payton's computer, or indeed in the entire residence, that suggested that evidence of drug sales or anything else specified in the warrant would be found on the computer in his bedroom. It is true, of course, that pay/owe sheets indicating drug sales were physically capable of being kept on Payton's computer. But a similar bare capability was present in Giberson*;* a computer is physically capable of containing false identification documents. In Giberson*,* we did not simply recite that fact and uphold the seizure; we relied quite specifically on the documents found next to the printer and the computer, in circumstances indicating a likelihood that they were created on and printed from the computer. It was the presence of those documents that rendered the search reasonable.

There was an additional factor that led us to conclude that the officers acted reasonably in Giberson*.* We stated:

> In the circumstances underlying this appeal, it was reasonable for the officers to believe that seizable items were stored on Giberson's computer, and to secure the computer and obtain a specific warrant and search it. . . . Their actions were particularly appropriate because the agents merely secured the computer while they waited to get a second warrant that would specifically authorize searching the computer's files. The seizure of the computer was therefore reasonable.

A seizure of a computer to await a second warrant is nevertheless a Fourth Amendment seizure, but it is far less intrusive than a search. In Payton's case, however, Officer Horn searched first and seized afterwards. When he first encountered the computer, he moved the mouse, inactivating the screen saver, and opened a file. In the absence of any circumstances supporting a reasonable belief that items specified in the warrant would be found on the computer, the search did not meet the Fourth Amendment standard of reasonableness.

We recognize that there are several statements in Giberson to the effect that no heightened Fourth Amendment standard should be applied to computers as opposed to other containers. For example, we stated that "[w]hile it is true that computers can store a large amount of material, there is no reason why officers should be permitted to search a room full of filing cabinets or even a person's library for documents listed in a warrant but should not be able to search a computer.". . .

[This] and similar statements must be placed in context, however. They were made in response to Giberson's argument that computers could *never* be searched unless that authority was specifically granted in the search warrant. Indeed, Giberson conceded that it was reasonable for the officers to conclude that false identification documents might be found on his computer. He contended, however, that computers were sufficiently different from other

containers that they were entitled to a bright-line categorical rule of heightened Fourth Amendment protection: no search is permissible without specific authorization in the warrant. Our opinion in Giberson rejected this contention, stating that the support for such an argument could not be "technology-specific" to computers alone.

Thus Giberson held that computers were not entitled to a special categorical protection of the Fourth Amendment. Instead, they remained subject to the Fourth Amendment's overall requirement that searches be constitutionally "reasonable." And, for the second time, Giberson stated its rule of reasonableness for the case before it:

> If it is reasonable to believe that a computer contains items enumerated in the warrant, officers may search it. Here, numerous documents related to the production of fake I.D.s were found in and around Giberson's computer and were arguably created on and printed from it. It was therefore reasonable for officers to believe that the items they were authorized to seize would be found in the computer, and they acted within the scope of the warrant when they secured the computer.

In Payton's case, however, the legitimating facts were absent. There was no comparable evidence pointing to the computer as a repository for the evidence sought in the search. The search of the computer preceded any attempt to secure the computer and seek a second warrant. We conclude that the search in those circumstances did not meet the Fourth Amendment requirement of reasonableness.

Our confidence in our conclusion is buttressed by contemplating the effect of a contrary decision. In order to uphold the search in this case, we would have to rule that, whenever a computer is found in a search for other items, if any of those items were capable of being stored in a computer, a search of the computer would be permissible. Such a ruling would eliminate any incentive for officers to seek explicit judicial authorization for searches of computers. But the nature of computers makes such searches so intrusive that affidavits seeking warrants for the search of computers often include a limiting search protocol, and judges issuing warrants may place conditions on the manner and extent of such searches, to protect privacy and other important constitutional interests. We believe that it is important to preserve the option of imposing such conditions when they are deemed warranted by judicial officers authorizing the search of computers. If unwarranted searches of computers are automatically authorized by upholding the search in Payton's case, that option will be lost. Indeed, the special considerations of reasonableness involved in the search of computers are reflected by the practice, exemplified in Giberson, of searching officers to stop and seek an explicit warrant when they encounter a computer that they have reason to believe should be searched.

For all of these reasons, we conclude that the search of Payton's computer without explicit authorization in the warrant exceeded the scope of that warrant and did not meet the Fourth Amendment standard of reasonableness illustrated by Giberson. We accordingly reverse the district court's denial of Payton's

> motion to suppress the evidence resulting from the search, and remand the matter to the district court with instructions to permit Payton to withdraw his conditional guilty plea.

[Footnote, some citations omitted]

LED EDITORIAL COMMENTS: 1. This decision may be further reviewed: Despite the Payton Court's efforts to distinguish this case from the Ninth Circuit's decision in Giberson, a solid argument can be made that the decision conflicts with Giberson. We hope that the Ninth Circuit will submit the Payton decision to review by a larger panel of Ninth Circuit judges ("en banc" review).

2. Proofread your affidavits and warrants: This case is a reminder that officers and attorneys preparing affidavits and search warrant should always make sure that what they intended to include is in fact included. It is also a reminder to officers that, when in doubt as to the scope of the warrant at the time of its execution, they should check the warrant and consider re-contacting the judge to obtain a second warrant, under circumstances such as here, to seize or search a computer.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) 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 BUSINESS-PREMISES-EQUIVALENT, AND (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" – In State v. Engel, __ Wn.2d __, 210 P.3d 1007 (2009), the Washington Supreme Court rules unanimously that defendant's burglary conviction must be reversed because the outdoor storage area of a business from which he stole wheels did not qualify as a "fenced area" for purposes of a prosecution for burglary.

The crime of burglary requires that the area the person enters or remains in with intent to commit a crime be a "building." RCW 9A.52.030. "Building" is defined in RCW 9A.04.110(5) as follows:

> "Building," in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building; . . .

At the time of the theft in the Engel case, the wheels were in the "yard" area of a business. A locked gate protected the entrance to the yard, with fencing extending out from the gate. But the fencing did not completely enclose the yard or buildings in the yard. That was because, for over half of the property, the business relied on embankments or drop-offs of terrain rather than the fence to protect the yard from easy intrusion.

This yard area did not qualify as a "fenced area," the Supreme Court concludes, because it was not sufficiently enclosed. After extensive discussion of case law and concepts in this State and

elsewhere regarding burglary and "curtilage," the Supreme Court concludes its decision by significantly restricting the settled understanding in the criminal justice community of what constitutes a "fenced area":

> Applying the concept that we may supplement the criminal code with consistent common law, the term "fenced area" may be understood as a contemporary formulation of the concept of curtilage. By including "fenced area" in the definition of a building for burglary, the legislature intended the whole curtilage as a proper object of the crime, rather than just the buildings in the curtilage.
>
> This interpretation avoids absurd results. Under the State's interpretation, would-be petty criminals who trespass might be liable for burglary even if the property line at their point of entry were unfenced and unmarked, even if they remained on the property without approaching any buildings or structures, and even if the property were such that they could enter and remain without being aware that it was fenced. Such examples are well outside the category of offenses the legislature intended to punish as burglary.
>
> The common law context indicates that the plain meaning of "fenced area" is limited to the curtilage of a building or structure that itself qualifies as an object of burglary (as defined in RCW 9A.04.110(5)). The curtilage is an area that is completely enclosed either by fencing alone or, as was the case in [State v. Wentz, 149 Wn.2d 342 (2003) **Sept 03 LED:08**], a combination of fencing and other structures. This result is consistent with the common law and avoids absurd results.
>
> Upholding an overly broad definition of "fenced area" would extend criminal liability beyond what is warranted by the plain language of the statute, as understood in the context of the common law. Therefore, the Court of Appeals decision affirming Engel's conviction is reversed and the case is remanded with instructions to vacate the conviction and dismiss the charge.

Result: Reversal of unpublished Court of Appeals opinion that affirmed the King County Superior Court second degree burglary conviction of Roger Dean Engel.

LED EDITORIAL COMMENT: 1. Legislative fix? This Supreme Court decision narrows the commonly understood meaning of "fenced area" by requiring that a "fenced area" have some connection to a structure that is ordinarily understood to be a "building." A legislative fix may be in order.

2. What is "curtilage" under Engel? Under the common law, the concept of "curtilage" is generally limited to areas adjacent to dwellings, where such adjacent areas are used for daily living activities. We think that the Engel Court's use of the term "curtilage" is by way of loose analogy and is not limited to dwellings. We think that the usage extends in a more general sense to areas around "buildings" (again, in the ordinary understanding of such structures), including business-related buildings. Thus, we think that the term "fenced area" under Engel includes a storage yard of a business, which area is completely surrounded by fencing, or a combination of fencing and building, if the storage yard extends from, is immediately adjacent to, or is contiguous with, a "building" in the ordinary sense of that word. On the other hand, we think that Engel would not include, as a "fenced area" under RCW 9A.04.110(5) an isolated area not adjacent to any

structure meeting the ordinary sense of "building," regardless of whether the area contained valuable goods and was completely surrounded by a securely gated, 15-foot-high, 1-foot-thick concrete wall with razor wire on top.

(2) SIXTH AMENDMENT RIGHT TO CONFRONTATION: STATEMENTS OF ROBBERY VICTIM (WHO LATER DIED PRIOR TO TRIAL) TO RESPONDING OFFICERS HELD "TESTIMONIAL," AND HENCE INDADMISSIBLE, UNDER THE CRAWFORD-DAVIS CONFRONTATION STANDARD – In State v. Koslowski, __ Wn.2d __, 209 P.3d 479 (2009), the Washington Supreme Court rules 6-3 that the statements of a robbery victim (who died between the time of the crime and the trial) to police officers were "testimonial" hearsay. Her statements were therefore inadmissible based on the defendant's Sixth Amendment right to confrontation, as interpreted by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** and Davis v. Washington, 126 S.Ct. 2266 (2006) **Sept 06 LED:03**.

Under the U.S. Supreme Court precedents of Crawford and Davis, out-of-court statements by a person who, for whatever reason, does not later testify at trial are not admissible against a criminal defendant: (1) if the statements were "testimonial" (in the elusive sense of that term used in the Crawford and Davis decisions), and (2) the defendant does not later have the opportunity to formally cross examine the declarant (at trial or otherwise). Under the test of Crawford-Davis, statements in response to police or 911 operators are non-testimonial if the primary purpose of the statements is to help police in meeting an ongoing emergency. An example would be apprehension of a person who is then at large and who poses a danger to public safety. On the other hand, if the police questioning is primarily to help prove past events, the statements will generally be deemed testimonial because a reasonable person would understand that the primary purpose of the statement and questioning was to develop a criminal case.

The key factors to consider are: (1) the timing of the statements; (2) the then-existing threat, if any, of harm to the person making the statements; and (3) the need for officers to obtain information to resolve an ongoing emergency. The Koslowski majority opinion concludes that the statements to the responding officers were testimonial under consideration of these factors and the totality of the circumstances. After engaging in comprehensive and detailed analysis of each of the four factors, the Koslowski majority opinion summarizes its analysis as follows:

> Considering all the Davis factors and the rest of the analysis in Davis, which expressly addresses statements by a victim during interrogation [*in this context, "interrogation" means any and all "questioning" of the victim by officers* – LED Editorial Note] by police officers who respond to a report of a crime, we conclude, on this record, that the statements were testimonial. They were made in the course of police interrogation under circumstances objectively indicating that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution. The State has not established the statements were non-testimonial because it has not established that the circumstances objectively indicate the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency. Because Ms. Alvarez was unavailable to testify and Mr. Koslowski had no prior opportunity for cross-examination, admitting the officers' testimony about her statements at trial violated his right to confrontation.

[Footnote omitted]

Justice Alexander is joined in dissent by Justices Charles Johnson and James Johnson.

Result: Reversal of Court of Appeals decision that affirmed the Yakima County Superior Court convictions of Duane Jonathon Koslowski for first degree robbery, first degree burglary, and first degree unlawful possession of a firearm; case remanded for possible re-trial.

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WASHINGTON STATE COURT OF APPEALS

PREVIOUSLY "TRESPASSED" PERSON CAUGHT SHOPLIFTING HELD GUILTY OF BURGLARY, NOT JUST TRESPASSING, FOR TWO ALTERNATIVE REASONS

State v. Morris, __ Wn. App. __, 210 P.3d 1025 (Div. II, 2009)

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

> On March 30, 2007, Macy's loss prevention officers, via closed circuit camera, saw Darnell Morris take two watches valued at $205.02 from a clearance display at the Tacoma Mall Macy's and leave without paying for them. Because Macy's had revoked Morris's right to enter the store for one year ("trespassed" him) on February 6, 2007, the Pierce County prosecuting attorney's office charged Morris with one count of second degree burglary, RCW 9A.52.030(1). A jury found Morris guilty as charged, and the trial court sentenced him to 43 months, the high end of the standard range for an offender score of 7.

ISSUES AND RULINGS: Is the evidence sufficient to establish that the previously "trespassed" Morris entered or remained unlawfully in Macy's with intent to commit the crime of theft? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court conviction of Larry Morris for second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Morris . . . argues that because Macy's is a place open to the public, the State should have charged him with trespassing and misdemeanor theft instead of second degree burglary. . . .
>
> But Macy's revoked Morris's invitation to enter the store when it "trespassed" him for shoplifting on February 6, 2007. Under the trespass notice, Morris was prohibited from entering any Macy's for one year, until February 7, 2008. Morris went to the Macy's located inside the Tacoma Mall on March 30, 2007, he was entering without the owner's permission, and was trespassing. Perhaps more importantly, when Morris placed the watches up the right sleeve of his coat and then into his front pocket, he remained in the store intending to commit the crime of theft; and he subsequently walked passed numerous cash registers and out the door without paying for the concealed items. When the Macy's loss prevention personnel apprehended and confronted Morris, he admitted taking the watches, intending to sell them because he had no money. This evidence is

sufficient to establish that Morris entered or remained in Macy's with an intent to commit a crime (theft) and to prove second degree burglary beyond a reasonable doubt. State v. Varga, 151 Wn.2d 179 (2004). [Court's footnote: *A person commits second degree burglary if, "with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling." RCW 9A.52.030.*]

EVIDENCE HELD TO SUPPORT CONVICTIONS FOR POSSESSING MARIJUANA WITH INTENT TO DELIVER AND CONSPIRACY FOR SAME CRIME

State v. Valencia, 148 Wn. App. 302 (Div. II, 2009)

LED INTRODUCTORY EDITORIAL NOTE: This case involved issues as to whether the evidence of the activities of two men apparently involved as "runners" (or "couriers") in a multi-person drug-dealing operation, Isidro Sanchez Valencia (referred to as "Sanchez Valencia" by the Court of Appeals) and Eduardo Chavez Sanchez (referred to as "Sanchez" by the Court of Appeals), was sufficient to support their convictions possessing marijuana with intent to deliver and for conspiracy to possess marijuana with intent to deliver. In hopes of making it easier for our readers to focus on those two defendants, we have bolded their names in the excerpts below from the Court of Appeals decision. The first reference to either Sanchez Valencia or Sanchez is in the fifth paragraph of the description of the facts.

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

In August of 2006, detectives from the Cowlitz County Drug Task Force contacted Detective Bryan Acee of the Vancouver Police Department and asked him to begin surveillance on Jesus Gonzalez-Perez, a suspected drug trafficker. Acee began surveilling on a residence located at 2612 Grand Boulevard, No. B, in Vancouver, Washington, an address associated with Gonzalez-Perez. In the course of his investigation and surveillance on the Grand Boulevard address, Acee reported observing frequent foot and vehicle traffic coming to and from the residence, with visits usually lasting only a few minutes and on a number of occasions seeing hand-to-hand transactions occurring near the doorway.

Between August 27 and August 30, 2006, Detective Acee observed the occupants at the Grand Boulevard address move boxes and furniture to 806 S.E. 141st Avenue, another residential address in Vancouver, Washington. Acee and other officers continued surveillance at the 141st Avenue address through September and into October of 2006. On September 19, Acee observed an unknown male arrive at the 141st Avenue residence, talk briefly with someone at the doorway, engage in a hand-to-hand transaction, and leave with a small shoebox. On October 2, Acee observed seven different subjects arrive at the residence, again with visits lasting only a few minutes, with hand-to-hand transactions at the doorway, including what appeared to be an exchange of currency. Six of the seven visitors on October 2 left with either a shoebox or a black garbage bag.

On October 18, Detective Acee obtained a search warrant authorizing a search of the 141st Avenue house for items related to drug trafficking, as well as the persons of Gonzalez-Perez, Renee Turner, and Audel Arregan-Cardenas. On

the morning of October 21, Acee and other officers continued surveillance on the residence with a plan to execute the search warrant later that evening.

On October 21, Detective Acee observed a number of people drive up to the house, enter, and then leave carrying one or two black garbage bags. The garbage bags appeared to be a quarter to a third full and contain something light. A number of officers followed the vehicles that left the residence that day and observed the drivers engage in “counter-surveillance” techniques.

One of the people arriving at the 141st Avenue house that day was **Sanchez**, who left the residence carrying two black garbage bags that he placed in the trunk of his vehicle. This was the first time officers had seen **Sanchez** at this residence. Detective Acee attempted to follow **Sanchez's** vehicle, but lost him and returned to the residence to resume surveillance.

Another person leaving the residence with a black garbage bag that day was Mark Turner. Officer Troy Rawlins stopped Mark Turner's vehicle within a few blocks of the residence. Rawlins found a backpack tucked behind the driver's seat of Mark Turner's car. The backpack contained a black garbage bag with what appeared to be marijuana inside it. Officers later weighed and tested the contents of the black garbage bag, confirming it to be three pounds of marijuana.

Officers also saw **Sanchez Valencia** at the residence earlier that morning repairing a mailbox. Before October 21, officers had not seen **Sanchez Valencia** at this residence during any of their surveillance. Later that day, officers saw **Sanchez Valencia** leave the residence carrying a black garbage bag. He placed the bag in his vehicle and then left with a young boy. Officer Josannah Hopkins followed **Sanchez Valencia's** vehicle but lost sight of him. Hopkins did not observe **Sanchez Valencia** use any “counter-surveillance” techniques while driving away from the residence.

Later that same afternoon, Detective Acee called the officers who were surveilling various locations so they could help him execute the search warrant. When they entered the house, the officers were overwhelmed with the odor of fresh marijuana. But there was no one at the residence. Officers discovered 68 one-pound clear plastic bags of marijuana on the floor of a bedroom closet, as well as a digital scale. They also found a receipt in the pocket of a shirt which indicated that **Sanchez** had wired $2,000 to Mexico earlier that month. Officers also discovered a large shopping bag containing approximately $126,000 in the closet of a second bedroom and a loaded handgun in a third bedroom. Finally, officers found various items throughout the house and in a backyard shed, such as prepaid cellular phones, walkie-talkies, a box of black garbage bags, scales, two one-pound packaged bags of marijuana, a Vancouver motel receipt in the name of **Sanchez**, and a “shake net.”

After searching the house, officers moved all the police cars and returned to the residence to await people returning. Renee Turner and Alberto Valencia-Rojos arrived at the house with an infant in the back seat. Officers detained Renee Turner and Valencia-Rojos, searched their vehicle, and discovered a loaded handgun in the glove box, two-way radios in the back seat, and paperwork addressed to **Sanchez** in the vehicle's center console. Officers also detected a

strong odor of marijuana, but they did not find any marijuana nor did they find the black garbage bags they had seen the suspects placing in the vehicle earlier that day.

Sanchez Valencia was the next to arrive at the house, driving the same vehicle he left with earlier that day. Officers searched this vehicle but, once again, they did not discover any marijuana nor did they discover the black bag he had placed in the vehicle, although they did detect the scent of marijuana behind the driver's seat. When later interviewed, **Sanchez Valencia** told Detective Shane Gardner that his name was Eugenio Gonzalez Sanchez. As the evening progressed, two other vehicles arrived at the residence. Officers similarly searched the vehicles, detected a strong odor of marijuana, but failed to find any marijuana other than some loose particles in the trunk of one of the vehicles.

Sanchez was the last to arrive at the residence. Again, officers detected the scent of marijuana in his vehicle, but they did not find any marijuana. They searched **Sanchez's** person and found approximately $8,500 in cash wrapped in a rubber band in the pocket of his jeans.

Procedural background

On October 26, 2006, Clark County charged eight different individuals, including **Sanchez** and **Sanchez Valencia**, with possession of marijuana with intent to deliver and conspiracy to possess marijuana with intent to deliver. The possession of marijuana with intent to deliver charge included an enhancement because the offense occurred within 1,000 feet of a school bus stop. The case was tried to a jury with **Sanchez** and **Sanchez Valencia** as co-defendants.

At the trial, Detective Acee testified that, in his years of experience investigating drug distribution rings, he recognized the activities occurring around the two residences in Vancouver, Washington, as evidence of a sophisticated drug distribution operation. Acee also testified that he recognized the residences as being “safe houses,” places where marijuana is delivered from growers and is packaged for sale by distributors. Acee further testified that, in his experience, he recognized Renee Turner as a “facilitator,” a person with a clean record who can register vehicles, utilities, and phone records in her name so that law enforcement will not suspect illegal activities at the safe house. Acee also testified that large drug operations often utilized an organizational hierarchy similar to legitimate businesses. Acee recognized Gonzalez-Perez as a “broker,” one who represents a geographical region and is responsible for hiring “managers” who are responsible for the money collection and often carry guns. At the bottom of the hierarchy are “runners” or “couriers” who simply take the product from the safe house and deliver it to neighborhood drug houses. Acee also testified about how drug distribution operations use communication devices such as prepaid cellular phones and walkie-talkies, stating:

> In my experience, [prepaid cellular phones and walkie-talkies] are used as a communication-a secure communication device between people. I have seen, in-in terms of drug trafficking, where the person's driving the load vehicle, or the vehicle that's loaded with narcotics, can call ahead and check in with scouts that are

> put out on the road ahead of time to look for police roadblocks or police canine units, or just police cruisers in general; and they're also used to communicate to the driver of the load vehicle that it is safe, now, to come into the safe house and unload.
>
> The jury found both **Sanchez** and **Sanchez Valencia** guilty of possession of marijuana with intent to deliver and conspiracy to possess marijuana with intent to deliver and entered a special verdict finding that the offense was committed within 1,000 feet of a school bus stop.

[Footnotes omitted]

ISSUES:

1) Where the evidence shows that – 1) there was a safe house to which marijuana was delivered from growers and was packaged for sale; 2) defendants left the safe house with black garbage bags that appeared to contain something light; and 3) one member of the group was a facilitator with a clean record and thus could register vehicles, utilities, and phone records in her name so that law enforcement would not suspect illegal activity was occurring at the safe house – was the evidence sufficient to support defendant's conviction for possession of marijuana with intent to deliver? (ANSWER: Yes)

2) Is the evidence described in issue-statement 1, together with Detective Acee's testimony about the typical organization, or hierarchy, of illegal drug operations, to support a conspiracy conviction for defendants Sanchez Valencia and Sanchez? (ANSWER: Yes)

Result: Affirmance of Clark County Superior Court convictions of Isidro Sanchez Valencia and Eduardo Chavez Sanchez for 1) possession of marijuana with intent to deliver, and 2) conspiracy to commit possession of marijuana with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Possession with intent to deliver

> To convict **Sanchez Valencia** and **Sanchez** of possession of a controlled substance with intent to deliver, the State had to prove that they (1) unlawfully possessed (2) a controlled substance (3) with intent to deliver.
>
> Viewing the evidence in a light most favorable to the State, the record contains ample evidence to support the jury's verdict finding both appellants guilty of unlawful possession of a controlled substance with intent to deliver. Here, the State proved that both appellants left a drug house that contained over 68 pounds of marijuana, $126,000 in cash, and many other items used in a major marijuana distribution operation, such as scales, cellular phones, packaging materials, and a loaded firearm. Each appellant left the house with one or two black garbage bags that appeared to contain something light. From the pattern of conduct engaged in by others leaving the residence that day with similar black garbage bags that included drivers using counter-surveillance techniques and one such driver found to have three pounds of marijuana in the black garbage bag contained within his vehicle, any rational trier of fact could infer that the black garbage bags **Sanchez** and **Sanchez Valencia** were seen carrying contained

marijuana. In addition, Detective Acee testified that he smelled fresh marijuana in both appellants' cars.

The State also presented sufficient evidence from which a rational jury could infer that **Sanchez** and **Sanchez Valencia** intended to deliver the marijuana to others. While " 'bare possession . . . absent other facts and circumstances' " is not enough for a trier of fact to infer an intent to deliver, there are additional factors present here. In addition to the large amount of marijuana and cash contained within the residence, police also found weapons, communication devices, scales, and packaging materials. Police officers also discovered that **Sanchez** was carrying a large sum of cash [approximately $8500]. Having a substantial amount of cash is also an additional factor indicating an intent to deliver. State v. Campos, 100 Wn. App. 218 (Div. III, 2000) **July 2000 LED:12** (defendant possessed $1,750 cash), review denied, 142 Wn.2d 1006, 34 P.3d 1232 (2000); Hagler, 74 Wn. App. 232 (Div. I, 1994) **Oct 94 LED:11** (defendant possessed $342 cash). [**LED EDITORIAL NOTE: Additional facts, such as the amount of drugs possessed, supported the holdings in Campos and Hagler that the evidence was sufficient to support the convictions for possession of illegal drugs with intent to deliver.**]

Sanchez and **Sanchez Valencia** contend that, because officers did not discover any marijuana on their persons or within their vehicles, their activities may be consistent with innocent behavior. But circumstantial evidence and direct evidence are equally reliable for purposes of drawing inferences. Furthermore, it is not necessary that circumstantial evidence exclude "every reasonable hypothesis consistent with the accused's innocence . . . It is only necessary that the trier of fact is convinced beyond a reasonable doubt that the defendant is guilty."

2) Conspiracy of possession with intent to deliver

Likewise, there was sufficient evidence for a jury to convict **Sanchez** and **Sanchez Valencia** of conspiracy to commit possession of a controlled substance with intent to deliver.

To convict **Sanchez** and **Sanchez Valencia** of conspiracy to commit possession of a controlled substance with intent to deliver, the State had to prove that (1) the appellants agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of possession of a controlled substance with intent to deliver, (2) the appellants made the agreement with the intent that such conduct be performed, and (3) any one of the persons involved in the agreement took a substantial step in pursuance of the agreement. RCW 9A.28.040.

At trial, Detective Acee testified that, as a result of his years of experience investigating drug distribution organizations, he recognized the residence from which both appellants departed with garbage bags as being a "safe house," a place where marijuana is delivered from growers and is packaged for sale. Acee further testified that, in his experience, he recognized Renee Turner as a "facilitator," a person with a clean record who can register vehicles, utilities, and phone records in her name so that law enforcement will not suspect illegal

> activities at the safe house. Finally, Acee testified that large-scale drug operations often use an organizational hierarchy similar to that of legitimate businesses, with brokers and managers at the top and runners or couriers at the bottom entry level jobs.
>
> Credibility determinations are for the trier of fact and are not subject to review. And, here, any jury could have found Detective Acee's testimony credible and could properly infer that, by leaving the house with black garbage bags, **Sanchez** and **Sanchez Valencia** agreed and knowingly participated in a drug distribution enterprise, intended such criminal conduct to occur, and that a substantial step was taken in furtherance of that criminal enterprise.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "DETAINED" UNDER CUSTODIAL SEXUAL ASSAULT STATUTE GETS BROAD READING – In State v. Torres, __ Wn. App. __, __ P.3d __, 2009 WL 2226453 (Div. I, 2009), the Court of Appeals rejects the argument by a former law enforcement officer that the phrase, "being detained," in the custodial sexual assault statute (RCW 9A.44.160) means "[under] restraint pursuant to a lawful arrest." The Court of Appeals holds that instead the phrase, "being detained," in RCW 9A.44.160 means "[under] restraint on freedom of movement to such a degree that a reasonable person would not have felt free to leave."

RCW 9A.44.160 (with emphasis and bracket Arabic numerals added) provides in relevant part as follows:

> (1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:
>
> . . .
>
> (b) When the victim is [1] being detained, [2] under arrest or [3] in the custody of a law enforcement officer and the perpetrator is a law enforcement officer.
>
> (2) Consent of the victim is not a defense to a prosecution under this section.

The Torres Court explains that the three phrases in RCW 9A.44.160(1)(b) – "being detained," "under arrest," and "in the custody of a law enforcement officer" – must each be given effect. That leads the Court to the conclusion that "being detained" has the same meaning as does that concept in appellate court cases addressing police authority to detain a suspect under Terry v. Ohio. At the time that then-law enforcement officer Torres had non-forcible sexual intercourse with a woman whose car he had stopped for a traffic violation, he was detaining her within the meaning of that phrase under the Terry v. Ohio case law. Therefore, the Torres Court affirms his conviction for custodial sexual misconduct.

Result: Affirmance of King County Superior Court conviction of Carlos Torres for first degree custodial sexual misconduct.

(2) BAIL JUMPING IS CLASSIFIED FOR SENTENCING PURPOSES BASED ON CHARGE EXISTING AT TIME OF JUMP, NOT ON ULTIMATE DISPOSITION OF THAT CHARGE – In State v. Coucil, __ Wn. App. __, 210 P.3d 1058 (Div. I, 2009), the Court of Appeals rules that "bail jumping" under RCW 9A.76.170 is classified for sentencing purposes based on the specific charge pending at the time that the defendant jumps bail, not on the ultimate disposition of that underlying charge.

In the Coucil case, defendant had been charged with felony harassment for threatening to kill Paul Carlson. Released on bail, Coucil failed to appear at a hearing. Eventually he was rearrested, tried, and convicted: (1) not of felony harassment, but instead of a lesser-included charge of misdemeanor harassment; and (2) of class C felony bail jumping, per RCW 9A.76.170(3)(c). The latter statute makes it a class C felony to jump bail where a "person was . . . charged with . . . a class B or class C felony." The Court of Appeals concludes that the statute is unambiguous in providing that the underlying pending charge at the time of the jump is dispositive as to the proper classification of bail jumping.

Result: Affirmance of King County Superior Court conviction of Nikeemia Coucil for class C felony bail jumping and for misdemeanor harassment.

(3) 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 – In Beal v. City of Seattle, __ Wn. App. __, 209 P.3d 872 (Div. I, 2009), in the first paragraph of its decision, the Court of Appeals summarizes the case and its decision as follows:

> While meeting with the City of Seattle's Fleets and Facilities Department (FFD) director, members of the public orally requested information about the City's plans to mitigate environmental damage caused during construction of its Joint Training Facility (JTF). Although the City ultimately responded to a later written records request, the plaintiffs filed suit claiming that the City did not respond to their oral request within five business days as required by the Public Records Act (PRA), chapter 42.56 RCW. The trial court granted the City's motion for summary judgment, holding that the plaintiffs did not request public records at the meeting. Because the request was unclear and did not ask for public records, we affirm.

In the closing portion of its analysis, the Court of Appeals warns, however, that a request for public records may be made orally:

> The PRA does not require written requests, but it does require that requests be recognizable as PRA requests. The request's medium may be relevant to its clarity, and an oral statement during the course of a meeting is less clear than a written request would have been. [The requestors] failed to put the agency on notice at the meeting or in their early e-mails that they were requesting public records. Their request could have been, and apparently was, a request that the City simply provide feedback and information. As such, this request, like the request in Wood v. Lowe, 102 Wn. App. 872 (2000), was ambiguous. The trial court properly ruled that [the requestors] did not make a PRA request at the January 24 meeting.

[Footnote omitted]

Result: Affirmance of King County Superior Court order of summary judgment for the City of Seattle.

LED EDITORIAL COMMENT: Any and all governmental agency personnel who receive an oral or written request for information that might be construed as a public records request should pass the request through the chain of command to the public records contact person in their agencies so that the public records person can determine whether to treat the request as one for public records. Substantial monetary penalties can be levied against public agencies in Washington even for good faith mistakes by agency personnel who fail to timely respond to public records requests.

Agencies may wish to send confirming letters when they receive oral requests for records. Also, agencies may wish to consult their attorneys for advice on whether a rule may be adopted requiring that records requests must be made in writing.

(4) TELEPHONE HARASSMENT: WHERE TARGET HEARD SHOUTED THREAT, IT DID NOT MATTER THAT SOMEONE ELSE WAS HOLDING THE PHONE RECEIVER – In State v. Sloan, 149 Wn. App. 736 (Div. II, 2009), the Court of Appeals holds that it was telephone harassment under RCW 9.61.230 when the defendant shouted "you're f**king dead" into the phone and his wife heard the threat from the receiver. The Sloan Court rejects defendant's argument that he based on the fact that, while his wife was near the receiving phone and heard his threat, his wife was not the person holding the receiving phone at the time that defendant made the threat. In salient part, the Court's analysis is as follows:

> The crucial question here is one of statutory interpretation, involving an issue of first impression – whether a call to Anna's apartment was a call to Anna where, although Anna's friend answered the telephone, Anna herself heard the threat that Sloan intended for her.
>
> RCW 9.61.230 provides in relevant part:
>
> > **Telephone harassment.**
> >
> > (1) Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:
> >
> > (a) Using any lewd, lascivious, profane, indecent, or obscene words or language, or suggesting the commission of any lewd or lascivious act; or
> >
> > . . . .
> >
> > (c) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; is guilty of a gross misdemeanor, except as provided in subsection (2) of this section.
> >
> > (2) The person is guilty of a class C felony punishable according to chapter 9A.20 RCW if either of the following applies:

. . . .

> (b) That person harasses another person under subsection (1)(c) of this section by threatening to kill the person threatened or any other person.

The Supreme Court recently analyzed the telephone harassment statute in State v. Lilyblad, 163 Wn.2d 1 (2008) **April 08 LED:14**, but it did not address the specific issue here. Nevertheless, Lilyblad's analysis sheds light on this issue. Lilyblad telephoned the home of her sons' paternal grandmother and spoke with her children, who were living there. At some point during the conversation, the grandmother picked up the telephone and Lilyblad threatened the grandmother. The trial court had instructed the jury that " '[m]ake a telephone call' refers to the entire call rather than the initiation of the call," thus allowing the jury to find Lilyblad guilty if it found that she had formed the intent to harass the victim grandmother at any point during the conversation.

The Supreme Court, however, reversed Lilyblad's conviction, holding that "telephone harassment requires that the defendant form the specific intent to harass at the time the defendant initiates the call to the victim." In reaching this conclusion, the court analyzed the verb "to make" to determine the moment at which a defendant must have formed the requisite intent: "[M]aking a call includes the point of connection. Once connected, the call effectively has been made. . . .

Such an act is completed at the moment it is received by the intended party at the other end." The court noted the "fact that the person called must be the same person ultimately threatened reinforces this conclusion,"; "unanimity between the person called and the person receiving the threat indicates that the caller must identify the intended victim at the time the call is 'made' to that person, not at the time the threat is communicated."

Extending Lilyblad to its logical conclusion, the person to whom the call is made is determined by the defendant's intent – the call is "made" to the person the defendant intends to threaten when he picks up the telephone to place the call. Second, the court's statement that the act of making the call is completed when "it is received by the intended party" indicates that the defendant must both intend to call a person and actually communicate the threat to that specific person.

The facts, taken together with the "to convict" instruction **[LED EDITORIAL NOTE: The content of the jury instruction is not addressed in this LED entry.**], meet this test: (1) at the time he placed the call, Sloan intended to telephone Anna to threaten to kill her; and (2) Anna did receive Sloan's telephoned threat when she clearly heard it coming from the telephone receiver, which her friend was holding. Nothing in the statute or the instruction required the State to prove or the jury to find that the "intended party" (Anna) answered the telephone. It is sufficient that she heard the intended telephoned threat, recognized that it was Sloan making the call, and knew he was directing the threat to kill at her.

> Our conclusion here is consistent with a decision by Division One of our court, which affirmed a conviction for felony telephone harassment where the threat was left as a message on the victim's answering machine. State v. Tellez, 141 Wn. App. 479 (Div. I, 2007) (holding that definition of true threat need not be included in information or "to convict" instruction). Although the identity of the person to whom the call was made was not an issue in Tellez, the holding supports our holding here – that a defendant need not communicate the threat directly to the person to whom the telephone call is "made" if the threat is ultimately heard by that intended person.
>
> Because the jury here convicted Sloan of telephone harassment with threat to kill, it necessarily found that when Sloan said, "You're f* *king dead," the "you" was Anna and the statement was a "true threat" to kill her. Anna was standing close enough to Schulte to hear Sloan's threat. Thus, similar to the message left on the victim's answering machine in Tellez, Anna ultimately and immediately heard Sloan make the threat, even though Anna was not holding the telephone receiver herself when Sloan threatened to kill her.
>
> If the intent to harass, intimidate, torment, or embarrass must be formed at the time the defendant initiates the call, then it is more consistent to interpret the phrase "make a telephone call to such other person" as calling the intended victim's telephone. It would be absurd to relieve Sloan of criminal liability because Anna's friend, rather than Anna, fortuitously picked up and answered Anna's telephone, especially where Anna clearly heard Sloan utter the threat intended for her as he spoke it. We construe the law to avoid absurd results.

[Some citations omitted]

Result: Affirmance of Cowlitz County Superior Court conviction of Noel C. Sloan for telephone harassment (Sloan did not seek review of his conviction of violating a protection order).

(5) TWO INCIDENTS OF "CRIMINAL HARASSMENT" OF SAME PERSON SUPPORT A CONVICTION FOR "STALKING" ALONG WITH THE HARASSMENT CONVICTIONS – In State v. Haines, __ Wn. App. __, __ P.3d __, 2009 WL 2357954 (Div. I, 2009), the Court of Appeals rules that two incidents of criminal harassment, which occurred about a month apart, were sufficient to support defendant's conviction for "stalking" under RCW 9A.46.110, in addition to his convictions for felony harassment and misdemeanor harassment based on the same conduct. The Haines Court rejects defendant's creative interpretation of the stalking statute that would require six predicate acts of harassment in order to support a single stalking conviction based on harassment conduct. The Court of Appeals also rejects Haines' challenge to the stalking statute as unconstitutionally vague, as well as his double jeopardy challenge to using his stalking conviction together with his harassment convictions for sentencing purposes.

Result: Affirmance of King County Superior Court conviction of James Alfred Haines for felony harassment, misdemeanor harassment, and stalking based on two incidents in which Haines threatened a convenience store cashier while she was at work.

(6) 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 FLOOR – In

State v. Marohl, __ Wn. App. __, __ P.3d __, 2009 WL 2371086 (Div. II, 2009), the Court of Appeals rules that where there is evidence that a defendant rode the defendant to the floor in the course of an assault, the jury could find that the floor constituted an instrument or thing likely to produce bodily harm for purposes of the third degree assault statute, RCW 9A.36.031.

RCW 9A.36.031(1)(d) provides that: "(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree: . . . (d) with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." (Emphasis added).

Defendant was involved in an altercation with another man inside a casino. There was evidence that defendant had his arm around the other man's neck and rode him down to the floor, thus breaking off the victim's prosthetic arm at the elbow and causing cuts and bruises to his face. Under these circumstances, the jury could find that the floor was used as an "instrument or thing likely to produce bodily harm," the Court of Appeals holds.

Result: Affirmance of Mason County Superior Court conviction of James Michael Marohl for third degree assault.

(7) **CONSENT BY CONDITIONAL USE PERMIT HOLDER TO FUTURE ADMINISTRATIVE SEARCHES BY COUNTY STAFF HELD VOLUNTARY** – In Bonneville v. Pierce County, 148 Wn. App. 500 (Div. II, 2009), the Court of Appeals rules that a conditional use permit holder voluntarily agreed during the permit-issuance process to allow Pierce County staff to come onto his property to inspect to ensure he was acting within the limits of his conditional use permit. Therefore, the Court of Appeals rules that there is no basis for Robert Bonneville's civil lawsuit claim under section 1983 of the federal Civil Rights Act, 42 U.S.C. section 1983. Bonneville had alleged a Fourth Amendment violation by county staff, including law enforcement officers who were present during one of the inspections.

Result: Affirmance of Pierce County Superior Court order granting summary judgment to Pierce County against Robert Bonneville a/k/a Will Ellwonger.

(8) **CORPUS DELICTI RULE: CHILD'S TESTIMONY THAT DEFENDANT ATTEMPTED INTERCOURSE WAS SUFFICIENT CORROBORATION TO SUPPORT TRIAL COURT'S ADMISSION INTO EVIDENCE OF HIS CONFESSION TO PENETRATION** – In State v. Angulo, 148 Wn. App. 642 (Div. III, 2009), the Court of Appeals rejects a child-rape defendant's argument that his confession is inadmissible under the corpus delicti rule.

Under the corpus delicti rule, a defendant's out-of-court admission, whether to police or to friends or other non-police persons, generally cannot be admitted into evidence to support a conviction unless there is corroborating evidence that a crime was committed by someone (though the evidence need not show that the defendant committed the crime). The defendant confessed to police that he had slightly penetrated the victim's vagina on each of the two occasions for which the State had charged the defendant. The nine-year-old victim's admissible child hearsay statement to a detective was that the defendant had touched her "privates," but the victim did not say that penetration occurred.

The Angulo opinion engages in detailed, comprehensive discussion of the history and purposes of the corpus delicti rule. Along the way the Angulo Court discusses three prior Washington Court of Appeals decisions that assume that if penetration is an element of the charged sex crime, then there must be corroboration of penetration. Ultimately, the Angulo Court concludes

as follows that the purpose of the rule (not convicting persons based almost exclusively on out-of-court admissions) are satisfied in this circumstance despite lack of corroboration of the penetration:

> However, we think that these three cases applied a stricter than necessary standard for establishing the corpus delicti. The traditional requirement of a "criminal act" was replaced, unnecessarily in our view, by a requirement that a specific element (penetration) be established. That is not the way the corpus delicti rule is applied in other types of cases. As noted previously, the requirements in a homicide case are the fact of death and a criminal agency as the cause of death. There is no requirement that the appropriate mental state (intent, recklessness, negligence), premeditation (in a first degree murder charge), or identity of the killer, all of which would have to be established beyond a reasonable doubt to prove a case, be established in order to admit an incriminating statement. In essence, the gravamen of a homicide case is a dead body and a non-natural cause of death.
>
> The gravamen of a child rape prosecution is a sexual act with a minor. Where, as here, a young child describes an act of attempted sexual intercourse, we believe that there is sufficient evidence to admit the defendant's statement that he succeeded in achieving penetration, even though his victim did not know that fact. The child described a criminal act. Under traditional principles of the evidentiary corpus delicti rule . . . and its numerous progeny, that should be sufficient to admit the statement. The evidentiary corpus delicti rule involves not a question of which crime was committed, but whether one was committed. The rule was not designed as a method of distinguishing one crime from another. Rather, it is a safeguard to ensure that an incriminating statement relates to an actual offense.

Result: Affirmance of Adams County Superior Court convictions of Ricardo L. Angulo for two counts of first degree rape of a child.

(9) EVIDENCE HELD TO BE SUFFICIENT TO SUPPORT CONVICTION FOR ATTEMPTED SECOND DEGREE RAPE OF A CHILD – In State v. White, 150 Wn. App. 337 (Div. II, 2009), the Court of Appeals rejects the defendant's challenge to the sufficiency of evidence to support his conviction for attempted second degree rape of a child. The Court of Appeals explains that the following evidence supports the conviction. The adult male defendant: (1) entered the bedroom where the smaller 13-year-old victim was sitting on a bed watching TV; (2) closed the door (others were elsewhere in the house); (3) unzipped his pants; (4) put a knee on the bed; (5) took out his penis; (6) grabbed the victim's buttocks; (7) put his penis within six inches of the victim's face; and (8) twice ordered the victim to perform oral sex on him, with the victim refusing each time.

The White Court rejects the defendant's argument that these circumstances are no different from "a hypothetical, noncriminal situation where a man approaches a woman at a bus stop and says that he would like to have sex with her but, after she declines, he takes no further actions except to stand next to her." Among other things, the Court of Appeals notes that "White's analogy involves consenting adults without touching, positioning, or exposing genitals, unlike the facts here. Furthermore, the man at the bus stop does not confine his victim or demand sexual gratification."

Result: Affirmance of Pierce County Superior Court conviction of Rasheed White for attempted second degree rape of a child.

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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

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