



# Law Enforcement

November 2004

# Digest

## HONOR ROLL

**573<sup>rd</sup> Basic Law Enforcement Academy – June 2, 2004 through October 7, 2004**

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**9<sup>TH</sup> CIRCUIT, U.S. COURT OF APPEALS**

**AFFIDAVIT FOR CHILD PORN SEARCH WARRANT FAILS TO JUSTIFY SEARCH, AS IT FAILED TO ESTABLISH PROBABLE CAUSE THAT SUSPECT WHO ACCESSED A CHILD PORN WEBSITE ACTUALLY DOWNLOADED CHILD PORN**

U.S. v. Gourde, 382 F.3d 1003 (9<sup>th</sup> Cir 2004)

**Facts:**

An FBI agent investigating a child pornography case submitted a search warrant application for authorization to search the residence of Micah Gorde in Castle Rock, Washington for "any computers, associated storage devices and/or other devices located therein that can be used to store information and/or connect to the Internet, for records and materials evidencing a violation of [the child pornography statutes]."

The affidavit in support of the search warrant included the following information (as summarized by the Court of Appeals):

[T]he evidence presented to the magistrate included only that Gourde (1) affirmatively subscribed to an internet pornography service that advertised "over one thousand pictures of girls ages 12-17!" and displayed several thumbnail images of girls who at least appeared to be "prepubescent" on the subscription page; (2) had unlimited "access to hundreds of images, including historical postings to the site, which could easily [have been] downloaded during his period of membership" and "would have had to have viewed images of naked prepubescent females with a caption that described them as twelve to seventeen-year-old girls"; and (3) failed to unsubscribe to the site for at least two months. The affidavit also provided expert opinion evidence of the proclivities of child pornography collectors and opined that Gourde's affirmative act of subscribing to Lolitagurls.com and failure to unsubscribe provided a sufficient basis to place Gourde in that category.

Proceedings below: (Excerpted from Ninth Circuit opinion)

Based on the affidavit in question, the magistrate judge issued a warrant to search Gourde's residence, particularizing the items to be seized as contained in Attachment A. Pursuant to the warrant, officers searched Gourde's residence and seized his computer and its contents. Upon inspection, officers discovered hundreds of images of child pornography and child erotica.

Gourde moved to suppress the evidence obtained pursuant to the search of his computer and related items. He asserted that the affidavit failed to present sufficient evidence of probable cause.

...

The district court determined that the evidence in the affidavit supported a fair probability that evidence of a crime would be found on Gourde's computer. The judge applied a "common sense approach" to conclude that evidence of a subscription to even a "mixed" site--one that offered both legal adult pornography and illegal child pornography--provided the necessary "fair probability" to "look further"; he therefore denied the motion to suppress. Upon this ruling, Gourde opted to plead guilty on the condition that he would retain the right to appeal the ruling to [the Ninth Circuit].

ISSUE AND RULING: Did the affidavit establish probable cause to search Gourde's residence and his home computer to search for child pornography? (ANSWER: No)

Result: Reversal of U.S. District Court decision and remand for entry of order suppressing evidence in Government's child pornography prosecution of Micah Gourde.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

[T]he chain of inferences that the government asks us to draw is unprecedentedly lengthy and improbable. From the fact that Gourde became a paying member of Lolitagurls.com for two months (indicating that, at a minimum, he viewed a couple of pages of the site, including a page claiming that all of the material on the site was legal, and submitted his credit card number to "join"), the government asks us to infer that: (1) the website contained actual child pornography despite the affidavit's failure to verify the age of a single person

depicted on the website; (2) Gourde was aware that the images were child pornography even though a disclaimer on the first page of the website stated that the images complied with federal law; (3) Gourde did not just "look around" the website or use it for some other legal purpose, but rather actually downloaded images; (4) the images Gourde downloaded were not the legal adult pornographic images offered by the website or images that only appeared to be child pornography; and (5) Gourde retained the images from January 2002 (the last month Gourde had access to the website) until May 16, 2002 (the date of the search warrant application).

Even more so than in [U.S. v. Weber, 923 F.2d 1338 (9<sup>th</sup> Cir. 1990)], where the government asked us to infer that a defendant's ordering child pornography supported an inference that he received and retained other child pornography:

Each of these inferences standing alone may be reasonable. But with each succeeding inference, the last reached is less and less likely to be true. Virtual certainty becomes probability, which merges into possibility, which fades into chance. The fourth amendment requires a "fair probability" that the items searched for will be found.

An affidavit establishing that it is possible, with some straining, to *infer* that Gourde--along with every other member of every site on the Internet containing what appears to be child pornography -- might possess child pornography is not enough to justify a warrant to search Gourde's home and seize his computer.

...

Notably, the government concedes that it had the means to actually track Gourde's usage of the site to determine whether he downloaded images. It is not clear from the record, however, whether the government (1) chose not to avail itself of the information or (2) found no evidence of downloading. This uncertainty provides an important rebuttal to the argument that not finding probable cause here will inhibit the government's ability to prosecute child pornographers in the future. Simply put, there is no reason to think that the government's access to corroborating information in this case is atypical; once the government has gone through the motions necessary to procure a membership list (i.e., seized a website's computer and gained access to the website server), it likely also can access the necessary tracking information to demonstrate whether or not the subject of the investigation has actually downloaded child pornography. Requiring the government to buttress its affidavit with personalized information linking a website member to actual child pornography strikes a reasonable balance between safeguarding the important Fourth Amendment principles embodied in the probable cause requirement and ensuring that the government can effectively prosecute possessors and distributors of child pornography.

...

We therefore conclude that the affidavit here failed to establish a fair probability that contraband or evidence of a crime would be found on Gourde's computer. . . [T]here was no evidence here that Gourde actually downloaded any child pornography from the Lolitagurls.com website; rather, much like the catalog order described in Weber, the affidavit here revealed only that Gourde had subscribed, and thereby received access, to a mixed-pornography website, which is insufficient to create a fair probability that evidence of possession of child

pornography would be found on Gourde's computer or related equipment. Further . . . there was no evidence presented to the magistrate here that a Lolitagurls.com subscription involved automatic email transmissions containing child pornography or any other evidence indicating Gourde's sexual interest in children, such as suggestive screen names.

In sum, unlike in those cases where evidence of a subscription to an exclusively child pornography website was coupled with other corroborating information, the facts presented here established only that Gourde subscribed to a mixed pornography website and remained a member for two months. These facts--even when bolstered with the boilerplate language describing the characteristics of child pornographers and Agent Moriguchi's opinion that Gourde's actions placed him in that class--fail to provide a sufficient foundation on which to establish probable cause; indeed, with each inferential leap, "[v]irtual certainty bec[ame] probability, which merge[d] into possibility, which fade[d] into chance." Because the Fourth Amendment requires a "fair probability" that the items searched for will be found, we cannot agree with the district court that this affidavit sufficiently established probable cause.

[Some citations omitted]

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### **BRIEF NOTE FROM THE 9<sup>TH</sup> CIRCUIT, U.S. COURT OF APPEALS**

**TRIAL COURT MUST OBTAIN EVIDENCE FROM CELLMATE-INFORMANT TO DETERMINE IF DEFENDANT SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED** – In Randolph v. California, 380 F.3d 1133 (9<sup>th</sup> Cir. 2004), the Court of Appeals rules, in a right-to-counsel challenge under the Sixth Amendment, that a federal district court judge did not look closely enough at the question of the extent of police involvement with a jailhouse informant.

The informant conversed with defendant in the jail after charges had been filed against the defendant, and then the informant later testified against the defendant at trial. The Ninth Circuit finds the record inadequate to review the Sixth Amendment issue raised by the defendant. Therefore, the Ninth Circuit remands the case to the district court to take more evidence and then to make factual findings: 1) as to when the informant met with law enforcement officers and the prosecution team; and 2) when, in relation to that meeting or those meetings, the informant obtained incriminating information from the defendant; and 3) as to what, if anything, the informant did to stimulate conversations with the defendant about the murder with which the defendant was charged.

The Randolph Court explains the basis for its remand ruling as follows:

If, in fact, the State placed [Informant] in a cell with [Defendant] after he indicated his willingness to cooperate with the prosecution, the State "intentionally create[d] a situation likely to induce [Defendant] to make incriminating statements without counsel's assistance." If that is true, [the officers] took the risk that [Informant] might "deliberately elicit" information from [Defendant] within the meaning of Massiah v. U.S., 377 U.S. 201 (1964) and U.S. v. Henry, 477 U.S. 264 (1980) and that such information would be excluded at trial. According to [Informant]'s testimony, that is exactly what happened. Therefore, subject to factual determinations to be made by the district court, [Defendant] has potentially established a Massiah violation.

Our decision in Brooks v. Kincheloe, 848 F.2d 940 (9th Cir.1988), is consistent with our conclusion in this case. In Brooks, the defendant was indicted for the

murder of a young boy. While he was in custody awaiting trial, he shared a cell with Kee, to whom he admitted killing the boy. When detectives found out that the defendant had confided that information to Kee, they asked Kee to "tell them what Brooks had been saying" and to "remember anything further Brooks might tell [Kee]," but promised nothing in return. Kee said that he wanted to talk to his attorney first and was returned to his cell, which he shared with the defendant. A few days later, Kee provided prosecutors a written statement detailing what the defendant had said to him. The statement included information that the defendant had revealed to Kee after the initial meeting with prosecutors. After Kee provided prosecutors with the statement, he was moved to another jail and given \$100.

We concluded that all of the defendant's incriminating statements could be used at trial, including those made to Kee after he met with detectives. The court found that Brooks had confessed his responsibility for the murder to Kee before Kee met with detectives, that "the detectives did not request Kee to elicit any information from defendant," and that Kee was not used by the police "to carry out any deliberate and surreptitious investigation of defendant." We refused to disturb the state court findings of fact "that Kee was not a government agent at the time that Brooks made the incriminating statements concerning the murder.... While these findings indicate that Kee did take action beyond mere listening, they also clearly demonstrate that he did this before the detectives talked to him."

In this case, however, there is substantial evidence to support a conclusion that [the officers] knew or should have known that [Informant] believed that he would receive leniency if he elicited incriminating statements from [Defendant], circumstances sufficient to make [Informant] a government agent. Further, there is substantial evidence that, after meeting with [the officers], [Informant] took affirmative steps to elicit information from [Defendant]. This evidence of government action "designed deliberately to elicit incriminating remarks" removes this case from the purview of Brooks.

We conclude that [Informant] was acting on behalf of the State when he was put back in the cell with [Defendant] after his first meeting with [the officers]. Because it is within the district court's province as factfinder, we do not determine when the first meeting between [Informant] and [the officers] took place and when in relation to that meeting [Informant] obtained incriminating information from [Defendant]. Nor do we determine precisely what [Informant] did to obtain the incriminating information from [Defendant]. We vacate the district court's decision that [Defendant]'s Sixth Amendment rights under Massiah were not violated, and we remand to the district court for further factfinding.

[Some citations omitted]

Result: Vacation of California U.S. District Court's denial of habeas corpus petition of Willis Randolph seeking review of his California murder conviction; case remanded for hearings.

**LED EDITORIAL NOTE:** The most recent previous LED entry on jailhouse informants under the Sixth Amendment addressed the Washington Supreme Court decision in In re Personal Restraint of Benn, 134 Wn.2d 868 (1998) July 98 LED:19. In Benn, the Supreme Court held that the factual record did not support the defendant's claim that the jailhouse informant was a "government agent" at the time that the informant communicated with the charged defendant in the jail.

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## **BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT**

**(1) AGE ELEMENT IN JUVENILE ACT'S AUTOMATIC-DECLINE PROVISIONS REFERS TO AGE AT THE TIME OF THE DECLINE PROCEEDINGS** – In State v. Salavea, 151 Wn.2d 133 (2004), the Washington Supreme Court unanimously rules that the age element in the automatic decline provision of the Juvenile Act, RCW 13.04.030(1)(e)(v), refers to the age of the defendant at the time of the decline proceeding, not at the earlier time that the crime was committed. RCW 13.04.030(1)(e)(v) provides that juveniles will automatically be prosecuted in adult criminal court where:

- (v) The juvenile is sixteen or seventeen years old and the alleged offense is:
  - (A) A serious violent offense as defined in RCW 9.94A.030; [or]
  - (B) A violent offense as defined in RCW 9.94A.030 and the juvenile has a criminal history consisting of (I) One or more prior serious violent offenses; (II) two or more prior violent offenses; or (III) three or more of any combination of the following offenses: Any class A felony, any class B felony, vehicular assault, or manslaughter in the second degree, all of which must have been committed after the juvenile's thirteenth birthday and prosecuted separately; [or]
  - (C) Robbery in the first degree, rape of a child in the first degree, or drive-by shooting, committed on or after July 1, 1997; [or]
  - (D) Burglary in the first degree committed on or after July 1, 1997, and the juvenile has a criminal history consisting of one or more prior felony or misdemeanor offenses; or
  - (E) Any violent offense as defined in RCW 9.94A.030 committed on or after July 1, 1997, and the juvenile is alleged to have been armed with a firearm.

In light of its interpretation of RCW 13.04.030, the Supreme Court concludes that the defendant cannot establish the prejudice necessary to support a claim of unreasonable delay by the State in the filing of criminal charges in adult court.

Result: Affirmance of Court of Appeals decision (**Nov 03 LED:13**) that affirmed Pierce County Superior Court convictions of Dynamite Salavea (a/k/a Pele Tuupo) for rape of a child in the first degree (four counts) and child molestation in the first degree (two counts).

**(2) SEATTLE ORDINANCE BARRING THE POSTING OF NOTICES ON CITY-OWNED PROPERTY, INCLUDING UTILITY POLES, UPHELD AGAINST FREEDOM-OF-SPEECH ATTACK** – In City of Seattle v. Mighty Movers, \_\_\_ Wn.2d \_\_\_, 96 P.3d 979 (2004) the Washington Supreme Court rules, 6-3, that a former City of Seattle ordinance prohibiting, among other things, the posting of signs and notices on utility poles, did not violate First Amendment constitutional protection of freedom of speech.

In overruling a Court of Appeals decision (see 112 Wn. App. 904 (Div. I, 2002) **Oct 02 LED:23**), the Supreme Court majority opinion explains: 1) that the primary purpose of utility poles is to support utility lines; and 2) that the purposes of the former ordinance were a) to protect the safety of utility workers (who must climb the poles), b) to enhance public safety by promoting unobstructed vision for drivers and pedestrians, c) to prevent damage to public property, d) and to enhance urban aesthetics. These purposes justified the content-neutral and viewpoint-neutral ordinance under the First Amendment, the majority holds. Dissenting from the majority opinion are Justices Sanders, Owens and Chambers.

Result: Reversal of Court of Appeals' decision that had reversed a King County Superior Court summary judgment ruling in favor of the City of Seattle.

**LED EDITORIAL NOTE:** The decision in this case is largely academic for the City of Seattle, as, during the pendency of the case before the Supreme Court, Seattle modified the ordinance under review to try to conform the ordinance to the Court of Appeals' freedom-of-speech analysis that the Supreme Court majority rejects as being too restrictive on government.

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**WASHINGTON STATE COURT OF APPEALS**

**STATE WINS ON ISSUES OF 1) PROBABLE CAUSE FOR SEARCH WARRANT; 2) JUSTIFICATION FOR TERRY SEIZURE AND FRISK; AND 3) SUFFICIENCY OF EVIDENCE OF METHAMPHETAMINE MANUFACTURING**

State v. Jacobs, 121 Wn. App. 669 (Div. II, 2004)

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

In the early hours of March 21, 2001, Jennifer Hand spoke to [a deputy] at the Thurston County Sheriff's Office. Hand managed an Olympia mobile home park and had received numerous complaints from tenants that a chemical odor emanated from space 7. Jacobs and Austin-Bocanegra lived in space 7 with their three-month-old child. Hand also told Westby that she had personally smelled the chemical odor and that a mutual friend told her that Jacobs and Austin-Bocanegra were "cooking meth."

On the morning of March 22, two sheriff's deputies investigated Hand's complaint. [A detective] and [a uniformed officer] went to the mobile home park. Both deputies knew that Austin-Bocanegra had an outstanding Thurston County misdemeanor arrest warrant.

As they approached the house, the deputies detected chemical odors that they "associated with the production of Methamphetamine." When Jacobs answered the door, he told the deputies that he lived in the mobile home. The deputies advised him that they were investigating a tip that his home was a suspected methamphetamine lab. Jacobs denied manufacturing methamphetamine.

The deputies also told Jacobs that they sought Austin-Bocanegra because she had an outstanding misdemeanor warrant. Jacobs told the deputies that Austin-Bocanegra was not home, but that their child was asleep inside.

The deputies thought Jacobs appeared to be under the influence of methamphetamine. On his own, Jacobs admitted that he used methamphetamine, including the night before. He also admitted to having liquid chemicals outside his house, some of which he deposited in a nearby dumpster. According to the deputies, the odor from the dumpster was similar to the odor wafting from the home. Jacobs told the deputies that "someone" left the chemicals at his house but that he did not know what the chemicals were.

Based on their conversation, [the uniformed deputy] decided to detain Jacobs. The deputy could clearly see a weapon-sized suspicious bulge in Jacobs' front pants pockets, although Jacobs denied having anything in his pockets. The bulge appeared to be consistent with the cylinder of a revolver or a bullet magazine.

In lieu of a safety search, the deputies asked Jacobs to turn out his front pants pockets. When Jacobs took a knife out of his pocket, a clear film canister fell to the ground, rolling near the deputy's foot. [The uniformed deputy] picked up the canister and noticed white powder; it later field tested positive for methamphetamine. [The uniformed deputy] then advised Jacobs of his Miranda rights and placed him under arrest for unlawfully possessing a controlled substance.

[The uniformed deputy] and [the detective] continued to believe that Austin-Bocanegra and her infant were in the mobile home, even though Jacobs denied it. After asking the Thurston County Narcotics Task Force (TNT) to respond and secure the scene, [the detective] called into the home for Austin-Bocanegra to come out. She appeared at the door of the mobile home holding the baby.

[The uniformed deputy] told Austin-Bocanegra that she was under arrest on her outstanding warrant and advised her of her Miranda rights. Austin-Bocanegra said that she understood her rights and then she waived them.

The deputies also thought Austin-Bocanegra appeared to be under the influence of methamphetamine. In response to [the uniformed deputy]'s questioning, she told him she last used methamphetamine four days before. But she denied living in the mobile home or knowing anything about a methamphetamine manufacturing lab.

At 12:35 P.M. the same day, [the affiant-detective], a TNT detective, applied for a search warrant. In his affidavit, he averred that he was "looking for ... a possible methamphetamine lab located within" Austin-Bocanegra and Jacobs' mobile home. And because of his "training and experience from going to other ... labs" and his education in clandestine laboratory operations, he felt confident that the mobile home harbored a methamphetamine manufacturing lab. [The second detective] based his probable cause affidavit on his personal investigation of the site, his conversation with Jacobs, and the information [the other deputies] and Hand provided.

Based on the affidavit, a magistrate determined that there was probable cause to issue a search warrant. During the later search, some of the items seized included red stained coffee filters, a plastic gram scale with white residue, Red Devil lye, over-the-counter cold pills and tablets, and an air purifying respirator.

The State charged Jacobs and Austin-Bocanegra as co-defendants with unlawful manufacture of a controlled substance in violation of RCW 69.50.401(a)(1)(ii), .435(a)(3), and RCW 9.94A.605 (formerly RCW 9.94A.128 (2001)) (count I), and criminal mistreatment in the second degree in violation of RCW 9A.42.030 (count II).

After trial, the jury found Jacobs and Austin-Bocanegra guilty of count I, but not of count II. The jury also returned special verdicts, finding Jacobs and Austin-Bocanegra guilty of (1) manufacturing methamphetamine where a person under the age of eighteen is on the premises and (2) manufacturing a controlled substance within 1,000 feet of a school bus stop.

ISSUES AND RULINGS: 1) Did the combination of the mobile home park manager's report and the deputies' independent investigation add up to probable cause supporting the warrant to search the two defendants' mobile home for evidence of methamphetamine manufacturing? (ANSWER: Yes); 2) Was there objective justification for the Terry seizure of Jacobs and the safety search of Jacob's pockets for weapons? (ANSWER: Yes); 3) Was there sufficient

evidence to support the jury convictions of both Jacobs and Austin-Bocanegra as guilty of manufacturing methamphetamine? (ANSWER: Yes)

Result: Affirmance of Thurston County Superior Court convictions and sentences of James Allen Jacobs and Kathy Ann Austin-Bocanegra for manufacturing methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Probable cause to search

In reviewing an affidavit of probable cause that relies on an informant's tip, we use the Aguilar-Spinelli two-prong analysis. The affidavit must sufficiently identify the basis for the informant's information and establish the informant's credibility. If one prong of the analysis is not satisfied, an independent police investigation corroborating the informant's information may suffice to support the missing Aguilar-Spinelli prong and establish probable cause.

Here, the affidavit explains that Hand not only smelled chemical odors coming from space 7, but also she received tenant complaints about the noxious odors. And a mutual friend told her that Jacobs and Austin-Bocanegra were manufacturing methamphetamine with their young son present.

The State concedes that Hand's information alone fails to establish either prong of Aguilar-Spinelli. But [the deputies] investigated Hand's complaint and reported their findings to [the affiant-detective], corroborating Hand's information. Both deputies independently described a strong "iodine smell of chemical odor" emanating from the mobile home, the odor increasing with the door open and decreasing with the door closed. And Jacobs admitted to living in the mobile home and having a pressure cooker and acetone inside the house. He also told [the uniformed deputy] that he had discarded some liquid chemicals in a nearby dumpster, with fumes similar to those emanating from the house. And when Jacobs turned out his pants pockets, a clear film canister with white powder fell out. The substance later field tested positive for methamphetamine. Here, the independent police investigation corroborates Hand's disclosures and satisfies Aguilar-Spinelli.

Jacobs and Austin-Bocanegra assert that the affidavit insufficiently described the deputies' skill in odor detection.

When an officer bases a probable cause affidavit only on detection of a controlled substance odor, a search warrant is justified if that officer's experience and training in detecting such odors is in the search warrant affidavit. But if the odor detecting officer's experience and education is not in the affidavit, and the magistrate is given other facts that demonstrate probable cause, the affidavit's lack of the officer's experience and education is not fatal to the search warrant's validity.

Here, [the deputies] detected chemical odors more than 20 feet away from the house. They detected the same chemical odor at a nearby dumpster. The deputies told [the affiant-detective] about their independent investigation corroborating Hand's information about the noxious odors. [The affiant-detective], in turn, reported this evidence to the issuing magistrate. Moreover, [the affiant-detective]'s affidavit extensively covered his experience with unlawful drug detection. . .

In its CrR 3.6 findings of fact and conclusions of law, the trial court determined that [the deputies] had extensive experience working with methamphetamine production labs, although the search warrant affidavit did not disclose it. Although it would have been more appropriate for the affidavit to detail the deputies' experiences with clandestine methamphetamine labs, the lack of this information is not fatal to the validity of the search warrant. Austin-Bocanegra and Jacobs' argument fails because there was additional evidence presented to the issuing magistrate to establish probable cause for the search warrant.

2) Seizure and frisk of Jacobs

[A]n officer may conduct a Terry investigative stop if he or she has "a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." And under Terry, if a police officer reasonably fears for his or her safety, but does not have probable cause to arrest, he or she may reasonably search the individual for weapons without violating the Fourth Amendment.

While investigating Hand's tip, [the deputies], who are both trained in clandestine methamphetamine labs, smelled chemicals as they approached the mobile home door. The chemical odor became stronger when the door was opened. Jacobs admitted using methamphetamine. Jacobs also admitted having acetone and a pressure cooker inside his home and placing chemicals in a nearby dumpster.

And both deputies saw a suspicious weapon-shaped bulge in Jacobs' front pants pockets. When Jacobs turned out his pockets, a clear film canister with white powder in it fell to the ground. The substance in the canister later field tested positive for methamphetamine.

Under Terry, these specific and objective facts gave the deputies a "reasonable, [and] articulable suspicion" that the home contained a methamphetamine production lab. The deputies properly seized Jacobs. And the unknown object in Jacobs' pants gave rise to the deputies' suspicion that they should be concerned for their safety, allowing a Terry search. Jacobs and Austin-Bocanegra's argument based on a warrantless search fails.

3) Sufficiency of evidence

To convict a defendant of manufacturing methamphetamine, the State must prove that the defendant (1) intended to (2) manufacture methamphetamine. RCW 69.50.401(a). Manufacturing is "the production, preparation, propagation, compounding, conversion, or processing of a controlled substance." RCW 69.50.101(p).

According to Kimberly Hefton, a crime lab forensic scientist specializing in clandestine manufacturing of controlled substances, and Jeff Herbig, a narcotics enforcement detective, the mobile home contained evidence of a methamphetamine lab. Their testimony described the items seized as consistent with an unlawful lab, including: coffee filters stained with red liquid found throughout the house; over the counter cold pills and tablets; several ounces of white powder in a plastic baggy; plastic gram scale with white residue in it; a squirrel ventilation fan; iodine looking carpet stains throughout the house; Red Devil lye; an air purifying respirator; and plastic filters and funnels.

Substantial evidence also shows that both Jacobs and Austin-Bocanegra lived in the mobile home. Hand testified that both had a verbal agreement with the owner of the park to live in the mobile home, both paid rent, and neither Austin-Bocanegra nor Jacobs had notified her of their intent to vacate the premises. There was only one bedroom in the mobile home and inside this bedroom was a bassinet, baby bottle, and pictures of Austin-Bocanegra and the baby.

Austin-Bocanegra individually challenges sufficiency of the evidence, contending that her fingerprints on an acetone bottle were not enough to sustain her conviction. We disagree.

Evidence of fingerprints alone is sufficient to sustain a conviction for manufacturing methamphetamine when a trier of fact could reasonably infer from circumstantial evidence that the fingerprint on the object could only have occurred at the time the crime was committed. State v. Todd, 101 Wn. App. 945 (2000) **Jan 01 LED:11**. Here, Austin-Bocanegra's fingerprints were on a bottle of acetone, which was inside a blue bag in the utility room. The blue bag also contained a pressure cooker. And the utility room contained the methamphetamine production lab. Finally, Hefton testified that acetone pressure cooking is part of the methamphetamine production process. Sufficient evidence supports finding that Austin-Bocanegra manufactured methamphetamine.

[Footnote and some citations omitted]

#### **“DWELLING”? JURY MUST DECIDE STATUS OF UNOCCUPIED RESIDENTIAL STRUCTURE THAT WAS BEING RENOVATED**

State v. McDonald, \_\_\_ Wn. App. \_\_\_, 96 P.3d 468 (Div. II, 2004)

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

On the morning of December 9, 2002, Kevin Hinton went to a house that he and his wife owned in Gig Harbor. He found the driveway gate open and a white van parked in front. A man was standing near the driver's side of the van, and the front door of the house was open. A woman came running out of the house, she and the man jumped in the van, and the man began driving slowly toward the gate. Hinton blocked the driveway and called 911. The van left the driveway, traveled along the fence line, then tried to traverse a short wall and some trees. It became stuck in a ditch, and its two occupants fled into the woods.

A short time later, a neighbor reported to 911 that two strangers were prowling around her driveway. A police dog tracked their scent to a horse trailer, in which deputies found a man and woman hiding. Hinton identified them as the two who had been at his house, and they were arrested. The man was McDonald.

Although Hinton and his wife had previously lived in the Gig Harbor house for about eight years, they had not been living there for the two or three months preceding the above incident. They had moved to Tacoma because Hinton was remodeling the Gig Harbor house in the evenings and on weekends. By December 9, 2002, he had torn out an exterior wall of the bathroom and covered the hole with plywood sheeting. He had removed the front steps, leaving a two foot drop from the porch to the ground. He had dug a trench around the house's perimeter to facilitate work on the foundation. The house was essentially under construction and, according to a deputy who was in it on December 9, may not have had any beds.

The State charged McDonald with residential burglary, and the court convened a jury trial on March 19, 2003. Hinton had not yet finished remodeling, so he and his wife were still living in Tacoma. The evidence showed that the house had been locked prior to the burglary; that the intruders had probably entered through a window or by removing the plywood sheeting that covered the hole in the exterior bathroom wall; and that a number of items belonging to the Hintons had been recovered from the abandoned white van.

At the end of the evidence, McDonald proposed an instruction that would have given the jury the option of convicting on second degree burglary rather than residential burglary. He reasoned that a person commits second degree burglary, not residential burglary, if he or she enters a building that is not a dwelling; that a jury could reasonably find that the Hintons' house was not a "dwelling" on December 9, 2002; and that the jury needed to consider this option. The State opposed the instruction, and the trial court sided with the State. Commenting that "[a] residence is a residence is a dwelling," the trial court reasoned in effect that the house was so clearly a dwelling that reasonable minds could not differ. The trial court refused to give the proposed instruction, and McDonald was convicted of residential burglary.

ISSUE AND RULING: 1) Is there sufficient evidence that the building was not a "dwelling" to support giving a jury instruction on second degree burglary? (ANSWER: Yes, this is a jury question); 2) Is there sufficient evidence that the building was a "dwelling" to support giving a jury instruction on residential burglary? (ANSWER: Yes, this is a jury question).

Result: Reversal of Pierce County Superior Court conviction of Jerry Russell McDonald for residential burglary; case remanded for retrial.

ANALYSIS:

1) Evidence of second degree burglary

In key part, the McDonald Court's explanation for its conclusion that the trial court erred in not giving defendant's proposed instruction on second degree burglary is as follows:

The legislature has divided a single offense, burglary, into three degrees: first, residential, and second. Two of those degrees are pertinent here: residential and second. A person is guilty of residential burglary if, with intent to commit a crime therein, he enters or remains unlawfully in a "dwelling" other than a vehicle. A person is guilty of second degree burglary if, with intent to commit a crime therein, he enters or remains unlawfully in a building other than a vehicle or a dwelling. Although residential burglary and second degree burglary are both Class B felonies, the legislature has mandated that the sentencing guidelines commission "consider residential burglary as a more serious offense than second degree burglary." Necessarily then, second degree burglary is an inferior degree of residential burglary.

...

McDonald reasons that the jury could have convicted on second degree burglary instead of residential burglary because, when the evidence is viewed in the light most favorable to him, the jury could have found that on December 9, 2002, the Hintons' house was not a "dwelling" within the meaning of RCW 9A.04.110(7). The State reasons that the jury could not have convicted on second degree burglary instead of residential burglary because, even when the evidence is

taken in the light most favorable to McDonald, the jury could have found *only* that the Hintons' house was a "dwelling" within the meaning of RCW 9A.04.110(7).

RCW 9A.04.110(7) defines a "dwelling" as "any building or structure ... which is used or ordinarily used by a person for lodging." Taking the evidence in the light most favorable to McDonald, a jury could have found that no one was living in the Hintons' house from about October 2002, to at least March 2003, and thus that the house was not being "used or ordinarily used by a person for lodging" on December 9, 2002. McDonald satisfied the factual requirement as well the legal one, and the trial court erred by refusing his proposed instruction.

[Citations and footnotes omitted]

2) Evidence of residential burglary

The McDonald Court explains as follows its view that the evidence was sufficient to support the giving of residential burglary instructions to the jury:

In addition to arguing that the trial court erred by not giving his proposed instruction, McDonald argues that the evidence is insufficient to support a finding that the Hintons' house was a "dwelling" within the meaning of RCW 9A.04.110(7). According to most other jurisdictions, however, the question whether a building is a residence turns on all relevant factors and is generally a matter for the jury to decide. Agreeing, we hold that the evidence in this case presents a jury question on whether the Hintons' house was a "dwelling."

[Citations and footnotes omitted]

**TRIAL COURT ERRED IN ADMITTING HEARSAY TESTIMONY OF INTERROGATING OFFICER REGARDING WHAT DEFENDANT SAID DURING INTERROGATION, AS TRANSLATED BY FELLOW OFFICER**

State v. Gonzalez-Hernandez, 122 Wn. App. 53 (Div. II, 2004)

Facts and Proceedings below:

During investigation of a child rape case, law enforcement officers interrogated the suspect, Manuel Gonzalez-Hernandez. Relevant facts regarding the interrogation are described by the Court of Appeals as follows:

Unable to get a certified interpreter, Pierce County Sheriff's [officer A] asked [officer B] to translate during her interview with Gonzalez. [Officer B] grew up in central California and had also lived in Central America; he could communicate in Spanish "fairly well." Although [officer A] studied Spanish for four years and understands more than she speaks, [officer B] speaks Spanish better than [officer A]. During the interview, Gonzalez spoke some English, but he spoke mostly Spanish. [Officer A] recorded the statements [officer B] interpreted.

[Officer B] told Gonzalez that the interview concerned child rape. Gonzalez denied any sexual contact with A.S. [Officer A]'s report stated that Gonzalez said he was sorry. But [officer B] could not recall if Gonzalez said he was sorry; he was also not sure he would have recognized the word "sorry" in Spanish. [Officer B] testified that if Gonzalez "said he was sorry, it was probably in English." And when asked what the Spanish word for "rape" was, [officer B] stated that he believed he used the English word.

The State charged Gonzalez with two counts of first degree child rape and one count of first degree child molestation.

At trial, Gonzalez testified he had never touched A.S. inappropriately. He said he had given A.S. a bath on one occasion when he bathed her brothers, and that Stouffer was home at the time.

In rebuttal, the State called [officer B] and [officer A] to testify about Gonzalez's statements. [Officer A] testified to Gonzalez's responses (to [officer A]) as translated by [officer B]. After the court overruled defense counsel's objection, [officer A] testified that she asked Gonzalez if "he was sorry." He said that he was. When asked why he was sorry, Gonzalez said he "didn't know." When asked if A.S. was lying, Gonzalez responded that "she was not lying," and "he wasn't lying either."

The jury found Gonzalez guilty on all three counts.

**ISSUE:** Was the testimony of the interrogating officer [officer A] regarding the out-of-court translation by officer B admissible hearsay? (**ANSWER:** No, the hearsay was not admissible).

**Result:** Reversal of Pierce County Superior Court convictions of Manuel Gonzalez-Hernandez for first degree child rape (two counts) and first degree child molestation (one count); case remanded for retrial.

#### **ANALYSIS:**

The Court of Appeals notes some basic propositions regarding the hearsay evidence rules in the context of police interrogations:

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801. It is not admissible except as provided by the rules of evidence, other court rules, or statute. ER 802. Where a statement is not offered for the truth of the contents of the conversation, but only to show that it was made, the statement is not hearsay. ER 801; State v. Garcia-Trujillo, 89 Wn. App. 203 (1997).

Where the police use an interpreter in questioning a suspect, the questioning officer's testimony of what the interpreter said is admissible only if it is not offered for the truth of the matters asserted or if the interpreter was an agent of or authorized to speak for the declarant.

Next, the Court discusses two precedents – State v. Garcia-Trujillo, 89 Wn. App. 203 (Div. I, 1997) and State v. Huynh, 49 Wn. App. 192 (1987). The two decisions seem to be somewhat inconsistent in their discussion of the hearsay rule in this context. (**LED Ed. Note: The Court's extensive discussion of the two decisions is omitted from this LED entry.**) The Gonzalez Court concludes under the following analysis that, regardless of how one looks at the two precedents, the interpreter hearsay cannot be admitted.

Regardless of how the hearsay issue is analyzed, we face the same reliability issue. [Officer A] testified that Gonzalez said he was sorry in English. But the State did not establish what question [officer B] asked Gonzalez in Spanish that elicited the answer. And this is particularly troubling because [officer B] did not know the Spanish word for sorry and may not have known the Spanish word for rape. When asked what the Spanish word for rape was, [officer B] said he used the English word for rape, suggesting that he did not know the Spanish word. Yet the relevant question was whether Gonzalez said he was *sorry* for the *rape*.

The record simply does not establish what Gonzalez was sorry for. Without this, we do not know whether Gonzalez's answer contradicted his testimony or was otherwise relevant. Adding to our concerns about this testimony is [officer A]'s testimony that when asked why he was sorry, Gonzalez said "[h]e didn't know why he was sorry," and [officer B]'s testimony that Gonzalez said A.S. was not lying but neither was he. Accordingly, [officer A]'s testimony that Gonzalez said he was sorry was inadmissible.

## **OFFICER'S TESTIMONY THAT "REID INVESTIGATIVE TECHNIQUE" REVEALED THAT DEFENDANT WAS BEING DECEPTIVE CONSTITUTED INADMISSIBLE OPINION ON DEFENDANT'S GUILT**

State v. Barr, \_\_\_ Wn. App. \_\_\_, 2004 WL 2095120 (Div. III, 2004)

### Facts and Proceedings below:

Mr. Barr was interrogated after he was arrested on suspicion of having committed a brutal rape. The officer who conducted the videotaped interrogation testified at trial regarding the interrogation. The Court of Appeals describes as follows the part of the officer's testimony that was the focus of Mr. Barr's appeal following conviction:

Reid Investigative Technique. During his testimony, [officer A] testified that he interviewed Mr. Barr at the police station. [Officer A] testified that he had been trained to use the Reid Investigative Technique that taught him to look for verbal and nonverbal clues that someone was being deceptive. [The officer]'s testimony indicated that he applied this training when interviewing Mr. Barr. The following exchanges took place during [the officer]'s direct testimony:

Q. Did you note any signs of deception when the defendant was being interviewed?

A. Yes. Yes, ma'am. *What I thought was deception*, one of the first things I noticed just in his contact with [Officer B] is he kept mentioning going to prison. Nobody had said that to him. He was just in an interview room at the station and that was a flag for me. *What I have been taught [by] some of these schools is people feel guilty and that they realize there is [sic] consequences and lots of times they'll verbalize those fears. So it was obvious to me he was afraid he was going to go to prison for this.* He mentioned it at last twice to [Officer B] and to me, as well, in our interview.

Q. What about this swearing on your grandmother's grave type thing?

A. At one point he made a statement about swearing on his daughter's life or something like that and I called him on it in the tape, if you remember, you know, *that's one of the big flags like that and like the utterances about the thing going to prison, those are big flags when you see those things start to bunch together. You get an idea somebody is being deceptive.*

Q. What about the nonverbal cues?

A. One of the things I noticed and in watching the tape when he was talking to [Officer B] he was sitting like we are. As soon as I

came in [and] started questioning his knees came up on the bench, his hands came in here and *that's a protective posture that we are taught to look for and they're protecting themselves*. They feel like they're under attack.

Q. Did he have any labored breath?

A. No, he wasn't huffing or puffing, the heaving. It seems disingenuous to me, didn't seem real.

Q. How about change in voice, inflexion [sic]?

A. There were times when I was pressuring him when I was trying that theme of being more direct with him, that he would react the same way, you know, he would hit the table. He would move out closer to me on the table and raise his voice as if he was upset, but then once we start talking again he would be right back down. *Again, it didn't seem genuine to me. It didn't seem like if he was really feeling these emotions and that worked up he would be hitting the table and stuff*. He wouldn't have these ups and downs so quickly.

Mr. Barr was convicted of second degree rape, unlawful imprisonment, and vehicle prowl in the second degree.

**ISSUE AND RULING:** Did the officer's testimony assessing the credibility of defendant's interrogation answers in light of the Reid Investigative Technique constitute impermissible testimony as to Mr. Barr's guilt? (**ANSWER:** Yes)

**Result:** Reversal of Kittitas County Superior Court conviction of Derrick Dwayne Barr for second degree rape, unlawful imprisonment, and second degree vehicle prowl; case remanded for retrial.

**ANALYSIS:** (Excerpted from Court of Appeals opinion)

Was the testimony an impermissible opinion on Mr. Barr's guilt? To meet his burden, Mr. Barr must establish that [Officer A]'s testimony constituted an impermissible opinion on Mr. Barr's guilt. The determination as to whether testimony is an impermissible opinion on guilt or a permissible opinion pertaining to an ultimate issue requires the consideration of: (1) the particular circumstances of the case, (2) the type of witnesses called, (3) the nature of the testimony and the charges, (4) defenses invoked, and (5) the other evidence presented to the trier of fact. Significantly, opinion testimony as to guilt does not necessarily implicate a constitutional right.

In State v. Carlin, 40 Wn. App. 698 (1985), a police officer's testimony that a police dog tracked the defendant by following a "fresh guilt scent" was held to be inadmissible opinion testimony implicating a constitutional right. The court concluded that "[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial."

In State v. Wilber, 55 Wn. App. 294 (1989), the State presented two officers who testified that they had received special training to observe body and eye movements that enabled them to tell when a person was being truthful. The

officers then gave opinions on whether a fact witness in the case was being truthful. The Wilber court, analyzing the testimony as expert testimony under ER 702, found the officers' statements inadmissible because the officers' testimony did not satisfy generally-accepted, scientific evidence standards. Because the Wilber court resolved the issue by applying ER 702, the court did not apply the constitutional harmless error standard. Significantly, the Wilber court noted that the error would have been one of constitutional magnitude if the officers' testimony had been an impermissible opinion on the defendant's guilt.

The State maintains that the testimony here was not improper because the officer did not testify that Mr. Barr was being deceptive, but, rather, the officer's testimony consisted of observations of Mr. Barr's behavior indicating that there were signs that Mr. Barr was being deceptive. This is a distinction without a difference. The officer's testimony was clearly designed to give the officer's opinion as to whether Mr. Barr had committed the offense. For example, [Officer A] stated: "What I have been taught [by] some of these schools is people feel guilty and that they realize there is [sic] consequences and lots of times they'll verbalize those fears. So it was obvious to me he was afraid he was going to go to prison for this." [Officer A] also testified that: "At one point he made a statement about swearing on his daughter's life or something like that and I called him on it in the tape, if you remember, you know, that's one of the big flags like that and like the utterances about the thing going to prison, those are big flags when you see those things start to bunch together. You get an idea somebody is being deceptive." Clearly this testimony embodied an opinion by the officer that Mr. Barr had committed the offense and the officer had the training to determine that Mr. Barr's statements and body language were proof that this was true. In other words, the officer was testifying, as an expert, as to his opinion regarding manifestations of Mr. Barr's guilt.

Relying on Seattle v. Heatley, 70 Wn. App. 573 (Div. I, 1993) **March 94 LED:11** the State argues the officer's testimony was admissible because his observation and analysis of Mr. Barr's behavior were helpful to the jury. The officer in Heatley was asked his opinion of the defendant's impairment due to alcohol consumption. The officer responded:

"Based on my, his physical appearance and my observations of that and based on all the tests I gave him as a whole, I determined that Mr. Heatley was obviously intoxicated and affected by the alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner. At that time, I did place Mr. Heatley under arrest for [driving while intoxicated]."

Mr. Heatley argued that the officer's opinion encompassed the only disputed issue: whether he was guilty of driving while intoxicated. In rejecting this argument, the appellate court acknowledged that the officer's testimony encompassed ultimate factual issues before the trier of fact; however, the court also concluded that the officer's testimony did not give a direct opinion on the defendant's guilt. Further, the court held that the officer's opinion was admissible because it was based on the officer's experience and observations, and because the opinion was of assistance to the trier of fact.

Heatley is distinguishable because the officer had experience in observing impairment based on alcohol and Washington permits lay witness testimony as to the degree of intoxication of another person if the witness has had the

opportunity to observe that person. In contrast, Washington courts have not yet recognized as reliable any investigatory method based on the observation of a witness's body movements. Here, as in Wilber there is no evidence that the officer's opinion as to the significance of the witness's body movements was based on a theory generally accepted by the scientific community.

In short, the officer's testimony invaded the province of the jury by impermissibly commenting on Mr. Barr's guilt.

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## **BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

**(1) GOOD FAITH IMMUNITY PROVISION IN FIREARMS STATUTE PRECLUDES SUIT AGAINST SHERIFF'S OFFICE FOR DELAY IN APPROVING PISTOL PURCHASE** – In Deschamps v. Mason County Sheriff's Office, \_\_\_ Wn. App. \_\_\_, 96 P.3d 413 (Div. II, 2004), the Court of Appeals rules that on the facts in the case before it, the Mason County Sheriff's Office (MCSO) is immune from suit under RCW 9.41.0975 because the MCSO acted in good faith while it was reviewing, over a several-month period, a prospective firearm purchaser's application to purchase a pistol at a local sporting goods store.

RCW 9.41.0975 states in pertinent part:

1) The state, local governmental entities, any public or private agency, and the employees of any state or local governmental entity or public or private agency, acting in good faith, are immune from liability

...

f) *For errors in preparing or transmitting information* as part of determining a person's eligibility to receive or possess a firearm, or eligibility for a concealed pistol license.

Emphasis added.

RCW 9.41.0975 applies as a matter of law under the facts of this case, the Deschamps Court concludes, because nothing indicates that MCSO staff acted with dishonesty or with unlawfulness over the several months that they took checking several sources to clarify Mr. Deschamps' eligibility to own a gun. (**LED Ed. Note: Due to LED space limits, we will not attempt to describe the complex factual background regarding the MCSO staff's efforts in this regard**). Also of significance is that, as soon as the MCSO made a clear determination that Deschamps was entitled to own a firearm, staff approved purchase of the firearm.

Result: Affirmance of Mason County Superior Court summary judgment order in favor of the Mason County Sheriff's Office.

**(2) TRIAL COURT'S ADMISSION OF "EXCITED UTTERANCE" EVIDENCE DID NOT VIOLATE SIXTH AMENDMENT'S CONFRONTATION CLAUSE UNDER CRAWFORD RULE** – In State v. Orndorff, \_\_\_ Wn. App. \_\_\_, 95 P.3d 406 (Div. II, 2004), the Court of Appeals rules that it does not violate the Sixth Amendment's "confrontation clause" for a trial court to admit into evidence the testimony of one victim about another victim's "excited utterance."

In Crawford v. Washington, 124 S.Ct. 1354 (2004), **May 04 LED:20**, the U.S. Supreme Court held that the Sixth Amendment's confrontation clause bars admission of hearsay testimony if 1) the out-of-court statement (the hearsay) is "testimonial" in nature; 2) the defendant did not have a prior opportunity to formally cross-examine the declarant; and 3) the declarant is not available at trial and hence cannot be cross-examined at trial.

The Orndorff Court holds under the following analysis that an “excited utterance” is not “testimonial” for purposes of Crawford:

Crawford did not comprehensively define "testimonial." The court explained that the Confrontation Clause applies to witnesses who "bear testimony" such as "a 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " And this includes " 'ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.' " The term also includes prior testimony at a preliminary hearing, before a grand jury, at a former trial, and police interrogations.

[The first victim’s testimony about the second victim’s] excited utterance fits into none of these categories. It was not a declaration or affirmation made to establish or prove some fact; it was not prior testimony or a statement given in response to police questioning; and Coble [the second victim] had no reason to expect that her statement would be used prosecutorially. Rather, Coble’s statement was a spontaneous declaration made in response to the stressful incident she was experiencing. We hold that Coble’s excited utterance was not testimonial and, therefore, not precluded by Crawford’s Confrontation Clause analysis.

Result: Affirmance of Kitsap County Superior Court conviction of Shawn A. Orndorff and Ronald D. Davis for first degree burglary, second degree assault, and unlawful firearm possession.

**(3) DEFENDANT’S RIGHTS TO DUE PROCESS AND TO SILENCE VIOLATED -- PROSECUTOR SHOULD NOT HAVE ASKED DETECTIVE TO TESTIFY THAT DEFENDANT AT TIME OF ARREST DID NOT DENY THE CHARGE** – In State v. Holmes, 122 Wn. App. 438 (Div. I, 2004), the Court of Appeals rules that in a prosecution for child rape and child molestation the State went too far when the prosecutor elicited a detective’s testimony at trial that defendant at time of arrest did not appear surprised and did not deny the charges as one “would normally expect.” This exchange violated defendant’s right against self-incrimination, the Holmes Court rules. The testimony was a direct comment on the defendant’s failure to deny the charges immediately upon being confronted with them. Case law clearly prohibits, on due process grounds, the State’s use of a person’s silence at the time of arrest to impeach an explanation offered by that person at criminal trial.

The Holmes Court also holds that defense counsel’s elicitation from the detective on cross-examination that the defendant was cooperative when arrested did not open the door to the detective’s testimony on redirect. The detective’s testimony on redirect did not contradict defendant’s portrayal of himself as cooperative and was not an observation on the extent of the defendant’s cooperation, the Holmes Court holds.

Result: Reversal of King County Superior Court conviction of Donald Holmes for child rape and child molestation; remanded for re-trial.

**(4) JUVENILE’S AGE AT TIME OF MIP OFFENSE CONTROLS ON DRIVERS’ LICENSE REVOCATION UNDER RCW 66.44.365(1)** – In State v. R.J., 121 Wn. App. 215 (Div. I, 2004), the Court of Appeals rules that the age of a juvenile at the time he commits MIP determines whether the sanction of drivers’ license suspension under RCW 66.44.365(1) applies. The R.J. Court summarizes its ruling as follows:

When a juvenile between the ages of 13 and 18 is found to have committed certain alcohol violations, including possession of liquor, the juvenile court is required to notify the Department of Licensing, and the Department revokes the juvenile's driver's license for a period of time. The only question in this case is whether the notification statute is triggered by the juvenile's age on the date of the offense, or by the age on the date of adjudication. Here, the juvenile committed an alcohol offense when he was 17 years old. His adjudication did not occur, however, until after his 18th birthday. We hold the juvenile's age on the date of the offense determines whether notification is required, and affirm the juvenile court's decision to notify the Department.

Result: Affirmance of King County Superior Court decision to notify DOL of R.J.'s MIP adjudication.

**(5) "BLUE BOOK" EVIDENCE HELD ADMISSIBLE UNDER "MARKET REPORTS" HEARSAY EXCEPTION, ER 803 (17), TO SHOW VALUE OF STOLEN ITEM IN PSP PROSECUTION** – In State v. Shaw, 120 Wn. App. 847 (Div. I, 2004), the Court of Appeals rules that evidence of the Kelley Blue Book value of a stolen automobile came within the "market reports" exception to the hearsay rule, as proof of the market value of an automobile in a prosecution for first degree possession of stolen property under RCW 9A.56.150.

Accordingly, the Shaw Court rules that evidence that the Kelley Blue Book value of a stolen automobile was \$2,520 constituted sufficient evidence to prove that market value of the automobile exceeded \$1,500 at the time and in the area of offense as required for a conviction for first degree possession of stolen property. Evidence that the victim ultimately sold the vehicle for \$1,400 goes to the weight of evidence considered by the jury and is irrelevant to the evidence-law question before the Shaw Court.

Result: Affirmance of King County Superior Court conviction of Jeremy Shaw for first degree possession of stolen property.

**(6) RETAILER'S COMPUTER-GENERATED TALLY OF STOLEN GOODS ADMISSIBLE AS "BUSINESS RECORDS" UNDER HEARSAY EXCEPTION AT RCW 5.45.020** – In State v. Quincy, 122 Wn. App. 395 (Div. I, 2004), the Court of Appeals holds a retail store's computer-generated tally of items stolen from the retailer who uses the same computer system to price goods for sale is admissible as evidence of the value of the stolen goods under the statutory hearsay exception for "business records" at RCW 5.45.020.

Result: Affirmance of Snohomish County Superior Court conviction of James Glen Quincy for first degree theft.

**(7) FATHER WHO PAID SHOPLIFTING CIVIL PENALTY ENTITLED TO RESTITUTION FROM HIS SHOPLIFTING JUVENILE SON** – In State v. T.A.D., 122 Wn. App. 290 (Div. I, 2004), the Washington Court of Appeals rules that the Juvenile Justice Act authorizes restitution to a father who paid a shoplifting civil penalty (collected by the victimized retail store) that resulted from his son's crime.

The key part of the Court of Appeals' analysis is as follows:

A court's authority to impose restitution is purely statutory. We review restitution orders for abuse of discretion. Juvenile offenders must be ordered to make restitution to "any persons who have suffered loss or damage as a result of the offense committed by the respondent." Restitution includes "damages for ... loss of property."

DeMartin contends the court had no authority to award restitution for a loss arising from a separate civil matter. DeMartin relies on State v. Martinez, 78 Wn. App. 870 (1995) which involved an adult prosecution for arson. The restitution order included expenses incurred by the defendant's insurance company for investigating the fire, and for attorney fees after the defendant brought a civil action to collect on his policy. The applicable statute limited restitution to loss that directly resulted from the crime charged, and the Martinez court held these expenses were improper because there was no direct causal relationship between the costs incurred and the arson.

Martinez is inapposite here. RCW 4.24.230(2) provides that parents of minors who shoplift are liable for a civil penalty of \$100 to \$200 in addition to the retail value of the stolen goods. Such a penalty is a loss suffered as a direct result of the criminal offense. Further, the definition of "victim" is interpreted broadly under the Juvenile Justice Act of 1977, and includes "a person who is injured ... as the result of an occurrence." This definition does not limit restitution to injuries received as a direct result of the crime charged. DeMartin's father was a victim for restitution purposes under the Juvenile Justice Act of 1977.

Result: Affirmance of King County Superior Court restitution order imposed in juvenile adjudication against Thomas Andrew DeMartin.

**(8) RESTITUTION DUTY APPLIES BROADLY TO JUVENILE RIDER IN JOYRIDING CASE** – In State v. Keigan C., 120 Wn. App. 604 (Div. I, 2004), the Court of Appeals rules in consolidated cases that, reading the juvenile restitution statute (RCW 13.40.190) and the joyriding statute (RCW 9A.56.070) together, juvenile passengers who are convicted in joyriding cases are liable for restitution for all damages to the vehicle, including damage that occurred before they got into the vehicle and damage that occurred after they got out of the vehicle.

Result: Affirmance of King County Superior Court restitution orders against juveniles Keigan C., Ferguson H., and Ian F.

**(9) "I FORGOT" IS NOT A VALID DEFENSE TO BAIL-JUMPING CHARGE** – In State v. Carver, 122 Wn. App. 300 (Div. II, 2004), the Court of Appeals rules that forgetfulness is not a valid defense to a charge of bail-jumping under RCW 9A.76.170. The key part of the Court's statutory analysis is as follows:

The current version of RCW 9A.76.170(1) provides in relevant part: "Any person having been released by court order or admitted to bail *with knowledge of the requirement of a subsequent personal appearance* before any court of this state ... and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping." (Emphasis added).

Based on a plain reading of the current version of RCW 9A.76.170, we expressly hold that the State must prove only that Carver was given notice of his court date -- not that he had knowledge of this date every day thereafter -- and that "I forgot" is not a defense to the crime of bail jumping.

Result: Affirmance of Kitsap County Superior Court conviction of George Michael Carver for bail jumping.

**(10) FELONS WHO SERVED THEIR TIME IN COUNTY JAIL (NOT PRISON) NONETHELESS ARE "INMATES" FOR PURPOSES OF "ESCAPE FROM COMMUNITY CUSTODY" STATUTE** – In State v. Rizer, 121 Wn. App. 898 (Div. III, 2004), the Court of Appeals holds that the "escape from community custody" statute (RCW 72.09.310) applies to

felons who: 1) serve all of their incarceration time in the county jail; 2) then are placed in community custody; and 3) thereafter fail to report to DOC as required.

The ten defendants in the consolidated case convinced the trial court judge that they did not qualify as "inmates" because they had not been incarcerated in a state institution. Not so rules the Rizor Court under statutory analysis that we will not address in this **LED** entry.

**Result:** Reversal of Yakima County Superior Court orders that dismissed charges under RCW 72.09.310 against Christina Anastasia Rizor, Doris Mae Smith, Kenneth Ray Brown, Angela Lynn Nelson, Nathaniel Gerald Knox, Jennifer April Gomez, Melissa Ann Castillo, Antonio Garcia Valle, Rolando David Mireles, and Francisca Rodriguez Sotelo.

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### **INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES**

The Washington Office of the Administrator for the Courts maintains a web site 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 from 1939 to the present. 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/rules/>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct/>]. This web site 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 website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.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 January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "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 WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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