Law Enforcement Digest

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NINTH CIRCUIT UNITED STATES COURT OF APPEALS

GOVERNMENT WINS IN CHILD PORNOGRAPHY CASE ON ISSUES OF (1) PROBABLE CAUSE/STALENESS AND (2) CDT III SEARCH WARRANT PROTOCOLS

United States v. Schesso, 730 F.3d 1040 (9th Cir., Sept. 18, 2013)

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

> In the fall of 2008, German authorities conducted an investigation into the online distribution of child pornography over a decentralized peer-to-peer file-sharing network known as "eDonkey." The network allows users to share files over the Internet by connecting directly to each other's computers. The investigation revealed, and later examination confirmed, that during a four-hour period in October 2008, an 18-minute child pornography video was made available for download over eDonkey by someone using an Internet Protocol ("IP") address—a unique, electronic numeric label linked to a specific device—located in the United States. German authorities advised Immigration and Customs Enforcement ("ICE") of this evidence and [an ICE special agent] determined that the IP address was assigned to [Joseph T.] Schesso at his Vancouver, Washington, residence.
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> [A detective and a digital forensics investigator] of the Vancouver Police Department assumed leadership of the investigation because the state had an independent interest in the crimes under investigation. [The detective], the case agent, prepared an affidavit supporting a warrant application to search Schesso's residence and seize evidence of violations of Washington statutes prohibiting possession of and dealing in child pornography. The application described the storage capacity of computers, the use of the Internet to distribute child pornography, the operation of peer-to-peer networks, and the known characteristics of child pornography collectors, such as their tendency to conceal sexually explicit images of children from discovery and to retain them indefinitely. The application further explained that due to the volume of evidence, the vulnerability of digital data, and the technical equipment and expertise needed to search digital devices, it would be necessary to remove the devices from the residence and conduct analysis and recovery of data off-site in a controlled laboratory environment.
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> A Washington state court judge approved the warrant in June 2010. The warrant noted that there was probable cause to search for evidence of dealing in and possession of child pornography, and authorized a search of Schesso's residence for "[a]ny computer or electronic equipment or digital data storage devices that are capable of being used" for those violations. The warrant permitted seized items to be transferred to the Vancouver Police Department Digital Evidence Cybercrime Unit or to any qualified law enforcement digital evidence processing lab for examination, analysis, and recovery of data. The warrant did not contain any protocols for sifting through the data or any provision for the return of non-evidentiary property.
>
> Officers from the Vancouver Police Department and [the ICE agent] executed the warrant on the same day. The officers entered the residence when no one was home. Schesso and his wife arrived within an hour. Though not under arrest, Schesso consented to an interview after waiving his rights under Miranda v. Arizona, 384 U.S. 486 (1966), and admitted to viewing child pornography on and off for several years as well as to using eDonkey and other peer-to-peer software to download child pornography. Schesso estimated he had between 100 and

500 videos and between 500 and 1,000 images of child pornography, an estimate that he raised to 10,000 images at a follow-up interview the next day. Schesso's wife also called [the Vancouver detective] on the evening of the search to inform him that she had learned that her niece had been touched sexually by Schesso about five years earlier.

The first search of Schesso's home resulted in the seizure of multiple pieces of electronic media and data storage devices pursuant to the terms of the warrant, including a custom-built computer tower and external storage devices such as camera memory cards. The forensic examination of these devices, conducted by [the digital forensics investigator], revealed 3,400 images and 632 videos of commercial child pornography, including the video that German authorities determined had been shared over eDonkey. Analysis of a camera memory card also uncovered six deleted sexually explicit images of a young girl, later identified as Schesso's niece. Schesso's wife identified the couch and blanket depicted in those images as items in her home, and a second state search warrant was obtained to seize the blanket and a fabric sample from the couch. [The digital forensics investigator] halted her computer examination before completion because sufficient evidence had been found for prosecution and other cases required her attention.

The case was accepted for federal prosecution and Schesso was charged with production, distribution, receipt, and possession of child pornography in violation of 18 U.S.C. §§ 2251 and 2252A. Schesso moved to suppress all evidence seized from his residence, as well as his inculpatory statements and the items seized during the execution of the second warrant, as fruits of the allegedly illegal first search. Schesso's motion focused on the procedural safeguards under United States v. Comprehensive Drug Testing, Inc. ("CDT III"), 621 F.3d 1162, 1177 (9th Cir. 2010) **Feb 11 LED:04** and the staleness of the warrant. Except as to the camera memory cards, he did not challenge probable cause. His motion acknowledged that "[t]he information in the application, if it had been timely, would have provided a basis for seizing Mr. Schesso's personal computers and related storage devices."

The district court initially granted the suppression motion as to all evidence seized pursuant to the two searches, but not as to Schesso's inculpatory statements. Schesso was unsuccessful in his arguments that the warrant was invalid due to staleness and that the government had acted in bad faith by seeking the warrant from a state judge rather than a federal judge. Nevertheless, the district court concluded that the affidavit failed to connect generalized statements about child pornography collectors to Schesso thus rendering the warrant facially deficient and the good faith exception inapplicable.

The district court later issued a supplemental memorandum opinion that granted the suppression motion as to all evidence seized during both searches and as to Schesso's inculpatory statements. Although the oral ruling and earlier order expressed that the government did not engage in the type of "deliberate overreaching" that United States v. Tamura, 694 F.2d 591 (9th Cir. 1982), and CDT III intended to prevent, the opinion emphasized that the warrant application failed to include any of the protocols for searching electronic records suggested by the concurring opinion in CDT III. The court rejected the good faith exception

to the exclusionary rule on the ground that "the overturned warrant is so facially deficient that reliance on it is not reasonable."

[One footnote omitted]

ISSUES AND RULINGS: 1) Did the affidavit establish probable cause that the officers would find child pornography on a computer or electronic equipment or digital data storage device in Schesso's residence? (ANSWER BY NINTH CIRCUIT: Yes, and, because child pornography was the subject matter, including uploading by the suspect, the mere passage of 20 months since the eDonkey incident did not make the information stale for probable cause to search purposes);

2) Was the search warrant fatally flawed because it did not contain any of the protocols suggested by the Ninth Circuit in United States v. Comprehensive Drug Testing, Inc. ("CDT III"), 621 F.3d 1162, 1177 (9th Cir. 2010) **Feb 11 LED:04**, such as (A) the government's waiver of reliance on the plain view doctrine, (B) segregation and redaction of electronic data by specialized personnel or an independent third party, and (C) disclosure of the actual risks of destruction of information? (ANSWER BY NINTH CIRCUIT: No)

Result: Reversal of suppression ruling of U.S. District Court (W.D. Washington, Tacoma); case remanded for prosecution of Joseph T. Schesso.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) Probable Cause Issue

> Schesso did not merely possess a commercial child pornography video, which might have resulted from a onetime accidental download or inadvertent receipt. Key to the probable cause analysis is the evidence that Schesso took the affirmative step of uploading and distributing the video on a network designed for sharing and trading. [*Court's footnote: The district court confused the act of downloading a file with the act of uploading a file. In his oral ruling, he inaccurately stated that "[t]he only crimes described . . . in the affidavit are the possession and downloading of [one] particular file." Not so. In fact, the scope of the warrant is specifically premised on Schesso's uploading of the file, an act that connects him to the profile of a child pornography collector*.]
>
> As the affidavit explained, peer-to-peer file sharing networks are "frequently used to trade digital files of child pornography," "often provide enhanced capabilities to reward those who share files by providing reduced wait periods, higher user ratings, or other benefits," and sometimes do not allow users to download files at all unless they also share files. It is hardly a leap to infer that Schesso either had other files to share or that he used the network to download files.
>
> The judge issuing the warrant thus made the "practical, common-sense decision" that "given all the circumstances set forth in the affidavit before him . . . there [was] a fair probability that contraband or evidence" of child pornography would be found on Schesso's computer and other digital storage equipment. This determination is in line with our precedent. See, e.g., United States v. Gourde, 440 F.3d 1065, 1069-71 (9th Cir. 2006) **May 06 LED:12** (emphasizing that probable cause means "fair probability," not certainty or even a preponderance of the evidence, and concluding that it was reasonable to infer that there was a fair

probability that defendant "received or downloaded" child pornography images based on defendant's paid subscription to a child pornography website); United States v. Kelley, 482 F.3d 1047, 1053 (9th Cir. 2007) **May 07 LED:04** (concluding that it was reasonable to infer that defendant "was part of a network of persons interested in child pornography" and permissible to search defendant's computer based on evidence that defendant had received nine emails with attachments "containing the same type of illicit child pornography" that was found on the computers of two individuals who collected or distributed child pornography); United States v. Lacy, 119 F.3d 742, 745 (9th Cir. 1997) (implying that it was reasonable to infer that defendant had the characteristics of a "collector[] of child pornography" based on evidence in the affidavit that defendant had downloaded at least two computerized visual depictions of child pornography).

Because there was a fair probability that the eDonkey video as well as other evidence of possession of and dealing in child pornography would be found on Schesso's digital equipment, the warrant was not overbroad. The government was faced with the challenge of searching for digital data that was not limited to a specific, known file or set of files. The government had no way of knowing which or how many illicit files there might be or where they might be stored, or of describing the items to be seized in a more precise manner. United States v. Adjani, 452 F.3d 1140, 1447–48 (9th Cir. 2006) **[LED EDITORIAL NOTE: Adjani was discussed in the October 2006 LED Editorial Comments on United States v. Battershell, 457 F.3d 1048 (9th Cir. 2006) Oct 06 LED:08]** ("Warrants which describe generic categories of items are not necessarily invalid if a more precise description of the items subject to seizure is not possible.") (citation omitted). These factors, along with the detailed explanation of the need for off-site analysis and recovery, justify the seizure and subsequent off-premises search of Schesso's entire computer system and associated digital storage devices.

We have repeatedly found equally broad searches constitutional on similar or less evidence. See, e.g., United States v. Krupa, 658 F.3d 1174, 1178 (9th Cir. 2011) **Jan 12 LED:13** (holding valid a search of fifteen computers at a residence based on evidence of one contraband image and a report of child neglect); United States v. Brobst, 558 F.3d 982, 993–94 (9th Cir. 2009) (holding valid a warrant authorizing the search and seizure of photographs, computers, compact disks, floppy disks, hard drives, memory cards, printers, other portable digital devices, DVDs, and video tapes based on a witness's observation of one illicit photograph in defendant's home); . . .

We are not convinced by Schesso's additional argument that there was no probable cause to seize the camera memory cards simply because Schesso was not suspected of producing child pornography. Camera memory cards have data storage functionality like any external digital storage device, and Schesso's custom-built computer tower had a port connecting directly to camera memory cards, allowing him to read, write, or import data between devices. At the time of the search, a camera was connected to one of the computers. The officers reasonably concluded that the camera memory cards were covered by the warrant as "digital data storage devices . . . capable of being used to commit or further" the crimes of possession of and dealing in child pornography.

Nor are we persuaded that the information supporting the warrant application was stale. . . . . [The detective's] affidavit explained that individuals who possess, distribute, or trade in child pornography "rarely, if ever, dispose of sexually explicit images of children" because these images are treated as "prized possessions." In light of the "nature of the criminal activity and property sought" and the reasonable inference that Schesso fit the profile of a collector, the state court judge had ample reason to believe that the eDonkey video or other digital child pornography files would be present at Schesso's residence a mere 20 months after the eDonkey incident. . . .

2) Protocols Issue

The question we consider next is whether the electronic data search guidelines laid out in the CDT cases affect the outcome here. After considering constitutional requirements, the temporal sequence of the cases, and the advisory nature of the guidelines, we conclude that the absence of these protocols in Schesso's warrant neither violates the Fourth Amendment nor is inconsistent with CDT III or its predecessor case, Tamura. Schesso's scenario did not implicate the real concern animating the court in CDT III and Tamura: preventing the government from overseizing data and then using the process of identifying and segregating seizable electronic data "to bring constitutionally protected data into . . . plain view." CDT III, 621 F.3d at 1171 **Feb 11 LED:04**.

In Tamura, the government had probable cause to seize three categories of paper records. To avoid the time-consuming task of identifying those specific records on site, the government seized substantially more records for off-site examination, thus gaining access to materials it had no probable cause to collect. Significantly, the seizure far exceeded the documents detailed in the warrant. Our analysis was blunt: "It is highly doubtful whether the wholesale seizure by the Government of documents not mentioned in the warrant comported with the requirements of the fourth amendment." Although we declined to suppress the evidence at trial, we suggested procedural safeguards and monitoring by a magistrate when over-seizure is justified because documents subject to seizure "are so intermingled" that they cannot feasibly be identified and segregated on-site.

In CDT III, we reiterated the concerns expressed in Tamura in the context of electronic data. A short procedural history of CDT III is in order. During the time government agents were investigating Schesso, our court issued its original en banc decision, now known as CDT II, in a case involving steroid use by professional baseball players. The government had probable cause to seize the electronic drug testing records of ten baseball players from an independent company administering the drug testing program. But the government requested authorization to seize considerably more data beyond that of the ten players for off-site segregation and examination. The magistrate judge granted the request subject to the government's following certain procedural safeguards "designed to ensure that data beyond the scope of the warrant would not fall into the hands of the investigating agents"—including that "law enforcement personnel trained in searching and seizing computer data," rather than investigating case agents, conduct the initial review and segregation of data.

Once the electronic data was seized, however, the government ignored the required protocols. Alongside the computer specialist, the investigating case

agent reviewed the drug testing results of hundreds of professional athletes for whom probable cause had not been shown, and used what he learned to obtain subsequent search warrants based on the government's contention that the evidence was in "plain view." Referencing the district court's binding order that the government intentionally disregarded the warrant's procedural safeguards, we affirmed the district court's grant of the motion to return the records of all but the ten identified baseball players who had been suspected of criminal activity. To avoid a reprise, CDT II laid out a number of procedural safeguards for future warrants as part of the majority opinion. [*Court's footnote*: *These prophylactic guidelines include waiver of reliance on the plain view doctrine, segregation and redaction of electronic data by specialized personnel or an independent third party, and disclosure of the actual risks of destruction of information.*]

After CDT II, [federal] magistrate judges in the Western District of Washington took steps to implement the protocol, requiring the protocol for all warrants authorizing searches of electronically stored information. Because the government disagreed with this approach, ICE directed its agents not to agree to a waiver of plain view, for example, and adopted a practice of submitting its warrant applications to state judges rather than through the federal system.

Approximately a year later, the en banc [Ninth Circuit] court issued a new, amended opinion. The search protocol was no longer part of the majority opinion, but instead was moved to a concurring opinion and thus was no longer binding circuit precedent. By its own terms, the concurring opinion proposes the protocols not as constitutional requirements but as "guidance," which, when followed, "offers the government a safe harbor." Notably, there is no clear-cut rule: "District and magistrate judges must exercise their independent judgment in every case, but heeding this guidance will significantly increase the likelihood that the searches and seizures of electronic storage that they authorize will be deemed reasonable and lawful."

Schesso's situation is unlike CDT III and Tamura in that the government properly executed the warrant, seizing only the devices covered by the warrant and for which it had shown probable cause. Based on the evidence that Schesso possessed and distributed a child pornography video on a peer-to-peer file-sharing network, law enforcement agents had probable cause to believe that Schesso was a child pornography collector and thus to search Schesso's computer system for any evidence of possession of or dealing in child pornography. In other words, Schesso's entire computer system and all his digital storage devices were suspect.

Tellingly, the search did not involve an over-seizure of data that could expose sensitive information about other individuals not implicated in any criminal activity—a key concern in both the per curiam and concurring opinions of CDT III.

The rationale leading us to defer to the state court judge's determination of probable cause applies with even greater force to the question whether the officers' reliance on the warrant was objectively reasonable. The affidavit included sufficient evidence connecting Schesso to the profile of a child pornography collector to justify the officers' reliance on the warrant. We have previously upheld comparably broad warrants based on similar evidence. . . .

> Our analysis is not affected by the officers' decision to seek a warrant from a Washington state court rather than the Western District of Washington. . . . .

[Some case citations and some footnotes omitted]

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) PROSECUTION VIOLATED BRADY BY FAILING TO DISCLOSE IMPEACHMENT EVIDENCE RELATING TO A GOVERNMENT WITNESS – In Amado v. Gonzalez. 734 F.3d 936 (9th Cir., Oct. 30, 2013), a three-judge panel of the Ninth Circuit holds in habeas corpus review in a 2-1 majority opinion that prosecutors violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose impeachment evidence relating to one of its witnesses to the defense.

The defendant was convicted of aiding and abetting first degree murder, premeditated attempted murder, assault with a firearm, and shooting at an occupied motor vehicle for his role in the attack of a rival gang on a bus. The evidence against the defendant was not particularly strong and much of it came from the testimony of an individual who witnessed someone loosely meeting the defendant's description walking toward the bus carrying a gun. After trial, for the first time, the defense learned from a probation report not previously shared by the prosecution that this witness had a felony conviction, was on probation and had previously been a member of a gang affiliated with the gang the victims belonged to.

The Court finds a Brady violation, holding that the information was favorable to the accused because it could have been used to impeach the witness, it was available to the prosecution and should have been disclosed to the defense, and that the failure to do so was prejudicial to the defendant. The Court also rejects the argument that there is a "due diligence" requirement on the part of the defense to obtain such information.

The dissenting opinion argues primarily that the majority opinion fails to give proper deference to the narrow review standard for habeas corpus review.

Result: Reversal of United States District Court (Central District California) denying Randall Amado's writ of habeas corpus.

(2) NO FOURTH AMENDMENT SEARCH OCCURS WHERE DETECTIVES DO NOT VIEW ANY ADDITIONAL IMAGES OTHER THAN THOSE VIEWED BY COMPUTER STORE EMPLOYEE, REGARDLESS OF FACT THAT DETECTIVES REQUESTED THE IMAGES BE ENLARGED (WASHINGTON RULE UNDER ARTICLE I, SECTION 7 DIFFERS); WIFE HAD APPARENT AUTHORITY TO CONSENT TO SEARCH OF HOME OFFICE AND COMPUTER (WASHINGTON RULE UNDER ARTICLE I, SECTION 7 DIFFERS) – In United States v. Tosti, 733 F.3d 816 (9th Cir., Oct. 1, 2013), a three-judge panel of the Ninth Circuit holds that police detectives did not exceed the scope of a private search of the defendant's computer, and that the defendant's wife had apparent authority to consent to the search of a home office. **[LED EDITORIAL NOTE: On both issues, Washington officers should note that the Washington Supreme Court has ruled differently under the Washington constitution, article I, section 7. See the LED Editorial Note at the close of this LED entry.]**

The defendant took his computer to a CompUSA store for repair. While attempting to repair the computer a CompUSA employee discovered a number of images of child pornography. The employee called the police. The detectives viewed only those images the store employee viewed. Both the employee and detectives testified that they could recognize the images as

child pornography from the thumbnail images, however, the detectives requested the employee change the images to slideshow. The Court rules under what is sometimes called the "private search doctrine" that there was no search because the officers did not exceed the scope of the private search.

After the defendant was arrested (four years later) his wife called the FBI and asked that they come and get a number of images of child pornography that she found in a shared office in the home. The FBI seized a number of items from the office and a computer. The Court finds that the defendant's wife had apparent authority, if not actual authority, to consent to the search.

Result: Affirmance of United States District Court (Northern District California) conviction of Donald Thomas Tosti for possession of child pornography.

LED EDITORIAL NOTES: In State v. Eisfeldt, 163 Wn.2d 628 (2008) July 08 LED:09, the Washington Supreme Court ruled that the Fourth Amendment's "private search doctrine" does not apply under article I, section 7 of the Washington constitution. Like the Fourth Amendment, evidence discovered in a search by a private person who is not a government agent is generally not subject to the exclusionary rule of the Washington constitution. But unlike under the Fourth Amendment's "private search doctrine," under the Washington constitution as interpreted in Eisfeldt, the search by the private person does not allow law enforcement to automatically conduct a warrantless search of the same area or item as was searched by the private person. Thus, Washington officers would need to obtain a warrant prior to searching the item(s).

And in State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02, the Washington Supreme Court ruled that the Fourth Amendment's "apparent authority rule" for consent searches does not apply under article I, section 7 of the Washington constitution. Under the Washington constitution, a consent search is lawful only if the person giving consent actually had authority under "joint access and control" analysis to give consent. See the February 2006 LED at pages 9-10 for some helpful tips from Washington's King County Prosecuting Attorney's Office for determining if a person has actual authority to consent to a search. In the present case the government presented evidence that the defendant's wife had actual authority, but the Ninth Circuit did not directly rule on this issue because it found that she had "apparent authority," which is sufficient under the Fourth Amendment.

So, the two successful arguments by the federal prosecutors in the Tosti case may not have worked if this case had been prosecuted in the Washington courts.

(3) PHOTOGRAPHS CONSTITUTE CHILD PORNOGRAPHY WHERE THEY ARE DEPICTIONS OF CHILDREN "MORPHED," OR DIGITALLY ALTERED, TO APPEAR AS THOUGH THE CHILDREN ARE ENGAGED IN SEXUAL ACTIVITY – In Shoemaker v. Taylor, 730 F.3d 778 (9th Cir. Sept. 13, 2013), a three-judge panel of the Ninth Circuit holds 1) in context the particular images of nude children in this case are not protected by the First Amendment, 2) depictions of children that have been "morphed" to appear as though the children are engaged in sexual activity constitute child pornography, 3) it is not error to allow the jury to consider the context in which the images were displayed, and 4) there is sufficient evidence to support defendant's convictions for possession of child pornography.

The defendant was convicted of possession of child pornography based on the possession of a number of images of nude children in various poses. The Court's analysis is in part as follows:

A. Nude Images—Exhibits 3, 5, 7, 9, 12, and 13

First, Shoemaker argues that Exhibits 3, 5, 7, 9, 12, and 13 were simply innocent pictures of nude children, and thus protected speech. Upon independent review of the images we cannot conclude that these images are protected by the First Amendment. Therefore, we hold that the state court was not unreasonable to determine that Exhibits 3, 5, 7, 9, 12, and 13 were not protected speech.

The Supreme Court has clearly established that not all images of nude children amount to child pornography because "nudity, without more[,] is protected expression." New York v. Ferber, 458 U.S. 747, 765 n. 18 (1982); see also Osborne v. Ohio, 495 U.S. 103, 112 (1990). "For example, a family snapshot of a nude child bathing presumably would not be criminal." United States v. Hill, 459 F.3d 966, 970 (9th Cir. 2006) (internal quotation omitted) **[LED EDITORIAL NOTE: Hill is discussed in the October 2006 LED at pages 13-14; see also United States v. Krupa, 658 F.3d 1174 (9th Cir. 2011) Jan 12 LED:13]**. The Supreme Court has, however, upheld statutes criminalizing the possession of "lewd" or "lascivious" depictions of nude children. United States v. X–Citement Video, Inc., 513 U.S. 64 (1994) (holding that "lascivious" and "lewd" are indistinguishable and that federal child pornography statute 18 U.S.C. § 2252 criminalizing the possession of images depicting "lascivious exhibition of the genitals" was not vague or overbroad); Osborne, 495 U.S. at 112–13; Ferber, 458 U.S. at 765 (upholding New York law prohibiting images amounting to a "lewd exhibition of the genitals").

We have held that "'lascivious' is a 'commonsensical term' and that whether a given photo is lascivious is a question of fact . . . . [W]hether the item to be judged is lewd, lascivious, or obscene is a determination that lay persons can and should make." United States v. Arvin, 900 F.2d 1385, 1390 (9th Cir. 1990) (citations omitted). To determine whether depictions of nude children are "lascivious," "lewd," or "for the purpose of sexual stimulation of the viewer," and thus child pornography, our court and other circuits have relied on the Dost factors, set forth in United States v. Dost, 636 F. Supp. 828 (S. D. Cal.1986), aff'd sub nom. The Dost test sets forth six factors for determining lewdness or lasciviousness:

> (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;
> (2) whether the setting of the visual depiction is sexually suggestive, i.e. in a place or pose generally associated with sexual activity;
> (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
> (4) whether the child is fully or partially clothed, or nude;
> (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and
> (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

636 F.Supp. at 832. We have stated that "the [Dost] factors are neither exclusive nor conclusive" but rather "general principles as guides for analysis" and "a starting point" in determining whether an image constitutes child pornography.

Considering these factors on de novo review of the images, we conclude that the six images that Shoemaker claims are innocuous nude photographs are in fact child pornography. We find, just as the district court found after independently reviewing the photographs, that several of the Dost factors are present in Exhibits 3, 5, 7, 9, 12, and 13, including: nudity, expressions of sexual coyness, focus on genitals and pubic areas, and girls "arrayed for the sexual stimulation of the viewers." Therefore, the state court's determination was not unreasonable.
. . .

B. Morphed Images—Exhibits 8 and 14

Shoemaker argues that the jury wrongly found Exhibits 8 and 14 to be child pornography because those images were morphed, and the state court unreasonably applied clearly established federal law by failing to afford him habeas relief on this ground.

Upon an independent review of the record, it is clear that the images depict children engaging in sexually explicit behavior and would thus not be protected by the First Amendment if not "morphed." Irrespective of whether the images are in fact morphed, Shoemaker's claim fails because there is no clearly established Supreme Court law holding that images of real children morphed to look like child pornography constitute protected speech.

Morphed images of children engaged in sexual activity directly implicate the interest of protecting children from harm, an interest the Supreme Court deemed compelling in Ferber. There, the Court explained that states have a compelling interest in "safeguarding the physical and psychological well-being of a minor" and the "prevention of sexual exploitation and abuse of children." 458 U.S. at 756–57 (internal quotation omitted). The Court further noted that actual child pornography is "intrinsically related to the sexual abuse of children" because it is "a permanent record of the children's participation and the harm to the child is exacerbated by [its] circulation." Id. at 759 (emphasis added).

Morphed images are different from traditional child pornography because the children depicted may not have been sexually abused or physically harmed during the images' production. But, morphed images are like traditional child pornography in that they are records of the harmful sexual exploitation of children. The children, who are identifiable in the images, are violated by being falsely portrayed as engaging in sexual activity. As with traditional child pornography, the children are sexually exploited and psychologically harmed by the existence of the images, and subject to additional reputational harm as the images are circulated.

For this reason, at least three other circuits have held that morphed images of children engaging in sexual activity constitute unprotected speech. See Doe v. Boland, 698 F.3d 877 (6th Cir. 2012); United States v. Hotaling, 634 F.3d 725 (2d Cir. 2011), cert. denied, ___ U.S. ___, 132 S. Ct. 843 (2011); United States v. Bach, 400 F.3d 622 (8th Cir. 2005). In Hotaling, the Second Circuit explained that the "underlying inquiry is whether an image of child pornography implicates the interests of an actual minor." The court held that "[s]exually explicit images that use the faces of actual minors are not protected expressive speech under the

First Amendment" because, when a minor's face is used, her interests are implicated and she is placed "at risk of reputational harm and . . . psychological harm." In Bach, the Eighth Circuit similarly reasoned,

> Although there is no contention that the nude body actually is that of AC or that he was involved in the production of the image, a lasting record has been created of AC, an identifiable minor child, seemingly engaged in sexually explicit activity. He is thus victimized every time the picture is displayed.

As the foregoing underscores, the Supreme Court has not clearly established that images morphed to depict children engaged in sexual activity are protected by the First Amendment. Indeed, the Court has expressly left open the question whether morphed images can constitute child pornography. Ashcroft v. Free Speech Coalition, 535 U.S. 234, 242 (2002) **June 02 LED:17**. In Free Speech Coalition, the Court held that virtual child pornography—images of naked children created entirely digitally without the use of any real children—was protected speech. The Court thus declared unconstitutional those portions of the federal Child Pornography Protection Act prohibiting such pornography. The Court, however, expressly declined to rule on the section of the Act that covered morphed images: "Although morphed images may fall within the definition of virtual child pornography, they implicate the interests of real children and are in that sense closer to the images in Ferber. Respondents do not challenge this provision, and we do not consider it." Id. at 242. In fact, by stating that morphed images are "closer to the images in Ferber," the Court noted that morphed images were more likely to be considered unprotected speech like the actual child pornography at issue in Ferber, rather than protected speech.
. . .

. . . In sum, we conclude that the Supreme Court has not clearly established that morphed images are protected by the First Amendment. Accordingly, we hold that under § 2254(d), the state court reasonably rejected Shoemaker's claim that Exhibits 8 and 14 cannot be considered pornographic.

C. Context in Which the Images Were Shown

Shoemaker contends that the court erred when it allowed the jury to consider the context in which the images were displayed in determining whether the images were child pornography. Specifically, Shoemaker alleges error in the jury instructions, which allowed the jury to consider the "setting" of the images, and the prosecutor's arguments regarding the adult website on which six of the images were displayed. Shoemaker argues that Free Speech Coalition established that context is irrelevant in determining whether an image is child pornography. Shoemaker misreads Free Speech Coalition.

In Free Speech Coalition, the Supreme Court struck down a federal law that banned materials marketed in such a way that "conveys the impression" that such materials depict minors engaged in sexually explicit conduct. The Court was concerned that "[e]ven if a film contains no sexually explicit scenes involving minors, it could be treated as child pornography if the title and trailers convey the impression that [such] scenes would be found in the movie." The Court found the law overbroad because its analysis would not "depend principally upon the

content of the prohibited work" but would instead "turn[ ] on how the speech is presented, not on what is depicted." The Court did not state, however, that the context in which an image is displayed may never be considered in determining whether an image is child pornography. In fact, the Court noted that how an image is pandered may be relevant in determining whether particular materials are obscene, citing Ginzburg v. United States, 383 U.S. 463, 474 (1966). Thus, the Court left open the question whether the context in which an image is displayed may be considered as a factor in a child pornography determination.

However, Free Speech Coalition does tell us that a child pornography determination may not "turn on" the context in which an image is presented. We read "turn on" to mean to "depend principally on." In Free Speech Coalition, the Court rejected the government's argument that "the determination [of child pornography] would still depend principally upon the content of the prohibited work." (Emphasis added.) The Court instead found that "[t]he determination turns on how the speech is presented, not what is depicted" and therefore held that the challenged law was unconstitutional. (Emphasis added.) The juxtaposition in the opinion between "depend principally upon" and "turns on" supports our view that the two phrases are treated as synonymous. Thus, we read Free Speech Coalition as clearly establishing that the context of how an image is presented may not be the principal consideration in determining whether that image is child pornography.

We now turn to whether the state court unreasonably applied Free Speech Coalition in rejecting Shoemaker's habeas claim regarding the jury instructions. The instructions allowed the jury to consider "[w]hether the 'setting' was sexually suggestive." The jury may have understood "setting" to mean the backdrop depicted within the four corners of the photograph—for example, the sailboat in Exhibit 1 or the bathtub in Exhibit 7. This would make "setting" a factor relating to the content of the images rather than to the context in which they were displayed. Therefore, we cannot say that the state court was unreasonable in finding that the jury instructions, which tracked the widely-used Dost factors, were proper.
. . .

[Some citations omitted]

Result: Affirmance of United States District Court (Central District California) order denying Stephen P. Shoemaker's petition for writ of habeas corpus after he had been convicted of eight misdemeanor counts of possession of child pornography and one misdemeanor count of duplicating child pornography.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) STATUTE PROHIBITING POSSESSION OF FIREARM BY PERSON RELEASED ON BOND AFTER COMMITTING A SERIOUS OFFENSE IS NOT UNCONSTITUTIONAL UNDER ARTICLE I, SECTION 24 OF WASHINGTON STATE CONSTITUTION OR THE SECOND AMENDMENT TO UNITED STATES CONSTITUTION – In State v. Jorgenson, ___ Wn.2d ___, 312 P.3d 960 (Nov. 21, 2013), the Washington Supreme Court holds that RCW 9.41.040(2)(a)(iv), which prohibits possession of a firearm by a person released on bond after a judge has determined there is probable cause to believe the person has committed a serious offense, is constitutional as applied to the defendant under state and federal constitutions.

Justice Wiggins files a dissenting opinion in which Justice Jim Johnson concurs.

Result: Affirmance of Cowlitz County Superior Court conviction of Roy Steven Jorgenson of two counts of second degree unlawful possession of a firearm.

(2) PROSECUTOR MAY CONSIDER FACTS OF CRIME WHEN DETERMINING WHETHER TO SEEK THE DEATH PENALTY – In State v. Monfort, ___ Wn.2d ___, 312 P.3d 637 (Nov. 14, 2013), the Washington Supreme Court holds that a prosecutor may consider the facts of the crime when deciding whether to file a death penalty notice, and does not have to complete an exhaustive investigation of mitigating circumstances.

RCW 10.95.040(1) directs the prosecutor to "file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." The Court holds that a prosecutor may consider the facts of the crime when deciding whether to file a death penalty notice, the prosecutor does not have to complete an exhaustive investigation of mitigating circumstances before filing a death penalty notice, the prosecutor in the present case properly exercised his discretion, and the trial court improperly held the prosecutor to a higher standard.

Justice Gordon McLoud files a concurring opinion joined by Justices Gonzalez and Fairhurst.

Result: Reversal of King County Superior Court order granting defendant Christopher John Monfort's motion to strike death penalty notice in his trial for aggravated first degree murder of a police officer. Case remanded for trial and consideration of death penalty.

LED EDITORIAL NOTE: See also State v. McEnroe; State v. Anderson, ___ Wn.2d ___, 309 P.3d 428 (Sept. 5, 2013) Nov 13 LED:17 which also involved a challenge to the prosecutor's death penalty notice.

(3) NO RIGHT TO HEARING ON GOVERNOR'S CANCELLATION OF INDETERMINATE SENTENCING REVIEW BOARD (ISRB) DECISION WHICH HAD GRANTED PAROLE – In In re Lain, ___ Wn.2d ___, 2013 WL 5968490 (Nov. 7, 2013), the Washington Supreme Court rejects the personal restraint petition of an inmate who had his grant of parole reversed by the Governor.

The majority opinion summarizes the case as follows:

> Jerry Lain was sentenced to a maximum of life imprisonment under Washington's former indeterminate sentencing scheme [for stabbing a police officer, then seizing the officer's gun and shooting him in the abdomen and face]. In 2010, the Indeterminate Sentencing Review Board [ISRB] found Lain parolable, approved his release plan, ordered parole with supervision conditions, and fixed a date for release to Iowa. Four days before that set release date, [and after receiving considerable correspondence from police organizations and the media] the governor canceled Lain's parole under RCW 9.95.160, which provides that "the governor may cancel or revoke the parole granted to any convicted person by the board." In response, the board added 36 months to Lain's minimum term of confinement. Lain brings both an as-applied and a facial challenge to the statute, arguing that it violates due process because it does not outline procedures for the governor to provide the inmate notice and an opportunity to be

> heard before the governor acts. We hold that RCW 9.95.160 is constitutional both on its face and as applied to Lain. Although Lain was entitled to due process protections regarding cancellation of his parole, he was not entitled to a separate hearing before the governor. Due process requirements were met when he had a parolability hearing before the board and received written reasons for the governor's decision to cancel parole.

Justice Fairhurst writes a concurring opinion.

Result: Dismissal of Jerry Dale Lain's personal restraint petition.

(4) SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF MALICIOUS MISCHIEF, FOR DAMAGE TO THE PROPERTY OF ANOTHER, WHERE DEFENDANT DAMAGED A HOME HE WAS PURCHASING ON A REAL ESTATE CONTRACT – In State v. Wooten, 178 Wn.2d 890 (Oct. 31, 2013), in a 8-1 decision the Washington Supreme Court finds that there is sufficient evidence to convict the defendant of malicious mischief in the first degree where the defendant damaged a home he was purchasing on a real estate contract.

A person commits malicious mischief when they knowingly and maliciously cause physical damage to the property of another. Property of another is "property in which the actor possesses anything less than exclusive ownership." RCW 9A.48.010(1)(c). Because the defendant was purchasing the home on a real estate contract, and was not the exclusive owner, there is sufficient evidence to convict him of malicious mischief for damage to the property of another.

Justice Owens dissents.

Result: Affirmance of Lewis County Superior Court conviction of David Allen Wooten for first degree malicious mischief.

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WASHINGTON STATE COURT OF APPEALS

INVESTIGATORY POST-ARREST CAR SEARCH IN 2008 THAT WAS MADE UNLAWFUL BY CHANGE TO CAR-SEARCH-INCIDENT DOCTRINE THAT CULMINATED WITH STATE V. SNAPP CANNOT BE SALVAGED ON FACTS OF CASE BY "INVENTORY SEARCH" RATIONALE OR "INDEPENDENT SOURCE" EXCEPTION TO EXCLUSIONARY RULE

State v. Green, ___ Wn. App. ___, 312 P.3d 669 (Div. I, Oct. 28, 2013)

Facts:

The Court of Appeals describes as follows the circumstances surrounding a vehicle search that occurred immediately after a fatal vehicle-pedestrian collision and just before the vehicle was towed to a police storage facility:

> Around 10:00 p.m. on January 4, 2008, Peter Green was driving his Jeep Cherokee when he collided with a pedestrian, who died soon afterward. Seattle Police Department (SPD) detectives arrived at the scene and took a statement from Green. Suspecting him of driving under the influence, they arrested him and transported him to a hospital for a blood draw.

> Green's car was towed to the SPD storage facility that night. Before it was towed, [a detective] searched the car. In the rear cargo area, [the detective] found a new television inside its carton. He looked inside a paper bag on the front passenger floor and found two receipts. Removing them from the bag, he examined the receipts and observed that they were for purchases made that day at two Sears stores. One receipt was for the purchase of a television with three $500 Sears gift cards at the Redmond Sears. The other was for disposable cell phones purchased at the Sears in downtown Seattle with a Sears gift card. [The detective] also found a plastic Sears bag containing two disposable cell phones. It was suspicious to him that the receipts showed the television and phones had been purchased with large denomination gift cards at two different stores. He seized the receipts and phones.

The detective began conducting parallel investigations for vehicular homicide and theft/fraud. He obtained and executed search warrants based in significant part on what he had found in the pre-towing search of the vehicle.

Proceedings:

In the theft/fraud investigation, the State ultimately charged Green with one count of second degree theft and five counts of second degree identity theft. Green lost a motion seeking to suppress the evidence that was seized in the pre-towing search. A jury convicted him as charged.

After Green's trial and while his appeal was pending, the United States Supreme Court decided Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**, and then the Washington Supreme Court decided a series of three cases on vehicle searches incident to arrest, the final of which was State v. Snapp, 174 Wn.2d 177 (2012) **May 12 LED:25**. The end result under Snapp's interpretation of article I, section 7 of the Washington constitution is that, once a vehicle occupant has been arrested and fully secured in handcuffs in the back seat of a patrol car, the previously occupied vehicle may not be searched as a matter of course as an incident of the arrest, even for evidence related to the crime of arrest.

Defendant Green had kept his appeal of his pre-Gant conviction alive until Snapp was decided. The State was thus compelled by Snapp to concede that the detective's pre-towing search of Green's vehicle was not a valid search incident to his arrest. The State argued, however, that the evidence discovered in the search was nonetheless admissible either (1) because the search could be viewed as an inventory search, or (2) because the "independent source" exception to the Washington exclusionary rule applied. The trial court ruled on remand that the inventory search exception did not apply, but that the evidence was admissible under the independent source exception to the exclusionary rule.

ISSUES AND RULINGS: 1) Does the detective's retrieval of receipts from the bag and his examination of those receipts qualify as an inventory search under article I, section 7 of the Washington constitution? (ANSWER BY WASHINGTON SUPREME COURT: No, because his purpose in doing so was investigatory)

2) Are the receipts nonetheless admissible under the "independent sources" exception to the exclusionary rule of article I, section 7 of the Washington constitution? (ANSWER BY WASHINGTON SUPREME COURT: No, because there was no independent source under the facts of this case)

Result: Reversal of King County Superior court convictions of Peter James Green for one count of second degree theft and five counts of second degree identity theft.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Inventory search

> One exception to the warrant requirement is an inventory search accompanying a lawful vehicle impound. State v. Ladson, 138 Wn.2d 343, 349 (1999) **Sept 99 LED:05**; State v. White, 135 Wn.2d 761, 769-70 (1998) **Sept 98 LED:08**. The principal purposes of an inventory search are to (1) protect the vehicle owner's property; (2) protect the police against false claims of theft by the owner; and (3) protect the police from potential danger. White . . . . The direction and scope of an inventory search "must be limited to the purpose justifying the exception: finding, listing, and securing from loss during detention the property of the person detained, and protection of police and bailees from liability due to dishonest claims of theft." Ladson.
>
> Here, the trial court made the unchallenged determinations that the impoundment was lawful and that [the detective] had an investigatory purpose and an inventory purpose in conducting the initial warrantless search. The court further concluded:
>
> > The purposes of an inventory search pursuant to vehicle impound are to protect the owner's property and the police department from false claims of theft, and to remove potentially dangerous property for the safety of others. The receipts found in the paper bag were not part of the inventory search, but the investigatory search incident to the defendant's arrest.
>
> The State contends this conclusion was error. It argues that because [the detective] properly looked inside the bag pursuant to the inventory search, anything he found therein was properly seized. In support of this proposition, the State relies on State v. Montague, 73 Wn.2d 381 (1968), but that case is distinguishable.
>
> In Montague, the defendant, Robert Montague, was driving a car at night with only one headlight. When he was stopped by a police detective he was unable to produce a valid driver's license or registration for the car. Montague was placed under arrest and, pursuant to police procedure, the car was impounded. Prior to impoundment, police procedure required the car to be searched for valuables and any valuables found to be listed on a property card. While conducting the search, the detective examined a brown paper bag on the floor of the car and found it contained eight small plastic bags filled with what appeared to be marijuana. Montague's motion to suppress the marijuana was denied and he was convicted of unlawful possession of the substance. On appeal, the Washington Supreme Court affirmed the conviction, stating:
>
> > When . . . the facts indicate a lawful arrest, followed by an inventory of the contents of the automobile preparatory to or following the impoundment of the car, and there is found to be reasonable and proper justification for such impoundment, and

> where the search is not made as a general exploratory search for the purpose of finding evidence of a crime but is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him, then we have no hesitancy in declaring such inventory reasonable and lawful, and evidence of crime found will not be suppressed.

Thus, in Montague, the detective, while conducting a lawful inventory search, properly looked into the paper bag, recognized the marijuana as evidence of a crime, and lawfully seized it. That is not the circumstance presented here.

In this case, [the detective] did not recognize the receipts as either items subject to inventory or as evidence of a crime. While he properly looked inside the bag to determine whether it contained anything of value, [the detective] testified that he did not consider the receipts to be relevant to his inventory search and there is no evidence that he did, in fact, inventory them. [The detective] also candidly admitted that his seizure of the receipts was for investigatory purposes and that he "really didn't know at that point" whether the receipts were evidence of any criminal activity. Thus, the record supports the trial court's determination that the seizure of the receipts exceeded the lawful scope of the inventory search and became an investigatory search, unsupported by any exception to the warrant requirement. . . .

2) Independent Source Doctrine

Where police seize evidence pursuant to an unlawful search, the exclusionary rule prohibits introduction of the evidence seized. Murray v. United States. 487 U.S. 533, 536-37 (1988) . . . . The rule also prohibits the admission of evidence that is the product of the unlawfully acquired evidence, "up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint." Murray. Under the independent source exception, however, "evidence tainted by unlawful governmental action is not subject to suppression under the exclusionary rule, provided that it ultimately is obtained pursuant to a valid warrant or other lawful means independent of the unlawful action." State v. Gaines. 154 Wn.2d 711, 718 (2005) **Oct 05 LED:04**. The Washington Supreme Court has explained, "This result is logical. According to the plain text of article I, section 7, a search or seizure is improper only if it is executed without 'authority of law.' But a lawfully issued search warrant provides such authority." [Gaines].

The independent source doctrine differs from the inevitable discovery doctrine, which [the United States Supreme Court recognizes under the Fourth Amendment but] Washington does not recognize. State v. Winterstein, 167 Wn.2d 630, 636 (2009) **Feb 10 LED:24** (inevitable discovery doctrine incompatible with article I, section 7); State v. O'Neill, 148 Wn.2d 564, 592 (2003) **April 03 LED:03** (inevitable discovery exception would create no incentive for State to comply with article I, section 7). While the independent source doctrine recognizes that probable cause may still exist based on legally obtained information after excluding the illegally obtained information, the inevitable discovery doctrine is speculative and does not disregard illegally obtained evidence. State v. Afana, 169 Wn.2d 169, 181 (2010) **Aug 10 LED:09** . . . .

> We hold that the receipts are not admissible under the independent source doctrine. Neither the receipts nor knowledge of them were in fact found through an independent source. The receipts were not found while executing the first search warrant; the State only contends they would have been had they not been seized during the initial search. But the State's argument requires this court to engage in the inevitable discovery doctrine's "speculative analysis of whether the police would have ultimately obtained the same evidence by other lawful means" . . . .
>
> Furthermore, the State's contention that the first warrant provides an independent source for the receipts requires speculation that the detectives would have looked in the paper bag, while carrying out the first search warrant, examined the receipts, and become suspicious that they were evidence of another crime while seeking evidence of the vehicular homicide. In sum, the connection between the receipts and the first search warrant is attenuated and speculative . . . We agree with Green that what the State actually asks us to apply here is the inevitable discovery doctrine.

[Some footnotes omitted; some citations omitted or revised for style]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) TWO HOLDINGS: (1) FAILURE BY DEFENDANT'S ATTORNEY TO CHALLENGE OVERBREADTH OF SEARCH WARRANT AT TRIAL NOT PREJUDICIAL; (2) EVIDENCE OF METH RESIDUE FOUND IN SEARCH SUPPORTS POSSESSION CONVICTION – In State v. Higgs, ___Wn. App. ___, 311 P.3d 1266 (Div. III, Oct. 29, 2013), the Court of Appeals rejects defendant's challenge to his drug convictions that he based on: (1) his trial attorney's failure to challenge a search warrant that was indisputably overbroad; and (2) the fact that the evidence supporting his conviction for possession of methamphetamine was based on mere residue that officers found in executing a search warrant.

Overbroad search warrant: On the issue relating to the failure of trial counsel to challenge the overbroad search warrant, the Higgs Court summarizes its ruling as follows:

> Nicholas Higgs appeals his convictions for unlawful possession of a controlled substance (methamphetamine), unlawful possession of a controlled substance (amphetamine), use of drug paraphernalia, and unlawful delivery of a controlled substance (amphetamine). He argues that (1) the warrant under which law enforcement officers seized evidence during a search of his residence was overbroad because most of its portions were not supported by probable cause, (2) his trial counsel was ineffective for failing to assert the overbroad warrant as a basis for his motion to suppress the seized evidence, and (3) evidence of methamphetamine residue found during the search was insufficient to support his unlawful possession of methamphetamine conviction.
>
> Although the State concedes that portions of the warrant were overbroad, we consider this issue only in the context of ineffective assistance of counsel because Higgs asserts overbreadth for the first time on appeal. We hold that Higgs's counsel was not ineffective because (1) the warrant's portions supported by probable cause [including the portions authorizing search for evidence of possession of methamphetamine] can be severed from the overbroad portions

[including unsupported portions authorizing search for evidence of distribution of methamphetamine] and therefore the trial court likely would have denied a motion to suppress the drug evidence seized under the valid portion of the warrant, and (2) Higgs cannot show that the admission of the evidence seized under the invalid portion of the warrant prejudiced him.

Sufficiency of residue evidence to support a possession conviction: On the issue relating to sufficiency of the residue evidence to support the conviction of possession, the key part of the analysis by the Higgs Court is as follows:

> It is well settled that RCW 69.50.4013 does not require that a defendant possess a minimum amount of a controlled substance in order to sustain a conviction. [**LED EDITORIAL NOTE: Here, the Higgs decision discusses four Washington decisions.**]. A plain reading of the statute supports this conclusion. RCW 69.50.4013(1) provides, "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." RCW 69.50.4013 does not contain a "measurable amount" element, and we are constrained from adding one. . . .
>
> Higgs nevertheless argues that if we do not adopt a common law rule requiring a measurable amount of a controlled substance to sustain a conviction, "Washington will be the only state in the nation that permits conviction of a felony for possession of residue, without proof of knowledge." In support of his contention, Higgs cites cases from other jurisdictions requiring the State to prove that the defendant knowingly possessed the controlled substance in order to sustain a conviction for possession of drug residue. However, our Supreme Court has held that, by its plain language, the Washington possession statute does not contain a knowledge element and has refused to imply such an element. State v. Bradshaw, 152 Wn.2d 528, 537 (2004) **Jan 05 LED:08**. Further, contrary to Higgs's claim, Washington law does allow evidence of knowledge, or the lack thereof, in drug possession cases. Bradshaw. Washington recognizes an unwitting possession affirmative defense to "ameliorate[ ] the harshness of [the] strict liability crime". Bradshaw. Any complaint that Washington law currently places the burden of proof of knowledge on defendants is a matter properly addressed to the legislature, not the courts.
>
> Accordingly, in the absence of a "measurable amount" element in RCW 69.50.4013, it was unlawful for Higgs to possess any amount of methamphetamine, including residue. In this case, the officers found a baggie and a light bulb smoking device containing methamphetamine residue in Higgs's home. Viewing the evidence in the light most favorable to the State, this evidence was sufficient for any rational trier of fact to find beyond a reasonable doubt that Higgs unlawfully possessed the methamphetamine. . . .

[Some citations omitted; some citations revised for style]

Result: Affirmance of Skamania County Superior Court convictions of Nicholas M. Higgs for unlawful possession of a controlled substance (methamphetamine and amphetamine), use of drug paraphernalia, and unlawful delivery of a controlled substance (amphetamine).

LED EDITORIAL COMMENT ON OVERBROAD SEARCH WARRANT: LED readers involved in drafting and reviewing search warrants may want to review the lengthy Court of Appeals opinion in this case. The Court provides extensive excerpts from the search warrant, as well as providing detailed analysis of complex legal questions relating to when offending portions of an overbroad warrant can be severed from the warrant to save the results of a search under the warrant. Courts will not always be able to salvage, as here, the result of a search made under a warrant whose authorization to search and seize significantly exceeds the probable cause support in the affidavit. Officers and prosecutors drafting search warrants and affidavits should of course always strive to match the probable cause in the affidavit with the authorization to search in the warrant.

While we have not seen the full text of the warrant and affidavit in Higgs, we have an inkling from the excerpts provided by the Court of Appeals that boilerplate from a previous warrant application in a drug distribution investigation was pasted into the paperwork in this non-distribution case. Beware in this computer age of wholesale cutting and pasting from past search warrant paperwork.

Another apparent problem in this case was failure to use in the warrant a stand-alone "dominion and control" provision seeking, along the following lines, authority to seize: "articles of personal property tending to establish the identity of persons in control of the premises being searched, including but not limited to utility company receipts, rent receipts, addressed mail and keys." Citing State v. Weaver, 38 Wn. App. 17,19 (1984), the Higgs Court notes that such a stand-alone, dominion-and-control search authorization is deemed to be supported by the affidavit's underlying establishment of probable cause to search and seize contraband or other evidence in the premises.

(2) DIVISION TWO OF THE COURT OF APPEALS APPLIES "INCIDENTAL RESTRAINT DOCTRINE" FINDING INSUFFICIENT EVIDENCE OF FIRST DEGREE KIDNAPPING IN CASE WHERE DEFENDANTS WERE CONVICTED OF ROBBERY – In State v. Berg; and State v. Reed, ___ Wn. App. ___, 310 P.3d 866 (Div. II, Oct. 8, 2013), Division Two of the Court of Appeals applies the incidental restraint doctrine, concluding that there is insufficient evidence to convict defendants of first degree kidnapping where one defendant held the victim at gunpoint in the garage of the victim's rental house while the other defendant stole marijuana plants from the garage and stole other items from the house.

The facts relevant to sufficiency of the evidence for first degree kidnapping are:

> Albert Watts was an authorized medical marijuana user who lived in a rented house in Vancouver, Washington. Berg and Reed learned that Watts grew marijuana in a workshop located in a walled-off portion of his garage.
>
> One evening, Watts was alone in the workshop tending to the marijuana plants when Berg and Reed kicked in the door. Holding a handgun, Reed ordered Watts to the ground. Berg took the gun and pinned Watts to the floor, threatening to shoot him if he moved. Reed then went inside the house and took Watts's cell phone and wallet. Reed then loaded the marijuana plants into a white car.
>
> When Reed finished loading the car, he returned to the workshop. Berg stopped pinning Watts to the floor, and Reed asked whether Watts would call the police. Watts answered that he would tell the police "nothing."

> After Reed told Watts to remain on the floor for fifteen minutes, Berg and Reed left. Three or four minutes after they left, Watts stood up and walked inside his house. Later, during Berg and Reed's flight from the scene, Berg shot a police officer . . . .

The Court's analysis of the sufficiency of the evidence is as follows:

> A person commits first degree kidnapping "if he or she intentionally abducts another person with intent . . . [t]o facilitate commission of any felony or flight thereafter." RCW 9A.40.020(1)(b). The critical element of abduction can take three forms, all of which necessarily involve restraint: (1) restraint by secreting the victim in a place where he or she is not likely to be found, (2) restraint by threats of deadly force, or (3) restraint by the use of deadly force. State v. Green, 94 Wn.2d 216, 225 (1980); see RCW 9A.40.010(1). A restraint is defined as a restriction on a person's movements that is without the person's consent, is without legal authority, and interferes substantially with the person's liberty. RCW 9A.40.010(6).
> . . .
>
> . . . When the State presents only evidence of conduct that was merely incidental to the commission of another crime, no rational trier of fact could find that the evidence proves beyond a reasonable doubt that the conduct was a restraint. Green, 94 Wn.2d at 229–30.
>
> Whether a restraint was incidental to the commission of another crime is a fact-specific determination. State v. Elmore, 154 Wn. App. 885, 901, review denied, 169 Wn.2d 1018 (2010). As a matter of law, a restraint was incidental to the commission of a home invasion robbery when (1) facilitating the robbery was the restraint's sole purpose, (2) the restraint was inherent in the robbery, (3) the robbery victims were not transported from their home to a place where they were not likely to be found, (4) the restraint did not last substantially longer than necessary to complete the robbery, and (5) the restraint did not create a significant independent danger. State v. Korum, 120 Wn. App. 686, 707 (2004), aff'd in part and rev'd in part on other grounds, 157 Wn.2d 614 (2006) . . . . In all five of these respects, this case is indistinguishable from Korum.
> . . .
>
> Because the State's only evidence of kidnapping was conduct that was merely incidental to the robbery, the evidence is not sufficient under Green and Korum to support Berg's and Reed's convictions for first degree kidnapping.
>
> Therefore we vacate these convictions.

Result: Reversal of Clark County Superior Court convictions of Daylan Erin Berg and Jeffrey S. Reed fro first degree kidnapping. Affirmance of remaining convictions for attempted first degree murder, first degree burglary, first degree robbery, and intimidating a witness.

LED EDITORIAL COMMENT: The Court notes that "Division One of this court has declined to follow Korum, calling it "wrongly decided." State v. Phuong, 174 Wn. App. 494, 508 (2013), petition for review filed, No. 88889–2 (Wash. May 31, 2013); State v. Grant, 172 Wn. App. 496, 498 (2012), review denied, 177 Wn.2d 1021 (2013). Similarly,

Division Three has limited Korum to cases where the prosecutor has acted vindictively or overcharged the defendants. State v. Butler, 165 Wn. App. 820, 830–31 (2012)."

LED EDITORIAL NOTE: In response to the defendant's argument that his right to a public trial was violated, the Court holds that the exclusion from of a single individual, by officers not the trial judge, does not amount to a courtroom closure.

(3) CANDIDATE FOR JUDICIAL OFFICE IS NOT A "PUBLIC SERVANT" FOR PURPOSES OF INTIMIDATING A PUBLIC SERVANT STATUTE; THREAT TO BOMB MUST TARGET A LOCATION IN ORDER TO VIOLATE STATUTE – In State v. Hendrickson, ___ Wn. App. ___, 311 P.3d 41 (Div. III, Oct. 1, 2013), the Court of Appeals holds, among other things, that (1) a candidate for judicial office is not a public servant for purposes of an intimidating a public servant prosecution, and (2) where no location is provided there can be no bomb threat under the bomb threat statute.

The defendant used the internet to target people she did not like. Her activities led to ten convictions including three counts of cyberstalking, two counts each of threatening to bomb, felony harassment, and intimidating a public servant, and a single count of second degree identity theft.

The intimidating a public servant counts were based on threatening e-mails sent to two judicial candidates; one was an incumbent and the other was not. The bomb threat count was based on a threat that they would go "boom" but where no specific location was given.

The Court's analysis is as follows:

> Intimidating a Public Servant
>
> Ms. Hendrickson argues that the intimidating a public servant statute does not apply to candidates for public office. She also argues that while Judge Wernette was a judge during the election campaign, there was no evidence that the threat was directed at his actions as a public servant. We agree with both of her arguments and reverse these two convictions.
> . . .
>
> In relevant portions, the intimidating a public servant statute provides:
>
> > (1) A person is guilty of intimidating a public servant if, by use of a threat, he or she attempts to influence a public servant's vote, opinion, decision, or other official action as a public servant.
> >
> > (2) For purposes of this section "public servant" shall not include jurors.
>
> RCWA 9A.76.180(1)(2).
>
> In turn, "public servant"
>
> > means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating

> as an advisor, consultant, or otherwise in performing a governmental function.

RCW 9A.04.110(23).

Ms. Hendrickson argues that a candidate for public office is not a "public servant" to whom the intimidation statue can apply. We agree. The definition of a public servant expressly is directed to those who hold government office or employment or to who have been selected to do so. A candidate for election to office has not yet assumed office nor been chosen by the electorate to do so. While the definition of a public servant includes a candidate-elect, it does not include those who have not yet been selected for the position. Accordingly, the charge of intimidating a public servant did not apply to Judge Lohrmann. While he would win the election a few short days after the August 14 e-mail, he had not yet become a public servant by virtue of the electorate's blessing at the time of the e-mail. Accordingly, the evidence does not support the intimidation count related to Judge Lohrmann.

Ms. Hendrickson also argues that Judge Wernette was not a "public servant" by nature of his superior court candidacy. While we agree that Judge Wernette did not qualify as a public servant by nature of his candidacy, Ms. Hendrickson's argument ignores the fact that Judge Wernette was already a public servant as a result of his position as a municipal court judge. The question then becomes whether the threat was an attempt to influence Judge Wernette's "vote, opinion, decision, or other official action." An election campaign is clearly not a vote, opinion, or decision. The remaining question is whether it is an "other official action" of a public servant.

"No court has addressed what constitutes 'official action' for the purpose of this statute, and there is no need to consider it here." Ms. Hendrickson's argument does require us to consider "official action" for this purpose. However, we need not extensively discuss the subject.

Just as being a candidate for public office does not make one a public servant, so too candidacy for public office is not itself an "official action" under this statute. The decision to run for office is a personal choice; it is not itself a function of being a public servant. While certain offices are filled by election, and those office holders frequently run for reelection, no office requires that its holder run for election as one of the functions of the job. Thus, although Judge Wernette was a public servant, his action in running for election was personal rather than official. The July 31 e-mail was directed toward his candidacy rather than his official actions as a municipal judge. Accordingly, there was no basis for finding that the e-mail was intended to influence the judge's official action.

. . .

Running for election is not an "official action" of a public servant. The evidence was insufficient to support the conviction for intimidating Judge Wernette.

. . .

Threat to Bomb

Ms. Hendrickson attacks the sufficiency of the evidence supporting count 5, the threat to bomb conviction arising from the August 14 e-mail. Because it did not target a particular location, we agree that this e-mail did not constitute a threat to bomb.

The statute in question is RCW 9.61.160(1). It provides:

> (1) It shall be unlawful for any person to threaten to bomb or otherwise injure any public or private school building, any place of worship or public assembly, any governmental property, or any other building, common carrier, or structure, or any place used for human occupancy; or to communicate or repeat any information concerning such a threatened bombing or injury, knowing such information to be false and with intent to alarm the person or persons to whom the information is communicated or repeated.

. . .

Based on the clear focus of the statute on protection of property rather than people, Ms. Hendrickson persuasively argues that the August 14 e-mail did not violate the statute because it did not indicate any structure or vehicle that was endangered. Instead, that e-mail simply threatened that both judges would go "boom," unlike the July 31 e-mail that specifically mentioned Judge Wernette's car as the endangered object. The statute expressly names a number of locations-typically structures or locations where people gather, live, or use for transportation-that a person may not threaten to bomb. Human beings are not protected under this statute, except indirectly from the protection of the structures they use. Because the e-mail that served as the basis for count 5 did not indicate that any place protected by RCW 9.61.160 was to be bombed, there was insufficient evidence to support this conviction. . . .

Result: Reversal of Walla Walla Superior Court convictions of Kathy Ann Hendrickson for two counts of intimidating a public servant and one count of bomb threat. Affirmance of remaining seven convictions.

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NEXT MONTH

Space permitting, the March 2014 LED will include a discussion of the recent 5-4 Washington Supreme Court decision in Sargent v. Seattle Police Department, ___ Wn.2d ___, 2013 WL 6685191 (Dec. 19, 2013), involving the application of the investigative records exemption, RCW 42.56.240, to open criminal and internal administrative investigations.

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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.supremecourt.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 "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through 2007, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

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