



Law Enforcement

JULY 2010

Digest

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

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UNITED STATES SUPREME COURT

WHERE CUSTODIAL DEFENDANT UNDERSTOOD LAWFUL MIRANDA WARNINGS, HIS SILENCE AT THE OUTSET OF QUESTIONING AND THROUGHOUT MUCH OF NEARLY-THREE-HOUR INTERROGATION SESSION DID NOT MAKE INADMISSIBLE HIS CONFESSION THAT CAME NEAR THE END OF THE SESSION; HIS WAIVER WAS IMPLIED IN HIS CONFESSION AND AT NO POINT HAD HE INVOKED HIS MIRANDA RIGHTS

Berghuis v. Thompkins, ___ S.Ct. ___, 2010 WL 2160784 (2010)

INTRODUCTORY EDITORIAL COMMENTS: In the legal subject area of search and seizure, the Washington Supreme Court, after decades of ruling to the contrary, determined in the early 1980s that the Washington constitution’s article I, section 7 is more restrictive on law enforcement officers in a number of respects than is the U.S. Constitution’s Fourth Amendment. But in the legal subject area of law enforcement interrogation of suspects, the Washington appellate courts to date have interpreted the Washington constitution as not imposing, under “independent grounds” analysis, greater restrictions than the U.S. constitution’s Fifth and Sixth Amendment protections. See Tacoma v. Heater, 67 Wn.2d 733 (1966) (Sixth Amendment); State v. Medlock, 86 Wn. App. 89 (Div. III, 1997) Aug. ’97 LED:21 (Sixth Amendment); State v. Earls, 116 Wn.2d 364 (1991) (Fifth and Sixth Amendments); State v. Unga, 165 Wn.2d 95 (2008) March ’09 LED:15 (Fifth Amendment).

In State v. Radcliffe, 164 Wn.2d 900 (2008) Dec. ’08 LED:18 (a Fifth Amendment case), however, the Washington Supreme Court noted that the Court was declining to address

the question of whether, under “independent grounds” analysis, article I, section 9 of the Washington constitution imposes greater restrictions on law enforcement interrogators than does the Fifth Amendment of the U.S. constitution. The Radcliffe Court declined to address the “independent grounds” question raised by defendant under article I, section 9 of the Washington constitution because defendant had not raised that question prior to the Washington Supreme Court’s grant of review in that case.

The U.S. Supreme Court’s decision in Berghuis v. Thompkins, digested below, no doubt will prompt other defendants to ask the Washington Supreme Court to look at article I, section 9 of the Washington constitution as an “independent grounds” source of protection in relation to custodial interrogation. The majority opinion in Thompkins takes an approach to Miranda waiver and invocation of rights that we think is contrary to nationally settled expectancies among criminal justice legal analysts – based on extensive, though admittedly a bit mixed, case law – regarding Miranda standards. See, for example, the Ninth Circuit’s decision in U.S. v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008) April 08 LED:08, holding that Miranda waiver, either express or implied, was required prior to questioning a custodial suspect.

The Thompkins majority opinion stands for the contrary proposition that, so long as a custodial suspect is given and understands the Miranda warnings, law enforcement interrogators may lawfully start questioning immediately and may continue such questioning until and unless, at some point during the questioning, the suspect unambiguously invokes his or her right to silence (not just by remaining silent) or unambiguously invokes his or her right to an attorney.

The ruling and analysis in Thompkins will apply to almost all jurisdictions in the United States (we say “almost all” in light of our limited research indicating that, at a minimum, the appellate courts in Hawaii, Minnesota and New Jersey have taken a more restrictive, independent-state-constitutional-grounds approach to some elements of the Miranda waiver question). Accordingly, interpretation of Thompkins by most law enforcement agencies and courts throughout the nation will be of interest and relevance in Washington.

But remember that the question of whether a person has waived or has invoked Miranda rights remains a mixed question of fact and law that is analyzed under the totality of the circumstances of the particular case. The safest legal course for ensuring admissibility of a statement is for interrogators to continue the current practice of seeking an express waiver before proceeding with questioning of the suspect who has manifested that he or she understands the warnings (i.e., making a waiver request along the lines of: “Having these rights in mind, do you want to talk?”)

Finally, as always, we remind our readers that any analysis and opinions expressed by the LED Editors are not legal advice, are our own personal thinking, and do not necessarily express the views of the Washington Attorney General or Criminal Justice Training Commission. Washington law enforcement officers and agencies are urged to consult their own legal advisors and local prosecutors for guidance on legal issues.

Facts and trial court proceedings: (Excerpted from U.S. Supreme Court majority opinion)

Two Southfield [Michigan] police officers traveled to Ohio to interrogate Thompkins [an arrestee in a Southfield drive-by shooting], then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the

interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the Miranda rule. It stated:

NOTIFICATION OF CONSTITUTIONAL RIGHTS AND

STATEMENT 1. You have the right to remain silent. 2. Anything

you say can and will be used against you in a court of law. 3. You

have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while

you are answering any questions. 4. If you cannot afford to hire

a lawyer, one will be appointed to represent you before any

questioning, if you wish one. 5. You have the right to decide at

any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four Miranda warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form. Compare [the following] (at a suppression hearing, Helgert testified that Thompkins verbally confirmed that he understood his rights), with [the following] (at trial, Helgert stated, "I don't know that I orally asked him" whether Thompkins understood his rights).

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was "[l]argely" silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as "yeah," "no," or "I don't know." And on occasion he communicated by nodding his head. Thompkins also said that he "didn't want a peppermint" that was offered to him by the police and that the chair he was "sitting in was hard."

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, "Do you believe in God?" Thompkins made eye contact with Helgert and said "Yes," as his eyes "well[ed] up with tears." Helgert asked, "Do you pray to God?"

Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, see Michigan v. Mosley, 423 U.S. 96, 103 (1975), citing Miranda v. Arizona, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

....

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

State court appeals and federal court review

Thompkins appealed and lost in the Michigan appellate courts. He then sought review in the federal courts. He lost in the U.S. District Court, but the Sixth Circuit of the U.S. Court of Appeals ruled that Thompkins’s “persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his [Miranda] rights.”

The State of Michigan sought and obtained review in the United States Supreme Court.

ISSUES AND RULINGS: 1) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, did defendant’s silence for much of the questioning become – at any point in the interrogation session – an invocation of his Miranda right to silence? (ANSWER: No, rules a 5-4 majority)

2) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, and where defendant was silent for much of the questioning, was his incriminating statement near the end of the near-three-hour interrogation session an implied waiver of his Miranda right to silence? (ANSWER: Yes, rules a 5-4 majority)

3) Where the custodial defendant was Mirandized and understood his rights before the officers began questioning him, did the officers violate Miranda by beginning to question him without first obtaining either an explicit or implicit waiver of Miranda rights? (ANSWER: No, rules a 5-4 majority)

Result: Reversal of decision of U.S. Court of Appeals for the Sixth Circuit; reinstatement of Michigan trial court conviction of Van Chester Thompkins for first degree murder, assault with intent to commit murder, and certain firearms-related offenses.

ANALYSIS:

1) Mere silence does not invoke right to silence under Miranda

The Thompkins majority opinion rejects defendant’s argument that, even though he had been Mirandized and even though he understood his rights before the officers began questioning him, his silence in the face of much of the questioning constituted, at some point in the interrogation process, an invocation of his Miranda right to silence. The majority opinion relies in large part on the U.S. Supreme Court’s decision in Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02**. In Davis, the Court held that, where a custodial suspect – who had waived his Miranda rights at the outset of an interrogation – made an ambiguous reference to his right to an attorney midway through the interrogation, his interrogators were not required to stop questioning him or

even to clarify his wishes. See also State v. Radcliffe, 164 Wn.2d 900 (2008) **Dec. '08 LED:18** (applying Davis).

Prior to the Thompkins decision, most commentators and courts had interpreted Davis as addressing only a mid-interrogation reference by a suspect to his or her Miranda rights. The assumption had been that, at the threshold, a suspect's ambiguous statement about Miranda rights prior to a waiver did not relieve law enforcement of the requirement to obtain a Miranda waiver, either express or implied, before interrogating the suspect. The Thompkins majority opinion, however, interprets Davis as supporting the conclusion that a suspect's ambiguous statement about Miranda rights – after receiving the warnings and understanding them but before any questioning – likewise need not be clarified. That is because the Thompkins majority concludes that questioning can proceed, as discussed below under Part 3 of our digesting of the majority's analysis, without a waiver.

The Thompkins majority then reasons that, just as, under Davis, the assertion of the right to attorney must be unambiguous, so must an assertion of the right to silence be unambiguous. Mere silence in the face of questioning is not an unambiguous assertion of the right to silence, the majority concludes. The suspect must expressly say that he or she does not wish to answer questions or does not wish to talk or something similarly unambiguous to that effect.

2) Implied waiver of right to silence during interrogation

Central to the analysis by the Thompkins majority is the opinion's assertion that "where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." The Thompkins majority opinion explains:

The record in this case shows that Thompkins waived his right to remain silent. There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. There was more than enough evidence in the record to conclude that Thompkins understood his Miranda rights. Thompkins received a written copy of the Miranda warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that "you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned." He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.

Second, Thompkins's answer to Detective Helgert's question about whether Thompkins prayed to God for forgiveness for shooting the victim is a "course of conduct indicating waiver" of the right to remain silent. If Thompkins wanted to remain silent, he could have said nothing in response to Helgert's questions, or he could have unambiguously invoked his Miranda rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a Miranda warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to re-warn suspects from time to time. Thompkins's answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then

Thompkins had given sporadic answers to questions throughout the interrogation.

Third, there is no evidence that Thompkins's statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. The fact that Helgert's question referred to Thompkins's religious beliefs also did not render Thompkins's statement involuntary. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" (quoting Oregon v. Elstad, 470 U.S. 298 (1985)). In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.

[Some citations omitted]

3) Beginning the interrogation before waiver has occurred

The Thompkins majority opinion concludes its Miranda analysis with an explanation of the view of the majority justices that it would be inconsistent with the concept of "implied waiver" under Miranda to require interrogators to not begin questioning until after a suspect who understands the warnings has waived his or her Miranda rights:

Thompkins next argues that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. [North Carolina v. Butler, 441 U.S. 369 (1979)] forecloses this argument. The Butler Court held that courts can infer a waiver of Miranda rights "from the actions and words of the person interrogated." This principle would be inconsistent with a rule that requires a waiver at the outset. The Butler Court thus rejected the rule proposed by the Butler dissent, which would have "requir[ed] the police to obtain an express waiver of [Miranda rights] before proceeding with interrogation." This holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the Miranda warnings themselves." Davis. The Miranda rule and its requirements are met if a suspect receives adequate Miranda warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that Miranda rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace

for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

In order for an accused's statement to be admissible at trial, police must have given the accused a Miranda warning. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of Miranda rights. In making its ruling on the admissibility of a statement made during custodial questioning, the trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established. Thus, after giving a Miranda warning, police may interrogate a suspect who has neither invoked nor waived his or her Miranda rights. On these premises, it follows the police were not required to obtain a waiver of Thompkins's Miranda rights before commencing the interrogation.

[Some citations omitted]

Justice Kennedy authored the majority opinion, joined by Justices Scalia, Alioto, Roberts and Thomas. Justice Sotomayor authored the dissenting opinion, joined by Justices Ginsburg, Breyer and Stevens.

LED EDITORIAL COMMENTS: Our usual practice is to make our editorial comments after presenting the court's decision. For Thompkins, however, we have provided all of our commentary in our introductory comments above at pages 2-3.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) 2006 FEDERAL SEX OFFENDER REGISTRATION LAW REGULATING INTERSTATE SEX OFFENDER MOVEMENT DOES NOT APPLY TO THOSE WHO MOVED BEFORE EFFECTIVE DATE – In Carr v. U.S., ___ S.Ct. ___, 2010 WL 2160783 (2010), a 6-3 majority of the U.S. Supreme Court rules that a 2006 enactment of a federal law requiring that those required under state or federal law to register as sex offenders must update their registration when they move to another state does not apply to those who moved to another state prior to the effective date of the 2006 enactment. The first paragraph of the majority opinion in Carr briefly summarizes the decision as follows:

Since 1994, federal law has required States, as a condition for the receipt of certain law enforcement funds, to maintain federally compliant systems for sex-offender registration and community notification. In an effort to make these state schemes more comprehensive, uniform, and effective, Congress in 2006 enacted the Sex Offender Registration and Notification Act (SORNA or Act) as part of the Adam Walsh Child Protection and Safety Act Among its provisions, [SORNA] established a federal criminal offense covering, [among other things], any person who (1) "is required to register [as a sex offender] under SORNA," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." 18 U.S.C. section 2250, At issue in this case is whether section 2250 applies to sex offenders whose interstate travel occurred prior to SORNA's effective date and, if so, whether the statute runs afoul of the Constitution's prohibition on ex post facto laws. See Art. I, §9, cl. 3. Liability under §2250, we hold, cannot be predicated on pre-SORNA travel. We therefore do not address the ex post facto question.

Result: Reversal of decision of the Seventh Circuit of the U.S. Court of Appeals that had upheld a federal district court conviction of defendant Carr for failing to register in Indiana as a sex offender after he had moved there prior to 2006 from Alabama, where he had been registered as a sex offender.

(2) EIGHTH AMENDMENT OF U.S. CONSTITUTION HELD TO BAR SENTENCING JUVENILES TO LIFE WITHOUT PAROLE FOR NON-HOMICIDE CRIMES – In Graham v. Florida, ___ S.Ct. ___, 2010 WL 1946731 (2010), the U.S. Supreme Court rules in a split decision (with five justices joining in the lead opinion) that it is cruel and unusual punishment under the Eighth Amendment of the U.S. constitution to sentence persons who commit non-homicide crimes while under age 18 to life without the possibility of parole.

Result: Reversal of Florida appellate court decision that upheld defendant Graham’s life-without-parole sentence based on, among other things, an aggravated assault and attempted armed robbery at age 16, his subsequent violation of the terms of his probation for that offense (including possession of a firearm), and two armed robberies that he committed 34 days before his 18th birthday.

NINTH CIRCUIT, U.S. COURT OF APPEALS

PROBABLE CAUSE TO BELIEVE MOTEL ROOM WAS PROBATIONER’S CURRENT RESIDENCE WAS ESTABLISHED BY (1) CREDIBLE AND SPECIFIC INFORMANT’S TIP THAT SAME MORNING SPECIFYING THE ROOM IN WHICH HE WAS LIVING, (2) CORROBORATION FROM MOTEL MANAGER, AND (3) CCO’S CORROBORATING VOICE RECOGNITION WHEN PROBATIONER RESPONDED “WHO IS IT?” TO KNOCK AT DOOR

U.S. v. Franklin, 603 F.3d 652 (9th Cir. 2010) (decision filed April 29, 2010)

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

Because of three prior felony convictions, Franklin was in January 2006 subject to “community custody” under Washington state law. As a condition of his community custody, he agreed to report his current address and any change in his address to his Community Corrections Officer (CCO) . . . He also agreed to “abide by written or verbal instructions issued by” [his CCO]. On January 4, 2006, Franklin told [his CCO] that he was homeless. [The CCO] instructed Franklin to contact him by midnight that night to say where he would be staying and where he planned to reside in the future. [The CCO] also instructed Franklin to report back in person on January 17. Franklin did not contact [the CCO] before midnight as instructed, nor did he report to [the CCO] in person on January 17.

On January 18, between 8:30 and 9:00 am, [the CCO] received a call from a female informant with whom Franklin had a child. The informant told [the CCO] that Franklin was living in Room 254 of a local motel. She said that Franklin was staying with another man and that he had a handgun and ten rounds of ammunition. Based on previous dealings with this informant, [the CCO] believed she was credible.

[The CCO] spoke to his supervisor, who authorized a probation search provided that [the CCO] could first confirm that Franklin in fact resided at the motel room. [The CCO] and [a Spokane Police Department Officer] . . . went to the motel to determine if Franklin was staying in the room. [The officer] went to the front desk and showed the clerk a booking photograph of Franklin. The clerk confirmed both that Franklin was currently staying in Room 254 and that Franklin had personally rented the room.

[The CCO], [the officer], and other officers went to Room 254. They arrived before 9:45 am. [The CCO] knocked on the door and heard a loud voice, which he recognized as Franklin's. The voice asked, "Who is it?" [The CCO] replied, "DOC" (Department of Corrections), and Franklin opened the door. Officers immediately restrained him. They then searched the room and discovered a gun, which Franklin admitted was his.

Pursuant to a plea agreement, Franklin pled guilty in state court to a state charge of unlawful possession of a firearm. . . .

Franklin was subsequently indicted in federal court for being a felon in possession of a firearm and for possessing a stolen firearm. He filed a motion to suppress evidence obtained in the search of the motel room After a hearing, the district court denied both motions. On the suppression motion, the district court found that [the CCO] had probable cause to believe that Franklin was residing in Room 254. The court also found that [the CCO] had reasonable suspicion that Franklin had violated his community custody agreements

Ninth Circuit's footnote re deeming Franklin to be on "probation" (as opposed to "parole")

The Ninth Circuit notes that a probationer in some circumstances is deemed to have greater privacy protection than a parolee, and that it is not clear which label applies to Franklin's "community custody" status, but that Franklin's Fourth Amendment privacy arguments fail in this case whether Franklin is deemed to have been on probation or parole:

Washington law defines "community custody" as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities by the department." Wash. Rev. Code § 9.94A.030(5).

The parties do not make clear whether Franklin's community custody was more analogous to parole ("in lieu of earned release time") or probation ("imposed as part of a sentence"). The Government's brief equates Franklin's community custody to probation, while Franklin's brief characterizes it as parole. Where this distinction might make a difference — notably, for purposes of reasonable expectations of privacy under the Fourth Amendment, *see Samson v. California*, 547 U.S. 843, 850 (2006). ("[P]arolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment.") — we assume, in Franklin's favor, that his community custody is the equivalent of probation. The assumption does not affect our result.

ISSUE AND RULING: The CCO had received a tip earlier that morning that Franklin was living in a particular motel room; the tip came from a credible informant whose past relationship with

Franklin gave the CCO reason to believe that the informant would know where Franklin was living. An officer verified with the front desk clerk that a person resembling Franklin's photograph was staying in Room 254 and had personally rented the room. After the CCO knocked on the door of the room, a voice from inside called "Who is it?" The CCO recognized the voice as Franklin's. Did this information add up to probable cause that Franklin's residence at the time of arrest was the motel room? (ANSWER: Yes)

Result: Affirmance of U.S. District Court (Spokane) conviction of Freddie L. Franklin of being a felon in possession of a firearm in violation of 18 U.S.C. section 922(g).

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Franklin does not dispute that the officers had reasonable suspicion that he had violated the terms of his community custody by failing to report to [the CCO] as scheduled and by failing to advise [the CCO] where he was living. The contested issue is whether the officers had sufficient basis to believe that Room 254 was Franklin's residence.

In Motley v. Parks, 432 F.3d 1072 (9th Cir. 2005), an en banc panel of our court held that "before conducting a warrantless search [of a residence] pursuant to a parolee's parole condition, law enforcement officers must have probable cause to believe that the parolee is a resident of the house to be searched." The probable cause standard for a parole search necessarily applies to probation searches as well. Both parolees and probationers "are on the 'continuum' of state-imposed punishments," Samson v. California, 547 U.S. 843, 850 (2006), and parolees "have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment." Because the Fourth Amendment gives parolees the benefit of probable cause in this context, it must extend that same protection to probationers.

Probable cause requires "that the facts available to the officer would warrant a man of reasonable caution in the belief" that Room 254 was Franklin's residence at the time.

The facts overwhelmingly support the district court's finding that there was probable cause to believe that Franklin was residing in the motel room. Before the search was conducted, an officer verified with the front desk clerk that a person resembling Franklin's photograph was staying in Room 254 and had personally rented the room. After [the CCO] knocked on the door of the room, a voice from inside called "Who is it?," and [the CCO] recognized the voice as Franklin's. [The CCO] had previously received a tip that Franklin was living in the room from a credible informant whose past relationship with Franklin gave [the CCO] reason to believe that she would know where Franklin was living.

Some of those facts individually would be sufficient to support probable cause. In combination, there is no serious doubt.

That a motel room was identified as Franklin's residence makes this case different, but it does not make it difficult. We recognized in United States v. Howard, 447 F.3d 1257, 1262 (9th Cir. 2006), that "[w]e have applied a relatively stringent standard in determining what constitutes probable cause that a residence belongs to a person on supervised release." But the cases cited and

discussed in Howard involved parolees or probationers thought to be living at homes identified as belonging to others. . . . [citing and briefly discussing cases]

Residential arrangements take many forms. A “residence” does not have to be an old ancestral home, but it requires more than a sleepover at someone else’s place. “It is insufficient to show that the parolee may have spent the night there occasionally.” Howard. That a house or apartment belonging to someone else is also the “residence” of a probationer is not an inference that can be drawn simply because the probationer happens to be seen there. That a given home is known to belong to someone else necessarily raises at least some concern for the rights of that other person.

When the location in question is a motel room, however, especially one identified as having been rented by the person in question, establishing that location as the person’s residence is much less difficult. There is no need to draw an inference based solely on physical presence in someone else’s home, and no concern about the rights of an established resident. The temporary nature of the occupancy does not change the fact that for the night or nights that Franklin rented Room 254, he was legally entitled to use the room and to control access to it. For that time period, the room was his residence in the sense meant in the community custody agreements. As such, it was subject to a warrantless search based on reasonable suspicion.

There was ample evidence to support the district court’s finding that the officers had probable cause to believe that Room 254 was Franklin’s residence at the time of the search. The motion to suppress was properly denied.

[Some citations omitted]

LED EDITORIAL COMMENTS: Beware of State v. Jorden, 160 Wn.2d 121 (2007) July 07 LED:18. Jorden held that a person renting a motel room has a privacy expectation under the Washington constitution’s article 1, section 7. The Washington Supreme Court held in Jorden that law enforcement generally may not look at or obtain motel/hotel registration information without a search warrant or exception to the warrant requirement. No such privacy expectation exists for this type of information under the Fourth Amendment of the federal constitution. So, no issue was raised in federal court in Franklin regarding the officers’ obtaining of information from the motel manager.

We think it possible that Washington courts would hold that officers’ obtaining of information of the sort obtained from the motel manager in the Franklin case (at least information regarding who had paid for/rented the room) violates the Washington constitution under Jorden. The Jorden opinion talked of law enforcement “random[ly]” checking for registry information, but we think that Jorden extends privacy protection beyond random checking, and that Jorden generally requires a search warrant to get such information in non-exigent circumstances.

In the Franklin case, even without the confirmation from the motel manager, the officers apparently had ample probable cause to believe that Franklin was residing in the motel room. But as a general approach, officers should consider applying for a search warrant to get such information. As always, we urge officers and agencies to confer with their own legal advisors and/or local prosecutors on legal issues.

IN-PERSON REPORT BY UNKNOWN, UNIDENTIFIED UPS DRIVER HELD TO BE RELIABLE IN SUPPORT OF REASONABLE SUSPICION FOR A TERRY STOP

U.S. v. Palos-Marquez, 591 F.3d 1272 (9th Cir. 2010) (decision filed January 19, 2010)

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

The investigatory stop at issue occurred on Otay Lakes Road, which is an east-west road five miles north of the United States/Mexican border in an area described as notorious for alien smuggling. As United States Border Patrol Agent Staunton drove around a sharp bend in the road, he saw a dark-colored Dodge Ram pickup truck traveling west in his eastbound lane. The pickup was attempting to pass a westbound UPS truck. Staunton veered to avoid a collision with the pickup, which passed him and continued west. Staunton testified the pickup was traveling “faster than normal” given the conditions of the road.

When the UPS truck passed Staunton, its driver gestured to get Staunton's attention regarding the pickup. Staunton testified that his knowledge of the area's connection with alien smuggling and the atypically fast speed at which the pickup was traveling, coupled with the UPS driver's gesture, caused him to suspect that the pickup might be loaded with contraband. He radioed to Border Patrol intern agents Simon and Martinez, who were situated farther west on the same road, to be on the lookout for the pickup that was “driving erratically [and] that almost ran [him] off the road.” Within seconds, Simon radioed to Staunton that he had a visual of the truck. One minute later, the UPS driver pulled over at Simon's location and reported that he had seen the pickup load up with several suspected illegal aliens. Simon immediately radioed back to Staunton, informing him of the UPS driver's report. Simon did not obtain the UPS driver's name or license plate number.

Staunton then put a call out over the radio to agents in the area, describing the make and model of the pickup and the UPS driver's report. Within minutes of the broadcast, Agent Padron saw the pickup traveling west on Otay Lakes Road at a high rate of speed, as described by the report. When the pickup stopped at the traffic light, an unmarked car of plain-clothes Border Patrol agents (“BIC” agents) was able to pull alongside it, and reported that its occupants looked “nervous and shaky.” Approximately five minutes after Padron had first seen the pickup, he and the other agents initiated a stop. They found four illegal aliens in the pickup that Palos-Marquez was driving.

Palos-Marquez was charged in a five-count indictment with transportation of illegal aliens and aiding and abetting the commission of that crime Palos-Marquez moved to suppress the fact that illegal aliens were found in the pickup by arguing that the agents lacked reasonable suspicion to initiate the stop. After an evidentiary hearing, the district court stated that “in the words of Agent Staunton” the area was notorious for alien smuggling and in close proximity to the border. According to the district court, those facts, combined with the pickup's near accident with Staunton and the UPS driver's gesturing, put Staunton on notice that Palos-Marquez “could be a load driver.” Taking into account Staunton's initial suspicions, coupled with the UPS driver's “highly reliable” report to Border Patrol agents that he had seen the pickup driver “taking on a load of individuals by the side of the road,” the district court held there was

“more than reasonable suspicion” to justify the stop, and denied the motion to suppress.

Pursuant to a plea agreement, Palos-Marquez pled guilty to one count of the indictment, reserving the right to appeal the district court's ruling that there was reasonable suspicion for agents to conduct the stop of his vehicle.

ISSUE AND RULING: In light of the totality of the circumstances, including the in-person nature of the report of observation of crime by the unknown, unidentified UPS driver, did the border agents have reasonable suspicion to stop the pickup truck? (ANSWER: Yes)

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Credibility of unknown, unidentified UPS driver in light of in-person nature of the report

An investigatory stop does not violate the Fourth Amendment “if the officer has a reasonable suspicion supported by articulable facts that criminal activity ‘may be afoot.’” To determine whether a stop was supported by reasonable suspicion, “we consider whether, in light of the totality of the circumstances, the officer had a ‘particularized and objective basis for suspecting the particular person stopped of criminal activity.’”

An officer may justify an investigatory stop based solely or substantially on an informant's tip, depending on its reliability. At its most reliable, an informant's tip alone may sufficiently establish reasonable suspicion for a stop. Thus, in Adams v. Williams, the [United States] Supreme Court held that where an informant who had provided information in the past and was known to the officer made an in-person tip “that an individual seated in a nearby vehicle was carrying narcotics and had a gun at his waist,” 407 U.S. 143 (1972), the tip “carried enough indicia of reliability to justify the officer's forcible stop” of the defendant. At the other end of the reliability spectrum, the Court in Florida v. J.L., held that a tip from an anonymous caller telephoning from an unknown location, who reported only that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun,” lacked any indicia of reliability and could not provide reasonable suspicion for an investigatory stop. 529 U.S. 266 (2000) **May 00 LED:07**.

When the tip is provided in a face-to-face encounter, even when the informant is unidentified, we have deemed it to be closer to the Adams end of this reliability spectrum. See U.S. v. Sierra-Hernandez, 581 F.2d 760 (9th Cir. 1978). In Sierra-Hernandez, a Border Patrol agent was approached by a man wearing overalls, a baseball cap, and driving a late-model Mercedes Benz. The man pointed to a nearby pickup truck and said, “[t]he black pickup truck just loaded with weed at the cane-break.” The agent, without asking the man for his name or other identifying information, stopped the truck and discovered marijuana.

We held the in-person tip was sufficiently reliable to justify the stop. We reasoned that by “presenting himself to the agent and doing so while driving a car from which his identity might easily be traced, the informant was in a position to be held accountable for his intervention,” and the “reliability of the information was thus increased.”

Courts have indicated that the in-person nature of a tip gives it substantial indicia of reliability for two reasons. First, as explained above, an in-person informant risks losing anonymity and being held accountable for a false tip. Second, when a tip is made in-person, an officer can observe the informant's demeanor and determine whether the informant seems credible enough to justify immediate police action without further questioning.

Here, the UPS driver's tip featured both of these key indicia of reliability. The driver risked losing his anonymity by speaking face-to-face with Agent Simon, who was able to observe his appearance and affiliation with UPS, and who could have asked the driver for identification had it seemed necessary. Moreover, Simon could judge the UPS driver's demeanor and evaluate his credibility.

Other indicia present in this case are also relevant to determining the tip's reliability. For example, if the unidentified informant is a member of a small class of likely sources, we have held that the "tip does provide the lawful basis for some police action." . . . We held [in a similar case] that the tip was reliable because the informant "could be held accountable for fabricating any story" if the officer decided to follow up and identify him, which was possible given the officer's knowledge of the informant's place of employment. Therefore, "the concerns raised by anonymous tips" that "the tipster cannot be held accountable for fabrications and the tipster's reputation cannot be assessed" were "simply not present" in this context.

In this case, like in [the similar case discussed by the Court], the Border Patrol agent knew that the informant was a UPS driver who had worked a designated route at a certain time on the day of Palos-Marquez's stop. The agent could have reasonably concluded that the UPS driver's identity could be determined with only a small amount of investigation. This increases the reliability of the tip because the informant likely could be held accountable if the information proved to be false.

....

There are several other facts present here that weigh in favor of the tip's reliability. The UPS driver relayed his tip near to where he had observed the events, and agents stopped a pickup fitting the driver's description within minutes of his statement. We have held that if an unidentified informant's tip is "made contemporaneously with a complainant's observations" the report is generally more reliable than those made later in time. Furthermore, the UPS driver indicated that he had first-hand knowledge of the crime when he reported to Agent Simon that he had seen several suspected illegal aliens load into the pickup. Thus, our observation that an informant's tip "is considered more reliable if the informant reveals the basis of knowledge of the tip-how the informant came to know the information"-applies.

In sum, the UPS driver's tip displayed significant indicia of reliability that supported the agents' formulation of "a reasonable suspicion that criminal activity was occurring," particularly "in the light of the surrounding circumstances" discussed below.

Other circumstances supporting reasonable suspicion

In addition to the in-person tip, we consider other facts available to the officers to determine whether “in light of the totality of the circumstances, the officer had a ‘particularized and objective basis for suspecting the particular person stopped of criminal activity.’ ”

Here, the agents relied on three facts in addition to the in-person tip to support their reasonable suspicion. First, Agent Staunton testified that the Otay Lakes Road area is “notorious not only for alien traffic to cross there through this area, but also load vehicles-people to load up with illegal aliens.” Second, the pickup was being driven erratically, at a high rate of speed. Third, the BIC agents observed that the pickup’s occupants appeared “nervous and shaky.”

[Some citations omitted]

LED EDITORIAL COMMENT: Washington officers do not, of course, generally investigate the federal crime of alien smuggling. But the general principles regarding assessment of informant-based reasonable suspicion for a Terry stop discussed in Palos-Marquez are applicable to investigation of all crimes. Washington courts to date follow the Fourth Amendment in assessing reasonable suspicion in this context (i.e., there are as yet no “independent grounds” rulings under article I, section 7 of the Washington constitution on this sub-issue relating to the Terry “reasonable suspicion” standard).

In State v. Jones, 85 Wn. App. 797 (Div. III, 1997) Aug 97 LED:16, Division Three of the Washington Court of Appeals held in a 2-1 decision that an in-person hand-signal report regarding a possible drunk driver from an unknown, unidentified driver of a “commercial vehicle” (markings unknown, however) failed to provide reasonable suspicion of DUI because the officer had no basis for assessing the credibility of the truck driver. Judge Kurtz dissented, arguing that the majority judges had misread the Fourth Amendment case law that applied to the reasonable suspicion standard under Washington law.

More recently, in State v. Lee, 147 Wn. App. 912 (Div. I, 2008) Feb 09 LED:11, Division One of the Washington Court of Appeals held that a corroborated in-person report constituted reasonable suspicion for a Terry stop for illegal drug possession. The 2008 Division One Lee decision criticized some of the analysis in the 1997 Division Three Jones decision. The Lee Court also noted that the defendant there was arguing for a standard that was closer to the probable cause standard that is applied to arrest, rather than the lesser standard of reasonable suspicion that is applied to Terry stops. We offered a similar criticism of Jones in the August 1997 LED at page 18, where we said the following about the analysis of “reasonable suspicion” in the Jones majority opinion:

We agree with the dissent’s common sense analysis. The [Jones] majority has clearly misread the Fourth Amendment cases. We wonder what the majority’s analysis would have been if the unknown trucker had yelled out his window to the officer that the driver of the car ahead had just been observed shooting a firearm at passing vehicles. The better view of the case law is that a face-to-face report makes the source credible for Terry stop purposes. Ideally, an officer first will attempt to identify a complaining witness, but an officer receiving a first-hand eyewitness report of crime from such a source generally should be able to immediately respond to such a non-anonymous report with a Terry stop of the suspect, without having to first investigate the citizen complainant for veracity. . . .

SEIZURE OF RESIDENCE FOR OVER 26 HOURS BEFORE MAKING APPLICATION FOR SEARCH WARRANT HELD TO VIOLATE FOURTH AMENDMENT

U.S. v. Song Ja Cha, 597 F.3d 995 (9th Cir. 2010) (decision filed March 9, 2010)

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

It was Saturday evening, January 12, 2008, in Tamuning, Guam, when Officers Manibusan and Laxamana pulled into the parking lot of the Blue House Lounge karaoke bar to investigate a report they had received earlier that evening. Sonina Suwain (“Ms. Suwain”), who was from Chuuk, had reported that the owner of the Blue House Lounge, Ms. Cha, had Ms. Suwain's passport and was refusing to return it. When the officers arrived at the Blue House Lounge, Ms. Suwain told the officers that two of her cousins from Chuuk, “Cindy” and “Vivian,” were being held inside the Blue House Lounge against their will.

Officer Manibusan sent Officer Tan, who had just arrived with several other officers, into the Blue House Lounge to find Cindy and Vivian so he could determine whether they were there “on their own free will.” When Officer Tan entered the lounge, the karaoke machine was playing and customers were drinking at the bar. He found Cindy waiting tables. Officer Tan asked the bartender where he could find Vivian, and the bartender pointed to several numbered doors in the back of the restaurant. Officer Tan recognized these rooms as “comfort rooms,” which are fairly common in karaoke bars in Guam. In these rooms, customers “can buy drinks and take the waitress into the room and watch TV or sing songs or just chat.” Officer Tan heard a woman's voice coming from one of the comfort rooms and knocked on the door. Vivian emerged looking disheveled, and a man stood hiding behind the door with his pants “barely on”- unzipped, unbuttoned, and unbuckled.

Once Officer Tan and the two women were outside, the women, crying, reported that they were being prostituted against their will. They maintained that Ms. Cha kept their passports and that if they refused to have sex with a customer, Ms. Cha would refuse to feed them that night. Hearing this, Officer Manibusan ordered Ms. Cha to close up for the evening even though the bar would normally stay open much later. The officers interviewed each customer before the customer left the bar.

After all the customers left the establishment, Officer Manibusan asked Ms. Cha to give him and a few other officers a “tour.” Other officers completed a detailed “scene check.” The officers' tour extended into the Chas' residence, which was connected to the Blue House Lounge by a hidden door. There, the officers found Mr. Cha asleep. They woke him and forced him outside.

With the “scene check” complete, Officer Manibusan instructed the Chas to lock up. Mr. Cha did so and kept the keys. All of the officers drove away, while the Chas escorted the women in their car down to the police station. It was 1 a.m. Sunday morning.

The officers interviewed the women throughout the night. Ms. Cha was not allowed to leave the precinct and was ultimately arrested at 6 a.m. Mr. Cha,

however, remained free throughout, leaving at least once to get Ms. Cha some food.

At about 8 a.m., Mr. Cha returned home to find a police officer outside, guarding the house. He called his lawyer, Mr. Van de veld, anxiously recounted the night's events and told Mr. Van de veld that "the police were still there and would not allow him access to the premises." Mr. Van de veld told Mr. Cha that he would stop by as soon as he finished his golf game.

Around 12:45 p.m., Mr. Van de veld, with his golf buddies in tow, arrived at the Cha residence. The officers informed him that the Blue House Lounge and the Cha residence had been "detained" since around midnight and that no one was allowed to enter the premises. Mr. Van de veld left to drive his friends home.

When Mr. Van de veld returned to the Blue House Lounge at 2:30 p.m., Mr. Cha was still waiting outside. Mr. Van de veld was concerned about Mr. Cha's health because, earlier that afternoon, Mr. Cha looked "pale and was perspiring heavily." Knowing that Mr. Cha had diabetes, Mr. Van de veld asked if the police would allow Mr. Cha to find his insulin and glucose monitor inside the house. The police refused.

It was four hours later, at 7 p.m., when an officer finally accompanied Mr. Cha into the house to get his medicine. Afterward, Mr. Cha and Mr. Van de veld waited outside Mr. Cha's house until 1 a.m. Monday morning when Mr. Van de veld went home to get some sleep. The record does not reveal where Mr. Cha slept while his house was "detained" through the night.

While Mr. Cha had been waiting outside his house all Sunday, the police had been back at the precinct preparing the warrant application. At about 9:20 Sunday morning, Officer Perez, who had not previously been involved in the case, received a call from his supervisor and was told to come into the office at noon for a briefing. At the briefing, Officer Perez was tasked with preparing the warrant application. But it was not until six-and-a-half hours later that he actually began work on the application; he wanted to wait to receive and review all the police reports first.

So, while more interviews were conducted and the investigation continued, Officer Perez changed the caption on the warrant application and updated his background information. He "urgently" worked from 6:30 to 9:15 p.m. Sunday to finish the application because, under a Guam ordinance, there was a presumption against searches conducted after 10 p.m. But when he found that he could not meet the 10 p.m. deadline, he worked until 4 a.m. to finish the warrant application. And, after he returned to work at 7:50 a.m. on Monday morning, Officer Perez brought the application to the Chief Prosecutor, who had made an unusual request to review the warrant application. Officer Perez then unsuccessfully searched for a magistrate judge throughout the morning. He finally found a magistrate judge to issue the warrant at 10:25 a.m. Monday.

Even with the warrant in hand, the police did nothing with the warrant for almost three hours. It was 1:15 p.m. when Officer Perez finally called Mr. Cha's lawyer and told him that the search would be conducted at 2 p.m. - - which happened to coincide with Ms. Cha's 2 p.m. arraignment. Mr. Van de veld requested that the

police wait until after the arraignment to begin the search, but the police refused. By the time that Mr. Cha and Mr. Van de veld returned from the courthouse, the police had already began the search at the Blue House Lounge and Cha residence. The search concluded at 1 a.m. Tuesday, when Mr. Cha was finally allowed back into his house. An arrest warrant issued for Mr. Cha a few weeks later, on February 7, 2008.

In a pretrial hearing, the Chas moved to suppress the evidence seized at their house and the Blue House Lounge. The magistrate judge recommended and the district court concluded that the warrantless seizure of the Cha residence was unconstitutionally long. The district court ordered the evidence suppressed.

ISSUE AND RULING: Did the officers violate the Fourth Amendment by failing to seek a search warrant for over 26 hours after seizing the residence? (**ANSWER:** Yes)

Result: Affirmance of U.S. District Court (Guam) order suppressing evidence seized under the search warrant.

ANALYSIS: (Excerpted from Ninth Circuit decision)

It is undisputed that the police officers had probable cause and that the officers were allowed to seize the Blue House Lounge and Cha residence for a reasonable time while they obtained a warrant. “Of course, a seizure reasonable at its inception . . . may become unreasonable as a result of its duration or for other reasons.” Neither the Supreme Court nor this Circuit has identified when a warrantless seizure of a residence becomes unconstitutionally long. Here, the police seized the Cha house for at least 26.5 hours—from 8 a.m. on Sunday, January 13, 2008 to 10:25 a.m. on Monday, January 14, 2008. Under the circumstances of this case, the duration of this seizure was too long under the Fourth Amendment.

The Supreme Court in [Illinois v. McArthur](#) set forth the relevant test for determining the reasonableness of a seizure of a residence. [531 U.S. 326 \(2001\)](#) **April 01 LED:02**. Under this test, we are to “balance the privacy-related and law enforcement-related concerns” using four factors: (1) whether the police had probable cause to believe that the defendant's residence contained evidence of a crime or contraband; (2) whether “the police had good reason to fear that, unless restrained,” the defendant would destroy the evidence or contraband before the police could return with a warrant; (3) whether “the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy”; and (4) whether “the police imposed the restraint for a limited period of time”—in other words, whether the “time period was no longer than reasonably necessary for the police, acting with diligence, to obtain the warrant.”

Because the police officers had probable cause, the first factor favors the government. But the other three factors favor the Chas. The district court's finding under the second factor that the government did not have good reason to fear that Mr. Cha would destroy evidence is not clearly erroneous.

The third factor weighs in favor of the Chas because the government did not make “reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy.” In [McArthur](#), the Supreme Court concluded that

the third factor weighed against the defendant in part because the officers allowed the defendant to enter his trailer home accompanied by an officer whenever he wished. But the police did not allow Mr. Cha to enter his residence even with police accompaniment for 11 hours after he sought permission to enter his house and more than four hours after the police were informed that Mr. Cha needed medicine for his diabetes.

Under the fourth factor, the duration of the seizure in this case was much longer than in [McArthur](#) - - at least 26.5 hours instead of only two. And although the United States argues that the police officers “were extraordinarily diligent and worked tirelessly around the clock in their pursuit of a search warrant,” the [McArthur](#) test asks only how long was reasonably necessary for police, acting with diligence, to obtain the warrant. Here, even if the police officers acted diligently during the seizure interviewing witnesses multiple times and drafting a meticulous warrant application, they took a much longer time than was reasonably necessary to obtain the warrant. The government already had probable cause by 1 a.m. Sunday. And the magistrate judge who authored the report and recommendation-a magistrate judge in Guam and familiar with warrant procedure there-admonished, “Police officers on Guam know that when exigent circumstances are present and there is an urgency to obtain a search warrant, a detached magistrate may be located at any hour to approve a warrant application.”

[Segura v. U.S.](#) [468 U.S. 796 (1984)] also supports the conclusion that the seizure here was unreasonable. In [Segura](#), the Supreme Court concluded that a 19-hour warrantless seizure was reasonable under the circumstances. The two Justices to expound on the seizure's duration cited three reasons why the seizure was reasonable. They noted that the officers did not exploit the delay in obtaining the warrant, that only eight hours of the delay was during the hours of 10 a.m. to 10 p.m. - - when they assumed judicial officers were not readily available-and that both the defendants who had possessory interests in the residence were under arrest or in the custody of the police during the entire occupation.

Here, although there was no evidence of bad faith, the delay was much longer: at least 26.5 hours instead of 19. Also, in [Segura](#), the seizure occurred at night, and more than half of the delay occurred before 10 a.m. the next morning. Here, however, the seizure occurred in the morning, and the officers had all day Sunday to obtain the warrant before the late-night-hour of 10 p.m. Also contrary to the assumption in [Segura](#), a judicial officer was available to the police even at night. And, unlike the defendants in [Segura](#), Mr. Cha was not under arrest or in the custody of the police but rather sought entry to his residence. His possessory interests were therefore quite strong instead of “virtually nonexistent.” In light of the Supreme Court's discussion of the two-hour seizure in [McArthur](#) and the two Justices' discussion of the 19-hour seizure in [Segura](#), Supreme Court precedent strongly suggests that the length of the seizure at issue in this case was unreasonable. *[Court's footnote: The United States relies heavily on a Guam Ordinance that provides a presumption against searches between the hours of 10 p.m. and 6 a.m. . . . The officers delayed much longer than this time frame, however. Additionally, this section provides that warrants cannot be executed between 10 p.m. and 6 a.m. “unless the court, by appropriate provision in the warrant and for reasonable cause shown, authorizes its execution [during*

these hours].” In view of this exception, too, the United States’ reliance on this section is misplaced.]

. . . .

Cases that have allowed the seizure of packages for a longer period of time than involved here do not cast doubt on our decision. . . . That a package may be seized for a longer period of time than a residence is logical given the heightened constitutional protection “preserving the privacy and sanctity of the home.” “[A] man’s house is his castle,” whether it is under siege by police officers prying into his possessions stored within or whether they exclude him from its sanctuary.

The poignant facts of this case demonstrate why Fourth Amendment possessory and privacy interests are greatly affected by the seizure of a dwelling. Mr. Cha was rendered homeless for the duration of the seizure. When he left his wife at the police station at 8 a.m., he went home only to find that he was barred from entering. He then waited outside his house for most of the day until 7 p.m. when an officer finally accompanied him to retrieve his diabetes medicine. He then waited outside his residence until at least 1 a.m. The next day he waited outside as well, only to travel to his wife’s arraignment. The search began at 2 p.m., and he helped the officers during the search that lasted until 1 a.m. Tuesday morning. Only then was he allowed to return to his house—nearly 48 hours after being excluded.

Under [the case law discussed in this opinion], we conclude that the 26.5-hour warrantless seizure of the Cha residence was unreasonable.

LED EDITORIAL COMMENTS: The facts of this case are unusual, but at least two general principles can be drawn from the decision. First, where officers inadvertently develop probable cause to search a premises and have reasonable concern that evidence will be destroyed if they do not secure the premises, the officers may lawfully secure the premises while they seek a search warrant. Second, officers who have impounded premises must proceed as quickly as reasonably practicable to prepare a search warrant application and present it to a judge (as well as proceeding with due speed to execute the search of the impounded premises). Time is more of the essence if one or more residents of the impounded premises, as here, has not been arrested or otherwise detained, and is being excluded from the premises.

Also, turning briefly to the unusual facts of this case, if officers learn that a resident who is not under arrest needs to go inside the impounded premises to retrieve medicine (or for some other reasonable emergent purpose), officers should try to quickly accommodate that need by allowing the resident to go inside the premises, accompanied by officers of course, to retrieve the medication. The person first should be advised that he will not be allowed to go inside unaccompanied by law enforcement.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) 1996 RECLASSIFICATION OF VEHICULAR HOMICIDE FROM CLASS B TO CLASS A FELONY WAS NOT RETROACTIVE AND THEREFORE DID NOT CHANGE CONVICT’S STATUS FOR PURPOSES OF RESTORATION OF FIREARMS RIGHTS – In Rivard v. State,

___ Wn.2d ___, ___ P.3d ___, 2010 WL 1795624 (2010), the Washington Supreme Court rules unanimously that a defendant may have his firearms rights restored where he was convicted of a vehicular homicide committed before 1996 amendments changed the classification of the crime from a class B to a class A felony.

The opinion for the Supreme Court holds that the Legislature's reclassification of vehicular homicide offense from a class B to a class A felony had no effect on defendant's prior conviction for that offense, and thus did not retroactively convert his conviction to a class A felony. Accordingly, the defendant was entitled to petition to have his right to possess firearms restored under RCW 9.41.040(1)(a) and (4) as a person previously convicted of a class B felony. Under those statutory provisions, the defendant was entitled to have his right to possess firearms restored because (1) he had spent five years or more in the community without being charged or convicted of any other crimes, and (2) he had no prior felony convictions that otherwise prohibited firearms possession.

Result: Reversal of Court of Appeals decision (see **Nov 08 LED:23**) and affirmance of Spokane County Superior Court decision granting the petition of James D. Rivard for restoration of his right to possess firearms.

(2) LIBRARY FILTER FOR ADULTS USING INTERNET HELD NOT VIOLATIVE OF WASHINGTON CONSTITUTION'S ARTICLE I, SECTION 5 – In Bradburn v. North Central Regional Library District, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 1795621 (2010), a 6-3 majority of the Washington Supreme Court (Justice Madsen writing the lead opinion for 5 justices) holds that the North Central Regional Library District (NCRLD) did not violate Article I, section 5 of the Washington constitution (protecting freedom of speech and related rights) when the library refused to disable the filter for adults using its Internet access, thus affecting the adult patron's access to some materials. The filters inevitably filter out more than obscene non-protected speech, but the majority refuses to find a constitutional overbreadth problem under the facts. The lead opinion also concludes that Internet access was not an aspect of the Article I, section 5 right to a limited public forum. "The filtering policy appears to us, as NCRLD contends, to be a reasonable measure that sets minimal restrictions on Internet access so that the Internet is used by all of NCRLD's patrons in a way that advances the duty of education and fulfills NCRLD's mission and traditional role."

Justice James Johnson writes a lone concurring opinion that agrees with the result under the lead opinion and compares the circumstances to the library's choice not to acquire all possible materials in light of limits on library resources.

Justice Chambers, joined by Stephens and Sanders, dissents. His dissenting opinion says that the library's use of the Internet filters is far too broad and is like "burning down the house to roast the pig."

Result: The Washington Supreme Court's opinion is its response to a certified question from the U.S. District Court for Eastern Washington (in relation to a federal court lawsuit); the Supreme Court answers the federal court that under the Washington constitution's Article I, section 5, a library may use an Internet filter, as indicated in this LED entry.

WASHINGTON STATE COURT OF APPEALS

ASKING PASSENGER IN PARKED CAR FOR ID WAS NOT A "SEIZURE;" CAR SEARCH CHALLENGE FAILS BECAUSE THEORY WAS NOT RAISED AT TIME OF TRIAL

State v. Johnson, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 1875794 (Div. II, 2010)

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

Working as a city-wide truancy enforcement officer for the Tacoma School District, [a law enforcement officer] was patrolling in a public park adjacent to a high school on a school day morning when he observed an occupied vehicle in a parking spot designated for persons with disabilities; the vehicle did not display a disabled placard or a disabled license plate, required for parking in the space. Without activating his emergency lights or siren, he parked his patrol car at an angle, about 10 to 15 feet behind the vehicle, for officer safety. [Court's footnote: *At his suppression hearing, Johnson testified that [the officer] had parked his patrol car in a manner that blocked the parking lot entrance. [the officer] testified that he had parked at an angle 10 to 15 feet behind the vehicle, "for officer safety, just in case either of the subjects in the vehicle was armed, [which] gave [him] an advantage of them not exactly knowing where [he] was at, and [his] car would provide cover, if needed." [The officer] did not assert, however, that in so doing he had been attempting to block the vehicle.*]

The vehicle's windows were "steamed up." [The officer] observed a female in the driver's seat and a male, Johnson, apparently sleeping, in the passenger's seat. He also observed that the female driver had "numerous sores on her arms, . . . appeared to be kind of be what [officers] refer to as tweaking, [and] was kind of uncontrollably moving involuntarily." In addition to enforcing the disabled parking violation, [the officer] suspected possible drug use and decided to check to see whether the vehicle's occupants were "okay."

[The officer] approached the female driver and asked why she and her passenger were at the park and why they had parked in a disabled spot. When he asked for identification, she provided only a name. Telling her that he would return, he went back to his patrol car and ran a records inquiry on the name. [The officer] did not, however, tell the driver or her passenger that they could not leave.

[The officer's] inquiry revealed a restraining order that prohibited a named male from having contact with this female driver. [The officer] returned to the patrol car to determine whether the male passenger was the same person listed on the restraining order. [The officer] asked for, but did not demand, identification from the passenger. The passenger told [the officer] that his name was "Duane K. Johnson" and provided a birth date. [The officer] ran another records inquiry, determined that "Duane K. Johnson" was a possible alias for Jesse Johnson, who had an outstanding felony warrant and "numerous" bench warrants for his arrest, and discovered that Johnson's booking photos matched the vehicle's male passenger. [Court's footnote: *The record on appeal does not identify the crimes underlying these warrants.*]

[The officer] returned to the vehicle, arrested Johnson on the warrants, handcuffed him, advised him of his Miranda rights, and placed him in the back of his patrol car. [The officer] then asked the female driver to step out of the

vehicle, patted her down for weapons, and asked her to stand near his patrol car while he searched the vehicle incident to Johnson's arrest.

Inside the vehicle, [the officer] discovered a small screw-top container (which tested positive for traces of heroin), one small rock of crack cocaine (found inside the screw-top container), and miscellaneous drug paraphernalia. He then arrested the female driver, advised her of her Miranda rights, placed her in the backseat of his patrol vehicle, and continued to search the vehicle incident to arrest.

The State charged Johnson with unlawful possession of a controlled substance, cocaine, Count I; unlawful use of drug paraphernalia, Count II; unlawful possession of a dangerous weapons, Count, III; obstructing a law enforcement officer, Count IV; and unlawful possession of a controlled substance, heroin, Count V. [In superior court proceedings that ended with his conviction in November of 2008], Johnson moved to suppress the evidence, arguing that [the officer's] initial "traffic stop" was pretextual and an unconstitutional seizure. Johnson did not expressly challenge the vehicle search as outside the scope of a lawful search incident to arrest of a person handcuffed in the back of a patrol car. The trial court denied Johnson's suppression motion.

At Johnson's first trial, the jury convicted him of obstructing a law enforcement officer, acquitted him of possession of a dangerous weapon, and failed to reach a verdict on the three other counts (two counts of unlawful possession of a controlled substance and one count of unlawful use of drug paraphernalia). At his second jury trial, the trial court relied on its previous denial of Johnson's suppression motion. The jury convicted Johnson of all three remaining charges.

ISSUES AND RULINGS: 1) Where (a) the patrol officer asked the passenger in the parked car for identification and ran a records check without telling the driver or passenger that they must remain in place, (b) where, in parking his patrol car behind the parked vehicle the officer did not activate his flashers or siren, and (c) where the officer apparently did not block the other vehicle or the exit to the parking area with his patrol car, was the passenger seized prior to the point when the officer learned that the passenger was the subject of several outstanding arrest warrants? (ANSWER: No, agree all three judges);

2) In the 2008 superior court proceedings, Johnson did not challenge the officer's authority to search the car incident to his arrest. By failing to raise the issue at the time of trial, did Johnson waive his right to challenge the car search in the Court of Appeals? (ANSWER: Yes, rules a 2-1 majority)

Result: Affirmance of Pierce County Superior Court convictions of Jesse Ray Johnson for obstructing a law enforcement officer, unlawful possession of a controlled substance (two counts) and unlawful use of drug paraphernalia.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. No seizure occurred prior to the officer learning of the arrest warrants for Johnson

The lead opinion analyzes the case under the following analysis (all 3 judges on the 3-judge panel concur in the following analysis on the "seizure" issue):

To determine whether a seizure occurred, Washington courts use an objective standard to examine the police officer's actions. State v. O'Neill, 148 Wn.2d 564 (2003) **April 03 LED:03**. Not every encounter between a law enforcement officer and an individual amounts to a seizure.

Washington Constitution article I, section 7 permits social contacts between police and citizens. Thus, an officer's mere social contact with an individual in a public place with a request for identifying information, without more, is not a seizure.

The Washington Supreme Court recently clarified the limitations of a "social contact" in State v. Harrington, 167 Wn.2d 656 (2009) **Feb 10 LED:17**. That court held that a series of police actions that might pass constitutional muster separately, may, when viewed cumulatively, constitute an impermissible progressive intrusion into a person's private affairs and, thus, an unlawful seizure.

An officer asked Harrington to remove his hands from his pockets. A second officer arrived and stood nearby. And, of particular significance, the first officer asked Harrington for permission to pat him down ("When [officer] requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington."). Harrington. Here, in contrast, the degree of officer intrusion was less because contact was limited to questions about the vehicle occupants' presence in the disabled parking spot and a request for identification.

[Court's footnote: Based on similar facts, Division Three of this court held that an encounter was not a seizure because the officer's intrusion was less than that in Harrington: "Here, no second officer joined Officer Walker, and his intrusions into Mr. Bailey's privacy progressed only as far as the second stage of Harrington, plus the additional intrusion of asking for Mr. Bailey's identification. And significantly, Mr. Bailey volunteered that he may have had an outstanding warrant as soon as he handed Officer Walker his identification." State v. Bailey, 154 Wn. App. 295 (2010) (citing Harrington) March 10 LED:13].

When an officer subjectively suspects the possibility of criminal activity but does not have suspicion justifying an investigative detention (Terry stop), officer contact does not constitute seizure. O'Neill. Thus, it is not a seizure when a law enforcement officer parks behind a vehicle parked in a public place, asks an occupant to roll down a window, questions him, and requests identification. See O'Neill.

[Court's footnote: Although vehicle passengers have a greater sense of security and privacy than do pedestrians, Wash. Const.'s art. I, § 7 distinction between these differing expectations of privacy disappears when a vehicle is parked in a public place. State v. Rankin, 151 Wn.2d 689 (2004) Aug 04 LED:07; O'Neill].

[Court's footnote: Johnson cites State v. Day, 161 Wn.2d 889 (2007) Dec 07 LED:18 for the proposition that an officer's mere suspicion that a civil infraction has been committed does not justify an investigative detention. But our Supreme Court (1) expressly stated that "an officer may approach and speak with the occupants of a parked car even when the observed facts do not reach

the Terry stop threshold"; and (2) made clear that it was deciding only whether such suspicion alone justified an investigative detention. Here, the issue is whether [the officer] seized Johnson before arresting him, and Day does not apply.]

Here, the trial court found credible [the officer's] testimony that he had parked his patrol car approximately 10 to 15 feet behind the vehicle [that was] illegally parked in the disabled spot and that [the officer] did not activate his emergency lights or siren. [The officer] was the only officer on the scene. He did not demand identification from Johnson, nor did he ask Johnson to step out of the parked vehicle until after he ([the officer]) had learned about Johnson's outstanding arrest warrants. Until this point, a reasonable person would have felt free to leave under the circumstances.

Accordingly, we hold that [the officer] lawfully contacted Johnson and asked for his identification when [the officer] found the vehicle in which Johnson was a passenger illegally parked in a spot reserved for persons displaying disability authorization.

[Some citations omitted; subheading added]

2. Johnson waived his "search incident" challenge by failing to raise the issue at trial

The Johnson Court rules by 2-1 vote (Judge Houghton dissenting) that, because Johnson failed to challenge the vehicle search in the 2008 superior court proceedings, Johnson waived his right to challenge the vehicle search, despite the fact that at the time of the superior court proceedings, the new vehicle search rules announced in Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**; State v. Valdez, 167 Wn.2d 761 (2009) **Feb 10 LED:11**; and State v. Patton, 167 Wn.2d 379 (2009) **Dec 09 LED:17** had not yet been announced.

LED EDITORIAL NOTE: There are conflicting Court of Appeals decisions on the question of waiver in light of the 2009 motor-vehicle-search rulings of Gant-Patton-Valdez. We expect the Washington Supreme Court to resolve this issue within the next year or so.

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

IN SPLIT DECISION, DISMISSAL OF CHARGES IS HELD TO BE REQUIRED BASED ON DETECTIVE'S SEIZURE AND SCRUTINY OF ATTORNEY-CLIENT-PROTECTED PAPERS TAKEN DURING EXECUTION OF A SEARCH WARRANT IN A CHILD SEX ABUSE INVESTIGATION – In State v. Perrow, ___ Wn. App. ___, ___ P.3d ___, 2010 WL 2038005 (Div. III, 2010), the Court of Appeals rules 2-1 that the trial court correctly dismissed criminal charges after it ruled that a detective violated attorney-client privilege. The majority opinion for the Court of Appeals explains as follows that the detective not only seized certain attorney-client-protected documents during the execution of a search warrant, but he also carefully reviewed the documents and presented a report on the documents to the prosecutor:

In October 2007, [an Okanogan County Sheriff's detective] began investigating Mr. Perrow's alleged sexual abuse of his daughter, A.P. On October 26, [the detective] called A.P. and told her he would assist her with obtaining a civil anti-harassment protection order against her father. After speaking with A.P., the

detective contacted an Okanogan County prosecuting attorney. A civil protection order was issued against Mr. Perrow on November 13. On or about November 14, [the detective] called Mr. Perrow and informed him of A.P.'s allegations. [The detective] then prepared an affidavit for a search warrant of Mr. Perrow's home.

Mr. Perrow received a copy of the protection order on November 17 and contacted Michael Vannier, an attorney, on or about November 19. Mr. Vannier agreed to represent Mr. Perrow on the civil protection order matter as well as the potential criminal charges. On November 20, Mr. Vannier met with Mr. Perrow and asked him to gather information about A.P.'s allegations and provide him with a "written narrative" of the matters. Mr. Perrow prepared the requested materials for his attorney.

On November 29, [the detective] and other law enforcement officers executed a search warrant at Mr. Perrow's home. [The detective] seized written materials from Mr. Perrow's residence, including two composition books, some notes, and a yellow note pad. During the search, Mr. Vannier received a phone call from either Mr. Perrow or his wife informing him that [the detective] was taking the materials Mr. Perrow had prepared for Mr. Vannier. Mr. Vannier told the caller to tell the officer that the materials were protected by the attorney-client privilege. Mr. Perrow told [the detective] that the seized items had been prepared for Mr. Vannier. [The detective] removed the items from Mr. Perrow's home and took them to the Okanogan County sheriff's office where he read and analyzed them.

[The detective] observed that the documents appeared to have been written after Mr. Perrow was served with the protection order on November 17. He read through the documents page by page and compared them with what Mr. Perrow had said on the phone. [The detective] prepared a written analysis of the documents. He forwarded his report and the seized documents to the prosecutor's office.

The Perrow majority judges (Judges Brown and Sweeney) conclude that the trial court correctly dismissed all charges against Perrow as the only reasonable remedy for violation of the attorney-client privilege by the detective.

The third Court of Appeals Judge, Kevin Korsmo, writes a lengthy dissent. He argues that, while the detective did commit a non-deliberate violation of the attorney-client privilege, it was not necessary or appropriate – or consistent with common sense – for the trial court to dismiss the charges. Rather, another prosecutor's office, screened from the attorney-client-protected documents, could have been asked to take over prosecutorial duties in the case, starting with the charging decision in the case, without benefit of the attorney-client protected information.

Result: Affirmance of Okanogan County Superior Court order dismissing charges of child molesting against James Martin Perrow.

LED EDITORIAL NOTE: The Perrow majority and dissenting opinions both discuss State v. Granacki, 90 Wn. App. 598 (Div. I, 1998) Aug 98 LED:19, in which the Court of Appeals held that dismissal of charges was necessitated by violation of the attorney-client privilege by a detective who, during a recess at trial, read the defense attorney's notes that had been left on counsel's table. The dissenting opinion also discusses State v. Garza, 99 Wn. App. 291 (Div. III, 2000) Jan 01 LED:21, a case in which correctional officers read through legal papers of inmates who had been involved in an escape

attempt; that case was remanded by the Court of Appeals for the trial court to make factual determinations of whether security concerns justified the corrections officers' review of some or all of the various documents. Also discussed in Perrow is the seminal Washington case on police violation of attorney-client privilege, State v. Cory, 62 Wn.2d 371 (1963), in which charges were dismissed because a sheriff bugged a jail meeting room and secretly recorded conversations between a criminal defendant and his attorney.

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

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

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

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

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