Law Enforcement Digest

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NOVEMBER 2009 LED TABLE OF CONTENTS

NINTH CIRCUIT, U.S. COURT OF APPEALS 2

FACTS SIMILAR TO THOSE IN TERRY V. OHIO SUPPORT STOP AND FRISK
U.S. v. Johnson, ___ F.3d ___, 2009 WL 2883020 (9th Cir. 2009) (decision filed September 10, 2009) 2

POLICE ENTRY INTO "IMMEDIATELY ADJOINING AREA" HELD LAWFUL AS INCIDENTAL TO ARREST PER BUIE, AND PLAIN VIEW SEIZURE OF GUN UPHELD
U.S. v. Lemus, ___ F.3d ___, 2009 WL 2999361 (9th Cir. 2009) (decision filed September 22, 2009) 5

BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS..... 9

FEDERAL LAW FOR SEX OFFENDER REGISTRATION: RETROACTIVE APPLICATION HELD TO VIOLATE CONSTITUTIONAL EX POST FACTO PROTECTION
U.S. v. Juvenile Male (S.E.), ___ F.3d ___, 2009 WL 2883017 (9th Cir. 2009) (decision filed September 10, 2009) 9

FOURTH AMENDMENT "GOOD FAITH" EXCEPTION TO EXCLUSIONARY RULE HELD NOT APPLICABLE TO A SEARCH INCIDENT TO ARREST IN VIOLATION OF THE RULE ANNOUNCED IN ARIZONA V. GANT
U.S. v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) (decision filed August 24, 2009) 10

"IN PARI DELICTO" THEORY JUSTIFIES GOVERNMENT'S RETENTION OF MONEY THAT CRIMINAL PAID FOR DOCUMENTS IN STING
Kardoh v. U.S., 572 F.3d 697 (9th Cir. 2009) (decision filed July 10, 2009) 10

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT 11

TRIBAL OFFICERS HAVE AUTHORITY TO PURSUE NON-INDIAN TRAFFIC LAW VIOLATORS FROM RESERVATION AND TO MAKE A STOP OFF THE RESERVATION TO HOLD FOR CITY, COUNTY OR STATE OFFICERS
State v. Eriksen, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 2992560 (2009) 11

WASHINGTON STATE COURT OF APPEALS 11

WITNESSES WHO WERE PREVIOUSLY ACQUAINTED WITH DEFENDANT LAWFULLY TESTIFIED THAT HE WAS THE SHOOTER IN CAB SURVEILLANCE PHOTOS; ALSO, DEFENDANT'S PRIVACY RIGHTS DID NOT PRECLUDE STATE FROM PRESENTING EVIDENCE THAT DEFENDANT HAD REFUSED TO PROVIDE A VOICE EXEMPLAR
State v. Collins, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2999329 (Div. I, 2009) 11

WHILE CHARGES ARE PENDING, COURT MAY LAWFULLY ORDER TAKING OF DEFENDANT'S DNA BASED ON PROBABLE CAUSE – WARRANT NOT REQUIRED IN ADDITION TO THE COURT ORDER
State v. Garcia-Salgado, 149 Wn. App. 702 (Div. I, 2009) 14

BRIEF NOTES FROM THE WASHINGTON COURT OF APPEALS 16

NO OUTRAGEOUS GOVERNMENT MISCONDUCT IN: 1) ALLEGED DECEPTION BY DETECTIVE IN TALKING TO VICTIMS, WITNESSES AND THEIR FAMILY MEMBERS; OR IN 2) ALLEGED COACHING OF WITNESSES BY VICTIMS' ADVOCATE
State v. Wiatt, 151 Wn. App. 22 (Div. II, 2009) 16

TRIAL COURT'S ADMISSION OF CHILD HEARSAY STATEMENTS UPHELD UNDER ANALYSIS OF THE 9 RYAN FACTORS
State v. Kennealy, ___ Wn. App. ___, 214 P.3d 200 (Div. II, 2009) 18

CONSTITUTION PRECLUDES COURT ORDER BANISHING DEFENDANT FROM ENTIRE COUNTY; THE ORDER WAS TIED TO A SSOSA, SO CASE MUST BE REMANDED FOR RESENTENCING
State v. Sims, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2998947 (Div. II, 2009) 21

RETROACTIVITY OF ARIZONA V. GANT AND WAIVER ADDRESSED IN CONFLICTING DIVISION TWO COURT OF APPEALS DECISIONS
State v. McCormick, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3048723 (Div. II, 2009) 21

GANG AFFILIATION EVIDENCE HELD INADMISSIBLE UNDER ER 404(B) BECAUSE SUCH EVIDENCE WAS NOT SHOWN TO BE A REASON OR A MOTIVE FOR THE CRIMES THAT THE STATE WAS PROSECUTING
State v. Scott, ___ Wn. App. ___, 213 P.3d 71 (Div. III, 2009) 22

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NINTH CIRCUIT, U.S. COURT OF APPEALS

FACTS SIMILAR TO THOSE IN TERRY V. OHIO SUPPORT STOP AND FRISK

U.S. v. Johnson, ___ F.3d ___, 2009 WL 2883020 (9th Cir. 2009) (decision filed September 10, 2009)

Facts: (Excerpted from Ninth Circuit opinion)

> On October 19, 2006, Alaska State Trooper Vic Aye and Deputy Troy Meeks of the United States Marshals Service were serving federal warrants on the east side of Anchorage. The officers were wearing plain clothes and driving an unmarked sports utility vehicle. While the officers were stopped at a traffic light across from the First National Bank, Deputy Meeks noticed three suspicious individuals standing in the bank's parking lot next to a tan Buick sedan. The car was parked about 20 feet from the bank's front entrance and its hood was raised. The three men-later identified as Johnson, David Brookins, and Alvin Nelson-were not looking under the hood but instead appeared to be surveying the bank and the surrounding area. As the officers drove away, Deputy Meeks observed Johnson and Nelson head toward the bank's front door. Johnson, who was

wearing a hooded sweatshirt under a jacket, flipped up his hood partially obscuring his face.

His suspicions aroused, Deputy Meeks described to Trooper Aye what he had just witnessed. The officers decided to double back for another look. By the time they circled back to the bank, the sedan's hood had been closed, and Brookins was alone in the vehicle sitting in the driver's seat. The other two men were nowhere to be seen. Trooper Aye decided to enter the bank while Deputy Meeks stayed outside to surveil Brookins.

Once inside the bank, Trooper Aye immediately noticed a teller nervously watching Johnson and Nelson, who were standing in line. The men were whispering to each other, and Johnson appeared to be surveying the bank lobby. Trooper Aye approached another bank employee who also appeared to be eyeing the men. He surreptitiously identified himself as a state trooper and asked the employee if everything was alright. She responded "no," and also appeared nervous.

Although not in uniform, Trooper Aye could still be recognized as a law enforcement officer. He was carrying several pieces of police equipment including a sidearm, taser, and two-way radio and he was wearing a bulletproof vest underneath his outer clothing. At some point, Johnson looked directly at Trooper Aye, said something to Nelson, and immediately walked out of the bank. Deputy Meeks observed Johnson exit the bank and stand at the driver's side of the sedan. Johnson appeared to gesture to Brookins before getting into the back seat. Trooper Aye and Deputy Meeks communicated by cellular phone as to what each had just witnessed. Trooper Aye then left the bank and rejoined Deputy Meeks in the police vehicle. The officers decided to stop and question the men. They pulled behind the sedan and activated their emergency lights.

The officers approached the car and displayed their badges. They verbally identified themselves as law enforcement officers and asked for identification. Trooper Aye told Johnson and Brookins that the whole incident "might be a misunderstanding" and that they "just want[ed] to talk with [them]." The men cooperated with the officers' request that they step out of the car. Deputy Meeks patted down Brookins and discovered a loaded .25 caliber handgun in his front pocket and a spare magazine in his back pocket. Deputy Meeks informed Trooper Aye, who was talking to Johnson, that he had found a gun. The officers then conducted a patdown search of Johnson and located another semi-automatic pistol in his coat pocket. The officers handcuffed Johnson and Brookins and seated them on the curb. Nelson then emerged from the bank and walked toward the sedan with his hands in his pockets.

Having already discovered that his associates were armed, the officers drew their own weapons and demanded that Nelson place his hands in plain view. After conducting a patdown frisk, which uncovered no additional firearms, the officers secured Nelson.

The officers explained to the three suspects that the matter still could be a misunderstanding, but they needed to run their identifications to determine whether they had any active warrants or other criminal history. At that point, Johnson volunteered that he had a previous drug conviction in Florida. Deputy

Meeks and Trooper Aye contacted the Anchorage Police Department ("APD"), whose officers responded and took over the investigation.

Proceedings below:

Johnson was indicted in federal district court for being a felon in possession of a firearm. The district court denied his suppression motion. He pleaded guilty, conditioned on his right to appeal the suppression ruling.

ISSUES: 1) Was the initial police seizure of Johnson an arrest requiring probable cause? (ANSWER: No)

2) Was the initial police seizure of Johnson justified by reasonable suspicion and did they officers act reasonably frisking and in handcuffing Johnson? (ANSWER: Yes)

Result: Affirmance of U.S. District Court (Alaska) conviction and sentence of Todd Douglas Johnson for being a felon in possession of a firearm in violation of federal law.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) Initial seizure was not an arrest

> We first dispose of Johnson's contention that his initial seizure amounted to an arrest and therefore required probable cause from the outset. He argues that he was under arrest from the moment officers activated their emergency lights, pulled their vehicle behind the parked sedan, and approached the car. Based on our review of the record, we disagree. The record reveals that Trooper Aye and Deputy Meeks identified themselves and simply asked to talk to Johnson and Brookins, who fully cooperated with the officers' request that they exit their vehicle and submit to a frisk.
>
> After finding weapons, the officers were justified in handcuffing Johnson and Brookins as they waited for the third suspect to emerge from the bank. *See United States v. Bravo,* 295 F.3d 1002, 1010-11 (9th Cir. 2002) (noting that, although handcuffing is a substantial factor in the determination, the totality of the circumstances remains the test for deciding whether a suspect was arrested or merely detained). Even after all three men were secured with handcuffs while the officers ran a background check, the officers repeatedly reassured the suspects that the detention might be nothing more than a misunderstanding and that its purpose was merely investigatory. Taken together, the circumstances of Johnson's detention would lead a reasonable person to believe that he was free to leave once the officers conducted a brief inquiry and allayed their suspicions. The district court did not err in finding that Johnson was not under arrest, but rather merely detained, during the material time period. *[Court's footnote: The government does not dispute that Johnson's detention ultimately escalated into an arrest. See United States v. Robertson, 833 F.2d 777, 780 (9th Cir.1987) ("We often confront the issue of when a legitimate 'Terry stop,' for which only reasonable suspicion of criminal activity is required, escalates into an arrest for which probable cause is required. The differing standards for each reflect the differing degrees of intrusion characteristic to each."). But, it is readily apparent that Johnson's arrest did not occur until well after the officers had conducted the patdown search and discovered the firearm in his coat pocket, and even after*

Johnson volunteered that he had a prior conviction. Therefore, the precise moment of arrest is not material to the suppression issue before us.]

2) Officer safety actions were reasonable

The investigatory stop and frisk was supported by reasonable suspicion on facts quite similar to those in Terry itself, where an alert detective suspected three men of casing a business for a possible robbery. The specific, articulable facts known to Deputy Meeks and Trooper Aye were more than sufficient to support their suspicion that Johnson and his associates were casing a bank for a potential robbery and not merely experiencing car trouble. When two of the individuals entered the bank, one flipped up the hood on his hooded sweatshirt, which could aid in concealing his identity. The third man remained outside, lowered the hood of the car, and sat in the driver's seat. The two men inside the bank were seen whispering to one another while one appeared to surveil the lobby area. A visibly nervous bank employee told Trooper Aye that something was amiss in the bank. When one of the suspects became aware of Trooper Aye's presence, he whispered something to his associate, left the bank, and returned to the sedan waiting outside. A trained law enforcement officer could reasonably suspect that these individuals might well be intending to rob the bank and flee in the waiting getaway car.

Given the nature of the suspected criminal activity, the officers were also justified in patting down Johnson. As Deputy Meeks testified, in his experience, "[a]lmost everybody has weapons" in Alaska. But here the officers suspected that a bank robbery was about to take place, which increased their suspicion that the men might be armed. Moreover, the suspects outnumbered the officers by three to two. Trooper Aye and Deputy Meeks were therefore justified, for their own safety, in conducting a patdown frisk of Brookins and Johnson to check for weapons. This is especially true in Johnson's case. After Deputy Meeks first discovered a loaded pistol and an extra ammunition clip in Brookins's possession, the officers had an even greater basis to suspect that Johnson might likewise be armed and that another patdown frisk was warranted for officer safety.

We are unmoved by Johnson's efforts to provide innocent explanations for the conduct both outside and inside the bank. Whether this incident was indeed a foiled bank robbery attempt or a simple misunderstanding is not material to his suppression motion or this appeal. Applying a "totality of the circumstances" review of the facts then known to them, the officers possessed substantial information supporting a reasonable suspicion that criminal activity was afoot and that weapons might be involved. The investigatory stop and frisk of Johnson and the discovery of his semi-automatic handgun did not violate his Fourth Amendment rights. The district court properly denied his motion to suppress the evidence.

[Some citations omitted; subheadings added]

POLICE ENTRY INTO "IMMEDIATELY ADJOINING AREA" HELD LAWFUL AS INCIDENTAL TO ARREST PER BUIE, AND PLAIN VIEW SEIZURE OF GUN UPHELD

U.S. v. Lemus, ___ F.3d ___, 2009 WL 2999361 (9th Cir. 2009) (decision filed September 22, 2009)

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

> When Detective Longoria clocked in to the office at six o'clock to report for his morning briefing, Sergeant Gerardo was waiting for him. The Sergeant informed him that the DA had issued a warrant for the arrest of Juan Hernan Lemus, of Calexico. Detective Longoria had dealt with Lemus before. A year or so back he had been to Lemus's place for a probation search, and found drugs. But Detective Longoria knew Lemus wasn't just into drugs. He recalled that Lemus had been a member of a group busted for a drive-by shooting. And he remembered that some of Lemus's cousins had been arrested for violent crimes.
>
> Detective Longoria checked the database. Lemus's arrest warrant was in there. It looked like Lemus was still living at the same place, an apartment out on Sixth Street. If he remembered right, it was part of a small complex with a house and two other apartments. Some of Lemus's family members lived there too.
>
> He and Detective Diaz drove out to Sixth Street. They parked in front of Lemus's residence, and started watching for Lemus. An hour later, he appeared, walking out of his apartment and over to his mother's house. Shortly after, he left his mother's house and walked back to his apartment, carrying a beige envelope. Nothing looked out of place. Lemus was just heading back toward his apartment. But Detective Longoria thought he'd better call in some more units. Lemus might be dangerous if cornered.
>
> The detectives drove up to the side of Lemus's apartment and pulled up next to a fence surrounding the property. Detective Longoria jumped out and started calling to Lemus. Lemus saw them and asked what was going on. The detectives responded that Lemus had an outstanding arrest warrant and that they were going to take him into custody.
>
> No response. Lemus slowly backed away, toward the sliding glass door on the side of his apartment.
>
> Sergeant Gerardo and Officer Orozco arrived for backup. They tried to explain the situation to Lemus from across the fence. But he continued to retreat towards his apartment. He opened the sliding glass door.
>
> The officers continued to tell Lemus to come out, but Lemus instead started to walk into the apartment. The officers were there in an instant, taking hold of Lemus and handcuffing him before he could fully enter the doorway and retreat into his living room.
>
> Detective Longoria thought he'd better check to make sure no one was hiding out in the apartment. He sent Gerardo and Orozco in. They scanned the living room, and didn't see anyone. Just a couch and a TV. Checked the bedroom and bathroom too. Negative. Lemus was alone.

> Diaz, in the living room, got Detective Longoria's attention. Wasn't there something sticking out from the couch? Detective Longoria thought it looked like the butt of a weapon. Since Lemus was a felon, having a gun would be a crime. Detective Longoria lifted the couch cushion to make sure, and confirmed that it was a semi-automatic handgun. It was later determined to be a Sturm and Ruger, 9 millimeter.
>
> Detective Longoria let the cushion fall. He thought he should get a search warrant before touching the gun – he didn't want to lose the chance to seize it. He left the officers at the scene to keep things secure, and headed back to the station.
>
> The warrant was issued, and the Ruger was seized. After agents from the Bureau of Alcohol, Tobacco, Firearms and Explosives discovered that the weapon was manufactured in Arizona and had been moved in interstate commerce, a grand jury returned a one-count indictment charging Lemus with being a felon knowingly in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 924(a)(2). In district court, Lemus moved to suppress the pistol, claiming that it was obtained unlawfully because it was discovered during a warrantless search. When the district court denied the motion, Lemus entered a conditional guilty plea preserving his right to appeal the district court's denial of his suppression motion.

ISSUE AND RULING: In Maryland v. Buie, 494 U.S. 325 (1990), the U.S. Supreme Court recognized two separate rules, each based on officer safety rationales, authorizing police searches of certain areas of a residence following arrest of a suspect in the residence. First, Buie recognizes that police may search the area "immediately adjoining the place of arrest. Second, Buie recognized that if officers reasonably believe the residence harbors a dangerous person, the officers may sweep the premises to look in areas where a person may be hiding. Was the police seizure of evidence in this case justified by the first Buie rule, plus the "plain view" doctrine? (ANSWER: Yes)

Result: Affirmance of U.S. District Court (Nevada) conviction and sentence of Juan Hernan Lemus for being a felon in possession of a firearm in violation of federal law.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> [T]he Supreme Court has identified exceptions to the warrant requirement for searches conducted immediately following a home arrest. The Court has recognized that "unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's 'turf.'" Maryland v. Buie, 494 U.S. 325 (1990). This disadvantage creates concern that the suspect may gain access to hidden weapons. *See generally* Chimel v. California, 395 U.S. 752 (1969). It also creates concern that others associated with the suspect might ambush the officers, and "[a]n ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings." Buie. Thus, the Court has held that "the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest." Buie.

In Chimel, the Court authorized a narrow search of the arrestee's "person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him." Such a search, justified by the State's interests in the safety of the arresting officer and in preserving evidence, is strictly limited to the area "within [the arrestee's] immediate control"- "the area into which an arrestee might reach in order to grab a weapon or evidentiary items."

Later, in Buie, the Court refined its analysis in Chimel. It noted the "interest of the [arresting] officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack" and described two types of searches that might immediately follow an arrest and for which a warrant was not required. First, the officers' interest in their own safety justifies a search "incident to the arrest . . . as a precautionary matter and without probable cause or reasonable suspicion, . . . [of] closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." Second, the officers can perform a further protective sweep beyond immediately adjoining areas when there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." This "protective sweep" is not a license to search every nook and cranny of a house, but is subject to two significant limitations: it "extend[s] only to a cursory inspection of those spaces where a person may be found" and lasts "no longer than it takes to complete the arrest and depart the premises."

In this case, we need not decide whether Detective Longoria or the other investigating officers had "articulable facts which . . . would warrant [the officers] in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene" that would justify a protective sweep. Buie. *[Court's footnote: We also need not decide whether Detective Longoria's search of the living room is authorized as a search of the area "within [Lemus's] immediate control." The testimony presented during the suppression hearing did not conclusively establish the positioning of the couch (and the weapon within the couch) in relation to Lemus at the time of the arrest, and the parties have not argued that the search was permissible under Chimel.]* Because the record clearly demonstrates that Lemus was arrested in an area "immediately adjoining" the living room, a limited search of that room was proper without either reasonable suspicion or probable cause as a protective search incident to the arrest.

According to Buie, a "protective search 'incident to the arrest' "to protect the arresting officers from the danger of a surprise attack can be completed without reasonable suspicion or probable cause if two conditions are present. First, the area searched must "immediately adjoin [ ]" the area of arrest. Second, the area searched must be one "from which an attack could be immediately launched," and thus in any event must be capable of concealing at least one person. Both of these conditions are satisfied here.

Although the exact location of Lemus's arrest was disputed in the district court, the district court found that he was apprehended shortly after he had "stepped into the apartment breaking the threshold of the sliding glass door." This finding was not clearly in error. Even taking Lemus's account of the events as authoritative, it is clear that at most Lemus was only partially outside the living room when he was arrested. The living room thus "immediately adjoined" the area where Lemus was arrested.

Lemus's living room not only immediately adjoined the area of arrest, but was a place from which an attack could be immediately launched. The district court found that Lemus had opened the sliding glass door, which created additional hazards for the officers. We have recognized that"[a] bullet fired at an arresting officer standing outside a window is as deadly as one that is projected from one room to another." United States v. Hoyos, 892 F.2d 1387, 1397 (9th Cir.1989), overruled on other grounds by United States v. Ruiz, 257 F.3d 1030, 1032 (9th Cir.2001) (en banc). When Lemus opened the door, he not only gave himself access to the living room but exposed the officers to anyone lying in wait inside. The room was obviously large enough to hide one or more attackers. Although, as Lemus points out, the police officers could have left the premises immediately after the arrest, this fact does not make the search of the living room any less necessary-there was no guarantee that a potential attacker would not ambush the officers after they had turned their backs to the door.

Because the living room immediately adjoined the place of arrest and was large enough to contain an attacker, we need not reach the second prong of Buie and decide whether the search of the living room was justified as a "protective sweep." The officers were permitted to search the room "as a precautionary matter" without either reasonable suspicion or probable cause to believe that an attacker lay in ambush.

Because the police officers were lawfully permitted by Buie to enter the "immediately adjoining" living room to search for potential assailants, they could also seize the firearm under the "plain view" doctrine if (1) the weapon was in "plain view" and (2) "its incriminating character [was] immediately apparent." "

Detective Longoria's un-rebutted testimony established that the weapon was in plain view. The testimony made clear that Detective Diaz noticed something sticking out from under a couch cushion, and when Detective Longoria raised the cushion, he saw clearly that it was the butt of a pistol.

Detective Longoria's prior experience with Lemus made the incriminating nature of the evidence immediately apparent, because the detective had "probable cause to believe that [the pistol was] associated with criminal activity." Detective Longoria was one of the police officers who was present during the prior probationary search of Lemus's apartment, and knew that Lemus had been convicted of a felony. Because it is illegal for a felon to possess a firearm . . . , Detective Longoria had probable cause to believe that the pistol was illegal.

Detective Longoria's decision to lift the couch cushion to confirm his belief did not render the search unconstitutional. Once the detective realized that the weapon was illegal, he was justified in lifting the couch cushion to confirm his beliefs. *[Court's footnote: In fact, the police officers were even more careful than*

necessary. Although they were justified in seizing the weapon when they first entered Lemus's apartment, they proceeded to obtain a search warrant before removing the pistol from the premises.]

[Footnote and some citations omitted]

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

(1) FEDERAL LAW FOR SEX OFFENDER REGISTRATION: RETROACTIVE APPLICATION HELD TO VIOLATE CONSTITUTIONAL EX POST FACTO PROTECTION – In U.S. v. Juvenile Male (S.E.), ___ F.3d ___, 2009 WL 2883017 (9th Cir. 2009) (decision filed September 10, 2009), a 3-judge panel of the Ninth Circuit holds that constitutional protection against ex post facto (retroactive) laws are violated by application of the federal sex offender registration statute to juvenile sex offenses where the offenses were committed prior to the effective date of the statute.

The Ninth Circuit panel summarizes its analysis as follows:

> We must decide as a matter of first impression-in our court and in any other circuit court – whether the retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses before SORNA's passage violates the Ex Post Facto Clause of the United States Constitution. In light of the pervasive and severe new and additional disadvantages that result from the mandatory registration of former juvenile offenders and from the requirement that such former offenders report in person to law enforcement authorities every 90 days for 25 years, and in light of the confidentiality that has historically attached to juvenile proceedings, we conclude that the retroactive application of SORNA's provisions to former juvenile offenders is punitive and, therefore, unconstitutional.

Result: Vacation of the part of a U. S District Court (Montana) order requiring S.E. to register as a sex offender under federal law.

LED EDITORIAL COMMENT: Washington and federal case law is clear that retroactive application of sex offender registration laws to adult sex offense convictions does not violate constitutional exp post facto protections. The Ninth Circuit decision digested here distinguishes that case law and concludes that different public policy concerns require a different result as to juvenile offenses. Washington courts are not required to follow the Ninth Circuit's constitutional interpretations in individual criminal cases. So only time will tell whether the Washington sex offender registration statue's retroactive application to juvenile offenses will be held constitutional.

(2) FOURTH AMENDMENT "GOOD FAITH" EXCEPTION TO EXCLUSIONARY RULE HELD NOT APPLICABLE TO A SEARCH INCIDENT TO ARREST IN VIOLATION OF THE RULE ANNOUNCED IN ARIZONA V. GANT – In U.S. v. Gonzalez, 578 F.3d 1130 (9th Cir. 2009) (decision filed August 24, 2009), a 3-judge panel of the Ninth Circuit rules in a federal criminal case that "good faith" of law enforcement officers in conducting a search incident to arrest under their reasonable understanding of the law at the time of the June 19, 2006 search does not qualify for application of the Fourth Amendment "good faith" exception to the exclusionary rule. The 2006 car search by a Washington law enforcement officer was consistent with the accepted view of the law by bench and bar at the time. But the search was

not consistent with the rule announced three years later in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June '09 LED:13**, because the search occurred after a car occupant was arrested for outstanding warrants and secured in the back seat of a patrol car. The searching officer had no reason to believe that evidence relating to the crime that was the basis for the arrest warrant would be found in the car. See Gant.

We will not discuss in the **LED** the Ninth Circuit panel's discussion of the Fourth Amendment concepts of retroactivity and the good faith exception to exclusion of evidence. The panel is careful to point out that its decision does not bear on whether the officers would have qualified immunity in a lawsuit under the federal Civil Rights Act.

Result: Reversal of U.S. District Court (Eastern Washington) conviction of Ricardo Gonzalez for being a convicted felon in possession of a firearm in violation of federal law.

LED EDITORIAL COMMENT: This case could end up in the United States Supreme Court, and the Supreme Court could well take a different view of the Fourth Amendment. But for Washington officers involved in cases in the Washington courts, our guess is that the rule under article 1, section 7 of the Washington constitution will be that, assuming for the sake of argument that there can ever be a good faith exception to exclusion under the Washington constitution (which is doubtful), this circumstance (warrantless search conducted in good faith and under reasonable interpretation of precedent in existence at the time of the search) would not qualify.

(3) "IN PARI DELICTO" THEORY JUSTIFIES GOVERNMENT'S RETENTION OF MONEY THAT CRIMINAL PAID FOR DOCUMENTS IN STING – In Kardoh v. U.S., 572 F.3d 697 (9th Cir. 2009) (decision filed July 10, 2009), the Ninth Circuit applies a theory known as "in pari delicto" to allow the federal government to keep $40,000 that a Abdul Kardoh paid to an undercover federal agent – who Kardoh thought was a corrupt government employer – for under-the-table alien registration cards. Kardoh argued afterward that the government could not keep his money because no forfeiture statute or other statute expressly authorized the government to keep the money. But the longstanding common law (case law) doctrine of "in pari delicto" applies, holds the Ninth Circuit panel. The phrase is a shortened latin phrase that means "in case of equal fault the condition of the party defending is the better one." Under that doctrine, when parties engage in an illegal contract such as the contract in the case, the party making the payment cannot use the courts to get the money back.

Result: Reversal of U.S. District Court (California) order to the federal agency, ICE, to pay back the money to Kardoh.

LED EDITORIAL NOTE: The "in pari delicto" doctrine generally applies in Washington, but we do not know whether it has a practical use in the law enforcement context in light of the breadth of Washington's forfeiture laws.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

TRIBAL OFFICERS HAVE AUTHORITY TO PURSUE NON-INDIAN TRAFFIC LAW VIOLATORS FROM RESERVATION AND TO MAKE A STOP OFF THE RESERVATION TO HOLD FOR CITY, COUNTY OR STATE OFFICERS – In State v. Eriksen, ___ Wn.2d ___, ___

P.3d ___, 2009 WL 2992560 (2009), the Washington Supreme Court rules unanimously that a tribal officer has inherent sovereign authority, as well as statutory authority, to 1) continue fresh pursuit of a non-Indian driver who broke traffic laws on the tribe's reservation, and 2) to stop the driver off the reservation and hold that driver for a county sheriff's deputy to investigate a DUI.

Result: Affirmance of Whatcom County Superior Court DUI conviction of Loretta L. Eriksen.

LED EDITORIAL NOTES:

1) Stop and detain limit: The Supreme Court opinion in Eriksen is careful to point out, as follows that the law enforcement authority asserted for the tribal officer was limited to stopping and detaining the non-Indian traffic violator:

> **As in Schmuck the Lummi Nation does not assert authority to arrest and prosecute Eriksen for DUI but merely claims the power to *stop and detain* her until she could be turned over to Whatcom County officials. State v. Schmuck, 121 Wn.2d 373 (1993) Nov 93 LED:07. "The Nation is asserting a sovereign interest in the act of stopping and detaining any person who violates the law while on the Lummi Reservation, even if the tribal police officer cannot complete the stop until after the motorist has driven beyond the Reservation boundaries." Brief of Amicus Curiae Lummi Nation at 5.**

2) Reverse situation discussed: The Eriksen Court discusses with approval the decision in State v. Waters, 93 Wn. App. 969 (Div. III, 1999) May 99 LED:11, a Court of Appeals decision that upheld the arrest by City of Omak police of a Colville tribal member who the Omak officers chased onto tribal trust land. At the time that Waters was decided, our LED Editorial comments raised some questions about the reasoning in the Waters decision. We will not try to update the research underlying those May 1999 LED Editorial comments in this November 2009 LED, so the comments should be viewed in that light.

3. 2008 legislation noted: The seizure in this case occurred in 2005. The Eriksen Court includes the following footnote noting 2008 Washington legislation (see June 2008 LED at pages 10-11) qualifiedly expanding enforcement authority of tribal officers contingent on several conditions occurring:

> **Effective July 1, 2008, tribal offices have been able to expand this law enforcement power to also include the power to make arrests on the reservation by taking a series of steps including completing requirements in RCW 43.101.157 and executing an interlocal agreement pursuant to chapter 39.34. RCW 10.92.020.**

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WASHINGTON STATE COURT OF APPEALS

WITNESSES WHO WERE PREVIOUSLY ACQUAINTED WITH DEFENDANT LAWFULLY TESTIFIED THAT HE WAS THE SHOOTER IN CAB SURVEILLANCE PHOTOS; ALSO, DEFENDANT'S PRIVACY RIGHTS DID NOT PRECLUDE STATE FROM PRESENTING EVIDENCE THAT DEFENDANT HAD REFUSED TO PROVIDE A VOICE EXEMPLAR

State v. Collins, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2999329 (Div. I, 2009)

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

Early on Tuesday, July 10, 2007, the Far West Taxi Company received a call requesting a cab at 3840 South 177th Street in Sea-Tac, Washington. The caller identified himself as "Lenell," and gave his phone number as 206-499-0308. He called back to change the address to 3841 South 177th Street. The calls were recorded.

Driving Far West cab 119, Jagjit Singh responded to the call. The cab was equipped with a security camera, which recorded images of a man getting into the back seat of the cab at 2:45 a.m. and shooting Singh twice in the head. Shortly thereafter, the cab, with Singh's body still inside, was fully engulfed in flames in front of 3840 South 177th Street. Earnest Lenell Collins lived at that address with his parents, his younger brother Vernell, and three sisters.

An arson expert concluded the car fire was set on or around the victim, possibly with a road flare or firework. A search of the Collins residence yielded bullets scattered around the house, including many for use in handguns, roman candle type fireworks, two white t-shirts smelling of bleach, one with burn holes, and pieces of fabric from a shirt that were burnt, damp, and bloodstained.

Forensic analysis revealed a mixed DNA profile. The majority of the DNA was from Singh. Collins was a possible contributor to the profile, but Vernell was not.

On the evening of the murder, using false names, Earnest and Vernell Collins fled to Chicago on a Greyhound bus. They were arrested there in late July and returned to Seattle.

The telephone number given by the caller belonged to a cell phone purchased by one of Collins' girlfriends, Melisa Washington, who told police she sold the phone to Collins and routinely called him at that number up to the day before the crime. Police obtained a warrant for a voice exemplar to compare Collins' voice to that of the person who called for the cab. Collins refused to provide the exemplar.

Collins was charged with murder in the first degree (with two aggravating circumstances), felony murder in the first degree predicated on robbery, and arson in the first degree, all with firearm enhancements. After charges were filed, the State asked the court to compel a voice exemplar. Collins agreed to the order, but then refused to provide the exemplar. At trial, the court allowed the State to introduce Collins' refusals to provide an exemplar as evidence of consciousness of guilt.

Family and friends identified Collins as the person who called the cab company and the person in the taxicab photos. Collins was also identified as the man in the photos by faculty members and the security officer from his high school. Two acquaintances testified they saw a revolver in Collins' bedroom. Collins had told a friend that a good way to make money would be to rob a taxi cab.

Collins presented evidence that at the time of the murder, he was with one of his girlfriends, Omara Reece, and her sister, Natasha Reece. Natasha also testified that the person in the cab photos was not Collins. Other witnesses contradicted these accounts.

. . .

The jury convicted Collins on all counts.

ISSUES AND RULINGS: 1) Did it invade the role of the jury to allow witnesses who know the defendant to testify he was the person in the surveillance photos? (ANSWER: No)

2) Did it violate defendant's right of privacy under the Fourth Amendment or under article 1, section 7 of the Washington constitution to inform the jury that the defendant had refused to provide a voice exemplar? (ANSWER: No)

Result: Affirmance of conviction of Earnest Collins of murder in the first degree, felony murder in the first degree predicated on robbery, and arson in the first degree, all with firearm enhancements.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Opinion testimony from acquaintances regarding identity admissible

Collins . . . contends the testimony invaded the province of the jury because the photographs were available to the jury for review and he was present in the courtroom. This argument rests upon State v. Jamison, 93 Wn.2d 794 (1980) which held that testimony identifying the defendant as the robber shown in surveillance photographs invaded the province of the jury because the jury could compare the defendant's appearance to the photographs, and the testimony put the jury "in no better position to make that critical determination."

Collins' reliance is misplaced. The Jamison court stressed the principle that identity opinion testimony is admissible when it is useful to the jury:

> [W]e do not suggest that opinion testimony of identification based on knowledge of a defendant's appearance at or near the time of taking a surveillance photograph necessarily is inadmissible. Where such knowledge can actually assist the jury in correctly understanding matters that are not within their common experience, such opinion testimony is admissible. Here there was no evidence that, for example, the photographs failed to clearly or accurately depict the robber, or that defendant's appearance had changed or had been altered prior to trial or that he had certain peculiarities not readily comparable under trial conditions.

This accords with the weight of authority, which holds that identity testimony is helpful "at least when the witness possesses sufficiently relevant familiarity with the defendant that the jury cannot also possess, and when the photographs are not either so unmistakably clear or so hopelessly obscure that the witness is no better-suited than the jury to make the identification ." Human features develop in the mind's eye over time. Witnesses who have interacted with the defendant in a variety of circumstances, in a way the jury could not, may have a great advantage over the jury's limited exposure to the defendant in a sterile courtroom setting.

Further, as the Jamison court acknowledged, identification opinion testimony may be particularly helpful where the photography is imperfect. Here, the cab surveillance system produced still photographs at set intervals. The photos are

black and white, blurry, and grainy. Lighting conditions in the cab were poor. The passenger wore a baseball cap that cast a shadow over his eyes in all the images, and cast a shadow over his entire face in some. He wore a bulky coat that concealed his build. He also held a cigarette in his mouth, a posture in which the jury presumably did not observe Collins during trial.

The opinion of Collins' acquaintances on the identity of the person in the photographs was helpful to the jury and the court did not err in admitting it.

2) Privacy rights not violated

Collins contends his refusal to provide a voice exemplar should not have been admitted to prove consciousness of guilt because the order requiring the exemplar violated his rights under the Fourth Amendment, [and] the Washington Constitution, [among other things].

. . .

Collins' argument on this issue is limited to citing several cases holding that the nonconsensual collection and analysis of blood or urine invokes privacy concerns. He otherwise fails to address any of the relevant inquiries in a private affairs determination. He has thus provided us no basis for consideration of his argument.

Collins' Fourth Amendment argument has no merit. In United States v. Dionisio, 410 U.S. 1 (1973) the Supreme Court held that a directive to provide a voice exemplar does not infringe upon any interest protected by the Fourth Amendment because no person can have a reasonable expectation of privacy in his voice:

> The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world.

Collins' Fourth Amendment argument fails.

[Some footnotes and citations omitted; subheadings added]

LED EDITORIAL NOTE: The Court of Appeals also explains that the in-court identification of the defendant by his acquaintances did not raise the due process concerns that arise in eyewitness identifications in stranger ID circumstances.

WHILE CHARGES ARE PENDING, COURT MAY LAWFULLY ORDER TAKING OF DEFENDANT'S DNA BASED ON PROBABLE CAUSE – WARRANT NOT REQUIRED IN ADDITION TO THE COURT ORDER

State v. Garcia-Salgado, 149 Wn. App. 702 (Div. I, 2009)

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

> Alejandro Garcia-Salgado was charged with first degree rape of a child for raping 11-year-old P.H. on November 25, 2006. The State filed a sworn certification for determination of probable cause in support of the charges. Prior to trial, the State moved for an order requiring Garcia-Salgado to submit to a cheek swab for DNA testing.
>
> Garcia-Salgado objected, and the court set that matter over for hearing the following week. At that hearing, the State informed the court that a rape kit had been performed on P.H. The prosecutor indicated that she had spoken with the lab technician personally and requested that a DNA analysis be performed.
>
> Defense objected on the basis of Garcia-Salgado's privacy interest, arguing that the doctor who had examined P.H. "found no actual, physical evidence of penile-vaginal penetration." In response, the State argued that even if there was no actual penetration, there still could have been DNA evidence left in her vaginal area. The court inquired into whether the swabs were analyzed to find DNA other than the alleged victim's. The prosecutor responded:
>
> > Your Honor, the way it works is: the lab does a presumptive test, and then, based on the results of the presumptive test, determines whether or not it's appropriate to take the next step, the most expensive step, of doing a DNA test.
> >
> > . . .
> >
> > I believe the presumptive tests were done, and there was something on them; I couldn't say exactly what at this point in time.
>
> The trial court found the DNA swab to be minimally intrusive and ordered the taking of the sample under CrR 4.7(b)(2)(vi).
>
> A jury subsequently found Garcia-Salgado guilty of first degree rape of a child as charged. Garcia-Salgado appeals.

ISSUE AND RULING: If the Superior Court correctly determines that there is probable cause to believe that a criminal defendant's DNA information will match that on a rape victim's clothing, may the Superior Court order the taking of a DNA sample from defendant without issuing a search warrant? (ANSWER: Yes)

Result: Affirmance of King County Superior Court conviction of Alejandro Garcia-Salgado of first degree rape of a child.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The taking of DNA constitutes a search and seizure under both the United States and Washington State constitutions. In State v. Gregory, 158 Wn.2d 759 (2006) **Feb 07 LED:05** the Washington Supreme Court held that a court order issued

pursuant to CrR 4.7(b)(2)(vi) for a blood draw complies with the Fourth Amendment so long as it is supported by probable cause. Citing the seminal case, Schmerber v. California, 384 U.S. 757 (1966), the Gregory court listed three requirements that need to be established to determine whether a blood draw is reasonable: (1) there must be a clear indication that in fact the desired evidence will be found; (2) the chosen test must be reasonable; and (3) such test must be performed in a reasonable manner. Here, as in Gregory, Garcia-Salgado does not challenge the latter two factors-only the first-that there is no indication that his DNA would be found.

Garcia-Salgado argues that the taking of the DNA was illegal because it was a "warrantless search" and, therefore, the evidence obtained as a result should have been suppressed at trial. We disagree. There was evidence that Garcia-Salgado raped P.H. and that his DNA information would match that obtained from the victim's rape kit. The victim and several members of her family identified Garcia-Salgado as the rapist. He was arrested as he tried to flee the scene. A rape kit examination was performed on the victim within hours of the crime in part to obtain any potential DNA evidence. P.H.'s clothing was tested by the forensic scientists and genetic material was discovered on the clothing. The State sought Garcia-Salgado's DNA for the particularized purpose of comparing it with that found on P.H.'s clothing. This information coupled with the prosecuting attorney's representations to the court, was sufficient to establish probable cause under the facts and circumstances of this case.

Garcia-Salgado argues that a separate search warrant is necessary in this instance, because our courts have held that it is the warrant that provides the "authority of law" to conduct such a search. But here, the authority of law is provided by CrR 4.7(b)(2), which provides:

> Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:
>
> . . .
>
> (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof.

All that is missing here is a specific finding by the trial court that there was probable cause. It is clear from the record, however, that at the time the court issued its CrR 4.7 order, it had been presented with sufficient evidence demonstrating probable cause. While more specific findings would be helpful, the court properly ordered the collection of a DNA sample from Garcia-Salgado.

[Case citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) NO OUTRAGEOUS GOVERNMENT MISCONDUCT IN: 1) ALLEGED DECEPTION BY DETECTIVE IN TALKING TO VICTIMS, WITNESSES AND THEIR FAMILY MEMBERS; OR IN 2) ALLEGED COACHING OF WITNESSES BY VICTIMS' ADVOCATE – In State v. Wiatt, 151 Wn. App. 22 (Div. II, 2009), the Court of Appeals rejects the arguments of a defendant convicted of rape and other crimes that his constitutional due process rights were violated by (1) allegedly deceptive acts of a detective and (2) alleged coaching of witnesses by a victims' advocate. The Court of Appeals explains as follows its rejection of the defendant's arguments:

> [W]iatt asserts that the investigating detective and victim's advocate committed outrageous government misconduct that denied his right to due process. . .
>
> In some situations, the conduct of law enforcement agents is "'so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.'" The government conduct must "shock the universal sense of fairness." Outrageous government conduct will warrant dismissal only in the most egregious circumstances and not merely because the government acted deceptively.
>
> A. Detective's Conduct
>
> Wiatt argues that the lead detective's conduct was so outrageous that it denied his right to due process. He presents several declarations to support this claim and points to testimony about the detective's conduct.
>
> To summarize, Wiatt claims that [the detective] conducted an investigation that was flawed in five ways. Wiatt's evidence, if true **[LED Editorial Note: Note that the Court is only assuming the allegations to be true for the sake of addressing the argument],** shows the following.
>
> First, [the detective] took a statement from one witness, Amanda Chinn, and then told Chinn that what she said contradicted one of the victim's description of events, causing Chinn to say she was not sure about her statement. Second, [the detective] informed E.G. that her recollection of events differed from Z.H.'s, suggested facts to E.G. and obtained agreement regarding those facts, and pushed her about whether she was clear about what she saw. Third, [the detective] told J.M.B. that she had a video tape recording of Wiatt having sex with several women at once, although police never discovered such a tape recording.
>
> Fourth, [the detective] scared several victims and family members by telling them a rumor that Wiatt was a member of the Chinese Mafia. Last, she told a victim's mother that (1) police found evidence of date rape drugs at Wiatt's house and described the effect of date rape drugs on a person; (2) Wiatt was connected to the Asian Mafia; and (3) police had Wiatt's house under surveillance for over a year and, several times, girls ran out of his house half-naked after being raped but were too scared to prosecute. None of this information was true, but it caused Moye to feel "determined to see him put away for [a] long time."
>
> Public policy allows for some deceitful police investigatory conduct as long as it stays within reasonable bounds, generally circumscribed by outrageous and egregious circumstances not presented here. State v. Athan, 160 Wn.2d 354 (2007) **Aug 07 LED:02**; Lively, 130 Wn.2d 1 (1996) **Jan 97 LED:07**. Wiatt presents facts that, if true, merely show that [the detective] acted deceitfully.

This is not a due process violation. *See* Athan. Deception is a tool that police may legitimately use to gather evidence and motivate witnesses to be forthright and endure the ordeal of a trial. We note that, according to Wiatt's declarations, that tool worked in this case – several women did not want to cooperate with police until [the detective's] statements motivated them to do so. But it does not establish that the women testified falsely. Nothing that Wiatt presents here demonstrates that [the detective] committed outrageous, egregious, or shocking behavior that could give rise to a due process violation. This argument fails as a matter of law.

B. Victims' Advocate's Conduct

Next, Wiatt argues that the victims' advocate coached witnesses to cry. The evidence does not support this contention. And the contention, even if true, does not entitle Wiatt to relief.

Wiatt presents two declarations for this argument. Natalie Van Brunt declares she attended part of the trial and she

> saw a woman in the hallway telling some of the girls to cry when they got on the stand. The same woman sat in the back of the courtroom during some of the testimony. During a couple of the girls' testimony, I saw this woman make a motion with her hand near her eye, seeming to indicate that the witness should cry. The girls did cry at times during their testimony.

And Wiatt's mother declared:

> At some points during my son's trial, I was sitting outside of the courtroom in the hallway. I would sometimes see the victim's advocate, a woman named Kim, speaking with the alleged victims. Once or twice, I saw her making a motion with her hand near her eyes just before the witness went into the courtroom to testify. It was obvious that she was indicating that the witness should cry. To the best of my recollection, this happened with [J.M.B.] and/or [Z.H.].

The State presents a declaration by the victims' advocate stating that she did not coach any witness to cry.

Assuming, for argument's sake, that Wiatt's declarations are true, as a matter of law they do not demonstrate government misconduct. For example, Wiatt's mother's declaration only recounts that once or twice the victim advocate made a motion with her hand near her eyes while speaking with one or two victim witnesses. The declarations do not state that any witness cried *in response* to coaching. And even if witnesses did cry, this does not rise to the level of outrageous government misconduct, which must be shocking, most egregious, and so outrageous that it violates due process.

[Footnotes, some citations omitted]

Result: Denial of personal restraint petition of Jerry D. Wiatt, Jr., to set aside Thurston County Superior Court convictions for multiple counts of furnishing liquor to minors, and one count of second degree rape and one count of third degree rape.

(2) TRIAL COURT'S ADMISSION OF CHILD HEARSAY STATEMENTS UPHELD UNDER ANALYSIS OF THE 9 RYAN FACTORS – In State v. Kennealy, ___ Wn. App. ___, 214 P.3d 200 (Div. II, 2009), the Court of Appeals rejects a convicted child rapist's challenges to the trial court's admission of hearsay statements from three child victims, S.J., M.Y., and K.W. Because of **LED** space limitations, we will not describe or excerpt the appellate court's initial detailed description of the children's out of court statements. Instead, we will provide only the legal analysis portion of the Kennealy opinions, which does provide some description of the children's statements. **LED** readers may wish to read the court decision itself for full details and context. The legal analysis of the Court of Appeals is as follows:

> Child hearsay statements are admissible in a criminal or dependency case when the statements describe sexual or physical abuse of the child and (1) the court finds, in a hearing conducted outside the jury's presence, that the time, content, and circumstances of the statements provide sufficient indicia of reliability; and (2) the child either: (a) testifies at the proceedings; or (b) is unavailable as a witness: provided, that when the child is unavailable as a witness, the statement may be admitted only if there is corroborative evidence of the act.
>
> In determining the reliability of child hearsay statements, the trial court considers nine factors: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination *[Court's footnote: Factor (7) does not apply because S.J. testified.]*; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. State v. Ryan, 103 Wn.2d 165 (1984).
>
> Kennealy contends that the trial court should not have admitted the child hearsay statements because the trial court did not specifically mention each Ryan factor in ruling that the children's hearsay statements were admissible. But the trial court expressly stated that the Ryan factors were met, and the factors exist to merely help the trial court determine "whether the comments and circumstances surrounding the statement indicate" reliability.
>
> No single Ryan factor is decisive and the reliability assessment is based on an overall evaluation of the factors. The record before us shows that the Ryan factors were substantially met; thus, the trial court did not abuse its discretion.
>
> A. Motive to Lie
>
> Kennealy contends that S.J. had a motive to lie to his sister because S.J. was in "time out" when he made the statement. But we agree with the trial court and are not persuaded that being in a "time out" for behavior unrelated to the incident makes it more likely that S.J. would fabricate his statements about Kennealy's action. Even if this circumstance were to indicate a motive to lie, it is only one of many factors considered in determining the reliability of S.J.'s statements.

Kennealy does not contend that K.W. or M.Y. had a motive to lie, and there is no evidence in the record to support such a contention.

B. General Character

When assessing a child's general character, we look to whether the child has a reputation for truthfulness. Here, the trial court found that each child was trustworthy, i.e., they each had a reputation for truthfulness, and each child testified that he or she knew the difference between a truth and a lie and understood that something bad would happen if he or she told a lie.

Kennealy contends that S.J.'s general character does not show reliability because he has A.D.H.D. and his mother said he was emotionally immature and had difficulty describing sequences. But A.D.H.D., emotional immaturity, or difficulty in describing sequences of an event are not determinative of S.J.'s general character or truthfulness. And although S.J. testified that he "made up" the immaterial statement about taking a bath at Kennealy's house and that he dreamed about Kennealy molesting him, the trial court ascertained other indicia of S.J.'s general character for truth-telling that overcame the deficiencies on which Kennealy relies.

Kennealy also challenges M.Y.'s general character, arguing that her mother's statement that M.Y. can be "conniving" means that she cannot be trusted. M.Y.'s mother admitted that "every kid every now and then tells a little fib," but she said that if a person talks to M.Y. in the right way, she will tell the truth. RP (Feb. 4, 2008) at 159. M.Y. testified that she understood the difference between a truth and a lie, and the trial court found her trustworthy. M.Y.'s mother's statement-which she immediately corrected by saying that she meant M.Y. is smart and thinks outside the box-does not show that M.Y. is generally untrustworthy.

Kennealy does not challenge K.W.'s general character.

C. Past Fact

Almost all child hearsay statements about sexual abuse will contain statements about past facts. Here, all of the child hearsay statements involve statements of past fact. But because this factor is of little use in the child sexual abuse hearsay context, we hold that it does not render the statements unreliable.

D. More than one Person

Kennealy next argues that that the children's hearsay statements are unreliable because only one person heard each child's initial statement. But here, each child told the same accusations about Kennealy to more than one person over time. And when more than one person hears a similar story of abuse from a child, the hearsay statement is more reliable. Each child told a substantially similar account of the events to multiple people sequentially, which supports the trial court's ruling on the statements' reliability and trustworthiness.

E. Spontaneity

Kennealy further contends that the children's statements were not spontaneous and were, therefore, unreliable because each child made his or her statement in response to questioning. But statements made in response to questioning are spontaneous so long as the questions are not leading or suggestive. Here, the witnesses who questioned the children did not use leading questions. In one instance, M.Y.'s father asked M.Y., "Does [Kennealy] make you feel uncomfortable?" and "[did] he touch you?" But the Ryan spontaneity requirement is broad, and we hold that the trial court did not abuse its discretion in finding the children's statements were spontaneous because these questions were open-ended and did not suggest that the child respond with a statement about sexual contact. The trial court did not abuse its discretion in finding that the children's statements were spontaneous because there is no evidence of leading or suggestive questioning.

F. Timing of Declaration and Relationship to Child

The trial court must also consider when the child's statement was made to a hearsay witness and what the witness's relationship is to the child. When the witness is in a position of trust with a child, this factor is likely to enhance the reliability of the child's statement. Here, the children made the statements to their family members with whom they were in a relationship of trust. And although the police officers and nurses were strangers, the children likely trusted them because of their authoritative position in the community and because the discussion took place in a trusting or clinical atmosphere. Thus, this factor also supports the trial court's finding of reliability of S.J.'s, K.W.'s, and M.Y.'s statements to the witnesses.

G. Possibility of Faulty Recollection

Kennealy argues that S.J.'s and M.Y.'s inconsistent statements show that their memories were faulty. But when a child makes a statement soon after an event and then makes consistent statements to other people shortly thereafter, there is little possibility that the child's recollection was faulty. Here, S.J.'s disclosure was within a day or so of the incident. And K.W. and M.Y. made their statements around the same time that the incident occurred.

Kennealy also asserts that K.W.'s memory may be faulty because she had been told that Kennealy was a "bad guy," before she made the statement. But "'[a] young child is unlikely to fabricate a graphic account of sexual activity because such activity is beyond the realm of [a child's] experience.'" Kennealy's challenge to the reliability of the children's statements to others based on faulty memory fails.

H. Surrounding Circumstances Showing Misrepresentation

Kennealy finally maintains that S.J. may have misrepresented Kennealy's involvement to his sister because of the circumstances surrounding the statement, i.e., that he overheard his sister say Kennealy was acting "weird" during a telephone call. But nothing in the sister's statement suggested sexual misconduct with children or with S.J. These circumstances do not suggest misrepresentation by S.J.

> Kennealy also argues that M.Y.'s statements might show misrepresentation because M.Y. spoke to K.W. about K.W.'s experiences with Kennealy. But M.Y.'s statements about what happened to her differ significantly from what happened to K.W. The differences between M.Y.'s and K.W.'s statements do not show influence by K.W. on M.Y.'s statements. Kennealy's argument that the children's statements were unreliable because of circumstances causing the children to misrepresent Kennealy's involvement fails.
>
> The trial court did not abuse its discretion in admitting the children's hearsay statements because the Ryan reliability factors are substantially met.

[Some citations omitted]

(3) CONSTITUTION PRECLUDES COURT ORDER BANISHING DEFENDANT FROM ENTIRE COUNTY; THE ORDER WAS TIED TO A SSOSA, SO CASE MUST BE REMANDED FOR RESENTENCING – In State v. Sims, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 2998947 (Div. II, 2009), the Court of Appeals rules that a banishment order that bars the defendant from entering a county in order to protect the mental well being of the child victim and her family does not survive under the applicable constitutional test. A remand to allow the judge to tailor a narrower restriction is the appropriate remedy. Because the banishment order in this case was inexplicably linked with the imposition of a sentence under the statute for a Special Sex Offender Sentencing Alternative (RCW 9.94A.670), the trial court, on remand is authorized to reconsider its decision to impose a SSOSA.

Result: Reversal of county-wide banishment order and remand of case to Cowlitz County Superior Court for resentencing of Jack Irvin Sims for first degree child molestation.

(4) RETROACTIVITY OF ARIZONA V. GANT AND WAIVER ADDRESSED IN CONFLICTING DIVISION TWO COURT OF APPEALS DECISIONS – In State v. McCormick, ___ Wn. App. ___, ___ P.3d ___, 2009 WL 3048723 (Div. II, 2009), Division Two of the Court of Appeals rules that a defendant may, for the first time in the Court of Appeals, challenge a "search incident to arrest" based on Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**. No motion to suppress making a Gant-like argument need have been filed in Supreme Court in the original criminal proceedings.

The 3-judge McCormick panel (Judges Houghton, Penoyar, and Armstrong) disagrees with the decision of the 3-judge panel (Judges Quinn-Brintnall, Bridgewater, and Hunt) in State v. Millan, 151 Wn. App. 492 (Div. II, 2009). The Millan panel ruled that in this circumstance waiver precludes a defendant from later raising a challenge to a search incident to arrest based on the principle of Arizona v. Gant.

The McCormick Court asserts that the waiver-based decision in State v. Millan is contrary to controlling precedent.

Results: In McCormick, the Court of Appeals reverses the Grays Harbor County Superior Court conviction of Michelle D. McCormick for unlawful methamphetamine possession.

In Millan, the Court of Appeals affirms the Pierce County Superior Court conviction of Francisco Javier Millan for first degree unlawful possession of a firearm. Mr. Millan has petitioned for discretionary review in the Washington Supreme Court.

(5) GANG AFFILIATION EVIDENCE HELD INADMISSIBLE UNDER ER 404(B) BECAUSE SUCH EVIDENCE WAS NOT SHOWN TO BE A REASON OR A MOTIVE FOR

THE CRIMES THAT THE STATE WAS PROSECUTING – In State v. Scott, ___ Wn. App. ___, 213 P.3d 71 (Div. III, 2009), the Court of Appeals rules under Evidence Rule (ER) 404(b) that the trial court erred in admitting evidence of a defendant's gang affiliation. In the prosecution for first degree assault and first degree burglary, the evidence did not show (1) that joint gang affiliation was the reason defendant and co-defendants jointly attacked the victim, or (2) that gang affiliation of anyone was a motive for the crimes. Thus, the gang affiliation evidence was not shown to be relevant, the Court holds.

In the "400" sections in Part IV of the Evidence Rules, the ERs address "relevancy and its limits." ER 404(b) addresses admissibility of "other crimes, wrongs, or acts," which includes gang affiliation evidence. The Scott Court analyzes the ER 404(b) issue as follows (bracketed words added by LED Editors to try to add clarity to the Scott Court's analysis]:

> Here, the trial court identified [theoretically] proper bases for admitting the evidence. First, the evidence was [theoretically] admissible to show the motive behind the crime – to send a message to Wendy to repay her debts. The attack on Jeramie by three relative strangers [arguably] was otherwise unexplainable. Second, the evidence could well have been admissible [in theory] to show the connection between Mr. Scott and his co-defendants, as well as the relationship of Mr. Younger to the attackers. This evidence reinforced the motive and also was arguably [relevant] to explain the interactions of the various parties. Finally, the gang evidence also was [theoretically] admissible to explain the threats to Wendy and her refusal to initially identify the assailants. She knew that Mr. Scott was a gang member and feared him and his associates.
>
> While the offer of proof and the arguments of counsel suggested all of these proper reasons for admitting the gang evidence, the actual testimony presented fell far short of proving the connection between gang affiliation and the crime. The only person identified as a gang member was Mr. Scott. The record is utterly silent on whether any of the other actors were also members of the 18th Street gang. Thus, the evidence did not show that joint gang affiliation was a reason for the three men to attack Jeramie together or to explain why they would care whether Mr. Younger was not paid for the drugs he delivered to Wendy.
>
> The evidence also did not connect to the expressed motive, which the trial court had required when it conditionally admitted the testimony. There was no evidence presented about the importance of "respect" in the gang culture or that violence was a recognized response to "disrespect," despite the prosecutor's promise that [the detective] would address the topic. Expert testimony on those topics has been presented in other cases to establish a gang's interest in violent retaliation. The trial court expected similar testimony here. If the anticipated testimony had been elicited, there would not have been any error. Instead, this situation is similar to that in State v. Ra, 144 Wn. App. 688 (Div. II, 2008):
>
> > And the State never presented evidence that Ra was a gang member and, if so, what the gang mores were. Without such evidence, we have no basis to conclude that the State's gang evidence was admissible under ER 404(b).

The failure to connect the evidence likewise was error here.

Under analysis not addressed in this LED entry, the Scott Court also concludes that the trial court's error in admitting the gang affiliation evidence was not harmless error. Therefore, the case must be re-tried.

Result: Reversal of Benton County Superior Court convictions of Joshua Cameron Scott for first degree assault (two counts) and first degree burglary (two counts); case remanded for re-trial.

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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

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