



Law Enforcement

September 2005

Digest

582nd Basic Law Enforcement Academy – March 9, 2005 through July 14, 2005

- President: Eric Robison – Tacoma Police Department
Best Overall: Lee T. Streitz – Seattle Police Department
Best Academic: Stephen B. Bourdage – Auburn Police Department
Best Firearms: Joshua M. Rurey – Seattle Police Department
Tac Officer: Officer Herman Koppisch – Tacoma Police Department

583rd Basic Law Enforcement Academy – April 5, 2005 through August 10, 2005

- President: Henry Scott – Camas Police Department
Best Overall: Sean P. Granger – Pasco Police Department
Best Academic: Sean P. Granger – Pasco Police Department
Best Firearms: Philip L. Anderson – Clark County Sheriff's Office
Tac Officer: Officer Shelly Hamel – Federal Way Police Department

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UNITED STATES SUPREME COURT

FOR PURPOSES OF SECTION 1983 CIVIL RIGHTS ACTION, THERE IS NO FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO HAVE POLICE ENFORCE A RESTRAINING ORDER

Town of Castle Rock, Colorado v. Gonzales, 125 S.Ct. 2796 (2005)

Facts and Proceedings below:

One evening, Jessica Gonzales, discovered that her three young children were missing. Suspecting that her husband, who she was in the process of divorcing, had absconded with them, she called the Castle Rock Police Department. Two officers were dispatched to her home. Ms. Gonzales showed them a copy of a restraining order that restricted the contact her husband could have with her children and asked that the officers enforce it.

Ms. Gonzales alleges that, over the course of that evening, the police department repeatedly refused her requests that they take efforts to track down her husband. Finally, at around 3:20 a.m., Mr. Gonzales appeared at the police station and opened fire with a semi-automatic handgun. Police shot back, killing him. Inside the cab of his truck, they found the bodies of all three children, whom he had murdered.

On the basis of those allegations, Ms. Gonzales filed a section1983 federal civil rights lawsuit alleging that the Town of Castle Rock (Colorado) had violated the Due Process Clause of the Fourteenth Amendment because its police department had “an official policy or custom of failing

to respond properly to complaints of restraining order violations.” The U.S. District Court granted the Town’s motion to dismiss. The Tenth Circuit of the U.S. Court of Appeals reversed.

The Tenth Circuit held that Ms. Gonzales had a “protected property interest in the enforcement of the terms of the restraining order” and that the town had deprived her of due process because “the police never ‘heard’ nor seriously entertained her request to enforce and protect her interests in the restraining order.” In reaching that decision, the court pointed to Colorado Revised Statute, section 18-6-803.5(3), which provides, among other things, that a “peace officer shall use every reasonable means to enforce a restraining order.”

ISSUE AND RULING: Where an individual has obtained a state-law restraining order, does that individual have a constitutionally protected property interest (under the federal constitution’s Due Process Clause) in having the police enforce the order if that person provides police with probable cause to believe that a violation of the order is presently ongoing? (ANSWER: No)

Result: Reversal of 10th Circuit and reinstatement of U.S. District Court ruling dismissing the lawsuit.

ANALYSIS IN MAJORITY OPINION:

The voting in this case is 7-2 to reverse the 10th Circuit’s ruling. Justice Scalia writes the lead opinion for the majority. He first observes that the procedural component of the Due Process Clause does not protect everything that might be described as a “benefit.” A benefit is not a protected entitlement if government officials may grant or deny it in their discretion. In determining whether an individual’s interest in a governmental benefit rises to the level of a “legitimate claim of entitlement,” which is necessary for legally enforceable protection under the Due Process Clause, courts must look first at the state law creating the benefit, and then apply federal constitutional law.

The majority opinion concludes that the Colorado statute’s restraining order provision does not truly make enforcement of restraining orders mandatory. Justice Scalia’s opinion notes that a “well established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.” The opinion adds that Ms. Gonzales did not specify the precise means by which the restraining order should have been enforced - - by arresting her husband, by seeking a warrant for his arrest, or by “using every reasonable means.”

“Such indeterminacy,” states the Court, “is not the hallmark of a duty that is mandatory.” And, even if the statute made enforcement of restraining orders mandatory, “that would not necessarily mean that state law gave [Ms. Gonzales] an entitlement to *enforcement* of the mandate.” Justice Scalia’s opinion concludes by stating that, even if Colorado law gave Ms. Gonzales an entitlement to enforcement of the restraining order, “it is by no means clear that [such an entitlement] would constitute a ‘property’ interest for purposes of the Due Process Clause.”

Justice Scalia’s opinion concludes by noting that the U.S. Supreme Court’s decision in this case addresses only federal civil rights law, and that states are free to provide tort law remedies for police failure to “mandatory” arrest provisions of state laws governing restraining orders and domestic violence.

CONCURRING OPINION:

Justice Souter files a concurring opinion that Justice Breyer joins. The concurring opinion observes that Ms. Gonzales “claims a property interest in a state-mandated process in and of itself. This argument is at odds with the rule that process is not an end in itself. The purpose of

the federal constitution's Due Process Clause is to protect a substantive interest to which the individual has a legitimate claim of entitlement."

DISSENTING OPINION:

Justice Stevens files a dissenting opinion that Justice Ginsburg joins. The dissent argues that the Court should have deferred to the 10th Circuit's construction of Colorado law; that the law is part of a wave of domestic violence statutes designed to replace police discretion with mandatory obligations; and that the person named on the restraining order is the intended beneficiary of the law. The dissent further asserts that "[p]olice enforcement of a restraining order is a government service that is no less concrete and no less valuable than other government services, such as education." Accordingly, concludes the dissent, Ms. Gonzales should have been given the opportunity to prove in court that state officials deprived her of that property interest.

LED EDITORIAL COMMENTS: Legal analysts will likely differ on the importance and ramifications of this decision, and, as always, we urge those with questions to consult their own legal advisors and prosecutors. We believe that the effect likely will be fairly limited, though it certainly will discourage some failure-to-protect claims against the police grounded in section 1983, civil rights, constitutional-violation theories.

In the 9th Circuit of the U.S. Court of Appeals, decisions have held that police can be held liable under the federal constitution's Due Process Clause for, among other things, increasing a person's risk in some way by law enforcement actions. See the 9th Circuit decision in the City of Ridgefield case, digested below at pages 12-13. The City of Ridgefield decision was issued before the Castle Rock decision, which did not address this specific 9th Circuit theories of constitutional liability because the facts in Castle Rock would not have supported such theory. However, we think that the 9th Circuit will continue to hold that police can be liable in heightening-of-the risk circumstances.

Furthermore, we think that the Castle Rock decision will have only limited effect, if any, on how state courts view negligence-based tort law "duty to protect" under "mandatory" arrest provisions in state statutes in this context, such as those in RCW 10.31.100(2). It may be of some help to law enforcement agencies, however, that Justice Scalia's lead opinion noted that the Washington Court of Appeals held in Donaldson v. Seattle, 65 Wn. App. 661 (Div. I, 1992) Nov 92 LED:19, that there is no mandatory duty under the 4-hour arrest rule of RCW 10.31.100(2) for police to try to find a DV suspect who has committed a DV assault within the past 4 hours but has left the scene by the time police arrive. Justice Scalia suggests that the Donaldson rationale for negligence-based tort cases would extend to excuse law enforcement from liability exposure in situations where police learn of a restraining order violation but the suspect is at large.

The Court of Appeals' decision in Donaldson was not reviewed by the Washington Supreme Court, and the Washington Supreme Court has not had occasion to discuss Donaldson in deciding any subsequent case. We would hope that the U.S. Supreme Court's approval of the rationale of Donaldson, even though Donaldson's analysis was negligence-based tort law analysis, rather than the constitutional analysis of Castle Rock, would help convince the Washington Supreme Court of the wisdom of the Donaldson decision.

9TH CIRCUIT, U. S. COURT OF APPEALS

PAYTON RULE VIOLATED WHERE SUSPECT ARRESTED WITHOUT WARRANT FROM INSIDE HIS SMALL TRAILER AFTER HE OPENED DOOR WHILE LYING ON HIS BED

U.S. v. Quaempts, 411 F.3d 1046 (9th Cir. 2005)

Facts: (Excerpted from Ninth Circuit opinion)

At about 8:00 p.m. on December 7, 2001, Teresa Compo arrived at a hospital in Toppenish, Washington, claiming that she had been raped by Quaempts. Compo described to several police officers the general location of the trailer home where the assault had taken place. Following Compo's directions, at least four officers in two cars went to Quaempts' trailer. When the officers arrived, they looked through the window and saw Quaempts in his bed. Sergeant [A] [of the Yakima Nation police force] then knocked on the door and said "Darrell Quaempts, police officer. I need to talk to you." Quaempts responded by reaching over from his bed and opening the door.

Sergeant [A], from outside the trailer, first told Quaempts that he was being placed under arrest for sexual assault. Quaempts asked who made the complaint, and was told it was Teresa Compo. According to the officers, Quaempts responded with: "Shit she came here. I didn't." [A] then instructed Quaempts to get out of bed and get dressed. Quaempts cooperated, and after stepping out of the trailer, was placed in handcuffs and taken to jail.

Proceedings below:

Quaempts was charged with rape in federal court. He moved to suppress the statement ("Shit she came here, I didn't.") he made from his bed after he was arrested. He asserted that police violated the Payton rule against warrantless entry to arrest where there was no consent and there were no exigent circumstances. The district court judge granted Quaempts' motion.

ISSUE AND RULING: Did the tribal officers violate the Payton rule when they lacked both consent to enter the trailer and exigent circumstances, and they made a warrantless arrest of Quaempts while he was lying on his bed after having opened the door of his small trailer? (ANSWER: Yes, even under the relaxed federal court interpretation of Payton allowing warrantless doorway arrests, this arrest violated the rule.)

Result: Affirmance of suppression ruling of U.S. District Court for Eastern Washington.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

The Fourth Amendment's express right to be free from warrantless arrests inside one's home was reaffirmed by the Supreme Court a quarter century ago in Payton v. New York, 445 U.S. 573 (1980). The Court invalidated a New York statute authorizing warrantless entry into private residences for routine felony arrests.

In Payton, the police broke down an apartment door when there was no response to their knock. In a companion case, defendant's three-year-old son opened the door allowing the police to see the defendant sitting in bed, and the police then arrested him. The Court held that the arrests were an illegal invasion of a zone of privacy, a zone "bounded by the unambiguous physical dimensions of an individual's home."

Payton would appear to control this case and compel the district court's ruling, but for one factual difference. Here, the defendant himself, albeit in his bed, opened the door to the officers. The government thus argues that the defendant waived any privacy rights when he opened the door. It relies upon U.S. v. Vaneaton, 49 F.3d 1423 (9th Cir 1995).

In Vaneaton, we extended United States v. Santana, 427 U.S. 38 (1976). The Court in Santana established that the open doorway of a private residence is not a private place but a public one, and a person already standing in that open doorway when the police arrive has no expectation of privacy. In Vaneaton a majority of the panel concluded that when a person opens the door in response to a police knock, and thereby stands on the threshold of the home, that person is no longer in a private place. The critical fact in both Santana and Vaneaton was that the defendant was not in the house, but in the doorway and hence in a public, not a private place.

Quaempts, however, was in his bed, the sanctuary of the right to privacy. To extend the holding of Vaneaton beyond the threshold into the interior of the home would do violence to the principles laid down in Payton that established a zone of privacy inside the physical dimensions of one's home. The Court there drew "a firm line at the entrance to the house," without regard to the size of the dwelling.

It does not matter that the officers did not actually enter the house to make the arrest. As this court has stated, "it is the location of the arrested person, and not the arresting agents, that determines whether an arrest occurs within a home." Because Quaempts did not take himself outside the physical zone of privacy of the house by going to the threshold of his house or to any other public place, the officers could not make a lawful warrantless arrest.

[Some citations omitted]

LED EDITORIAL NOTE RE ACCESS TO NINTH CIRCUIT OPINIONS: Ninth Circuit opinions from the past several years are accessible on the Internet at [<http://www.ca9.uscourts.gov/>] and can be found if one has the case name and the date of the decision. The Kennedy decision was issued on June 23, 2005.

LED EDITORIAL COMMENT: The Ninth Circuit and some other federal circuit courts have interpreted Payton as permitting officers to treat as if he were outside in a public area a person who stands at the threshold of his home after he voluntarily opens an entry door. The Washington Supreme Court stated a different and more restrictive rule – a sort of goaltending or any-penetration rule – in State v. Holeman, 103 Wn.2d 426 (1985). The Holeman rule is that a person who voluntarily answers an entry door in response to a police officer's knock at the door is not in a public area, and hence not subject to non-exigent, warrantless arrest until such point that the home occupant either: 1) voluntarily steps outside or 2) voluntarily consents to police entry into the premises.

The United States Supreme Court has not addressed these competing interpretations of Payton. State and local officers in Washington are legally safest if they assume that the restrictive Holeman rule is the governing rule.

CALIFORNIA OFFICERS NOT ENTITLED TO QUALIFIED IMMUNITY ON EXCESSIVE FORCE, DECEIVING-OF-MAGISTRATE CLAIMS

Baldwin v. Placer County, 405 F.3d 778 (9th Cir. 2005)

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

On September 22, 1998, Jeff Potter, an officer of the marijuana eradication team (MET) of the County's Sheriff Department, applied for a search warrant for the residence of Michael Baldwin and Georgia Chacko, then Baldwin's wife. The affidavit stated that on July 16, 1998, Deputy Mark Reed had told Sergeant Kevin Besana that "a citizen informant" had told him that Michael Baldwin, a dentist, was "possibly growing marijuana." The date when this information was given and the date when Baldwin was possibly growing marijuana were not stated in the affidavit. Potter stated that Besana had passed this tip to him and that four days after receiving it, he confirmed Baldwin's office address as a dentist and obtained the registration number of his car; Potter used the car registration to confirm the informant's statement as to Baldwin's home address. A check of DMV records showed Baldwin to be 35 years-old, 5' 9", weighing 165 pounds and Georgia Chacko to be 34 years-old, 5' 5", weighing 125 pounds.

On September 16, 1998, so the affidavit continues, Potter searched the trash at Baldwin's home address. He found "marijuana leaves and stems recently cut from a mature marijuana plant. The marijuana was fresh green and still moist." He also, he said, had found "marijuana seeds and a hydroponic grow rock. There were also two black 1/2 gallon planting pots commonly used in indoor marijuana grows and four packages of 'rain drip' irrigation equipment commonly used in indoor marijuana grows." He concluded on the basis of his specific training in the investigation of narcotics and his ten years of experience in approximately three hundred narcotics cases that "[t]he items found in the trash inspection reveal an ongoing criminal activity to grow marijuana indoors." He also concluded that "it is common for persons involved in the cultivation of marijuana to also be involved in the sale of marijuana." Potter sought a warrant listing the documents and property he expected to find; he did not mention guns. On September 23, 1998, a state court judge issued the search warrant that Potter sought.

According to the plaintiffs' evidence, the only marijuana in their trash searched by Potter were blackened bits of marijuana wrapped in a paper towel, the remnants of smoked marijuana. They bolster their claim of falsity in Potter's affidavit by thirteen declarations from other individuals whose trash was searched by MET. In each instance MET officers swore they found "marijuana leaves and stems recently cut from a mature marijuana plant" and that "the marijuana was fresh green and still moist." In each instance, these thirteen individuals swore they placed no marijuana or products of marijuana in their trash.

The Baldwins' further evidence is that the "rain drip" irrigation equipment was only for outdoor landscaping and that this fact should have been obvious to a trained narcotics investigator. The equipment included a sprinkler spraying water up to 14 feet, a soaker hose, and 6" heavy duty support stakes; none of these items are used in an indoor grow. The two black gardening pots pointed to no illegal activity. The "grow rock" in Potter's affidavit was, the plaintiffs also state, a lava rock with no implication of criminal activity.

In the early dawn of the day that Potter obtained the warrant, according to the sworn declaration of Michael Baldwin, a group of five officers including Potter entered Baldwin's home "para-military style" without knocking. Officer Reed encountered Baldwin as Baldwin came into the house from the back door. Reed pointed his gun at him and ordered him to lie down. Baldwin complied with the

order. Reed “then pushed his gun at the rear of [Baldwin’s] head and placed his knee in the small of [Baldwin’s] back, all the while pressing a loaded firearm against the back of [Baldwin’s] head.” Baldwin was terrified that the gun would go off.

According to the sworn deposition of Georgia Chacko, she was clothed only in a T-shirt and cotton briefs and just getting up to start her day when she opened her bedroom door to be confronted by a flashlight in her face and fingers sharply poking five to seven times at her throat and forcing her back into the bedroom. A voice told her to get on the floor. A gun was pointed at her, then brought into contact with her head for 30 seconds. She got on the ground. The unidentified gunman kned her in the small of her back and handcuffed her. The gunman was Potter.

On October 12, 2001, the plaintiffs filed their first amended complaint. The County moved for summary judgment on the ground of the qualified immunity of the officers. On April 2, 2004, the district court denied the motion, ruling that triable material issues of fact existed as to the plaintiffs’ claims of excessive force, judicial deception, and conspiracy by the MET team, all in violation of 42 U.S.C. § 1983; state law claims similarly remained open to credibility determinations by a jury.

ISSUES AND RULINGS: To qualify for qualified immunity dismissal of a case on a motion for summary judgment, officers must assume the factual allegations of the plaintiffs to be true, and must establish that reasonable officers would have believed their alleged conduct to meet then-current Fourth Amendment standards. Are the officers entitled to summary judgment on the excessive force or deceiving-of-magistrate civil rights allegations of the plaintiffs? (ANSWER: No)

Result: Civil rights case remanded to the U.S. District Court (in California) for trial.

ANALYSIS: (Excerpted from the 9th Circuit opinion)

Excessive force. The County argues that “objectively reasonable” officers could have believed that “the exigency of the entry” justified the batteries on the plaintiffs. On the conceded facts before us, whatever exigency existed was insufficient to justify the batteries. Baldwin was a practicing dentist. Nothing in the record indicates that the officers had reason to believe that he would resist or flee. The officers had stated no belief that the plaintiffs would be armed; they mentioned no criminal history or conspiracy that could have justified such a belief. They had no reason not to identify themselves before giving orders to the plaintiffs. Invading a home in the early morning, they have stated no fact justifying their batteries. They violated the civil right of the plaintiffs to be free from battery by gun-wielding officers, a right established in this circuit since 1984. Potter’s fingers at the throat of Baldwin’s wife constitute a separate battery that a reasonable officer would know was excessive. The governmental interests in using handcuffs are at their maximum when “a warrant authorizes a search for weapons and a wanted gang member resides on the premises.” Conversely, governmental interests are at a minimum when the searchers assert no belief that weapons will be found and no belief other than that the occupants of the house are a practicing dentist and his wife. We conclude that the law at the time [of the search] . . . clearly established that the . . . conduct could violate the constitution.

Judicial Deception. The Fourth Amendment is the guarantee of every citizen that his home will be his castle, safe from the arbitrary intrusion of official authority. It

is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate. This obvious truth is met by the County with the argument that we should redact Potter's affidavit, purge it of its lies, and find what remains sufficient to justify the issuance of the warrant. Objectively, the County adds, there was enough to justify a search. Its arguments are unpersuasive.

First, when Potter's lies are taken out, what is left is an unidentified citizen at an unidentified date telling a sheriff's deputy of marijuana growing at an unidentified time; also the presence of a rock and two pots, the uses of which are ambiguous. No magistrate could have authorized a search on this basis, essentially amounting to an informant's tentative tip.

[Citations omitted]

ANNOUNCEMENTS WITHOUT ACTUAL KNOCKS HELD REASONABLE UNDER TOTALITY OF CIRCUMSTANCES IN EXECUTING WARRANT IN METH-COOKING HOUSE

U.S. v. Combs, 394 F.3d 739 (9th Cir. 2005)

Facts and Proceedings below: (Excerpted from Ninth Circuit opinion)

After receiving an anonymous tip, Anchorage Police began investigating possible methamphetamine production and drug trafficking at the home of Robert Combs. A search warrant issued, based upon information obtained from the investigation, to search Combs's home at any time of the day or night for evidence of misconduct involving controlled substances.

On the morning of September 12, 2002, the search warrant was executed with the assistance of a Crisis Intervention Response Team ("CIRT"), a tactical police unit trained and equipped to handle high risk raids on suspected methamphetamine labs, which may involve exposure to various flammable, explosive, and toxic chemicals. The CIRT officers wore protective gear consisting of flash fire resistant Nomex balaclavas, gas masks, one-piece Nomex flight suits and Kevlar vests with police insignia.

Anchorage Police Lieutenant Steven Smith was in command. He had spent nearly seventeen years with the Anchorage Police Department, ten of which were with the CIRT. During those ten years, Lieutenant Smith participated in somewhere between thirty to forty warrant services. In addition to Lieutenant Smith, approximately ten to twelve CIRT officers were involved in the entry of Combs's house. Six officers were to make the actual entry at the door at the back of the house, while four to six additional officers were to provide cover.

When Lieutenant Smith arrived at the scene, he noticed smoke coming from the chimney and an acrid smell in the air. He also noticed what appeared to be an open flame at a window in the northeast corner of the house. Because the smoke and flame indicated that the occupants might be involved in the dangerous process of cooking methamphetamine, he became concerned for the CIRT unit's safety. There were flood lights and two surveillance cameras attached to the house and the windows to the garage were papered over. The officers knew the house was occupied because a woman was seen entering the house just before the warrant was executed.

Service of the warrant commenced when Lieutenant Smith parked his marked police car, with the overhead lights flashing, in front of the house and began making announcements regarding the warrant service over the public address

system in the front grill of the vehicle. Lieutenant Smith repeatedly publicly announced, for a period of thirty seconds to a minute, “Anchorage Police with a warrant for 1502 West 32nd Avenue.”

Although Lieutenant Smith could not see the approach of the CIRT from the south of the building, he heard the entry team officers around the location announcing, “Anchorage Police with a warrant.” Sergeant Soto, a member of the CIRT, was part of the group approaching the back door to make entry. Soto’s role during the search was to be the “breacher.” He carried a metal battering ram and halogen tools for this purpose. When the team members finished assembling at the door, they waited while Lieutenant Smith continued to announce the police presence with a search warrant. At some point, Soto’s team leader told him to breach. Soto hit the door on the doorknob side with the battering ram four or five times without success. His team leader instructed him to hit the hinged side of the door. After two hits, the door broke open and the officers entered the house. Soto estimated that he spent a total of ten to twelve seconds pounding on the door with the battering ram.

The subsequent search of the house resulted in the seizure of, among other things, evidence of an active methamphetamine lab, firearms, and currency from drug trafficking. Officers also obtained a statement from Combs after he was placed under arrest and advised of his rights. Combs [was charged in federal court and] moved for suppression of all of this evidence, arguing in part that the manner of execution of the search warrant was unreasonable because the police failed to properly “knock and announce” before breaching the door.

[The motion was denied and Combs was convicted of federal drug and gun crimes.]

ISSUE AND RULING: On the totality of the circumstances, was it reasonable for the officers executing the meth-house search warrant to repeatedly announce their presence and purpose via loudspeaker over a period of 30 to 60 seconds, and then batter the door in without actually knocking on it? (**ANSWER:** Yes)

Result: Affirmance of federal district court conviction of Robert F. Combs for various illegal drug activity and firearms offenses.

ANALYSIS:

The Combs Court first explains in extensive background review that compliance with the knock-and-announce requirement is reviewed for reasonableness under the totality of the circumstances and does not lend itself to “bright line” categorical standards. The Court notes, for instance, that in Richards v. Wisconsin, 520 U.S. 385 (1997) **Aug 97 LED:07**, the U.S. Supreme Court held that there is not a blanket authority for no-knock entry for illegal rug search warrant executions.

The Combs Court then continues its analysis in salient part as follows:

That the government must announce its presence before entering a private home is a longstanding principle. In [Wilson v. Arkansas, 514 U.S. 927, 937 (1995) **Sept 95 LED:03**], the Supreme Court traced its origins to English common law. The Court noted that the “common-law knock and announce principle was woven quickly into the fabric of early American law.” It held that “the method of an officer’s entry into a dwelling [is] among the factors to be considered in assessing the reasonableness of a search or seizure.” The Wilson Court left to the circuit

courts the development of circumstances under which an entry is deemed reasonable under the Fourth Amendment.

While the definition of “reasonableness” was left for another day, the Wilson opinion does provide guidance in determining what is reasonable. The Court set forth a non-exhaustive list of occasions when “the presumption in favor of announcement necessarily . . . give[s] way to contrary considerations.” It identified circumstances when the rule need not be strictly followed, such as when there is a threat of physical violence against law enforcement, when chasing a fleeing felon, or where evidence “would likely be destroyed if advance notice were given.” The Court was careful to note that the examples it gave were not a “comprehensive catalog of the relevant . . . factors,” but rather illustrations of circumstances that may carry weight in a reasonableness determination.

Since Wilson, the Court has reiterated that the knock and announce principle is a part of the reasonableness inquiry rather than a prerequisite for constitutional entry. See U.S. v. Banks, 540 U.S. 31, 35-36 (2003) **Jan 04 LED:02** (noting that the Court has “fleshed out” the notion of reasonable execution on a “case by case” basis “largely avoiding categories and protocols for searches”). Instead of setting bright-line, rigid rules, the Court has “treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case” because “it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones.” See also Richards v. Wisconsin, 520 U.S. 385 (1997) **[Aug 97 LED:07]** (rejecting categorical exception to the knock and announce requirement for felony drug cases; favoring instead a case-by-case analysis).

With this guidance from the Supreme Court, we cannot accept Combs’s assertion that without a literal knock, the entry into his home was per se unreasonable under the Fourth Amendment.

The general practice of physically knocking on the door, announcing law enforcement’s presence and purpose, and receiving an actual refusal or waiting a sufficient amount of time to infer refusal is the preferred method of entry. See [U.S. v. Banks, 540 U.S. 31 (2003). This method is preferable because it provides a clear rule that law enforcement can follow. It also promotes the goals of the knock and announce principle: protecting the sanctity of the home, preventing the unnecessary destruction of private property through forced entry, and avoiding violent confrontations that may occur if occupants of the home mistake law enforcement for intruders.

Although “knock and announce” is the preferred method of entry, given the totality of the circumstances in a particular case, it is not invariably required by the Fourth Amendment. In some circumstances, it may be necessary to dispense with the knock and announcement entirely. Other circumstances may warrant a knock and announcement, but only a relatively short delay before a forced entry. See, e.g., Banks, 540 U.S. at 39 (finding 15-20 second wait before entry reasonable given time of day and destructibility of the evidence). Under other circumstances, the police may not be justified in breaking down a door until they have waited a more extended period of time to infer a refusal of entry. See, e.g., Banks at 41 (noting that “[p]olice seeking a stolen piano may be able to spend more time to make sure they really need the battering ram” since that evidence is not easily destroyed).

To determine whether an entry is reasonable, we must consider all the circumstances surrounding the entry, including, but not limited to, officer safety, time of day, destructibility of evidence, the size of the residence, the nature of the offense, and any other observations by law enforcement that would support a forced entry. We also must examine what, if any, notice the police gave before entry and the likelihood that the notice alerted those inside the home to the officer's presence and purpose. A physical knock, or any other one factor, is not dispositive.

...

We conclude that the entry was reasonable in this case, even though a literal knock was not made. First, there was reason for the officers to be concerned for their safety. The house was equipped with security cameras and flood lights. Windows were papered over, suggesting that the occupants of the home were concerned with protecting their illegal methamphetamine laboratory. In addition, after arriving at the scene, Lieutenant Smith noticed smoke coming from the chimney and what he thought to be an open flame at a window, indicating that the occupants may have been cooking methamphetamine—a dangerous process of mixing several highly explosive chemicals over an open flame. Given these circumstances, it was reasonable for Lieutenant Smith to limit the amount of time his officers spent outside but within arm's reach of the house.

Second, the officers announced their presence to the extent possible given their legitimate safety concerns. They parked in front of the house in a marked police car with the overhead lights flashing. Lieutenant Smith repeatedly announced over a loudspeaker, "Anchorage Police with a warrant for 1502 West 32nd Avenue." Given the small size of the house, the time of day, the officer's knowledge that there was at least one occupant awake in the house, and that officers on the other side of the house heard the announcement, the district court's finding that "the residents of Combs' small home heard the police announce their presence and demand entry and disregarded that request" was not clearly erroneous. Moreover the occupants of the home could have had no doubt that the police had arrived to search their residence as the announcements repeatedly gave the street address of their home.

Given these circumstances, we find that law enforcement's actions were reasonable and the warrant's execution complied with the requirements of the Fourth Amendment. We do not suggest that the absence of any of these factors would compel a contrary conclusion. The factors we have listed are simply part of our "case by case" examination. Just as it is not permissible to "turn[] the notion of a reasonable time under all the circumstances into a set of sub-rules," likewise it is not appropriate to turn the knock and announce requirement "into a set of sub-rules." Banks. [A] categorical scheme on the general reasonableness analysis threatens to distort the 'totality of the circumstances' principle, by replacing a stress on revealing facts with resort to pigeon holes." Banks.

[Some citations omitted]

BRIEF NOTES FROM THE 9TH CIRCUIT, U. S. COURT OF APPEALS

(1) SECTION 1983 CIVIL RIGHTS ACTION AGAINST POLICE AGENCY UPHELD IN FAILURE-TO-PROTECT CASE ON GROUNDS THAT POLICE INCREASED THE DANGER BY GIVING ASSAULT VICTIMS A “FALSE SENSE OF SECURITY” – In Kennedy v. City of Ridgefield, 411 F.3d 1134 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals holds in a 2-1 ruling that a federal civil rights suit can go forward against the City of Ridgefield and one of its officers.

The plaintiff in the civil action under 42. U.S.C. section 1983 alleged a violation of the Fourteenth Amendment due process clause. The case arose from a police investigation of a 13-year-old neighbor boy who family accused of sexually molesting their 9-year-old daughter.

Ridgefield police officers told the suspect’s mother of the accusation. Later that same day, the officer told the accusing family that he had informed the suspect’s mother. Early the next morning, the 13-year-old boy broke into his accusers’ home at night, while they were sleeping. He shot and killed the father of the 9-year-old, and he wounded the girl’s mother.

The girl’s mother brought suit against the Ridgefield Police Department and one of its officers, alleging that the officer had broken his promises: 1) to tell them before he informed the suspect of their accusations of molestation; and 2) provide a special police patrol after he told the suspect of the accusation.

While police do not have a general constitutional duty to protect citizens from criminal acts, the “state-created danger” doctrine is an exception to the rule. The Kennedy majority summarizes as follows their reasoning that the factual allegations, if prove, would establish a constitutional violation:

The Plaintiff alleges that the Defendant violated her 14th Amendment right to substantive due process under the “state-created danger” doctrine. In DeShaney v. Winnebago County Dep’t of Soc. Serv., 489 U.S. 189 (1989), the U.S. Supreme Court held that the Due Process Clause “is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.” Since the Due Process Clause does not require the state to provide its citizens with a minimum level of security, it follows that the state cannot be held liable for failing to do so.

Two exceptions to DeShaney exist. Under the “special relationship” doctrine, the state can be held liable for a third party’s harm where the state has custody over the plaintiff. Under this exception, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes some responsibility for [that person’s] safety and general well-being.” Here, Plaintiff does not allege that [the officer] ever had custody over her or her husband; consequently, this exception is inapplicable.

The “state-created danger” doctrine represents the second recognized exception to DeShaney’s rule against holding state officials liable for private violence. Under this theory, plaintiffs can recover “when a state officer’s conduct places a person in peril in deliberate indifference to their safety.” This Circuit first recognized liability based on state created danger in Wood v. Ostrander, 879 F.2d 583 (9th Cir.1989). In Wood, a state trooper determined that the driver of an automobile was intoxicated, arrested the driver and impounded the car. The officer left Wood, a passenger in the car, stranded late at night in a high-crime area. Wood accepted a ride from a passing car and was subsequently raped. This Court held that Wood could claim § 1983 liability, since there was a genuine issue of fact “that[the trooper] acted with deliberate indifference to Wood’s interest in personal security under the fourteenth amendment.”

Since Wood, this Circuit has held state officials liable for the creation of danger in a variety of circumstances. In L.W. v. Grubbs, 974 F.2d 119 (9th Cir.1992), this Court found that state employees could be liable for the rape of a registered nurse assigned to work alone in the medical clinic of a medium-security custodial institution with a violent sex offender. In Munger v. City of Glasgow, 227 F.3d 1082 (9th Cir.2000), this Court found that police officers could be held liable for ejecting a visibly drunk patron from a bar on a bitterly cold night.

To find an officer liable under the “state-created danger” theory, a plaintiff must show that the officer’s actions created or increased the danger facing him or her. Second, the plaintiff must demonstrate that the state official acted with deliberate indifference to a known or obvious danger. Interpreting the facts in a manner most favorable to Plaintiff, we conclude that [the officer] did in fact augment the danger Plaintiff and her husband faced and acted with deliberate indifference to a known or obvious danger. Plaintiff has therefore demonstrated that her constitutional rights were violated and so satisfied the first prong under Saucier.

The Kennedy majority opinion goes on to deny “qualified immunity” to the police officer. The majority opinion asserts that a “reasonable” officer in these circumstances would have known that his acts or omissions violated the constitution.

The dissenting judge vigorously criticizes the majority opinion on all of the major points summarized above.

Result: Affirmance of U.S. District Court ruling that denied qualified immunity to the named Ridgefield police officer.

Status: At LED deadline, the City of Ridgefield was planning to seek reconsideration or further review in this case.

LED CROSS-REFERENCE NOTE: See the LED entry above on the U.S. Supreme Court decision in the Castle Rock (Colorado) case that was issued 4 days after the 9th Circuit issued its decision in the Kennedy case.

(2) OFFICER’S INADVERTENT ATTACHING OF WRONG LIST OF ITEMS TO BE SEIZED RESULTS IN OVERBROAD SEARCH WARRANT, BUT EVIDENCE HELD ADMISSIBLE BECAUSE THE ITEMS ACTUALLY SEIZED WERE ON THE LIST OF ITEMS THAT HAD BEEN APPROVED FOR SEIZURE BY MAGISTRATE – In U.S. v. Sears, 411 F.3d 1124 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals agrees with the U.S. Attorney in a federal criminal case that although an inadvertent error by a police officer resulted in a search warrant being overbroad, the evidence seized under the warrant was not subject to suppression because the evidence was seized under the not-overbroad parts of the warrant.

In brief, the facts were as follows. A law enforcement officer handling search warrant paperwork in an investigation of a cocaine dealer gave the wrong paperwork to the officers who were to execute the warrant. The problematic document was an attachment that contained the list of items to be seized. The error occurred when, instead of photocopying all of the documents that had been presented to the warrant-issuing judge, the officer printed from a computer file what he thought had been the attachment presented to the judge. Unfortunately, the document in the computer file had been updated before being presented to the judge, and the officer, failing to notice the updating, printed out and gave to the executing officers an earlier version.

The version he gave the officers had eight extra words that make it overbroad in violation of the Fourth Amendment, the Sears Court states (and the government conceded). The document, with the offending eight words italicized, read as follows:

[a]ll articles of personal property tending to establish and document sales of cocaine, consisting in part, of articles of personal property tending to establish the identity of persons in control of premises, vehicles, storage areas or containers located at, *or nearby*, or related to the subject premises where cocaine may be hidden. All vehicles, storage areas or containers located at, *or nearby*, or related to the subject premises where cocaine may be hidden; all articles of personal property tending to establish the location of such premises, vehicles, storage areas or containers where cocaine may be found or secreted, consisting of and including *but not limited to* utility bills and receipts, rent receipts, canceled mail envelopes and keys.

While highly critical of the officer's paperwork error, the majority opinion concludes that the Court should apply the usual remedy – severance of the overbroad language from the warrant and admission of evidence lawfully seized under the remaining language in the warrant. The Sears Court majority opinion concludes as follows:

For the reason Judge Kozinski gives in his dissent, we do not condone the sloppy police work that resulted in the violation of Sears's Fourth Amendment rights. Specifically, we do not condone reprinting from a computer file a document that is thought to be the same as that contained in an approved search warrant, as was done here, instead of photocopying the document itself. Indeed, if Officer Kasper's actions in this case had been shown to be standard practice in the SFPD, and the resulting problem seen here to be anything other than unusual and unforeseen, this would be a very different case. However, based on the facts of the case before us, we conclude that the district court properly ordered suppression of only that evidence seized pursuant to the unreviewed portions of the warrant.

The dissenting judge feels much more offended by the officer's inadvertent mistake. He concludes his analysis as follows:

What we have here . . . is an officer who doctored a judicially-approved warrant and told no one what he had done. This conduct was completely unauthorized, quite dangerous and could easily have remained undetected. Now that it's come to light, it just won't do to say "close enough for government work." We must make sure that no police officer even thinks of pulling a stunt like this again.

My colleagues say that "if Officer Kasper's actions in this case had been shown to be standard practice in the SFPD, and the resulting problem seen here to be anything other than unusual and unforeseen, this would be a very different case. But why? Fourth Amendment rights are individual, not collective: I am aware of no doctrine that provides a different remedy for their violation depending on whether the rights of others are similarly violated. If Office Kasper's conduct was impermissible and resulted in a violation of defendant's rights, as the majority eventually recognizes . . . then defendant is entitled to the same relief whether he is the lone victim or one of many. Antiseptic suppression of the seized evidence – and a stern warning that his conduct will never be tolerated – is the only appropriate remedy.

Result: Affirmance of federal district court (North District of California) conviction of John Sears on federal charges of possession of cocaine.

LED EDITORIAL COMMENT: Beware of poorly labeled computer files. Photocopying is the legally safest method of making copies of search warrant documents for those executing the warrant. Also in drafting search warrants, beware of open-ended phrases such as “including but not limited to” and “nearby” in search warrants. Check with your prosecutor or legal advisor regarding use of such phrases in warrants.

(3) OFFICER’S INTRODUCTORY REMARKS PRIOR TO MIRANDIZING DEFENDANT DID NOT DESTROY THE EFFECTIVENESS OF THE WARNINGS – In Juan H. v. Allen, 408 F.3d 1262 (9th Cir. 2005), the Ninth Circuit of the U.S. Court of Appeals, in a habeas corpus appeal by a juvenile first degree murderer, rejects the defendant’s argument (among others) that an officer who interrogated him understated the importance of the Miranda warnings, and thus improperly obtained a waiver of rights.

The Detective had talked to the suspect at the suspect’s home the previous day. That questioning was non-custodial and was lawfully un-Mirandized. No arrest was made that night. The next day questioning at the stationhouse was clearly custodial, and the interrogating officer led into the Miranda warnings with the following introduction:

Since you’re here and we’re not at your house, there’s something I have to do before we go back over what you told me last night, okay? You know, and that’s the law, so I don’t want to violate the law.” The language conveyed that the warnings had serious legal meaning, and the juvenile later indicated that he understood the importance of the warnings.

This introductory language conveyed that the warning had serious legal meaning the Juan H. Court holds; the language did not undercut the effect of the warnings.

Result: Reversal (on grounds not related to the Miranda issues in this case) of federal district court’s denial of habeas corpus relief to Juan H.

(4) CONTAINER THAT WAS MARKED “BUSHMASTER” AND THAT OFFICERS NOTED WAS VERY SIMILAR TO CONTAINERS THEY USED AS “GUN CASES” DID NOT MEET “SINGLE PURPOSE CONTAINER” STANDARDS UNDER FOURTH AMENDMENT “PLAIN VIEW” ANALYSIS – In U.S. v. Gust, 405 F.3d 797 (9th Cir. 2005), the Ninth Circuit rules that the warrantless search of a defendant’s locked, flat, black plastic container suspected of being a gun case was not justified by the single-purpose container exception to warrant requirement. The Gust Court rules that the container was not readily identifiable by the general public as a “gun case”. Although the arresting officers felt that they recognized the container as a “gun case” because it was exactly like the ones used by police department, the container looked virtually identical to guitar cases and was nondescript.

The Gust Court describes the relevant facts in the case in part as follows:

On February 1, 2003, Officer [1] of the Liberty Lake Police Department received a nonemergency call from a passerby who had observed individuals firing shotguns on private property located in a designated no-shooting zone. Officer [1] drove to the scene of the reported shooting, and, upon hearing shots as he exited his patrol vehicle, called for law enforcement assistance.

Officer [1]’s request was answered by Deputy [2] of the Spokane County Sheriff’s Department. After Deputy [2] arrived on the scene, he and Officer [1] entered the property to investigate the shots. They encountered Gust walking with his girlfriend, Regina Lyons, and his friend, Brian Olsen. Gust and his companions were carrying cases that the officers testified they were readily able to identify as gun cases [because

the officers used the same types of cases for their guns]. The officers detained Gust and his companions, and ran a warrant check that came back positive for Olsen and “unconfirmed” for Gust.

Gust informed the police that the trio had been engaged in target practice and that they had received permission to do so. Gust also told the police that the cases he and his companions were carrying contained guns. Officer [1] searched the gun cases and found the sawed-off shotgun that formed the basis for Gust’s prosecution and conviction for possession of an unregistered firearm in violation of 26 U.S.C. § 5861(d).

Under the Fourth Amendment, when police have lawfully seized a container that has only one purpose and therefore by its nature reveals its contents, as a variation on the “plain view” doctrine, police may lawfully open the container, even if it is locked: 1) without first obtaining a search warrant; 2) and without consent or exigent circumstances. The Gust Court asserts that the Ninth Circuit’s view is that the standard for determining if a container is a “single purpose container” is an objective one, viewed exclusively from the viewpoint of a non-officer, layperson. Under the Ninth Circuit view, an officer’s experience and training is generally irrelevant in this regard, as are the circumstances under which the container was found.

After extensive discussion of case law on this point (that the U.S. Supreme Court has not expressly resolved), the Gust Court explains that the evidence here does not meet the Court’s standard:

Our review of the record leads us to the conclusion that once one disregards the officers’ testimony regarding their experience with gun cases and the circumstances surrounding the search, the record is devoid of evidence to show that the case in dispute is one that is susceptible to ready identification by the general public as a gun case. In fact, the evidence in the record points to the contrary conclusion that a layperson would not be able to infer the contents of the case based on its outward appearance alone, and leads us to the “definite and firm conviction that a mistake has been committed,” even given the “significantly deferential” clear error standard of review.

For example, there are photographs of the disputed case in the record. These photographs depict a nondescript, flat, rectangular case made of black plastic, bearing the mark “BUSHMASTER.” The case has a handle and hasps or fasteners along the opening side so that it can be secured with padlocks, and is virtually identical to some of the guitar cases pictured in Defendant’s Exhibit 113. Also, at the first suppression hearing, Deputy [2] testified that he “wouldn’t be able to say” what was in the gun case if one were “set ... in front of [him] today.”

The record does contain testimony from Gust’s girlfriend, Lyons, that cases such as the one in dispute are “what are commonly referred to as gun cases” and the “type of case [that] ordinarily houses a gun.” But, like the officers, Lyons was offering her opinion as a person “who has experience and knowledge” of gun cases. Moreover, her statements on their face are not unequivocal statements about the readily identifiable nature of the cases; Lyons is explaining that the cases are in fact the type of case commonly used for gun storage, not asserting that the cases are automatically recognizable to the general public as such. Finally, one cannot reasonably read Lyons’ above statements as support for the proposition that the case in dispute is a container of such a nature that its contents can be readily inferred from its outward appearance when Lyons also testified that such cases “could hold other things” and that she would not “be able to tell [what was in the case] without opening it.”

We hold that the district court erred in finding that the case in dispute is identifiable as a gun case based on its outward appearance alone, and in applying the “single-purpose

container” exception to uphold the warrantless search of the case. Given that the district court had also ruled that the government could not justify the search based on consent or the exigent circumstances exception, Gust was entitled to have the sawed-off shotgun from the case and his post-search statements suppressed.

[Footnotes and citations omitted]

Result: Reversal of U.S. District Court (Eastern District of Washington) conviction of Tony Lawrence Gust for possession of an unregistered firearm.

WASHINGTON STATE SUPREME COURT

RANKIN’S RESTRICTION AGAINST ASKING NON-VIOLATOR MOTOR VEHICLE PASSENGERS FOR IDENTIFICATION EXTENDS TO ASKING SUCH PASSENGERS FOR NAME, DATE OF BIRTH AND AREA OF RESIDENCE

In re Brown, __ Wn.2d __, __P.3d __, 2005 WL 1829979 (2005)

Facts and Proceedings below: (Excerpted from Supreme Court’s lead opinion)

[Brown] was a passenger in a station wagon displaying an Oregon trip permit which was stopped at 10:48 p.m. by [a law enforcement officer], who believed the trip permit was “illegal.” The officer had his overhead lights and headlights on as he approached the vehicle. After pulling the vehicle over, the officer approached the vehicle on foot on the passenger side.

As [the officer] approached the vehicle, another officer arrived. That [second officer on the scene] approached the driver’s side and took the driver’s license. **LED NOTE: All references to “the officer” by the Supreme Court and in our bracketed references are to the first officer on the scene.**

[The officer] “started to walk back, and then I asked the passenger if I could have his name.” Brown gave the name “Jemeliah D. Johnson.” The officer then asked for Brown’s birth date and where he was from, and Brown said his birth date was June 7, 1977, and he was from California.

[The officer] “ran both [the driver and Brown] for driver status and warrants.” He also ran a check on the license plate of the vehicle. The records check of the license plate determined it was “flagged sold or just expired,” though [the officer] later testified that he could not recall which. The car did not return as registered to either the driver or Jemeliah D. Johnson, but the records/warrants check of the driver came back “clear and current.”

The records check revealed no records for the name Brown gave. The officer asked Brown to confirm the name, and when the name returned no records after two additional checks the officer asked Brown for “any license or I.D. on him.” Brown said he had left his license in California.

The officer then asked Brown, “So if I checked your pockets right now, I wouldn’t find any identification?” Brown said “no.” [The officer] then asked, “Would you mind if I checked you?” Brown again said “no,” and exited the vehicle.

The officer then searched Brown. The officer located a palm pilot, which the officer opened. In it the officer found a credit card labeled “Plotinum” and bearing

the name “Tim W. Cross” along with a hotel key card. After learning from Brown that he was staying across the street, the officers had the hotel manager identify Brown as the person who had registered as “Byron Black.” [The officer] called the credit card company to confirm his suspicions that the credit card might be forged, then arrested Brown. The officers obtained a search warrant for the hotel room, where they found materials for making forged credit cards and forged identification.

Brown moved to suppress the evidence derived from the seizure and the trial court held a CrR 3.6 hearing on April 29, 2002. The trial court denied the motion to suppress [and Brown was convicted and sentenced].

Brown appealed his conviction on multiple grounds. While his case was pending at the Court of Appeals, Brown filed a Personal Restraint Petition (PRP) pro se with that court, claiming that the initial traffic stop leading to his arrest was unlawful because Oregon trip permits were valid in Washington. The Court of Appeals summarily dismissed that PRP.

On January 6, 2004 the Court of Appeals affirmed his conviction. Brown moved the Court of Appeals to reconsider its decision. Less than two months after the Court of Appeals denied Brown’s reconsideration motion this court issued State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED07**, which overturned a case the Court of Appeals relied upon to reject Brown’s direct appeal. [Brown then sought review of the denial of his PRP.]

ISSUES AND RULINGS: 1) Under the Rankin decision’s analysis, did the officer “seize” the non-violator passenger, Brown, when the officer asked the passenger for his name, date of birth, and area where he resided? (ANSWER: Yes); 2) Did the officer have articulable suspicion that the vehicle was stolen, such that the seizure was justified by the facts? (ANSWER: No).

Result: Supreme Court grants Byron Lee Brown’s Personal Restraint Petition and vacates his Clark County Superior Court convictions for multiple counts of forgery, identity theft and possessing stolen property.

ANALYSIS:

After explaining the Court’s initial ruling, not addressed in this LED entry, that Brown was not procedurally barred from raising Rankin in his PRP, the Supreme Court explains as follows its view that a Rankin violation occurred in this case:

- 1) Was it a “seizure” to ask the passenger for name, D.O.B. and area of residence?

In Rankin we held, “under article I, section 7 [of the Washington Constitution], law enforcement officers are not permitted to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request.” Rankin further stated, “a mere request for identification from a passenger for investigatory purposes constitutes a seizure.” An “independent basis” is an “articulable suspicion of criminal activity.”

The State cites numerous pre-Rankin cases, but these no longer apply. The State claims that Rankin “appears to be in direct conflict” with those prior cases. However, as the State observes, in Rankin we specifically distinguished [State v. Young, 135 Wn.2d 498 (1998) Aug 98 LED:02], a case which involved a pedestrian, by noting that “a passenger faced with undesirable questioning by the police does not have the realistic alternative of leaving the scene as does a

pedestrian.” *[Court’s footnote: The State also attempts to distinguish Rankin by arguing that the weather is a factor in treating pedestrians and passengers differently. Nowhere in Rankin did we make our holding “weather dependent.”]*

The State attempts to distinguish Rankin by arguing that whether a person is seized depends on whether an officer “requested identification and took it away or otherwise told or suggested that the person must remain.” Rankin makes no distinction regarding an officer’s “taking identification away.” Rankin clearly holds that it is the request for passenger identification, without an articulable suspicion of criminal activity, that results in an unconstitutional seizure under article I, section 7. The distinction proposed by the State would vitiate the greater protection afforded by the Washington Constitution, since an officer can investigate an individual by running a warrants and records check without actually taking a driver’s license or ID card.

The State makes a variation of the same argument by noting that the officer didn’t ask for Brown’s license, but only his name. Again, Rankin holds that it is the request for “identification” that violates the constitution, not the removal of a driver’s license or other ID card. *[Court’s footnote: Without making the explicit argument, the State implies that “identification” is synonymous with “driver’s license” or “ID card.” This ignores the plain meaning of the terms “identification” and “identify.” . . . The State’s proposed interpretation would reduce constitutional protections to a word game and allow officers to skirt constitutional mandates by asking folks for their name and only demanding a driver’s license or ID card if they received an investigatory “hit” on the name.]* The State concedes that the officer asked Brown for his name and his date of birth and the state in which he lived. *[Court’s footnote: The request of birth date and state of residence reinforces our conclusion that Brown’s “identification” was requested, since the purpose of this information was clearly to distinguish between driving and criminal records of individuals with similar names.]*

Rankin is our most recent case to discuss the seizure of a vehicle passenger by means of an officer’s request for identification. The officer requested Brown’s name, birth date, and state of residence in order to run a “record check,” which included “driver status and warrants.” Under Rankin Brown was clearly seized when he was asked to identify himself for investigative purposes so the officer could conduct a warrants and records check.

2) Did the officer have articulable suspicion to justify seizing Brown?

The State claims that even if Brown was seized, the officer had an articulable suspicion that the vehicle Brown was riding in was stolen. However, as part of this argument the State bootstraps the fact that the name Brown provided did not produce any records. Since the officer was required to have an articulable suspicion of criminal activity before he seized Brown by asking Brown to identify himself, that information cannot be factored into the “articulable suspicion” equation.

To determine whether the officer had an articulable suspicion of criminal wrongdoing we must examine the reasonableness of the officer’s actions in view of the facts he knew. [Here, the officer] knew: (1) the vehicle had not been reported stolen; (2) the driver had a current license and no outstanding warrants; (3) the license plate matched the description of the vehicle; (4) the vehicle was not registered to the driver; (5) the vehicle had an Oregon license plate with a

temporary tag on it; (6) the vehicle had a valid Oregon trip permit, which was apparently not valid to drive on Washington's highways; [and] (7) the vehicle had either been "flagged sold or just expired," but the officer could not recall which on the witness stand.

In order to find that the officer had an articulable suspicion that the car was stolen, this court would have to conclude that merely driving a borrowed vehicle that may have an expired plate or may have just been sold raises an articulable suspicion that the vehicle was stolen, even when the vehicle has not been reported stolen. These facts simply do not raise an "articulable suspicion of criminal activity" as required by Rankin to seize a passenger.

[Some footnotes, citations omitted; headings added]

WASHINGTON STATE COURT OF APPEALS

PROBABLE CAUSE FOR WARRANT TO SEIZE AND SEARCH COMPUTER AND STORAGE MEDIA ESTABLISHED BY AFFIDAVIT STATING ADULT MALE TOOK NUDE PICTURES OF 16-YEAR-OLD GIRL WHO POSED, WITH ASSISTANCE OF OTHERS, AS BIRTHDAY PRESENT TO DEFENDANT

State v. Griffith, 115 Wn. App. 357 (Div. III, 2005)

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

Aaron Griffith hosted a party on the night of April 27, 2001. C.R. attended the party with J.T. Hewitt. C.R. was 16 years old at the time.

C.R. drank several beers at the party. She offered to pose for Mr. Griffith so he could use his new digital camera. She then started to take off her clothes and posed for what some described as seductive pictures. Several people were present at this time. After taking the pictures, Mr. Griffith showed them to others using the viewing window on his camera as well as his computer.

Thereafter, C.R. went to sleep and woke everyone up when she started to scream. Another male party guest was on top of her and she was not dressed from the waist down. She later reported this incident to the police as an attempted rape.

During the attempted rape investigation, the man C.R. accused told the police about the pictures Mr. Griffith had taken. C.R. confirmed that pictures were taken of her in the nude and some were put on a computer.

The police then filed an affidavit for a search warrant for Mr. Griffith's residence. The affidavit indicated that the affiant had interviewed numerous individuals and reviewed police reports. The affiant stated that Mr. Griffith hosted a birthday party at which beer was served. C.R., a minor, was a guest at the party. C.R. was the alleged victim of a rape and, during the investigation of that rape, the police learned Mr. Griffith had taken nude photos of C.R. The pictures were a birthday present to Mr. Griffith.

Based upon the affidavit, a judge issued a search warrant. The warrant indicated there was probable cause to believe evidence of possession of child pornography and possession of pictures of a child engaged in sexually explicit conduct was likely to be found at Mr. Griffith's residence. The warrant permitted the seizure of many items, including computers, all cameras, videotapes, unprocessed film, and storage media.

The police executed the warrant on May 30, 2001, and seized, among other things, numerous computer disks, hard drives, and two cameras. On the hard drives, the police found several pornographic images, some of which appeared to be minors. They also found evidence of a web site where these images were available for download.

On September 21, 2001, the State charged Mr. Griffith with possession of child pornography. On January 9, 2002, the State amended the information to add one count of sexual exploitation of a minor. On February 21, the State filed a second information charging Mr. Griffith with dealing in child pornography pursuant to RCW 9.68A.050(1). The court granted the State's motion to consolidate the two cases.

On January 13, 2003, Mr. Griffith filed a motion to suppress evidence seized during the execution of the search warrant. He argued the affidavit supporting the warrant did not state a crime, the information contained in the affidavit was stale, the affidavit did not show an adequate nexus between the alleged offense and the place to be searched, and the affidavit was not supported by probable cause. The court denied the motion. [Mr. Griffith was convicted of possessing child pornography and dealing in child pornography.]

ISSUES AND RULINGS: 1) The affidavit for the search warrant stated that the adult male defendant took nude pictures of the 16-year-old girl who posed, with the help of others at the party, as a birthday present to the adult male. The affidavit also explained that the suspect put the pictures on a computer in his home. Did the affidavit establish probable cause to seize and search "computer" and "storage media" in the home? (ANSWER: Yes, rules a 2-1 majority); 2) was the warrant overbroad in authorizing search for internet accounts, video tapes and film, among other things, where the affidavit did not provide a link to such items? (ANSWER: Yes); 3) Where evidence in the case was sized under valid (PC-supported) portions of the warrant, is the sized evidence admissible under the "severability doctrine?" (ANSWER: Yes)

Result: Affirmance of Douglas County Superior Court conviction of Aaron Thomas Griffith for possessing child pornography and dealing in child pornography.

ANALYSIS: (Excerpted from Court of Appeals majority opinion)

1) Probable cause

An affidavit is sufficient to support probable cause if it contains information from which an ordinarily prudent person would conclude a crime has been committed and evidence of a crime can be found at the place to be searched. The standard of probable cause is governed by the probability, rather than a prima facie showing, of criminal activity. The determination of probable cause is given great deference. Affidavits are to be read as a whole, in a commonsense, nontechnical manner, with doubts resolved in favor of the warrant. The determination of probable cause is reviewed for an abuse of discretion.

Mr. Griffith contends the warrant was invalid because the affidavit did not indicate “sexually explicit” photographs of a minor would be found and, consequently, the affidavit did not suggest any criminal activity was occurring. The affidavit for the warrant indicates that C.R., a minor, posed naked for Mr. Griffith. It states he took pictures and then hooked the camera up to his computer.

We affirm the court’s order denying the motion to suppress because the affidavit contains sufficient facts to allege Mr. Griffith committed a crime. Not all possession of nude pictures of minors is illegal. See State v. Grannis, 84 Wn. App. 546 (1997); State v. Huckins, 66 Wn. App. 213 (1992). But a nude picture of a minor is illegal if it depicts the minor engaged in sexually explicit conduct. If a minor is unclothed and the picture is for the sexual stimulation of the viewer, then it meets the definition of sexually explicit conduct. The purpose for which the picture of a nude minor is taken determines whether probable cause may be found. C.R. said the pictures were taken as a birthday present for Mr. Griffith. The affidavit also noted that others were helping her pose for the pictures. Given our deferential standard of review, the affidavit contains facts sufficient to suggest a crime was committed. The warrant was thus supported by probable cause.

2) Overbreadth; severability doctrine

Mr. Griffith next claims the warrant was invalid because it was not sufficiently particular. Search warrants must particularly describe the place to be searched and the items to be seized. A description is sufficient if it is as specific as the situation and the circumstances permit. When a search warrant authorizes the search of material protected by the First Amendment, the degree of particularity is greater than in those situations where the First Amendment is not implicated.

The items sought by the warrant here concerned child pornography. Even though child pornography is not protected by the First Amendment, a heightened degree of particularity is still required. The warrant lists several items to be searched for and seized including, all cameras--digital, 35 millimeter, and Polaroid--unprocessed film, all computer processing units and all electronic storage media, documents pertaining to internet accounts, all material depicting a minor engaged in sexually explicit conduct, printed material showing the exposed genitals or rectal area of a minor, videotapes, digital images, and any documents relating to the distribution or receipt of child pornography.

The affidavit stated that Mr. Griffith used a digital camera to take pictures of C.R., who was unclothed in the pictures. The affidavit also indicated he put the pictures on a computer. However, the warrant permits the seizure of a large array of items; most are not supported by probable cause. For example, there was no evidence in the affidavit suggesting that Mr. Griffith put these pictures on the internet, or that he used film, or videotapes. These items are not obviously related to the crime.

A warrant is overbroad when it describes many items, but fails to link some of them to the offense. The warrant here suffers from overbreadth. Under the severability doctrine, only the invalid portions of the warrant must be suppressed. The computer and storage media were specifically named in the warrant and,

arguably, are connected to the crime because Mr. Griffith was seen placing the pictures on the computer. This was the only evidence seized used to convict Mr. Griffith. Thus, even though the remainder of the warrant should be suppressed, the evidence that supports his conviction was validly seized. This is not a basis to reverse the convictions.

[Some citations omitted]

DISSENT: Judge Schultheis dissents on the probable cause issue, arguing that the affidavit: 1) in stating that the 16-year-old was “nude,” does not establish that any of her private body parts are exposed; and 2) does not show that the purpose of the picture-taking was for sexual stimulation.

On the first point, Judge Schultheis explains:

RCW 9.68A.070 makes it unlawful to “knowingly possess[] visual or printed matter depicting a minor engaged in sexually explicit conduct.” Under the statute, unless a picture depicts “sexually explicit conduct” it is not illegal to possess it. State v. Grannis, 84 Wn. App. 546 (1997). Sexually explicit conduct includes “[e]xhibition of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer.” RCW 9.68A.011(3)(e). Here, the affidavit relates that Aaron Griffith “was taking nude pictures of [C.R.] as a birthday present to him.” Three other persons helped her pose for the pictures. I find insufficient facts to support two elements.

First, the affidavit does not state that Ms. R.’s private parts were exposed. A “nude” photograph does not always depict an area of the body that would make possession of the picture illegal. In other words, if the anatomy required to be shown by the statute is obscured, there is no crime [citing out-of-state cases].

The probable cause here can be compared to that found in State v. Petrone. In Petrone, a juvenile victim testified before a county judge as part of a request for a search warrant. She first testified generally that she and others were photographed in the nude. The judge initially declined to issue the warrant, remarking that nudity alone was insufficient to show a violation of the child pornography law; the photographs had to be sexually explicit--a lewd exhibition of genitals. The victim then testified they were asked to “sit on the ground and like put our knees up and stuff and just so that we could show parts of our bodies.” The judge issued the search warrant. The Wisconsin Supreme Court held the victim’s description was sufficient to establish probable cause by showing that the defendant had photographed the victims’ genital or pubic areas. There was no such clarification here, only that there were nude photos.

On the second point, Judge Schultheis explains:

The facts presented -- that the pictures were taken as a birthday present for Mr. Griffith and that others helped her pose -- are not helpful to reach the conclusion that possession of the photographs would constitute a crime without some indication that there was exposure of an intimate body part. That is what sets this case apart from State v. Myers, 133 Wn.2d 26 (1997) **Oct 97 LED:06**. There, the Washington State Supreme Court held that the jury could infer that the defendant made a videotape for the purpose of sexual stimulation of the viewer when he posed his seven-year-old daughter while bathing and then repeatedly

photographed extreme close-ups of her pubic area. Here, there are no facts upon which the sexual stimulation can be logically inferred because the exposure is ambiguous.

NEXT MONTH

The October **LED** will address, among other recent appellate court decisions, the August 11, 2005 decisions of the Washington Supreme Court in City of Redmond v. Bagby, ___ Wn.2d ___, ___ P.3d ___, 2005 WL 1906681 (2005) and City of Bremerton v. Hawkins, ___ Wn.2d ___, ___ P.3d ___, 2005 WL 1903553 (2005). In the companion cases of Bagby and Hawkins, the Court distinguishes its 2004 holding in the case of City of Redmond v. Moore, and the Court rules that the statutory scheme of automatic suspension of drivers' licenses upon conviction of certain statutorily specified crimes does not violate constitutional due process protections. The October 2005 **LED** will also address the August 8, 2005 decision of the Washington Court of Appeals, Division One in State v. Holmes, ___ Wn. App. ___, ___ P.3d ___, 2005 WL 1863368 (Div. I, 2005). In Holmes, the Court of Appeals holds, as to an arrest for third degree DWLS -- an arrest that was made prior to the Washington Supreme Court's issuance of its decision in City of Redmond v. Moore -- that the arrest was lawful regardless of whether the method of revocation of the license met constitutional due process standards and regardless of whether, at the time of the arrest, the arresting officer knew if due process standards had been met in the license revocation process.

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://www.://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 2005, is at [<http://slc.leg.wa.gov/>]. Information about bills filed since 1997 in the 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.aqo>].

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