Law Enforcement Digest

APRIL 2010

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

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656th Basic Law Enforcement Academy – October 27th, 2009 through March 10th, 2010

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UNITED STATES SUPREME COURT

FIFTH AMENDMENT INITIATION-OF-CONTACT RULE CLARIFIED: (1) BRIGHT-LINE, 14-DAY-BREAK-IN-CUSTODY RULE CREATED TO SET BOUNDARY FOR POLICE-INITIATED, SUBSEQUENT ATTEMPT AT CUSTODIAL INTERROGATION AFTER ATTORNEY-RIGHT ASSERTED BY CUSTODIAL SUSEPCT; (2) THE NEW 14-DAY STANDARD APPLIES TO CONVICTED AND SENTENCED PRISONERS IMMEDIATELY RETURNED TO GENERAL PRISON OR JAIL POPULATION AFTER ASSERTING RIGHT TO ATTORNEY DURING CUSTODIAL INTERROGATION

Maryland v. Shatzer, __ S.Ct. __, 2010 WL 624042 (2010) (decision filed February 24, 2010)

LED INTRODUCTORY EDITORIAL NOTES: We have only summarized this important decision. The decision can be accessed at [http://supct.law.cornell.edu/supct/index.html] and also at [http://www.supremecourtus.gov/opinions/opinions.html].

Facts and Proceedings below:

In 2003, a detective contacted Michael Shatzer, Sr., who was incarcerated in a Maryland state prison on a child sex abuse conviction. The detective told Shatzer he wanted to question him regarding a suspected sex crime involving a different victim than the victim Shatzer had been convicted of abusing. The allegation was that Shatzer had also sexually abused his own son. Shatzer invoked his Miranda right to an attorney, so the detective terminated the interview.

Shatzer was released back into the general prison population. Three years later, another detective sought to interview Shatzer regarding the same allegation that Shatzer had sexually abused his young son. This time, Shatzer waived his Miranda rights and, though attempting to minimize his guilt, made incriminating statements.

Shatzer was charged with the sex crime against his son. The trial court refused to suppress the statements, concluding that the Miranda-based bar to police initiation of contact with an attorney-invoking continuous custody suspect, per Edwards v. Arizona, 451 U.S. 477 (1981), did not apply because there had been a "break in custody" between the 2003 interrogation and the 2006 interrogation. The trial court concluded that it did not matter that Shatzer had remained in a form of "custody" throughout the period, i.e., in the Maryland state prison system. Shatzer was convicted.

The Maryland Court of Appeals reversed his conviction on dual rationales: (1) that a passage of time out of "custody" does not lift the initiation-of-contact bar of Edwards, and (2) that, in any event, release of a convict back into the general prison population does not constitute a break in custody.

ISSUES AND RULINGS: (1) Where, during a custodial interrogation session, a suspect invokes his right to an attorney, and where the suspect is subsequently released from custody, may a

law enforcement officer initiate contact with the suspect by taking the suspect back into custody and requesting a Miranda waiver after waiting 14 days or more from the time of release? (ANSWER: Yes, but only after waiting at least 14 days);

(2) Where the suspect was incarcerated in the general population in a state prison under conviction and sentence during the earlier custodial interrogation session in which he invoked his right to an attorney, and where the suspect was then immediately placed back in the general prison population after he invoked his Miranda right to an attorney, does the 14-day-break-in-custody rule (see Issue 1 above) apply such that a law enforcement officer may lawfully initiate contact with the suspect and seek a Mirandized custodial interrogation after waiting at least 14 days? (ANSWER: Yes)

Result: Reversal of decision of Maryland Court of Appeals and reinstatement of the second degree child abuse conviction of Michael Blaine Shatzer, Sr.

ANALYSIS IN LEAD OPINION:

Justice Scalia writes the lead opinion for the Supreme Court. He is joined by six other justices. The lead opinion has two main parts. The first part discusses the issue of whether there should be a break-in-custody rule under Miranda's initiation-of-contact restrictions (and, if so, what duration of break suffices to allow initiation of contact by law enforcement). The second part addresses the issue of whether this rule should apply to persons who invoke their right to counsel at a time when they are in prison or jail under conviction and sentence.

1. 14-day-break-in-custody rule for re-initiation of custodial contact

Edwards v. Arizona created a presumption that once a suspect in custody invokes the Miranda right to the presence of an attorney, any waiver of that right in response to a subsequent police-initiated attempt at custodial interrogation is involuntary. The purpose of Edwards is to preserve the choice of the suspect to communicate with police only through counsel. The rule is intended to prevent law enforcement from badgering a suspect into waiving his or her previously asserted Miranda right to an attorney.

The lead Shatzer opinion asserts that it is easy to believe that a suspect's later waiver was coerced/badgered when the suspect was held in uninterrupted, pre-trial custody following the first refusal to waive. The suspect remains cut off from normal life and is isolated in a "police-dominated atmosphere" where police "appear to control his fate." But, the lead Shatzer opinion says, where a suspect has been released from custody and returned to his normal life for some time before a later re-arrest and attempted interrogation, there is little reason to think that the suspect's change of heart has been coerced/badgered.

The opinion next explains that the Edwards presumption is a court-made rule, and that there is need for a further court-made, "bright line" rule regarding a break-in-custody period to guide law enforcement personnel and others. The opinion concludes that the appropriate period is 14 days, which the opinion asserts, provides ample time for the suspect to get re-accustomed to his normal life, consult with friends and an attorney, and to shake off any residual coercive effects of the prior custody.

2. Applicability of 14-day rule to persons in prison or jail after conviction and sentence

Next, the opinion turns to the question of whether release of an already-incarcerated convict back into the general prison population constitutes a break in Miranda custody. Lawful imprisonment under conviction and sentence, the opinion says, does not create the coercive pressures produced by the pre-trial, "investigative custody" that underlies the Edwards presumption. Suspects who have been incarcerated under conviction and sentence, and who

are released back into the general prison population following an attempted interrogation return to their accustomed surroundings and daily routine - - these convict-suspects regain the degree of control they had over their lives before the attempted interrogation.

The opinion asserts that the continued detention of the already incarcerated convict is relatively disconnected from the convict-suspect's prior unwillingness to cooperate in an investigation. The lead opinion concludes, therefore, that the "inherently compelling pressures" of custodial interrogation that Edwards was concerned with ended when Shatzer returned to his normal life in the general prison population.

CONCURRING OPINIONS:

Justice Thomas writes a separate concurring opinion, joined by no one, that agrees with the result of the lead opinion, but criticizes the restrictions that the lead opinion places on law enforcement. Justice Steven also writes a separate opinion joined by no one. Justice Stevens agrees with the result because the time-gap was so long (two-and-a-half years), but Justice Stevens argues that the Court should have put greater restrictions on law enforcement initiation of contact than it did in relation to breaks in custody.

LED EDITORIAL NOTE: The article entitled "Initiation of Contact Rules under the Fifth Amendment" on the CJTC Internet LED Page has been updated to include discussion of the Shatzer decision.

LED EDITORIAL COMMENTS:

1. The 14-day-break-in-custody rule is probably better than the "meaningful break in custody" rule that most lower courts had applied

Previously, most courts that had considered the issue had concluded that a "meaningful break in custody" (generally involving a release of the suspect into the civilian community) permitted law enforcement officers to re-arrest and re-Mirandize suspects who had invoked their attorney rights during custodial interrogation. See, for example, the Washington Court of Appeals decision in State v. Jones, 102 Wn. App. 89 (Div. II, 2000) Oct 2000 LED:16, which allowed the re-contact, re-arrest and re-Mirandizing after a period of three weeks involving a suspect who had been allowed to be in the community during the interim. The Jones Court concluded three weeks was a "meaningful break in custody." The U.S. Supreme Court's lead opinion in Shatzer concludes that a bright line rule setting a specific time period is needed for guidance of law enforcement officers, rather than a vague "meaningful break in custody" standard. Hence the 14-day rule. The concurrence of Justice Thomas suggests that the bright line is not that bright. He points out that "[d]etermining whether a suspect was previously in custody, and when the suspect was released, may be difficult without questioning the suspect, especially if state and federal authorities are conducting simultaneous investigations." But on balance, we think that the 14-day bright line of Shatzer will be appreciated for its clarity by law enforcement personnel and by other State-interested participants in the criminal justice system.

2. The 14-day rule almost certainly does not allow police initiation of custodial contact and re-Mirandizing of continuous-custody pre-trial jail detainees, whether or not those detainees can be characterized as being part of the "general population" of the jail

We think that Shatzer's holding that a break in custody while a convicted person remains continuously in prison applies to persons in local jails who have been convicted and sentenced, and who are serving their sentences in the local jails. But we think that

Shatzer's break-in-custody holding will not ever apply to pre-trial detainees in local jails who have been in jail awaiting trial and sentencing ever since asserting the right to an attorney during a custodial interrogation. In part, we base this view on the discussion in the lead Shatzer opinion distinguishing, as follows, the Shatzer case factually from the U.S. Supreme Court decisions that collectively produced the Fifth Amendment initiation-of-contact rules:

> **[The prisoners'] detention is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. This is in stark contrast to the circumstances faced by the defendants in [the Supreme Court's initiation-of-contact precedents], whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.**

3. There *presently* appears to be no limit on police initiation of contact and request for a non-custodial, voluntary conversation with a suspect who previously asserted the right to counsel during custodial interrogation, and who was subsequently released into the civilian community at large (i.e., released into society – but we urge the exercise of common sense restraint)

We agree with the following statement regarding Shatzer and the "Initiation of Contact" rule in the March 2010 edition of The Federal Law Enforcement Informer (The Informer - - internet address: [http://www.fletc.gov/legal]), a monthly publication of the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC) Legal Training Division (see 3 INFORMER 10 at page 3):

> **If a suspect invokes counsel under Miranda while in custody and is then released, nothing prohibits law enforcement from approaching, asking questions, and obtaining a [voluntary] statement without the Miranda lawyer present from the suspect who remains out of custody.**

[Bracketed word "voluntary", underlining added by LED Editors].

Accordingly, although officers must wait 14 days before taking suspects back into custody for re-Mirandizing and re-interrogation, officers apparently do not need to wait 14 days to try to initiate a voluntary, non-custodial discussion with the suspect. But we think that officers should apply common sense and (1) wait a reasonable time before re-engaging in such a non-custodial contact and (2) not abuse this option. For example, officers would be well advised (1) not to walk the invoking suspect out of the police station and then immediately attempt "voluntary, non-custodial" questioning as the suspect walks to his or her car, and (2) not to sit outside the suspect's home to greet the suspect and attempt such "voluntary, non-custodial" questioning each morning during the ensuing 14 days when he or she leaves the house to go to work.

To date, our Washington appellate courts have not identified "independent grounds" in our Washington constitution on Miranda issues (this is in sharp contrast to our Washington Supreme Court's multiple "independent grounds" rulings on search-and-seizure issues). Therefore, federal agency interpretations of Miranda rulings by the U.S. Supreme Court (and by other federal courts), such as that quoted here from FLETC's Informer, are instructive to Washington law enforcement officers.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) TAMPA PD'S MIRANDA WARNING HELD TO ADEQUATELY CONVEY RIGHT OF SUSPECT TO HAVE ATTORNEY PRESENT DURING QUESTIONING – In Florida v. Powell, ___ S.Ct. ___, 2010 WL 605603 (2010) (decision filed February 23, 2010), by a 7-2 vote, the U.S. Supreme Court reverses a Florida Supreme Court decision in rejecting a felon-with-a-gun defendant's challenge to the wording of Miranda warnings given him by officers of the Tampa Police Department in Florida.

At the start of a custodial interrogation, the Tampa PD officers read to suspect Kevin Dewayne Powell the following warning from a Department form (emphasis added by **LED** Editors):

> You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use these rights at any time you want during this interview.

Powell told the officers that he understood his rights, that he was willing to talk, and that he had purchased and possessed the gun for general protection knowing that he was barred by his past conviction from possessing a gun. Prior to his trial in Florida state court, he challenged the wording of the Tampa PD Miranda warnings on grounds that the warnings did not adequately inform him of his right to have an attorney present during any questioning. The trial court rejected his argument, and a jury convicted him on the gun-possession charge. On appeal, an intermediate state appeals court held that the trial court should have suppressed the confession, and the Florida Supreme Court affirmed that ruling.

The prosecutor for the State of Florida obtained review in the U.S. Supreme Court, and that Court, as noted above, has now reversed. The U.S. Supreme Court majority, as it has in two previous decisions where the wording of Miranda warnings has been challenged, recognizes that the warnings could have been more clearly worded, but concludes that the warnings were adequate.

The majority opinion asserts that it is preferable that an agency's Miranda warnings are like those of the FBI, which are explicit in stating that the suspect has "the right to the presence of counsel during questioning." But the majority opinion concludes that the essence of this warning was adequately conveyed in the Tampa PD warning that informed Powell he had "the right to talk to a lawyer before answering any of [their] questions" and "the right to use any of [his] rights at any time [he] want[ed] during the[e] interview."

The majority opinion also rejects Powell's argument that the majority's essence-of-the-words ruling will cause other law enforcement agencies to purposely revise their Miranda warnings to try to make the warnings more ambiguous in hopes of gaining more waivers from unwary suspects. Quoting from a friend-of-the-court brief of the United States Government, the Powell majority opinion asserts the belief that agencies will have better sense than "to assume the litigation risk of experimenting with novel Miranda formulations."

Result: Reversal of Florida Supreme Court decision and remand of case, presumably for reinstatement of Powell's conviction for unlawful gun possession.

LED EDITORIAL CROSS-REFERENCE NOTE: See the entry beginning at page 19 below digesting the decision in State v. Campos-Cerna addressing the juvenile warnings under Washington law.

LED EDITORIAL COMMENT: The current Miranda warning cards and forms that we have seen from other Washington law enforcement agencies and from the Washington Criminal Justice Training Commission include an explicit warning that the suspect has "the right at this time to talk to a lawyer and have [the lawyer] present with you while you are being questioned." That explicit version of that part of the warnings should be retained by those agencies. Other agencies using a version similar to that of Tampa PD should consider changing their warnings to the just-quoted version. As noted above in our comment regarding the Shatzer decision, to date, our Washington appellate courts have not identified "independent grounds" in our Washington constitution on Miranda issues. But a purposeful fuzzing of Miranda warnings testing the limits of ambiguity might be the circumstance that would tip our Washington appellate courts to start down that treacherous road.

(2) PRISONER'S SECTION 1983 FEDERAL CIVIL RIGHTS ACT LAWSUIT UNDER CRUEL AND UNUSUAL PUNISHMENT PROVISION OF THE EIGHTH AMENDMENT ALLEGING EXCESSIVE FORCE BY CORRECTIONS OFFICER FOCUSES ON THE PURPOSE OF THE USE OF FORCE, NOT ON THE EXTENT OF INJURY – In Wilkins v. Gaddy, ___ S.Ct. ___, 2010 WL 596513 (2010) (decision filed February 22, 2010), the U.S. Supreme Court unanimously concludes that under the U.S. Supreme Court Eighth Amendment precedent of Hudson v. McMillan, 503 U.S. 1 (1992) **May 92 LED:03**, the focus in "excessive force" lawsuits brought by prisoners against correctional officers is not on whether a certain amount of injury was sustained. Rather, while not every ill-intentioned touching by a CO will constitute "excessive force," the focus under the Eighth Amendment's "cruel and unusual punishment" provision is primarily on whether force was applied in a good-faith effort to maintain or restore discipline, or instead was applied maliciously and sadistically with intent to cause harm.

In Wilkins, the Fourth Circuit Court of Appeals had concluded that the case should be dismissed because the resulting physical injuries alleged by the prisoner were relatively minor. The Supreme Court concludes, however, that the prisoner's allegations that a corrections officer punched, kicked, kneed, choked, and body-slammed him maliciously and sadistically and without any provocation, leaving him with a bruised heel, back pain, and other injuries requiring medical treatment, stated an adequate excessive force claim under the Eighth Amendment. The Court does note, however, that if the resulting injuries indeed were not great, then the dollar damages may be relatively minimal. But that is not a basis for dismissing the lawsuit.

Result: Reversal of ruling for the government by the Fourth Circuit of the U.S. Court of Appeals; case remanded to U.S. District Court (Western District of North Carolina) for possible trial.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

GOVERNMENT PREVAILS ON PROBABLE CAUSE ISSUES IN CASE INVOLVING: (1) CORROBORATED ANONYMOUS TIP; (2) ONE CONTROLLED BUY BY COMPENSATED CI WITH GOOD TRACK RECORD BUT WITH DISCLOSED PAST ARRESTS FOR CRIMES OF DISHONESTY; (3) AN UNSUCCESSFUL ATTEMPT AT A SECOND CONTROLLED BUY; AND (4) A SIX-DAY DELAY IN EXECUTION OF SEARCH WARRANT

U.S. v. Jennen, ___ F.3d ___, 2010 WL 625041 (9th Cir. 2010) (decision filed February 24, 2010)

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

In October 2007, a Spokane Police Department ("SPD") detective applied for a search warrant to search Jennen's residence and person. The detective's affidavit accompanying the search warrant application provided the following information:

In early October 2007 the SPD received an anonymous tip stating that Jennen and his girlfriend were using illegal drugs, including methamphetamine and cocaine, in the presence of their children. The anonymous tip disclosed the place where Jennen resided, that Jennen had weapons and cameras and seemed to know when police were coming and would usually disappear accordingly, and that Jennen bragged about keeping dynamite under his home. On October 18, 2007, the SPD, using a confidential informant ("CI"), orchestrated a controlled purchase of methamphetamine at Jennen's residence. The CI called Jennen and ordered methamphetamine from him. Jennen directed the CI to his residence. The SPD maintained surveillance while the CI parked at Jennen's residence and made contact with two white males. The CI explained to the SPD that these two white males were Jennen and his supplier: the CI first made contact with Jennen's supplier, after which Jennen came out of his home and gave the CI a baggie of methamphetamine in exchange for the purchase money. The CI stated that Jennen lived with his girlfriend and their children, that they had surveillance cameras in their home, and that Jennen had firearms. The CI also provided Jennen's home phone number, which police records showed belonged to Jennen's girlfriend. The affidavit disclosed that the CI had been arrested for crimes of dishonesty and was receiving monetary compensation for his work, but that the CI was reliable in past investigations involving the sale of controlled substances.

Based on the above information contained in the affidavit, on October 19, 2007, a state judicial officer authorized the search warrant. The search warrant permitted, in relevant part, the SPD to search Jennen's residence and his person for illegal drugs including methamphetamine, evidence of Jennen's involvement in the sale or distribution of drugs, and firearms.

On October 23, 2007, after the warrant was already issued, the SPD unsuccessfully attempted a second controlled purchase of methamphetamine from Jennen at his residence. The CI stated that Jennen was suspicious of activity in a field to the north and told the CI that he was "out."

On October 25, 2007, the SPD executed the search warrant at Jennen's residence. Both Jennen and his girlfriend were present, along with young children. Drug paraphernalia, packaging materials, and a substance that field-tested positive for methamphetamine were found during the search. Search of the premises also recovered a working .22 caliber semi-automatic rifle, a working bolt-action rifle, two non-functional firearms, and ammunition. Two televisions in Jennen's home were set up as surveillance monitors, showing the north and south ends of Jennen's home.

Jennen was indicted on one count of being a felon in possession of a firearm and ammunition, and one count of possession of a stolen firearm. Jennen moved to suppress the evidence obtained by law enforcement during the search, and the district court denied the motion. Jennen thereafter entered a conditional guilty plea to the crime of being a felon in possession of a firearm and ammunition,

reserving the right to appeal the denial of his suppression motion and the court's sentencing ruling. At sentencing, the district court determined that Jennen's conviction for second degree assault with a deadly weapon was a conviction for a "crime of violence." The district court calculated an advisory United States Sentencing Guidelines ("Guidelines") range of thirty-seven to forty-six months and sentenced Jennen to the low end of the range. Jennen's timely appeal followed.

ISSUES AND RULINGS: (1) Was the anonymous tip adequately corroborated to help, along with a controlled buy, establish probable cause to search Jennen's home for controlled substances? (ANSWER: Yes);

(2) Could the CI be deemed credible for probable cause purposes where the CI had a good track record for credibility, but, as was disclosed in the warrant affidavit, was being compensated by the police and had been arrested in the past for crimes of dishonesty? (ANSWER: Yes);

(3) Did the failed attempt at a second controlled buy undermine probable cause to search Jennen's home for controlled substances? (ANSWER: No);

(4) Did the six-day delay in executing the search warrant make stale the probable cause information supporting the search warrant? (ANSWER: No)

Result: Affirmance of U.S. District Court (Eastern Washington) conviction of Jason Lee Jennen for being a felon in possession of a firearm in violation of federal law.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1. Corroborated anonymous tip as supporting probable cause in part

> To uphold the issuance of a warrant, we "need only find that the issuing magistrate had a substantial basis for finding probable cause." For anonymous tips to be given weight, "officers must provide some basis to believe that the tip is true." For an anonymous tip to be the basis for probable cause, there must be additional evidence that shows the tip is reliable: "(1) the tip must include a range of details; (2) the tip cannot simply describe easily observed facts and conditions, but must predict the suspect's future movements; and (3) the future movements must be corroborated by independent police observation."
>
> The anonymous tip here met the . . . standard. First, the anonymous tip included a "range of details" that were more than "easily observed facts and conditions." The anonymous tip described how Jennen and his girlfriend were doing drugs in the presence of children. It disclosed where Jennen resided; the types of drugs, including methamphetamine and cocaine, being used; that Jennen possessed weapons; and that Jennen had cameras and seemed to know when police were coming. Second, the tip described the continuing illegal conduct (Jennen and his girlfriend "do drugs" and "have weapons[and] cameras") and where that illegal conduct would take place in the future (at Jennen's residence). Third, important details disclosed in the anonymous tip were corroborated by the CI: Jennen, along with his girlfriend and their children, was residing where the tip indicated, Jennen had firearms and surveillance cameras, and Jennen had drugs. *[Court's footnote: Jennen replies that certain information in the tip – that Jennen and his girlfriend were using drugs in the presence of children and that Jennen was keeping dynamite under his home – had not been corroborated prior to the*

execution of the warrant. [The standard] does not require that all details in an anonymous tip be corroborated, only that future activities be corroborated. The activities that were corroborated here gave the state judicial officer "a substantial basis for finding probable cause."]

2. CI's credibility based on track record despite compensation and prior arrests for crimes of dishonesty

Jennen next contests the reliability of the information obtained through the controlled purchase because the CI had been arrested for crimes of dishonesty and was being compensated by the SPD. We disagree that the information provided by the CI could not be relied on to establish probable cause. In assessing this issue, and considering the evidence provided by the CI, we keep in mind that the superordinate standard controlling the legality of the search is probable cause, not certainty of cause. The mere fact that the CI received compensation and was arrested for crimes of dishonesty is not dispositive given the additional information provided in the affidavit that bolstered the CI's credibility. The affidavit described how the CI had "assisted . . . in past investigations that resulted in the arrests and convictions of subjects dealing in controlled substances" and that "this CI has been proven reliable." *[Court's footnote: Jennen notes that the affidavit did not demonstrate that the CI's cooperation, itself, led to convictions. The affidavit did not need to state that convictions were obtained on the basis of the CI's work to establish the CI's reliability.]* Because the information "provided [by the CI] in the past involved the same type of criminal activity as the current information, the inference of trustworthiness is even stronger." The CI had a track record of demonstrated reliability in prior drug investigations and therefore the CI could properly be considered more reliable. The state judicial officer properly issued the warrant because the state judicial officer had "a substantial basis for finding probable cause." *[Court's footnote: Jennen argues that the information obtained by the CI through the controlled purchase could not corroborate the anonymous tip because of the tipsters anonymity. Doubtless, judicial officers must be cautions about issuing warrants when part of the probable cause determination relies on information provided in an anonymous tip. Here, the CI's reliability and track records, combined with the detailed nature of the information disclosed in the tip, provided "a substantial basis for finding probable cause."]*

3. Failed attempt at second controlled buy does not undermine probable cause

Jennen next argues that the second, failed controlled purchase undermined probable cause supporting the warrant. Once again we disagree, keeping in mind that it is probable cause, not certain cause, that permits the search. Even in light of the intervening failed controlled purchase, "nothing . . . changed the facts upon which the original affidavit was based and which gave the agents probable cause to believe that articles subject to seizure were in the [residence]." The second controlled purchase, though it did not result in the CI obtaining methamphetamine, showed only that Jennen had no methamphetamine that he was willing to sell at that time once his suspicion was aroused, and did not exculpate Jennen from his apparent involvement in a continuing drug scheme. Given the totality of the circumstances, the second, failed controlled purchase did not undermine probable cause that Jennen had the items sought in the warrant in his residence.

4. Six-day delay in execution of search warrant does not render PC stale

> Nor, as Jennen contends, was there an "[u]nreasonable delay in the execution of a warrant." The warrant was executed six days after it was issued. Because there was no unreasonable delay in executing the warrant and the "facts underlying the magistrate's determination of probable cause" did not "material[ly] change," there was no need, as Jennen argues, for the SPD to confer with a judicial officer to see if "probable cause still exist[ed]." The district court did not err in denying Jennen's motion to suppress. Jennen's conviction on his conditional guilty plea stands.

[Subheadings added; citations omitted]

CHILD PORNOGRAPHY CASE: NO PRIVACY RIGHT IN COMPUTER FILE-SHARING SYSTEM ACCESSIBLE TO OTHERS ON PEER-TO-PEER NETWORK

U.S. v. Borowy, __ F.3d __ , 2010 WL 537501 (9th Cir. 2010) (decision filed February 17, 2010)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

> On May 3, 2007, Special Agent Byron Mitchell logged onto LimeWire, a publically available peer-to-peer filesharing computer program, to monitor trafficking in child pornography. Agent Mitchell conducted a keyword search in LimeWire using the term "Lolitaguy," a term known to be associated with child pornography. From the list of results returned by this search, Agent Mitchell identified known images of child pornography using a software program that verifies the "hash marks" of files and displays a red flag next to known images of child pornography. At least one of these files was shared through what was later determined to be Borowy's IP address. Using the "browse host" feature of LimeWire, Agent Mitchell viewed a list of the names of all of the approximately 240 files being shared from Borowy's IP address, several of which were explicitly suggestive of child pornography and two of which were red-flagged. Agent Mitchell downloaded and viewed seven files from Borowy's IP address, four of which were child pornography. Prior to downloading the files, Agent Mitchell did not have access to the files' contents. Execution of a search warrant resulting from Agent Mitchell's investigation led to the seizure of Borowy's laptop computer, CDs, and floppy disks. Forensic examination of these items revealed more than six hundred images of child pornography, including seventy-five videos.
>
> Borowy moved to suppress this evidence, arguing that Agent Mitchell's activities in locating and downloading the files from LimeWire constituted a warrantless search and seizure without probable cause that violated Borowy's Fourth Amendment rights. Borowy argued that because he had purchased and installed a version of LimeWire that allows the user to prevent others from downloading or viewing the names of files on his computer and because he attempted to engage this feature, he had a reasonable expectation of privacy in the files. However, for whatever reason, this feature was not engaged when Agent Mitchell downloaded the seven files from Borowy's computer, and there was no restriction on Agent Mitchell's accessing those files. The district court refused to suppress the evidence, finding that Agent Mitchell's conduct was not a search under the Fourth Amendment and that Agent Mitchell had probable cause to download the files.
>
> Borowy conditionally pleaded guilty to possession of child pornography under 18 U.S.C. § 2252A(a)(5)(B), reserving his right to appeal the suppression decision. .

. . Borowy was sentenced to forty-five months of imprisonment followed by lifetime supervised release.

ISSUE AND RULING: Did Borowy have a privacy right in the file-sharing computer system that he had loaded into his computer and that he knew others could freely access through their computers? (ANSWER: No)

Result: Affirmance of U.S. District Court (Nevada) conviction and sentence of Charles A. Borowy for possession of child pornography.

ANALYSIS: (Excerpted from 9th Circuit opinion)

> Under Katz v. United States, 389 U.S. 347 (1967), government conduct qualifies as a search only if it violates a reasonable expectation of privacy. Whether Agent Mitchell engaged in an unconstitutional search and seizure is largely controlled by United States v. Ganoe, 538 F.3d 1117, 1127 (9th Cir. 2008) **Oct 08 LED:07**, which held that the defendant's expectation of privacy in his personal computer could not "survive [his] decision to install and use file-sharing software, thereby opening his computer to anyone else with the same freely available program." This result is consistent with that of other circuits that have considered the issue.
>
> Borowy argues that his case is distinguishable from Ganoe because of his ineffectual effort to prevent LimeWire from sharing his files. However, as in Ganoe, "[t]he crux of [Borowy's] argument is that he simply did not know that others would be able to access files stored on his own computer" and that, although Borowy intended to render the files private, his "technical savvy" failed him. Borowy, like Ganoe, was clearly aware that LimeWire was a file-sharing program that would allow the public at large to access files in his shared folder unless he took steps to avoid it. Despite his efforts, Borowy's files were still entirely exposed to public view; anyone with access to LimeWire could download and view his files without hindrance. Borowy's subjective intention not to share his files did not create an objectively reasonable expectation of privacy in the face of such widespread public access. Because Borowy lacked a reasonable expectation of privacy in the shared files, Agent Mitchell's use of a keyword search to locate these files did not violate the Fourth Amendment.
>
> Borowy also argues that the use of a "forensic software program" that is unavailable to the general public to confirm that the files contained child pornography rendered Agent Mitchell's conduct an unlawful Fourth Amendment search. We disagree. Borowy had already exposed the entirety of the contents of his files to the public, negating any reasonable expectation of privacy in those files. Moreover, the hash-mark analysis appears to disclose only whether the files in the list that Agent Mitchell's keyword search returned were known child pornography. In this context, the hash-mark analysis functioned simply as a sorting mechanism to prevent the government from having to sift, one by one, through Borowy's already publically exposed files. *[Court's footnote: Because we decide only the case in front of us, we reject Borowy's argument that our decision will allow unrestricted government access to all internet communications. We do not rule on whether, if confronted with different facts—for example, where the information was not already exposed to the public at large, where the hash-mark analysis might reveal more than whether a file is known child pornography, or where the government "vacuumed" vast quantities of data indiscriminately—we might find a Fourth Amendment violation. Here we*

are presented only with the limited case of a targeted search of publicly exposed information for known items of contraband.]

Finally, Borowy argues, citing Arizona v. Hicks, 480 U.S. 321, 324-26 (1987), that by downloading the seven files to examine their contents, Agent Mitchell seized the files without probable cause in violation of the Fourth Amendment. *See also* Soldal v. Cook County, 506 U.S. 56, 68-69 (1992) (explaining that even in the absence of a search, seizures of property are subject to Fourth Amendment scrutiny). We need not resolve whether downloading a file constitutes seizure of that file because the district court properly concluded that Agent Mitchell had probable cause. Probable cause "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime." As the district court noted, the file names for at least five of the files were explicitly suggestive of child pornography. [*Court's footnote: Of the remaining two file names, it appears that the district court may have been exceedingly charitable as to at least one of them, which included the abbreviation "PTHC," in determining that it was not suggestive of child pornography. See* Stults*, 575 F.3d at 838 (explaining that "PTHC" is an abbreviation commonly associated with child pornography)*]. The list of these file names was obtained by searching for a term known to be associated with child pornography and two of the files were red-flagged as known child pornography. In light of this information, the district court correctly held that Agent Mitchell had probable cause to download the files.

[Some citations omitted]

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WASHINGTON STATE SUPREME COURT

NO IMPROPER "VOUCHING" FOUND IN OFFICER'S TESTIMONY REGARDING DEMEANOR: 1) OF ALLEGED VICTIM OF DOMESTIC VIOLENCE AND SEX CRIMES, AND 2) GENERALLY OF OTHER VICTIMS OF SUCH CRIMES

State v. Aguirre, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 727592 (2010)

Facts and Proceedings below:

> The trial court admitted the testimony of [a law enforcement officer] with extensive experience investigating physical and sexual abuse cases. [The officer] had interviewed the victim following the assault and rape. [The officer] testified as to the general demeanor of victims of sexual assault and domestic violence and described the victim's demeanor during the interview, but she did not give her opinion on whether the victim's demeanor indicated that the victim was a sexual assault victim.

ISSUE AND RULING: Was the law enforcement officer's testimony about the demeanor of the complaint, as well as the demeanor generally of victims of such crimes, improper "vouching" as to believability of other witnesses where the officer did not testify either to the guilt of Aguirre or to the veracity of the complaining witness? (ANSWER: No, rules a unanimous Court)

Result: Affirmance of Thurston County Superior Court convictions and sentence of Daniel Marshall Aguirre for second degree assault and second degree rape with sentence enhancement for being armed with a deadly weapon.

ANALYSIS: (Excerpted from Supreme Court opinion)

> Aguirre first argues that [the officer's] testimony describing the victim constituted impermissible vouching for the victim's credibility and that the trial court's decision to admit it was error. We review trial court judgments regarding the admissibility of expert testimony for abuse of discretion. State v. Kirkman, 159 Wn.2d 918 (2007). That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds.
>
> In considering testimony that addresses witness demeanor, "the court will consider the circumstances of the case, including the following factors: '(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.'" Kirkman. . . .
>
> [The officer's] testimony satisfied the requirements of the Kirkman test. [The officer] did not reiterate the victim's testimony or explain how that testimony was consistent with the victim having suffered domestic violence. On the contrary, [the officer] gave a general description of the demeanor of domestic violence victims, stating several times that every victim responds to abuse differently. ("[E]ach individual is different."), ("[A]gain, everybody is different.". See State v Stevens, 58 Wn. App. 478 (1990) (expert testimony generally describing symptoms exhibited by rape victims admissible when relevant and not offered as direct assessment of credibility of victim).
>
> Likewise, when [the officer] described the victim's demeanor, she refrained from stating or implying that the victim had been a victim of domestic violence. Rather, [the officer] limited her testimony to her objective observations of the victim during their interview as compared to other victims whom [the officer] had interviewed during her lengthy criminal justice career. Such testimony was likely helpful to the jury in evaluating for themselves whether the victim had in fact been assaulted and raped. It was not a direct comment on Aguirre's guilt or the victim's veracity. It was based on [the officer]'s own inferences from the evidence. Thus, [the officer]' testimony satisfied the Kirkman test and did not amount to improper vouching for the victim's credibility. We cannot say that the trial court abused its discretion in coming to an identical conclusion and admitting the testimony.
>
> Aguirre's reliance on State v. Black, 109 Wn.2d 336 (1987), State v. Garrison, 71 Wn.2d 312 (1967), and State v Haga, 8 Wn. App. 481 (1973), when arguing for the opposite conclusion, is misplaced. These cases are distinguishable. In each, the witness either gave or was asked to give his opinion on the credibility of another party. A direct opinion on the credibility of the victim was given in Black, a direct opinion on the guilt of the defendant was solicited but excluded in Garrison, and an indirect opinion on the guilt of the defendant as given in Haga. *[Court's footnote: In Black, the expert whose testimony was challenged had testified that "'[t]here is a specific profile for rape victims and [the victim] fits it.'" In Garrison, a bartender was asked to give his opinion as to whether the defendant was one of the parties who participated in a burglary at the tavern where the bartender worked. Finally, in Haga, an ambulance driver who responded to the scene of a double murder testified that the defendant, the husband and father, respectively, of the victims, was unusually "'calm and cool about it,'" behavior very unlike that of the innocent relatives of murder victims*

> *whom the driver had observed.]* Here, [the officer]'s testimony addressed neither the guilt of Aguirre, as did the testimony at issue in Garrison and Haga, nor the veracity of the victim, as did the expert testimony at issue in Black. Accordingly, we affirm the Court of Appeals decision dismissing Aguirre's claim that [the officer]'s testimony amounted to improper vouching for the victim's credibility.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SECOND AMENDMENT OF FEDERAL CONSTITUTION APPLIES TO STATES, BUT THE CONTENT OF DEFENDANT'S CHALLENGE TO RCW 9.41.040'S LIMITS ON POSSESSION OF FIREARMS BY CHILDREN IS HELD INADEQUATE TO ALLOW COURT TO ADDRESS CONSTITUTIONALITY OF STATUTE – In State v. Sieye, ___ Wn.2d ___, 2010 WL 548385 (2010), the Washington Supreme Court turns away a federal Second Amendment challenge to a conviction for being in possession of a firearm at age 17 under circumstances where no statutory exception to the prohibition on such possession applied.

RCW 9.41.040(2)(a)(iii) reads in relevant part as follows:

> A person . . . is guilty of the crime of unlawful possession of a firearm in the second degree, if the person is does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm: . . . [i]f the person is under eighteen years of age, except as provided in RCW 9.41.042.

RCW 9.41.042 enumerates nine exception that allow children under age 18 to possess firearms.

In this case, then-17-year-old Christopher William Sieye was found in possession of a loaded Bursa .380 semiautomatic handgun during a traffic stop. When making the stop, the officer had observed Sieye making furtive gestures toward the floorboard area where the officer subsequently found the gun. None of the exceptions of RCW 9.41.042 applied to Sieye's possession of the handgun.

The majority opinion is authored by Justice Sanders and joined by Justices Charles Johnson, Alexander, Owens and Chambers. That opinion initially holds that the federal constitution's Second Amendment applies to the states. But the opinion then declares that the defendant did not make an adequate argument to allow the Washington Supreme Court to determine the constitutionality of RCW 9.41.040(2)(a)(iii) under either the Washington or the federal constitution.

Justice Stephens writes an opinion that is joined by Justice Fairhurst and concurs in the result reached by the majority, but contends that the Court should not have addressed whether the Second Amendment applies to state and local laws, in light of the fact that a case is now pending at the U.S. Supreme Court in which the U.S. Supreme Court appears to be on the verge of resolving that issue. Justice Jim Johnson writes a lone dissent arguing the RCW 9.41.040(2)(a)(iii) violates both the Washington and federal constitutions.

Result: Remand to the Court of Appeals to consider Christopher William Sieyes' other challenges to his Kitsap County Superior Court conviction for second degree possession of a firearm in violation of RCW 9.41.040(2)(a)(iii).

(2) EXCITED UTTERANCE ON E-911 TAPE ADMISSIBLE UNDER STATE AND FEDERAL CONSTITUTIONAL PROVISIONS ON RIGHT TO CONFRONTATION; BUT STATE CONSTITUTIONAL PROTECTION HELD TO BE GREATER THAN FEDERAL – In State v. Pugh, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 5155364 (2009), an 8-1 majority of the Supreme Court rules that a tape of an E-911 phone call was properly admitted into evidence in defendant's prosecution for felony violation of a domestic violence no-contact order. The call came from a woman reporting an assault and violation of a DV no-contact order. She reported that she had been injured and that the assailant was still in the area and was dangerous. Eight of the justices agree that the E-911 tape is admissible under these facts. But all nine of the justices also agree that the Washington constitution's protection of a criminal defendant's right to confront witnesses is greater than the federal constitution's protection, and hence that the Washington constitution is more restrictive than the federal constitution as to admission of hearsay in criminal prosecutions.

The lead opinion in Pugh asserts that the federal constitution'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**, was not violated by the admission of the E-911 tape because, at the time the victim made the call, she was seeking help with an ongoing emergency situation. The Crawford-Davis test focuses primarily on four admissibility factors to determine if the police agency questioning of a witness or victim is primarily to deal with an ongoing emergency: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the statements were necessary to resolve the present emergency or instead to learn what had happened in the past; and (4) the level of formality of the interrogation.

The Sixth Amendment test for admissibility was met, the Pugh majority holds, because there was the ongoing emergency of the victim's need for protection from a perpetrator who was still in the vicinity, as well as an emergency need for law enforcement personnel to have the dispatcher get some details so that they might better know the danger posed by the perpetrator when they arrived at the scene, plus the possible emergency need for medical services for the assault victim.

Under the State constitutional protection of the right to confrontation, on the other hand, the E-911 tape was admissible only because the victim's statements fall within what is known as the res gestae doctrine as it existed at the time of adoption of the Washington constitution. The res gestae doctrine requires, per Beck v. Dye, 200 Wash. 1 (1939), that the statement or declaration: (1) relates to the main event and explains, elucidates, or in some way characterizes that event; (2) is a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) is a statement of fact, and not the mere expression of an opinion; (4) is a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) is made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation (though it need not be made exactly contemporaneous with the event); and (6) is made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made. The statements on the E-911 tape in Pugh met this test for admissibility the majority holds.

Justice Chambers writes a concurring opinion (joined by Justice Stephens), in which he underscores some of the points in the majority opinion that suggest – even though Court expressly states that it is not deciding the question – that some statements that would be

admissible as "excited utterances" under Evidence Rule 803(a)(2) may be inadmissible under the test of the Washington constitution's confrontation clause.

Justice Sanders writes a dissent joined by no one in which he argues strenuously that the other eight justices have fallen woefully short of providing the essentially face-to-face level of protection for criminal defendants that he feels is required by an independent grounds reading of the Washington constitution's right to confrontation.

Result: Affirmance of unpublished Court of Appeals decision that affirmed the King County Superior Court conviction of Timothy Earl Pugh for felony violation of a domestic violence no-contact order.

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WASHINGTON STATE COURT OF APPEALS

TOTALITY OF CIRCUMSTANCES, INCLUDING OFFICER'S REQUEST TO LOOK IN CONTACTED PERSON'S WALLET FOR IDENTIFICATION, WAS NOT A TERRY SEIZURE

State v. Smith, ___ Wn. App.___, ___ P.3d ___, 2010 WL 703264 (Div. II, 2010)

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

> On July 13, 2007, officers from the Department of Corrections and [a police agency detective] visited the Chieftain Motel in Bremerton. After arresting one client with an outstanding warrant, they decided to check on another client, Christina Ohnemus, who had a room in the same motel. Kevin Joseph Smith and Ron De'Bose were in Ohnemus's room, and the officers asked the men to leave while they briefly searched the room. Smith walked outside, but De'Bose chose to remain.
>
> While Smith was standing outside the room, [the detective] approached and asked his name. [The detective] then stepped back a few feet to check for warrants on his hand-held radio. The officer found no outstanding warrants, but the physical description associated with Smith's name stated his eye color was hazel. The detective observed Smith's eyes were blue. [The detective] testified that it is common for people with warrants to give a false name, so he asked if Smith had any identification with him. Smith handed the detective a check cashing card that described Smith's eyes as blue. Due to the continued discrepancy, [the detective] asked if Smith had any other identification. While Smith was holding his wallet open, the detective asked if he could look in the wallet and Smith handed it to him.
>
> [The detective] looked through Smith's wallet and found several cards with different names. After arresting Smith for identity theft, [the detective] searched Smith's wallet and found a small plastic bag containing methamphetamine. The State charged Smith with unlawful possession of methamphetamine. At trial, Smith moved to suppress the evidence found in his wallet. The trial court denied his motion, and a jury found him guilty.

ISSUE AND RULING: Do the totality of the circumstances, including the officer's request to look in Smith's wallet for identification, add up to a Terry seizure of Smith that must be supported by reasonable suspicion? (ANSWER: No)

Result: Affirmance of Kitsap County Superior Court conviction of Kevin Joseph Smith for unlawful possession of meth amphetamine (Smith also lost his challenge to a bail jumping conviction; the part of the Court of Appeals opinion discussing the bail-jumping conviction is unpublished and is not discussed in the **LED**.)

ANALYSIS: (Excepted from Court of Appeals opinion)

> An illegal seizure may invalidate voluntary consent. A person is "seized" when his freedom of movement is restrained by physical force or a show of authority, and a reasonable person would not feel free to leave or otherwise decline an officer's request and terminate the encounter. State v. O'Neill, 148 Wn.2d 564 (2005) **April 03 LED:03**. The standard is objective.
>
> Smith argues he was seized when the officers asked him to leave the motel room. He relies on cases where a driver or passenger was seized upon being asked to exit a vehicle. But the facts here are significantly different from those in the cases Smith cites. Smith's companion chose to remain in the room, strongly suggesting that the officers did not require Smith to leave. Moreover, the officers did not instruct Smith to remain in the area outside the room. Smith has not shown that his freedom of movement was restrained at that point; he was not seized.
>
> Smith next argues he was seized when [the detective] began questioning him in the presence of several officers bearing weapons. At the time of questioning, [the detective]'s gun was visible, there were two officers in the motel room, and another officer stood approximately six feet away with an AR-15 rifle slung over his back. The "'threatening presence of several officers'" or the "'display of a weapon by an officer'" may convert a casual encounter between a police officer and a citizen into a seizure. State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:09**. But the fact that an officer is armed, without more, does not convert an encounter into a seizure. State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) **Nov 93 LED:09**, abrogated in part by State v. Thorn, 129 Wn.2d 347 (1996) **Aug 96 LED:13**. Smith does not argue that the officers' conduct was threatening. He simply argues that their presence was threatening because some were visibly armed. These circumstances, without more, did not convert the casual encounter between [the detective] and Smith into a seizure.
>
> Smith next argues he was seized when [the detective] retained his identification card. An officer's request for identification, without more, is not a seizure. State v. Ellwood, 52 Wn. App. 70 (Div. I, 1988). If an officer removes a suspect's identification or property from the suspect's presence, then the suspect is seized. See State v. Hansen, 99 Wn. App. 575 (Div. I, 2000) **June 00 LED:17**. Once [the detective] requested identification, he remained within two to three feet of Smith while holding Smith's check cashing card. Smith was not seized because [the detective] did not remove Smith's identification or property from his presence.
>
> Finally, Smith argues this case is similar to State v. Soto-Garcia. In that case, an officer asked Soto-Garcia if he had cocaine. Soto-Garcia said no, but consented to a search. The officer discovered cocaine in his shirt pocket. We held that Soto-Garcia was seized when the officer requested permission to search, reasoning that the "atmosphere created by [the officer's] progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter." In State v. Harrington, No. 81719-7, 2009 WL 4681239 (Wash. Dec.10, 2009) **Feb 10 LED:17**, the Washington State Supreme Court recently discussed Soto-Garcia and also

held that an officer's "progressive intrusion" into a defendant's privacy resulted in a seizure.

The Harrington court summarized Soto-Garcia, describing the independent elements that amounted to a seizure as: "[the officer's] inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search [Soto-Garcia]-all of which, combined, formed a seizure." Harrington. The Harrington court compared Soto-Garcia to Harrington's case, and held that Harrington was also seized by an officer's progressive intrusion into his privacy:

> [Officer] Reiber initiated contact with Harrington on a dark street. He asked questions about Harrington's activities and travel that evening and found Harrington's answers suspicious. A second officer arrived at the scene and stood nearby. Reiber asked Harrington to remove his hands from his pockets to control Harrington's actions. Then Reiber asked to frisk, without any "specific and articulable facts" that would create an objectively reasonable belief that Harrington was "armed and presently dangerous." The facts in both Soto-Garcia and this case create an atmosphere of police intrusion, culminating in a request to frisk.

Harrington.

The circumstances supporting a seizure in Soto-Garcia and Harrington are not present here. In Soto-Garcia, we emphasized that the officer asked a direct question about drug possession. The Harrington court reasoned that the officer asked Harrington to remove his hands from his pockets "to control Harrington's actions." In both cases, the progressive intrusion into the defendants' privacy culminated in a request to frisk. **[LED EDITORIAL NOTE: This factual lumping of Harrington and Soto-Garcia is not accurate. In Soto-Garcia, the officer requested consent to search, while in Harrington, the officer requested consent to frisk. See Feb 2010 LED at pp 22-23.]** The Harrington court emphasized that "[r]equesting to frisk is inconsistent with a mere social contact" and held that "[w]hen Reiber requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington." In contrast, [the detective] did not question Smith about illegal activity, attempt to control his actions, or request to frisk him. The detective simply asked for identification, and then asked to look through Smith's wallet, which Smith was holding open at the time.

For these reasons, Smith was not seized before consenting to a search of his wallet. The trial court correctly concluded that [the detective] did not improperly contact Smith and that Smith validly consented to the search.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) RCW 9A.04.080(2), STATUTE OF LIMITATIONS: THE PHRASE, "DURING ANY TIME WHEN THE PERSON CHARGED IS NOT USUALLY AND PUBLICALLY RESIDENT WITHIN THIS STATE," DOES NOT TOLL THE STATUTE OF LIMITATIONS FOR PERSONS WHILE THEY ARE IN JAIL IN WASHINGTON – In State v. Walker, 153 Wn. App. 701 (Div. III, 2010), the Court of Appeals reverses five of defendant's convictions for bail jumping and

remands the case for the superior court to take evidence and make factual findings on the questions of whether the statute of limitations ran out on any of the five bail-jumping charges.

At issue on the five remanded charges was applicability of RCW 9A.04.080(2), which provides: "The periods of limitation prescribed in subsection (1) of this section do not run during any time when the person charged is not usually and publically resident within this state." (Emphasis added). Defendant Walker apparently had been in jail in other Washington counties during a substantial portion of the time at issue.

The Court of Appeals holds that a person who is in a county jail in Washington is "usually and publically resident in the state," and therefore such Washington jail time does not toll the statute of limitations.

Result: Five of the seven Benton County Superior Court bail jumping convictions of Robert T. Walker reversed; case remanded for hearings to determine 1) the periods that defendant was incarcerated in Washington jails, and 2) whether the statute of limitations ran on any of the bail jumping convictions.

(2) ARGUABLE AMBIGUITY IN VANCOUVER PD'S JUVENILE MIRANDA WARNING DOES NOT NEGATE JUVENILE'S WAIVER OF HIS MIRANDA RIGHTS – In State v. Campos-Cerna, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 703078 (Div. II, 2010), the Court of Appeals rejects a defendant's challenge to the Vancouver Police Department's wording of its standard Miranda waiver form's "additional warning to persons under 18."

The Vancouver form's additional warning, at the time the facts of this case arose, reads as follows:

> If you are under the age of 18, anything can be used against you in a juvenile court prosecution for juvenile offenses and can also be used against you in an adult court criminal prosecution if **the juvenile court decides** you are to be tried as an adult.

The defendant argued that the warning was misleading because it did not reflect the legal proposition that in some circumstances an offense committed by a person under age 18 will be tried in adult court automatically, with no hearing or decision by the juvenile court. The Court of Appeals rejects the argument, explaining, among other things, that "the juvenile warning gives notice that any statement can be used in an adult proceeding if the juvenile court declines jurisdiction, but it does not rule out the possibility that there are situations in which only an adult court may hear the case."

Result: Affirmance of Clark County Superior Court conviction of Orlin Campos-Cerna for first degree murder and attempted first degree murder.

LED EDITORIAL NOTE: At LED deadline, the Court of Appeals decision in this case was not yet final because time remained for the defendant to seek reconsideration or to seek Washington Supreme Court review. We note that, simply by striking the bolded words in the block quote above, the warning would avoid the argument made by Campos-Cerna in this case.

(3) ACCOMPLICE WHO WAS NOT PRESENT IN A SCHOOL ZONE AT THE TIME OF COHORT'S DELIVERY OF CONTROLLED SUBSTANCES CANNOT RECEIVE SCHOOL ZONE SENTENCE ENHANCEMENT FOR THE OFFENSE – In State v. Pineda-Pineda, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 682018 (Div. I, 2010), the Court of Appeals rules that RCW 69.50.435's sentence enhancement for delivery of a controlled substance in a school zone cannot be imposed on the basis of accomplice liability where the defendant was not

present in the school zone when the delivery occurred. The Pineda-Pineda Court factually distinguishes the Washington Supreme Court decision in State v. Silva-Baltazar, 125 Wn.2d 472 (1994) **March 95 LED:08**, in which the Court ruled that where the defendant is present in the school zone at the time his accomplice delivers the controlled substances, then the drug free school zone sentence enhancement applies.

Result: Affirmance of Skagit County Superior Court conviction of Eli Pineda-Pineda for conspiracy to deliver a controlled substance, but reversal of his school zone sentence enhancement.

(4) BAIL JUMPING CONVICTION STANDS EVEN THOUGH, BECAUSE OF DEFENDANT'S ABSCONDING BEHAVIOR, NO COURT PROCEEDING OCCURRED ON THE HEARING DATE ON WHICH HE FAILED TO APPEAR – In State v. Aguilar, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 4604696 (Div. III, 2009), the Court of Appeals rules under the following analysis that defendant could be convicted of bail jumping even through no actual hearing was held on the hearing date that he missed:

> Under RCW 9A.76.170, the crime of bail jumping is defined as:
>
> > (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
>
> "The elements of bail jumping are satisfied if the defendant (1) was held for, charged with, or convicted of a particular crime; (2) had knowledge of the requirement of a subsequent personal appearance; and (3) failed to appear as required."
>
> Mr. Aguilar argues that, because the court did not convene on October 23, it was impossible to determine whether he failed to appear for the hearing. But the evidence at trial showed that Mr. Aguilar knew he had a court date of October 23, 2007, and that he failed to appear.
>
> First, the knowledge element of the crime of bail jumping requires that the State prove beyond a reasonable doubt that the defendant knew, or was aware, that he was required to appear at the scheduled hearing. According to the clerk, the date of trial was set when Mr. Aguilar was arraigned in August 2007. Mr. Aguilar readily admitted during his testimony that he knew he was to appear in court for trial on October 23, that he did not appear on that date, and that he did not intend to appear in court on that date.
>
> Moreover, the trial date of October 23, 2007 was never stricken by the trial court. The trial date was still left on the trial court's calendar. Importantly, failure [sic] of the court to convene for trial is not an element of the crime.
>
> As the State correctly points out, the issue of [materiality of] a court's failure to convene on the day the defendant was alleged to have bail jumped has not been addressed in Washington. The State argues that a similar situation occurred in State v. Adkins, 678 S.W.2d 879 (Mo. App. 1984). We find the reasoning in Adkins instructive.

In Adkins, Michael Adkins appealed his conviction for failure to appear on the ground that the evidence could not support the conviction because the judge was not present in the court at the time Mr. Adkins was scheduled to appear for sentencing. Mr. Adkins's theory on appeal was that the failure to appear statute could be violated only if the court was in session at the appointed time and place. The failure to appear statute did not address the issue of whether the judge was present, nor did it make the defendant's guilt or innocence contingent upon the judge actually being on the bench at the appointed hour, and the court affirmed the conviction. The Adkins court explained its reasoning as follows:

> While we commend [Mr.] Adkins for the ingenuity of his argument, we find it unconvincing. It would be illogical, we think, to hold that a defendant who willfully fails to appear in court at the time required is guilty of a violation of § 544.665.1 only if the judge is then on the bench. Had [Judge] Seier been in chambers at the Cole County Courthouse on the morning of July 8, 1981, could it be persuasively argued that [Mr.] Adkins' guilt or innocence of failure to appear should hinge on whether [Judge] Seier ascended the bench and called court to order? We think not. Such reasoning would put form above substance, and run counter to common experience. Busy judges routinely have court personnel check on the presence of litigants, attorneys and witnesses, remaining at their desks until all parties are in place for court proceedings.

Here, the trial court would not have been able to proceed with Mr. Aguilar's trial on October 23, 2007, without Mr. Aguilar's presence. As was the case in Adkins, there was little or no reason to convene court on that day when the court had already issued a bench warrant for Mr. Aguilar's arrest, based on his failure to maintain contact with his attorney. Applying the reasoning in Adkins, whether a person is guilty of bail jumping does not depend on whether the court convened to hear his or her case.

In sum, Mr. Aguilar was required to be in court on October 23, 2007, he was aware that he was required to appear, and he failed to appear as required. Sufficient evidence supports his conviction for bail jumping.

[Some citations omitted]

Result: Affirmance of Walla Walla County Superior Court convictions of Ricardo L. Aguilar of bail jumping and escape from community custody.

(5) WASHINGTON STATE UNIVERSITY POLICE OFFICER HAD AUTHORITY FOR OFF-CAMPUS ARREST UNDER MUTUAL AID AGREEMENT – In State v. Hardgrove, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 117723 (Div. III, 2010), the Court of Appeals rules that, where the Washington State University Police Department has mutual aid agreements under chapter 10.93 RCW with the City of Pullman, as well as with Whitman County, a WSP police officer had authority under each agreement to make a traffic stop on a Pullman street off the WSU campus.

Result: Affirmance of Whitman County Superior Court conviction of Justin James Hardgrove for possession of methamphetamine discovered in a search of his person incident to his arrest for driving while license suspended.

(6) DUI DEFENDANT LOSES ARGUMENT THAT IMPLIED CONSENT WARNINGS MUST ADVISE OF CERTAIN THINGS NOT SPECIFIED IN STATUTORY WARNING – In State v. Elkins, 152 Wn. App. 871 (Div. I, 2009), the Court of Appeals rejects a DUI defendant's argument that the implied consent warnings specified in RCW 46.20.308(2) and on the standard State implied consent form are misleading, and that two other warnings along the following lines must be added: 1) that a person's driver's license can be suspended or revoked if: (a) the test shows less than .08 BAC content, but (b) the driver is nonetheless convicted of DUI or physical control (see RCW 46.61.506(1)); and 2) that a driver will be given a mandatory jail term if convicted after refusing the test. Nothing in the law requires these additional warnings, the Court of Appeals rules.

Result: Affirmance of King County Superior Court convictions of Christine Elkins, a/k/a Christine Moses, for attempting to elude a pursuing police vehicle, DUI, second degree assault, felony hit and run, and bail-jumping.

(7) RCW 77.15.570: NON-INDIAN HUSBAND FISHING ALONE ON "USUAL AND ACCUSTOMED" FISHING PLACE OF INDIAN TRIBE WAS "ASSISTING" HIS INDIAN WIFE, WHO WAS AT HOME, IN EXERCISING HER FISHING RIGHTS – In State v. Guidry, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 491939 (Div. II, 2009), the Court of Appeals rules 2-1 in favor of a fisherman who was charged with violating RCW 77.15.570 and other statutes for commercially engaging as a non-Indian in Indian fishery.

Larry Patrick Guidry, Jr. is a non-Indian whose wife is a member of the Nisqually Indian Tribe. Guidry was charged with violating RCW 77.15.570 when he was found to have been engaged, alone and without the presence of his wife, in commercial fishing in an area that is off the Nisqually Reservation but is one of the "usual and accustomed" fishing places of the tribe. The Nisqually Tribe permits this fishing activity by an unaccompanied non-Indian spouse of a tribal member in a "usual and accustomed" fishing place.

Because the activity was not on the reservation, the State of Washington had jurisdiction over it. But the Guidry majority opinion concludes that the non-Indian husband's activity fit within a provision in RCW 77.15.570 that permits a non-Indian spouse to "assist" an Indian spouse in the exercise of Indian fishing rights. The dissent by Judge Bridgewater argues that it is absurd to assert that a person is "assisting" another person in fishing when the other person is not participating in the fishing in any way.

Result: Reversal of Thurston County Superior Court convictions of Larry Patrick Guidry, Jr. for various fishing law violations.

Status: The State has filed a request for discretionary Washington Supreme Court review.

(8) SWOLLEN EYE AND FACE PAIN THROUGHOUT AT LEAST A MORNING HELD TO BE ENOUGH TO SUPPORT ASSAULT THREE CONVICTION – In State v. Fry, ___ Wn. App. ___, 220 P.3d 1245 (Div. III, 2009), the Court of Appeals rejects an assault-three defendant's argument that the evidence in his case does not meet the standard for "substantial pain that extends for a period sufficient to cause considerable suffering" per RCW 9A.36.031(1)(f). The Fry Court explains:

> Mr. Fry claims that the State did not make an adequate showing that Ms. Fry experienced "substantial pain that extended for a period of time sufficient to cause considerable suffering" because no evidence showed or suggested that she experienced pain or discomfort beyond July 3. This is not helpful. Mr. Fry essentially invites us to conclude as a matter of law that the pain must last more than a day. We find no authority to support that notion. And, indeed, another

court has concluded that pain lasting for three hours is sufficient to "cause considerable suffering." State v. Saunders, 132 Wn. App. 592 (Div. I, 2006).

Here, Ms. Fry's swollen eye and the pain in her face lasted throughout the morning of July 3. This is ample support for the jury's conclusion that Ms. Fry experienced pain for a period of time sufficient to cause suffering. The evidence, then, supports Mr. Fry's conviction.

Result: Affirmance of Benton County Superior Court conviction of Jesse Edward Fry for assault in the third degree.

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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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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 Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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