Law Enforcement Digest

SEPTEMBER 2014

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

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Patrol Partner Award:	Joshua R. Beauchamp, Seattle PD
Tac Officer:	Corporal Lisa Mosley, WSP

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SEPTEMBER 2014 LED TABLE OF CONTENTS

ANNOUNCEMENT: SEARCH AND SEIZURE GUIDE BY PAM LOGINSKY HAS BEEN UPDATED THROUGH JUNE 2014 AND IS AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS" 3

BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS 4

FORMER FELON WHOSE RIGHTS WERE AUTOMATICALLY RESTORED UNDER STATE LAW, BUT WHO COULD NOT CARRY A CONCEALED WEAPON, WAS PROPERLY PROHIBITED FROM POSSESSING A FIREARM UNDER FEDERAL LAW, AND SUCH PROHIBITION DOES NOT VIOLATE THE SECOND AMENDMENT
Van Der Hule v. Holder, ___ F.3d ___, 2014 WL 3451423 (9th Cir., July 16, 2014) 4

CIVIL RIGHTS ACT LAWSUIT: PLAINTIFF FAILED TO STATE FAILURE TO TRAIN CLAIMS AGAINST COUNTY OR SHERIFF
Flores v. County of Los Angeles, ___ F.3d ___, 2014 WL 3397219 (9th Cir., July 14, 2014) 5

PROSECUTION VIOLATED BRADY BY FAILING TO DISCLOSE IMPEACHMENT EVIDENCE RELATING TO A GOVERNMENT WITNESS
Amado v. Gonzalez, ___ F.3d ___, 2014 WL 3377340 (9th Cir., July 11, 2014) 5

PROBABLE CAUSE FOR ISSUANCE OF SEARCH WARRANT WOULD REMAIN EVEN IF AFFIDAVIT WAS SUPPLEMENTED WITH INFORMATION OMITTED BY POLICE, RELATING TO WITNESS'S CREDIBILITY
United States v. Ruiz, ___ F.3d ___, 2014 WL 3377345 (9th Cir., July 11, 2014) 5

NINTH CIRCUIT AFFIRMS JURY VERDICT IN FAVOR OF OFFICER BASED ON TERMINATION IN RETALIATION FOR TESTIFYING IN FAIR LABOR STANDARDS ACT (FLSA) LAWSUIT
Avila v. Los Angeles Police Dep't, ___ F.3d ___, 2014 WL 3361123 (9th Cir., July 10, 2014) 6

CIVIL RIGHTS ACT LAWSUIT: CASE MUST GO TO TRIAL WHERE OFFICERS ENTERED A HOME WITHOUT A WARRANT, LOOKING FOR INTRUDERS, POINTED GUNS AT TEENAGE BOYS PRESENT IN THE HOME, SHOT THE FAMILY DOG, AND USED FORCE AGAINST HOMEOWNER WHO RECENTLY HAD BACK SURGERY
Sandoval v. Las Vegas Metropolitan Police Dep't, ___ F.3d ___, 2014 WL 2936254 (9th Cir., July 1, 2014) 7

WASHINGTON STATE SUPREME COURT 7

FOUR RULINGS UNDER WASHINGTON CONSTITUTION: 1) FRISK WAS JUSTIFIED BY LATE HOUR, PLUS OFFICER'S 1-ON-1 CONTACT ON STREET WITH TRAFFIC VIOLATOR, PLUS OFFICER'S KNOWLEDGE THAT DETAINEE HAD FALSELY DENIED POSSESSING A WEAPON IN A CONTACT A WEEK BEFORE WHEN THE DETAINEE IN FACT WAS DISCOVERED IN EARLIER CONTACT TO HAVE DERRINGER-STYLE GUN IN POCKET; 2) FRUIT OF POISONOUS TREE DOCTRINE IS NOT APPLICABLE TO FRISKS; 3) OFFICER-SAFETY CONSIDERATIONS DID NOT SUPPORT SEARCH OF SIX-BY-FOUR-BY-ONE-TO-TWO-INCH LIGHTWEIGHT, HARD, OPAQUE BOX LAWFULLY TAKEN FROM DETAINEE'S POCKET; 4) CONSENT TO SEARCH BOX WAS NOT ESTABLISHED TO BE VOLUNTARY
State v. Russell, ___Wn.2d ___, 2014 WL 3537955 (July 10, 2014) 8

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT.....14

LEAVING LOADED GUN AT HOME CANNOT BE "LEGAL CAUSE" OF INJURY TO CHILD "B" WHERE CHILD "A" FOUND THE LOADED GUN AND TOOK IT TO SCHOOL WHERE IT ACCIDENTALLY DISCHARGED INJURING CHILD "B"
State v. Bauer, ___ Wn.2d ___, 2014 WL 3537953 (July 17, 2014) 14

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS.....15

SEARCH WARRANT TO EXTRACT BLOOD SAMPLE HELD NOT TO AUTHORIZE TESTING OF BLOOD SAMPLE
State v. Martines, ___ Wn. App. ___, 2014 WL 3611308 (Div. I, July 21, 2014) 15

DEPARTMENT OF FISH AND WILDLIFE STATUTE AUTHORIZING SEIZURE OF ITEM FOR EVIDENTIARY PURPOSES WITHOUT ANY NOTICE REQUIREMENT DOES NOT PRECLUDE A SUBSEQUENT DECISION TO PURSUE FORFEITURE
Washington State Dep't of Fish and Wildlife v. 1999 Ford F530 Pickup, ___ Wn. App. ___, 2014 WL 3929881 (Div. III, July 17, 2014) 16

ABANDONMENT IS NOT A DEFENSE TO THE CRIME OF RESIDENTIAL BURGLARY
State v. Olson, ___ Wn. App. ___, 2014 WL 3359388 (Div. I, July 7, 2014) 17

CITY ORDINANCE THAT PROHIBITS CARRYING "DANGEROUS" KNIFE DOES NOT VIOLATE RIGHT TO BEAR ARMS UNDER ARTICLE I, SECTION 24 OF WASHINGTON CONSTITUTION OR SECOND AMENDMENT TO FEDERAL CONSTITUTION
City of Seattle v. Evans, ___ Wn. App. ___, 327 P.3d 1303 (Div. I, June 30, 2014) 17

INSUFFICIENT FACTS TO SUPPORT CHARGE OF TRAFFICKING IN STOLEN PROPERTY WHERE DEFENDANT TOOK UNPURCHASED MERCHANDISE FROM STORE SHELF TO THE CUSTOMER SERVICE COUNTER TO "RETURN" THE ITEMS FOR STORE CREDIT
State v. Graham, ___ Wn. App. ___, 327 P.3d 717 (Div. III. June 26, 2014) 18

PUBLIC DUTY DOCTRINE DOES NOT PROTECT COUNTY FROM LIABILITY WHERE DISPATCHER ALLEGEDLY GAVE ASSURANCES THAT TRIGGERED RESCUE DOCTRINE
Mita v. Guardsmark, LLC, ___Wn. App. ___, 2014 WL 2862208 (Div. III, June 24, 2014) 18

CORPUS DELICTI FOR MANSLAUGHTER ESTABLISHED BY BLOOD SPATTER EVIDENCE; BUT DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF HER ALLEGED PTSD AND BATTERED PERSON SYNDROME
State v. Green, ___ Wn. App. ___, 2014 WL 2866555 (Div. II, June 24, 2014) 19

SPECIAL INQUIRY JUDGE SUBPOENA CAN SATISFY ARTICLE 1, SECTION 7
State v. Reeder, ___ Wn. App. ___, 2014 WL 2818992 (Div. I, June 23, 2014) 19

UNDER DUE PROCESS PROTECTIONS, JUROR'S QUESTION TO OFFICER THAT ASKED IF DEFENDANT HAD ASKED WHY HE WAS ARRESTED OR IF HE SEEMED SURPRISED SHOULD NOT HAVE BEEN POSED TO OFFICER BY TRIAL COURT
State v. Terry, ___Wn. App. ___, 2014 WL 2772899 (Div. III, June 19, 2014) 20

ILLEGAL POSSESSION OF A FIREARM IS NOT A CRIME AGAINST PROPERTY AND THUS CANNOT BE THE PREDICATE CRIME FOR FIRST DEGREE BURGLARY
State v. Kindell, ___ Wn. App. __, 326 P.3d 876 (Div. II, June 17, 2014) 21

EVIDENCE HELD SUFFICIENT TO MEET FIRST DEGREE KIDNAPPING STATUTE'S ELEMENT OF "INTENT TO CAUSE EXTREME MENTAL DISTRESS"
State v. Harrington, ___Wn. App. ___, 2014 WL 2750704 (Div. III, June 17, 2014) 21

DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION VIOLATED WHERE CHILD WHOSE HEARSAY WAS ADMITTED INTO EVIDENCE WAS NOT QUESTIONED DIRECTLY ABOUT ALLEGATIONS AND HEARSAY STATEMENT
State v. Kinzle, ___Wn. App. ___, 326 P.3d 870 (Div. I, June 16, 2014) 22

THE DEPARTMENT OF CORRECTIONS POSSESSES THE SOLE AUTHORITY TO GRANT MEDICAL FURLOUGHS TO INMATES
In re Cage, ___ Wn. App. ___, 326 P.3d 805 (Div. III, June 3, 2014) 22

DETECTIVE'S TESTIMONY REGARDING A CONVERSATION BETWEEN THE DEFENDANT AND AN INFORMANT, WHERE THE DETECTIVE WAS PRESENT WITH THE INFORMANT, IS HEARSAY
State v. Hudlow, ___ Wn. App. ___, 2014 WL 1924362 (Div. III, May 13, 2014, publication ordered July 15, 2014) 23

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY PAM LOGINSKY HAVE BEEN UPDATED THROUGH JUNE 2014 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS":

"Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors June 2014," by Pamela B. Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys.

The 400 + page guide by Pam Loginsky is generally updated each year.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) FORMER FELON WHOSE RIGHTS WERE AUTOMATICALLY RESTORED UNDER STATE LAW, BUT WHO COULD NOT CARRY A CONCEALED WEAPON, WAS PROPERLY PROHIBITED FROM POSSESSING A FIREARM UNDER FEDERAL LAW, AND SUCH PROHIBITION DOES NOT VIOLATE THE SECOND AMENDMENT – In Van Der Hule v. Holder, ___ F.3d ___, 2014 WL 3451423 (9th Cir., July 16, 2014), a three-judge panel of the Ninth Circuit holds that a former felon who is prohibited under state law from possessing a concealed weapon is barred by federal law from possessing a firearm and that such ban does not violate his Second Amendment rights.

Petitioner is a former felon whose civil rights were automatically restored under Montana law. He was, however, prohibited from carrying a concealed weapon under Montana law. Petitioner was denied approval of a firearms purchase and brought a declaratory judgment action against the Attorney General of the United States.

18 U.S.C. § 922(g) provides in part:

> It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(a)(2) provides that "a crime punishable by imprisonment for a term exceeding one year":

> [should] be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20) (emphasis added). The last clause of this provision is known as the "unless clause."

The Ninth Circuit concludes that "Montana's prohibition on Van der Hule's obtaining a permit to carry a concealed weapon is a sufficient restriction of his firearm rights to trigger the 'unless clause' of 18 U.S.C. § 921(a)(20). He is, accordingly, forbidden to receive or possess a firearm under federal law and that ban does not violate his Second Amendment rights."

Result: Affirmance of United States District Court (Montana) order granting summary judgment in favor of the Attorney General.

(2) CIVIL RIGHTS ACT LAWSUIT: PLAINTIFF FAILED TO STATE FAILURE TO TRAIN CLAIMS AGAINST COUNTY OR SHERIFF – In Flores v. County of Los Angeles, ___ F.3d ___, 2014 WL 3397219 (9th Cir., July 14, 2014), a three-judge panel of the Ninth Circuit affirms the dismissal of plaintiff's § 1983 lawsuit based on failure to train. The Court summarizes its decision as follows:

> Plaintiff Maria Flores alleges that after she received a traffic ticket, she drove to a Los Angeles County vehicle inspection site to clear the ticket. There, she alleges, she was sexually assaulted by a deputy sheriff, who is to date unidentified. She now sues the County and its sheriff Lee Baca, claiming the assault was a proximate result of their failure properly to train deputy sheriffs "to ensure that Sheriff's [d]eputies do not sexually assault women that [d]eputies come in contact with." This failure to train is alleged to be a violation of plaintiff's constitutional rights, actionable under 42 U.S.C. § 1983. The district court dismissed Flores's claims for failure to state a claim for relief, and she appeals.
>
> Flores's allegations do not establish that the County or Baca were deliberately indifferent to the risk of sexual assault by deputies on members of the public, nor that the assault on Flores was a known or obvious consequence of the alleged lack of training of deputies. Further, in view of the penal code of California, which already prohibited such assault, and which law the deputies were sworn to uphold, and in the absence of any pattern of sexual assaults by deputies, Flores has also failed to allege facts sufficient to state a claim, plausible on its face, that the alleged failure to train officers not to commit sexual assault constituted deliberate indifference. For these reasons, we affirm.

[Footnote omitted]

Result: Affirmance of United States District Court (Central District California) order dismissing plaintiff's lawsuit for failure to state a claim.

(3) PROSECUTION VIOLATED BRADY BY FAILING TO DISCLOSE IMPEACHMENT EVIDENCE RELATING TO A GOVERNMENT WITNESS – In Amado v. Gonzalez. ___ F.3d ___, 2014 WL 3377340 (9th Cir., July 11, 2014), the Ninth Circuit withdraws the prior panel opinion in this case, appearing at 734 F.3d 936 (9th Cir., Oct. 30, 2013), and discussed in the **February 2014 LED at page 9**. That opinion is withdrawn, and replaced by the July 11, 2014 opinion, and may no longer be cited. Because the substituted opinion is not significantly different, in those respects of interest to most LED readers, we will not re-address it.

(4) PROBABLE CAUSE FOR ISSUANCE OF SEARCH WARRANT WOULD REMAIN EVEN IF AFFIDAVIT WAS SUPPLEMENTED WITH INFORMATION OMITTED BY POLICE, RELATING TO WITNESS'S CREDIBILITY – In United States v. Ruiz, ___ F.3d ___, 2014 WL 3377345 (9th Cir., July 11, 2014), a three-judge panel of the Ninth Circuit holds in a 2-1 opinion that probable cause to issue search warrant would remain even if affidavit was supplemented with (omitted) information relating to witness's credibility.

Court staff summarizes the opinion as follows:

> The panel affirmed the district court's denial of a motion to suppress a shotgun seized during the execution of a search warrant in a case in which the defendant

> argued that reckless omissions by the search warrant affiant fatally undermined the magistrate judge's finding of probable cause.
>
> The panel wrote that the failure to disclose to the magistrate judge at the time of the warrant hearing drug related information that raises serious concerns about a witness's credibility is a serious breach of the duty the officer owed to the court. The panel also assumed, without deciding, that two witness's eyewitness statements, standing alone, were not sufficient to support probable cause. The panel affirmed because there was corroboration that the crime being investigated had actually occurred, as well as some specific indication that the identification of the defendant from a photo lineup was sufficiently reliable.

[Emphasis added]

Result: Affirmance of United States District Court (Idaho) denial of motion to suppress federal firearms charges against Martin Cantu Ruiz.

LED EDITORIAL COMMENT: One of the most difficult points to assess in drafting search warrant affidavits is whether facts that seem irrelevant or very marginally relevant can be omitted from an affidavit. Unfortunately, what may seem to be irrelevant to a law enforcement officer applying his or her own common sense may not seem to be irrelevant to a reviewing judge applying his or her own version of common sense. Also of concern is that civil liability under the Civil Rights Act can result from a reckless or deliberate omission of a fact that tends to negate probable cause. See, for example, Chism v. Washington State, 661 F.3d 380 (9th Cir. 2011) Jan 12 LED:16. The best rule on this point for an officer-affiant is that when in doubt, the officer-affiant should include the information, or at least run the omission question by a deputy prosecutor or agency legal advisor.

(5) NINTH CIRCUIT AFFIRMS JURY VERDICT IN FAVOR OF OFFICER BASED ON TERMINATION IN RETALIATION FOR TESTIFYING IN FAIR LABOR STANDARDS ACT (FLSA) LAWSUIT – In Avila v. Los Angeles Police Dep't, ___ F.3d ___, 2014 WL 3361123 (9th Cir., July 10, 2014), a three-judge panel of the Ninth Circuit affirms a jury verdict in favor of an officer who was terminated in retaliation for testifying in a Fair Labor Standards Act (FLSA) lawsuit.

The Court summarizes the case as follows:

> Leonard Avila, a police officer, periodically worked through his lunch break but did not claim overtime. According to his commanding officer, Avila was a model officer. The Los Angeles Police Department (LAPD), however, deemed Avila insubordinate for not claiming overtime and fired him.
>
> Not coincidentally, that termination occurred only after Avila had testified in a Fair Labor Standards Act (FLSA) lawsuit brought by fellow officer, Edward Maciel, who sought overtime pay for working through his lunch hours. Avila then brought this action, claiming that he was fired in retaliation for testifying, in violation of the FLSA antiretaliation provision, 29 U.S.C. § 215(a)(3). The evidence at trial was that the only officers disciplined for not claiming overtime were those who testified against the LAPD in the Maciel suit, notwithstanding uncontested evidence that the practice was widespread in the LAPD.

> A jury returned a verdict in favor of Avila on his FLSA anti-retaliation claim. On appeal, the City of Los Angeles and the LAPD contend that the jury was not correctly instructed. We find no reversible error and affirm.

Result: Affirmance of United States District Court (Central District California) jury verdict in favor of the officer.

(6) CIVIL RIGHTS ACT LAWSUIT: CASE MUST GO TO TRIAL WHERE OFFICERS ENTERED A HOME WITHOUT A WARRANT, LOOKING FOR INTRUDERS, POINTED GUNS AT TEENAGE BOYS PRESENT IN THE HOME, SHOT THE FAMILY DOG, AND USED FORCE AGAINST HOMEOWNER WHO RECENTLY HAD BACK SURGERY – In Sandoval v. Las Vegas Metropolitan Police Dep't, ___ F.3d ___, 2014 WL 2936254 (9th Cir., July 1, 2014), a three-judge panel of the Ninth Circuit reverses a district court grant of qualified immunity to officers.

The Ninth Circuit summarizes the case as follows:

> This appeal arises out of the events of October 24, 2009, when the Las Vegas police, on the lookout for two white males, mistook a teenaged boy and his friends, all Hispanic, for intruders in the boy's own home. In the course of the afternoon, police pointed guns at the boys, entered the home without a warrant, handcuffed and detained the boys and others, and shot and killed the family dog. The family ("the Sandovals") brought suit against the police, alleging violations of their constitutional rights and related rights under state law. The district court granted summary judgment to the police department and the officers on all claims. We reverse the judgment on the Fourth Amendment claims for excessive force and unlawful entry and on certain of the state law claims, and affirm the judgment on the remaining claims.

The Ninth Circuit views the factual allegations in the best light for the plaintiffs, as courts must do in reviewing a summary judgment grant of qualified immunity to law enforcement officers in a Civil Rights Act lawsuit. The Court sees constitutional fault in the officers' alleged ignoring of the facts: (1) that the persons inside the home did not match the descriptions of the reported possible prowlers, and (2) that the officers failed to ask the home's occupants any questions before forcibly entering the house with guns drawn under their apparent belief (unjustified) that a burglary was in progress. The Ninth Circuit concludes that the officers' entry was unlawful and not supported by probable cause of any crime, or the existence of an exigency or emergency aid exception. The panel further concludes that the officers used excessive force with regard to pointing a gun at the boys and later handcuffing them, particularly since the officers were responding to a call of prowling, which, unlike burglary, does not carry an inherent risk of violence.

Result: Affirmance in part, reversal in part, of United States District Court (Nevada) order granting summary judgment dismissal to defendants; remand for trial.

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WASHINGTON STATE SUPREME COURT

FOUR RULINGS UNDER WASHINGTON CONSTITUTION: 1) FRISK WAS JUSTIFIED BY LATE HOUR, PLUS OFFICER'S 1-ON-1 CONTACT ON STREET WITH TRAFFIC VIOLATOR, PLUS OFFICER'S KNOWLEDGE THAT DETAINEE HAD FALSELY DENIED POSSESSING A WEAPON IN A CONTACT A WEEK BEFORE WHEN THE DETAINEE IN FACT WAS

DISCOVERED IN EARLIER CONTACT TO HAVE DERRINGER-STYLE GUN IN POCKET; 2) FRUIT OF POISONOUS TREE DOCTRINE IS NOT APPLICABLE TO FRISKS; 3) OFFICER-SAFETY CONSIDERATIONS DID NOT SUPPORT SEARCH OF SIX-BY-FOUR-BY-ONE-TO-TWO-INCH LIGHTWEIGHT, HARD, OPAQUE BOX LAWFULLY TAKEN FROM DETAINEE'S POCKET; 4) CONSENT TO SEARCH BOX WAS NOT ESTABLISHED TO BE VOLUNTARY

State v. Russell, ___Wn.2d ___, 2014 WL 3537955 (July 10, 2014)

Facts: (Excerpted from lead opinion for Washington Supreme Court)

> At 11:00 p.m. on September 5, 2011, [an officer] was on patrol . . . when he observed a person riding a bicycle without a headlight, in violation of traffic laws. See RCW 46.61.780. [The officer] saw the cyclist change into the left lane and travel for several blocks in the direction of oncoming traffic, another traffic violation. [The officer] pulled the cyclist over at a nearby gas station.
>
> After pulling the cyclist over, [the officer] recognized him as [Tanner Zachary Roy] Russell, a passenger in a traffic stop that the officer made a week earlier. During the prior stop, [the officer] asked Russell if he had any weapons on him of any kind and Russell said no. But during the course of the stop, another officer found a loaded .22 caliber, derringer-style handgun in Russell's pocket. The gun was a very small and easily concealable weapon meant for close-range shooting. The officers confiscated the gun and issued Russell a citation.
>
> Because of that previous encounter, [the officer] feared that Russell might have a weapon and decided to frisk him. He was especially suspicious because Russell had lied about the gun during the previous stop and because the gun was so concealable. During the frisk [the officer] felt a small, hard container in Russell's pants pocket. He testified that the container was approximately six inches long, four inches wide, and "an inch or two" deep. **[LED EDITORIAL NOTE: The Supreme Court opinions in this case do not mention that the trial court record and the briefing, including pictures in both the record and the briefing, establish that the box was a Mini Maglite box.]**
>
> [The officer] testified to what happened next:
>
> A. **I know that box was not a gun, but** based on how big the box or that container was and the fact that he hid a very small caliber weapon in his front pocket the previous contact, **I still felt that I needed to check what's in that box for my safety. [Emphasis added by LED Editor]**
>
> Q. Okay. So how did you go about doing that?
>
> A. Once I felt that to make sure everything matches as far as how big and remember how big the other weapon was, I asked him, What's this. He says, It's a box. [I ask] Do you mind if I take it out? He says, Okay.
>
> Q. So you did ask him for consent to search the box?
>
> A. (Witness nods head.)
>
> Q. Did he appear to have any problem with that?

A. No.

> . . . . [The officer] opened the container and found one syringe containing methamphetamine. Though he testified that he performed the search to ensure that the box did not contain a gun **[LED EDITORIAL NOTE: This inaccurately describes a fair reading of the officer's imprecise testimony quoted above in bold in this LED entry - - "I know that the box was not a gun, but . . . I still felt that I needed to check what's in that box for my safety".]**, [the officer] admitted "that the syringe weighed only a fraction of what the pistol weighed."

Proceedings below:

The prosecutor charged Russell with possession of methamphetamine. The Superior Court judge granted his pretrial suppression motion. In an unpublished opinion, the Court of Appeals reversed the Superior Court in a 2-1 decision upholding the search of the box as being within the lawful scope of a justified frisk based on officer safety.

ISSUES AND RULINGS:

LED EDITORIAL NOTE: In an unusual blanket statement in a footnote at the outset of the legal analysis, the lead opinion authored by Justice Owens declares as to the entirety of its legal analysis that only the Washington constitution, not the Fourth Amendment, is being considered as to all search and seizure issues. The footnote states: "We analyze the issues in this case under the Washington constitution because article I, section 7 'grants greater protection to individual privacy rights than the Fourth Amendment.' State v. Harrington, 167 Wn.2d 656, 663 (2009)." We would hope that prosecutors will continue to argue to courts that where there has been no independent grounds ruling in a published appellate court decision on a particular issue, the Fourth Amendment and article I, section 7 standards are the same.

1) Under the Washington constitution, was the officer justified in conducting a frisk in this traffic stop based on the late hour and darkness, the fact that the contact was 1-on-1, and the fact that the detainee falsely claimed in a contact the previous week not to have a weapon when he in fact had a derringer-style gun in his pocket in a contact the previous week? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court)

2) Does the Washington constitution's fruit of the poisonous tree doctrine apply to frisks? (ANSWER BY SUPREME COURT: No, rules an 8-1 majority)

3) Under the Washington constitution, did officer-safety considerations support the officer's search of the contents of the six-by-four-by-one-to-two-inch lightweight, hard, opaque box that the officer had lawfully removed from the detainee's pocket? (ANSWER BY SUPREME COURT: No, rules a unanimous Court)

4) Does the record support the conclusion that the search of the mini-Maglite box was conducted with Russell's voluntary consent for purposes of Washington constitutional analysis? (ANSWER BY SUPREME COURT: No, rules a unanimous Court)

Result: Reversal of Court of Appeals decision that reversed the Lewis County Superior Court's suppression of the methamphetamine evidence supporting a possession charge against Tanner

Zachary Roy Russell; remand of case to Superior Court, presumably for suppression of the evidence and dismissal of the charge.

ANALYSIS: (Excerpted from Supreme Court's lead opinion; subheading # 2 added by LED Ed. and the Court's subheading numbers 2 and 3 renumbered, respectively, to 3 and 4)

1. The Initial Protective Frisk Was Justified

> . . . . A protective frisk is justified "when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" State v. Collins, 121 Wn.2d 168, 173 (1993) **July 93 LED:07** (quoting Terry v. Ohio, 392 U.S. at 21-24). "'A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing.'" State v. Belieu, 112 Wn.2d 587, 601-02 (1989) . . . . (quoting Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966)).
>
> In this case, the stop and frisk was justified because [the officer] could point to specific and articulable facts that supported a belief that Russell could be armed and dangerous. After legitimately stopping Russell for traffic violations, [the officer] immediately recognized him from a stop one week prior. At that prior encounter, Russell denied having a weapon when he in fact possessed a small derringer-style gun. [The officer] testified that this specific and articulable fact made him fear for his safety. In addition, the encounter was late at night and [the officer] was the only officer making the stop. These circumstances contribute to a reasonable safety concern. Nothing about the initial stop and frisk was arbitrary or harassing. We hold that the officer was justified in performing the initial protective frisk.
>
> This case is similar to Collins, where this court upheld the warrantless stop and frisk of a suspect whom the officer recognized from an encounter two months prior. During the previous encounter, the officer found "'a large amount of either .38 or .357' ammunition, a holster, and a set of handcuffs" in the suspect's truck. That fact, along with the timing of the latter stop (it was at 4:00 a.m.) and the officer's knowledge that the suspect had a prior felony arrest, led the court to conclude that the frisk was reasonable.
>
> The justification for the initial frisk is stronger in this case than in Collins. First, the prior encounter occurred just one week before the stop in question rather than two months. Second, the officer actually found a gun in the prior encounter rather than ammunition and a holster. Third, Russell lied about the gun in the prior encounter while the suspect in Collins voluntarily revealed the ammunition. Finally, [the officer] was alone during the stop in question and therefore more at risk than the officer in Collins, who made the stop with a partner. . . .

2. The "Fruit Of The Poisonous Tree Doctrine" Does Not Apply To Frisks

> Russell argues that if the officer used the prior encounter to justify the frisk in this case, then the State must prove the validity of the prior encounter or the frisk would be unconstitutional as "fruit of the poisonous tree" [under the constitutional Exclusionary Rule]. We disagree. Russell cites no case holding that the "fruit of the poisonous tree" doctrine applies to Terry frisks, and it would be absurd to

hold that it does. The purpose of Terry frisks is to protect officer and bystander safety. An officer need only identify specific and articulable facts that create an objectively reasonable belief of danger. We would undermine the purposes of Terry and create unjustifiable risks if we hold that an officer in the field must ignore specific facts that indicate potential danger. We reject Russell's "fruit of the poisonous tree" argument.

3. The Warrantless Search Of The [Box] During The Protective Frisk Was Not Justified

The scope of a valid Terry frisk is limited to protective purposes. The frisk must be brief and nonintrusive. "If the officer feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object." State v. Hudson, 124 Wn.2d 107, 113 (1994) **Oct 94 LED:06** "[o]nce it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent." State v. Allen, 93 Wn.2d 170, 173 (1980).

The search of the container in this case violated Russell's constitutional right to be free from police intrusion. The officer felt a small container, removed it, and then opened it without a warrant. He admitted that the contents of the container weighed only a fraction of what the pistol weighed. Therefore, we conclude that no reasonable person could believe that the container housed a gun. At the point at which he discovered that the container did not house a weapon, his authority to invade Russell's privacy and search the container any further ended. **[LED EDITORIAL NOTE: As we point out in our editorial note above, and as we address further in our editorial comment below, the Court misreads the officer's imprecise testimony, which under a fair reading was that he was also concerned that the box might contain a weapon other than a gun.]**

This case is similar to Allen, where this court held that the warrantless search of a wallet found during a stop and frisk was unconstitutional. The court determined that once the officer discovered that the wallet was not a weapon, the permissible scope of the frisk ended. The Court of Appeals applied similar logic and held that the warrantless search of a cigarette pack found during a Terry frisk was unconstitutional in State v. Horton, 136 Wn. App. 29, 38-30 (2006) **Jan 07 LED:09**. The court in Horton rejected the State's argument that the cigarette pack could have contained a small weapon like a razor blade or another small, sharp object. The court feared that if it accepted the State's argument, the scope of the Terry frisk would be "essentially unlimited, since the tiniest object can conceivably be used offensively."

These cases show that in Washington, warrantless searches of small containers found during protective frisks are generally unconstitutional. The container itself was not a weapon, and the officer had no authority to search through it after realizing that it posed no threat. Furthermore, once the officer took control of the container the risk of danger ended. He could have completed the encounter while holding onto the container, thus eliminating any perceived danger.

The State argues that the search was justified because the officer had to return the container at the end of the encounter. While it is true that the officer had to return the container, it does not follow that the officer may always search it first.

See State v. Glossbrener, 146 Wn.2d 670, 682 (2002) **Sept 02 LED:07** (holding that an officer violated a detainee's rights when he performed a protective search of the passenger compartment of the detainee's car after completing his investigation and "the only thing left was for [the detainee] to leave"). **[LED EDITORIAL NOTE: Under the Fourth Amendment, the United States Supreme Court takes a different view of officer safety in this context and sees a continuing risk to the officer in releasing a detainee back to his vehicle at the conclusion of a seizure, or, presumably, in returning an item to a detainee at the conclusion of a seizure. Michigan v. Long, 463 U.S. 1032, 1052 (1983). There is always a chance that the Washington Supreme Court will reconsider this point in some future case, but for now, the Washington constitution is interpreted differently than the Fourth Amendment on this concept regarding officer safety.]** Terry frisks are limited, external pat-downs to ensure safety. Any further intrusion must end as soon as an officer discovers that the suspect does not have a weapon. An officer may not search through a detainee's personal effects under the unreasonable belief that they may contain a weapon. We hold that the search of the container violated Russell's constitutional rights.

4. The State Did Not Show That Russell Voluntarily Consented To The Search

. . . .

Police do not need a warrant for searches if they have valid consent. The State has the burden to show that the consent was voluntarily given. Whether consent is freely given is a question of fact dependent upon the totality of the circumstances. A court considers several factors, including [but not limited to] "(1) whether Miranda warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right not to consent." State v. Shoemaker, 85 Wn.2d 207, 212 (1975). No one factor is dispositive.

The State has not met its burden to prove that Russell voluntarily consented to the search. In fact, the record does not show that Russell consented at all. The officer testified only that Russell did not "appear to have any problem" with the search. The State offered no additional evidence of consent. Even the Court of Appeals noted that the evidence supporting the finding of consent is "sketchy." We review findings of fact for substantial evidence, and here, we do not find substantial evidence supporting the court's finding that Russell consented to the search**. [LED EDITORIAL NOTE: The trial court found, however, that the officer did not have a reasonable basis for frisking Russell in the first place, thus rendering irrelevant any consent to search the detainee gave after the officer found the box.]** Additionally, the record contains no evidence that Russell's supposed consent was voluntary. The officer did not give Russell Miranda warnings nor did he advise him of the right to refuse consent. Nor did the State establish Russell's education or intelligence level. The search cannot be otherwise justified on the basis of Russell's consent.

[Some case citations omitted or revised; record citations omitted; footnotes omitted]

JUSTICE GONZALEZ'S CONCURRING OPINION:

Justice Gonzalez writes a concurring opinion indicating that: (1) the lead opinion should have been clearer that, even under this sparse suppression hearing record, the removal of the hard, opaque box from the detainee's pocket was lawful under the Washington constitution, and that it was only the subsequent search of the box that exceeded the proper scope of a frisk under the Washington constitution; and (2) the lead opinion did not need to address the Exclusionary Rule's "fruit of the poisonous tree" doctrine, and the lead opinion may have been wrong in its cursory analysis and conclusion on that issue.

LED EDITORIAL COMMENTS:

1. TRY AGAIN WITH IN A NEW CASE WITH A DIFFERENT RECORD?

We are troubled by the scope-of-frisk analysis in this case. We have no doubt that the federal courts would uphold the opening of the Mini Maglite box as part of a reasonable frisk under the Fourth Amendment. See, for example, United States v. Hartz, 458 F.3d 1011 (9th Cir. 2005) Oct 06 LED:02. A variety of small weapons could have been hidden in the Mini Maglite case, and our assessment of cases under the Fourth Amendment is that the courts would not question the officer's founded belief that the box might contain a weapon and should be immediately opened for safety reasons. Courts have even held under the Fourth Amendment that a loaded hypodermic needle is a weapon subject for purposes of the frisk rule. See People v. Autry, 283 Cal. Rptr. 417 (Cal. App. 1991) ("It hardly takes the imagination of Alfred Hitchcock to think up any number of nasty ways a hypodermic needle and syringe can do grievous injury, at least in close contact.")

We concede, however, that courts must decide cases on their factual record, not on abstract theories and concepts, and that the suppression hearing record was weak in its support of the officer's safety concerns about what might have been lurking in the detainee's Mini Maglite box. While the appellate prosecutor put the best light she could on the officer's testimony in her Statement of Additional Authorities to the Supreme Court following oral argument, the officer's testimony at the suppression hearing (quoted above in part in the Facts section of this LED entry) was not as precise as it could have been as to whether he was searching the box for a type of weapon other than a gun generally or a gun specifically similar to the Derringer-type gun found in the detainee's pocket the week before. The Supreme Court's lead opinion in Russell seized on the imprecision and concluded that the officer had in reality eliminated the possibility of the box containing any weapon when the officer determined the weight of the Mini Maglite box was considerably less than the weight of the Derringer-type gun seized the week before.

Ideally, the officer would have been precise in regard to the breadth of his safety concerns, and he would also have explained, with the trial deputy prosecutor leading the way, about his training and experience and the literature and Internet information on smaller, lighter pen/zip guns, "mouse" guns etc. (which our own Internet googling suggests may include even homemade "Mini Maglite guns" and other devices that can cause a bullet to fire), as well as explaining about the variety of non-firearm weapons (a balisong or other knife or any of a variety of shanks and razor devices) that could have been secreted in the relatively roomy 6-by-4-by-1-to-2 inch hard, opaque box. Pen/zip guns are discussed in law enforcement training such as that by Lifelong Training & Calibre Press ("Surviving Hidden Weapons") and they also are noted in written research studies such as that by three FBI authors in their 2006 publication (at page 57): "Violent Encounters: Felonious Assaults on America's Law Enforcement Officers"

("Manufacturers also have produced handguns intentionally disguised as other objects, including pens, pagers, cell phones, belt buckles and wallets.")

We hope that in the right circumstances some Washington prosecutors would be willing to try to make a better record about small weapons variability and take to the Washington Supreme Court a scope-of-frisk case involving search of a similar container under similar facts. It is one thing to generally reject the search of a cigarette pack for a tiny weapon per the State v. Horton Court of Appeals decision discussed in Russell (even though federal courts have upheld such searches; see the Hartz case cited in this comment). But it is quite another thing to foreclose checking the contents of such a hard, opaque, relatively roomy box as the Mini Maglite box here.

Nonetheless, officers must keep in mind the rule of Russell/Horton that, to the extent that a reasonable officer would conclude that a container found during a frisk could contain only a miniature weapon, while the container may be lawfully taken temporarily from the suspect during the Terry frisk, the container cannot be lawfully opened under Terry until the officer obtains valid consent, makes an actual lawful custodial arrest, or obtains a search warrant. If the Terry stop terminates without one of these three things happening, then the officer must figure out a way to safely return the unopened item. For instance, the officer may tape the container shut with evidence tape or ask the suspect to facilitate locking the item into a trunk. Discovery of such a container during a frisk may also support increasing the officer's security by temporarily handcuffing a previously non-cuffed detainee. Handcuffing is not per se lawful under Terry v. Ohio with every detainee, but the brief handcuffing during frisk procedures is lawful where it is reasonably necessary in light of the circumstances (such as with an increasingly hostile or agitated detainee or one who will not obey directions to keep his hands in sight, etc.)

As always, of course, we urge officers to consult their local prosecutors and agency legal advisors on legal questions.

2. THE LEAD OPINION MAY BE CORRECT ON THE VOLUNTARINESS-OF-FIRST-PARTY-CONSENT-TO-SEARCH ISSUE BUT THE OPINION'S ANALYSIS IS A BIT BRIEF

For an excellent comprehensive outline of the case law and factors to be considered on voluntariness of first-party consent to search, see pages 276 through 279 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors June 2014," by Pamela B. Loginsky, Staff Attorney, WAPA. As noted on page 3, of this September 2014 LED, the 2014 version of Ms. Loginsky's Guide is available on the CJTC LED Internet page and also on the home page (under What's New) of the Washington Association of Prosecuting Attorneys.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

LEAVING LOADED GUN AT HOME CANNOT BE "LEGAL CAUSE" OF INJURY TO CHILD "B" WHERE CHILD "A" FOUND THE LOADED GUN AND TOOK IT TO SCHOOL WHERE IT ACCIDENTALLY DISCHARGED INJURING CHILD "B" – In State v. Bauer, ___ Wn.2d ___, 2014 WL 3537953 (July 17, 2014), the Washington State Supreme Court holds that "legal cause" in criminal cases is narrower than "legal cause" in torts cases and thus, leaving a loaded gun at home cannot be the legal cause of injury to child B. The court also rejects accomplice liability theory.

A child took a loaded gun, belonging to his mother's boyfriend (Bauer) from the home where the mother and boyfriend lived. The child brought the gun to school in his backpack a few days later. The gun discharged as the child was rummaging in his backpack at the end of the day. The bullet struck a classmate, and seriously injured her.

The State charged Bauer with assault in the third degree as well as an accomplice.

The Court summarizes is conclusion as follows:

> The legislature defined the crime of third degree assault to reach a person who "[w]ith criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." RCW 9A.36.031(1)(d). Bauer asserts that the State has failed to make a prima facie case that his conduct of leaving guns around his house loaded and accessible to invited children "caused" the bodily harm here. We agree. Although causation in fact is the same in criminal and civil cases, legal causation is not. Our case law suggests that legal causation does not extend as far in criminal cases as it does in tort cases, and even our civil cases do not extend liability as far as the State seeks to do in this case. We therefore reverse the decision of the Court of Appeals.

Justice Gonzalez dissents.

Result: Reversal of Kitsap County Superior Court denial of Douglas L. Bauer's motion to dismiss assault in the third degree charge.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) SEARCH WARRANT TO EXTRACT BLOOD SAMPLE HELD NOT TO AUTHORIZE TESTING OF BLOOD SAMPLE – In State v. Martines, ___ Wn. App.. ___, 2014 WL 3611308 (Div. I, July 21, 2014), the Court of Appeals holds that the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested.

The defendant was involved in a rollover collision. Martines smelled of intoxicants, had bloodshot and watery eyes, and stumbled while walking. The officer sought a warrant to extract a blood sample from Martines. The Court of Appeals notes regarding the application:

> [The officer's] affidavit of probable cause stated that a blood sample "may be tested to determine his/her current blood alcohol level and to detect the presence of any drugs that may have impaired his/her ability to drive." He obtained a warrant that authorized a competent health care authority to extract a blood sample and ensure its safekeeping. The warrant did not say anything about testing of the blood sample.

The Court summarizes its opinion as follows:

> The extraction of blood from a drunk driving suspect is a search. Testing the blood sample is a second search. It is distinct from the initial extraction because its purpose is to examine the personal information blood contains. We hold that

the State may not conduct tests on a lawfully procured blood sample without first obtaining a warrant that authorizes testing and specifies the types of evidence for which the sample may be tested.

Result: Reversal of King County Superior Court conviction of Jose Figeroa Martines for felony driving while under the influence.

Status: King County is moving for reconsideration of the Court of Appeals decision

LED EDITORIAL COMMENT: Law enforcement agencies should immediately review their search warrant for blood forms to ensure that both the affidavits AND the search warrants seek, and require, forensic testing of blood for the presence of alcohol and drugs by the Washington State Toxicology Laboratory. (Law enforcement legal advisors and prosecutors are updating forms as this LED entry is being drafted, so hopefully all agencies will have updated their forms by the time this LED is published.) Additionally, because the Court of Appeals specifically holds that the analysis of blood is a separate search from the extraction, the safest approach – at least for the time being – may be for agencies to obtain a warrant authorizing forensic analysis of blood in cases where the suspect consents to the initial extraction (or at least to obtain consent to the analysis as well). While the Martines decision only concerns alcohol and drug testing of a blood sample collected pursuant to a search warrant for evidence of the crime of DUI, officers should check with their local prosecutors and legal advisors regarding the inclusion of testing authorization language in other types of search warrants.

As readers are probably aware, the WSP has revised its search warrant template to authorize forensic testing of the blood sample for intoxicating liquor, marijuana, or other drugs. Agencies using this template should use the new template when requesting search warrants for blood draws. The revised search warrant for blood template is available on the WSP website at: http://www.wsp.wa.gov/breathtest/dredocs.php, as well as the Washington Association of Prosecuting Attorneys (WAPA) website at: http://www.waprosecutors.org/. (The revised search warrant template also contains language authorizing the submittal of search warrant applications by electronic means. Officers should follow their agency's protocols for submitting warrants by email or other electronic means.) Additionally, officers should expect to hear from prosecutors regarding search warrants for retesting of blood that was previously tested pursuant to a warrant that did not specifically require testing. Such warrants will likely only be sought in felony cases.

The WSP has also revised its voluntary blood draw consent (page 7 of the DUI Arrest Report packet) to authorize forensic testing of the blood sample for intoxicating liquor, marijuana, or other drugs. Agencies MUST use this revised form when requesting consent for a blood draw and should ensure that page 7 in any existing DUI Arrest Report packets is replaced with the revised page 7. The revised voluntary blood draw consent form is available on the WSP website at: http://www.wsp.wa.gov/breathtest/btpindex.php#dui. The Spanish translation of the voluntary consent is forthcoming and will be available soon.

(2) DEPARTMENT OF FISH AND WILDLIFE STATUTE AUTHORIZING SEIZURE OF ITEM FOR EVIDENTIARY PURPOSES WITHOUT ANY NOTICE REQUIREMENT DOES NOT PRECLUDE A SUBSEQUENT DECISION TO PURSUE FORFEITURE – In Washington State Dep't of Fish and Wildlife v. 1999 Ford F530 Pickup, ___ Wn. App. ___, 2014 WL 3929881 (Div. III, July 17, 2014), the Court of Appeals holds that RCW 77.15.094, which authorizes seizure of

evidence without notice for evidentiary purposes, does not preclude a subsequent agency decision to "seize" the item for forfeiture purposes and give the 15 day notice that is required under a separate forfeiture statute. RCW 77.15.094 authorizes the search and seizure of evidence suspected of use in the violation of Fish and Wildlife laws or regulations without any sort of formal notice, and the statute also provides "[s]eizure of evidence of a crime does not preclude seizure of the property for forfeiture as authorized by law." RCW 77.15.070, which is the general Fish and Wildlife forfeiture statute, does require 15 day notice.

The Court of Appeals rejects the vehicle owner's public policy argument that the government could unreasonably prolong proceedings by originally seizing items under RCW 77.15.094 and then waiting for a long period before giving the 15 day notice of pursuit of forfeiture under RCW 77.15.070. The Court of Appeals notes that this public policy argument does not override the language of the statute, and the Court notes that an owner of property has the option at any time of invoking a court rule, CrR 2.3(e), to seek return of unlawfully seized property where an item has been unlawfully seized for evidentiary purposes under RCW 77.15.094.

Result: Reversal of Whatcom County Superior Court order dismissing forfeiture proceedings.

(3) ABANDONMENT IS NOT A DEFENSE TO THE CRIME OF RESIDENTIAL BURGLARY – In State v. Olson, ___ Wn. App. ___, 2014 WL 3359388 (Div. I, July 7, 2014), the Court of Appeals holds that abandonment is not a defense to the crime of residential burglary.

"A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle." RCW 9A.52.025(1). "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

"In any [criminal trespass prosecution] it is a defense that: (1) A building involved in an offense under RCW 9A.52.070 [criminal trespass in the first degree] was abandoned; . . ." RCW 9A.52.090(1).

The Court of Appeals concludes:

> [u]nder the plain and unambiguous language of the statute, the defense of abandonment applies only to the crime of criminal trespass. The legislature did not provide the statutory defense of abandonment as a defense to residential burglary, and the supreme court in [City of Bremerton v. Widell, 146 Wn.2d 561, 51 P.3d 733 (2002)] did not hold otherwise.

Citing State v. Jensen. 149 Wn. App. 393 (2009) **May 09 LED:18**.

Result: Affirmance of King County Superior Court conviction of Chad Bruce Olson for residential burglary.

(4) CITY ORDINANCE THAT PROHIBITS CARRYING "DANGEROUS" KNIFE DOES NOT VIOLATE RIGHT TO BEAR ARMS UNDER ARTICLE I, SECTION 24 OF WASHINGTON CONSTITUTION OR SECOND AMENDMENT TO FEDERAL CONSTITUTION – In City of Seattle v. Evans, ___ Wn. App. ___, 327 P.3d 1303 (Div. I, June 30, 2014), the Court of Appeals holds that a City of Seattle ordinance that prohibits carrying a "dangerous" knife (any fixed-blade knife or a knife with a blade more than 3 ½ inches) does not violate either the state or federal right to bear arms.

The defendant was found by police in public in possession of a fixed blade kitchen knife in a pants pocket. He was charged with violating a City of Seattle ordinance that makes it unlawful to knowingly "[c]arry concealed or unconcealed on his or her person any dangerous knife, or carry concealed on his or her person any deadly weapon other than a firearm." A dangerous knife is "any fixed-blade knife and any other knife having a blade more than three and one-half inches (3 1/2″) in length." A fixed-blade knife includes "any knife, regardless of blade length, with a blade which is permanently open and does not fold, retract or slide into the handle of the knife, and includes any dagger, sword, bayonet, bolo knife, hatchet, axe, straight-edged razor, or razor blade not in a package, dispenser or shaving appliance." Three relatively broad exceptions are provided under the ordinance.

Result: Affirmance of Seattle Municipal Court conviction (and King County Superior Court order affirming) of Wayne Evans for unlawfully carrying a dangerous weapon.

(5) INSUFFICIENT FACTS TO SUPPORT CHARGE OF TRAFFICKING IN STOLEN PROPERTY WHERE DEFENDANT TOOK UNPURCHASED MERCHANDISE FROM STORE SHELF TO THE CUSTOMER SERVICE COUNTER TO "RETURN" THE ITEMS FOR STORE CREDIT – In State v. Graham, ___ Wn. App. ___, 327 P.3d 717 (Div. III. June 26, 2014), the Court of Appeals holds defendant's act of taking unpurchased merchandise from a store shelf to the customer service counter to "return" the items (in exchange for store credit) does not amount to trafficking in stolen property because the intent is not to deprive the store of the merchandise, but instead the intent is to deprive the store of only the value of the merchandise. (NOTE: The defendant's actions would amount to theft.) Likewise the use of the store credit obtained in exchange for the "returned" merchandise to buy an additional item does not constitute trafficking in stolen property.

Result: Affirmance of Grant County Superior Court order granting defendant Chantell M. (Simonton) Graham's motion to dismiss charge of trafficking in stolen property.

(6) PUBLIC DUTY DOCTRINE DOES NOT PROTECT COUNTY FROM LIABILITY WHERE DISPATCHER ALLEGEGLY GAVE ASSURANCES THAT TRIGGERED RESCUE DOCTRINE – In Mita v. Guardsmark, LLC, ___Wn. App. ___, 2014 WL 2862208 (Div. III, June 24, 2014), Division Three of the Court of Appeals rules that a civil lawsuit that involves a claim for a death against Spokane County must go to trial based in part on the rescue doctrine's exception to the public duty doctrine. The plaintiffs allege that a family member called the Spokane County Crime Reporting Center (SCRC) and reported as missing an 84-year-old man who had failed to return to jury duty or home that afternoon. The plaintiffs further allege that the family member who called suspended his own search for the man after the dispatcher allegedly promised to dispatch an officer to search for the missing man, but then failed to send a dispatch. The missing man ended up freezing to death in the snow near the courthouse where he had been serving on a jury the day he went missing. The Mita Court notes that SCRC disputes the plaintiffs' factual allegations regarding the content of the family member's telephone conversation with the dispatcher, but the Court explains that this is a fact question for a jury to decide.

The public duty doctrine generally shields government entities from liability for negligence in carrying out certain obligations under the rationale that an agency's duty to the general public does not support a claim of a civil liability duty to a particular victim. There are several exceptions to the public duty doctrine, one of which is the rescue doctrine. Under the rescue doctrine, a party, including a government agency, undertakes a civil liability duty if (1) the actor voluntarily promises to aid or warn a person in need, and (2) the person in need or a person

acting on behalf of the person in need reasonably relies on the promise. The Mita Court concludes, among other things, that the rescue doctrine applies to the County under the facts alleged by the plaintiffs in this case.

Result: Reversal of Spokane County Superior Court summary judgment order that dismissed the case against the County and that also dismissed a claim against a contracted security firm (the facts and issues in the case against the security firm are not addressed in this LED entry); case remanded for trial on the claims against the County and the security firm.

(7) CORPUS DELICTI FOR MANSLAUGHTER ESTABLISHED BY BLOOD SPATTER EVIDENCE; BUT DEFENDANT SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE OF HER ALLEGED PTSD AND BATTERED PERSON SYNDROME – In State v. Green, ___ Wn. App. ___, 2014 WL 2866555 (Div. II, June 24, 2014), the defendant loses her appeal on a corpus delicti issue but wins on an evidentiary issue. The defendant had initially told investigating officers and two of her sons that she shot her husband of 57 years because he asked her to do it. But at trial she claimed that she did not shoot her husband, that she did not recall making the alleged statements, and that she could not explain why she would have said that she shot her husband.

Under the common law corpus delicti rule, a defendant generally cannot be convicted on his or her incriminating out-of-court statement alone. The State must present some independent evidence that a crime occurred. To establish the corpus delicti for a criminal homicide, the State must present some independent evidence of the fact of death and a causal connection between the death and a criminal act. The Green Court rules 3-0 that, while the evidence was conflicting, there was such independent evidence in this case in the form of: (1) a detective's testimony about the lack of blood spatter on the victim's left thumb, which indicated that the thumb was outside, not inside, the trigger guard, when the victim was shot; and (2) the pathologist's testimony that the blood spatter evidence was consistent with the theory that someone other than the victim pulled the trigger.

On another issue, the Court of Appeals rules 2-1 that the trial court erred in excluding a defense expert's testimony that the defendant's alleged PTSD and her alleged battered person syndrome could explain why she might have said that she shot the victim when she did not. The majority concludes that the expert testimony would help the jury understand concepts that are beyond the understanding of laypersons, and that, if properly limited, the testimony would not invade the province of the jury.

Result: Reversal of Kitsap County Superior Court conviction of Darlene Marie Green for first degree manslaughter; case remanded for retrial.

(8) SPECIAL INQUIRY JUDGE SUBPOENA CAN SATISFY ARTICLE 1, SECTION 7 – In State v. Reeder, ___ Wn. App. ___, 2014 WL 2818992 (Div. I, June 23, 2014), the Court of Appeals holds that a special inquiry judge (SIJ) subpoena can satisfy article I, section 7 of the Washington Constitution.

Chapter 10.27 RCW governs special inquiry proceedings. Special inquiry proceedings are somewhat similar to federal grand jury proceedings.

Special inquiry proceedings are secret. A special inquiry judge is "a superior court judge designated by a majority of the superior court judges of a county to hear and receive evidence of crime and corruption." RCW 10.27.170. Special inquiry judges are authorized to issue subpoenas when the petitioner "has reason to suspect crime or corruption . . . , and there is

reason to believe that there are persons who may be able to give material testimony or provide material evidence concerning such suspected crime or corruption." RCW 10.27.170 (emphasis added).

The Court of Appeals holds that RCW 10.27.170 requires a showing of reasonable suspicion to issue a subpoena, a showing at least as great as that required to satisfy the requirements for a grand jury subpoena under the Fourth Amendment. The Court rejects the defendant's argument that article I, section 7 of the Washington Constituion requires probable cause for issuance of a special inquiry judge subpoena.

Result: Affirmance of King County Superior Court convictions of Michael J. Reeder for 14 counts of securities fraud and 14 counts of first-degree theft by deception.

LED EDITORIAL NOTE: There is a model policy for SIJ proceedings available on the WAPA website at: http://www.waprosecutors.org/docs/2012%20SIJ%20Model%20Policy-Updated.pdf

Additionally, "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors June 2014," by Pamela B. Loginsky, Staff Attorney, WAPA, contains a discussion of SIJ proceedings. As noted on page 3, of this September 2014 LED, the 2014 version of Ms. Loginsky's Guide is available on the CJTC LED Internet page and also on the home page (under What's New) of the Washington Association of Prosecuting Attorneys.

(9) UNDER DUE PROCESS PROTECTIONS, JUROR'S QUESTION TO OFFICER THAT ASKED IF DEFENDANT HAD ASKED WHY HE WAS ARRESTED OR IF HE SEEMED SURPRISED SHOULD NOT HAVE BEEN POSED TO OFFICER BY TRIAL COURT – In State v. Terry, ___Wn. App. ___, 2014 WL 2772899 (Div. III, June 19, 2014), Division Three of the Court of Appeals rules in a vehicle theft case that a defendant's constitutional due process rights were violated where the jury heard a law enforcement officer's answer to a juror-posed question asking whether the defendant expressed or showed surprise when the officer arrested him.

Edward W. Terry was prosecuted for theft of a vehicle, possession of a stolen vehicle, trespassing and resisting arrest. Testimony at trial included two eyewitnesses who had seen, under less than ideal conditions for observing, a man (1) crawl out of a vehicle that had overturned about a quarter-mile away from them in a one-car accident, and (2) run away across their wheat fields. Accompanied by one of the eyewitnesses, the responding law enforcement officer went in the direction of the flight and spotted a man about two miles away. The officer had reason to believe that the man was the driver (there was no challenge in this appeal to the officer's authority to seize or arrest the defendant). The suspect was defiant toward the officer and resisted arrest, though not assaulting the officer nor actively trying to escape. Immediately following the securing of the suspect in handcuffs, the officer read him his rights under Miranda v. Arizona.

At the trial, the trial court allowed the jurors to pose questions to the witnesses through the judge. Under this process, one juror asked the arresting officer if the defendant had expressed or showed surprise at being arrested. The officer answered that the defendant had not asked why he was being arrested, and that the officer did not know whether or not the defendant was surprised at being arrested. During closing argument, the prosecutor argued that guilt was manifest in the defendant's failure to ask the officer why he was being arrested.

The Court of Appeals explains that under United States Supreme Court and Washington court decisions interpreting federal constitutional due process protections, a suspect's silence after being arrested and given Miranda warnings cannot be used against him. It is deemed unfair to advise the person that he has a right to remain silent, and then to assume guilt from his exercise of that right. Thus, the Court of Appeals rules, the trial court in this case should not have posed the juror's question about suspect surprise to the officer. The Terry Court also rules that, in light of the lack of overwhelming other evidence of guilt, the error of allowing the officer to answer the question was not harmless as to the charges of theft of a vehicle, possession of a stolen vehicle and trespassing.

Result: Reversal of Columbia County Superior Court convictions of Edward W. Terry for theft of a vehicle, possession of a stolen vehicle and trespassing; remand of case to the Superior Court for retrial of those charges; in the unpublished portion of its opinion, the Court of Appeals affirms Terry's conviction of resisting arrest.

(10) ILLEGAL POSSESSION OF A FIREARM IS NOT A CRIME AGAINST PROPERTY AND THUS CANNOT BE THE PREDICATE CRIME FOR FIRST DEGREE BURGLARY – In State v. Kindell, ___ Wn. App. __, 326 P.3d 876 (Div. II, June 17, 2014), the defendant hid from the police for several hours at the home of an acquaintance. After his arrest officers found the acquaintance's unloaded shotgun lying on the couch in the living room and ammunition in a box in the hallway and on the bed. The defendant was charged with first degree burglary and second degree unlawful possession of a firearm.

The Court holds that: "as a matter of law, unlawful possession of a firearm is not a crime against property. We further hold that this error [in instructing the jury that possession of a firearm constitutes a crime against property] was not harmless because it allowed the jury to convict Kindell of first degree burglary based on a predicate crime that as a matter of law cannot satisfy the crime against property requirement in RCW 9A.52.020(1)."

Result: Reversal of Clark County Superior Court conviction of Arvell Lamont Kindell for first degree burglary. (Affirmance of second degree unlawful possession of a firearm conviction.).

(11) EVIDENCE HELD SUFFICIENT TO MEET FIRST DEGREE KIDNAPPING STATUTE'S ELEMENT OF "INTENT TO CAUSE EXTREME MENTAL DISTRESS" – In State v. Harrington, ___Wn. App. ___, 2014 WL 2750704 (Div. III, June 17, 2014, amended July 22, 2014), the Court of Appeals holds that RCW 9A.40.020(1)(d)'s "intent to cause extreme mental distress" was met by the evidence presented at trial. The Court of Appeals explains as follows:

> . . . . The State needed to prove Russell Harrington wanted to cause more mental distress than the distress normally accompanying restraint by deadly force. We note that a victim can be restrained by deadly force without the perpetrator actually threatening to kill the victim. The perpetrator may restrain the victim by aiming the gun at the victim and telling the victim not to move or leave a room without specifically telling the victim he intends to kill her. Actually threatening to kill the victim under the circumstances where the victim believed she would die immediately can add a layer to the mental distress.
>
> Russell Harrington intended to inflict extreme mental distress by explicitly and repeatedly threatening to kill his wife. Michelle's distress resulting from a reasonable belief that she would die and never see her son again could be as extreme as distress can reach. Mr. Harrington expressed his intent by threatening that the son would have two parents or no parents. Russell spun a

> terrorist's web, tricked Michelle into it, and then employed extreme mental distress to compel Michelle to remain married. Even assuming Russell's story that he only threatened to kill himself, Michelle would have suffered extreme mental distress. Severe distress follows from one announcing he will kill himself in front of another.

Result: Affirmance of Benton County Superior Court conviction of Russell Allen Harrington for first degree kidnapping.

(12) DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION VIOLATED WHERE CHILD WHOSE HEARSAY WAS ADMITTED INTO EVIDENCE WAS NOT QUESTIONED DIRECTLY ABOUT ALLEGATIONS AND HEARSAY STATEMENT – In State v. Kinzle, ___Wn. App. ___, 326 P.3d 870 (Div. I, June 16, 2014), Division One of the Court of Appeals rules that the trial court violated the Sixth Amendment right to confrontation of a child molestation defendant where the prosecutor did not directly question the alleged child molestation victim, and the trial court nonetheless admitted out-of-court accusations that the alleged child victim made to a child interview specialist.

The Court of Appeals explains that under State v. Price, 158 Wn.2d 630 (2006) **Jan 07 LED:07** a child victim who testifies "I don't remember" when directly questioned about the alleged criminal act or prior statements concerning it has said enough to satisfy the confrontation clause, but that the circumstances of the Kinzle case are distinguishable from those in Price:

> In [the Price] circumstance, the defendant will have a "full and fair opportunity to expose the memory lapse through cross-examination, thereby calling attention to the reasons for giving scant weight to the witness's testimony." Price, 158 Wn.2d at 649. The jurors then have the opportunity to evaluate whether they believe the child forgot or whether she was evading for some other reason. Price, 158 Wn.2d at 649. But when a witness is not directly questioned about the alleged criminal act or prior statement, the cross-examiner [defendant] has nothing to confront.
>
> That is what happened here. Kinzle was caught in a "constitutionally impermissible Catch-22 of calling the child for direct or waiving his confrontation rights." [State v. Clark, 139 Wn.2d 152 (1999)]. The conviction involving N must therefore be reversed.

Result: Reversal of Snohomish County Superior Court child molestation conviction of Jeffrey M. Kinzle on a count alleging molestation of victim N; Kinzle's conviction on a count of molestation of victim R, who was asked and who answered direct questions about the alleged criminal act, is not reversed.

(13) THE DEPARTMENT OF CORRECTIONS POSSESSES THE SOLE AUTHORITY TO GRANT MEDICAL FURLOUGHS TO INMATES – In In re Cage, ___ Wn. App. ___, 326 P.3d 805 (Div. III, June 3, 2014), an inmate (in the custody of the Department of Corrections (DOC)) obtained a doctor's note stating that he needed to be at home with his children because his wife was experiencing emergency complications with her pregnancy. The inmate sought and obtained an order granting him furlough in the sentencing court. The DOC brought an emergency motion to vacate the order.

The Court of Appeals holds that under the plain language of RCW 72.66.012 the sole authority to grant furloughs "vests" with the DOC. The Court points out that its conclusion is also

supported by case law. See January v. Porter, 75 Wn.2d 768, 773-74 (1969) ("Courts have long recognized this division of power and the transfer of the jurisdiction over a finally convicted felon from the judicial to the executive branch of government"); State v. Law, 110 Wn. App. 36, 40-41 (2002) ("Once sentenced, felons are under the jurisdiction of [DOC], even if serving time in a county jail." "Under this chapter [chapter 72.66 RCW], the Secretary [of DOC}. . . grants furloughs."). Finally, the Court notes that the structure of Washington's determinate sentencing scheme, which generally leaves no room for change in sentencing, and thus no inherent authority by the sentencing judge, also supports its decision.

Result: Reversal of Spokane County Superior Court's denial of DOC's motion to vacate order granting medical furlough to inmate Shundrae Cage.

(14) DETECTIVE'S TESTIMONY REGARDING A CONVERSATION BETWEEN THE DEFENDANT AND AN INFORMANT, WHERE THE DETECTIVE WAS PRESENT WITH THE INFORMANT BUT DID NOT HEAR THE DEFENDANT SPEAK, IS INADMIISSIBLE HEARSAY; SIXTH AMENDMENT RIGHT TO CONFRONTATION ALSO IMPLICATED - In State v. Hudlow, ___ Wn. App. ___, 2014 WL 1924362 (Div. III, May 13, 2014, motion to publish granted July 15, 2014), the Court of Appeals holds that a detective's testimony regarding a telephone call between the defendant and an informant, where the detective was present on the informant's end of the line and did not hear the defendant speak, is inadmissible hearsay. The detective's testimony was essentially a "summary" of his sense of the conversation between the informant and the defendant in which they set up a drug deal. The Court also rules that the admission of the hearsay regarding the informant's statements in the telephone conversation with defendant violated the defendant's Sixth Amendment right to confrontation because the informant's statements were "testimonial" under the Sixth Amendment, and the informant was not called to testify and was not shown to be unavailable to testify at trial.

Result: Reversal of Spokane County Superior Court conviction of Thomas Robert Hudlow for delivery of a controlled substance; case remanded for new 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.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and

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

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

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

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