Law Enforcement Digest

OCTOBER 2012

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

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED AS OF AUGUST 2, 2012 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS":

- **Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution**
- **Article: "Initiation of Contact" Rules Under Fifth Amendment**
- **Article: Lineups, Showups and Photographic Spreads: Legal and Practical Aspects Regarding Identification Procedures & Testimony**

These articles by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year. The Identification Procedures article will be further revised by the end of 2012.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) FEDERAL STOLEN VALOR ACT, WHICH PROHIBITS FALSELY CLAIMING TO BE A RECIPIENT OF MILITARY DECORATIONS OR MEDALS, IS UNCONSTITUTIONAL – In United States v. Alvarez, ___ U.S. ___, 132 S. Ct. 2537 (June 28, 2012), the United States Supreme Court rules 6-3 that the Stolen Valor Act, which makes it a federal crime to falsely claim receipt of military decorations or medals and provides an enhanced penalty if the Congressional Medal of Honor is involved, 18 U.S.C. §§ 704(b), (c), violates the First Amendment's Free Speech provisions.

Result: Affirmance of Ninth Circuit Court of Appeals decision reversing the conviction of Xavier Alvarez for violation of the Stolen Valor Act.

(2) SCIENTIST MAY TESTIFY REGARDING ANOTHER SCIENTIST'S REPORT WITHOUT VIOLATING THE CONFRONTATION CLAUSE IF THE REPORT IS NOT BEING OFFERED INTO EVIDENCE – In Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221 (June 18, 2012), the United States Supreme Court holds in a 4-1-4 (plurality) opinion that an analyst may testify regarding another's report, without violating the Sixth Amendment Confrontation Clause as interpreted in recent Supreme Court opinions, if that report is not being offered into evidence.

Facts and Analysis: (Excerpted from summary of the majority opinion prepared by the Court's Reporter of Decisions; note that the summary is not part of the Court's opinion)

> At petitioner's bench trial for rape, Sandra Lambatos, a forensic specialist at the Illinois State Police lab, testified that she matched a DNA profile produced by an outside laboratory, Cellmark, to a profile the state lab produced using a sample of petitioner's blood. She testified that Cellmark was an accredited laboratory and that business records showed that vaginal swabs taken from the victim, L.J., were sent to Cellmark and returned. She offered no other statement for the purpose of identifying the sample used for Cellmark's profile or establishing how Cellmark handled or tested the sample. Nor did she vouch for the accuracy of Cellmark's profile. The defense moved to exclude, on Confrontation Clause grounds, Lambatos' testimony insofar as it implicated events at Cellmark, but the prosecution said that petitioner's confrontation rights were satisfied because he had the opportunity to cross-examine the expert who had testified as to the match. The prosecutor argued that Illinois Rule of Evidence 703 permitted an expert to disclose facts on which the expert's opinion is based even if the expert is not competent to testify to those underlying facts, and that any deficiency went to the weight of the evidence, not its admissibility. The trial court admitted the

evidence and found petitioner guilty. Both the Illinois Court of Appeals and the State Supreme Court affirmed, concluding that Lambatos' testimony did not violate petitioner's confrontation rights because Cellmark's report was not offered into evidence to prove the truth of the matter asserted.

(a) Before Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20** this Court took the view that the Confrontation Clause did not bar the admission of out-of-court statements that fell within a firmly rooted exception to the hearsay rule. In Crawford, the Court held that such statements could be "admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Id. In both Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) **Sept 09 LED:03** and Bullcoming v. New Mexico, ___ U.S. ____, 131 S. Ct. 2705 (2011) **Sept 11 LED:02**, two of the many cases that have arisen from Crawford this Court ruled that scientific reports could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation. In each case, the report at issue "contain[ed] a testimonial certification, made in order to prove a fact at a criminal trial." Here, in contrast, the question is the constitutionality of allowing an expert witness to discuss others' testimonial statements if those statements are not themselves admitted as evidence.

(b) An expert witness may voice an opinion based on facts concerning the events at issue even if the expert lacks first-hand knowledge of those facts. A long tradition in American courts permits an expert to testify in the form of a "hypothetical question," where the expert assumes the truth of factual predicates and then offers testimony based on those assumptions. Modern evidence rules dispense with the need for hypothetical questions and permit an expert to base an opinion on facts "made known to the expert at or before the hearing," though such reliance does not constitute admissible evidence of the underlying information. Ill. Rule Evid. 703; Fed. Rule Evid. 703. Both Illinois and Federal Rules bar an expert from disclosing the inadmissible evidence in jury trials but not in bench trials. This is important because Crawford while departing from prior Confrontation Clause precedent in other respects, reaffirmed the proposition that the Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."

(c) For Confrontation Clause purposes, the references to Cellmark in the trial record either were not hearsay or were not offered for the truth of the matter asserted.

. . .

(3) This conclusion is consistent with Bullcoming and Melendez-Diaz where forensic reports were introduced for the purpose of proving the truth of what they asserted. In contrast, Cellmark's report was considered for the limited purpose of seeing whether it matched something else, and the relevance of that match was established by independent circumstantial evidence showing that the report was based on a sample from the crime scene. There are at least four safeguards to prevent abuses in such situations. First, trial courts can screen out experts who would act as conduits for hearsay by strictly enforcing the requirement that experts display genuine "scientific, technical, or other specialized knowledge" to help the trier of fact understand the evidence or determine a fact at issue. Second, experts are generally precluded from disclosing inadmissible evidence

to a jury. Third, if such evidence is disclosed, a trial judge may instruct the jury that the statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence establishing its underlying premises. Fourth, if the prosecution cannot muster independent admissible evidence to prove foundational facts, the expert's testimony cannot be given weight by the trier of fact.

(e) Even if Cellmark's report had been introduced for its truth, there would have been no Confrontation Clause violation. The Clause refers to testimony by "witnesses against" an accused, prohibiting modern-day practices that are tantamount to the abuses that gave rise to the confrontation right, namely, (a) out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct, and (b) formalized statements such as affidavits, depositions, prior testimony, or confessions. These characteristics were present in every post-Crawford case in which a Confrontation Clause violation has been found, except for Hammon v. Indiana, 547 U.S. 813 (2006). But, even in Hammon the particular statement, elicited during police interrogation, had the primary purpose of accusing a targeted individual. A person who makes a statement to resolve an ongoing emergency is not like a trial witness because the declarant's purpose is to bring an end to an ongoing threat. Such a statement's admissibility "is the concern of . . . rules of evidence, not the Confrontation Clause." The forensic reports in Melendez-Diaz and Bullcoming ran afoul of the Confrontation Clause because they were the equivalent of affidavits made for the purpose of proving a particular criminal defendant's guilt. But the Cellmark report's primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence for use against petitioner, who was neither in custody nor under suspicion at that time. Nor could anyone at Cellmark possibly know that the profile would inculpate petitioner. There was thus no "prospect of fabrication" and no incentive to produce anything other than a scientifically sound and reliable profile. Lab technicians producing a DNA profile generally have no way of knowing whether it will turn out to be incriminating, exonerating, or both. And with numerous technicians working on a profile, it is likely that each technician's sole purpose is to perform a task in accordance with accepted procedures. The knowledge that defects in a DNA profile may be detected from the profile itself provides a further safeguard.

[Some citations omitted]

Result: Affirmance of Illinois State Supreme Court decision affirming convictions of Sandy Williams for aggravated criminal sexual assault, aggravated robbery, and aggravated kidnapping.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) NINTH CIRCUIT ORDERS REHEARING EN BANC IN HASKELL V. HARRIS – On July 25, 2012, the Ninth Circuit Court ordered rehearing en banc (by the full court) in Haskell v. Harris, 669 F.3d 1049 (9th Cir., Feb. 23, 2012) **July 12 LED:05** (California's all-felony-arrestee DNA statute survives Fourth Amendment challenge). The panel opinion may no longer be cited.

(2) WARRANT TO SEARCH FATHER'S HOME FOR MURDER WEAPON NOT SUPPORTED BY AFFIDAVIT THAT PROVIDED REASONABLE SUPPORT FOR INFERENCE THAT

ADULT SON OF FATHER WAS CONNECTED TO THE HOMICIDE BUT DID NOT SUPPORT INFERENCE THAT THE SON HAD RECENTLY VISITED THE FATHER'S RESIDENCE – In United States v. Grant, 682 F.3d 827 (9th Cir., June 11, 2012), a three-judge Ninth Circuit panel invalidates for lack of probable cause a search warrant that California law enforcement officers, investigating a homicide that occurred nine months earlier, obtained to search the home of James Grant, III, for a handgun that, based on the evidence found at the crime scene, used either a .38 special or .357 Magnum cartridge.

The officers did not suspect James Grant, III, in the homicide. But they did have some evidence linking one of his sons, Davonte, to the homicide. They also had some evidence supporting the conclusion that a particular gang was connected to the homicide. Also, they had evidence that Davonte and another son of the father (named James like his father) were members of that gang, and that the two sons associated with one another from time to time.

The homicide officers' affidavit for a search warrant for the father's residence asserted that the handgun and ammunition related to the homicide would probably be found in the father's residence. That assertion was based primarily on the following, in addition to the facts noted above: (1) the son named James had some connection to evidence related to the homicide (this allegation and conclusion had no logical support anywhere in the affidavit); (2) James had visited the father in the past several months (this allegation was a reasonable inference from supported factual assertions in the affidavit); (3) the murder weapon had not yet been found in a number of searches conducted at other residences in the months since the homicide (this was true).

When the officers searched the home of James Grant, III, the officers did not find the type of firearm they were looking for. However, they did find two other firearms and ammunition, which, because Grant was a convicted felon, Grant unlawfully possessed under federal law.

The Ninth Circuit holds that the search warrant affidavit did not establish probable cause that the firearm used in the homicide might be located in the father's home. Nothing in the affidavit suggested that Davonte ever visited Grant's home after the homicide. And there was nothing in the affidavit logically supporting an inference that James obtained the gun from Davonte and brought the firearm to Grant's home when James visited his father.

Result: Reversal of United States District Court (Central District of California) conviction of James Grant, III, for violating a federal law prohibiting possession of firearms by persons convicted of certain crimes.

LED EDITORIAL NOTE: The Ninth Circuit also holds that the federal Fourth Amendment's "good faith" exception to exclusion of evidence does not apply in this case because the officers' reliance on the warrant was unreasonable. The affidavit did not provide any plausible connection between the father's home and the firearm used in the homicide. Note that if this had been a case tried in the courts of the State of Washington involving standards for searches by Washington officers, it appears that there would have been no issue of "good faith" exception to exclusion to evidence. While the Washington Supreme Court has not yet squarely addressed whether there is a good faith exception to exclusion of evidence under the Washington constitution in the search warrant context, that seems the likely outcome if and when that issue is presented to the Washington Supreme Court. See State v. Crawley, 61 Wn. App. 29 (Div. III, 1991) (holding by Court of Appeals that there is no good faith exception to exclusion in the search warrant context under article I, section 7 of the Washington constitution); State v. Adams, 169 Wn.2d 487 (2010) Oct 10 LED:15 (holding by Supreme Court that there is no case-law based good faith exception to exclusion under article I, section 7).

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WASHINGTON STATE COURT SUPREME COURT

1) EVIDENCE INSUFFICIENT TO SUPPORT CONVICTION FOR POSSESSION OF STOLEN ACCESS DEVICE WHERE THE DEFENDANT POSSESSED A PLASTIC CREDIT CARD BEARING ANOTHER'S NAME, AN ACCOUNT NUMBER, ETC., THAT ACCOMPANIED A CREDIT CARD OFFER, BUT THE CARD HAD NOT BEEN ACTIVATED; 2) COURT FINDS PROBABLE CAUSE TO ARREST FOR POSSESSION OF CONTROLLED SUBSTANCE WHERE OFFICER OBSERVED A GLASS TUBE, CONSISTENT WITH A TUBE THAT COULD BE USED TO INGEST ILLEGAL DRUGS, CONTAINING A WHITE CHALKY SUBSTANCE (EVEN THOUGH THE ARREST WAS ORIGINALLY FOR POSSESSION OF DRUG PARAPHERNALIA (A NONEXISTENT CRIME UNDER STATE STATUTES))

State v. Rose, ___ Wn.2d ___, 2012 WL 3218531 (Aug. 9, 2012)

Facts and Proceedings below: (Excerpted from Supreme Court majority opinion)

> [A police officer] received a call that a possible residential burglary or trespass was in progress. Shortly thereafter, [the officer] came upon Douglas Rose, who matched the description of the burglar. While waiting to hear about the outcome of the burglary call, the officer placed Rose in the back of his patrol car but soon learned the burglary report did not merit further action. However, as [the officer] detained Rose, he noticed a glass tube protruding from Rose's bag. [The officer] thought he could see a white chalky substance on the inside of the tube and thought the tube was consistent with a tool a person could use to ingest drugs. [The officer] arrested Rose for possession of drug paraphernalia. He then searched Rose and found what appeared to be a credit card in the name of Ruth Georges. Rose's possession of the credit card led to a charge of second degree possession of stolen property, specifically a stolen "access device." The white substance in the tube was later revealed to be methamphetamine, and Rose was also charged with unlawful possession of a controlled substance.
>
> At a bench trial, evidence revealed that Rose had visited Georges in her home shortly before he was apprehended by [the officer]. Prior to Rose's arrival, Georges had thrown away a credit card offer she received in the mail that day. The offer included a plastic credit card with an account number and Georges's name printed on it. . . .

ISSUES AND RULINGS: 1) Is there sufficient evidence to convict the defendant of possession of stolen access device where the credit card contained a name and account number, but accompanied a credit card offer and had not been activated? (ANSWER BY SUPREME COURT: No, rules a unanimous court) 2) Is there probable cause to arrest for use of possession of controlled substance where the defendant was originally arrested based on possession of drug paraphernalia (a crime that does not exist under Washington statutes) but the facts supported an arrest for possession of controlled substance? (ANSWER BY SUPREME COURT: Yes, rules a unanimous court)

Result: Reversal of Court of Appeals decision (reported at 160 Wn. App. 29 (Div. III, 2011 **May 11 LED:16**) that affirmed the Benton County Superior Court conviction of Douglas Craig Rose for possession of stolen access device; affirmance of conviction for unlawful possession of controlled substance.

ANALYSIS:

Possession of Stolen Access Device

The defendant was convicted of second degree possession of stolen access device. RCW 9A.56.160(1). RCW 9A.56.010(1) defines "access device" as:

> Any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.

[Emphasis added]

The defendant argues that the card is not an access device because it was not linked to an account. The state argues that the card could still be used to obtain something of value.

The Court explains:

> The evidence at trial revealed that Georges received a credit card solicitation in the mail from MasterCard. Included in the offer was an unactivated credit card. It looked like an actual credit card: it had an account number, an account holder name and expiration date printed on its face, and a signature block with a three digit security code on the back. But it was not tied to an existing account nor was it ever signed. The record reflects that Georges was required to call MasterCard and pay a $30 initiation fee to activate an account and use the card. She did not have the $30 fee, so she threw the card away. The record does not reflect whether there were any other hurdles to activating the account, for example, whether Georges was preapproved or whether any other information such as Georges's birth date or social security number, would have been required if a person called to activate the account. We must decide whether these facts support a finding that Rose possessed an access device when he possessed the card.

The Court concludes that because the credit card was not linked to an existing account and was not signed, and there was no evidence presented that a card in such circumstances nonetheless could have been used to obtain something of value or activated by another individual, the card does not meet the definition of "access device."

Possession of Controlled Substance

> Rose points out that although use of drug paraphernalia to ingest a controlled substance is a crime, mere possession of drug paraphernalia is not a crime. State v. O'Neill, 148 Wn.2d 564, 584 n. 8 (2003) **April 03 LED:03**; RCW 69.50.412(1) (criminalizing use of drug paraphernalia). And, the use of drug paraphernalia is a misdemeanor offense that must be committed in the officer's presence to make a warrantless arrest. See RCW 10.31.100(1) (authorizing exception to the presence rule for misdemeanor warrantless arrest if officer suspects cannabis use). [The officer] did not see Rose use the glass pipe to smoke methamphetamine. Rose is therefore correct that he could not properly be arrested for possession of drug paraphernalia.

> The Court of Appeals held that the arrest was nonetheless valid because the evidence in the record demonstrates probable cause that Rose possessed a controlled substance. The Court of Appeals relied on [State v. Huff, 64 Wn. App. 641 (1992)], which explains that "an arrest supported by probable cause is not made unlawful by an officer's subjective reliance on, or verbal announcement of, an offense different from the one for which probable cause exists."
>
> Following this rule, the Court of Appeals considered that [the officer] testified he saw a chalky white residue in the pipe, explained that the officer could have reasonably believed the residue was an illegal substance, and therefore held that there was probable cause to arrest Rose for possession of a controlled substance.
>
> Rose counters that the suppression court made no specific finding of fact that the white residue was a controlled substance or that [the officer] had any suspicion that the residue was a controlled substance. . . . Rose argues that the Court of Appeals overstepped its authority when it "sua sponte conclude[d] that this residue provided probable cause to arrest Rose for possession of a controlled substance."
>
> We are not persuaded by Rose's argument. It is true that during the suppression hearing, [the officer] made no mention of whether he had any suspicions about the residue in the pipe. He merely noted that he saw it. The suppression court made no specific finding of fact about what [the officer] may have thought about the white residue. But at the suppression hearing, Rose did not challenge his arrest for possession of drug paraphernalia. The issue at the suppression hearing was whether his initial detention was an arrest unsupported by probable cause. The State responded that the detention was merely a Terry stop and that [the officer] then developed probable cause for a possession of drug paraphernalia arrest based on his plain-view observation of the glass pipe with its white residue. Other than their connection to the plain-view observation, the glass pipe and the white residue were not the focus of the hearing. No one seemed to question that those items gave [the officer] sufficient probable cause to arrest.
> . . .
>
> The circumstances of the stop and arrest of Rose clearly reflect that [the officer] had a plain view of a glass pipe, with a white residue inside, that in his training and experience he suspected were consistent with drug possession. He said as much at trial. That he did not say so at the suppression hearing simply reflects that this was not an issue at that hearing. We affirm the Court of Appeals and hold that based on the facts actually known to [the officer] at the time of the stop and arrest, probable cause existed for a warrantless arrest for possession of a controlled substance.

[Footnotes and some citations omitted]

LED EDITORIAL COMMENTS: Possession of Stolen Access Device: The Court appears to be open to the idea that in another case involving an unactivated card under similar facts, the card could be shown to be an "access device" if sufficient evidence regarding business practices could be presented by the State to establish that the unactivated credit card could be used to obtain something of value. The Court distinguishes

factually and thus does not overrule Court of Appeals decisions in State v. Chang, 147 Wn. App. 490 (2008) Jan 09 LED:03; State v. Clay, 144 Wn. App. 894 (2008) Aug 08 LED:25; and State v. Schloredt, 97 Wn. App. 789 (1999) March 00 LED:18.

Arrest for Possession of Controlled Substance: This case is a reminder that contrary to the belief of some, the mere possession of drug paraphernalia is not a crime under Washington statutes. RCW 69.50.412(1) only criminalizes the use of drug paraphernalia, not its mere possession (in a footnote, the Supreme Court declines, because the information was brought to the Court's attention too late in the appellate process, to consider on the arrest issue a county ordinance criminalizing possession of drug paraphernalia with intent to use it). Additionally, note that in the context of § 1983 (Civil Rights Act) lawsuits, as well as criminal cases, the known facts giving probable cause for a lawful arrest as to any crime will support the arrest, regardless o f the specific offense that officers identify at the time of arrest. Devenpeck v. Alford, 543 U.S. 146 (2004) Feb 05 LED:02.

SUPREME COURT VOTES 7-2 TO REVERSE COURT OF APPEALS AND HOLD UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION THAT WARRANTLESS SEARCH BY SCHOOL RESOURCE OFFICER (SRO) WAS NOT "SCHOOL SEARCH" BUT INSTEAD WAS POLICE SEARCH

State v. Meneese, ___ Wn.2d ___, 282 P.3d 83 (August 2, 2012)

Facts: (Excerpted from Supreme Court majority opinion)

> [Officer's] employment
>
> [The law enforcement officer involved in this case] has been a full-time law enforcement officer with the Bellevue Police Department for over 15 years. Since the late 1990s, he has also served as the SRO at Robinswood High School in Bellevue. In 2008, the police department and the school district signed an agreement formalizing the relationship between [the officer] and five other officers and the school district. In return, the school district agreed to pay $90,000 per year to the police department. As an SRO, [the Robinswood SRO] was to "creat[e] and maintain[] a safe, secure, and orderly learning environment for students, teachers, and staff, through prevention and intervention techniques." He had no authority to administer school discipline, suspensions, or expulsions. He dressed in a standard-issue police uniform that bore the Bellevue Police Department insignia on it. He also drove a marked police vehicle to and from the school. And on a rare occasion, he would assist a fellow officer with an incident unrelated to the school.
>
> Meneese's arrest and subsequent search
>
> In February 2009, [the SRO] was conducting a routine check of the boys' restroom at Robinswood when he discovered Meneese standing at the sink holding a bag of marijuana in one hand and a medicine vial in the other. [The SRO] confiscated the marijuana and escorted Meneese along with his backpack to the dean of students' office.
>
> At the office, the dean took a passive role as [the SRO] informed her about the situation. No school discipline took place at this time. Instead, [the SRO] placed

> Meneese under arrest and requested a patrol unit to pick Meneese up for booking at the police station. While waiting on backup, [the SRO] became suspicious that Meneese's backpack might contain additional contraband because it had a padlock on the handles. [The SRO] attempted, and had limited success, to search the backpack without first removing the lock. When asked for the key, Meneese claimed to have left it at home. This made [the SRO] even more suspicious. He then handcuffed and searched Meneese for the key, which [the SRO] found. Upon opening the backpack, [the SRO] discovered a replica Beretta air pistol (i.e., BB gun). And at this point, [the SRO] read Meneese his Miranda rights, and the backup officer arrived shortly thereafter to transport Meneese for booking.

Procedural History: Meneese was adjudicated in juvenile court as having committed the criminal acts of carrying a dangerous weapon at school and possessing less than 40 grams of marijuana. He lost a motion to suppress the air pistol that the SRO found in the search of his backpack. The Court of Appeals affirmed the decision below. State v. J.M., 162 Wn. App. 27 (Div. I, 2011) **Aug 11 LED:17**.

ISSUE AND RULING: Where the SRO who searched the backpack – 1) was a full-time, fully commissioned, uniformed, city police department officer; 2) was seeking to obtain evidence for criminal prosecution, not evidence for informal school discipline; and 3) at the time of the backpack search, had arrested and was planning to transport Meneese for booking – did the search of the backpack qualify as a "school search" under the school search exception to the warrant requirement of article I, section 7 of the Washington constitution? (ANSWER BY WASHINGTON SUPREME COURT: No, rules a 7-2 majority, and no search warrant exception applies under the facts of this case to justify the warrantless search of arrestee Meneese's backpack)

Result: Reversal of Court of Appeals decision that affirmed the King County juvenile court adjudication of Jamar Billy Deshawn Meneese for carrying a dangerous weapon at school and possessing less than 40 grams of marijuana.

ANALYSIS BY MAJORITY:

Justice Susan Owens authors the majority opinion and is joined by Chief Justice Madsen and Justices Charles Johnson, Tom Chambers, Stephen Gonzalez, Charles Wiggins, and Mary Fairhurst. The dissenting opinion is authored by Justice Debra Stephens and is joined by Justice James Johnson.

The majority opinion recognizes that under the case law interpreting both the federal constitution's Fourth Amendment and under the Washington constitution's article I, section 7, public K-12 school teachers and administrators may conduct warrantless searches under relaxed standards as compared to the standards for searches by law enforcement officers. K-12 school officials may search if there are reasonable grounds – an objective, reasonable person standard that is less than probable cause and closest to the Terry reasonable suspicion standard – for suspecting that the search will produce evidence that the student has violated or is violating either the law or the rules of the school.

Such a school search by school officials is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the suspected violation. In determining whether a school official had reasonable grounds to search, Washington courts consider a fact-based test

of generalized reasonableness that includes consideration of such factors as: (1) the student's age, history, and school record; (2) the prevalence and seriousness of the problem in the school to which the search was directed; (3) the probative value and reliability of the information justifying the search; and (4) the exigency to make the search without delay, relaxed concept of exigency that takes into account the need for school officials to act quickly and on the spot to maintain order and discipline in schools.

The U.S. Supreme Court has not yet addressed the question of whether a search by an SRO can qualify as a school search. The Meneese majority opinion recognizes that some decisions from other jurisdictions have held that SRO searches under some circumstances qualified under the Fourth Amendment school search exception. The majority opinion offers some factual bases for distinguishing those other-jurisdiction decisions. More importantly, the majority opinion states that, whatever the Fourth Amendment standard may be, article I, section 7 of the Washington constitution precludes application of the school search exception under the circumstances of this case.

The Meneese majority opinion points out that the Washington Supreme Court previously held that article I, section 7 imposes a greater restriction on searches in one aspect of the public K-12 school setting. In York v. Wahkiakum School District, No. 200, 163 Wn.2d 297 (2008), the Washington Supreme Court expressly recognized the school search exception and its reasonable suspicion standard. But York held that a particular high school sports participation drug testing policy violated article I, section 7 even if the drug-testing policy met Fourth Amendment standards. The Meneese majority opinion cites York in support of the majority's reliance on article I, section 7 of the Washington constitution to reject application of the school search exception under the facts of this case, regardless of what the weight of Fourth Amendment case law may be regarding SRO searches.

The Meneese majority opinion concludes that where the SRO who searched the backpack – 1) was a full-time, fully commissioned, uniformed, city police department officer; 2) was seeking to obtain evidence for criminal prosecution, not evidence for informal school discipline; and 3) at the time of the backpack search, had arrested and was planning to transport Meneese for booking – the search of the backpack cannot qualify as a "school search" under the school search exception to the warrant requirement of article I, section 7 of the Washington constitution. In key part, the majority opinion's explanation is as follows:

> There is, however, a fundamental difference between the principal in [State v. McKinnon, 88 Wn.2d 75 (1977)] and [the SRO in this case]. The "principal [was] not a law enforcement officer. His job [did] not concern the discovery and prevention of crime. His . . . primary duty [was] maintaining order and discipline in the school." [McKinnon] [The SRO here] is a law enforcement officer. [His] job does concern the discovery and prevention of crime, and he has no authority to discipline students. He is a uniformed police officer who "respond[s] to, and address[es], incidents occurring on school grounds." [Citation to record] Moreover, his role as SRO does not exempt him from other police duties as he can still be called upon to answer police matters unrelated to the school.
>
> Further evidence of [the SRO's] role as a law enforcement officer is evident from his search of Meneese's locked backpack. [The SRO] had arrested and handcuffed Meneese before searching the backpack. An ordinary school official could not have arrested a student under these circumstances and, most likely, could not have handcuffed a student either, given the nonviolent nature of this offense. At no point during this event did Meneese either use or threaten to use

> physical force. The overt actions of arresting and handcuffing Meneese coupled with all the other indicia of police action illustrate that [the SRO] was a law enforcement officer and not a school official.

[Some, but not all, of the bracketed language added by LED Editor]

LED EDITORIAL COMMENT: The majority opinion in Meneese does not state that SRO searches will never, under any circumstances, qualify under the school search exception of the Washington constitution's article I, section 7. But our assessment of the Meneese majority opinion in light of the trend of other search and seizure decisions of the Washington Supreme Court over the past thirty years is that it is unlikely that a majority of the current membership of the Washington Supreme Court would ever vote for that result under any circumstances. As always, law enforcement agencies are urged to consult with agency legal advisors and/or county prosecutors on legal issues addressed in the LED.

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WASHINGTON STATE COURT OF APPEALS

DOUBLE-MURDER DEFENDANT WINS ARGUMENT THAT 1) HE UNEQUIVOCALLY ASSERTED HIS RIGHT UNDER CRIMINAL RULE 3.1 TO ATTORNEY CONTACT, AND 2) HE WAS NOT GIVEN REASONABLE ASSISTANCE TO MAKE SUCH CONTACT

State v. Pierce, ___Wn. App. ___, 280 P.3d 1158 (Div. II, July 17, 2012)

Facts:

Pat and Janice Yarr were murdered, and their house was burned down. While the house was still burning, Michael Pierce's image was captured on an automatic teller machine (ATM) surveillance video while he was using the Yarrs' debit card.

Based on the footage from the ATM camera, police arrested Pierce for theft of the Yarrs' debit card. Detectives interrogated Pierce about the theft, and Pierce denied stealing the debit card. The interrogating detectives then accused Pierce of murdering the Yarrs, at which point Pierce said, "If you're . . . trying to say I'm doing [sic] it I need a lawyer. I'm gonna need a lawyer because it wasn't me. You're wrong." The police then escorted Pierce across the street to jail.

During the next five hours, Pierce made two phone calls to his girlfriend. During that time, Pierce did not expressly ask to make a phone call to an attorney. The business number for the public defender's office is posted by every phone at the jail. The inmates are allowed to make a free call to the public defenders' office. But it was after business hours. Jail procedure is that when a defendant requests after business hours to speak to attorney public defender, corrections officers escort the defendant to the booking desk and dial the home phone numbers of the public defenders. In order to protect the public defenders' privacy, their home phone numbers are not given to inmates.

Approximately five hours after he was taken to the jail, Pierce requested to speak to the detectives again. The detectives again talked to Pierce. [**LED EDITORIAL NOTE: The briefing in the Court of Appeals, though not the Court of Appeals opinion, reflects that the detectives re-Mirandized Pierce before any further questioning.**] Pierce made some incriminating statements during that further questioning.

Proceedings below:

The prosecutor charged Pierce with two counts of first degree murder, plus other charges. Pierce moved to suppress the statements that he made to the detectives after invoking his right to counsel. He argued that he had not been put in contact with an attorney as required by Superior Court Criminal Rule (CrR) 3.1(c)(2). The trial court ruled the statements were admissible, finding that (1) Pierce had made only an equivocal request to speak to an attorney and (2) the jail had, in any event, made the necessary reasonable efforts to put Pierce in communication with a lawyer.

A jury found Pierce guilty of two counts of first degree felony murder, plus one count each of first degree burglary, first degree robbery, first degree arson, theft of a firearm, second degree unlawful possession of a firearm, and second degree theft.

ISSUE AND RULING: Pierce stated during custodial questioning by detectives, "I need a lawyer" and "I'm gonna need a lawyer because it wasn't me [who did the murder]." He was then escorted to jail, and no one did anything in the next five hours to put him in contact with an attorney. After about five hours passed, Pierce requested to talk to the detectives again. He then made incriminating statements. Was Pierce's right under CrR 3.1 to be placed in contact with an attorney upon request violated such that his incriminating statements in the second interrogation session inadmissible? (ANSWER: Yes, and the trial court's error in admitting Pierce's statements from the second interrogation session was not harmless).

Result: Reversal of Jefferson County Superior Court convictions of Michael John Pierce for two counts of first degree felony murder, plus one count each of first degree burglary, first degree robbery, first degree arson, theft of a firearm, second degree unlawful possession of a firearm, and second degree theft; case remanded for a new trial.

ANALYSIS:

Under CrR 3.1(c)(2), "At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, and the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer."

Unequivocal request for attorney contact

The Court of Appeals explains as follows its view that, as a matter of law, Pierce made an unequivocal request to contact an attorney within the meaning of CrR 3.1(c)(2):

> In contrast to Pierce's unequivocal request for an attorney, the [decision in State v. Whitaker, 133 Wn. App. 199 (Div. I, 2006) **Aug 12 LED:18**)] presents an example of an equivocal request. There, Whitaker asked "when he could talk to an attorney." But although the interrogating Federal Bureau of Investigation (FBI) agents informed Whitaker he could request an attorney "at that moment" Whitaker clarified that he was only asking about when in the process an attorney would be appointed. Division One of this court held that Whitaker's statements were equivocal and therefore did not constitute a request for counsel invoking CrR 3.1(c)(2).
>
> The statement here was unlike that in Whitaker. Whitaker asked only when an attorney would be appointed, and he failed to ask for one immediately when the

FBI agents told him he could do so. But here, Pierce stated that he was "gonna" need a lawyer, a statement hardly as equivocal as that in Whitaker.

Division One of our court recently held a request for counsel analogous to Pierce's to be an unequivocal assertion of the right to counsel under Miranda. State v. Nysta, ___ Wn.App. ___, 275 P.3d 1162 (2012) **July 12 LED:09**. [*Court's footnote 4: Washington cases make no distinction between an invocation of the Miranda right to counsel and a request for counsel that triggers CrR 3.1(c)(2).*] Nysta said, "I gotta talk to my lawyer." Division One held that this request was unequivocal because Nysta did not use such words as "if", "or", "maybe", or "perhaps". While Pierce initially said he would need a lawyer "if" the police were going to accuse him of murder, he immediately followed with the statement, "I'm gonna need a lawyer because it wasn't me." This was an unequivocal request for counsel analogous to that in Nysta.

. . . .

Cases from other jurisdictions bolster our conclusion that Pierce's request was unequivocal. The United States Court of Appeals for the Seventh Circuit provided a comprehensive analysis of the issue in United States v. Lee, 413 F.3d 622, 625-26 (7th Cir. 2005). There, the Seventh Circuit Court of Appeals recognized that statements such as "I can't afford a lawyer but is there any way I can get one?" or "maybe I should talk to a lawyer" or "I don't know if I need an attorney" have been held to be equivocal requests for counsel under Miranda.

The Seventh Circuit Court of Appeals also noted several statements that have been held to be unequivocal requests for a lawyer, including, "'I think I should call my lawyer'; 'I have to get me a good lawyer, man. Can I make a phone call?'; 'Can I talk to a lawyer? I think maybe you're looking at me as a suspect, and I should talk to a lawyer. Are you looking at me as a suspect?'" Lee. . . . The Lee court held that the question, "Can I have a lawyer?" was also an unequivocal invocation of the Miranda right to counsel.

The Colorado Court of Appeals reached the same conclusion regarding a statement even more analogous to Pierce's in People v. Cook, 665 P.2d 640, 643 (Colo. App. 1983). There, Cook said, "Oh, I guess I am going to need an attorney." The Colorado Court of Appeals held that this statement was sufficient to invoke Cook's right to counsel.

Pierce's statement, "I'm gonna need a lawyer because it wasn't me" is analogous to that in Cook. Furthermore, Pierce's statement was distinguishable from the equivocal requests noted in Lee and analogous to the unequivocal requests noted therein. These cases, in addition to the Washington cases we cite above, demonstrate that Pierce unequivocally requested counsel. The trial court erred in concluding to the contrary.

[Some citations omitted]

No reasonable efforts to put Pierce in contact with an attorney

The Court of Appeals explains as follows its view that, as a matter of law that no one made a reasonable effort to put him in communication with an attorney for purposes of CrR 3.1(c)(2):

. . . . We have held that "[a]lthough the rule does not require the officers to actually connect the accused with an attorney, it does require reasonable efforts to do so." State v. Kirkpatrick, 89 Wn. App. 407, 414 (Div. II, 1997) **March 98 LED:12**.

We discussed "reasonable efforts" in City of Tacoma v. Myhre, 32 Wn. App. 661, 664 (1982), where police made insufficient efforts to put Myhre in contact with an attorney. The police gave Myhre access to a telephone to call his attorney, but when his attorney did not answer, the police refused Myhre's request to let him call his mother who had the attorney's home number. We held that the police violated former JuCrR 2.11(c)(2), which had language virtually identical to CrR 3.1(c)(2), because "[a]n additional call would not have burdened the police and obviously was necessary if defendant was to contact his attorney." So too here, the additional step of dialing the home number of a public defender would not have burdened corrections staff and was obviously necessary for Pierce to contact an attorney.

In contrast, the police made reasonable efforts to put the defendant in contact with an attorney in City of Seattle v. Wakenight, 24 Wn. App. 48, 51 (1979). There, the police gave Wakenight, who was not indigent, a telephone book. Wakenight made several calls but received no answer. The police also contacted the office of the public defender for Wakenight. Division One of our court held that such measures were sufficient to vindicate Wakenight's rights under CrR 3.1(c)(2), despite being unsuccessful. But here, the police did not even take the minimal step of providing Pierce a phone book.

Similarly, in City of Seattle v. Carpenito, 32 Wn. App. 809, 813 (1982), the police gave Carpenito access to a telephone and a telephone book that listed the numbers of the public defender and private attorneys. Both the private attorneys and the public defender's office had 24-hour answering services. Division One held that this access was sufficient to comply with former JuCrR 2.11(c)(2). But distinguishably here, the public defender's office did not have a 24-hour answering service; corrections staff was required to dial the home numbers of public defenders after hours.

These cases demonstrate that merely giving the inmate access to a phone without providing the means to contact an attorney does not satisfy the CrR 3.1(c)(2) requirement to provide "any other means necessary to place the person in communication with a lawyer." Although courts have accepted rather minimal efforts as reasonable, as in Wakenight, no court has accepted the procedure here: to put in jail a prisoner who has requested counsel and wait for him to reassert his right to counsel before taking steps to put him in contact with an attorney. The jail's own policy of dialing public defender home numbers after hours shows the futility of merely providing the public defender's business number after hours. Posting the business number cannot be deemed "reasonable efforts" under CrR 3.1(c)(2) under these facts.

Accordingly, the trial court's finding that the public defender's business number was posted near the booking phone does not support its conclusion that corrections staff took reasonable efforts to place Pierce in contact with an attorney. The trial court's conclusion on this point was erroneous. *[Cour"s footnote 5: The fact that Pierce reinitiated contact with the police does not*

impugn this conclusion. A defendant does not waive a CrR 3.1(c)(2) violation by reinitiating contact with the police unless the reinitiation occurs before the earliest opportunity to place the defendant in contact with an attorney. Kirkpatrick, 89 Wn. App. at 407. The earliest opportunity to place Pierce in contact with an attorney was when he was booked into jail. His reinitiating contact with the police five hours later therefore does not cure this violation of CrR 3.1(c)(2).]

[Some citations omitted]

The Court of Appeals goes on to explain (in analysis not addressed in this LED entry) its view that Pierce's statements in the second questioning session provided strong evidence against him, and therefore the violation of CrR 3.1(c)(2) was not harmless error.

LED EDITORIAL COMMENT: We repeat with slight revisions the suggestions that we made in the March 1998 LED (suggestions that are also made in the "Initiation of Contact" article on the CJTC LED Internet page) in response to the Court of Appeals decision in State v. Kirkpatrick, 89 Wn. App. 407, 414 (Div. II, 1997) March 98 LED:12:

(1) If a person in custody requests counsel in response to Miranda warnings or terminates a custodial interrogation with a request for counsel (as opposed to a mere assertion of the right to remain silent), then the officer should ask if the arrestee wants to talk to an attorney at that time. If the arrestee says "no," then we think that the officer has no further obligation regarding the counsel request, other than to honor it by not initiating interrogation while the suspect remains in continuous custody. And, if the arrestee says that he or she does want to talk to counsel right away, then the officer should make a reasonable and contemporaneous effort to get the arrestee to a telephone to allow contact with an attorney, or direct others to do so.

AND

(2) If an officer becomes aware that there has been a violation of the access-to-counsel requirement of CrR 3.1(c)(2), then the officer should not assume that any subsequent initiation of contact by the "wronged" arrestee cures the error. Instead, to try to cure the taint of the earlier failure of law enforcement or correctional staff to follow up on the request for an attorney, the officer should inquire of any such contact-initiating arrestee whether that arrestee now wants an immediate consult with an attorney. If the arrestee states that he or she does want to talk to an attorney right away, then the officer should try, as indicated above, to help effect an immediate contact with an attorney. On the other hand, if the arrestee declines the correcting offer to facilitate an attorney consult, then, if the officer wants to interrogate, the officer should fully warn the suspect and obtain an express waiver before proceeding with interrogation.

FOUR HOLDINGS: 1) ARREST PRECEDED SEARCH OF PERSON THAT YIELDED RAPE SUSPECT'S IDENTIFICATION CARDS, SO SEARCH INCIDENT TO ARREST WAS LAWFUL; 2) WARRANTLESS SEIZURE AT POLICE STATION OF SUSPECT'S CLOTHING AS EVIDENCE OF CRIME AND LATER LAB TESTING WERE LAWFUL AS INCIDENTAL TO ARREST; 3) RCW 10.31.030'S REQUIREMENT THAT ARRESTEE BE ALLOWED TO POST BAIL BEFORE ANY BOOKING INVENTORY DOES NOT APPLY WHERE ITEMS WERE SEIZED AS EVIDENCE OF CRIME; 4) FAILURE OF VICTIM TO IDENTIFY DEFENDANT IN PHOTO MONTAGE SHE WAS SHOWN NEAR TIME OF CRIME DOES NOT PRECLUDE HER IDENTIFICATION OF HIM AT TRIAL WHERE NO POLICE IRREGULARITY ALLEGED

State v. Salinas, ___Wn. App. ___, 279 P.3d17 (Div. II, July 2, 2012)

Facts and Proceedings below:

A homeless woman living near a city park reported to police at 2 a.m. that she had just been raped by a man with a knife. After using a police canine to track to where defendant Salinas was lying in his sleeping bag, the officers identified themselves as police and shined a flashlight in his face. Salinas matched the victim's description of her rapist. Police ordered Salinas to show his hands.

Salinas ran away toward the waterfront. Police chased him down and ordered him to lie on the ground. The canine officer allowed the dog to bite the non-compliant Salinas to make him comply. Salinas then complied with the order to lie on the ground. The officers handcuffed Salinas as he was lying on the ground.

The officers searched Salinas and found several identification cards with different names and dates of birth. **[LED EDITORIAL NOTE: In a footnote, the Court of Appeals states regarding the officers' obtaining of the ID cards: "Salinas' appellate brief asserts that the officers reached into his pocket, removed his wallet, and searched it. The relevant finding simply states, 'The officers obtained the defendant's name and identification.'"]**

The officers eventually learned Salinas' identity. And they learned from dispatch that he was wanted on a felony warrant. The officers took him to the police station and interviewed him. At the station, they took his clothes for later lab testing as evidence in the rape incident. He was later booked into jail.

The State charged Salinas with three counts of first degree rape and one count of first degree kidnapping. Key evidence in the prosecution was DNA evidence from Salinas' clothing. A jury convicted Salinas as charged.

ISSUES AND RULINGS: 1) Under the Washington constitutional rule established in State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03** that a custodial arrest must always precede a search if the search is to qualify as a search incident to arrest, was Salinas under arrest at the point when the officers conducted a search by taking his identification cards and investigating the information on those cards? (ANSWER BY COURT OF APPEALS: Yes); 2) Did the officers have authority under Washington's constitutional standard for search incident to arrest when they seized Salinas' clothing at the police station and later submitted the clothing to a lab for DNA testing, all of this occurring without a search warrant? (ANSWER BY COURT OF APPEALS: Yes); 3) Did the seizure and DNA testing of Salinas' clothing violate his rights for the alternative reason that RCW 10.31.030 requires that a person be given a reasonable opportunity to post bail before his personal effects are inventoried as a part of jail booking procedure? (ANSWER BY COURT OF APPEALS: No, because the seizure and lab procedures were done under search incident to arrest authority, not as part of a jail booking inventory); 4) Where the victim failed to identify Salinas in a photo montage procedure conducted near the time of the crime, but where there were no allegations of impermissibly suggestive police procedures in conducting the photo montage, was it an abuse of discretion for the trial court to allow her to identify Salinas as the rapist at trial? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of Whatcom County Superior Court convictions of Hector Serano Salinas for three counts of first degree rape and one count of first degree kidnapping.

1) A lawful custodial arrest preceded the search for and seizure of the ID cards

Under the Washington constitution, article I, section 7, as interpreted by the Washington Supreme Court in State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**, an actual custodial arrest must precede a search for evidence if that search is to qualify as a search incident to arrest. The Salinas Court asserts the test for whether a person is under custodial arrest, as opposed to being merely temporarily detained, is an objective test. The test is assessed from the perspective of a reasonable person in the would-be arrestee's situation. Salinas argued on appeal that, while concededly he was the subject of a seizure, he was not yet under custodial arrest at the point when the officers conducted a search by taking his identification cards and investigating the information on those cards.

The Court of Appeals points to the following facts in support of its conclusion that Salinas was under arrest at the point when officers took and checked his ID cards: 1) police chased him down and ordered him to lie on the ground; 2) the canine officer allowed the dog to bite the non-compliant Salinas to make him comply with their order; 3) Salinas then complied with the order to lie on the ground; 4) the officers handcuffed Salinas as he was lying on the ground; 5) only then did the officers take and check the ID cards. The Court of Appeals declares:

> A reasonable person in this situation would have thought he was being arrested and taken into custody, not merely being detained for a brief investigation.

[LED EDITORIAL COMMENT ON ISSUE 1: Here, the officers had probable cause to arrest Salinas at the point when they forcibly took his ID cards and checked them. It appears from the Court of Appeals opinion, however, that the officers did not announce at that point that Salinas was under arrest. Such a police announcement would have helped clarify the circumstances.

Sometimes, officers will have only reasonable suspicion that would justify only a temporary seizure, but a felony suspect is reasonably believed to be armed and dangerous. The Washington Supreme Court has held that, in this circumstance, felony stop procedures based on dangerousness of the suspect do not necessarily make a seizure an arrest requiring probable cause to arrest. See State v. Belieu, 112 Wn.2d 587 (1989) Sept 89 LED:17 (upholding full felony stop procedures with a dangerous person based on reasonable suspicion of a felony). In light of the arrest-must-precede-search rule of O'Neill, Washington officers – 1) who are considering whether to go beyond frisking the suspect and to conduct a search for evidence, and 2) who believe that they have probable cause to support arrest – would be wise, before they start the search for evidence, to inform the felony stop suspect that he or she is under arrest.]

2) Seizure of clothing and DNA testing was incident of arrest and did not require search warrant

The Court of Appeals rejects Salinas' argument that the recent Washington Supreme Court decision in State v. Snapp, ___Wn. App. ___, 275 P.3d 289 (2012) **May 12 LED:25** limiting the authority to conduct searches of vehicles incident to arrest of occupants applies to the search here of a person and his personal effects incident to arrest. After extended discussion of Washington case law going back over 100 years, the Court of Appeals concludes as follows that taking Salinas' clothing and testing it for DNA without a search warrant incidental to his arrest was lawful under the Washington constitution, article I, section 7:

> In summary, Salinas was lawfully arrested for rape. The seizure and forensic examination of his clothing without a warrant was a proper exercise by the State of its right to take from an arrestee's person materials reasonably believed to be

connected with the alleged crime. The police acted properly within the scope of a search incident to a lawful custodial arrest.

[LED EDITORIAL NOTE/COMMENT ON ISSUE 2: Neither the Court of Appeals opinion nor the briefing of the parties in Salinas mentions the Division Three Court of Appeals decision in State v. Byrd, 162 Wn. App. 612 (Div. III, 2011) Oct 11 LED:21. Byrd is currently on review in the Washington Supreme Court where oral argument was presented on May 15, 2012. In Byrd, the Court of Appeals ruled that the Fourth Amendment limit under the 2009 U.S. Supreme Court decision in Arizona v. Gant on motor vehicle searches incident to arrest also limits searches of the person incident to arrest.]

3) Opportunity to post bail per RCW 10.31.030 is irrelevant to search incident to arrest

The Court of Appeals analyzes Salinas' argument under RCW 10.31.030 as follows:

> A person arrested under a warrant must be given an opportunity to post bail before being subjected to an inventory search. RCW 10.31.030; State v. Smith, 56 Wn. App. 145 (1989); State v. Caldera, 84 Wn. App. 527 (1997) **May 97 LED:05**. The purpose of the statute is to provide a defendant with notice of the charge and the amount of bail as soon as possible after arrest so that the defendant may avoid incarceration by posting bail. State v. Ross, 106 Wn. App. 876 (2001). **Sept 01 LED:15**. But the rule applies only to inventory searches prior to booking, not to searches incident to arrest. State v. Jordan, 92 Wn. App. 25 (1998) **Feb 99 LED:09**; Ross. Because Salina'' clothing was seized incident to arrest, RCW 10.31.030 does not apply.

[Some citations revised]

4) Inability of victim to identify Salinas in photo montage did not bar her from doing so at trial

The Court of Appeals explains as follows its rejection of Salinas' challenge to the trial testimony of the victim identifying him as the rapist:

> The victim failed to identify Salinas in a photo montage the police presented to her shortly after the rape. Before trial, Salinas moved unsuccessfully to prevent the victim from identifying him in court. Salinas contends it was error to permit the in-court identification because it was so unreliable that it violated due process. Our review is for abuse of discretion. State v. Kinard, 109 Wn. App. 428 (2001) **March 02 LED:15**.
>
> Where the defendant does not claim that the police used impermissibly suggestive identification procedures, the due process clause does not condition the admissibility of identification testimony upon proof of its reliability. State v. Vaughn, 101 Wn.2d 604 (1984). "The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness." Perry v. New Hampshire, ___U.S. ___, 132 S. Ct. 716 (2012) **March 12 LED:02**. Whether a witness's identification is reliable and what weight to give it are issues for the jury to resolve, considering any uncertainty or inconsistencies in the testimony. State v. Kinard. Because Salinas' challenge was based on reliability alone, the trial court properly denied the motion.

[Some citations revised]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) SPLIT DECISION REJECTS CONSTITUTIONAL AND PRIVACY ACT CHALLENGES BY SENDERS OF TEXT MESSAGES THAT OFFICERS OBTAINED FROM iPHONES OWNED BY SUSPECTED DRUG USERS, AND SUBSEQUENTLY USED IN DRUG DEAL STINGS – In State v. Hinton, ___Wn. App. ___, 280 P.3d 476 (Div. II, June 26, 2012) and State v. Roden, ___Wn. App. ___, 279 P.3d 461 (Div. II, June 26, 2012), in separate 2-1 decisions by the Court of Appeals issued the same day, the Court rejects statutory and constitutional claims of privacy protection asserted by senders of text messages where the text messages were recovered from an electronic device belonging to a message recipient (suspected by police of drug dealing) whose rights were not at issue in the two cases.

Facts, proceedings and legal analysis in State v. Hinton:

A detective was in possession of an iPhone of a suspected drug dealer (Daniel Lee). How the police obtained Lee's iPhone is not addressed in or relevant to the Court of Appeals opinion.

A text message from Jonathan Hinton (texting as "Z-Shawn Hinton") came in to the iPhone while the detective was monitoring it. Pretending to be Lee, the detective used the iPhone to engage in an exchange of text messages with Hinton. The detective ultimately set up a sting drug deal. The police arrested Hinton at the exchange site for attempted possession of heroin. The detective then called a phone number for the sender that the detective had obtained from Lee's iPhone. Hinton's cell phone rang.

The State charged Hinton with attempted possession of heroin. He moved under the Fourth Amendment and under article I, section 7 of the Washington constitution to suppress the detective's use of Lee's iPhone. Hinton did not raise an argument under chapter 9.73 RCW, the "Privacy Act." The superior court rejected Hinton's constitutional arguments and convicted him on stipulated facts.

By a 2-1 vote, the Court of Appeals upholds the conviction, concluding that the sender of text messages in this context has no State or federal constitutional protection against the seizure and use of text messages on the phone of another person. The majority opinion is authored by Judge Joel Penoyar and concurred in by Judge Lisa Worswick. Judge Marywave Van Deren dissents.

The majority opinion explains that there is no constitutional privacy protection for the sender under either the Washington or federal constitution because a person sending a text message voluntarily runs the risk that his message, once he successfully sends it, will be received by whoever happens to possess the iPhone then or in the future. And the sender of the text message has no control over what that person might do with the message.

The majority opinion rejects an argument in Judge VanDeren's dissent that the Washington constitution protects the text messages as "private" because the Privacy Act, chapter 9.73 RCW, treats the communications as "private communications." The majority responds as follows in footnote 8 that "private" under the Privacy Act does not necessarily mean constitutionally protected as "private" under the Washington constitution:

> We disagree with the dissent that Washington's privacy act, chapter 9.73 RCW, and its case law demonstrate that the text messages on Lee's iPhone are private affairs under article I, section 7 for two reasons. Dissent at 5-6 (citing State v. Townsend, 147 Wn.2d 666, 57 P.3d 255 (2002) **March 03 LED:11**). First, our Supreme Court has explained that determining whether the privacy act was violated "is, of course, a very different inquiry than whether the defendant's constitutional rights were violated." State v. Corliss, 123 Wn.2d 656, 661, 870 P.2d 317 (1994) **June 94 LED:02**. Second, while Townsend held that ICQ messages were private communications for purposes of the privacy act, the Supreme Court ultimately held that the privacy act had not been violated because the defendant impliedly consented to the recording. 147 Wn.2d at 674, 676, 678-79. The court held that the defendant impliedly consented to the recording because the defendant, "as a user of e-mail had to understand that computers are, among other things, a message recording device and that his e-mail messages would be recorded on the computer of the person to whom the message was sent." Townsend, 147 Wn.2d at 676.

[Some citations revised]

Finally, because defendant Hinton did not present evidence or make arguments relating to the seizure of the iPhone phone from Lee, the majority opinion does not address whether any rights of Lee, the owner of the iPhone, were violated. And, assuming for the sake of argument that any such rights of Lee as iPhone owner were violated in the police seizing the phone or accessing the text messages, the Court declines to address whether a sender of text messages to an iPhone would have standing to assert the rights of the owner of the iPhone to which text messages were sent.

Result in Hinton: Affirmance of Cowlitz County Superior Court conviction of Shawn D. Hinton for attempted possession of heroin; the Court of Appeals also affirms a conviction for possession of heroin arising from a separate incident involving a different issue that the Court of Appeals addresses in an unpublished part of its opinion.

Status of Hinton: Hinton has petitioned the Washington Supreme Court for discretionary review.

Facts, proceedings and legal analysis in State v. Roden:

The same detective as in the Hinton case was in possession of the same iPhone of the same suspected drug dealer (Lee) as in Hinton. As in the Hinton decision, the means by which the police obtained the iPhone is not addressed in or relevant to the Court of Appeals opinion.

A text message from Roden (as "Z-Jon") appeared on the iPhone. Pretending to be the suspected drug dealer, the detective engaged in an exchange of text messages with Roden, ultimately setting up a sting drug deal. The police arrested Roden at the exchange site for attempted possession of heroin.

The State charged Roden with attempted possession of heroin. He moved under chapter 9.73 RCW, the "Privacy Act," to suppress evidence related to the detective's use of the iPhone. Roden moved under the Fourth Amendment and under article I, section 7 of the Washington constitution to suppress evidence related to the detectives' use of the dealer's iPhone. The superior court rejected Roden's argument and convicted him on stipulated facts.

By a 2-1 vote, the Court of Appeals upholds the conviction, concluding that, while the text messages arguably are "private" for purposes of the Privacy Act, the sender of text messages in this context impliedly consents to the interception of those messages by other persons, including the police. The majority opinion is authored by Judge Joel Penoyar and concurred in by Judge Lisa Worswick. Judge Marywave Van Deren dissents.

In key part, the majority opinion explains as follows its implied-consent theory as to why there is no protection for the sender of a text message under chapter 9.73 RCW:

> Roden voluntarily sent the text messages to [the iPhone of suspected drug-dealer, Lee] with the expectation that Lee would read them. In doing so, he also anticipated that the iPhone would record and store the incoming messages to allow Lee to read them. Cell phones, like computers, are "message recording device[s]," a fact that Roden must have understood as a user of text messaging technology on cell phones. Accordingly, Sawyer did not violate Roden's rights under the Act.

[Footnote and citation omitted]. For its implied consent theory, the majority opinion relies primarily on two previous appellate court decisions interpreting chapter 9.73 RCW, State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11** (detective's recording of internet ICQ communications with suspected child molester was a recording of "private communications" under the Privacy Act, but the recording was lawful under the Act based on the implied consent of the sender of the messages); In re Marriage of Farr, 87 Wn. App. 177 (Div. I, 1997**) April 98 LED:11** (a person leaving a voicemail message impliedly consents to having his communication recorded).

Finally, because defendant Roden did not present evidence or make arguments relating to the seizure of the iPhone phone from Lee, the majority opinion does not address whether any rights of Lee, the owner of the iPhone, were violated. And, assuming for the sake of argument that any such rights of Lee as iPhone owner were violated in the police seizing the phone or accessing the text messages, the Court declines to address whether a sender of text messages to an iPhone would have standing to assert the rights of the owner of the iPhone to which text messages were sent.

Result in Roden: Affirmance of Cowlitz County Superior Court conviction of Jonathan N. Roden for attempted possession of heroin.

Status of Roden: Roden has petitioned the Washington Supreme Court for discretionary review.

LED EDITORIAL COMMENTS: The decisions in Hinton and Roden leave unresolved a number of questions not yet resolved by any Washington appellate court decision or U.S. Supreme Court decision, including the following:

1) After police seize an iPhone or similar device incident to arrest of a drug dealer, if, without a search warrant, they view the text messages on the device, do they violate the statutory or constitutional rights of the owner of the phone to whom text messages are sent (note that Washington's Privacy Act provides civil, criminal, and exclusionary sanctions for violations of the Act)?

2) Does a sender of such messages have standing to raise the rights of the owner of the device in a criminal case (note that the Hinton and Roden majority opinions declined to address this issue)?

3) What if a sender of messages to another's iPhone states with each message something to the effect of "consent to log or record is denied", thus undercutting the "implied consent" and "assumed risk" theories of the State in Hinton and Roden?

4) What if the owner of the iPhone has taken steps to prevent access by persons other than herself or himself to text messages, again thus undercutting the "implied consent" and "assumed risk" theories of the State in Hinton and Roden?

As always, we urge that law enforcement consult local legal advisors and prosecuting attorneys for advice on legal issues addressed in the LED.

(2) ROBBERY EVIDENCE SUFFICIENT UNDER "TRANSACTIONAL" ANALYSIS WHERE THIEF TOOK ITEM FROM PERSON, HANDED IT TO ACCOMPLICE, AND JOINED OTHERS IN USING FORCE TO PREVENT VICTIM FROM REGAINING POSSESSION OF ITEM – In State v. Truong, 168 Wn. App. 529 (Div. I, May 29, 2012), the Court of Appeals rules that sufficient evidence supports defendant's robbery conviction where she grabbed a Zune MP3 player from the person of the victim, handed the stolen Zune to an accomplice, and joined in with accomplices using force to prevent the victim from regaining possession.

The Truong Court relies on State v. Handburgh, 119 Wn.2d 284 (1992) **Sept 92 LED:10**, which recognizes that under the clear terms of RCW 9A.56.190 "a taking can be ongoing or continuing so that the later use of force to retain the property taken renders the actions a robbery." The Court refers to this a "transactional" analysis of robbery, under which "the force or threat of force need not precisely coincide with the taking." The Court factually distinguishes State v. Johnson, 155 Wn.2d 609 (2005) **Jan 06 LED:03**, which held that where a defendant had abandoned a stolen item and then used force to escape (not to retain the abandoned item), the force did not elevate the theft to robbery. The Truong Court distinguishes the Johnson decision because in Truong there was no abandonment of the stolen item, and there was no attempt to escape at the time the force was being used.

Result: Affirmance of King County Superior Court convictions of Sindy Joy Truong for first degree robbery of an item from one victim (the robbery in which the issue described above arose) and second degree robbery of another item from another victim (the circumstances of the latter robbery are not addressed in this LED entry).

(3) PUBLIC RECORDS ACT LAWSUIT: GUILD REPRESENTATIVE HAS STANDING TO BRING A PUBLIC RECORDS ACT LAWSUIT, BUT LETTER TO SHERIFF DID NOT PROVIDE SUFFICIENT NOTICE THAT IT WAS A PRA REQUEST – In Germeau v. Mason County, 166 Wn. App. 789 (Div. II, Feb. 28, 2012) the Court of Appeals holds that a guild representative has standing to bring a lawsuit under the public records act (PRA), but that under the totality of the facts in this case the representative's letter to the sheriff did not provide sufficient notice that it was a PRA request.

Mason County Deputy Sheriff Richard Germeau signed a "Verification of Receipt" acknowledging his receipt of a Mason County Sheriff's Office general order that adopted the County's public records requests policy. Germeau had also made previous public records requests using the "Mason County Public Records Request Form."

Deputy Germeau was also the representative of the Sheriff's Office Employees Guild (Guild) at the time of this case.

In August 2009 the sheriff's office opened an internal affairs investigation into an off duty physical altercation and domestic dispute involving a guild member.

In his capacity as Guild representative, Deputy Germeau wrote a letter on Mason County Deputy Sheriffs Guild letterhead, addressed to "Chief Byrd" and "[a]ny individuals associated in an [i]nvestigator[y] capacity." The letter, which did not expressly represent that it was a Public Records Request, stated:

> I will be representing [the detective sergeant] as his guild representative regarding any internal affairs investigation or line investigation. From this point forward if contact is needed with [the detective sergeant] for investigative purposes either formal or non-formal arrangements will need to be made through me.
>
> At the time any active investigation begins either official or unofficial the guild will assume that an internal affairs investigation has begun. Also we are aware that there may be a related criminal investigation with [the detective sergeant] being a victim. We will assume at this time that there is an arterial [sic] motive to use any findings or evidence in this investigation in any current active internal affairs/line investigation or any additional personnel investigations which may occur as [a] result of any findings. The guild will assume at this time that any investigation regarding [the detective sergeant] , being administrative or criminal in nature, is with the intention to be used ultimately in a personnel matter.
>
> Upon receipt of this memo understand that the guild is requesting and has the right to be privileged to any work product, or investigative findings regarding any investigation involving [the detective sergeant]. This includes any notes, interoffice memo's [sic] or emails that may be related.
>
> Also I am requesting that I be afforded the opportunity to sit in as an observer during any witness interviews which are conducted as [a] result of any investigation regarding [the detective sergeant].
>
> Please respond to this memo in writing.
>
> Regards
>
> Rich Germeau

It did not appear to the undersheriff that Germeau's letter was a PRA request that required compliance with PRA disclosure requirements and timelines. Instead, the undersheriff believed that Germeau's letter was written in his capacity as Guild representative and that the letter's purpose was "to assist [the Guild] in [its] role of representing [the detective seargeant]."

Standing

The County argued that because the Guild requested the records, the Guild, rather than Germeau should have brought the PRA action. The Court of Appeals rejects this argument, explaining, relying on Kleven v. City of Des Moines, 111 Wn. App. 284, 289-93 (2002), the Court

holds that as the Guild representative Germeau had "a personal stake" in receiving the requested information and thus, he has standing to bring his PRA action against the County.

Fair Notice of PRA Request

The Court analyzes the notice issue in part as follows:

> "[T]he P[R]A 'only applies when public records have been requested. . . . A "'specific request for public records'" occurs when "the person requesting documents from an agency . . . state[s] the request with sufficient clarity to give the agency fair notice that it had received a request for a public record." Wood [v. Lowe, 102 Wn. App. 872, 877–78 (2000)] . . . In other words, at a minimum, the PRA "require[s] that requests be recognizable as PRA requests." Beal v. City of Seattle, 150 Wn. App. 865, 876 (2009). The issue here is not whether the County adhered to the PRA's disclosure requirements but, rather, whether Germeau's letter triggered any obligation by the County to comply with the PRA.
>
> . . .

[Footnotes and some citations omitted]

Relying on Wood, the Court explains:

> . . . Here, the Guild has a collective-bargaining agreement with the County; thus, RCW 41.56.030(4) entitled Germeau, in his Guild representative capacity, to the requested documents. Under Wood, given the "ambiguous nature" of Germeau's letter and its request for information about [the detective sergeant's] investigation to which Germeau was entitled under the collective-bargaining agreement, it was reasonable for the County to have believed that Germeau's letter requested documents under the collective-bargaining agreement rather than under the PRA.
>
> For the foregoing reasons, we hold that Germeau's . . . letter did not provide fair notice to the County that he was making a PRA request and, therefore, the letter did not trigger the PRA or obligate the County to comply with PRA disclosure requirements.

Result: Affirmance of Thurston County Superior Court order dismissing PRA lawsuit.

LED EDITORIAL COMMENT: Given the highly fact specific nature of this case this LED entry has omitted much of the extensive discussion of the relevant facts and law. Whether a request qualifies as a public records request is often a highly fact-based question. As always we urge law enforcement personnel and public records officers to consult with their agency legal advisors.

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

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more

simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "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 (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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

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