Law Enforcement Digest

MAY 2009

640th Basic Law Enforcement Academy – November 25, 2008 through April 14, 2009

President:	Amanda Bundy – Whatcom County Sheriff's Office
Best Overall:	Grant Boere – Jefferson County Sheriff's Office
Best Academic:	Enoch Lee – Seattle Police Department
Best Firearms:	Eric Gagnon – King County Sheriff's Office
Tac Officer:	Mark Best – Tacoma Police Department

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LAW ENFORCEMENT MEDAL OF HONOR PEACE OFFICERS MEMORIAL CEREMONY IS SET FOR FRIDAY, MAY 8, 2009 IN OLYMPIA AT 1:00 P.M.

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. This honor is reserved for those police officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's ceremony will take place Friday, May 8, 2009, commencing at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus, which is adjacent to the Supreme Court Temple of Justice. This is the third year that the Medal of Honor and Peace Officers Memorial ceremonies will be a combined program. This year the ceremony will be the week prior to Law Enforcement Week across the nation.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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PART ONE OF THE 2009 WASHINGTON LEGISLATIVE UPDATE

LED INTRODUCTORY EDITORIAL NOTE: This is Part One of what likely will be a three-part compilation of 2009 State of Washington legislative enactments of interest to law enforcement.

Note that unless a different effective date is specified in the legislation, acts adopted during the 2009 regular session take effect on July 26, 2009 (90 days after the end of the regular session). For some acts, different sections have different effective dates. We will generally indicate the effective date applicable to the sections that we believe are most critical to law enforcement officers and their agencies.

Consistent with our past practice, our Legislative Updates will for the most part not digest legislation in the subject areas of sentencing, consumer protection, retirement, collective bargaining, civil service, tax, budget, and workers' compensation benefits.

Text of each of the 2009 Washington acts is available on the Internet at [http://apps.leg.wa.gov/billinfo/]. Use the 4-digit bill number for access to the enactment.

We will include some RCW references in our entries, but where new sections or chapters are created by the legislation, the State Code Reviser must assign the appropriate code numbers. Codification by the Code Reviser will likely not be completed until early fall of this year.

We remind our readers that any legal interpretations that we express in the LED regarding either legislation or court decisions do not constitute legal advice, express only the views of the editors, and do not necessarily reflect the views of the Attorney General's Office or of the Criminal Justice Training Commission.

AUTHORIZING COURTS TO ENJOIN PRISONER ACCESS TO PUBLIC RECORDS UNDER CERTAIN SPECIFIED CIRCUMSTANCES

Chapter 10 (SSB 5130) Effective date: March 20, 2009

This enactment adds a new section to chapter 42.56, the Public Records Act, reading in its entirety as follows:

(1) The inspection or copying of any nonexempt public record by persons serving criminal sentences in state, local, or privately operated correctional facilites may be enjoined pursuant to this section.

(a) The injunction may be requested by: (i) An agency or its representative; (ii) a person named in the record or his or her representative; or (iii) a person to whom the request specifically pertains or his or her representative.

(b) The request must be filed in: (i) The superior court in which the movant resides; or (ii) the superior court in the county in which the record is maintained.

(c) In order to issue an injunction, the court must find that:

(i) The request was made to harass or intimidate the agency or its employees;

(ii) Fulfilling the request would likely threaten the security of correctional facilities;

(iii) Fulfilling the request would likely threaten the safety or security of staff, inmates, family members of staff, family members of other inmates, or any other persons; or

(iv) Fulfilling the request may assist criminal activity.

(2) In deciding whether to enjoin a request under subsection (1) of this section, the court may consider all relevant factors including, but not limited to:

(a) Other requests by the requestor;

(b) The type of record or records sought;

(c) Statements offered by the requestor concerning the purpose for the request;

(d) Whether disclosure of the requested records would likely harm any person or vital government interest;

(e) Whether the request seeks a significant and burdensome number of documents;

(f) The impact of disclosure on correctional facility security and order, the safety or security of correctional facility staff, inmates, or others; and

(g) The deterrence of criminal activity.

(3) The motion proceeding described in this section shall be a summary proceeding based on affidavits or declarations, unless the court orders otherwise. Upon a showing by a preponderance of the evidence, the court may enjoin all or any part of a request or requests. Based on the evidence, the court may also enjoin, for a period of time the court deems reasonable, future requests by:

(a) The same requestor; or

(b) An entity owned or controlled in whole or in part by the same requestor.

(4) An agency shall not be liable for penalties under RCW 42.56.550(4) for any period during which an order under this section is in effect, including during an appeal of an order under this section, regardless of the outcome of the appeal.

ADDRESSING TRAINING BY CJTC REGARDING CRISIS REFERRAL SERVICES FOR CRIMINAL JUSTICE AND CORRECTIONAL PERSONNEL, AND ALSO ADDRESSING QUALIFIED CONFIDENTIALITY OF COMMUNICATIONS WHEN SUCH SERVICES ARE PROVIDED TO PUBLIC SAFETY EMPLOYEES

Chapter 19 (SSB 5131) Effective date: July 26, 2009

Adds two new sections to chapter 43.101 RCW. The first section requires the Criminal Justice Training Commission to offer classroom or internet instruction on personal crisis recognition and crisis intervention services to criminal justice, correctional personnel, and other public safety employees.

The second section provides as follows for confidentiality for communications in the crisis referral services process:

(1) All communications to crisis referral services by employees and volunteers of law enforcement, correctional, firefighting, and emergency services agencies, and all records related to the communications, shall be confidential. Crisis referral services include all public or private organizations that advise employees and volunteers of such agencies about sources of consultation and treatment for personal problems including mental health issues, chemical dependency, domestic violence, gambling, financial problems, and other personal crises.

(2) A crisis referral service may reveal information related to crisis referral services to prevent reasonably certain death, substantial bodily harm, or commission of a crime.

DIRECTING WSP TO DEVELOP PLANS RELATING TO ABDUCTED AND MISSING PERSONS

Chapter 20 (SSB 5012) Effective date: July 26, 2009

Amends RCW 13.60.010 to provide that the Washington State Patrol "within existing resources, shall develop and implement a plan, commonly known as an 'amber alert plan,' for voluntary cooperation between local, state, tribal, and other law enforcement agencies, state government agencies, radio and television stations, and cable and satellite systems to enhance the public's ability to assist in recovering abducted children."

Also adds a new section to chapter 13.60 RCW to read as follows:

> Within existing resources, the Washington state patrol shall develop and implement a plan, commonly known as an "endangered missing person advisory plan," for voluntary cooperation between local, state, tribal, and other law enforcement agencies, state government agencies, radio and television stations, and cable and satellite systems to enhance the public's ability to assist in recovering endangered missing persons who do not qualify for inclusion in an amber alert.

ADDRESSING CERTIFICATION ACTIONS RELATING TO WASHINGTON PEACE OFFICERS

Chapter 25 (SB 5156) Effective date: July 26, 2009

Amends RCW 43.101.380 with a few minor technical changes. Changes the name from "decertification" to "certification" for the procedures under which the certification of a Washington peace officer is revoked or denied. Also makes minor changes to the wording relating to who serves on the certification hearing panels.

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NINTH CIRCUIT, U.S. COURT OF APPEALS

NO QUALIFIED IMMUNITY FROM FEDERAL CIVIL RIGHTS ACT LIABILITY FOR OFFICER ALLEGED TO HAVE DELIBERATELY FABRICATED EVIDENCE

McSherry v. City of Long Beach, ___ F.3d ___, 2009 WL 805804 (9th Cir. 2009) (decision filed March 30, 2009)

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

> In March of 1988, [a] six-year-old [girl] was kidnapped from a playground on a Navy Base in California. The perpetrator raped and molested her before releasing her several hours later. According to police reports, the victim and her four-year-old brother, a witness to the kidnapping, both provided descriptions of the suspect to the police. Several weeks later, [officer] Turley [of the Long Beach Police Department] showed both children a photo lineup separately, and both identified McSherry as the perpetrator. Turley's police reports indicate that he showed the victim and her brother photos of cars. Both selected a yellow Mazda station wagon belonging to McSherry's father, identifying it as the vehicle used in the abduction. After McSherry's arrest, an

adult witness, Robin Davis, picked McSherry out of a lineup, identifying him as a person she had seen in the area on the day of the kidnapping.

McSherry was arrested for the crime on May 17, 1988. According to police reports, [officers] Turley and Roberson interrogated McSherry, and he provided a detailed description of the interior of his grandparents' residence. On May 18, the day after McSherry's arrest, Turley and Navy Investigative Officer Tammy Warmack interviewed the victim to obtain a description of the place she had been taken. Turley's report documenting this interview states that the victim picked McSherry's grandparents' home out of a photo lineup, identifying it as the place McSherry had taken her. The report lists specific details allegedly provided by the victim about the room where she had been raped, including: descriptions of 1) a picture of the kidnapper on the wall; 2) a small brown television sitting on a gray dresser; 3) a small, possibly twin size bed, with blue sheets and a white blanket; 4) a black chair; and 5) a mirror alongside the door.

On May 19, Turley and Warmack served a search warrant at McSherry's grandparents' house. Turley's subsequent police report states that the victim's description provided on May 18, matched a bedroom in the residence. Furthermore, according to the report, while executing the warrant officers noticed a bird in the livingroom area and a barking dog in the backyard.

On May 24, following the execution of the search warrant, Turley and Warmack re-interviewed the victim to determine if she could provide a more detailed description of the location where she was taken. During that interview, the officers asked if she had heard or seen any animals at the place she was taken. According to Turley's report, the victim said she heard a bird. Turley asked her several other questions regarding the interior of the house, and the victim's responses matched details of the interior of the residence. Specifically, according to Turley, the victim gave the following additional details: 1) the room had one door that folded up and one door that swung open; 2) the mirror was big and round; 3) the picture of the kidnapper was round and hanging on the same wall where the television was located; and 4) the room had a window with a seat.

Turley testified at trial, again attributing the descriptions of the interior of the residence to the victim. Also at trial, the victim and Davis identified McSherry as the perpetrator. Medical evidence indicated that McSherry was a possible donor of the semen taken from the victim's underwear.

Following the trial, McSherry was convicted of the crimes. In December of 2001, nearly fourteen years into his forty-eight-year to life sentence, McSherry was exonerated by DNA evidence. The DNA revealed that George Valdespino had committed the crime. Valdespino later confessed.

. . . .

> [Following his release, McSherry sued officer Turley and other government defendants, claiming a violation of his constitutional due process rights.] In support of his claim that officers deliberately fabricated evidence, McSherry points in particular to the description of the interior of his grandparents' residence and argues that: 1) he provided Turley a detailed description of his grandparents' house after he was arrested; 2) Turley interviewed the victim the next day, then later documented in his police report and also testified at trial that the victim provided a detailed description of the interior of the residence during that interview; 3) the victim's detailed description differed from her initial description but matched the grandparents' residence; 4) after Turley searched the house, he reported that the victim provided another description with more matching details, 5) fourteen years after she was kidnapped, the victim [in a deposition that is described in the "analysis" below] denied giving the descriptions that Turley documented and testified to; and 6) because McSherry was exonerated of the crimes and another party confessed, the victim obviously was never in the residence and could not have provided such a detailed description.
>
> [The U.S. District Court granted summary judgment to officer Turley and the other government defendants in the case.]

[Footnote omitted]

ISSUE AND RULING: Is there a genuine issue of material fact whether officer Turley deliberately fabricated evidence and therefore is civilly liable under the Civil Rights Act, 42 U.S.C. section 1983, for violating the constitutional due process rights of McSherry? (ANSWER: Yes, and therefore the case must be tried)

Result: Reversal in part of U.S. District Court (California) grant of summary judgment to Detective Turley and the City of Long Beach.

ANALYSIS: (Excerpted from Court of Appeals decision)

> The victim's deposition creates a genuine issue of material fact as to whether [officer] Turley fabricated evidence. She denied providing the detailed description of the residence ascribed to her by Turley. Specifically, the victim said she did not tell police there was a picture on the wall because there was not one. She also denied telling the police that there were blue sheets and a white blanket on the bed. When asked whether she had told police that there was a folded up door in the room where she was taken, she said "No. There was no way that a five-year-old can actually remember everything in the house. I mean that's too much for a five-year-old. There's no way. That's too much information in a house for a five-year-old to describe." She denied also telling police that there was a window seat, that she heard a bird, or that there was a circular mirror. That Turley included that information, attributed to the victim, in his reports means there are genuine issues of material fact as to whether Turley fabricated the descriptions. Credibility is an issue for the trier of fact.

> As a result, Turley is not entitled to qualified immunity. If the evidence was fabricated, Turley violated McSherry's "clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government." Devereaux v. Abbey, 263 F.3d 1070 (9th Cir. 2001). Consequently, we reverse the judgment of the district court as to this claim that Turley deliberately fabricated evidence. At trial, McSherry may support his deliberate fabrication claim with evidence that Turley "used investigative techniques that were so coercive and abusive that [he] knew or should have known that those techniques would yield false information." Devereaux. McSherry may present direct or circumstantial evidence, including evidence about identifications of McSherry by the victim, the victim's brother, and an adult witness, and identifications of McSherry's father's car by the victim and the victim's brother.

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

(1) FRISK HELD NOT SUPPORTED BY REASONABLE BELIEF OF DANGER, AND THEREFORE OFFICER HELD NOT ENTITLED TO QUALIFIED IMMUNITY FROM CIVIL LIABILITY UNDER 42 U.S.C. SECTION 1983 (FEDERAL CIVIL RIGHTS ACT) – In Ramirez v. City of Buena Park, __ F.3d __, 2009 WL 764568 (9th Cir. 2009) (decision filed March 25, 2009), the Ninth Circuit Court of Appeals rules against a law enforcement officer and his agency on one of several search and seizure issues in a lawsuit under the Federal Civil Rights Act.

The Court rules that the Buena Park police officer had reasonable suspicion to seize a suspect under a California criminal prohibition against being intoxicated by certain controlled substances under certain circumstances (Note to **LED** readers: Washington State does not have a similar law). But the Court rules that the officer had insufficient objective indicators that the suspect was dangerous and might be armed. Therefore, the officer's frisk of the suspect was not justified. The Ninth Circuit explains its reasoning on this point as follows:

> A wide variety of factors support a reasonable belief that an individual is armed and dangerous. These include an officer's observation of a visible bulge in an individual's clothing . . . sudden movements or repeated attempts to reach for an object not immediately visible . . . and the nature of the suspected crime . . . . However, facts merely establishing that if an individual were armed he would be dangerous are insufficient if there was no reason to believe that the individual actually was armed.
>
> [Officer] Montez's only justification for the pat-down search of Ramirez is a conclusory reference to "officer safety." [Officer] Montez has not alleged any specific facts that would establish reasonable suspicion that Ramirez was armed and dangerous. On the contrary, Ramirez was cooperative. He complied with [Officer] Montez's request that he exit his vehicle, and there is no evidence he did so in a furtive manner. There is nothing in the record to

> suggest Ramirez made any abrupt movements or that he attempted to reach for anything upon exiting his vehicle. He also cooperatively submitted to the search of his person, albeit without his consent. [Officer] Montez testified that he tapped Ramirez's outer garments "to make sure" there were no bulges or weapons concealed, but does not allege that he observed a visible bulge or weapon on Ramirez. Unless an officer can point to specific facts that demonstrate reasonable suspicion that the individual is armed and dangerous, the Fourth Amendment tolerates no frisk.
>
> Being "testy" and suspected of illicit drug use does not support a finding that Ramirez had a weapon. Although the nature of the suspected crime itself does at times provide the requisite amount of reasonable suspicion to conduct a pat-down search of a detained individual. . . , this court has never held that mere suspicion of drug use alone provides the basis for a Terry frisk. Indeed, to hold that the pat-down here was consistent with the strictures of the Fourth Amendment would be to hold that a Terry frisk of a person is justified any time an officer believes an individual is under the influence, even though the officer lacks a reasonable suspicion that the person is armed and dangerous. Such a holding would be in direct conflict with Terry and its progeny, and would destroy the necessary distinction between the stop and frisk. "Each element, the stop and the frisk, must be analyzed separately; the reasonableness of each must be independently determined." Because [Officer] Montez could not have reasonably suspected Ramirez had a weapon, we hold his pat-down of Ramirez violated the Fourth Amendment.
>
> Having determined the existence of a constitutional violation, we consider [in assessing Civil Rights Act qualified immunity] whether the right violated was clearly established at the time of its occurrence. At the time of Ramirez's pat-down, it was clearly established that every pat-down is unreasonable unless it is supported by the officer's reasonable suspicion that the person to be frisked is armed and dangerous. Based on the complete lack of evidence that would support a reasonable suspicion Ramirez had a weapon, and [Officer] Montez's wholly inadequate justification for the search, we conclude that it would have been clear to a reasonable officer that a pat-down of Ramirez was unlawful in this situation. As a result, [Officer] Montez is not entitled to qualified immunity on the pat-down issue. Furthermore, there remains a factual dispute as to whether [Officer] Montez impermissibly searched inside Ramirez's pockets. This disputed issue of fact also precludes the grant of summary judgment in [Officer] Montez's favor.

[Some citations omitted]

Result: Reversal in part of U.S. District Court (California) order granting qualified immunity to the law enforcement officer.

LED EDITORIAL COMMENT: This decision does not change the broad authority under case law interpreting Terry v. Ohio for law enforcement officers to do what is reasonably necessary for safety. Frisk cases are highly-fact-based cases.

Sometimes the problem in such rare adverse appellate rulings on frisking is that somehow something got lost in the translation between (1) the officer's observations at the scene and (2) what the appellate court gleans from the record. We do not know if that happened here. But officers should support their frisks with relevant details in their reports. And prosecutors should bring out that support in briefing, in questioning officers in suppression hearings, and in writing up findings of fact for the trial court.

As every officer knows, Terry v. Ohio frisk authority is generally not automatic following a stop based on reasonable suspicion, except for stops for types of crimes where a person is likely to be armed, such as armed robbery or assault with a weapon. Beyond that, officers must support frisks in their reports with a description of articulable objective facts. Such justification is highly fact-based, depending on the totality of the circumstances, taking into account not only the seriousness of the crime and the officer's experience and training, but also a variety of other things. Such justification should recount such things as: suspicious bulge in suspect's clothing consistent with presence of a weapon; poor lighting; suspect's bulky clothing; suspect's criminal record; intelligence about danger specific to the particular suspect; suspect's sudden move toward a pocket or area; suspect's awkward movements as if trying to hide something; suspect's erratic and/or aggressive words or other behavior; officer's need to transport the suspect; officer's need to do something else that will make the officer vulnerable to attack from the suspect; suspect's failure initially to stop vehicle or otherwise heed the officer's request to stop; presence of an empty holster or knife sheath or knife or gun; officer's arrest of suspect's companion; lone officer outnumbered by potentially hostile persons; and other facts bearing on the assessment of danger.

(2) 2-1 MAJORITY RULES IN A "CLOSE CASE" THAT THERE WAS NO MIRANDA CUSTODY IN QUESTIONING OF SUSPECT AT HIS PLACE OF WORK – In U.S. v. Bassignani, __ F.3d __ , 2009 WL 764562 (9th Cir. 2009) (decision filed March 25, 2009), a 3-judge Ninth Circuit panel rules 2-1 that a child pornography suspect was not in "custody" for Miranda purposes when officers questioned him for two-and-a-half hours in a conference room at his place of work.

The majority opinion concedes that the facts of the case present a "close" question as to whether custody existed. The Court states that the custody question looks at a variety of factors, including but not limited to: (1) the language used to summon the person to be questioned; (2) the extent to which and manner in which the person is directly confronted by officers with evidence of his or her guilt; (3) the physical surroundings of the interrogation; (4) the duration of the detention; (5) the degree of pressure applied to detain the person. The dissenting opinion in this case argues that the record reveals coercive-leaning facts on all five of these factors.

This LED entry will not address the many details of the facts of this case. This LED entry will instead address just one aspect of the facts relevant to the custody question – what the lead detective said and did not say at the start of the questioning to advise the suspect of his freedom to leave. The detective told the suspect: "You're not being arrested. You'll walk out of here when we're done." But the detective never told the suspect that he did not have to answer questions or that he was free to leave.

The majority opinion recognizes that the officer could have said more to make the suspect aware of his right not to answer questions and his right to leave the room at any time, but in light of all of the facts, the majority opinion concludes there was not custody.

The dissenting opinion in Bassignani disagrees as to the assessment of almost all of the facts and custody factors in the case. Among many other things, the dissent says that custody was strongly suggested by the detective's opening statement that "you'll walk out of here when we're done," because this "implied Bassignani was not free leave at any time, but had to stay until the officers had finished their work."

Result: Reversal of U.S. District Court (California) suppression ruling and remand for trial of Alexander Bassignani on child pornography charges.

LED EDITORIAL COMMENT: We think that officers who wish to make interrogation non-custodial, and hence not subject to Miranda, should not push their luck. In light of the open-endedness of the totality-of-the-circumstances Miranda custody test, as well as the vagaries of the review process, the safest approach is to be clear with the suspect that he or she does not have to answer questions and is free to leave at any time.

Determining whether a person is in Miranda custody often is not an easy question to resolve. It turns on such factors as: the location of the questioning (street corner questioning is less likely to be held custodial than interrogation room questioning); the duration of the questioning (again, questioning during a brief Terry investigatory stop is ordinarily not deemed to be Miranda custody, while two-and-a-half hours of questioning is more likely to be deemed to be custodial); the words used by the police (including communication of probable cause, communication regarding the length of time that the interrogation might be expected to last, and any express communication that the suspect need not answer questions or is free to leave at any time); the intensity and manner of questioning; the use of restraints or a show of force prior to or at the time of the questioning; the incarceration of the suspect at the end of the questioning; and perhaps (under the Washington Supreme Court decision in State v. Heritage, 152 Wn.2d 210 (2004) Sept 04 LED:12) the youth of the suspect.

The bottom line is that, because the test of custody is so multi-factored and fact-based, many prosecutors and police legal advisors will tell officers that the better course of action, whenever in doubt as to Miranda applicability, is to Mirandize. We suppose that this is yet another case that illustrates that point.

But, if officers, in their best judgment regarding the particular case and particular suspect, decide that their best chance of obtaining a statement is to conduct purely voluntary, non-Mirandized questioning of a suspect in an interrogation room, they will generally want to do the following, regardless of the age of the suspect - - they will want to have procured the suspect's presence in the room voluntarily, and they will want to make clear before any questioning that the suspect is free not to answer any questions, is not under arrest, and indeed is free to leave at any time. And (despite the illogic of including the following final factor), they should be prepared to release the suspect once the questioning is completed.

This case did not involve questioning during a Terry seizure, where a person is not free to leave at any time. But even in questioning during a Terry seizure, officers

would be well-advised to not say "you're not under arrest and you'll be free to go when we're done" and instead to say something more like "you are not under arrest, but you are not free to go at this time." See State v. France, 129 Wn. App. 907 (Div. II, 2005) Dec 05 LED:17.

(3) RETAIL STORE LOSES FEDERAL LICENSE TO SELL FIREARMS, IN PART BECAUSE STORE DID NOT SEND PURCHASERS' HANDGUN APPLICATIONS TO CHIEF OF POLICE OR TO SHERIFF OF PURCHASER'S PLACE OF RESIDENCE PER RCW 9.41.090(5) – In The General Store v. Van Loan, __ F.3d __ , 2009 WL 819484 (9th Cir. 2009) (decision filed March 31, 2009), the Ninth Circuit affirms the federal trial court's grant of summary judgment to the federal government upholding revocation of the federal firearms dealer license of a retail store that was inspected and found non-compliant on several occasions over a several-year period by ATF inspectors.

The U.S. District Court upheld ATF's revocation based on findings: 1) that the store "willfully" failed to keep adequate records as required by federal law for firearms acquired for repair; and 2) that the store "willfully" failed to comply with Washington law, RCW 9.41.090(5), requiring a firearms dealer to send a copy of all handgun applications to the chief of police or sheriff of the purchaser's place of residence (the store, located in Spokane, had apparently sent all handgun applications, regardless of the purchaser's residence, to the Spokane Police Department).

Most of the focus of the Ninth Circuit opinion is on the definition of "willfully." The Ninth Circuit concludes the term includes "reckless disregard" of a known legal requirement, and that the longstanding non-compliance by the store despite repeated notices from ATF of the legal requirements meets this standard.

The Ninth Circuit also rejects, under the analysis excerpted below, the store's argument that it got close enough to, or should be excused from meeting, the requirements of State of Washington law requirements for handguns sales. The store argued (1) that it did not understand Washington law requirements, and (2) that the store did try to comply with Washington law when it sent all handgun applications to the local police department (Spokane PD) and did not hear back from the local police department or ATF regarding the mistake. The Ninth Circuit responds to these arguments as follows:

> The General Store contends that its admitted violation of [the federal statute requiring compliance with RCW 9.41.090(5)] was not willful because The General Store did not know its obligation and had, per a defense provided under federal law, "reasonable cause to believe that the purchase . . . would not be in violation of such State law."
>
> The General Store does not dispute that the form it used for processing handgun applications unambiguously states, "[s]end this original to the Chief of Police of the municipality or the Sheriff of the county of which the purchaser is a resident." In addition, the district court found that The General Store received written notice of the requirement in the letters sent by the ATF in 1998. The evidence supports the district court's determination that The General Store knew its obligations . . . .

> The General Store also argues that it had "reasonable cause to believe that the purchase . . . would not be in violation of such State law," because neither the ATF nor the Spokane Police Department informed The General Store that it was sending the forms to the wrong official. This argument is not persuasive. The dealer, not the ATF or the police department, bears the reporting obligation. The ATF's failure to cite every violation during prior inspections – particularly when faced with a large number of missing firearms – and the Spokane Police Department's inaction do not demonstrate a good faith belief given The General Store's repeated failure to follow a clear duty.

[Footnote omitted]

Result: Affirmance of U.S. District Court (Spokane) grant of summary judgment to ATF upholding ATF's revocation of the federal firearms dealer license of The General Store.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

CITY LITTERING ORDINANCE, WHICH HAS CRIMINAL SANCTIONS, HELD NOT PREEMPTED BY STATE LITTERING LAW, WHICH HAS ONLY CIVIL SANCTIONS – In State v. Kirwin, __ Wn.2d __, __ P.3d __, 2009 WL 781963 (2009), the Washington Supreme Court rules in a split decision that a City of Olympia ordinance that criminalizes littering is not preempted by a similarly worded State of Washington statute that treats littering as a mere civil infraction. Therefore, the lead opinion for the Supreme Court concludes, an officer's custodial arrest of a passenger for littering was lawful, as were the officer's search of the driver's car incident to the passenger's arrest and the obtaining of the driver's consent to open a locked container during the search incident to arrest. Hence, the Supreme Court affirms the Court of Appeals affirmance of the driver's superior court conviction for possessing methamphetamine. See State v. Kirwin, 137 Wn. App. 387 (2007) **Oct 07 LED:14**.

Justice Fairhurst authors the majority opinion. She is joined by five justices. The majority opinion notes that a lawful arrest for a crime of an occupant (here a passenger) of a car justifies a search of the cab of the car incident to that arrest. The majority opinion expressly states that the Court will not revisit case law on search incident to arrest in this case because defendant did not raise such case law. The only question raised by the defendant in his appeal to the Supreme Court was whether the ordinance was preempted such that the arrest of the passenger should have been treated as a custodial arrest for a mere infraction, which of course would be unlawful.

The majority opinion asserts that a State statute does not preempt a local ordinance merely because the statute and ordinance address the same conduct. And nothing in Washington's littering statute suggests legislative intent to foreclose local jurisdictions from adopting their own littering ordinances. The majority opinion also declares that a preemption theory addresses only the substance of the offenses defined by statute and ordinance, not their respective penalties.

Justice Madsen writes a concurring opinion joined by Justice Stephens. The concurrence asserts that the majority should have addressed a line of Washington equal protection cases. Those cases have held in a different procedural context that where the existence of a statute and a local ordinance on the same subject matter give a prosecutor discretion whether to seek a greater punishment for the same conduct, this choice generally violates the State and federal constitutional requirements for equal protection of the law. The concurrence also disagrees with the majority opinion's limiting of preemption analysis to the substance (and not the penalty levels) of the offenses. Finally, the concurrence explains that the reason the concurring judges do not argue for reversal is that the officer made the arrest in good faith under a statute that was not obviously unconstitutional on its face.

Justice Sanders writes a dissent that is not joined by any other Justice. His dissent argues: (1) that officers should not be able to search a vehicle incident to arrest of a passenger, as opposed to arrest of the driver (no Washington case law presently supports Justice Sanders on this point); (2) that search incident to arrest authority is not a "bright line" rule that permits searching the cab of the car without articulation of the need to look for weapons or evidence (no Washington case law presently supports Justice Sanders on this point); and (3) that the concurrence is correct in its discussion of preemption and of the equal protection line of cases.

Result: Affirmance of Court of Appeals decision that affirmed Thurston County Superior Court conviction of Dennis Ray Kirwin for unlawful possession of methamphetamine.

LED EDITORIAL COMMENT: This case is more about judicial restraint to not address issues not raised by defense counsel than about the validity of littering and other local ordinances that impose criminal penalties where state statutes on the same subject matter impose only civil penalties. But the decision does suggest that even in cases where challenges are made to such local ordinances, evidence will not be suppressed when officers discover evidence in searches incident to arrest for violation of such ordinances.

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WASHINGTON STATE COURT OF APPEALS

BENCH WARRANT FOR FAILURE TO OBEY SENTENCING TO WORK CREW DID NOT REQUIRE NEW PROBABLE CAUSE DETERMINATION AND WAS NOT STALE

State v. Bishop, ___ Wn. App. ___, ___ P.3d ___. 2009 WL 824424 (Div. II, 2009)

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

> On December 15, 2006, Bishop pleaded guilty to third degree theft and the municipal court sentenced him to 10 days on work crew, suspending the remaining 355 days of jail time. The trial court ordered him to report to the Office of Offender Services the same day to arrange for his work crew sentence. The referral, a document memorializing the trial court's order, warned that "[i]n criminal cases, the court may also issue a warrant for your arrest" should you fail to report for work crew. Bishop signed the letter under

the following sentence: “I have received a copy of the Referral, and promise to comply with the above requirements.”

On December 27, Robin Lux, coordinator for Offender Services and the work crew program, wrote to the trial court informing it that Bishop had not shown up from court for his 10-day sentence. Lux's signed letter listed the cause number, date, and Bishop's name. On March 22, 2007, the district court issued an arrest warrant, citing Bishop's failure to comply with a court order.

In early August 2007, a police officer stopped Bishop on the street and arrested him after checking his name against a list of outstanding warrants. The officer conducted a search incident to arrest and discovered methamphetamine and drug paraphernalia on his person. The State charged him with unlawful methamphetamine possession.

Defense counsel moved to suppress all evidence seized by the police during the search incident to arrest. The trial court held a suppression hearing, relying on stipulated facts. The stipulation recited the elements of unlawful methamphetamine possession and Bishop's admission that he unlawfully possessed the controlled substance.

Bishop's principal argument at the hearing centered on the Fourth Amendment's provision that “no warrants shall issue, but upon probable cause, supported by oath or affirmation” and the Washington Constitution's analogous provision in article I, section 7. Defense counsel also argued that the staleness doctrine should invalidate the arrest warrant. The trial court denied the motion to suppress.

The trial court found Bishop guilty as charged and sentenced him to 30 days in jail. He appeals.

[Footnote omitted]

ISSUES AND RULINGS: 1) Was the bench warrant for the convicted person’s failure to report to the work crew valid even though the work crew coordinator did not make her statement under oath or affirmation? (ANSWER: Yes); 2) Did anything happen between the date of Bishop’s failure to report to the work crew and the superior court’s issuance of the bench warrant to make the information underlying the issuance of the bench warrant stale? (ANSWER: No)

Result: Affirmance of Cowlitz County Superior Court conviction of Matthew Warren Bishop for possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Arrest warrant validity

Bishop first contends the trial court should have suppressed the warrant leading to his arrest and search because no oath or affirmation supported its issuance. He argues that because Lux did not give her statement under oath, the explicit language of both the federal and state constitutions require suppression.

Countering this argument, the State relies on State v. Erickson, 143 Wn. App. 660, *review granted,* 164 Wn.2d 1030 (2008) **(June 08 LED:21)**. In Erickson, Division One held that the trial court need not make an additional finding of probable cause to issue a bench warrant for failure to appear when probable cause supported the underlying conviction. Erickson was on probation when he failed to appear, and the court relied in part on his diminished privacy rights when it upheld the warrant's validity. . . The State's argument persuades us.

The Erickson court held that "[t]he probable cause necessary for a municipal court to issue a bench warrant for the arrest of a probationer who fails to appear is the probable cause for the original crime of which he or she was convicted." *[Court's footnote: Additionally, Division One determined in State v. Parks that "[u]nder CrRLJ 2.5, it is not necessary that a probable cause finding be made at the time of issuing the bench warrant. But the bench warrant will not be valid unless the record establishes that the court made a finding of probable cause at some earlier point in the history of the case." 136 Wn. App. 232 (Div. II, 2006)* ***Feb 08 LED:23****.]* Here, Bishop failed to report for his work crew sentence, and the trial court ordered his arrest. If a trial court may issue a bench warrant for a probationer's failure to appear based on the probable cause supporting the original conviction, it may also issue a bench warrant for failure to serve a sentence based on the oath or affirmation supporting the original conviction. Therefore, the same oath or affirmation that supported Bishop's arrest warrant for his original third degree theft conviction supported the trial court's later warrant that it issued when he did not report for his work crew sentence. *[Court's footnote: Although we do not agree with Bishop's argument under these particular facts, we note that the better practice would be to have letters, such as the one Lux wrote, be signed under penalty of perjury].*

2) Staleness

Bishop next contends that stale information supported his arrest warrant because Offender Services reported he did not appear for work crew months before the police arrested him. He argues that because it took 12 days for Offender Services to inform the municipal court that he had not shown up for work crew and, because the trial court did not issue the warrant until 90 days after receipt of the letter, the information had become stale.

Under State v. Maddox, "[a] delay in executing the warrant may render the magistrate's probable cause determination stale." 152 Wn.2d 499 (2004) **Dec 04 LED:18**. We apply a commonsense test to determine the staleness of information in a search warrant affidavit by looking to the totality of the circumstances surrounding its issuance.

The staleness doctrine applies to search warrant cases, as evidenced by the cases Bishop cites. Nonetheless, even applying search warrant doctrine to the arrest warrant here, the information supporting his arrest was not stale. Bishop pleaded guilty and the trial court sentenced him. When Offender

> Services realized he had not reported to serve his work crew sentence, it informed the trial court on December 27, 2006, and the trial court then issued a warrant March 22, 2007. The information that he failed to appear for his work crew sentence was not stale. Maddox. ("[t]he length of time between issuance and execution of the warrant is only one factor to consider along with other relevant circumstances").
>
> The trial court had no reason to believe that Bishop had shown up and served his work crew sentence between December 27, 2006, and March 22, 2007, as he argues. In fact, as he acknowledges, Offender Services had terminated him from the program 12 days after he failed to report for his sentence. This fact forecloses his argument because he could not have secretly completed the program after Offender Services terminated him.

[Some citations and footnotes omitted]

SEX OFFENDER REGISTRATION: STATUTORY SCHEME DELEGATING TO SHERIFF THE SETTING OF CLASSIFICATION LEVEL FOR SEX OFFENDER HELD TO VIOLATE CONSTITUTIONAL SEPARATION OF POWERS DOCTRINE

State v. Ramos, __ Wn. App. __, 202 P.3d 383 (Div. II, 2009)

Statutory background:

The Ramos case focuses on the statutory scheme under which Washington authorities assess the risk posed by sex offenders to the community. Sex offenders are classified as belonging to a risk level 1, 2 or 3 (1 = low risk, 2 = medium risk, 3 = high risk).

Risk levels are set for two purposes. First, they determine the amount of information about a sex offender to be released to the community. The higher the risk to the public, the more information about the offender that goes out, and to a broader audience. Second, the classification level determines how often sex offenders must report to the local sheriff. By legislation adopted and made effective in 2006 (as reported in the **May 2006 LED**), all level 2 and level 3 offenders have been required to report to local law enforcement every 90 days.

When sex offenders are released from State prison, their classification levels are determined by the Department of Correction's (DOC's) End of Sentence Review Committee (ESRC). See RCW 72.09.345. The DOC's ESRC uses actuarially-derived risk assessment tools to determine recidivism risk.

Local law enforcement agencies have the power to override the risk level set by the DOC's ESRC. In addition, local law enforcement agencies are also responsible under RCW 4.24.550(6) for setting the classification levels for all sex offenders who are not coming out of a State facility. For instance, local law enforcement agencies determine the classification level for sex offenders moving to Washington from another state, as well as for sex offenders convicted and released prior to the Legislature's creation of a registration requirement for the crime for which they were convicted.

For the purposes of the Ramos case, it is important to note that all the Legislature has said about setting classification levels is that the DOC's ESRC and local law enforcement agencies are to do it based on information gathered regarding the offender. The statutory scheme does not provide guidance about how the information is to be processed in order to determine a particular classification level.

Facts and Proceedings below:

Ramos was convicted of sexual exploitation of a minor in 1993 and released from prison in 1995. After the time of his release from prison, the Legislature added sexual exploitation of a minor to the list of crimes for which convicted persons must register. Because Ramos was not under DOC supervision at that time, the classification level was determined by the Thurston County Sheriff's Office.

The Sheriff's Office classified Ramos as a level 2 offender. As noted above, beginning in 2006, levels 2 and 3 have been required to report to local law enforcement every 90 days. When Ramos didn't comply with the reporting requirement, he was charged with and convicted of failure to report in violation of RCW 9A.44.130(7).

ISSUE AND RULING: Did the Legislature violate the Separation of Powers doctrine in the Sex Offender Registration laws by giving the Thurston County Sheriff inadequate guidance on how to determine the classification level for sex offender Ramos? (ANSWER: Yes)

Result: Reversal of Thurston County Superior Court conviction of Domingo Torres Ramos, Jr., for violation of RCW 9A.44.130(7).

ANALYSIS:

The Ramos Court asserts that only the Legislature can determine the elements of a crime, and that, under the constitutional Separation of Powers doctrine, the Legislature cannot delegate this power to the Executive branch of government. Such unlawful delegation occurred in this case, the Court concludes, because the Legislature made the defendant's sex offender classification level an element of the crime of failure to register without providing any real guidance to the Thurston County Sheriff as to how to determine the classification level for the offense.

The Ramos decision does not expressly address DOC's ESRC classification decisions.

LED EDITORIAL COMMENT: We believe that it is generally agreed among prosecutors and other government attorneys that the Ramos decision does not affect community notification regarding sex offenders by law enforcement agencies. Beyond that, we are not going to comment in the LED on the ramifications of the Ramos decision. Law enforcement personnel should consult their local prosecutors, agency legal advisors, and other government attorney advisors for guidance regarding the fallout of Ramos.

ABANDONED BUILDING DEFENSE HELD NOT APPLICABLE IN PROSECUTION FOR SECOND DEGREE BURGLARY

State v. Jensen, __ Wn. App. __, __ P.3d __, 2009 WL 755261 (Div. II, 2009)

Facts and Proceedings below:

Jensen was observed by a restaurant operator entering the restaurant through an open window. The restaurant operator called police, who arrested Jensen inside the building. The restaurant was shut down for the winter at the time of the entry and arrest. Evidence, including Jensen's own admissions to police, established that he had been staying in the restaurant for at least a few days, and had been consuming beer that was stored in the restaurant.

Jensen was charged with second degree burglary and third degree theft. The trial court's instructions to the jury told them that, if the facts supported abandonment of the building by the owner and tenant, an abandoned-property defense would apply to the lesser charge of first degree trespass. But the trial court did not give an instruction that would allow the abandoned-property defense for the charge of second degree burglary. The jury convicted Jensen as charged.

ISSUE AND RULING: Does the abandoned-property defense apply to a charge of second degree burglary? (ANSWER: No)

Result: Affirmance of Clallam County Superior Court convictions of Mark Christopher Jensen for second degree burglary and third degree theft.

ANALYSIS:

RCW 9A.52.090(1) provides: "In any prosecution under RCW 9A.52.070 [first degree criminal trespass] and 9A.52.080 [second degree criminal trespass], it is a defense that: (1) A building involved in an offense under RCW 9A.52.070 was abandoned." The Jensen Court concludes that this language is clear and does not support an abandoned-property defense in a burglary prosecution.

The Court of Appeals (Division Two) notes that in State v. J.P., 130 Wn. App. 887 (Div. III, 2005) **April 06 LED:11**, Division Three of the Court of Appeals stated that the abandoned-property defense applies to a charge of residential burglary. In rejecting that statement in J.P. as not being supported by the relevant statutory language, Division Two's explanation is in part as follows:

> We observe that while J.P.'s holding has a measure of logical appeal, because burglary and criminal trespass share the same unlawful entry element, the plain language of the statutory defense nevertheless applies that defense only to prosecutions for first degree criminal trespass. RCW 9A.52.090(1). As with any other statute, where the language of a statutory defense is clear, its plain language is to be applied as written. . . . Applying the statute as written, we hold that RCW 9A.52.090(1)'s abandonment defense is not available regarding Jensen's charged offense of second degree burglary.

[Some citations omitted]

PEEPING ON TWO PERSONS HAVING SEX SUPPORTS TWO VOYEURISM CONVICTIONS REGARDLESS OF WHETHER DEFENDANT CLAIMS HE DERIVED "SEXUAL GRATIFICATION" FROM WATCHING ONLY ONE OF THE PARTICIPANTS

State v. Diaz-Flores, __ Wn. App.__, 201 P.3d 1073 (Div. I, 2009)

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

> About 1:00 a.m. on July 6, 2006, a man walking his dog observed a person in a hooded sweatshirt step off the sidewalk and into the bushes behind a building at the Bellevue Meadows Apartments. The man called the police to report the activity. Officers Sanabria and Bradley arrived approximately 20 minutes later and searched the apartment complex area on foot.
>
> Officer Bradley saw a male, Omar Diaz-Flores, peering into an apartment window with his hands near his waist. One hand was inside his unzipped pants, and he was rocking back and forth. When Diaz-Flores spotted the officers, he began to walk away. Upon stopping Diaz-Flores, the officers noted that Diaz-Flores's pants were still unzipped and that he appeared to have an erection. Officer Sanabria looked through a crack in the drawn blinds where Diaz-Flores had been standing and could see inside a bedroom where a couple was having sexual intercourse.
>
> Officer Bradley then contacted the man in the apartment. He told Officer Bradley that he and his wife were having sex in their bedroom and that no one had permission to watch.
>
> Diaz-Flores was initially charged with one count of voyeurism. On the day of trial, the State moved to amend the information from one count of voyeurism to two counts – one count for the husband as a victim, and one count for the wife as a victim. The jury convicted the defendant of both counts of voyeurism. The judge sentenced him to concurrent standard range sentences of 6 months.

ISSUE AND RULING: Where a defendant is charged with two violations of the voyeurism statute based on his viewing of a man (charge 1), and a woman (charge 2) having sex, does it matter if he claims he derived sexual gratification from viewing only one of the two participants? (ANSWER: No)

Result: Affirmance of King County Superior Court convictions of Omar Diaz-Flores on two counts of voyeurism.

Statutory language re voyeurism

RCW 9A.44.115(2) provides:

> (2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The parties dispute whether the evidentiary burden requires proof that the defendant was aroused by each person he viewed or proof that the purpose of the act of viewing was for sexual arousal or gratification. Diaz-Flores contends that the State failed to present evidence that the defendant was aroused or had gratified his sexual desires in viewing *both* the naked male and the naked female. The State responds that the jury found sufficient evidence that the defendant viewed both individuals with the ***purpose*** of arousing or gratifying his sexual desire, and that evidence that each victim aroused Diaz-Flores is not required.

Before determining whether there was sufficient evidence to convict Diaz-Flores for two counts of voyeurism, it is necessary to resolve whether the State had to prove that Diaz-Flores was aroused by seeing both the man and the woman, or that his purpose in viewing the couple was for sexual gratification (regardless of whether he was actually aroused by both the man and the woman).

Division Three of this court addressed a similar challenge to the sufficiency of the evidence on a voyeurism conviction in State v. Glas, 106 Wn. App. 895 (Div. III, 2001) **Nov 01 LED:19**, reversed on other grounds, 147 Wn.2d 410 (2002) **Nov 02 LED:03**. **[LED EDITORIAL NOTE: After the Supreme Court's decision in Glas, the statute was amended to plug a loophole. See July 03 LED:11.]** There, Glas had taken photographs under the skirts of two women. Glas contended that there was insufficient evidence that his conduct was for sexual arousal or gratification. However, the court explained that "[t]he statute requires only that the purpose of the behavior be to arouse or gratify in some manner some sexual desire of any person." The logical inference of this statement is that the State does not have to produce evidence that the act actually aroused or gratified the defendant. As the court in Glas stated, "[t]hat commonsense reference [sic] followed from the evidence here, including Mr. Glas's statement that the photographs were ultimately destined for a pornographic Internet web site."

Having established that the State was only required to show that the purpose of the act was for sexual arousal or gratification, the State had only to provide evidence of Diaz-Flores's purpose. Officer Sanabria testified that Diaz-Flores's face was pressed right up against the window, that his hands were in his "crotch area", and that he put his hands in his pockets when he heard the officers approaching. Both officers testified that Diaz-Flores's zipper was down and it appeared that he had an erection. There was no evidence to

> suggest another purpose than sexual gratification. The State is entitled to all inferences that reasonably can be drawn from the evidence. The evidence here overwhelmingly suggests that Diaz-Flores's purpose in watching the couple was for sexual arousal or gratification.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) ROUGH "RABID DOG" GAME IN WHICH FATHER BIT AND BRUISED HIS 4-MONTH-OLD CHILD'S FACE RESULTS IN SECOND DEGREE ASSAULT CONVICTION – In State v. Hovig, __ Wn. App. __, 202 P.3d 318 (Div. II, 2009), the Court of Appeals rejects defendant's challenge to his second degree assault conviction under RCW 9A.36.021(1)(a). Defendant argued unsuccessfully that his conduct met neither the "recklessly inflicts" or the "substantial bodily harm" elements of the subsection (1)(a) variation of second degree assault with which he was charged.

The Court of Appeals rules that the evidence that the father acted intentionally in biting his 4-month-old son's face was sufficient for a fact-finder to determine that the injuries were "recklessly inflict[ed]" even if the father stupidly thought his actions were mere rough play.

On the "substantial bodily harm" question, the Court of Appeals notes that the expert medical testimony established that the bite would have been painful, and that the serious bruising could have lasted from seven to 14 days. This evidence, the Court rules, was sufficient to constitute "substantial bodily harm," which is defined in part at RCW 9A.04.110 as "bodily injury which involves a temporary but substantial disfigurement . . . "

Result: Affirmance of Grays Harbor County Superior Court conviction of Jessie L. Hovig for second degree assault.

(2) CHILD PORN STING: PROHIBITION ON COMMUNICATING FOR IMMORAL PURPOSES WITH SOMEONE A PERSON BELIEVES TO BE A MINOR BY SENDING AN ELECTRONIC COMMUNICATION HELD NOT TO BE UNCONSTITUTIONALLY OVERBROAD OR UNJUSTIFIABLY BURDENSOME ON FREE SPEECH – In State v. Aljutily, __ Wn. App. __, __ P.3d __, 2009 WL 618029 (Div. III, 2009), the Court of Appeals rejects a defendant's constitutional challenge to his conviction under RCW 9.68A.090(2), which provides in relevant part that it is a Class C felony if a person "communicates . . . with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication."

Aljutily sought sexual relations in instant messaging communications with City of Pullman and WSU police officers who were posing in the electronic exchanges as a 13-year-old girl. His challenge on appeal was that, in light of constitutional protection of freedom of speech, the Legislature went too far in prohibiting such communications. In rejecting his challenge, the Court of Appeals explains, among other things:

> As case law makes clear, RCW 9.68A.090 prohibits communication, by words or conduct that is: (1) done for immoral purposes, (2) intended to reach a minor, and (3) received by a minor, or someone the person believed to be a minor. RCW 9.68A.090 does not prohibit or deter a substantial amount of

> protected speech or conduct, and has been construed by our Supreme Court in a sufficiently limited manner.
>
> Mr. Aljutily's argument overlooks the State's burden to prove that the defendant intended that the communication reach a minor. [State v. Hosier, 157 Wn.2d 1 (2006) **Aug 06 LED:06**.] As the State persuasively argues, this limits the breadth of the statute and allows adults who do not intend to communicate with children to engage in communications of a sexual nature without fear of prosecution. The statute applies only if one intends that an immoral communication reach a minor and it actually does reach a minor or someone he or she believes to be a minor.
>
> The requirements that the communication be made with the intent that it reach a minor, and done with the immoral or predatory purpose of exposing or involving a minor in sexual misconduct, sufficiently limits the amount of speech or conduct that the statute regulates and ensures that a substantial amount of protected expressive activity is not deterred. The anonymous sexual Internet communication that Mr. Aljutily argues would be chilled by the statute can be accomplished freely and without threat of felony prosecution when the intent is to communicate with other adults, not minors.

Result: Affirmance of Whitman County Superior Court conviction of Tarig Mohammed A. Aljutily for felony communication with a minor for immoral purposes.

(3) ROBBERY AND OTHER CHARGES DISMISSED FOR GOVERNMENT MISMANAGEMENT OF CASE AND FOR DISCOVERY VIOLATIONS – In State v. Brooks, __ Wn. App. __, 203 P.3d 397 (Div. I, 2009), the Court of Appeals affirms the trial court's dismissal, "with prejudice" (i.e., barring re-filing of the charges) of charges of robbery, burglary, and theft of a firearm. The dismissal was under Criminal Rule 8.3(b), which authorizes this drastic sanction for governmental misconduct.

The Brooks opinion describes what it determines to be governmental mismanagement and discovery violations in the superior court proceedings, preventing the defense attorneys from being able to prepare for trial other than by agreeing to continuance of the trial date past the speedy trial deadline. Included in the mismanagement was failure of the prosecutor's office to timely provide: 1) a 60-page victim's statement; 2) defendant's statement to a deputy sheriff on the night of the incident; and 3) the lead detective's report, which likely would have revealed other witnesses that the defendants needed to interview and subpoena. While the lag time between the date of the incident and the date the officers transcribed the report and the witness statements was to some extent beyond the prosecutor's control, the record contained no evidence that the prosecutor's office attempted to work with the sheriff's office to resolve the delay. Also, there were lengthy gaps of time between the receipt of transcribed statements in the prosecutor's office and their transmission to defense counsel.

Result: Affirmance of Lewis County Superior Court's dismissal with prejudice of charges of first degree burglary, first degree robbery, and theft of a firearm against Natalie Renee Brooks (a/k/a Natalie Renee Pitts) and Jason P. Brooks.

(4) DEFENDANT ENTITLED TO BETTER ACCESS TO HIS COMPUTER RECORDS – In State v. Dingman, __ Wn. App. __ , 202 P.3d 388 (Div. II, 2009), the Court of Appeals

rules that the trial court erred in a theft and money laundering prosecution by not requiring the State to respond to the defendant's "discovery" request by either 1) providing direct access to the hard drive on the defendant's seized computers, or 2) providing mirror image copies of the hard drives in the particular software program being used by the defense's computer expert.

The Court of Appeals rules that the trial court should have deemed inadequate the State's objections: 1) that it would take too much time to copy computer hard drives seized from defendant into defense's chosen software format; 2) that defense's chosen software format might result in inaccurate copies; 3) that the State need not conform its response to computer discovery to defense's whims; and 4) that there was a possibility that the computer's hard drive would be damaged if the defense were allowed to use it.

Thus, the Court of Appeals rules that the trial court erred by requiring the State to provide defendant only with only mirror images of hard drives in the State's chosen software format. The Court explains: 1) that the defense expert was not trained to use the State's chosen software format; 2) that neither defense counsel nor the defense expert owned a version of the State's chosen software format; 3) that it was speculative whether use of the hard drive would cause damage to it; 4) that any potential alteration to the hard drives' original condition that the defense's chosen software might cause could be detected because the State already had mirror image copies it had created; and 5) that the State had a license to use defense's chosen software format.

Result: Reversal of Pierce County Superior Court convictions of Robert Corcoran Dingman for first degree theft (16 counts) and for money laundering (11 counts); remand of case for further discovery by defendant and for re-trial.

(5) PROHIBITION OF INTERNET GAMBLING DOES NOT VIOLATE COMMERCE CLAUSE OF UNITED STATES CONSTITUTION – In Rousso v. State of Washington, __ Wn. App. __, __ P.3d __, 2009 WL 736768 (Div. I, 2009), the Court of Appeals upholds the Legislature's prohibition of internet gambling.

In 2006, the Legislature amended RCW 9.46.040 to make it a Class C felony to transmit "gambling information" (as statutorily defined) via the internet (this amendment was reported in the **May 2006 LED** at page 18). Lee Howard Rousso is a poker-playing attorney who filed a lawsuit asserting that this 2006 expansion of the statute to address internet gambling imposes "clearly excessive" limits on the ability of the U.S. Congress to regulate interstate and international commerce. The Court of Appeals holds, however, that "the State's established interest in regulating gambling outweighs the burdens that [Washington's] Gambling Act imposes on interstate and international commerce."

Result: Affirmance of King County Superior Court order granting summary judgment to the State of Washington.

(6) "HONOR-BASED" INTERNET BETTING SERVICE IS NOT ENGAGED IN: (1) "GAMBLING" BECAUSE THE SERVICE REQUIRES ALL USERS TO AGREE THAT ALL BETS ARE NON-BINDING; OR (2) "BOOKMAKING" BECAUSE THE SERVICE DOES NOT TAKE A POSITION ON THE BETS – In Internet Community & Entertainment Corp. v. State of Washington, __ Wn. App. __, 201 P.3d 1045 (Div. II, 2009), the Court of Appeals

rules, 2-1, in a declaratory judgment lawsuit, that a corporation that operates an internet betting service was not engaged in "gambling" or "bookmaking" within the meaning of chapter 10.46 RCW.

"Gambling" is defined by RCW 9.46.0237 as "staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon *an agreement or understanding that the person or someone else will receive something of value* in the event of a certain outcome." The "honor-based" internet service required all users of the corporation's service to agree that all bets were non-binding. Because of that element of the operation, the majority opinion concludes, the corporation's actions of bringing bettors together – for small fees from the bettors for use of the internet forum – put the actions of the corporation outside the definitions of "gambling" or possessing or storing "gambling records."

"Bookmaking" is defined by RCW 9.46.0213 as "accepting bets, upon the outcome of future contingent events, as a business or in which the bettor is charged a fee or 'vigorish' for the opportunity to place a bet." The majority opinion in this case concludes that under this definition it does not constitute bookmaking if a person or entity does not take a position on bets.

Result: Reversal of Thurston County Superior Court order granting summary judgment to the State; remand for entry of order granting summary judgment to the corporation.

Status: The State of Washington has filed a petition seeking discretionary review by the Washington Supreme Court.

Note: The attorney representing the corporation in this case is the attorney who filed the lawsuit in his own name in the Rousso case digested immediately above.

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NEXT MONTH

Among other things, the June 2009 LED will include Part Two of the 2009 Washington Legislative Update.

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INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCWS, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts,

superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Decisions" and then "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the Criminal Justice Training Commission's Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]