



Law Enforcement

October 2006

Digest

595th Basic Law Enforcement Academy – April 12, 2006 through August 17, 2006

President: Greg Massey - Puyallup Police Department
Best Overall: Christopher Caplan – King County Sheriff's Office
Best Academic: Christopher Caplan – King County Sheriff's Office
Best Firearms: Jay Taylor – Everett Police Department
Tac Officer: Officer Shelley Hamel – Federal Way Police Department

596th Basic Law Enforcement Academy – April 24, 2006 through August 29, 2006

President: Robert Phillips – Mill Creek Police Department
Best Overall: Anthony Graham – Sequim Police Department
Best Academic: Kyle Kempte – Thurston County Sheriff's Office
Best Firearms: Thomas Vradenburg – Fife Police Department
Tac Officer: Officer Bill Shepard – Des Moines Police Department

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NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

NO FOURTH AMENDMENT PRIVACY IN EMPLOYEE’S WORKPLACE COMPUTER WHERE EMPLOYER: 1) OWNED COMPUTER, 2) HAD POLICY AND PRACTICE OF ROUTINELY MONITORING COMPUTER, AND 3) HAD PROHIBITION AGAINST PRIVATE USE

U.S. v. Ziegler, 456 F.3d 1138 (9th Cir. 2006) (Decision issued August 8, 2006)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

Frontline Processing (“Frontline”), a company that services Internet merchants by processing on-line electronic payments, is located in Bozeman, Montana. On January 30, 2001, Anthony Cochenour, the owner of Frontline’s Internet-service provider and the fiancé of a Frontline employee, contacted Special Agent James A. Kennedy, Jr. of the FBI with a tip that a Frontline employee had accessed child-pornographic websites from a workplace computer.

Agent Kennedy pursued the report that day, first contacting Frontline’s Internet Technology (“IT”) Administrator, John Softich. One of Softich’s duties at Frontline was to monitor employee use of the workplace computers including their Internet access. He informed Kennedy that the company had in place a firewall, which permitted constant monitoring of the employees’ Internet activities.

During the interview, Softich confirmed Cochenour’s report that a Frontline employee had accessed child pornography via the Internet. Softich also reported that he had personally viewed the sites and confirmed that they depicted “very, very young girls in various states of undress.” Softich further informed Kennedy that, according to the Internet Protocol address and log-in information, the offending sites were accessed from a computer in the office of Appellant Jeffrey Brian Ziegler, who had been employed by Frontline as director of operations

since August 2000. Softich also informed Kennedy that the IT department had already placed a monitor on Ziegler's computer to record its Internet traffic by copying its cache files.

Agent Kennedy next interviewed William Schneider, Softich's subordinate in Frontline's IT department. Schneider confirmed that the IT department had placed a device in Ziegler's computer that would record his Internet activity. He reported that he had "spot checked" Ziegler's cache files and uncovered several images of child pornography. A review of Ziegler's "search engine cache information" also disclosed that he had searched for "things like 'preteen girls' and 'underage girls.'" Furthermore, according to Schneider, Frontline owned and routinely monitored all workplace computers. The employees were aware of the IT department's monitoring capabilities.

The parties dispute what happened next. According to testimony that Softich and Schneider provided to a federal grand jury, Agent Kennedy instructed them to make a copy of Ziegler's hard drive because he feared it might be tampered with before the FBI could make an arrest. Agent Kennedy, however, denied that he directed the Frontline employees to do anything. According to his testimony, his understanding was that the IT department had already made a backup copy of Ziegler's hard drive. As the government points out, his notes from the Softich interview say, "IT Dept has backed up JZ's hard drive to protect info." Thinking that the copy had already been made, Kennedy testified that he instructed Softich only to ensure that no one could tamper with the backup copy.

Whatever Agent Kennedy's actual instructions, the Frontline IT employees' subjective understanding of that conversation seems evident from their actions during the late evening of January 30, 2001. Around 10:00 p.m., Softich and Schneider obtained a key to Ziegler's private office from Ronald Reavis, the chief financial officer of Frontline, entered Ziegler's office, opened his computer's outer casing, and made two copies of the hard drive.

Shortly thereafter, Michael Freeman, Frontline's corporate counsel, contacted Agent Kennedy and informed him that Frontline would cooperate fully in the investigation. Freeman indicated that the company would voluntarily turn over Ziegler's computer to the FBI and thus explicitly suggested that a search warrant would be unnecessary. On February 5, 2001, Reavis delivered to Agent Kennedy Ziegler's computer tower (containing the original hard drive) and one of the hard drive copies made by Schneider and Softich. Schneider delivered the second copy sometime later. Forensic examiners at the FBI discovered many images of child pornography.

On May 23, 2003, a federal grand jury handed down a three-count indictment charging Ziegler with receipt of child pornography, in violation of 18 U.S.C. § 2252A(a)(2); possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5)(B); and receipt of obscene material, in violation of 18 U.S.C. § 1462.

On September 8, 2004, the district court entered a written order denying Ziegler's motion to suppress. Importantly, the court made the factual finding that "Agent Kennedy contacted Softich and Schneider on January 30, 2001 and *directed them to make a back-up of Defendant's computer files* " (emphasis added).

However, citing United States v. Simons, 206 F.3d 392 (4th Cir. 2000), the court ultimately held that Ziegler had no reasonable expectation of privacy in “the files he accessed on the Internet” and therefore denied Ziegler's motion.

Ziegler subsequently entered into a written plea agreement with the government. Pursuant to the agreement, the government agreed to dismiss the child pornography counts in exchange for Ziegler's agreement to plead guilty to the receipt of obscene material.

ISSUE AND RULING: Did Ziegler have a reasonable expectation of privacy in his workplace computer under the Fourth Amendment where his employer owned it, routinely monitored its use, and prohibited private use? (**ANSWER:** No)

Result: Affirmance of U.S. District Court conviction of Jeffrey Brian Ziegler for receipt of obscene material in violation of federal law.

ANALYSIS: (Excerpted from 9th Circuit opinion)

Ziegler argues that “[t]he district court erred in its finding that Ziegler did not have a legitimate expectation of privacy in his office and computer.” He likens the workplace computer to the desk drawer or file cabinet given Fourth Amendment protection in cases such as O'Connor v. Ortega, 480 U.S. 709 (1987). Ziegler further contends that the Fourth Circuit's Simons case is inapposite. Whereas in Simons “the person conducting the search was a network administrator whose purpose was to search for evidence of employee misconduct,” in this case “the search was conducted at the behest of Agent Kennedy who was undeniably seeking evidence of a crime.”

The government, of course, views the matter quite differently. It contends that the district court's ruling was correct—Ziegler did not have an objectively reasonable expectation of privacy in his workplace computer.

Ziegler's expectation of privacy in his workplace computer must . . . have been *objectively* reasonable.

In United States v. Simons, the case upon which the district court relied, the Fourth Circuit reasoned that an employer's Internet-usage policy—which required that employees use the Internet only for official business and informed employees that the employer would “conduct electronic audits to ensure compliance,” including the use of a firewall—defeated any expectation of privacy in “the record or fruits of [one's] Internet use.” A supervisor had reviewed “hits” originating from Simons's computer via the firewall, had viewed one of the websites listed, and copied all of the files from the hard drive. Despite that the computer was located in Simons's office, the court held that the “policy placed employees on notice that they could not reasonably expect that their Internet activity would be private.”

As the government suggests, similar circumstances inform our decision in this case. Though each Frontline computer required its employee to use an individual log-in, Schneider and other IT-department employees “had complete administrative access to anybody's machine.” As noted, the company had also installed a firewall, which, according to Schneider, is “a program that monitors Internet traffic ... from within the organization to make sure nobody is visiting any

sites that might be unprofessional.” Monitoring was therefore routine, and the IT department reviewed the log created by the firewall “[o]n a regular basis,” sometimes daily if Internet traffic was high enough to warrant it. Upon their hiring, Frontline employees were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature. Ziegler, who has the burden of establishing a reasonable expectation of privacy, presented no evidence in contradiction of any of these practices. Like Simons, he “does not assert that he was unaware of, or that he had not consented to, the Internet [and computer] policy.”

Other courts have scrutinized searches of workplace computers in both the public and private context, and they have consistently held that an employer's policy of routine monitoring is among the factors that may preclude an objectively reasonable expectation of privacy. **[At this point, the Court engages in discussion of large number of other court decisions. – LED Eds.]**

In short, we see no reason to deviate from the reasoning of the cases cited above. The record evidence in this case establishes that the workplace computer was company-owned; Frontline's computer policy included routine monitoring, a right of access by the employer, and a prohibition against private use by its employees. *[Court's footnote: We do not hold that company ownership of the computer is alone sufficient to defeat an expectation of privacy. “Fourth Amendment privacy interests do not. . .turn on property interests.” Schowengerdt, 823 F.2d at 1333 (citations omitted). As always, the issue depends on what expectations may reasonably coexist with that ownership. At the least, we consider the combination of above-noted factors sufficient to defeat an expectation that would confer Fourth Amendment standing. At the same time, we do not hold that all the foregoing factors are necessary to defeat an expectation of privacy in a workplace computer.]* As such, Ziegler had no objectively reasonable expectation of privacy in his workplace computer and thus no standing to invoke Fourth Amendment protection.

[Some citations omitted]

LED EDITORIAL COMMENT: While article 1, section 7 of the Washington constitution has been held in some circumstances to provide greater protection of personal privacy than does the Fourth Amendment, our guess is that the Washington Supreme Court would reach the same result if asked to engage in article 1, section 7 state constitutional analysis on these facts.

WHERE POSTAL INSPECTORS HAD NO OBJECTIVE BASIS FOR BELIEVING POSTAL EMPLOYEE WAS ARMED, THEIR FRISK WAS UNLAWFUL

U.S. v. Flatter, 456 F.3d 1154 (9th Cir. 2006) (Decision issued August 9, 2006)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

Following a report by the Veterans' Administration (“VA”) that fourteen packages containing class II medications had been lost, postal inspectors began to investigate the possibility of mail theft at a postal facility in Spokane, Washington, through which all of the lost packages had been routed. Postal inspectors soon focused their attention on Andrew Flatter after a cross-comparison of work

schedules revealed that he was among a handful of workers who had been present on nearly all of the dates on which mail was lost.

The inspectors focused on Bay 32, which housed sorted mail that was to be delivered to Coeur d'Alene, Idaho. The mail in Bay 32 was in large, rectangular mesh boxes, sometimes referred to as "crab pots." Flatter's job was to drive a "tug," a motorized vehicle used to move the crab pots around the facility. Because the mail in Bay 32 was already sorted, there was no need for Flatter to have any contact with the mail beyond loading the crab pot into the appropriate truck in the loading bay.

The postal inspectors placed six decoy packages into two of the crab pots in Bay 32. The decoys were placed on top of the already-sorted mail so that they would be easily visible, both to Flatter and to the inspectors, who were observing the decoys by video camera. These decoys were white on the outside and gray on the inside, so that if someone were to tamper with the package, the gray interior would become exposed and the two contrasting colors would be easily visible.

Flatter heightened the investigators' suspicions by handling the mail in the crab pots while he moved them onto the mail truck bound for Coeur d'Alene. Investigators also saw Flatter remove a white object from one of the crab pots as he was pushing them onto the truck, but he then moved further inside the mail delivery truck, placing him out of the inspectors' view. Inspectors then observed Flatter emerge from the truck and leave the area with his tug.

The postal inspectors then sought to retrieve their six decoy packages from Bay 32's crab pots, but they were only able to locate five. They also noted that the five decoys they recovered had been moved from the spots in which they had originally been placed.

Inspectors Schaap and Sheppard then summoned Flatter, who was in the break room, to question him about the missing decoy envelope. They questioned him briefly in the hallway, and the inspectors found his responses to be evasive and unsatisfying, so they asked Flatter to come with them to the postal inspectors' office for further questioning. Flatter agreed, but requested that a union representative be present; one was provided. When they had arrived at the office, the inspectors told Flatter that he was not under arrest, and that he was free to leave. The inspectors told Flatter that, in order to ensure their own safety, they were going to pat him down for weapons. The inspectors then asked the union representative whether he had weapons; he answered that he did not. The inspectors later testified that they searched Flatter because they thought the situation might turn confrontational and the inspectors, Flatter, and the union representative were meeting in a small room.

Inspector Sheppard then proceeded to pat down Flatter. To facilitate the pat down, Sheppard had Flatter stand up. Sheppard stood behind Flatter while conducting the frisk. In the course of the check for weapons, Sheppard noticed at least half of an inch of white and gray plastic protruding from the top of Flatter's rear pocket. The inspector immediately suspected that this was the missing decoy package. He therefore removed it from Flatter's pocket, placed it on the table, and resumed searching Flatter for weapons. The envelope proved to be the decoy.

Flatter was indicted on one count of mail theft in violation of 18 U.S.C. § 1709. Flatter moved to suppress the envelope on the ground that it had been obtained in violation of the Fourth Amendment. He also made a motion to depose the postal inspector witnesses. Both motions were denied. Flatter was convicted after a jury trial and sentenced to three years' probation and a \$100 special penalty assessment.

ISSUE AND RULING: Where the postal inspectors had no objective basis for believing that the suspect was armed, were they justified in frisking him? (ANSWER: No)

Result: Reversal of U.S. District Court conviction of Andrew Milton Flatter for mail theft.

ANALYSIS: (Excerpted from 9th Circuit opinion)

In Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court considered what constitutes sufficient suspicion under the Fourth Amendment to justify frisking an individual for weapons. Citing "the . . . immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him," the Terry Court ruled that a search for weapons need not be supported by probable cause. The Court held that a search for weapons is permissible "for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual."

Inspector Sheppard, who searched Flatter for weapons, testified that he conducted the pat down search of Flatter out of concern for officer safety. Sheppard stated that the interrogation room was small, placing the two officers in close quarters with Flatter and the union representative. He also stated that he feared that the questioning was likely to become confrontational, particularly because they suspected Flatter of a crime instead of a lesser form of misconduct. Sheppard stated that, in his experience, individual responses to such circumstances vary dramatically, and that he therefore felt it was prudent to insure that Flatter was not carrying any weapons. However, Sheppard admitted that "[he] had no idea if[Flatter] had weapons on him." Based on these facts, the district court upheld the weapons search.

These facts merely establish that *if* Flatter was armed, he would be dangerous; nothing in the record suggests that there was any reason to believe that Flatter actually was armed. Our prior cases have identified a wide variety of factors that can support a reasonable belief that an individual is armed. For example, we have given significant weight to an officer's observation of a visible bulge in an individual's clothing that could indicate the presence of a weapon. See, e.g., United States v. Alvarez, 899 F.2d 833, 835, 839 (9th Cir.1990); United States v. Allen, 675 F.2d 1373, 1383 (9th Cir.1980); United States v. Hill, 545 F.2d 1191, 1193 (9th Cir.1976); cf. United States v. Thomas, 863 F.2d 622, 629 (9th Cir.1988) (not finding reasonable suspicion that defendant was armed in part because officers did not see any suspicious bulges in his clothing). We have also considered sudden movements by defendants, or repeated attempts to reach for an object that was not immediately visible, as actions that can give rise to a reasonable suspicion that a defendant is armed. See, e.g.,

United States v. Flippin, 924 F.2d 163, 164-66 (9th Cir.1991); cf. Ybarra, 444 U.S. at 93, 100 S.Ct. 338 (not finding reasonable suspicion where defendant, “whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening”). We also consider the nature of the crime suspected; indeed, some crimes are so frequently associated with weapons that the mere suspicion that an individual has committed them justifies a pat down search. See, e.g., Terry, 392 U.S. at 28, 88 S.Ct. 1868 (robbery); Hill, 545 F.2d at 1193 (same); United States v. \$109,179 in U.S. Currency, 228 F.3d 1080, 1086 (9th Cir.2000) (large-scale narcotics dealing); United States v. Post, 607 F.2d 847, 851 (9th Cir.1979) (same); cf. United States v. Mattarolo, 209 F.3d 1153, 1158 (9th Cir.2000) (finding reasonable suspicion, in part because nighttime burglary is a crime frequently committed while armed); Thomas, 863 F.2d at 629 (not finding reasonable suspicion, in part because counterfeiting is not a crime frequently committed while armed).

Here, however, officers had absolutely no reason to believe that Flatter was armed. They did not observe any bulges in his clothing. Nothing in Flatter's demeanor aroused the officers' concerns for their safety, or suggested that he might be armed; he did not act in a threatening manner at any time, nor were the officers aware of any past violent conduct. Mail theft by postal employees is not a crime that is frequently associated with weapons, such as robbery or large-scale drug dealing. Nor does the record suggest that Flatter had any idea he was under investigation; he was therefore no more likely to have been armed that day than to have been armed on any other work day. Because the officers had no reason to suspect that Flatter was armed and dangerous, we hold that the pat down violated the Fourth Amendment.

The government suggests in its brief that officers would have discovered the envelope even without the frisk for weapons because the parties were in close quarters and the envelope was sticking out of Flatter's rear pants pocket. The record does not support this contention. Flatter's vest obscured his waistline, so that the envelope was not visible until Flatter either lifted his arms pursuant to the search or the officer lifted the vest to inspect his waistband for weapons. Indeed, Flatter had already led the officers around the postal facility for some time and neither officer had noticed the envelope sticking out of Flatter's pocket. The evidence thus cannot be admitted under the inevitable discovery doctrine.

Since the decoy envelope was found as a direct result of the illegal weapons search, it must be suppressed as the fruit of the poisonous tree.

[Some citations omitted]

LED EDITORIAL COMMENT: The decision here seems like a no-brainer, but there is some useful discussion in the Court's analysis - - see the paragraph that we bolded above - - regarding what will justify a frisk.

SEARCH WARRANT AFFIDAVIT ESTABLISHED THAT COMPUTER CONTAINED IMAGES OF MINORS ENGAGED IN SEXUALLY EXPLICIT CONDUCT, THOUGH COURT WOULD PREFER THAT AFFIANT'S ATTACH COPIES OF THE IMAGES TO THE AFFIDAVIT

U.S. v. Battershell, 457 F.3d 1048 (9th Cir. 2006) (Decision issued August 10, 2006)

Facts and Proceedings below: (Excerpted from 9th Circuit opinion)

The following facts are drawn from the evidence presented at the suppression hearing before the federal district court and on the court's factual findings in support of its ruling. On April 6, 2004, Vancouver Police Officer [A] responded to a call from Grace Smith, Battershell's girlfriend, reporting that she and her sister had found pictures of minors engaged in sexual activity on Battershell's computer. Smith had been living at Battershell's home for three months and was given permission to use the computer so that she and her sister could look for jobs online. Smith and her sister told Officer [A] that while using Battershell's computer they had opened a file entitled "Potter," in which they saw pictures of "kids having sex." Smith and her sister also told the officer that Battershell was the only Windows user.

Smith and her sister opened the "Potter" folder and gave Officer [A] permission to view several small thumbnail photos. It was clear that some of the photos showed undressed people, but Officer [A] enlarged two pictures to see more details. According to Officer [A]'s report, which was included in the warrant application, the first picture showed "a young female (8-10 YOA) naked in a bathtub. The second picture showed another young female having sexual intercourse with an adult male. This confirmed that the pictures were illegal to obtain." **LED EDITORIAL NOTE: Apparently, this brief description in Officer A's report was the extent of the description of the pictures/images in the search warrant affidavit that is the subject of the probable cause review in this case.]**

Officer [A] retrieved a digital camera from his police car and "took photos of [the two pictures he had enlarged] to document should there be a computer problem." At this time Officer [B] arrived at the home and "also observed the photos to confirm they were on the computer." The officers then turned the computer off and seized it.

Officer [A] called Vancouver police computer forensics investigator [C] for advice on how to handle the computer. She told him to place it into evidence and said that she would later obtain a warrant to search the computer for pictures. On August 28, 2004, after obtaining the search warrant [supported by an affidavit that used Officer A's above brief description of the images/photos] from a Washington state court judge, investigator [C] conducted a forensic examination of Battershell's computer and uncovered 2,731 images depicting the sexual abuse and exploitation of children. These images were found on the hard drive in the "Potter" folder and on a compact disk taken from the computer.

After Battershell was indicted by a federal grand jury, and following an evidentiary hearing, the district court denied Battershell's motion to suppress the evidence, ruling that the warrant application established probable cause. Battershell and the government then entered into a conditional plea agreement . . . for violation of possessing visual depictions of minors engaged in sexually explicit conduct.

ISSUES AND RULINGS: 1) Did the officer's descriptions of the computer images, without attaching the pictures/images themselves, establish probable cause that the images showed

sexually explicit conduct? (ANSWER: Yes, as to one of the two descriptions, though attaching the images to the warrant affidavit would have been the preferable approach); 2) Did the officer's description of one of the two images in the affidavit establish probable cause that the one of persons engaged in sexually explicit conduct was a minor? (ANSWER: Yes)

Result: Affirmance of U.S. District Court conviction of Joel Battershell for possessing visual depictions of minors engaged in sexually explicit conduct.

ANALYSIS: (Excerpted from 9th Circuit opinion)

Introduction:

We must determine that the warrant application made a sufficient showing that there was probable cause for the magistrate to believe that the pictures likely to be found on Battershell's computer depicted: (1) sexually explicit conduct; and (2) a minor engaged in that conduct. We are satisfied that it did.

Description of sexually explicit conduct:

Officer [A] described the first photograph as "a young female (8-10 YOA) naked in a bathtub." The government correctly concedes that the description of the first photograph is insufficient to establish probable cause because the first photograph falls within the fifth category of child pornography: "lascivious exhibition of the genitals or pubic area." Officer [A]'s terse description, absent an accompanying photograph, is insufficient to establish probable cause that the photograph lasciviously exhibited the genitals or pubic area because his conclusory statement is an inherently subjective analysis and it is unclear if the photograph exhibited the young female's genitals or pubic area.

Officer [A] described the second image as depicting "another young female having sexual intercourse with an adult male." Both federal law and Washington law define "sexual intercourse" as "sexually explicit conduct." *Compare* 18 U.S.C. § 2256(2)(A) with Wash. Rev.Code § 9.68A.070. We explained in United States v. Smith, 795 F.2d 841 (9th Cir. 1986), that:

The statement that the photographs depict sexually explicit conduct is similar to many other factual conclusions routinely accepted by courts in applications for warrants . . . [F]actual conclusions are a normal, necessary, and perfectly acceptable part of an affidavit . . .

[C]ourts are directed to evaluate probable cause based on "all the circumstances set forth" in the warrant application. [This] approach "permits a balanced assessment of the relative weights of all the various indicia of reliability" surrounding informants' tips.

Significant to our ruling is the fact that the warrant application also included statements from Smith and her sister that the "Potter" folder on Battershell's computer had "pictures that they believed were kids having sex." This statement is one circumstance that creates a fair probability that visual depictions of minors engaged in sexually explicit conduct will be found on Battershell's computer. Indeed, the circumstances presented in the warrant application show that the information provided by Smith and her sister was highly reliable. Smith was

turning in her boyfriend, which enhances the credibility of her statement. Also, Smith and her sister did not give their information anonymously. Rather, their identities were “known to law enforcement and thus [they were] liable to repercussions” if they lied about what they had seen. United States v. Harding, 273 F.Supp.2d 411, 419 (S.D.N.Y. 2003). Officer [A] corroborated the report by viewing samples of what the two women had discovered.

Battershell argues that the warrant application is invalid without the accompanying photographs or other support sufficient to permit the issuing magistrate to make an independent probable cause determination. Battershell grounds his claim on our decision in Smith. In Smith, we upheld a warrant to search the defendant's apartment that had issued based on a postal inspector's affidavit asserting that photos depicted “explicit sexual conduct.” Smith, 795 F.2d at 848. **Although we were “troubled by the fact that the government did not present and the magistrate did not see the photos in question before the warrant issued,” we nonetheless upheld the warrant, in part because the language of the affidavit echoed the “quite specific” definitions of the child pornography statute and we determined that the magistrate could “reasonably consider[] the statement of an experienced postal inspector that the photos depicted ‘sexually explicit conduct’”** We recognize, of course, that in some investigations of child pornography copies of the pictures sought may not be readily available even though probable cause to believe they exist may be established through other means.

Indeed, a judge may properly issue a warrant based on factual descriptions of an image. See P.J. Video, 475 U.S. at 874 n.5 (“[W]e have never held that a magistrate must personally view allegedly obscene films prior to issuing a warrant authorizing their seizure. On the contrary, we think that a reasonably specific affidavit describing the content of a film generally provides an adequate basis for the magistrate to determine whether there is probable cause” (internal citation omitted)); see also United States v. Chrobak, 289 F.3d 1043, 1045 (8th Cir.2002) (ruling that a magistrate may base probable cause on viewing images or on a description of them).

Battershell relies on the First Circuit's decision in United States v. Brunette, however, to argue that the warrant application was insufficient to establish probable cause. In Brunette, the First Circuit determined that a warrant application, supported by the affiant's statement that the photograph at issue depicted “a prepubescent boy lasciviously displaying his genitals,” was insufficient to establish probable cause. The court held that “[o]rdinarily, a magistrate judge must view an image in order to determine whether it depicts the lascivious exhibition of a child's genitals.”

With respect to the second photograph, this case is easily distinguishable from Brunette because it involves an image in one of the first four categories, (*i.e.*, sexual intercourse) while Brunette involved an image in the fifth category (*i.e.*, lasciviously displaying the genitals). The first four categories, with the possible exception of the fourth category, which is not at issue here, involve easily identifiable nouns that are not qualified by amorphous adjectives. As we stated in Smith, “[t]he affiant need only be able to identify the specific, clearly defined acts listed” in the statute, such as sexual intercourse or bestiality, and such conclusory statements are permissible to establish probable cause. Elaborate

and detailed descriptions are unnecessary because “[a]ny rational adult person can recognize sexually explicit conduct engaged in by children under the age of 16 when he sees it.” United States v. Hurt, 808 F.2d 707, 708 (9th Cir.1987), amending 795 F.2d 765 (1986). Thus, the more demanding standard for establishing probable cause of “lascivious” images that the First Circuit employed in Brunette does not apply.

It would have been preferable if the affiant in this case had included copies of the photographs in the warrant application. But failing to include a photograph in a warrant application is not fatal to establishing probable cause. Indeed, a judge may properly issue a warrant based on factual descriptions of an image. Officer [A]’s description of the second photograph is sufficient to establish probable cause.

Under the totality of the circumstances the warrant application, including Smith and her sister’s statements and Officer [A]’s report confirming their observations, established a fair probability that Battershell’s computer contained images of sexually explicit conduct.

Description of minor:

The only remaining question is whether the warrant application was sufficient to permit the judge to conclude it was fairly probable that the person engaged in the sexually explicit conduct depicted in the second photograph was a minor.

Officer [A] described the first image as showing a naked “young female (8-10 YOA).” In the very next sentence, Officer [A] described the second picture as showing “another young female having sexual intercourse.” The word, “another,” is an adjective whose meaning is defined by its reference to an immediately preceding noun. Here, it refers to a “young female (8-10 YOA).” Having just used the term “young female” to mean a girl between the ages of eight and ten, Officer [A]’s use of the phrase “another young female” can only mean, grammatically, that he was describing another minor between the ages of eight and ten.

Furthermore, Officer [A] noted in his report that the second young female was having sex with an “adult” male. His use of the term “adult” for the male, juxtaposed with the term “young” for the female, suggests that the female was not an “adult.” Officer [A] concluded that the details in the two enlarged images “confirmed that the pictures were illegal to obtain.” If Officer [A] did not think that the “young female” in the second picture was a minor, then he would not have said that the photograph was illegal to obtain.

Battershell argues that the warrant application was insufficient to establish probable cause absent an attached copy of the photographs or “some sort of meaningful confirmation” of the ages, such as the pediatrician’s analysis in Smith. While a medical confirmation of the subject’s age may be sufficient to establish probable cause absent an attached photograph, it is not necessary. Indeed, we have accepted, for purposes of an affidavit in support of a search warrant, the conclusory age estimates made by civilians and other untrained lay witnesses without demanding a detailed explanation of how the witnesses reached that conclusion. See United States v. Wiegand, 812 F.2d 1239, 1243 (9th Cir.1987) (“Common sense suggests that most of the time one can tell the difference

between a child and an adult.”); see also United States v. Hill, 142 F.3d 988, 995 (7th Cir.1998) (accepting a computer repairman's statement that images showed “minors”); United States v. Peterson, 294 F.Supp.2d 797, 806 (D.S.C.2003) (accepting a computer repairman's statement that images showed “pre-pubescent” boys).

The issuing magistrate properly applied a practical, common-sense approach in light of the circumstances set forth in the affidavit, including Officer [A]'s description of the two photographs and the statement of Smith and her sister as to what they had seen before calling the police. This was sufficient to establish a fair probability that the person in the image was a child engaged in sexually explicit conduct with an adult.

[Some citations omitted; bolding added]

LED EDITORIAL NOTE: The Battershell decision is one of three very recent Ninth Circuit opinions addressing computer search warrant probable cause and computer seizures under such warrants. The other two such decisions are U.S. v. Hill, ___ F.3d ___, 2006 WL 2328721 (9th Cir. 2006) and U.S. v. Adjani, 452 F.3d 1140 (9th Cir. 2006).

In Hill, like Battershell, a case involving child porn investigation, the Ninth Circuit addresses in great detail what kind of description will be particular enough to satisfy Fourth Amendment probable cause standards when an officer-affiant is describing the “lasciviousness” of suspected child porn photos. The Hill decision also addresses the question of when a computer that is seized and searched under a warrant can be taken from the scene of to be searched elsewhere. Some of the important propositions addressed in the Hill decision regarding computer searches under warrants are: 1) this is a specialized area, and computer warrants and related affidavits must be drawn with special care so as not to authorize broad “government-fishing” expeditions; 2) it is helpful (although not always mandatory) for the affidavit to include a fairly detailed “computer search protocol” that includes instructions as to - - a) what will determine whether the computers will be searched on site rather than taken off site for searching; b) what procedures will be followed for screening data to determine what data can be searched and seized under the terms of the particular warrant being executed (as opposed to discovery that will trigger application for another search warrant).

The Hill Court also makes reference to the United States Department of Justice resource - - “Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations” that, among other things, can be accessed on the internet webpage for DOJ’s Computer Crime and Intellectual Property Division at [cybercrime.gov].

The Adjani case involved an extortion investigation. The Adjani Court holds that a computer belonging to a third person could be seized and searched when that computer was located at a residence covered by a search warrant, even though the computer did not belong to the resident of the premises. The third person had been described in the affidavit for the search warrant as being involved in the extortion plot, and there was nothing in the search warrant that restricted officers to searching only computers belonging to the resident of the premises.

Officers and attorneys working in this subject area probably will want to review each opinion in its entirety. As we note at the end of each month’s LED in our information

about Internet access to certain information, Ninth Circuit opinion can be located on a chronologically-arranged set-up at [<http://www.ca9.uscourts.gov/>] (click on "opinions") if one knows the date of the opinion and the name of the case. The Battershell decision was issued on August 10, 2006. The Hill decision was issued on August 11, 2006. And the Adjani decision was issued on July 11, 2006.

BRIEF NOTE FROM THE NINTH CIRCUIT OF THE U.S. COURT OF APPEALS

NO QUALIFIED IMMUNITY FOR OFFICERS - - JURY CAN DECIDE CIVIL RIGHTS SUIT ALLEGING THAT OFFICERS USED EXCESSIVE FORCE AGAINST NON-SUSPECT, NON-RESISTING, 11-YEAR-OLD DURING SEARCH WARRANT EXECUTION; RULING IS BASED ON YOUTH'S CLAIMS, AMONG OTHERS, THAT OFFICERS: 1) POINTED GUN AT YOUTH FOR TOO LONG AND 2) KEPT HIM IN HANDCUFFS FOR TOO LONG - - In Tekle v. U.S., 457 F.3d 1088 (9th Cir. 2006) (Decision issued August 11, 2006), the Ninth Circuit rules that federal officers are not entitled to qualified immunity against a claim arising out of how the officers dealt with an 11-year-old boy, Ephraim Tekle, during their execution of search and arrest warrants at the boy's home arising out of investigation of his parents for income tax and drug crimes.

As with all decisions in qualified immunity appeals, the factual description by the Court is slanted against the officers because the question before the appellate court is whether the allegations of the plaintiffs, if true, support taking the case to a jury, as opposed to requiring dismissal of the case on grounds that no reasonable officer would have known that he or she was required to act differently under the circumstances. The Ninth Circuit describes as follows the allegations of the plaintiff in the Tekle case:

In 1998, Tekle's parents . . . were suspected of narcotics trafficking and tax-related offenses. Internal Revenue Service ("IRS") Special Agent Thomas Jankowski prepared a plan to execute search and arrest warrants at their home. Jankowski learned that the couple's three children, including then eleven-year-old Ephraim, lived at the home and that [Ephraim's mother] took the children to school each morning. Jankowski thus planned to serve the warrants after [Ephraim's mother] had taken the children to school.

On the morning of March 23, 1998, a team of approximately twenty-three agents gathered at an area away from the [target] home for briefing. [Court's footnote: The agents were from the IRS, the DEA, and the Los Angeles Police Department.] Another team of agents arrested [Ephraim's mother] without incident after she dropped off two of her children at school. The agents asked [Ephraim's mother] for the garage door opener to her house, and she told them to be careful because her eleven-year-old son was at home and her husband recently had suffered a heart attack and undergone major heart surgery. The agents communicated by radio with the team of agents at the [target] home and informed them of what [Ephraim's mother] had told them.

At the [target] residence, the agents announced the presence of law enforcement officers over a public address system. Jankowski also called [Ephraim's father] on a cellular telephone, asking him to surrender himself at the front door.

Immediately prior to the agents' announcement, [Ephraim] opened the garage door and exited the garage in order to take out the trash, unaware of the agents'

presence. He was barefoot and was wearing a t-shirt and shorts. He saw numerous police cars and heard a "loud intercom" over which the officers were saying, "Young man, turn around and put your hands in the air." Because he did not realize they were speaking to him, he turned around and started running back to the house through the garage. The agents again told him to turn around with his hands up, and [Ephraim] turned around and started walking out of the garage with his hands up.

One of the officers told [Ephraim] to get on the ground, so he lay face down on the driveway. The officer held a gun to [Ephraim's] head, searched him, and handcuffed him. The officer pulled [Ephraim] up from behind by the chain of the handcuffs and took him out to the sidewalk, where [Ephraim] sat, still handcuffed, with his feet "in the gutter" until his father . . . was brought out of the house in handcuffs, approximately fifteen minutes later.

After [Ephraim's father] came out of the house, the officers removed the handcuffs from [Ephraim] and sat him on a stool in the driveway, where about fifteen to twenty officers kept their guns pointed at him. [Ephraim] asked if he could use the restroom, but one of the officers followed him to the restroom, keeping his hand on his gun, and would not let [Ephraim] close the door, so [Ephraim] returned to the driveway. One of the officers asked [Ephraim] where his parents were from, and [Ephraim] replied that he was born here but that his parents were from Ethiopia. The officer said, "Ethiopia is an f'n ugly country, and there's nothing to see there." When asked for his shoes, another officer threw the shoes on the ground and spat on them. Several hours later, one of [Ephraim's] relatives came to the house to pick him up.

In his complaint, [Ephraim] sought declaratory relief and damages. He alleged claims for false arrest, assault and battery, and mental distress pursuant to the FTCA. He further alleged violations of his federal and state civil rights. The district court granted summary judgment in favor of the defendants, concluding that the force used was reasonable and, in the alternative, that Fourth Amendment law governing the agents' conduct was not clearly established at the time of the incident. Accordingly, it held that the agents were entitled to qualified immunity. The court also concluded that [Ephraim] had not raised an issue of triable fact regarding the reasonableness of his detention. The court entered judgment in favor of the individual defendants and the United States, and [Ephraim] timely appealed.

The Ninth Circuit concludes, based on these allegations, that a jury (or court as fact-finder) could conclude that the officers used excessive force in detaining the unarmed and barefoot 11-year-old boy, dressed in a t-shirt and shorts, where, while the boy was initially briefly unresponsive to the officers' initial directive, he thereafter complied with their request to lie face down on driveway, and the officers nonetheless held a gun to his head, searched him, handcuffed him, pulled him up from behind by the chain of handcuffs and sat him on the sidewalk, still handcuffed, with their guns pointed at him, until his father was brought out of the house under arrest about fifteen minutes later.

The lead opinion for the Ninth Circuit notes that the Court has previously held that unreasonably pointing a gun at a non-threatening person (whether the person is a suspect or not) can constitute excessive force under the Fourth Amendment in some circumstances. See Robinson v. Solano County, 278 F.3d 1007 (9th Cir. 2002) (the 2002 decision affirmed a 2000 three-judge decision that was reported in the **October 2000 LED** starting at page 10). The Court notes that

it also has held that it can be excessive force under the Fourth Amendment to hold a non-threatening person in handcuffs for too long. See Baldwin v. Placer County, 418 F.3d 966 (9th Cir. 2005) **Sept 05 LED:06**; but compare Muehler v. Mena, 544 U.S. 93 (2005) **May 05 LED:02** (officers acted reasonably under the totality of the circumstances in light of officer-safety considerations supporting holding a person in handcuffs an extended period of time).

One judge on the three-judge panel in the Tekle case agrees with the majority on the gun-pointing aspect of the ruling, but he disagrees as to most aspects of the handcuffing ruling of the majority. The partially dissenting judge agrees that it would be excessive force if an officer, as alleged, pulled the non-resisting 11-year-old to his feet from a prone position by pulling up on the chain of the handcuffs fastened behind the boy's back. But the judge argues that keeping the 11-year-old in handcuffs until his father was removed from the house was reasonable as a precaution for safety and unimpeded execution of the warrants in light of the boy's initial unresponsiveness to the officers plus his physical capacity and potential impulsiveness as an 11-year-old.

Result: Federal district court summary judgment ruling for government reversed; case remanded for possible trial.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) POLICE CHILD-SEXUAL-ASSAULT RECORDS MAY NOT BE WITHHELD BASED ON REQUESTOR'S IDENTIFICATION OF VICTIM – In Koenig v. City of Des Moines, ___ Wn.2d ___, ___ P.3d ___, 2006 WL 2546946 (2006), the Washington Supreme Court rules 5-4 that police documents containing information about sexual assault of a child cannot be withheld under Washington public records laws based on the fact that the requesting person identifies (or knows or might determine the identify of the victim).

The Supreme Court's decision reversed in part a Court of Appeals decision in the same case. See 123 Wn. App 285 (Div. I, 2004) **Jan 05 LED: 16**.

Former RCW 42.17.31901 (recodified in 2005 as RCW 42.56.240(5), and also revised in 2005, (though apparently not in a manner relevant to the issue in this case) provided: "Information revealing the identity of child victims of sexual assault who are under age eighteen is confidential and not subject to public disclosure. Identifying information means the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator." In Koenig, the father of a child who was the reported victim of sexual assault made a public records request for the records to the investigating agency, the City of Des Moines. Rather than redacting (deleting) information about the identity of the victim and then giving the father the records, the City denied the request completely because, in light of the fact that the father had identified the child by name, release of the records would have identified her as a child victim of sexual assault. Applying a literal interpretation of the public records act, the majority justices conclude that there is no basis in the act for withholding a record based on the requestor's knowledge of the identity of the victim. The majority notes that if the father had requested the record giving only the case number or only the assailant's name, the City would have, under its interpretation of the act, given the father the record after deleting the identifying information.

Result: Reversal in part of Court of Appeals decision that reversed in part a King County Superior Court decision; case remanded to Superior Court for imposition of statutory daily penalties (applying Yousoufian v. Office of Ron Sims, 152 Wn.2d 421 (2004) **Jan 05 LED:06**), for an award of reasonable attorney fees, and for such further proceedings as are consistent with the Supreme Court decisions.

(2) DEATH OF DEFENDANT WITH APPEAL PENDING DOES NOT AUTOMATICALLY “ABATE” CONVICTION – In State v. Devin, ___ Wn.2d ___, ___ P.3d ___, 2006 WL 2468538 (2006), the Washington Supreme Court overrules the longstanding court-made “abatement rule,” which automatically vacated a conviction if a defendant died while his or her appeal of the conviction was pending. The Supreme Court’s lead opinion in Devin summarizes the Court’s ruling in Devin as follows:

The Court of Appeals vacated the attempted murder conviction of Jules Devin because, after his conviction, Devin died. We hold that, because Devin failed to file a timely appeal, it was error to apply the common law rule that when a criminal appellant dies with an appeal pending, the underlying conviction is abated as if it never happened. Furthermore, we agree with the State that the abatement rule, first established in 1914 in State v. Furth, 82 Wash. 665 (1914), is in conflict with modern laws that compensate crime victims for their suffering. Accordingly, we overrule Furth to the extent that it vacates challenged convictions automatically upon an appellant’s death, regardless of whether the unresolved appeal has merit or whether compensation is still owed to victims.

Justice Sanders stands alone in a concurring opinion arguing that the Court should not have overruled the “abatement rule” and instead should have stopped at its ruling that the “abatement rule” does not apply in this case because the defendant, at the time of his death, had not filed a timely appeal of his conviction.

Result: Reversal of Division One Court of Appeals decision that vacated the King County Superior Court conviction of Jules Devin (now deceased) for attempted murder.

WASHINGTON STATE COURT OF APPEALS

JAIL HELD CIVILLY LIABLE FOR VIOLATING WASHINGTON STRIP SEARCH STATUTE IN AUTOMATICALLY STRIP SEARCHING ARRESTEE WHO WAS IN CUSTODY PENDING RELEASE ON BAIL

Plemmons v. Pierce County, ___ Wn. App. ___, 140 P.3d 601 (Div. II, 2006)

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

The State charged Abra Plemmons with felony forgery. Plemmons was taken into custody on this charge during a traffic stop in Montana, her state of residence. She posted \$10,000 bail and traveled on her own to Washington to appear, with private counsel, in Pierce County Superior Court for arraignment and a bail hearing.

At the Pierce County Superior Court arraignment and bail hearing, Plemmons asked for release on her personal recognizance because she was a victim of

identity theft, she had come to Washington to appear in court of her own volition, and she had already posted \$10,000 bail when arrested on this same charge in Montana. The court denied her request, imposed bail of \$5,000, and ordered that she be taken into custody.

The County booked Plemmons at 2:59 P.M. that same day. Before placing her with the mixed, general population and intake inmates at the County jail, the County conducted an automatic strip search in accordance with its policy based on chapter 10.79 RCW. Plemmons received a bail bond at 4:41 P.M., and the jail released her at 7:22 P.M.

Sometime later, after determining that Plemmons was the innocent victim of identity theft, and not a forger, the County dropped the forgery charges against her.

Plemmons sued the County for federal constitutional and state statutory civil rights violations based on its post-arraignment strip search performed while she was in custody awaiting release on bail.

A visiting Thurston County Superior Court Judge granted Plemmons' motion for summary judgment, ruling that (1) the County was liable for damages under federal constitutional law and 42 U.S.C. § 1983; (2) the strip search did not violate RCW 10.79.120 and .130; and (3) these two statutes were unconstitutional as applied to Plemmons to the extent they permitted

the strip search of a person who has been 'committed' to jail as a pre-trial detainee for purposes of merely assuring presence at trial, without regard to the nature of the crime charged or other individualized suspicion.

ISSUE AND RULING: Do persons like Plemmons - - i.e., in custody subject to conditional release under CrR 3.2 (such as bail) - - "committed to incarceration by order of a court" within the meaning of RCW 10.79.120, such that they may be subject to a strip search without a warrant, reasonable individualized suspicion, probable cause, or other exception under RCW 10.79.130 or RCW 10.79.140, which otherwise generally protect persons in jail from warrantless strip searches? (**ANSWER:** No)

Result: Affirmance of Pierce County Superior Court order of summary judgment for Abra Plemmons based on her statutory theory under the strip search provisions of chapter 10.79 RCW.

ANALYSIS: (Excerpted from Court of Appeals opinion)

The parties agree that Pierce County strip-searched Plemmons as "a person committed to incarceration by order of a court" described in RCW 10.79.120. They disagree, however, about whether RCW 10.79.120 authorized this strip search.

RCW 10.79.120 provides:

RCW 10.79.130 through 10.79.160 apply to any person in custody at a holding, detention, or local correctional facility, *other than a person committed to incarceration by order of a court*, regardless of whether an arrest warrant or other court order was issued

before the person was arrested or otherwise taken into custody unless the court issuing the warrant has determined that the person shall not be released on personal recognizance, bail, or bond. RCW 10.79.130 through 10.79.160 do not apply to a person held for post-conviction incarceration for a criminal offense. The definitions and remedies provided by RCW 10.79.070 and 10.79.110 apply to RCW 10.79.130 through 10.79.160.

(Emphasis added).

RCW 10.79.130 establishes the following restrictions for strip searches:

(1) *No person* to whom this section is made applicable by RCW 10.79.120 *may be strip searched without a warrant unless:*

(a) There is a *reasonable suspicion* to believe that a *strip search is necessary* to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility;

(b) There is *probable cause* to believe that a *strip search is necessary* to discover other criminal evidence concealed on the body of the person to be searched, but not constituting a threat to facility security; or

(c) There is a *reasonable suspicion* to believe that a *strip search is necessary* to discover a health condition requiring immediate medical attention.

(2) For the purposes of subsection (1) of this section, a *reasonable suspicion is deemed to be present when the person to be searched has been arrested for:*

(a) A *violent offense* as defined in RCW 9.94A.030 or any successor statute;

(b) An offense involving *escape, burglary, or the use of a deadly weapon*; or

(c) An offense involving *possession of a drug* or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

(Emphases added).

If Plemmons fell within the RCW 10.79.120 category of a “person committed to incarceration by order of a court,” then she was not entitled to the protections and restrictions of RCW 10.79.130, and the County could search her without a warrant. If, however, Plemmons was not a “person committed to incarceration by order of a court” under RCW 10.79.120, then the County acted without authority in subjecting her to an automatic, warrantless, strip search. Several rationales support the latter conclusion. We address each in turn.

A. Pre-conviction Release of Accused

CrR 3.2, entitled “Release of Accused,” provides for the conditional release of accused persons subject to such restrictions as the posting of a bond and a cash deposit in order to assure the accused's reappearance for later proceedings.

CrR 3.2(b). CrR 3.2(i), entitled “Order for Release,” directs, “A court authorizing *the release of the accused* under this rule shall issue an appropriate order containing a statement of the conditions imposed . . . ” (Emphasis added). This language implies that a person, such as Plemmons, who is taken into custody pending posting of bail, has been ordered “released” subject to certain conditions rather than “committed to incarceration,” the prerequisite for a warrantless strip search under RCW 10.79.120, not subject to the restrictions of RCW 10.79.130 and .40.

...

Thus, it appears that an individual awaiting bail posting has been ordered conditionally “released” rather than “committed to incarceration.”

B. Legislative History

RCW 10.79.120 is accompanied by a statement of legislative intent:

It is the intent of the legislature to establish policies regarding the practice of strip searching persons booked into holding, detention, or local correctional facilities. It is the intent of the legislature to *restrict the practice of strip searching and body cavity searching* persons booked into holding, detention, or local correctional facilities *to those situations where such searches are necessary.*

RCW 10.79.060 (emphases added).

This statement does not directly address the specific issue here, but it clearly expresses the Legislature's intent to “restrict” strip searches of persons booked into local correctional facilities to “situations where such searches are necessary.” RCW 10.79.060.

The synopsis of the Final Bill Report for RCW 10.79.120 further elucidates the Legislature's intent:

Restrictions are placed on the conduct of strip searches. The restrictions affect which persons in custody may be searched and under what circumstances they may be searched. The restrictions do not apply to persons held for post-conviction supervision. *They do apply to any other person in custody at a holding, detention or local correctional facility other than any person not to be released on personal recognizance or bail.*

...

A person arrested for other than a violent offense, a drug offense or an offense involving escape, burglary or the use of a deadly weapon, may be strip searched *only upon an individual determination that reasonable suspicion or probable cause exists.*

1986 FINAL LEGISLATIVE REPORT, 49th Wash. Leg. at 39-40 (emphases added).

The third sentence of the first paragraph of the above synopsis shows that the Legislature intended to exclude pre-conviction detainees, such as Plemmons, from the category of persons “committed to incarceration by order of a court” who can be strip searched without a warrant: Similarly, the second paragraph in the

above-quoted synopsis demonstrates that strip searches are not allowed for persons arrested for non-violent offenses, such as forgery, without “an individual determination that reasonable suspicion or probable cause exists.”

This legislative history demonstrates the Legislature's intent to restrict warrantless strip searches of persons, such as Plemmons, arrested for a non-violent offense, who are to be released on bail before trial or conviction. Plemmons was in custody pending release on bail and, thus, entitled to the protections of RCW 10.79.130 through .160. These protections include a warrant, probable cause, or individualized reasonable suspicion before being strip searched none of which was present here.

Because Pierce County charged Plemmons with forgery, a non-violent, non-drug offense, the County at least had to make an individualized determination of reasonable suspicion. Pierce County made no such determination here; rather it searched Plemmons under its nonindividualized, blanket policy.

We hold that Plemmons did not meet the statutory criteria for a warrantless, strip search and, therefore, the County acted without authorization in strip searching her under its automatic strip search policy. Accordingly, we need not address the constitutionality of the statute.

[Some citations omitted]

PHONE HARASSMENT - - THERE IS NOW A SPLIT IN WASHINGTON APPELLATE COURTS - - DIVISION TWO DISAGREES WITH DIVISION ONE, AND HOLDS UNDER RCW 9.61.230 THAT STATE MUST PROVE THAT CALL WAS INITIATED WITH INTENT TO HARASS, INTIMIDATE, TORMENT OR EMBARRASS VICTIM

State v. Lilyblad (aka Stephanie Rena Paris), __ Wn. App. __, 140 P.3d 614 (Div II, 2006)

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

In December 2004, Stephanie Paris's two sons were living with their paternal grandmother, Lorie Haley, in Kalama. On December 24, Paris called Haley's home. One of the sons answered the telephone and shortly thereafter both sons were talking to Paris on separate telephones. Paris insisted that her eldest son “give the phone to [his] grandma.” He initially refused her requests.

Eventually, Haley noticed that Paris's sons seemed to be upset. After checking the caller ID, Haley joined the conversation. When she did, “[Paris] said that she was working with a deputy that-and there was one waiting at the bottom of the road and she was coming to get the kids.” Haley responded, “Stephanie, not on Christmas . . . Don't - please don't do this now.”

Thereafter, Haley and Paris began arguing. According to Haley, Paris made a variety of threats, claiming that “she was going to have the kids no matter what she had to do.” Paris even bragged that she had ways to kill Haley. Finally, Haley testified that Paris yelled, “[G]et off the phone you F-ing bitch, or I'll ... Or I'll kill you.” At that point, Haley hung up the telephone.

Two days later, Haley called the police about the telephone call and the Cowlitz County Sheriff's Office investigated. Eventually, the Cowlitz County Prosecutor charged Paris with one count of felony telephone harassment. A jury found Paris guilty.

ISSUE AND RULING: Under the phone harassment statute (RCW 9.61.230), must the State prove that the caller initiated the call with intent to harass, intimidate, torment or embarrass the victim (as opposed to the caller forming such intent during the call after having initiated it)? (ANSWER: The State must prove that the caller had such intent when he or she initiated the call)

Result: Reversal of Cowlitz County Superior Court conviction of Stephanie Rena Paris for felony telephone harassment; remand for new trial.

ANALYSIS:

In pertinent part, former RCW 9.61.230 states that:

Every person who, with intent to harass, intimidate, torment or embarrass any other person, shall make a telephone call to such other person:

....

(3) Threatening to inflict injury on the person or property of the person called or any member of his or her family or household; shall be guilty of a gross misdemeanor, except that the person is guilty of a class C felony if either of the following applies:

....

(b) That person harasses another person under subsection (3) of this section by threatening to kill the person threatened or any other person.

Paris asserts that the trial court's instructions did not require the State to prove that at the time she made the telephone call she had the intent to harass, intimidate, torment, or embarrass Haley.

Jury instruction 7 stated: " 'Make a telephone call' refers to the entire call rather than the initiation of the call." Jury instruction 5 stated:

To convict the defendant of the crime of Telephone Harassment, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about December 24, 2004, the defendant made a telephone call to Lori [sic] Haley;
- (2) That the defendant threatened to kill Lori [sic] Haley;
- (3) That the defendant acted with intent to harass or intimidate Lori [sic] Haley; and
- (4) The acts occurred in the State of Washington.

The trial court took the definitional instruction from City of Redmond v. Burkhart, 99 Wn. App 21 (Div. I, 2000) **June 2000 LED:18**. In Burkhart, Division One of this court stated that "make a telephone call" implies "that something is continually being 'made' until the last step necessary for finality is taken and completed. In the case of a telephone call, the final step would be hanging up the telephone." The Burkhart court also stated, "Thus, we hold that a caller who forms the intent to harass, intimidate, torment, or embarrass *at any point* in a telephone conversation is subject to penalty under RCW 9.61.230." The rationale of Burkhart is explained by the following quotation:

To interpret RCW 9.61.230 to govern only those calls dialed while the caller has the intent to intimidate defies common sense. Such a limited reading artificially narrows the scope of the statute and draws an illogical distinction between threats made by a caller who initiates the call with the intent to intimidate and those made by a caller who formulates the intent to intimidate mid-conversation. Both callers exhibit the same conduct—the threat—and the same intent—intimidation. To interpret the statute as treating them differently is to unnaturally constrict its reach.

Paris invites us to follow the rationale of State v. Wilcox, 160 Vt. 271, 628 A.2d 924 (1993), and similarly hold that the telephone call must be *initiated* with the intent to harass, intimidate, torment, or embarrass another person; Burkhart rejected Wilcox's holding. We decline Paris's invitation to follow Wilcox. But we also do not follow Burkhart. Instead, we hold that the statute is ambiguous as to: (1) whether the caller must make the telephone call with the intent to harass, intimidate, torment, or embarrass another person or (2) whether the caller at any time during the conversation may formulate the intent to harass, intimidate, torment, or embarrass another person. Therefore, we must apply the rule of lenity in this circumstance.

. . . If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.

(Emphasis added). Thus, under the rule of lenity, we must interpret the statute in favor of Paris; this interpretation requires the State to prove that Paris had the intent to harass, intimidate, torment, or embarrass when she initiated the telephone call.

Because the jury was not required to find that Paris had the intent to harass, intimidate, torment, or embarrass at the initiation of the telephone call, the jury was not instructed on every element of the crime, as article I, section 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution require. [The law does] permit the conviction to stand when the instruction fails to state the law correctly.

After drawing all reasonable inferences in favor of the State, we find that the evidence is sufficient for a rational trier of fact to find that Paris had the intent to harass, intimidate, torment, or embarrass when she initiated the telephone call.

In this case, we are reversing Paris's conviction based on the instructional error. We are not reversing for insufficiency of the evidence, and thus Paris may be retried for the offense for which she was convicted.

LED EDITORIAL COMMENT: As the Lilyblad Court explains in the analysis excerpted above, Division Two disagrees with Division One as to whether a caller commits phone harassment if he or she forms the intent to harass, intimidate, torment or embarrass the victim only after initiating the call. Law enforcement officers investigating such cases will want to try to determine the point at which the intent was formed. But we believe that probable cause to arrest would exist even if the suspect told the officer that intent to harass, intimidate, torment, or embarrass the victim was formed only after initiation of the call. As always, officers should consult their local prosecutors and legal advisors.

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

DOMESTIC VIOLENCE VICTIM'S SMITH STATEMENT HELD ADMISSIBLE AGAINST HEARSAY AND CONFRONTATION CLAUSE CHALLENGES – In State v. Thach, 126 Wn. App. 297 (Div. II, 2005), the Court of Appeals rejects a DV defendant's challenge to admissibility of his DV victims Smith declaration.

The Thach Court's analysis is as follows:

In State v. Smith, 97 Wn.2d 856 (1982), the [Washington] Supreme Court held that if a prior inconsistent statement satisfies the elements of ER 801(d)(1)(i), the statement is admissible as substantive evidence. Under ER 801(d)(1)(i), a court may admit statements of a witness when:

[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

ER 801(d)(1)(i). Binh contends that Ms. Thach's statement was not made under oath and was not part of a deposition or formal proceeding. Binh's contention inaccurately applies the case law regarding the admissibility of these types of statements.

To determine whether a statement is admissible, the trial court considers the Smith factors. State v. Nelson, 74 Wn. App. 380 (1994). **May 95 LED:21**. Those factors are: (1) whether the witness voluntarily made the statement; (2) whether there were minimal guarantees of truthfulness; (3) whether the statement was taken as standard procedure in one of the four legally permissible methods for determining the existence of probable cause; and (4) whether the witness was subject to cross examination when giving the subsequent inconsistent statement. All four factors are met in the present case.

The first factor to consider is whether the witness voluntarily made the statement. Officer Martin provided the domestic violence form to Ms. Thach. She then filled out the first page of the form. At trial, Ms. Thach testified that she wrote and signed her statement while seated in an ambulance after the assault.

The second factor to consider is whether there were minimal guarantees of truthfulness. In Smith, the police took the victim to a notary and had the victim's statement notarized. In Nelson, the victim's affidavit included the following language: "I have read the attached statement or it has been read to me and I know the contents of the statement."

In the present case, Ms. Thach testified that she signed her statement under penalty of perjury. Officer Martin also testified that Ms. Thach filled out the first part of the domestic violence form and he assisted her with the final questions as Ms. Thach received medical care. The officer witnessed Ms. Thach sign her statement. From this evidence a reasonable person could find that Ms. Thach's statement carried minimal guarantees of truthfulness.

The third factor is whether the statement was taken as a standard procedure in

one of the legally permissible methods for determining the existence of probable cause. The Smith court listed those four methods as: "(1) filing of an information by the prosecutor in superior court; (2) grand jury indictment; (3) inquest proceedings; and (4) filing a criminal complaint before a magistrate."

Officer Martin took Ms. Thach's statement as part of a standard procedure for determining probable cause. He testified that obtaining a signed, written victim statement in a domestic violence case was standard procedure. The statement was part of the evidence Officer Martin gathered and forwarded to the prosecutor. He also forwarded police reports to the prosecutor. The prosecutor used all of this information in order to establish probable cause and to determine whether to file an information in the superior court.

The final factor a court considers in determining admissibility is whether the witness was subject to cross-examination when giving the subsequent statement. Here, Binh had the opportunity to cross-examine his wife. The State satisfied all of the Smith factors and the trial court properly admitted Ms. Thach's statement.

Binh also raises the issue of admissibility under the holding set forth recently in Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**. Crawford has no bearing on this case as the Supreme Court stated that the confrontation clause is not implicated when the declarant is available for cross-examination at trial. Ms. Thach appeared at trial and Binh was able to cross-examine her about her statements.

[Some citations omitted]

Result: Affirmance of Clark County Superior Court conviction of Binh Thach for second degree domestic violence.

INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, 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 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/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 website at [<http://www.supremecourtus.gov/opinions/opinions.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." Opinions

from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed 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 January 2006, is at [<http://www1.leg.wa.gov/legislature>]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "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 address for the Criminal Justice Training Commission's home page is [<https://fortress.wa.gov/cjtc/www/led/ledpage.html>], while the address for the Attorney General's Office home page is [<http://insideago>].

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