Law Enforcement Digest

JANUARY 2014

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

****

HONOR ROLL

694th Basic Law Enforcement Academy – July 9 through November 13, 2013

President:	Katie J. Thompson, Wash. Dept. of Fish & Wildlife
Best Firearms:	Morgan T. Irwin, Seattle PD
Patrol Partner Award:	Ryan L. Olivarez, Pierce County
Tac Officer:	Sgt. Lisa Neymeyer, Port of Seattle PD

****

JANUARY 2014 LED TABLE OF CONTENTS

****

NOTE REGARDING 2013 LED SUBJECT MATTER INDEX AND 2009-2013 FIVE-YEAR SUBJECT MATTER INDEX: For many years, the December LED has included an annual LED subject matter index covering all LED entries for the year. Beginning last year, the annual subject matter index is a separate document. It will be available on the Criminal Justice Training Commission's LED webpage by mid-January 2014. Go to the Training Commission's Home Page at: https://fortress.wa.gov/cjtc/www/ and click on "Law Enforcement Digest." Additionally, the five-year subject matte rindex for years 2009-2013 will also be available at the same time and location.

****

UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT CIVIL LIABILITY: QUALIFIED IMMUNITY GRANTED TO OFFICER WHERE UNANIMOUS SUPREME COURT HOLDS FOURTH AMENDMENT CASE LAW DOES NOT CLEARLY ESTABLISH PROHIBITION ON WARRANTLESS ENTRY INTO CURTILAGE (HIGH-FENCE-AND-GATE-ENCLOSED FRONT YARD) IN HOT PURSUIT OF MISDEMEANANT WHOSE OFFENSE WAS DISOBEYING AN ORDER TO STOP

Stanton v. Sims, ___ U.S. ___, 134 S. Ct. 3 (Nov. 4, 2013)

Facts and Proceedings below:

> Around one o'clock in the morning on May 27, 2008, Officer Mike Stanton and his partner responded to a call about an "unknown disturbance" involving a person with a baseball bat in La Mesa, California. Stanton was familiar with the neighborhood, known for "violence associated with the area gangs." The officers—wearing uniforms and driving a marked police vehicle—approached the place where the disturbance had been reported and noticed three men walking in the street. Upon seeing the police car, two of the men turned into a nearby apartment complex. The third, Nicholas Patrick, crossed the street about 25

yards in front of Stanton's car and ran or quickly walked toward a residence. Nothing in the record shows that Stanton knew at the time whether that residence belonged to Patrick or someone else; in fact, it belonged to Drendolyn Sims.

Stanton did not see Patrick with a baseball bat, but he considered Patrick's behavior suspicious and decided to detain him in order to investigate. . . . Stanton exited his patrol car, called out "police," and ordered Patrick to stop in a voice loud enough for all in the area to hear. But Patrick did not stop. Instead, he "looked directly at Stanton, ignored his lawful orders[,] and quickly went through [the] front gate" of a fence enclosing Sims' front yard. When the gate closed behind Patrick, the fence—which was more than six feet tall and made of wood—blocked Stanton's view of the yard. Stanton believed that Patrick had committed a jailable misdemeanor under California Penal Code §148 by disobeying his order to stop; Stanton also "fear[ed] for [his] safety." He accordingly made the "split-second decision" to kick open the gate in pursuit of Patrick. Unfortunately, and unbeknownst to Stanton, Sims herself was standing behind the gate when it flew open. The swinging gate struck Sims, cutting her forehead and injuring her shoulder.

Sims filed suit against Stanton in Federal District Court under Rev. Stat. §1979, 42 U.S.C. section 1983, alleging that Stanton unreasonably searched her home without a warrant in violation of the Fourth Amendment. The District Court granted summary judgment to Stanton, finding that: (1) Stanton's entry was justified by the potentially dangerous situation, by the need to pursue Patrick as he fled, and by Sims' lesser expectation of privacy in the curtilage of her home; and (2) even if a constitutional violation had occurred, Stanton was entitled to qualified immunity because no clearly established law put him on notice that his conduct was unconstitutional.

Sims appealed, and a panel of the Court of Appeals for the Ninth Circuit reversed. 706 F. 3d 954 (2013) **February 13 LED:03; March 13 LED:04**. The court held that Stanton's warrantless entry into Sims' yard was unconstitutional because Sims was entitled to the same expectation of privacy in her curtilage as in her home itself, because there was no immediate danger, and because Patrick had committed only the minor offense of disobeying a police officer. The court also found the law to be clearly established that Stanton's pursuit of Patrick did not justify his warrantless entry, given that Patrick was suspected of only a misdemeanor. The court accordingly held that Stanton was not entitled to qualified immunity.

ISSUE AND RULING: Does the Fourth Amendment case law clearly establish for qualified immunity purposes under the Civil Rights Act, 42 U.S.C., section 1983, that the officer's forced warrantless entry of Ms. Sims' high-fenced and high-gated yard in pursuit of a misdemeanant was not lawful, where the entry was based on the exigent-circumstances-based rationale of "hot pursuit"? (ANSWER: No, rules a unanimous Court in a per curiam (unsigned) opinion, because the case law is unclear on whether officers may forcibly enter a private premises without a warrant in hot pursuit of a misdemeanant)

Result: Reversal of Ninth Circuit decision that denied qualified immunity to Officer Sims.

ANALYSIS: (Excerpted from Supreme Court opinion)

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 555 U.S. 223, 231 (2009) . . . . "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U. S. ___, ___ (2011) . . . "We do not require a case directly on point" before concluding that the law is clearly established, "but existing precedent must have placed the statutory or constitutional question beyond debate." al-Kidd, 563 U. S. at ___.

There is no suggestion in this case that Officer Stanton knowingly violated the Constitution; the question is whether, in light of precedent existing at the time, he was "plainly incompetent" in entering Sims' yard to pursue the fleeing Patrick. [al-Kidd] The Ninth Circuit concluded that he was. It did so despite the fact that federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect. . . . [**LED EDITORIAL NOTE: Here, the Supreme Court decision discusses some state and federal decisions.**]

Other courts have concluded that police officers are at least entitled to qualified immunity in these circumstances because the constitutional violation is not clearly established. . . . [**LED EDITORIAL NOTE: Here, the Supreme Court decision discusses additional state and federal decisions.**] Notwithstanding this basic disagreement, the Ninth Circuit below denied Stanton qualified immunity. In its one-paragraph analysis on the hot pursuit point, the panel relied on two cases, one from this Court, Welsh v. Wisconsin, 466 U.S. 740, 750 (1984), and one from its own, United States v. Johnson, 256 F.3d 895, 908 (2001) . . . . Neither case clearly establishes that Stanton violated Sims' Fourth Amendment rights.

In Welsh, police officers learned from a witness that Edward Welsh had driven his car off the road and then left the scene, presumably because he was drunk. Acting on that tip, the officers went to Welsh's home without a warrant, entered without consent, and arrested him for driving while intoxicated—a nonjailable traffic offense under state law. Our opinion first noted our precedent holding that hot pursuit of a fleeing felon justifies an officer's warrantless entry. . . . But we rejected the suggestion that the hot pursuit exception applied: "there was no immediate or continuous pursuit of [Welsh] from the scene of a crime." We went on to conclude that the officers' entry violated the Fourth Amendment, finding it "important" that "there [was] probable cause to believe that only a minor offense . . . ha[d] been committed." In those circumstances, we said, "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned." But we did not lay down a categorical rule for all cases involving minor offenses, saying only that a warrant is "usually" required.

In Johnson, police officers broke into Michael Johnson's fenced yard in search of another person (Steven Smith) whom they were attempting to apprehend on five misdemeanor arrest warrants. The Ninth Circuit was clear that this case, like Welsh, did not involve hot pursuit: "the facts of this case simply are not covered

by the 'hot pursuit' doctrine" because Smith had escaped from the police 30 minutes prior and his where-abouts were unknown. The court held that the officers' entry required a warrant, in part because Smith was wanted for only misdemeanor offenses. Then, in a footnote, the court said: "In situations where an officer is truly in hot pursuit and the underlying offense is a felony, the Fourth Amendment usually yields [to law enforcement's interest in apprehending a fleeing suspect]. . . . However, in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the 'rarest' cases." [Johnson].

In concluding—as it must have—that Stanton was "plainly incompetent," al-Kidd, 563 U. S. at ___ (slip op., at 12), the Ninth Circuit below read Welsh and the footnote in Johnson far too broadly. First, both of those cases cited [U.S. v. Santana, 427 U.S. 38 (1976) (allowing forced warrantless entry in hot pursuit of a felon)] with approval, a case that approved an officer's warrantless entry while in hot pursuit. And though Santana involved a felony suspect, we did not expressly limit our holding based on that fact. See 427 U. S. at 42 ("The only remaining question is whether [the suspect's] act of retreating into her house could thwart an otherwise proper arrest. We hold that it could not"). Second, to repeat, neither Welsh nor Johnson involved hot pursuit. . . . . Thus, despite our emphasis in Welsh on the fact that the crime at issue was minor—indeed, a mere nonjailable civil offense—nothing in the opinion establishes that the seriousness of the crime is equally important in cases of hot pursuit. Third, even in the portion of Welsh cited by the Ninth Circuit below, our opinion is equivocal: We held not that warrantless entry to arrest a misdemeanant is never justified, but only that such entry should be rare.

That is in fact how two California state courts have read Welsh. . . . [**LED EDITORIAL NOTE: Here, the Supreme Court decision discusses two California appellate court decisions.**]

Finally, our determination that Welsh and Johnson are insufficient to overcome Stanton's qualified immunity is bolstered by the fact that, even after Johnson, two different District Courts in the Ninth Circuit have granted qualified immunity precisely because the law regarding warrantless entry in hot pursuit of a fleeing misdemeanant is not clearly established. . . . [**LED EDITORIAL NOTE: Here, the Court discusses two Federal District Court decisions.**]

To summarize the law at the time Stanton made his split-second decision to enter Sims' yard: Two opinions of this Court were equivocal on the lawfulness of his entry; two opinions of the State Court of Appeal affirmatively authorized that entry; the most relevant opinion of the Ninth Circuit was readily distinguishable; two Federal District Courts in the Ninth Circuit had granted qualified immunity in the wake of that opinion; and the federal and state courts of last resort around the Nation were sharply divided.

We do not express any view on whether Officer Stanton's entry into Sims' yard in pursuit of Patrick was constitutional. But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate." al-Kidd, supra, at ___ (slip op., at 9). Stanton may have been mistaken in believing his actions were justified, but he was not "plainly incompetent." Malley v. Briggs, 475 U. S. 335, 341 (1986).

[Footnote omitted; some case citations omitted or revised for style]

LED EDITORIAL COMMENT: We believe that Washington case law is unclear as to whether there is greater restriction on "hot pursuit" entries in pursuit of misdemeanants under article I, section 7 of the Washington constitution than there is under the Fourth Amendment. The Washington Supreme Court has not yet addressed this issue. In State v. Bessette, 105 Wn. App. 793 (Div. III, 2001) Aug 01 LED:14, the Court of Appeals relied on both the Fourth Amendment and article I, section 7 to support its ruling that an officer had no authority to forcibly enter a third party's residence when in unbroken hot pursuit of an MIP suspect, because there were no exigent circumstances shown beyond the fact of the hot pursuit. But the Bessette Court closed its analysis by saying: "In short, the circumstances here were not exigent and, therefore, did not justify [the officer's] entry into Mr. Bessette's home without a warrant. This is particularly true given the stricter protection afforded by Washington State Constitution, article I, section 7." [Underlining added; internal citation omitted.] If officers cannot make a good showing that delaying for the time needed to get a search warrant will result in loss of evidence or increased danger or escape, the safest legal option is to get a search warrant in such situations.

****

BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) NINTH CIRCUIT ORDERS REHEARING EN BANC IN GONZALEZ V. CITY OF ANAHEIM – On October 28, 2013, the Ninth Circuit Court of Appeals ordered rehearing en banc in Gonzalez v. City of Anaheim, 715 F.3d 766 (9th Cir., May 13, 2013) **Sept 13 LED:11** (panel ruled in favor of city in use of deadly force case involving non-compliant motorist attempting to drive away with officers inside and outside of the vehicle). The panel decision may no longer be cited.

(2) PROSECUTOR IS ENTITLED TO ABSOLUTE PROSECUTORIAL IMMUNITY FOR FILING STATE COURT CRIMINAL CHARGES AGAINST AN AIRLINE PASSENGER – In Heinemann v. Satterberg, 731 F.3d 914 (9th Cir., Sept. 24, 2013), a three-judge Ninth Circuit panel holds that the King County Prosecutor is entitled to absolute prosecutorial immunity for filing criminal charges in State court against an airline passenger who was charged with harassment for an altercation with flight attendants.

The plaintiff sued the prosecutor alleging that he did not have jurisdiction to file criminal charges against the plaintiff (that only the feds did). The Ninth Circuit dismissed the lawsuit on both procedural grounds (not discussed in this LED entry) and on the merits, holding that "prosecutorial immunity protects a prosecutor for 'his decision to initiate a prosecution.'" Imbler v. Pachtman, 424 U.S. 409, 421–24 (1976). The Court's opinion appears to also suggest agreement with the prosecutor's argument that prosecution in State court for a crime committed on an airplane is not barred by the Montreal Convention of 1999 relied on by the plaintiff.

Result: Affirmance of United States District Court (Western District Washington) summary judgment order of dismissal.

(3) FEDERAL SEXUAL EXPLOITATION STATUTE DOES NOT REQUIRE DEFENDANT'S KNOWLEDGE THAT MATERIALS USED TO PRODUCE CHILD PORNOGRAPHY TRAVELED IN INTERSTATE COMMERCE; COURT ALSO FINDS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF SEXUAL EXPLOITATION OF A CHILD – In United States v. Sheldon, 730 F.3d 1128 (9th Cir., Sept. 19, 2013), a three-judge Ninth Circuit panel holds that

the federal sexual exploitation of a child statute, 18 U.S.C. §2251(a), does not require knowledge that material used to produce child pornography traveled in interstate commerce.

The Court reviews the plain language of the federal statute and concludes:

> To satisfy the jurisdictional element of § 2251(a) in this case, then, the Government was only required to prove beyond a reasonable doubt that the child pornography was produced with materials that had traveled in interstate commerce. The Government elicited testimony at trial that the recorder used to produce the videos in Montana was manufactured in China. This evidence was sufficient to satisfy the jurisdictional element of § 2251(a) under the correct interpretation of the statute.

The Court also concludes that there was sufficient evidence to convict the defendant of sexual exploitation of a child under the applicable federal statute:

> Defendant also argues that the evidence admitted at trial was insufficient to convict him of the sexual exploitation count because the videos were not sexually explicit. Evidence is sufficient to support the conviction if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Garrido, 713 F.3d 985, 999 (9th Cir. 2013) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (internal quotation marks omitted). An individual violates § 2251(a) if he "persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct[.]" 18 U.S.C. § 2251(a). Sexually explicit conduct is defined in 18 U.S.C. § 2256(2)(A) and includes "lascivious exhibition of the genitals[.]" Id. at § 2256(2)(A)(v). The jury was shown 27 videos from a video recorder owned by one of the minor children. Several of those videos depict the victims nude and discussing sexual acts. Having reviewed the evidence presented to the jury for ourselves, we conclude that a rational trier of fact could have found the videos to depict sexually explicit conduct. See United States v. Overton, 573 F.3d 679, 688 (9th Cir. 2009).

Result: Affirmance of United States District Court (Montana) conviction of Kevin Michael Sheldon of sexual exploitation of a child and knowingly receiving child pornography.

(4) CIVIL RIGHTS ACT LAWSUIT: POLICE CHIEF AND OFFICER ARE ENTITLED TO QUALIFIED IMMUNITY WHERE, PRIMARILY TO PROTECT A MISBEHAVING, DIFFICULT-TO-CONTROL 11-YEAR-OLD FROM RUNNING INTO TRAFFIC, THEY HANDCUFFED HIM AND TRANSPORTED HIM FROM SCHOOL TO A RELATIVE'S CARE – In C.B. v. City of Sonora, 730 F.3d 816 (9th Cir., Sept. 12, 2013), a three-judge Ninth Circuit panel holds that officers are entitled to qualified immunity on plaintiff's unlawful seizure and excessive force claims, where police handcuffed and transported a juvenile – who suffered from attention-deficit and hyperactivity disorders, who had forgotten that morning to take his medicine before coming to school, who was beyond the control of school officials, and who appeared to be at risk of running onto a busy street – from school to a relative's custody**. [LED EDITORIAL NOTE: Plaintiff also alleged two state law claims not discussed in this LED entry.]**

The Court's analysis is, in relevant part, as follows:

> That leaves the question of whether a reasonable officer could have believed (even if mistakenly) that C.B. was beyond the control of school officials within the meaning of [California law]. Even if we were to construe [the California statute's] "reasonable cause" standard as requiring probable cause for such belief, as C.B. contends, the officers are entitled to qualified immunity. The officers were informed by school officials that C.B. (1) was out of control, (2) was "a runner," (3) had been "yelling and cussing," (4) had not taken his medications, and (5) could not remain at school any longer. No clearly established law would put a reasonable officer faced with these circumstances on notice that taking C.B. into temporary custody under [the California statute] was unlawful. See Saucier v. Katz, 533 U.S. 194, 202 (2001). Moreover, the officers investigated further by talking to C.B., but C.B. was unresponsive. No clearly established law at the time suggested that the officers were required to conduct additional investigation beyond talking to C.B. before they could rely on the information they received from school officials, particularly when a prolonged investigation might increase the risk of C.B. running away and onto a busy road, from which he was separated only by an unlocked gate.
>
> . . . With respect to plaintiff's unlawful seizure claim, the district court did not cite a single case in which police officers were held to have violated the Fourth Amendment by transporting a disruptive child from a school to a guardian's home or place of business. . . .
>
> The district court also ignored precedent from other circuits indicating that handcuffing during the course of an otherwise lawful arrest ordinarily fails to state an excessive force claim. See Brown v. Gilmore, 278 F.3d 362 (4th Cir. 2002); Neague v. Cynkar, 258 F.3d 504 (6th Cir. 2001); Glenn v. City of Tyler, 242 F.3d 307 (5th Cir. 2001). Indeed, no clearly established law suggests that handcuffing a juvenile when lawfully taking him into temporary custody violates the juvenile's Fourth Amendment rights, absent a showing that the handcuffs caused injury or that the officer ignored complaints about the handcuffs, neither of which C.B. alleged in this case. . . .
>
> Because the law was, and still is, not "clearly established" that handcuffing and driving a juvenile from school to a relative's place of business implicates Fourth Amendment rights, [the Chief and officer] are entitled to qualified immunity with regard to plaintiff's claims under 42 U.S.C. § 1983. See Hope v. Pelzer, 536 U.S. 730, 739–41 (2002) (the "state of the law" must have given "fair warning" to the officer that the conduct in question was unconstitutional).

[Footnote and some citations omitted]

Result: Reversal of United States District Court (Eastern District California) order denying city's motion for judgment as a matter of law as to two government defendants and new trial for other government defendants.

(5) CIVIL RIGHTS ACT LAWSUIT: INMATE DOES NOT ENGAGE IN FIRST AMENDMENT PROTECTED ACTIVITY WHEN SERVING A SUMMONS AND COMPLAINT ON A PRISON OFFICIAL ON BEHALF OF ANOTHER INMATE – In Blaisdell v. Frappiea, 729 F.3d 1237 (9th Cir., Sept. 10, 2013), a three-judge panel of the Ninth Circuit holds that an inmate does not engage in First Amendment protected activity when he serves a summons and complaint on a prison official on behalf of another inmate.

The Court describes the facts, in relevant part, as follows:

> . . . On April 23, 2008, [inmate Richard] Blaisdell visited Christina Frappiea – the prison's Classification Supervisor – to ask her to notarize a document for a new lawsuit he planned to file against the prison. This was not Blaisdell's first attempt at litigation. He had filed at least three lawsuits against the prison and its officers since 2007. Frappiea notarized the document.
>
> As soon as Frappiea had finished, Blaisdell announced that she had been "served" and handed her a summons and complaint in a federal civil Racketeer Influenced and Corrupt Organizations Act ("RICO") suit prepared by another prisoner: Anthony Gouveia. Blaisdell had agreed to serve process as a favor to Gouveia and was not a party to his lawsuit. . . . After looking at the document, Frappiea reportedly said: "Oh. Well, you can't serve that. You're a state prisoner." Blaisdell claims he replied by stating: "[T]his is not a state suit and I have every legal right in the world to serve this to you. I am over 18, and I'm not a party to the suit. And it's not breaking any laws or any rules or anything."
>
> Following this exchange of words, Frappiea prepared a disciplinary report charging Blaisdell with Conspiracy, Failure to Follow Rules, and "Violation of Federal, State or Local Laws." Under the prison rules inmates are not permitted to possess another inmate's property, including his legal paperwork, without permission. The "Conspiracy" was Blaisdell's agreement to possess Gouveia's summons and complaint. As for the laws transgressed, Frappiea's disciplinary report references Arizona statutes that spell out the requirements to act as a process server. Frappiea later characterized Blaisdell's legal violation as a failure to comply with the screening provisions of the Prison Litigation Reform Act ("PLRA") before attempting service. See 28 U.S.C. § 1915A. A CCA hearing officer found Blaisdell guilty on all three counts and sentenced him to sixty days of administrative segregation.

[Footnotes omitted]

The inmate filed a lawsuit alleging that he received the infractions in retaliation for his serving the summons and complaint, which he claimed was First Amendment protected activity.

The Court holds that an inmate does not engage in First Amendment activity when serving a summons and complaint on behalf of another inmate. The Court rejects the idea that the inmate can vicariously assert an access to court claim on behalf of another inmate, and also rejects the inmate's freedom of association claim.

Because the inmate was not engaging in constitutionally protected activity, simple logic compels the conclusion that any retaliation by the prison official could not have been based on protected activity.

Result: Affirmance of United States District Court (Arizona) summary judgment dismissal of inmate's lawsuit.

****

WASHINGTON STATE SUPREME COURT

TWO HOLDINGS: (1) AFTER DETECTIVE'S DELIBERATELY FALSE STATEMENTS ARE DELETED, AFFIDAVIT STILL ESTABLISHES PC FOR WARRANT TO SEARCH COMPUTER FOR CHILD PORNOGRAPHY – INFORMANT HAD STRONG MOTIVE TO PROVIDE TRUTHFUL INFORMATION ABOUT WHAT HE SAW HOUSEMATE VIEWING ON COMPUTER; (2) EXECUTION OF SEARCH WARRANT WAS NOT FLAWED BECAUSE WARRANT NEED NOT BE SHOWN TO DEFENDANT PRIOR TO START OF SEARCH

State v. Ollivier, ___Wn.2d ___, 312 P.3d 1 (October 31, 2013)

LED INTRODUCTORY EDITORIAL NOTE: The lead issue in this case involved the speedy trial protections of (1) Washington Court Rules and (2) the State and federal constitutions. The Washington Supreme Court split 5-4 in favor of the State on the constitutional speedy trial issue. The speedy trial issues in the case are not addressed in this LED entry. There was no dissent on the search and seizure issues that are addressed in this LED entry, so we believe that there is no split of opinion on the two search and seizure issues of (1) probable cause and (2) the service-of-warrant requirement of Washington Criminal Court Rule, CrR 2.3(d).

Facts: (Excerpted from Supreme Court majority opinion)

> In March 2007, Brandon Ollivier, a registered sex offender, was living with roommates who also were registered sex offenders. When one of the roommates, Eugene Anderson, was arrested for a violation of community custody, he told his Community Corrections Officer (CCO) on March 8, 2007, that Ollivier had shown him child pornography on Ollivier's computer in their apartment. After this information was relayed to [King County Sheriff's Office Detective A], she took a taped statement from Anderson. Anderson told [Detective A] that Ollivier had shown him a video of a young girl and boy having sexual relations. He also stated that Ollivier had shown him photographs of young girls about nine years old who were dressed but posed provocatively. In addition, Anderson told [Detective A] that Ollivier kept a locked red box that contained pornography, including "Playboy" and "Barely Legal" magazines.
>
> [Detective A] prepared an affidavit to obtain a search warrant for the apartment. Among other things, she incorrectly stated that Anderson informed her that the red box contained photographs of unclothed children in sexually explicit poses. The warrant was issued and on April 5, 2007, it was executed. Ollivier was the only one in the apartment when detectives arrived to search it. During the search, detectives seized two desktop computers, one laptop computer, several compact disks, USB (Uniform Serial Bus) drives, and other storage media. At the conclusion of the search, [Detective A] posted a copy of the warrant on a bookcase in the apartment.
>
> [Detective B] initially examined the computer images [and] concluded they contained over 14,000 images of child pornography and about 100 video files of child pornography. The vast majority were images of children under 15 years of age who were purposefully posed to expose their genitals and the same children in various sex acts with other children and adults, as well as other sex acts.

Proceedings below:

Ollivier was charged with possession of depictions of minors engaged in sexually explicit activity. [**LED EDITORIAL NOTE: Trial was continued many times, triggering Court Rule and constitutional speedy trial issues that Ollivier lost at trial and all levels of appeal, including in the Supreme Court. The speedy trial issues are not addressed in this LED entry.**] At trial, he stipulated the evidence against him satisfied the definition of child pornography, and the evidence was not shown to the jury. Ollivier was convicted of one count of possession of depictions of minors engaged in sexually explicit conduct and was sentenced to a standard range sentence. He appealed to the Court of Appeals, which affirmed the conviction. State v. Ollivier, 161 Wn. App. 307 (Div. I, 2011) **Sept 11 LED:20**.

ISSUES AND RULINGS: 1) Defendant argues that after deleting the detective's deliberately false statements about what the citizen informant had told her, the affidavit did not establish probable cause because the informant's credibility as a citizen informant was not established. Defendant points to the facts that the citizen informant: (A) was under psychiatric care, (B) was jailed due to community custody violations at the time he provided the information, and (C) if he was found in possession of child pornography, he could have been punished, but none of this information was set forth in this form in the affidavit. Did the affidavit establish the credibility of the informant? (ANSWER: Yes, credibility was appropriately established in what remained in the affidavit after deletion of the false statements. The affidavit identified Anderson as a prior sex offender under the supervision of a CCO, and the fact he told the CCO about child pornography in the same residence where he had resided; this information showed that he would be motivated to tell the truth because he was a supervised registered sex offender and that his information was reliable. Also, contrary to defendant's contention, the fact of the informant's ongoing psychiatric care was not shown to have any relevance to determining the informant's credibility.)

2) Does CrR 2.3(d) require that, before executing a search warrant, officers first show a copy of the warrant to a resident present on the premises? (ANSWER: No, it is sufficient that, as here, officers present or post a copy of the warrant at the completion of the search if evidence is taken under the warrant)

Result: Affirmance of Court of Appeals decision that affirmed the King County Superior Court conviction of Brandon Gene Ollivier on one count of violating RCW 9.68A.070 by unlawful possession of depictions of minors engaging in sexually explicit conduct.

ANALYSIS:

1) Citizen informant credibility for the purpose of establishing probable cause

The majority opinion explains that a search warrant may be issued only on probable cause. Probable cause exists when a search warrant affidavit sets forth facts sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.

A search warrant may be invalidated if material falsehoods were included in the affidavit deliberately or with reckless disregard for the truth, or if there were deliberate or reckless omissions of material information from the warrant. If the defendant makes a substantial preliminary showing of such a material misrepresentation or omission, the defendant is entitled to an evidentiary hearing. If at the hearing the defendant establishes the allegations, then the material misrepresentation must be stricken or the omitted material must be included and the sufficiency of the affidavit then assessed as so modified. If at that point the affidavit fails to

support a finding of probable cause, the warrant will be held void and evidence obtained when the warrant was executed must be suppressed.

The majority opinion notes that Ollivier made an adequate preliminary showing to trigger an evidentiary hearing, and that the trial court correctly found that Detective A deliberately misrepresented that Ollivier's roommate had told her that Ollivier kept a red, locked box containing pornographic magazines with photographs of unclothed children under 16 years of age in sexually explicit poses for sexual gratification. The roommate had actually told Detective A only that Ollivier kept a red box with pornography, including "Playboy" magazines and "Barely Legal" magazines. The difference is significant in that child pornography is illegal to possess, while the actually described magazines are not illegal to possess. During argument to the trial court, Ollivier also claimed that another misrepresentation was made by Detective A, i.e., that the roommate saw Ollivier looking at both computer and print images of children under 10, when the roommate actually said only that he saw Ollivier viewing computer images.

The trial court determined that when the false information was omitted, there was still sufficient qualifying information in the affidavit to establish probable cause to support issuance of the search warrant. Under the following analysis, the Supreme Court agrees with the trial court:

> . . . . We agree with the trial court that the affidavit, after the misrepresentations are deleted, establishes probable cause. It states that the affiant [Detective A] received a telephone call from a CCO with whom she had worked for the past four years on criminal investigations, including investigations involving sex related crimes. It states the CCO advised the affiant that one of the CCO's clients, Eugene Anderson, who was a registered sex offender, had told the CCO that he had seen his roommate Ollivier, also a registered sex offender, during a recent, specified 10-day period looked at many photographs on his personal home computer at a specified address and these photographs were of children under 10 years of age who were posed, deliberately exposing their genitals. Anderson also told the CCO that he saw Ollivier view [on his computer] depictions of minors under age 16 engaging in sexual intercourse. The affidavit then relates that the affiant took Anderson's taped statement in which he said he knew the individuals in the photos were prepubescent because of their physical characteristics (which were described) and also said that while he lived with Ollivier, Ollivier viewed child pornography every day.
> . . . .
>
> Mr. Ollivier also contends, however, that the affidavit is insufficient because it does not establish Anderson's credibility as an informant. We continue to follow the Aguilar-Spinelli standard under article I, section 7 [of the Washington Constitution, a standard that the U.S. Supreme Court has abandoned in favor of a more relaxed totality of the circumstances test]. . . . This standard has two prongs. The basis of knowledge prong requires that the affidavit contain "sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place searched." . . . . The veracity prong requires that the affidavit contain information from which a determination can be made that the informant is credible or the information reliable. . . . When a citizen informant provides information, a relaxed showing of reliability suffices "because there is less risk of the information being a rumor or irresponsible conjecture which may accompany anonymous informants" and an identified informant's report is less likely to be

marred by self-interest." . . . . State v. Gaddy, 152 Wn.2d 64 (2004) **Sept 04 LED:19** . . . .

Accordingly, "[c]itizen informants are deemed presumptively reliable." Gaddy, 152 Wn.2d at 73 . . . The defendant must rebut the presumption of reliability to overcome it. See Gaddy, 152 Wn.2d at 73-74.

The second prong, basis of knowledge, may be satisfied by a showing that the informant had personal knowledge of the facts provided to the affiant. . . .

Here, Mr. Ollivier concedes that Anderson had a basis of knowledge as to whether there was pornography in the apartment. The concession is appropriate because Anderson lived in the apartment for a brief period and provided information about personal observations of child pornography on Ollivier's computer.

Ollivier contends, however, that no presumption of credibility should attach because Anderson was under psychiatric care, jailed due to community custody violations at the time he provided the information, and if he was found in possession of child pornography, he could have been punished, but none of this information was in the affidavit. These are appropriate facts to present in an effort to rebut the presumption of credibility attaching to a citizen informant, but we do not agree these facts mean the presumption does not arise. Nor do they rebut the presumption here.

As the State demonstrates, the affidavit identified Anderson as a prior sex offender under the supervision of a CCO, and the fact he told the CCO about child pornography in the same residence where he had resided, which was revealed in the affidavit, had the potential to expose him to additional sanctions. Thus, rather than bringing his credibility into question, this information showed that he would be motivated to tell the truth because he was a supervised registered sex offender and that his information was reliable.

Ollivier does not explain why the fact that Anderson was under psychiatric care shows that he was not credible or his information was unreliable in the circumstances.

In sum, we find that the affidavit sufficiently disclosed facts from which the judge could assess the reliability of Anderson's information and the basis of his knowledge.

[Footnotes omitted; some citations omitted, other citations revised for style]

2) CrR 2.3(d) requirement for presenting or posting copy of search warrant at execution

Defendant's argument under CrR 2.3(d) is that the evidence found on his computer must be suppressed because officers failed to present him with a copy of the search warrant before it was executed. The State's response is that there is no such requirement under the rule.

CrR 2.3(d) provides in part:

> Execution and Return With Inventory. The peace officer taking property under the warrant shall give to the person from whom or from whose premises the property is taken a copy of the warrant and a receipt for the property taken. If no such person is present, the officer may post a copy of the search warrant and receipt.

The Ollivier Court's analysis OF the CrR 2.3(d) issue is as follows:

> The plain language at issue provides that if an officer takes property pursuant to the warrant, then the officer "shall give" a copy of the warrant to the person from whose premises the property is taken or post a copy of the warrant. [*Court's footnote: The rule is consistent with "[t]he prevailing view in state and federal cases" that exhibiting or delivering a copy of the warrant "need only be done prior to post-search departure by the police." 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.12(a) (5th ed. 2012).*] Nothing in the language of the rule says that a copy of the warrant must be provided before the search is begun.
>
> Here, property was taken and [Detective A] posted a copy of the warrant before leaving. We do not agree that there was a violation of the rule.

LED EDITORIAL COMMENT: We believe that the best practice regarding service of a search warrant, even though held here not to be legally required, is to show it to a resident at the outset of the search.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SUPREME COURT REVERSES CONVICTION IN SPLIT VOTING ON ISSUES OF WHETHER, UNDER THE FACTS OF THE CASE: (1) ARREST WARRANT JUSTIFIED HOME ENTRY WHERE THERE WAS SOME DOUBT THAT SUBJECT OF WARRANT RESIDED AT THE HOME ENTERED OR WAS AT HOME AT THE TIME OF ENTRY; (2) FERRIER WARNINGS WERE OR WERE NOT REQUIRED TO OBTAIN VOLUNTARY CONSENT TO SEARCH THE HOME FOR THE WANTED PERSON; (3) WHETHER OFFICERS UNLAWFULLY IGNORED WITHDRAWAL OF CONSENT; (4) "INDEPENDENT SOURCE" EXCEPTION TO EXCLUSIONARY RULE NOT APPLICABLE ON FACTS OF THIS CASE – In State v. Ruem, ___Wn.2d ___, 2013 WL 6212019 (Nov. 27, 2013), the Washington Supreme Court reverses a suppression ruling and conviction, but the split voting and a one-issue concurring opinion leave some question as to what, if any, precedent is set by the decision.

LEAD OPINION BY JUSTICE STEPHENS

The lead opinion in the case is authored by Justice Stephens and is signed by only three other justices (Chief Justice Madsen and Justices Fairhurst and Owens). The lead opinion analyzes the legal issues in the case as follows:

(1) Under the rules of Payton v. New York, 445 U.S. 573 (1980) (Fourth Amendment) and State v. Hatchie, 161 Wn.2d 390 (2007) **Oct 07 LED:07** (article I, section 7 of the Washington constitution), an arrest warrant did not justify entry of a mobile home because (A) officers did not have probable cause to believe that the mobile home was the current address of the subject of the warrant (despite the fact that the mobile home was located at the address listed on the warrant); and (B) in any event, officers did not have probable cause to believe that the subject of the arrest warrant was home at the time that officers entered the home to execute the warrant.

(2) The three consent request warnings (telling the person about rights to refuse, restrict scope and retract at any time) required under State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02** (article I, section 7 of the Washington constitution) for a "knock and talk" residential consent search for contraband are not required to obtain voluntary consent from a resident to search a home for a non-resident who is wanted under an arrest warrant. Rather, voluntariness of consent of that third party resident on the totality of the circumstances is the standard in this circumstance. The lead opinion discusses the following decisions that have declined to apply a Ferrier warnings requirement in circumstances involving residences (which get the highest level of privacy protection under the State and federal constitutions): State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) **Nov 99 LED:02** (assisting INS in arrest at residence of person wanted by INS); State v. Williams, 141 Wn.2d 17 (2000) **Dec 00 LED:14** (consenting entry of third party's residence to look for subject of arrest warrant); State v. Khounvichai, 149 Wn.2d 557 (2003) **Aug 03 LED:06** (consenting entry of third party's residence to talk to suspect in vandalism incident).

(3) The officers unlawfully ignored the resident's withdrawal of consent that he uttered just as they were crossing the threshold of the front door of the mobile home.

(4) The "independent source" exception to exclusionary rule does not apply in this case because the search warrant that officers obtained was granted on the basis of evidence that they obtained unlawfully after ignoring the resident's withdrawal of consent.

The lead opinion describes the factual and procedural background of the case as follows:

> Over a period of several months in 2008, Pierce County sheriff's deputies attempted to execute an arrest warrant for [a man named Chantha Ruem]. The address on the warrant was 10318 East McKinley Avenue. Two dwellings – a house and a mobile home – sat on the property. The mobile home was located adjacent to the house.
>
> In March 2008, Chantha's father allowed [Deputy A] into the house and showed him Chantha's room. Chantha's girlfriend told [Deputy A] that Chantha was not there. [Deputy A] identified one of the cars parked in the driveway as registered to Chantha. [Deputy A] did not encounter Chantha that day.
>
> [Deputy A] surveilled the McKinley Avenue address intermittently over the next few months. Chantha's car was often at the property. The only person [Deputy A] observed driving the car was Chantha's girlfriend. [Deputy A] encountered Chantha's brother, David, at the mobile home, and David told him that Chantha was in California. On one occasion, [Deputy A] made a traffic stop of a vehicle leaving the property. The driver did not know who Chantha was but told [Deputy A] that David was at the mobile home. [Deputy A] never saw Chantha at the McKinley Avenue address.
>
> On the evening of June 4, 2008, [Deputy A] and a team of deputies again attempted to serve the warrant for Chantha. [Deputy A] went to the house to ask for Chantha, while [Deputy B] and [Sergeant C] went to the mobile home. [Another brother of Chantha, Dara Ruem, the defendant in this case] answered [Deputy B's] knock on the front door of the mobile home and told [Deputy B] that Chantha was not there. [Deputy B] asked for [Dara's] identification because [Dara] resembled photographs that [Deputy B] had seen of Chantha. [Dara

> Ruem] told [Deputy B] that he lived in the mobile home with his brother; [Deputy B] assumed [mistakenly] that [Dara] meant Chantha.
>
> [Dara] identified Chantha's car, which was parked on the property, but told [Deputy B] that Chantha had moved to California and bought a new car. [Deputy B] informed [Dara] that he was going to go inside to look for Chantha and asked Ruem "if that was okay." [Dara] initially agreed but stopped the deputies as they started to cross the threshold, saying, "Now is not a good time." At this point, [Deputy B] and [Sergeant C] could smell burnt marijuana. [Deputy B] assured [Dara] that they were not interested in arresting him for personal use of marijuana and then entered the mobile home.
>
> [Deputy B] and another deputy searched the mobile home while [Sergeant C] stayed with [Dara] in the living room. The deputies testified they were looking for Chantha, and they did not open drawers or spaces too small to hide a person. In the kitchen, [Deputy B] spotted several small marijuana plants. The plants were visible from the living room. [Sergeant C] arrested [Dara] and informed him of his Miranda rights. [Sergeant C] then called for a search warrant. In the process of looking for identifying features on the outside of the mobile home, [Sergeant C] discovered more marijuana plants. The deputies did not find Chantha in the mobile home or in the main house.
>
> Later that same day, deputies from the Pierce County sheriff's special investigations unit executed the search warrant at the mobile home. They found significant amounts of contraband, including more than 100 marijuana plants in various stages of growth, equipment associated with growing and processing marijuana, several packages of marijuana throughout the mobile home, a DVD (digital video disk) labeled "High Times Ultimate Grow," and more than $4,700 in cash. They also found a semiautomatic handgun.
>
> [Dara Ruem] was charged with one count each of manufacturing marijuana while armed with a firearm, possession of marijuana with intent to deliver while armed with a firearm, and unlawful possession of a firearm. He moved to suppress all evidence from the search, arguing that the deputies failed to advise him of his right to refuse their entry and did not have probable cause to believe that Chantha was present on June 4, 2008. The trial court denied the motion on the ground that the warrant for Chantha's arrest authorized the deputies' presence in the home and the marijuana plants were in plain view.
>
> [Dara] appealed his subsequent jury conviction, and the Court of Appeals affirmed [in an unpublished opinion]. The [Court of Appeals] held that the search was valid because [Dara] consented to the entry and the deputies were not required to provide Ferrier warnings in seeking to execute the arrest warrant on Chantha.

[Footnotes omitted]

CONCURRING OPINION BY JUSTICE WIGGINS

Justice Wiggins authors a concurring opinion that is signed by three other justices (Justice Charles Johnson, Justice Gonzalez and ProTem Justice Chambers). The Wiggins concurrence agrees with "the result" of the majority opinion, disagrees with the Ferrier analysis of the lead

opinion (characterizing that analysis as "dicta," non-precedential language not necessary to support the decision), and provides no analysis of the other legal issues addressed in the lead opinion. The Wiggins concurrence argues that the Court should rule that Ferrier warnings were required under the circumstances of this case. The Wiggins concurrence is not clear either: (1) as to the extent that it would extend Ferrier requirements beyond "knock and talk" contraband searches; and (2) as to whether it agrees with the majority's analysis in all respects on the other three issues in the case.

CONCURRING OPINION BY JUSTICE JAMES JOHNSON

Justice James Johnson writes an opinion concurring in part and dissenting in part with the lead opinion. He argues that the Court should uphold the conviction. No other Justice joins his opinion. Justice Johnson agrees with the lead opinion's legal conclusion that Ferrier warnings are not required in this context. He also argues that his agreement with the lead opinion's Ferrier ruling makes that ruling precedential, not dicta. Beyond that brief description, this LED entry will not address Justice James Johnson's opinion because his analysis of other issues is not joined by any other Justice.

Result: Affirmance of decision of Division Two of the Court of Appeals (by unpublished opinion) that affirmed the Pierce County Superior Court conviction of Dara Ruem for one count each of unlawful possession of a firearm and manufacturing marijuana while armed with a firearm.

LED EDITORIAL NOTE: None of the three opinions in Ruem addresses State v. Dancer, 174 Wn. App. 666 (Div. II, April 30, 2013) July 13 LED:19, or State v. Westvang, 174 Wn. App. 913 (Div. II, May 21, 2013) July 13 LED:23. In each of those cases, the Court of Appeals ruled that, unless officers have reasonable suspicion that the non-resident subject of an arrest warrant is present in a third party's residence, Ferrier warnings are required in asking the third party resident for permission to look in a residence for the non-resident subject of an arrest warrant. In Westvang, the Court of Appeals ruled that the State did not establish reasonable suspicion and therefore the Ferrier-less consent request did not yield a voluntary consent. In Dancer, the Court of Appeals ruled that the State did establish reasonable suspicion, so the consent was voluntary. The State has a petition for review pending in the Washington Supreme Court in the Westvang case. The defendant has a petition for review pending in the Washington Supreme Court in the Dancer. Actions on both petitions have been stayed in Westvang and Dancer pending resolution of Ruem. We will report in the LED what the Supreme Court now does with those petitions.

LED EDITORIAL COMMENTS:

(1) STANDARD FOR NON-SEARCH-WARRANT ENTRY OF RESIDENCE THAT OFFICERS BELIEVE TO BE THAT OF PERSON NAMED ON AN ARREST WARRANT: The lead opinion in Ruem appears to have put common sense gloss on some unfortunate language in State v. Hatchie, 161 Wn.2d 390 (2007) Oct 07:LED:07. In Hatchie the Washington Supreme Court upheld officers' entry of a residence – without a search warrant, consent, exigent circumstances or other search warrant exception – to arrest a person named on a misdemeanor arrest warrant. In an opinion authored by former Justice Richard Sanders for a unanimous Court, the Hatchie Court declared that such entries are lawful "as long as (1) the entry is reasonable, (2) the entry is not a pretext for conducting other unauthorized searches or investigations, (3) the police have probable cause to believe the person named in the arrest warrant is an actual resident of the home, and (4) said named person is actually present at the time of entry."

In our October 2007 LED entry regarding Hatchie, we sharply criticized the wording of the underlined fourth element of the Court's description. The Hatchie Court did not need to explore that element because the person named on the arrest warrant was in fact inside the residence when officers entered. We asserted that the Supreme Court would need to revisit this element, and we suggested that common sense and traditional approach to search and seizure issues dictate that the fourth element be "probable cause to believe that said named person is actually present at the time of entry."

In Ruem, the lead opinion for the Supreme Court repeats the Hatchie Court's description of the entry standard, including the criticized fourth element that would appear to require actual presence of the named person. But the lead opinion in Ruem clearly treats the fourth element as a probable cause standard. Thus, the lead opinion's analysis on the third element addresses whether the officers had probable cause to believe the named person presently lived at the residence, and the lead opinion's analysis on the fourth element addresses whether the officers had probable cause to believe that the named person was inside when they entered the residence. The lead opinion concludes that probable cause was not present on either element, so the government loses the entry argument on two alternative rationales. But we believe the lead opinion will help prosecutors argue in future cases that the standard for the fourth element is probable cause as to presence, not actual presence, at the time of entry.

(2) FERRIER CONSENT WARNINGS: Officers should consider giving Ferrier warnings whenever requesting consent, even if such warnings are not mandated for the particular factual context. The totality of circumstances test for voluntariness is murky and unpredictable, so a careful approach is safest legally. Courts of course do consider what warnings have been given and whether those warnings are in writing. Courts also consider such things as: (1) whether there has been a show of police force; (2) whether coerciveness is otherwise express or implied by police word or action (for instance, courts consider: (a) custodial status, albeit lawful, of the person asked for consent; or (b) threats by an officer to take away a person's children if consent is not granted); (3) whether the officer states or implies that failure to consent will be considered evidence of guilt; (4) whether there has been a threat to secure the item or scene and seek a search warrant (which is not by itself unlawful if probable cause supports it); (5) the maturity, sophistication, criminal-justice experience, and mental or emotional state of the person asked for consent; (6) whether there has been a recent refusal to consent by the person asked for consent; (7) whether the person asked for consent has already confessed or otherwise begun to cooperate (which tips the balance toward voluntariness); (8) whether Miranda warnings have or have not been administered (courts consider this even though it is not entirely logical to do so).

(2) PUBLIC RECORDS ACT LAWSUIT: WASHINGTON'S CONSTITUTIONAL SEPARATION OF POWERS CREATES A QUALIFIED GUBERNATORIAL COMMUNICATIONS PRIVILEGE THAT FUNCTIONS AS AN EXEMPTION TO THE PRA – In Freedom Foundation v. Gregoire, ___ Wn.2d ___, 310 P.3d 1252 (Oct. 17, 2013), the Washington State Supreme Court holds that separation of powers creates a qualified gubernatorial communications privilege that exempts records from the PRA.

The Freedom Foundation made a public records request to the office of the Governor requesting eleven records that the Foundation knew the Governor had previously claimed executive privilege for and refused to produce in response to other public records requests.

The Governor waived the privilege for five documents and part of a sixth document. She continued to claim privilege for part of the sixth document and five other documents. The withheld documents involved the negotiations to replace the Alaskan Way Viaduct in Seattle, the Columbia River Biological Opinion, and proposed medical marijuana legislation. The Governor included a privilege log and a letter from the Governor's general counsel that identified the withheld documents, their authors and recipients, their subject matter in general terms, and explained that the governor was asserting executive privilege to protect her access to the candid advice needed to fulfill her constitutional duties.

The Foundation filed suit seeking to compel production of the documents under the PRA.

The Court concludes that separation of powers dictates a qualified gubernatorial privilege:

> . . . Separation of powers concerns recognize the executive's need to keep some conversations confidential. Separation of powers concerns also dictate that the courts may override that confidentiality when it conflicts with "the court's duty to see that justice is done in the cases which come before it." O'Connor v. Matzdorff, 76 Wn.2d 589, 600 (1969); see United States v. Nixon, 418 U.S. 683, 711-13 (1974). These contrasting constitutional requirements define the limits of the gubernatorial communications privilege in several ways.
>
> Above all, the constitutional communications privilege applies only to communications "'authored'" or "'solicited and received'" by the governor or aides with "'broad and significant responsibility for investigating and formulating the advice to be given'" to the governor. Judicial Watch, Inc. v. Dep't of Justice, 361 U.S. App. D.C. 183, 365 F.3d 1108, 1114, 1116 (2004) (quoting In re Sealed Case, 326 U.S. App. D.C. 276, 121 F.3d 729, 752 (1997)). The executive communications privilege must extend beyond the governor to serve these purposes. Senior advisors must have the ability to obtain frank advice to help the governor shape policy decisions; extending the privilege away from the governor assures that these advisors will receive candid opinions. However, "the demands of the privilege become more attenuated the further away the advisors are from the [chief executive] operationally." The privilege's justifications fade when dealing with aides unlikely to ever provide policy advice. Accordingly, the privilege encompasses not only communications with the governor, but to senior policy advisors as well.
>
> Second, the communication must occur "for the purpose of fostering informed and sound gubernatorial deliberations, policymaking, and decisionmaking." Like any other privilege, we must limit the gubernatorial communications privilege to its purposes, here ensuring the governor's access to frank advice in order to carry out her constitutional duties. See Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 31 (1993). The privilege does not exist to shroud all conversations involving the governor in secrecy and place them beyond the reach of public scrutiny. Only those communications made to inform policy choices qualify for the privilege.
>
> Finally, the governor must provide a record that allows the trial court to determine the propriety of any assertion of the privilege. "'[I]t is the judiciary (and not the executive branch itself) that is the ultimate arbiter of executive privilege.'" Judicial inspection of material to determine the applicability of the privilege intrudes upon the separation of powers by breaching the confidentiality of the

> communications. Respect for a coordinate branch of government therefore requires us to provide some deference to a governor's decision that material falls within the ambit of executive privilege. But the judicial branch has the ultimate responsibility to determine the validity of a privilege claim. To assist the courts in making this determination, the governor must provide a privilege log listing the documents involved, the author and recipient, and a general description of the subject matter such that the court can evaluate the propriety of the governor's claims. If the governor provides this log, the courts must treat the communications as presumptively privileged.
>
> Because the privilege is qualified, the requesting party may attempt to overcome the presumption by showing a particularized need for the materials. **[LED EDITORIAL NOTE: In the present case, the Freedom Foundation refused to make any attempt to overcome this presumption.]** If the party makes this showing, the trial court must evaluate the documents in camera. The trial court must determine whether the requesting party's need for the material outweighs the public interests served by protecting the chief executive's access to candid advice for purposes of formulating policy; if so, it must release the documents. The federal courts have recognized that the demands of both criminal and civil trials may serve to overcome the privilege. Nixon, 418 U.S. at 712–13; Sun Oil Co. v. United States, 206 Ct. Cl. 742, 514 F.2d 1020, 1024 (1975); Dellums v. Powell, 182 U.S. App. D.C. 244, 561 F.2d 242, 247 (1977). . . .

[Footnotes and some citations omitted]

Chief Justice Madsen and Justice Charles Johnson each write concurring opinions.

Justice Jim Johnson dissents.

Result: Affirmance of Thurston County Superior Court order granting summary judgment and dismissing lawsuit.

(3) DEATH SENTENCE CAN BE PREDICATED ON AN ALFORD PLEA OF GUILTY – In In re Cross, 178 Wn.2d 519 (Sept. 26, 2013), the Washington State Supreme Court unanimously holds that a death sentence can be predicated on an Alford plea [North Carolina v. Alford, 400 U.S. 25 (1970)] (defendant enters a guilty plea while still maintaining his or her innocence, but acknowledging the existence of sufficient evidence to support a conviction).

The Court summarizes its opinion as follows:

> At common law, there existed a procedure for defendants to enter no-contest pleas and place themselves within the grace of the King. Because the plea was not supported with any evidence to support a finding of guilt, such pleas we considered insufficient to support a capital penalty. However, the Washington State statutes and rules that provide for accepting an Alford plea are much different than those of ancient no-contest pleas and, if followed, do provide an adequate basis to support capital punishment. Current Washington law does not permit the acceptance of a guilty plea, including an Alford plea, "without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." CrR 4.2(d). A careful review of the record reveals that

> Cross's Alford plea was a calculated one. It likely avoided having all the gruesome details of the murders presented to the jurors at the guilt phase and preserved his ability to argue at the penalty phase of the trial that he killed the three women without premeditation or a common scheme or plan. Unfortunately for Cross his tactic did not work. The record reflects that his plea was knowing, voluntary, and intelligent. Cross has failed to show error. His petition on this issue is denied.

Result: Denial of personal restraint petition filed by Dayva Cross, seeking relief from death sentence imposed after Alford pleas to capital murder and kidnapping in King County Superior Court.

(4) NO VIOLATION OF DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE "FACILITY DOG" BELONGING TO PROSECUTOR'S OFFICE IS ALLOWED TO SIT NEXT TO DEVELOPMENTALLY DISABLED VICTIM WHILE THE VICTIM TESTIFIES – In State v. Dye, 178 Wn.2d 541 (Sept. 26, 2013) the Washington State Supreme Court affirms the court of appeals decision reported at 170 Wn. App. 340 (Div. I, Aug. 27, 2012) **Dec 12 LED:16**, holding that it was not an abuse of discretion for the trial court to allow a "facility dog" to sit next to a developmentally disabled victim while he testified at trial.

The victim in this case was severely mentally disabled. During his defense interview the victim "was accompanied by a facility dog, Ellie . . . . a golden retriever used by the King County Prosecuting Attorney's Office to comfort children who are giving statements and testimony." The victim requested the dog's presence during his trial testimony. The trial court granted the request, and gave a limiting instruction to the jury, instructing the jury not to "make any assumptions or draw any conclusions based on the presence of this service dog."

The Supreme Court holds that it was not an abuse of discretion for the trial court to allow the dog to accompany the victim during trial.

Justice Gordon-McLoud issues a concurring opinion.

Result: Affirmance of King County Superior Court conviction of Timothy Dye for residential burglary.

(5) GIVING AFFIRMATIVE DEFENSE INSTRUCTION TO THE JURY, OVER THE DEFENDANT'S OBJECTION, VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONTROL HIS DEFENSE – In State v. Lynch, 178 Wn.2d 487 (Sept. 19, 2013), the Washington State Supreme Court holds that a trial court's instructing the jury on an affirmative defense, over the defendant's objection, violates the defendant's Sixth Amendment right to control his defense.

The defendant was charged with indecent liberties and second degree rape. He admitted the conduct but argued that the victim consented. Over the defendant's objection, the trial court instructed the jury that the defendant had the burden of proving consent by a preponderance of the evidence. The defendant argued that he raised the issue of consent to create reasonable doubt, but did not want to bear the burden of proving consent.

Relying on its recent decision in State v. Coristine, 177 Wn.2d 370, 376 (2013) **Aug 13 LED:22** the Supreme Court agrees, holding that the trial court's instruction violated the defendant's right to control his defense.

Concurrence: Justice Gordon McLoud issues a concurrence, joined by Justice Wiggins and Chief Justice Madsen, in which she argues that the consent instruction is unconstitutional.

Result: Reversal of Clallam County Superior Court convictions of Jeffrey Thomas Lynch for indecent liberties and second degree rape.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURT OF APPEALS HOLDS THAT STATUTORY PROVISION PRECLUDING APPEAL OF LICENSE REVOCATIONS BY INDIVIDUALS WHO OBTAIN INGNITION INTERLOCK DEVICES VIOLATES SUBSTANTIVE DUE PROCESS BECAUSE IT BEARS NO RATIONAL RELATIONSHIP TO LEGITIMATE STATE INTERESTS – In Nielsen v. Department of Licensing, ___ Wn. App. ___, 309 P.3d 1221 (Div. I, Sept. 30, 2013), the Court of Appeals holds that the statutory provision precluding appeal of license revocations by individuals who obtain an ignition interlock device (IID) is unconstitutional.

Washington's Implied Consent Statute, RCW 46.20.308, provides licensing consequences for drivers who refuse to submit to a test to determine the alcohol content or presence of any drug in their breath or blood. The statute also provides licensing consequences for drivers who submit to a test where the test results are over the legal limit.

The statute provides for administrative review of a license revocation, and if the revocation is sustained the statute provides for an appeal to superior court.

RCW 46.20.385 authorizes the issuance of IIDs in certain circumstances and RCW 46.20.385(1)(b) provides in part that "A person receiving an ignition interlock driver's license waives his or her right to a hearing or appeal under RCW 46.20.308."

The Court holds that this provision providing that a person waives the right to an administrative hearing or appeal is unconstitutional because it does not bear a rational relationship to a legitimate state interest.

Result: Reversal of Snohomish County Superior Court dismissal of Kai Nielsen's appeal of his license suspension.

(2) PUBLIC RECORDS ACT LAWSUIT: CHAPTER 13.50 RCW PROVIDES THE EXCLUSIVE MEANS FOR OBTAINING JUVENILE RECORDS – In Wright v. Department of Social and Health Services, 176 Wn. App. 588 (Div. II, Sept. 10, 2013), the Court of Appeals holds that chapter 13.50 RCW is an "other statute" under the Public Records Act (PRA) and as such is the exclusive means for obtaining juvenile records.

The Court's analysis is in pertinent part as follows:

> The PRA provides that a requested record may be exempt from disclosure if the record is controlled by any "other statute which exempts or prohibits disclosure of specific information or records." RCW 42.56.070(1) (emphasis added). RCW 13.50.100(2) expressly provides: "Records covered by this section shall be confidential and shall be released **only** pursuant to this section and RCW 13.50.010." (Emphasis added) (second emphasis added). Relying on this provision, we have previously held that chapter 13.50 RCW provides the exclusive means of obtaining juvenile justice and care records. [Deer v.

Department of Social and Health Services, 122 Wn. App. 84, 92 (2004)]. In Deer, the "sole question" was "whether a person denied access to DSHS records in which they or their children are named can use the processes and obtain the relief set forth in the [Public Disclosure Act] PDA." Id. at 88. We concluded that the child dependency records Deer sought were public records within the meaning of the PDA, but that chapter 13.50 RCW is an '"other statute'" that "'exempts or prohibits'" disclosure "of particular documents to particular people under [the PDA]." Id. at 89–90, 92 (quoting RCW 42.17.260). Consequently, Deer could not use the PDA's public record request procedures or seek remedies for DSHS's alleged PDA noncompliance because chapter 13.50 RCW is the exclusive means of obtaining the juvenile records at issue. Deer, 122 Wn. App. at 92–93. As in Deer, here, too, the PRA did not apply to Wright's request for the recorded interview and transcription and did not require DSHS to produce those records.

Similarly, in In re Dependency of K.B., [150 Wn. App. 912, 920 (2009)] the petitioner "agree[d] that chapter 13.50 RCW controls the process but argue[d] that it does not control the sanctions that may be imposed for [DSHS's] improper failure to disclose" requested juvenile records. Disagreeing, we held,

> If the legislature had intended to provide PRA sanctions in cases in which DSHS wrongfully denies access to chapter 13.50 RCW records, then it would have specified this in RCW 13.50.100(1).

KB., 150 Wn. App. at 923. We further noted that the legislature passed chapter 13.50 RCW to specify the exclusive "process, including sanctions, for obtaining juvenile justice and care agency records, after the PRA." Id. Here, we similarly hold that the PRA does not provide Wright with an applicable remedy for her unsupported claim that DSHS violated the PRA, based on its alleged "late" disclosure of the audio recorded interview and its transcription, available only under chapter 13.50 RCW.

Because the legislature has prescribed chapter 13.50 RCW as the sole method for obtaining juvenile records maintained under that chapter, we hold that (1) the PRA did not apply to DSHS's production of her interview recording and transcription; (2) DSHS did not violate the PRA in failing to disclose these requested items until it later found them; and (3) Wright was not entitled to any PRA awards for DSHS's nonexistent noncompliance.

[Footnotes omitted; some citations modified]

Result: Reversal of Pierce County Superior Court judgment in favor of PRA requestor, including reversal of penalty, cost, and fee award that totaled just under $650,000.

LED EDITORIAL NOTE: This case was decided by the same panel of Division II of the Court of Appeals that decided State v. A.G.S., ___ Wn. App. ___, 2013 4744676 (Div. II, Sept. 4, 2013), digested immediately below in this LED.

(3) UNDER CHAPTER 13.50 RCW RECORDS THAT ARE PART OF THE OFFICIAL JUVENILE COURT FILE ARE SUBJECT TO PUBLIC INSPECTION (UNLESS SEALED); RECORDS THAT ARE NOT PART OF THE OFFICIAL COURT FILE ARE CONFIDENTIAL – In State v. A.G.S., 176 Wn. App. 365 (Div. II, Sept. 4, 2013), the Court of Appeals remands the

case to the trial court for a determination of whether the defendant's Special Sex Offender Disposition Alternative (SSODA) is part of the official juvenile court file. If it is part of the official file, it is public and may be disclosed to the victims' families. If it is not part of the official file, it remains confidential and may not be disclosed.

The Court also notes: "[B]ecause the [Public Records Act] PRA and chapter 13.50 RCW do not conflict, chapter 13.50 RCW supplements the PRA and provides the exclusive process for obtaining juvenile justice and care agency records." [In re the Dependency of K.B., 150 Wn. App. 912, 920 (2009) (citing Deer v. Dep't of Soc. & Health Services, 122 Wn. App. 84, 92–93 (2004))].

Result: Reversal of Cowlitz County Superior Court order disclosing SSODA to victim's parents. Remand for determination of whether the SSODA is part of the official court file.

LED EDITORIAL NOTE: This case was decided by the same panel of Division II of the Court of Appeals that decided Wright v. Department of Social and Health Services, ___ Wn. App. ___, 2013 WL 4824373 (Div. II, Sept. 10, 2013), digested immediately above.

(4) PUBLIC RECORDS ACT LAWSUIT: FAILURE TO PROVIDE BRIEF EXPLANATION OF HOW EXEMPTION APPLIES TO REDACTION (IN THIS CASE OF DRIVER'S LICENSES) ENTITLES REQUESTOR TO COSTS AND FEES (BUT NOT PENALTIES) – In City of Lakewood v. Koenig, 176 Wn. App. 397 (Div. II, Sept. 4, 2013), the Court of Appeals holds that the city violated the public records act (PRA) by identifying redactions and citing the statutory exemptions but not providing a brief explanation of how the exemptions applied to the records.

The Court of Appeals describes as follows the City's redaction message to the requestor:

> [The Lakewood police detective's] Driver's License number has been redacted pursuant to RCW 46.52.120 and RCW 46.52.130.
> . . .
> . . . The City has redacted the dates of birth, driver's license numbers and social security numbers of (1) the involved officer; (2) the alleged victim; and (3) the listed eyewitnesses [in the Fife collision records]. These redactions are made pursuant to RCW 42.56.050, RCW 42.56.240, RCW 46.52.120, and RCW 46.52.130.
>
> . . .
>
> . . . The driver's license number of [a Tacoma Police officer] Justice has been redacted pursuant to RCW 42.56.050, 46.52.120, and 46.52.130.

The Court concludes that this response violated the PRA's brief explanation requirement, explaining:

> The PRA's brief explanation requirement provides that an agency response to a PRA request "include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW 42.56.210(3). A statement that is limited to identifying the information that is withheld and baldly citing a statutory exemption violates the brief explanation requirement. Sanders v. State, 169 Wn.2d at 827, 845–46 (2010).

The Court awards fees and costs, but not penalties, based on RCW 42.56.550(4) and Sanders, 169 Wn.2d at 860.

The Court concludes its opinion with a footnote that urges the Legislature to act to provide greater protection for personal identifying information:

> Although we do not resolve the question of whether the City properly redacted driver's license numbers in the disclosed records (an issue not before us in this appeal), we note our concern over the legislature's failure to expressly provide adequate protection for personal identifying information in the PRA statute. We recognize that the legislature has rejected a general personal privacy exemption. RCW 42.56.050. However, we use the phrase "personal identifying information" to mean information such as Social Security numbers, driver's license numbers, tax identification numbers, employee numbers, or any other identifying information that would allow a private individual to be identified and subjected to inappropriate scrutiny or harm. See RCW 42.56.590(5); RCW 9.35.005(3); RCW 19.215.010(5); Tacoma Public Library v. Woessner, 90 Wn. App. 205, 221–22 (1998).
>
> The legislature has acknowledged that disclosure of such personal identifying information can be harmful to private citizens. See ch. 9.35 RCW. In other statutes, the legislature has recognized that driver's license numbers are personal identifying information needing protection from public disclosure to guard against harm to private citizens, such as identity theft. See, e.g., RCW 42.56.590(5)(b), (6); RCW 19.215.005. However, it has not yet expressly provided a specific provision for the exemption of personal identifying information in the PRA.
>
> The PRA exists to ensure government transparency and accountability. RCW 42.56.030. Allowing the release of a private citizen's personal identifying information exposes private citizens to the risk of harm such as identity theft without furthering this purpose. See Tacoma Public Library, 90 Wn. App. at 221–22 (disclosure of personal identifying information can be highly offensive because it "could lead to public scrutiny of individuals concerning information unrelated to any governmental operation"). The legislature has expressed obvious concern over the release of personal identifying information and recognized that the release of personal identifying information serves no legitimate purpose under the PRA. Accordingly, we believe that the failure to include an express PRA exemption that impedes the crime of identity theft and protects the release of personal identifying information appears to be an unfortunate oversight but that it is up to the legislature not the courts, to address.

Result: Reversal of Pierce County Superior Court order granting summary judgment dismissal in favor of city.

****

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

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

accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

****

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

****