



# Law Enforcement

April 2004

# Digest

## HONOR ROLL

Police Corps 5 - September 9, 2003 through February 27, 2004

- |                    |   |
|--------------------|---|
| Overall:           | Rebecca Lewis - Snohomish County Sheriff's Office |
| Academic:          | Julie Beard - Redmond Police Department           |
| Firearms:          | Thomas Borges Jr. - Tacoma Police Department      |
| Defensive Tactics: | Mark Halsted - Bellevue Police Department         |
| Physical Fitness:  | Jeremy Sandin - Redmond Police Department         |
| Patrol Partner:    | Jeremy Sandin - Redmond Police Department         |

The Police Corps is a nationwide college scholarship program funded by the United States Department of Justice. Students must commit to working for a law enforcement agency for at least four years after graduation from college. In addition to the 720 Basic Law Enforcement Academy training, Police Corp recruits also complete additional training in areas such as team building, leadership, and community outreach. This is the 5th Police Corp Class to graduate from the CJTC.

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**UNITED STATES SUPREME COURT**

**IN CIVIL RIGHTS CASE, FOURTH AMENDMENT HELD TO HAVE BEEN VIOLATED WHERE SEARCH WAS CONDUCTED UNDER A WARRANT IN WHICH ATF AGENT MADE CLERICAL ERROR BY FAILING TO SPECIFY THE ITEMS THAT WERE TO BE SEIZED; QUALIFIED IMMUNITY IS DENIED TO ATF AGENT WHO PREPARED THE WARRANT AND LED OTHER OFFICERS IN THE SEARCH**

*Groh v. Ramirez*, 124 S.Ct. 1284 (2004)

Facts and Proceeding below:

**[LED ATTRIBUTION NOTE:** The following description regarding the facts in Groh is adapted from and makes extensive use of the “syllabus” (a fancy word for summary) of the Supreme Court’s opinion that was prepared by the U.S. Supreme Court’s “Reporter of Decisions.” The syllabus is not part of the opinion of the Court.]

Agent Groh, a Bureau of Alcohol, Tobacco and Firearms (ATF) agent, prepared and signed an application for a warrant to search the residence on the Montana ranch of the Ramirez family. The application explained that the search was for specified illegal weapons, illegal explosives, and for related records. The application was supported by agent Groh's detailed affidavit setting forth his basis for believing that such items were on the ranch and was accompanied by a warrant form that he completed.

The Magistrate Judge (Magistrate) signed the warrant form even though the actual warrant (in contrast to the application) did not identify any of the items that the ATF intended to seize. The portion of the search warrant calling for a description of the "person or property" that was to be seized described only the house of the Ramirez family, and did not describe the alleged weapons or explosives or records; the warrant did not incorporate by reference the application's itemized list of items. Agent Groh led federal and local law enforcement officers to the ranch the next day, but the searchers did not find any illegal weapons or explosives. Agent Groh left a copy of the warrant, but not the application, with the Ramirez family.

The Ramirez family sued Agent Groh and others under Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) and 42 U.S.C. § 1983 (the Federal Civil Rights Act), claiming, among other things, a Fourth Amendment violation. The U.S. District Court granted Agent Groh and the government summary judgment, finding no Fourth Amendment violation, and finding that even if such a violation occurred, they were entitled to qualified immunity.

The Ninth Circuit of the U.S. Court of Appeals affirmed, except as to the Fourth Amendment claim against Agent Groh, holding as to that claim that the search warrant was invalid because it did not describe with particularity the place to be searched and the items to be seized. The Ninth Circuit also concluded that United States v. Leon, 468 U.S. 897 (1984) precluded qualified immunity for Agent Groh because he was the leader of a search who did not read the warrant and did not satisfy himself that he understood its scope and limitations, and did not reasonably satisfy himself that the search warrant was not obviously defective.

**ISSUES AND RULINGS:** (1) Did the failure of the search warrant to specify the items to be seized make the search warrant unlawful under the Fourth Amendment? (**ANSWER:** Yes, rules a 7-2 majority); (2) Is Agent Groh entitled to qualified immunity? (**ANSWER:** No, rules a 5-4 majority, because no reasonable officer would have believed that he could execute a search warrant that did not specify the items to be seized).

*Note regarding the voting on the Supreme Court in this case: Justice Stevens writes the majority opinion and is joined by Justices O'Connor, Souter, Ginsburg, and Breyer. Justice Kennedy writes a dissenting opinion that concedes that the search was unconstitutional but argues that the Court should have granted Agent Groh qualified immunity. Justice Thomas writes a separate dissent, joined by Justice Scalia, arguing that no constitutional violation occurred, and that, even if one assumes a violation, qualified immunity would apply.*

**Result:** Affirmance of Ninth Circuit decision; case remanded for trial.

#### ANALYSIS IN MAJORITY OPINION:

**[LED ATTRIBUTION NOTE: The following description regarding the analysis in the majority opinion in Groh is adapted from and makes extensive use of the "syllabus" of the Supreme Court's opinion that was prepared by the U.S. Supreme Court's "Reporter of Decisions," We remind again that the syllabus is not part of the opinion of the Court.]**

## 1) Unlawfulness of the search

The majority opinion declares that the search was clearly "unreasonable" under the Fourth Amendment because the search warrant was invalid on its face. The warrant did not meet the Fourth Amendment's clear requirement that a warrant "particularly describ[e] ... the persons or things to be seized." The fact that the application for the warrant adequately described those things does not save the warrant. The majority declares in this regard that Fourth Amendment interests are not necessarily vindicated when another document says something about the objects of the search, but that document's contents are neither known to the person whose home is being searched nor available for inspection at the time of the search.

The majority opinion states that the Court need not decide in this case whether the Fourth Amendment permits a warrant to incorporate other documents by cross reference, because such incorporation did not occur here. Note however, that the majority opinion does note with apparent approval the considerable body of case law upholding warrants that incorporate by reference (and attach to the warrant) the warrant application or supporting affidavit.

The majority opinion goes on to assert that, because the search warrant did not describe the items to be seized at all, the warrant was so obviously deficient that the search must be regarded as warrantless, and thus presumptively unreasonable. This presumptive rule applies to searches whose only defect is a lack of particularity in the warrant, the majority opinion states, and therefore Agent Groh erred in arguing that such searches should be exempt from the presumption if they otherwise satisfy the general goals of the particularity requirement. Unless items described in the affidavit are also set forth in the warrant, the majority declares, there is no written assurance that the Magistrate actually found probable cause for a search as broad as the affiant requested.

Furthermore, even though Agent Groh limited the scope of his search, the limits were imposed by the agent himself, not a judicial officer, the majority complains. Moreover, the particularity requirement's purpose is not limited to preventing general searches; it also assures the individual whose property is searched and seized of the executing officer's legal authority, his need to search, and the limits of his power to do so. Finally, the majority rejects Agent Groh's argument that the particularity requirements' goals were served when he orally described the items to be seized to those present at the Ramirez home; that is because the Ramirezes dispute his account and that issue will have to be resolved at trial.

## 2) Qualified immunity

Next, the majority opinion addresses the question of whether Agent Groh is entitled to qualified immunity. That is, the Court having determined that there was a constitutional violation, the Court analyzed the question whether, despite a constitutional violation, it would not be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. See Saucier v. Katz, 533 U.S. 194 (2001). Here the majority opinion asserts that, given that the particularity requirement is stated in the Constitution's text, no reasonable officer could believe that a warrant that did not comply with that requirement was valid.

Moreover, the majority opinion continues, because Agent Groh prepared the warrant, he is not allowed to argue, as a supporting officer likely could, that he reasonably relied on the Magistrate's assurance that the search warrant contained an adequate description and was valid. Finally, the majority opinion rejects the idea that a reasonable officer could claim to be unaware of the basic legal proposition that a warrant may be so facially deficient that an officer cannot reasonably presume it to be valid.

**LED EDITORIAL COMMENT: This is a harsh result for the ATF but a lesson for all officers. Careful proofreading is your best protection against this kind of mess-up.**

**DUE PROCESS REQUIREMENTS NOT VIOLATED IN GOOD FAITH POLICE DESTRUCTION OF COCAINE AFTER POLICE HAD KEPT COCAINE FOR OVER TEN YEARS WHILE THE CHARGED DEFENDANT WAS ON THE LAM**

Illinois v. Fisher, 124 S.Ct. 1200 (2004)

Facts and Proceedings below: (Excerpted from Supreme Court's per curiam opinion)

In September 1988, Chicago police arrested respondent **[LED Editorial Note: defendant Gregory Fisher is "respondent"]** in the course of a traffic stop during which police observed him furtively attempting to conceal a plastic bag containing a white powdery substance. Four tests conducted by the Chicago Police Crime Lab and the Illinois State Police Crime Lab confirmed that the bag seized from respondent contained cocaine.

Respondent was charged with possession of cocaine in the Circuit Court of Cook County in October 1988. He filed a motion for discovery eight days later requesting all physical evidence the State intended to use at trial. The State responded that all evidence would be made available at a reasonable time and date upon request. Respondent was released on bond pending trial. In July 1989, however, he failed to appear in court, and the court issued an arrest warrant to secure his presence. Respondent remained a fugitive for over 10 years, apparently settling in Tennessee. The outstanding arrest warrant was finally executed in November 1999, after respondent was detained on an unrelated matter. The State then reinstated the 1988 cocaine-possession charge.

Before trial, the State informed respondent that in September 1999, the police, acting in accord with established procedures, had destroyed the substance seized from him during his arrest. Respondent thereupon formally requested production of the substance and filed a motion to dismiss the cocaine-possession charge based on the State's destruction of evidence. The trial court denied the motion, and the case proceeded to a jury trial. The State introduced evidence tending to prove the facts recounted above. Respondent's case in chief consisted solely of his own testimony, in which he denied that he ever possessed cocaine and insinuated that the police had "framed" him for the crime. The jury returned a verdict of guilty, and respondent was sentenced to one year of imprisonment.

The Appellate Court reversed the conviction, holding that the Due Process Clause required dismissal of the charge. Relying on the Illinois Supreme Court's decision in Illinois v. Newberry, 652 N.E.2d 288 (1995), the Appellate Court reasoned:

Where evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation. If the State proceeds to destroy the evidence, appropriate sanctions may be imposed even if the destruction is inadvertent. No showing of bad faith is necessary.

The Appellate Court observed that Newberry distinguished our decision in Arizona v. Youngblood, 488 U.S. 51 (1988) on the ground that the police in Youngblood did not destroy evidence subsequent to a discovery motion by the defendant. While acknowledging that "there is nothing in the record to indicate that the alleged cocaine was destroyed in bad faith," the court further determined that Newberry dictated dismissal because, unlike in Youngblood, the destroyed evidence provided respondent's "only hope for exoneration," and was "essential to and determinative of the outcome of the case." Consequently, the court concluded that respondent "was denied due process when he was tried subsequent to the destruction of the alleged cocaine." The Illinois Supreme Court denied leave to appeal.

**ISSUE AND RULING:** Does the Due Process Clause require dismissal of cocaine possession charges where: (A) the police, nearly 11 years after defendant was charged, destroyed the alleged cocaine seized in the course of a traffic stop, even though defendant, who was a fugitive for much of the 11 years, had requested, in a discovery motion filed eight days after the charges were filed, all physical evidence the state intended to use at trial; and (B) testing of the seized substance was defendant's best hope for exoneration, and the seized evidence was essential and determinative of the outcome of the case; but (C) the destroyed evidence was at best only potentially exculpatory and the police acted in good faith and in accordance with their normal practice in destroying the evidence? (**ANSWER:** No; dismissal under constitutional due process standards is not required under the facts of this case)

**Result:** Reversal of Illinois appellate court's dismissal order; conviction for possession of cocaine reinstated.

**ANALYSIS:** (Excerpted from Supreme Court's per curiam opinion)

We have held that when the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. See Brady v. Maryland, 373 U.S. 83 (1963). In Youngblood, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*"

The substance seized from respondent was plainly the sort of "potentially useful evidence" referred to in Youngblood, not the material exculpatory evidence addressed in Brady. . . . At most, respondent could hope that, had the evidence been preserved, a *fifth* test conducted on the substance would have exonerated him. But respondent did not allege, nor did the Appellate Court find, that the Chicago police acted in bad faith when they destroyed the substance. Quite the contrary, police testing indicated that the chemical makeup of the substance inculpated, not exculpated, respondent, and it is undisputed that police acted in "good faith and in accord with their normal practice." Under Youngblood, then, respondent has failed to establish a due process violation.

We have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police. Indeed, the result reached in this case demonstrates why such a *per se* rule would negate the very reason we adopted the bad-faith requirement in the first

place: to "limi[t] the extent of the police's obligation to preserve evidence to reasonable grounds and confin[e] it to that class of cases where the interests of justice most clearly require it."

We also disagree that Youngblood does not apply whenever the contested evidence provides a defendant's "only hope for exoneration" and is " 'essential to and determinative of the outcome of the case.' " In Youngblood, the Arizona Court of Appeals said that the destroyed evidence "could [have] eliminate[d] the defendant as a perpetrator." Similarly here, an additional test might have provided the defendant with an opportunity to show that the police tests were mistaken. It is thus difficult to distinguish the two cases on this basis. But in any event, the applicability of the bad-faith requirement in Youngblood depended not on the centrality of the contested evidence to the prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence. As we have held, the substance destroyed here was, at best, "potentially useful" evidence, and therefore Youngblood's bad-faith requirement applies.

The judgment of the Appellate Court of Illinois is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

**JUSTICE STEVENS' CONCURRENCE:**

Justice Stevens writes a concurrence not joined by any other Justice. He indicates that the opinion of the Court is too pro-State and does not leave sufficient flexibility to address situations that seem "unfair." Justice Stevens explains his view as follows:

While I did not join the three Justices who dissented in Arizona v. Youngblood, I also declined to join the majority opinion because I was convinced then, and remain convinced today, that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." This, like Youngblood, is not such a case.

Justice Stevens asserts that the courts of several state have limited the effect of Youngblood by adopting more restrictive due process rules under their state constitutions.

**LED EDITORIAL NOTE:** The Washington Supreme Court has followed the Youngblood rule and has not interpreted the Washington constitution as providing greater due process protections in relation to the good faith destruction of evidence in this particular context. See, for example, State v. Ortiz, 119 Wn.2d 294 (1992) Sept 92 LED:06; State v. Straka, 116 Wn.2d 859 (1991) Nov 91 LED:04.

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**BRIEF NOTE FROM THE UNITED STATES SUPREME COURT**

**BRADY VIOLATION OCCURRED WHERE STATE FAILED TO DISCLOSE THAT, CONTRARY TO THE TRIAL TESTIMONY OF TWO KEY WITNESSES, ONE OF THE WITNESSES WAS INTENSIVELY COACHED AND THE OTHER WAS A PAID INFORMANT** - In Banks v. Dretke, 124 S.Ct. 1256 (2004), the United States Supreme Court holds that that it was a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), for the State to fail to disclose to the defendant that, contrary to the trial testimony of two primary witnesses in the case, one of witnesses was intensively coached by prosecutors and law enforcement, and the other witness was a paid police informant.

On April 14, 1980, police found the body of 16 year old Richard Whitehead in a park east of Nash, Texas. He had been shot three times. Delma Banks was ultimately convicted of the crime and sentenced to death.

Witnesses testified at trial that they saw Banks and Whitehead together in Whitehead's green Mustang on April 11, and heard gunshots in the park at 4:00 a.m. on April 12. Banks showed up at Charles Cook's house in Dallas in a green Mustang at about 8:00 a.m. on April 12. Banks had blood on his leg and ultimately confessed to having "kill[ed] the white boy for the hell of it and take[n] his car and come to Dallas." Banks left Dallas by bus on April 14, leaving the green Mustang and the murder weapon. The next day Cook abandoned the green Mustang and sold the weapon to a neighbor.

On April 23, police received a call from a confidential informant indicating that Banks would be coming to Dallas to meet an individual and get a weapon. Police followed Banks to Cook's house, where he requested and obtained the murder weapon. Police later arrested Banks as he was en route from Dallas. They found a handgun in the vehicle. When police returned to Cook's house, they recovered a second weapon, which turned out to be the murder weapon.

Prior to trial, the State advised Banks' attorneys that it would "without the necessity of motions[,] provide you will all the discovery to which you are entitled." Despite this, the Supreme Court majority opinion explains:

[The] State withheld evidence that would have allowed Banks to discredit two essential prosecution witnesses. The State did not disclose that one of those witnesses was a paid police informant, nor did it disclose a pretrial transcript revealing that the other witness' trial testimony had been intensively coached by prosecutors and law enforcement officers.

The State also allowed the untruthful answers of the two witnesses to remain uncorrected during trial, as well as during Banks' state court appeals and collateral attacks on his conviction and sentence. The information and false testimony did not come to light until an evidentiary hearing in Banks' federal habeas corpus action (federal action seeking relief from conviction and sentence that is available after all state procedures have been exhausted).

Cook was one of the State's key witnesses at trial. The Supreme Court majority opinion notes as to Cook:

On cross-examination, Cook three times represented that he had not talked to anyone about his testimony. In fact, however, Cook had at least one "pretrial practice sessio[n]" at which [the deputy sheriff] and prosecutors intensively coached Cook for his appearance on the stand at Banks' trial. The prosecution allowed Cook's misstatements to stand uncorrected. In its guilt-phase summation, the prosecution told the jury "Cook brought you absolute truth."

Another key witness for the State was Robert Farr, the paid informant who told police that Banks would travel to Dallas in search of a weapon. The Supreme Court majority opinion notes as to Farr:

On cross-examination, defense counsel asked Farr whether he had "ever taken any money from some police officers," or "given[n] any police officers a statement." Farr answered no to both questions; he asserted emphatically that police officers had not promised him anything and that he had "talked to no one about his [case]" until a few days before trial. These answers were untrue, but the State did not correct them.

Farr offered more false testimony during the penalty phase of the trial, including testifying that he had not told the deputy sheriff that he had traveled to Dallas with Banks. However, in his declaration submitted in the federal habeas corpus action, Farr admitted that the deputy had asked Farr to help him find Banks' gun, and that in order to do that he had to "set [Banks] up." In order to do so, he told Banks that he wanted to rob a pharmacy and that he needed Banks' gun to do so. He convinced Banks to drive to Dallas to get the gun.

The Supreme Court majority opinion notes that the "three components or essential elements of a Brady prosecutorial misconduct claim [are]: 'The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.'" Applying the facts of the Banks case to these elements, the Court finds Brady violations. The Court explains that "[w]hen police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight."

Result: Defendant's Farr-related Brady claim – reversed and remanded to the Fifth Circuit Court of Appeals (reversal of Banks' death sentence); defendant's Cook-related Brady claim – reversed and remanded to Fifth Circuit Court of Appeals to issue a certificate of appealability (returns the case to the Fifth Circuit for further consideration of this claim).

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## **WASHINGTON STATE COURT OF APPEALS**

### **ARRESTEE'S INTENTIONAL SPITTING ON FLOOR AND ON SHIELD PARTITION OF PATROL CAR HELD NOT TO BE MALICIOUS MISCHIEF IN THE SECOND DEGREE BECAUSE SPITTING NOT DEEMED AN ACT OF PHYSICALLY DAMAGING OR TAMPERING WITH THE VEHICLE**

State v. Hernandez, \_\_ Wn. App. \_\_, \_\_ P.3d \_\_ (Div. III, 2004) (2004 WL 396264)

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

On a Monday in November 2002, Officer Joseph Harris contacted Mr. Hernandez at the Quincy alternative school to discuss Mr. Hernandez's involvement in the theft of a school television the previous Friday. Officer Harris took Mr. Hernandez outside to his patrol car and explained that he was being detained for questioning about the theft. Mr. Hernandez was belligerent and uncooperative when Officer Harris handcuffed him and placed him in the back seat of the patrol car. On the trip to the station, Mr. Hernandez screamed, cursed, and spit several times--twice on the shield partition between the front and back seats, and twice on the floor of the car. Officer Harris told him to stop or he would be charged with malicious mischief. After he delivered Mr. Hernandez to the Grant County juvenile detention facility, Officer Harris spent about 15 minutes cleaning the back seat of his patrol car with disinfectant.

Mr. Hernandez was charged by information with one count of second degree theft (RCW 9A.56.020(1)(a), .040(1)(a)), one count of second degree malicious mischief (RCW 9A.48.080(1)(b)), and one count of resisting arrest (RCW 9A.76.040(1)). He was adjudged guilty of the theft and malicious mischief charges and was sentenced to 15 to 36 weeks in a juvenile rehabilitation facility. He appeal[ed] only the sufficiency of the evidence to support second degree malicious mischief.

**ISSUE AND RULING:** Is an arrestee's intentional act of spitting on the floor and on the shield partition inside a patrol car an act of "physically damaging or tampering" with the vehicle under the second degree malicious mischief statute? (ANSWER: No)

**Result:** Reversal of Grant County Superior Court conviction of Roberto Carlos Hernandez for second degree malicious mischief; case remanded for re-sentencing on his conviction for second degree theft.

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

To prove second degree malicious mischief relevant to the charge against Mr. Hernandez, the State must show that the defendant knowingly and maliciously:

(b) Creates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle or property of the state, a political subdivision thereof, or a public utility or mode of public transportation, power, or communication.

RCW 9A.48.080(1). Maliciousness may be inferred from an act wrongfully done without just cause or excuse. RCW 9A.04.110(12).

Mr. Hernandez contends the State failed to prove that he tampered with the police car or physically damaged it sufficiently to support a charge of malicious mischief. . . . The question here is whether the evidence shows that Mr. Hernandez (1) knowingly and maliciously (2) physically damaged or tampered with the police car and (3) thereby created a substantial risk of interruption or impairment of the police officer's service to the public. RCW 9A.48.080(1)(b).

Both parties cite State v. Gardner, 104 Wn. App. 541 (2001) **April 01 LED:17**, one of the few cases to examine the second degree malicious mischief statute. In Gardner, the defendant accessed his foster brother's police radio. He pressed the transmitting button and produced disruptive clicking sounds that briefly interfered with the police communication system. The trial court and Division Two on appeal agreed that the physical act of pushing the button was sufficient to establish the element of "physically damaging or tampering" required by the statute. In doing so, Division Two adopted a dictionary definition of tampering: interfering in a harmful way.

Under the plain terms of RCW 9A.48.080(1), we find insufficient evidence that Mr. Hernandez knowingly and maliciously damaged or tampered with the police vehicle or that he consequently created a substantial risk of interruption or impairment of its service to the public. Unlike the defendant in Gardner, Mr. Hernandez did not disrupt emergency services by physically manipulating a device crucial to those services. His actions simply did not rise to the level of knowing and malicious creation of a substantial risk of interruption or impairment of service to the public. Accordingly, we find that the evidence is insufficient to establish second degree malicious mischief beyond a reasonable doubt.

**METHAMPHETAMINE, GUN AND LOADED MAGAZINE IN BACKPACK BEHIND THE DRIVER'S SIDE FRONT SEAT OF PICKUP JUSTIFIES SENTENCE ENHANCEMENT FOR DRIVER BEING "ARMED WITH A DEADLY WEAPON"**

State v. Gurske, \_\_\_ Wn. App. \_\_\_, 83 P.3d 1051 (Div. III, 2004)

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

A Pullman, Washington, police officer stopped Mr. Gurske for making an illegal left-hand turn. Mr. Gurske did not have a driver's license. He told the officer he had left it at home. The officer checked. Mr. Gurske's driving privileges had been suspended. Also Mr. Gurske had no identification and lived in Moscow, Idaho. The officer arrested Mr. Gurske for driving while license suspended. The police then impounded and inventoried Mr. Gurske's pickup and found a black backpack behind the driver's seat. "The backpack was within arms reach of the driver's position. However, the backpack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat location." The backpack contained a black 9 mm pistol in a holster. "The pistol was unloaded, but a fully loaded magazine for the pistol was found in the backpack." Methamphetamine was also found in the backpack. The trial judge concluded Mr. Gurske was in possession of a controlled substance (methamphetamine) while armed with a deadly weapon.

ISSUE AND RULING: Was the gun in the backpack sufficiently accessible and sufficiently connected to the crime of possession of methamphetamine (also in the backpack) to support enhancement of sentencing for committing the crime while armed with a deadly weapon? (ANSWER: Yes)

Result: Affirmance of Samuel William Gurske's Whitman County Superior Court conviction and sentence for being in possession of methamphetamine while armed with a deadly weapon.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A person is armed for purposes of a weapon enhancement if a weapons is easily accessible and readily available for use. State v. Schelin, 147 Wn. 2d 562 **Feb 03 LED:07**. A pistol need not be loaded to satisfy the requirement of the act. The parties here stipulated that the backpack holding Samuel Gurske's pistol was "within arms reach from the driver's position." The trial judge concluded from this that Mr. Gurske was armed for purposes of the weapons sentencing enhancement. We agree and therefore affirm.

"A person is "armed" if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes." Mr. Gurske would have had to move his position in the car to remove the backpack. But the backpack was also "within arms reach from the driver's position" and the pistol here was found with the drugs in that backpack. The fact that the pistol was unloaded is not relevant to the question of whether it was easily accessible and readily available for use. The stipulated facts here amply support the court's conclusion that Mr. Gurske was armed with a deadly weapon.

The State has also satisfied the requirement that it show some "nexus between the weapon and the defendant and between the weapon and the crime." Mr. Gurske's wallet was found in the backpack together with the pistol and three grams of methamphetamine.

In Schelin, police executed a search warrant for a marijuana grow operation. Mr. Schelin was at the bottom of some basement stairs when the police entered the defendant's home. A loaded revolver hung on the wall approximately 6 to 10 feet from where he was standing. The other contraband was also in the basement. The nexus between the weapon here, the narcotics, and its proximity to Mr. Gurske all support the court's conclusion that the weapon was easily accessible as required for the enhancement here.

## **CLERGY-PENITENT PRIVILEGE APPLIES TO YOUTH PASTOR'S "CONFESSION" TO ORDAINED CHURCH ELDER; "WAIVER" AND "INDEPENDENT SOURCE" QUESTIONS ALSO ADDRESSED**

State v. Glenn, 115 Wn. App. 540 (Div. II, 2003)

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

Glenn was a youth pastor at Bethel Christian Assembly Church in Tacoma (now the Church of All Nations). Church elder George Eide had a vision that caused him to believe that Glenn was involved with pornography. On Senior Pastor William Wolfson's advice, Eide contacted Glenn and arranged to meet with him to discuss the vision. During this meeting, Glenn confessed to misconduct apparently with specified victims; *[Court's footnote: The trial court sealed the record regarding the confession.]* Eide left the room several times to tell Wolfson by phone about Glenn's statements.

Wolfson summoned Glenn to a meeting of the church's Council of Elders at Wolfson's house. Both ordained pastors and non-ordained individuals attended the meeting, but details of Glenn's statements to Eide were not revealed. Glenn wanted to apologize personally to the church congregation and the victims' families, but Wolfson suggested that Glenn write letters to them instead.

After the meeting, Glenn went home with the church's financial director, Paul Hodgson, and drafted apology letters on Hodgson's computer. *[Court's footnote: Wolfson testified that he did not know whether these letters were ever delivered to their intended recipients.]* Nonetheless, the church leaders ultimately decided to report Glenn's acts to the police.

The State charged Glenn with several counts of child molestation and rape of a child in the second and third degrees, alleging that he engaged in misconduct with multiple victims whom he knew through his role as youth pastor. Glenn moved to suppress (1) his statements to Eide; (2) the letters; and (3) the victims' statements to the police, asserting that the communication with Eide was privileged. He argued that the letters were part of his communication with Eide because the church required him to write them and, further, that because the police obtained the victims' names from Glenn's confession, the victims' statements were fruit of the poisonous tree.

After a hearing, the trial court rejected all of Glenn's arguments. Glenn sought reconsideration, providing additional evidence that Eide had conducted a marriage ceremony approximately nine months after Glenn's confession. The court concluded that this evidence indicated that the church considered Eide to be clergy; consequently, it reversed its earlier decision with regard to the statements Glenn made to Eide. But the court declined to suppress the other evidence.

ISSUES AND RULINGS ON APPEAL: 1) Does church elder Eide qualify as “clergy” under RCW 5.60.060(3)? (ANSWER: Yes); 2) Do youth pastor Glenn’s statements to the church elder Eide qualify as a “confession”? (ANSWER: Yes); 3) Did youth pastor Glenn have a reasonable expectation that church elder Eide would not disclose his privileged confession of child abuse? (ANSWER: Yes); 4) Did youth pastor Glenn waive the clergy-penitent privilege a) by making certain disclosures in a meeting attended by clergy and non-clergy; b) by drafting letters of apology; or c) by taking a deposition from church elder Eide? (ANSWER: Yes, as to disclosures in the meeting; yes, as to the letters; and not answered at this stage of review as to deposition); 5) Should victim testimony be suppressed as the “fruit of the poisonous tree” based on clergy-penitent privilege? (ANSWER: It is not clear that the exclusionary rule applies to privileged statements, but that question need not be answered here, as there was an “independent source” for the testimony from the victims.)

Result: Affirmance of Piece County Superior Court ruling on privilege question; case remanded for trial of Herman Glenn, Jr. on charges of child molestation and child rape.

ANALYSIS: (Excerpted from Court of Appeals opinion; headings supplied by LED Eds.)

Overview of Washington law on clergy-penitent privilege

RCW 5.60.060(3) provides:

A member of the clergy or a priest shall not, without the consent of a person making the confession, be examined as to any confession made to him or her in his or her professional character, in the course of discipline enjoined by the church to which he or she belongs.

For the clergy/penitent privilege to attach, the statements must have been made (1) to a member of the clergy (the necessary relationship); and (2) as a "confession . . . in the course of discipline enjoined by the church" (communication made in the right context). RCW 5.60.060(3). Further, the privilege applies only to confidential communications. [State v. Martin, 91 Wn. App. 621 (1998) **Dec 98 LED:20**], *affirmed by* State v. Martin, 137 Wn.2d 774 (1999) **Aug 99 LED:16**

To determine whether the privilege applies, the trial court asks whether (1) it attached to the statements at issue; and (2) the party claiming the privilege waived it.

**ISSUE 1: Is church elder Eide “clergy”?**

[A]fter considering Glenn's motion for reconsideration and the additional evidence about Eide performing a marriage ceremony nine months after Glenn's alleged confession to him, the court concluded that Eide was clergy. The State argues that this was error, specifically contending that there is a lack of substantial evidence to support the trial court's findings of fact.

RCW 26.44.020(11) provides, "'Clergy' means any regularly licensed or ordained minister, priest, or rabbi of any church or religious denomination, whether acting in an individual capacity or as an employee or agent of any public or private organization or institution." The court has used this definition to determine the meaning of the term "clergy" in RCW 5.60.060(3). State v. Buss, 76 Wn. App. 780, 785, 887 P.2d 920 (1995). And Martin recognized that to fit within the definition of "clergy," the person must be ordained. 137 Wn.2d at 783-84.

Eide testified that he was ordained before his conversation with Glenn. The State has not pointed to any contrary evidence. Thus, the trial judge could reasonably find by a preponderance that Eide was ordained and thus was "clergy" for purposes of the clergy/penitent privilege.

ISSUE 2: Do the statements qualify as a "confession"?

The trial court found that Glenn's statements to Eide constituted a confession within the meaning of the clergy/penitent privilege. The State argues that the record does not support this finding.

The clergy/penitent privilege attaches only to "confessions[.]" RCW 5.60.060(3). "Determination of the definition of 'confession' . . . is to be made by the church of the clergy member." Martin, 137 Wn.2d at 787. "[T]he religious entity, and not the courts, should 'decide what types of communications constitute confessions within the meaning of a particular religion.'" Martin, 137 Wn.2d at 786-87 (quoting Martin, 91 Wn. App. at 628).

The courts usually strictly construe testimonial privileges, but they should not so construe the word "confession" in the clergy/penitent privilege. Martin, 137 Wn.2d at 789. "A broad interpretation of 'confession' would 'minimize the risk that [RCW 5.60.060(3)] might be discriminatorily applied because of differing judicial perceptions of a given church's practices or religious doctrine[.]'" Martin, 137 Wn.2d at 789. In Martin, we found a communication was a "confession" because the clergy member receiving the communication considered it to be a confession.

Glenn argues that the record reveals that Eide and Wolfson acted as if Glenn's statements were part of a process of confession and restoration. Eide testified: "I can define how our church would look at confession would be to confess your sins one to another, so that you may be healed[.]" and he recognized that "[s]cripture states of confessing your sins one to another." But he also testified that the church did not have a "doctrine of confession" and that he did not consider Glenn's statements to be a "confession."

Nonetheless, the trial court noted that the church's written materials contradicted the hearing testimony. Relying on these written materials, the trial court found that the church did have a doctrine of encouraging confession of sin and that Glenn's statements constituted such a confession.

...

Further, several church members testified to the effect that the church had a concept or doctrine of confession, which was important to the church.

Eide met with Glenn to tell him about his troublesome vision, a vision of which he believed Glenn was the subject. According to Eide's testimony, his vision at its most specific point involved God saying "[p]ornography with active participation" with respect to Glenn. After Eide described the vision to Glenn, Glenn made statements to Eide.

The record indicates that Glenn intended to make the same statements to Wolfson and that he disclosed to Eide because he believed Eide was acting in Wolfson's place. Specifically, both Glenn and Eide testified that after Eide told Glenn of his vision, Glenn said he had scheduled a meeting with Wolfson to discuss "these issues."

Viewing the evidence in the light most favorable to Glenn, including sealed portions of the record; giving deference to the trial court's evaluation of the evidence and of witness credibility; and interpreting "confession" broadly, the trial court could reasonably find that (1) Eide's church acknowledged that confession is a component of edification, as described in Exhibit 35; (2) after seeing his vision, Eide met with Glenn to identify the "root problems," as described in Exhibit 35; and (3) Glenn confessed to Eide, "acknowledging the root cause" as described in Exhibit 35. Martin, 137 Wn.2d at 789 ("confession" . . . is defined by the religion of the clergy member receiving the communication"). Thus, the trial court did not err by finding that Glenn confessed to Eide for purposes of the clergy/penitent privilege.

### ISSUE 3: Were the statements made confidentially?

The clergy/penitent privilege applies only to confidential communications. "Whether a communication is confidential turns on the communicant's reasonable belief that the conversation would remain private."

The State argues that the trial court erred by failing to address whether Glenn had a reasonable expectation that his statements to Eide would be kept confidential. It contends that Glenn could not have reasonably expected Eide to keep confidential the information involving child molestation and abuse.

The trial court found that Glenn had an expectation of confidentiality. Specifically, the court found that under church doctrine, a confession included an expectation of confidentiality. Having found that Glenn's statements to Eide constituted a "confession" as defined by church doctrine, the court thus determined Eide expected that Glenn would keep his statements confidential.

Substantial evidence supports the court's finding. Exhibits 32, 34, and 36 emphasize the need to maintain confidentiality as to matters shared in church cells. Several church members testified that they expected confessions to remain confidential. And Glenn testified that when making his statements to Eide, "I trusted [Eide] in the same regard as a spiritual leader. . . . He was obviously in the role of somebody I could share these confidences with[.]"

The State argues that Glenn did not have a reasonable expectation of confidentiality because he was aware of the church's policy of reporting child abuse. But according to the trial court's finding, the reporting policy did not apply to confessions to clergy or extend beyond statements to church counselors. Substantial evidence supports this finding.

### ISSUE 4: Did Glenn waive his claim of privilege?

After speaking with Eide, Glenn attended a meeting where both ordained pastors and non-ordained individuals were present. At the meeting, Glenn made general disclosures about having committed moral failures, but he did not reveal the specifics of his statements to Eide. He also drafted several letters to the victims.

The State argues that by doing so, Glenn waived any privilege that may have attached to his conversation with Eide. The State also argues that Glenn waived any such privilege by authorizing his attorney to depose Eide on November 1, 2000, with a deputy prosecutor present, about his conversation with Glenn.

The State cites Martin in support of its argument. 137 Wn.2d 774. Martin held that otherwise privileged communications are not privileged if made in the presence of unnecessary, non-clergy third parties. 137 Wn.2d at 787. Thus, the statements Glenn made at the meeting are not privileged. But this did not destroy the privileged status of his earlier statements to Eide.

If Glenn authorized his attorney to depose Eide in the presence of a prosecuting attorney about the content of his statements to Eide, he waived any privilege that may have attached to those statements. But as the State has not provided a record of Eide's November 1, 2000, deposition, we are unable to determine whether, and to what extent, Glenn waived any privilege that may have attached to his statements.

After meeting with Eide, and later with Wolfson and the church Counsel of Elders, Glenn wrote letters to the victims and the church congregation. Glenn sought to suppress these letters, arguing they were protected by the clergy/penitent privilege.

The trial court found that regardless of whether the clergy/penitent privilege attached to the letters, Hodgson was not acting in a clergy capacity when Glenn shared the letters with him at Hodgson's home and, thus, the privilege did not cover the letters.

On cross-appeal, Glenn argues that he created the letters at Wolfson's direction and that Hodgson was an "indispensable assistant to Wolfson[.]" [Court's footnote: Executive Pastor Julie Jenkins testified that Hodgson was not an ordained pastor.] He urges us to follow federal authority holding that the clergy/penitent privilege is not vitiated simply because a non-clergy individual is present when the communication is made, so long as the individual is essential to the communication.

Glenn does not point to evidence showing that the letters constituted a "confession" for purposes of the clergy/penitent privilege. Rather, the record shows that he wrote the letters to the victims and the congregation and merely showed them to Wolfson and Hodgson. Thus, Glenn has failed to show that the clergy/penitent privilege attached to the letters, as is his burden.

#### ISSUE 5: Is victim testimony "fruit of the poisonous tree"?

The trial court concluded that although the privilege protected Glenn's statements, it was not necessary to suppress the testimony of the victims contacted as a consequence of those statements. The court held that the doctrine of fruit of the poisonous tree does not extend to testimony discovered as a result of privileged statements.

On cross-appeal, Glenn contests this ruling. He argues that "Washington courts have applied the exclusionary rule in instances unrelated to the Fourth Amendment[.]" [Court's footnote: None of the cases Glenn cites involve the doctrine of fruit of the poisonous tree, let alone extend the doctrine beyond Fourth Amendment violations. We note, however, that unlike Fourth Amendment cases, here we are dealing with a statutory privilege, not a constitutional right.] We need not resolve this issue here because the State obtained the victims' names from independent sources.

At trial, the State presented the letter that Glenn wrote to specified victims. As we discussed above, Glenn has failed to show that the privilege applied to the letters. Thus, the victims' testimony was not the fruit of the poisonous tree.

[Some text, footnotes and citations omitted]

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

**(1) OFFICER'S INDIVIDUAL PRACTICE OF MAKING CUSTODIAL ARRESTS OF ALL DWLS VIOLATORS HELD NOT TO VIOLATE STATUTES GIVING DISCRETIONARY AUTHORITY EITHER TO MERELY ISSUE CITATION OR INSTEAD TO MAKE FULL CUSTODIAL ARREST** – In State v. Pulfrey, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Div. I, 2004) (2004 WL 326938), the Court of Appeals rules that, while RCW 10.31.100(3) and RCW 46.64.015 together give officers discretion whether to make a full custodial arrest or to cite and release a DWLS violator, there is no requirement in the statutes that officers actually exercise that discretion on a case-by-case basis. Accordingly, the Court rejects defendant's challenge to an officer's individual practice of making full custodial arrests of all DWLS violators.

The Pulfrey Court summarizes its ruling as follows:

Van Pulfrey was convicted of possession of methamphetamine, which were found during a search incident to his custodial arrest for driving with a suspended license in the third degree, a misdemeanor offense. The arresting officer testified that he "always" makes a full custodial arrest of persons suspected of driving while their licenses are suspended, and "always" searches their persons and vehicles incident to such arrests. Pulfrey argues that based on this testimony, the trial court should have granted his motion to suppress the evidence found during the search incident, in that the officer's categorical refusal to exercise the discretion granted by statute to issue a citation and notice to appear, in lieu of making a custodial arrest for this offense, violated the statute, thereby making the custodial arrest unlawful. But our Supreme Court has ruled that no additional justification beyond probable cause need be shown where custodial arrest is authorized by statute, as it is here. Accordingly, we decline to extend judicial oversight of police decisions regarding custodial arrest beyond the determination of probable cause, and affirm the trial court's ruling denying Pulfrey's motion to suppress the evidence discovered during the search incident to Pulfrey's custodial arrest.

The Pulfrey Court distinguishes the decision in All Around Underground Inc. v. WSP, 148 Wn.2d 145 (2002) **Feb 03 LED:02**. In the All Around case, the Washington Supreme Court struck down a WSP WAC rule on impounds of vehicles operated by drivers whose license are suspended or revoked. The All Around decision held that RCW 46.55.113 does not give the WSP authority to mandate impoundment of all suspended or revoked drivers. Instead, officers must exercise discretion on a case by case basis and consider reasonable alternatives to impoundment of each suspended or revoked driver encountered. The Pulfrey Court explains that different sources of law and different public policy considerations are at state in Pulfrey than were at stake in the All Around case.

**Result:** Affirmance of King County Superior Court conviction of Van R. Palfrey for possession of methamphetamine.

**LED EDITORIAL NOTE:** The defendant in Pulfrey made a narrow and unique argument. The defendant apparently did not argue that the arrest was pretextual. Nor did the defendant in Pulfrey otherwise raise the kinds of challenges that were discussed in our March 2003 LED article entitled: “Custodial arrest and search incident to arrest of those arrested for driving while license suspended.” Finally, it appears that the defendant did not argue that the officer failed to formally make a full custodial arrest before conducting the car search. Compare State v. Radka, 83 P.3d 1039 (Div. III, 2004) March 04 LED:11.

**(2) USED GENERATOR STOLEN FROM RENTAL BUSINESS NOT SHOWN TO BE WORTH OVER \$1500 FOR PURPOSES OF FIRST DEGREE THEFT STATUTE** – In State v. Morley, \_\_\_ Wn. App. \_\_\_, 83 P.3d 1023 (Div. III, 2004), the Court of Appeals rules that the State did not meet the statutory test under the first degree theft statute, RCW 9A.56.030, for proving value of a used generator stolen from a rental company.

Defendant was convicted of attempted first degree theft (RCW 9A.56.030) for trying to steal a used generator from a rental company. Under the theft statute “value” means the “market value” of the item at the time and in the area of the act. RCW 9A.56.010(18)(a).

The State attempted to prove market value by eliciting testimony from an employee of the rental company. The employee testified that it would cost about \$2000 to replace the stolen used generator with a new one. However, the defense attorney brought out on cross examination of the employee that the value of the used generator to the company would be considerably reduced if depreciation were factored in. The employee also testified on redirect examination that the rental company got a significant discount from its suppliers. The Morley Court explains as follows its application of the law on valuation to the facts of this case:

[W]e hold that the market value of a new generator is not the appropriate value for the purpose of assessing the value of the generator in this theft prosecution. The generator here was never held by RentX for sale and was obtained by it for a price significantly less than retail price. Further, it was a used item at the time of the attempted theft. RentX was in the business of renting equipment to its customers on a fee basis. Although the record here is silent on the number of times it had rented this particular generator, the inference from RentX's business purpose is that it had done so. The State did not produce any direct evidence of the . . . generator's market value as a used piece of equipment. . . . Mr. Morley also contends that rental value of the generator is the correct measure of value and that the State failed to produce any evidence of rental value. He cites State v. Lee, 128 Wn.2d 151 (1995). Mr. Morley's argument that the facts here are comparable to those in Lee is not persuasive. In Lee, the loss was the rental value of the residence. Here, the subject of the attempted theft was the generator itself, not its rental value. For the two to be comparable, Mr. Morley would have had to attempt to accept money from a customer who was renting the generator. Instead, he attempted to take the generator.

**Result:** Reversal of Shannon Bruce Morley's Spokane County Superior Court conviction for attempted first degree theft; remand to Supreme Court for entry of a conviction of the lesser-included offense of attempted second-degree theft.

**(3) IN CUSTODIAL INTERFERENCE PROSECUTION AGAINST MOTHER OF A CHILD, EVIDENCE THAT FATHER PASSED POLYGRAPH SHOULD NOT HAVE BEEN ADMITTED** – In State v. Justesen, \_\_\_ Wn. App. \_\_\_, 84 P.3d 271 (Div. I, 2004), the Court of Appeals rejects admission of polygraph evidence in a custodial interference case. The Court of Appeals summarizes its ruling in the first two paragraphs of its opinion. That summary reads as follows:

Appellant Misty Justesen concealed her daughter in Massachusetts for 18 months and was convicted of custodial interference. Her defense was a claim that she believed the girl's father was sexually molesting her. Justesen knew the father had passed a polygraph test in which he denied sexual misconduct, and the trial court allowed the jury to consider the polygraph evidence in deciding whether it was reasonable for Justesen to maintain a belief that the father was a molester.

The polygraph is not a reliable indicator of truth for purposes of court proceedings. Because the polygraph evidence was used to prove that the father's denial was truthful, it should not have been admitted without a stipulation. Finding that the error was prejudicial, we reverse the conviction.

**Result:** Reversal of Skagit County Superior Court conviction of Misty Justesen for custodial interference; case remanded for possible retrial.

**LED EDITORIAL NOTE:** In State v. Cherry, 61 Wn. App. 301 (Div. I, 1991) Dec 91 LED:14, the Court of Appeals for Division One held that polygraph evidence in an affidavit for a search warrant could be considered in the determination of whether probable cause existed. We believe that the Cherry decision involves distinguishable facts from those in Justesen, and that Cherry is still good law. See also State v. Clark, 143 Wn.2d 731, 749-50 (2001) (holding that information in a search warrant affidavit indicating that suspect had been deemed “deceptive” on a polygraph exam could be considered on the question of probable cause).

**(4) “PUTTING ANOTHER IN APPREHENSION” UNDER COMMON LAW DEFINITION OF “ASSAULT” MEANS PUTTING THE THREATENED PERSON IN APPREHENSION** – In State v. Nicholson, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (Div. II, 2004), the Court of Appeals explains the limits of one of the three definitions of common law assault.

The Nicholson Court explains that three common law definitions of assault are used by the Washington courts: 1) an attempt to inflict bodily injury on another with unlawful force (attempted battery); 2) an unlawful touching with criminal intent (battery); and 3) putting another in reasonable apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm (menacing).

In Nicholson, the allegation was that defendant held a knife to the stomach of a 20-month-old boy in the presence of the child's mother. At trial, the judge allowed the prosecutor to argue to the jury that the third variation of assault, the “putting another in reasonable apprehension” (menacing) variation of assault would apply if the child's mother were placed in apprehension of harm, even if the child himself or herself were not capable of such apprehension. The Nicholson Court explains as follows why this was error by the trial court:

In essence, the trial court supported the State's argument that the fear and apprehension element could be transferred, that is, it was satisfied if Nicholson placed Joan in fear and apprehension because she was T.N.'s mother. The fact that Joan is the victim's mother is immaterial to whether her fear and apprehension can be imputed to T.N. In [State v. Bland, 71 Wn. App. 345 (Div. I, 1993) **May 94 LED:15**] we held that fear and apprehension occurring in a third party rather than the victim are insufficient to support a finding that the fear and apprehension element of common law assault has been met. The trial court thus erred in permitting the State to argue that the fear and apprehension element of common law assault was met if Joan, the victim's mother, rather than T.N., the victim, was placed in fear and apprehension of bodily harm.

Result: Reversal of King County Superior Court conviction of Derek Anthony Nicholson, II, for assault of a child in the second degree while armed with a deadly weapon; case remanded for re-trial (Nicholson did not appeal his conviction for imprisonment-domestic violence).

**(5) AT CRIMINAL TRIAL, WITNESS IS NOT ALLOWED TO OPINION THAT THE DEFENDANT IS GUILTY OR THAT ANOTHER PERSON IS NOT GUILTY** — In State v. Dolan, 118 Wn. App. 323 (Div. II, 2003), the Court of Appeals reverses defendant Duane Dolan's conviction of assault of a child. The Dolan Court reverses in part because the State presented witnesses who testified as to their opinions that defendant was guilty. The Dolan Court's analysis in pertinent part on this issue is as follows:

Dolan argues that a police officer and case worker should not have been allowed to opine that [the child's mother] was not a cause of the bruising on [the child's] neck. The State asked the officer:

[PROSECUTOR:] When you talked to [the child's mother], was there any indication that she could have done this when you were investigating the case?  
[OFFICER:] I don't believe so.

The State asked the case worker:

[PROSECUTOR:] ... Why didn't CPS make the mother leave the residence?  
[CASE WORKER:] ... I didn't feel that the child was at risk with [the] mother, and she wasn't really the person in question.

Every opinion must be based on knowledge. Proper lay opinion is based on personal knowledge. Proper expert opinion is based on scientific, technical, or specialized knowledge. The opinions offered here were not based on either type of knowledge, and hence they were not admissible.

In addition, a witness may not give, directly or by inference, an opinion on a defendant's guilt. To do so is to violate the defendant's constitutional right to a jury trial and invade the fact-finding province of the jury. "Particularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant of a fair and impartial trial." Here, the evidence showed that both Dolan and Batts had access to [the child] at pertinent times, and it was up to the jury, not a witness, to opine on the significance of that fact.

The State argues that the improper opinions constituted harmless error. Given that improper opinion testimony violates the constitutional right to a jury trial, it must be harmless beyond a reasonable doubt. We cannot say that the evidence in issue here meets that test, especially when cumulated with the other errors noted herein.

[Citations, footnotes and text omitted]

Result: Reversal of Clark County Superior Court conviction of Duane Alan Dolan for assault of a child in the second degree; case remanded for a new trial.

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

The Washington Office of the Administrator for the Courts maintains a web site with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [<http://www.courts.wa.gov/>]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [<http://legalwa.org/>] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [<http://www.courts.wa.gov/rules>].

Many United States Supreme Court opinions can be accessed at [<http://supct.law.cornell.edu/supct>]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. another website for U.S. Supreme Court opinions is the Court's website at [<http://www.supremecourtus.gov/opinions/02slipopinion.html>]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [<http://www.ca9.uscourts.gov/>] and clicking on "Opinions." Federal statutes can be accessed at [<http://www4law.cornell.edu/uscode>]

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2004, is at [<http://slc.leg.wa.gov/>]. Information about bills filed in 2003 Washington Legislature is at the same address -- look under "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent WAC amendments is at [<http://slc.leg.wa.gov/wsr/register.htm>]. In addition, a wide range of state government information can be accessed at [<http://access.wa.gov>]. The address for the Criminal Justice Training Commission's home page is [<http://www.cjtc.state.wa.us>], while the address for the Attorney General's Office home page is [<http://www.wa/ago>].

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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](mailto:johnw1@atg.wa.gov)]. Questions regarding the distribution list or delivery of the LED should be directed to [[ledemail@cjtc.state.wa.us](mailto: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. LED's from January 1992 forward are available via a link on the Commission's Internet Home Page at: [<http://www.cjtc.state.wa.us>].