Law Enforcement Digest

APRIL 2012

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

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HONOR ROLL

678th Basic Law Enforcement Academy – October 11, 2011 through February 28, 2012

President:	Jason K. Schultz, Auburn PD
Best Overall:	Bryan B. Elliott, Yakima PD
Best Academic:	Scott B. Keller, Lynwood PD
Best Firearms:	Christopher C. Olin, Colfax PD
Patrol Partner Award:	Miles J. Imbery, Yakima PD
Tac Officer:	Officer Steve Grossfeld, Seattle PD

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WASHINGTON LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS MEMORIAL CEREMONY IS SCHEDULED FOR FRIDAY, MAY 4, 2012 IN OLYMPIA AT 1:00

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. The medal honors those law enforcement officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's Medal of Honor ceremony for Washington will take place Friday, May 4, 2012, starting at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus. The site is adjacent to the Supreme Court Temple of Justice.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT LAWSUIT: QUALIFIED IMMUNITY GRANTED TO OFFICERS WHO FORCIBLY ENTERED RESIDENCE IN SCHOOL-BOMB-THREAT-RUMOR CASE WHERE HOME OCCUPANT RAN INSIDE WHEN OFFICER ASKED WHETHER THERE WERE GUNS IN THE RESIDENCE

Ryburn v. Huff, ___U.S. ___, 2012 WL 171121 (Jan. 23, 2012)

LED INTRODUCTORY EDITORIAL COMMENTS: In the Ryburn case digested below, the U.S. Supreme Court unanimously agrees in a "per curiam decision" (a decision of the Court without attribution of authorship to any one Justice) to reverse the 2-1 Ninth Circuit decision in Huff v. City of Burbank, 632 F.3d 539 (9th Cir. 2011) March 11 LED:02. The Supreme Court grants qualified immunity to all officers in the case. Often, when an appellate court grants qualified immunity to officers, the court indicates: (1) that the officers made a mistaken assessment of the constitutional standard in place at the time of their actions, but the mistake was a reasonable one in light of lack of clear guidance in prior case law (and therefore the officers are entitled to qualified immunity), but (2) that in cases arising in the future, officers will be on notice as to the constitutional standard and will not be entitled to qualified immunity for acting in the same way as the officers acted in the case at hand. This is not such a case. The Supreme Court opinion in Ryburn does not expressly declare whether the officers violated the Fourth Amendment or not, but the tenor of the Ryburn opinion is that the officers acted in compliance with the Fourth Amendment under the facts as found by the trial court judge in a bench trial.

Another aspect of this case that is out of the norm from most Civil Rights Act decisions on qualified immunity digested in the LED is the procedural posture of the case. Most such cases involve appellate review of summary judgment rulings by trial courts. In appellate review of trial court summary judgment rulings, the allegations of the plaintiffs are viewed in the best light to the plaintiffs. In Ryburn, however, the case was fully tried

on the facts to the trial judge in a non-jury trial. Therefore, deference to the findings of fact by the trial court, not deference to the allegations by the plaintiffs, was required on appellate review. The U.S. Supreme Court analysis in Ryburn indicates that the majority judges on the Ninth Circuit 3-judge panel in Ryburn failed to adhere to the proper review standard in that they did not defer to the findings of fact by the trial judge.

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

> Petitioners Darin Ryburn and Edmundo Zepeda, along with two other officers from the Burbank Police Department, responded to a call from Bellarmine-Jefferson High School in Burbank, California. When the officers arrived at the school, the principal informed them that a student, Vincent Huff, was rumored to have written a letter threatening to "shoot up" the school. The principal reported that many parents, after hearing the rumor, had decided to keep their children at home. The principal expressed concern for the safety of her students and requested that the officers investigate the threat.
>
> In the course of conducting interviews with the principal and two of Vincent's classmates, the officers learned that Vincent had been absent from school for two days and that he was frequently subjected to bullying. The officers additionally learned that one of Vincent's classmates believed that Vincent was capable of carrying out the alleged threat. The officers found Vincent's absences from school and his history of being subjected to bullying as cause for concern. The officers had received training on targeted school violence and were aware that these characteristics are common among perpetrators of school shootings.
>
> The officers decided to continue the investigation by interviewing Vincent. When the officers arrived at Vincent's house, Officer Zepeda knocked on the door and announced several times that the officers were with the Burbank Police Department. No one answered the door or otherwise responded to Officer Zepeda's knocks. Sergeant Ryburn then called the home telephone. The officers could hear the phone ringing inside the house, but no one answered.
>
> Sergeant Ryburn next tried calling the cell phone of Vincent's mother, Mrs. Huff. When Mrs. Huff answered the phone, Sergeant Ryburn identified himself and inquired about her location. Mrs. Huff informed Sergeant Ryburn that she was inside the house. Sergeant Ryburn then inquired about Vincent's location, and Mrs. Huff informed him that Vincent was inside with her. Sergeant Ryburn told Mrs. Huff that he and the other officers were outside and requested to speak with her, but Mrs. Huff hung up the phone.
>
> One or two minutes later, Mrs. Huff and Vincent walked out of the house and stood on the front steps. Officer Zepeda advised Vincent that he and the other officers were there to discuss the threats. Vincent, apparently aware of the rumor that was circulating at his school, responded, "I can't believe you're here for that." Sergeant Ryburn asked Mrs. Huff if they could continue the discussion inside the house, but she refused. In Sergeant Ryburn's experience as a juvenile bureau sergeant, it was "extremely unusual" for a parent to decline an officer's request to interview a juvenile inside. Sergeant Ryburn also found it odd that Mrs. Huff never asked the officers the reason for their visit.
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> After Mrs. Huff declined Sergeant Ryburn's request to continue the discussion inside, Sergeant Ryburn asked her if there were any guns in the house. Mrs. Huff responded by "immediately turn[ing] around and r[unning] into the house." Sergeant Ryburn, who was "scared because [he] didn't know what was in that

house" and had "seen too many officers killed," entered the house behind her. Vincent entered the house behind Sergeant Ryburn, and Officer Zepeda entered after Vincent. Officer Zepeda was concerned about "officer safety" and did not want Sergeant Ryburn to enter the house alone. The two remaining officers, who had been standing out of earshot while Sergeant Ryburn and Officer Zepeda talked to Vincent and Mrs. Huff, entered the house last, on the assumption that Mrs. Huff had given Sergeant Ryburn and Officer Zepeda permission to enter.

Upon entering the house, the officers remained in the living room with Mrs. Huff and Vincent. Eventually, Vincent's father entered the room and challenged the officers' authority to be there. The officers remained inside the house for a total of 5 to 10 minutes. During that time, the officers talked to Mr. Huff and Vincent. They did not conduct any search of Mr. Huff, Mrs. Huff, or Vincent, or any of their property. The officers ultimately concluded that the rumor about Vincent was false, and they reported their conclusion to the school.

The Huffs brought this action against the officers under [the federal Civil Rights Act]. The complaint alleges that the officers violated the Huffs' Fourth Amendment rights by entering their home without a warrant. Following a 2-day bench trial, the District Court entered judgment in favor of the officers. The District Court resolved conflicting testimony regarding Mrs. Huff's response to Sergeant Ryburn's inquiry about guns by finding that Mrs. Huff "immediately turned around and ran into the house." The District Court concluded that the officers were entitled to qualified immunity because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led reasonable officers to believe "that there could be weapons inside the house, and that family members or the officers themselves were in danger." The District Court noted that "[w]ithin a very short period of time, the officers were confronted with facts and circumstances giving rise to grave concern about the nature of the danger they were confronting." With respect to this kind of "rapidly evolving incident," the District Court explained, courts should be especially reluctant "to fault the police for not obtaining a warrant."

A divided panel of the Ninth Circuit affirmed the District Court as to the two officers who entered the house on the assumption that Mrs. Huff had consented, but reversed as to [the first three officers to enter the house]. The majority upheld the District Court's findings of fact, but disagreed with the District Court's conclusion that petitioners were entitled to qualified immunity. The majority acknowledged that police officers are allowed to enter a home without a warrant if they reasonably believe that immediate entry is necessary to protect themselves or others from serious harm, even if the officers lack probable cause to believe that a crime has been or is about to be committed. But the majority determined that, in this case, "any belief that the officers or other family members were in serious, imminent harm would have been objectively unreasonable" given that "[Mrs. Huff] merely asserted her right to end her conversation with the officers and returned to her home."

Judge Rawlinson dissented. She explained that "the discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house." She faulted the majority for "recit[ing] a sanitized account of this event" that differed markedly from the District Court's findings of fact, which the majority had conceded must be credited. Judge Rawlinson looked to "cases that specifically address the scenario where officer safety concerns prompted the entry" and concluded that,

> under the rationale articulated in those cases, "a police officer could have reasonably believed that he was justified in making a warrantless entry to ensure that no one inside the house had a gun after Mrs. Huff ran into the house without answering the question of whether anyone had a weapon."

[Citations to record omitted]

ISSUE AND RULING: The officers were at the home of the Huffs in response to their son's absence from school, the son's history of being bullied, a rumor that the son had written a letter threatening to "shoot up" the school, and a classmate's opinion that the son was capable of carrying out the alleged threat. The officers entered the home after the son's mother reacted to a question of whether there were guns in the house by immediately turning around and running into the house. In light of the fact findings by the trial court and in light of existing case law, are all of the officers entitled to qualified immunity on the grounds that a police officer could have reasonably believed that he or she was justified in making a warrantless entry to ensure that no one inside the house had a gun that would endanger the officers or others? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court; the Court limits its analysis to the qualified immunity issue and does not reach the question of whether the officers' were or were not in compliance with the Fourth Amendment in entering the residence)

Result: Reversal of Ninth Circuit Court of Appeals opinion (see Huff v. City of Burbank, 632 F.3d 539 (9th Cir. 2011) **March 11 LED:02**) that reversed the District Court (Central District Court of California) grant of summary judgment to the officers.

ANALYSIS: (Excerpted from Supreme Court opinion)

> Judge Rawlinson's analysis of the qualified immunity issue was correct. No decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case. On the contrary, some of our opinions may be read as pointing in the opposition direction.
>
> In Brigham City v. Stuart, 547 U.S. 398 (2006) **July 06 LED:02**, we held that officers may enter a residence without a warrant when they have "an objectively reasonable basis for believing that an occupant is . . . imminently threatened with [serious injury]." We explained that "'[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" In addition, in Georgia v. Randolph, 547 U.S. 103 (2006) **June 06 LED:06**, the Court stated that "it would be silly to suggest that the police would commit a tort by entering [a residence] . . . to determine whether violence . . . is about to (or soon will) occur."
>
> A reasonable police officer could read these decisions to mean that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. In this case, the District Court concluded that petitioners had such an objectively reasonable basis for reaching such a conclusion. The District Court wrote:
>
> > "[T]he officers testified that a number of factors led them to be concerned for their own safety and for the safety of other persons in the residence: the unusual behavior of the parents in not answering the door or the telephone; the fact that Mrs. Huff did not inquire about the reason for their visit or express concern that they were investigating her son; the fact that she hung up the telephone on the officer; the fact that she refused to tell them whether there were guns in the house; and finally, the fact that

> she ran back into the house while being questioned. That behavior, combined with the information obtained at the school — that Vincent was a student who was a victim of bullying, who had been absent from school for two days, and who had threatened to 'shoot up' the school — led the officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger."

This belief, the District Court held, was "objectively reasonable," particularly since the situation was "rapidly evolving" and the officers had to make quick decisions.

The panel majority — far removed from the scene and with the opportunity to dissect the elements of the situation — confidently concluded that the officers really had no reason to fear for their safety or that of anyone else. As the panel majority saw things, it was irrelevant that the Huffs did not respond when the officers knocked on the door and announced their presence and when they called the home phone because the Huffs had no legal obligation to respond to a knock on the door or to answer the phone. The majority attributed no significance to the fact that, when the officers finally reached Mrs. Huff on her cell phone, she abruptly hung up in the middle of their conversation. And, according to the majority, the officers should not have been concerned by Mrs. Huff's reaction when they asked her if there were any guns in the house because Mrs. Huff "merely asserted her right to end her conversation with the officers and returned to her home."

Confronted with the facts found by the District Court, reasonable officers in the position of petitioners could have come to the conclusion that there was an imminent threat to their safety and to the safety of others. The Ninth Circuit's contrary conclusion was flawed for numerous reasons.

First, although the panel majority purported to accept the findings of the District Court, it changed those findings in several key respects. As Judge Rawlinson correctly observed, "the discrete incident that precipitated the entry in this case was Mrs. Huff's response to the question regarding whether there were guns in the house." The District Court's finding that Mrs. Huff "immediately turned around and ran into the house" implicitly rejected Mrs. Huff's contrary testimony that she walked into the house after telling the officers that she was going to get her husband. The panel majority upheld the District Court's findings of fact and acknowledged that it could not reverse the District Court simply because it "may have weighed the testimony of the witnesses and other evidence in another manner." But the panel majority's determination that petitioners were not entitled to qualified immunity rested on an account of the facts that differed markedly from the District Court's finding. According to the panel majority, Mrs. Huff "merely asserted her right to end her conversation with the officers and returned to her home" after telling the officers "that she would go get her husband."

Second, the panel majority appears to have taken the view that conduct cannot be regarded as a matter of concern so long as it is lawful. Accordingly, the panel majority concluded that Mrs. Huff's response to the question whether there were any guns in the house (immediately turning around and running inside) was not a reason for alarm because she was under no legal obligation to continue her conversation with the police. It should go without saying, however, that there are many circumstances in which lawful conduct may portend imminent violence.

> Third, the panel majority's method of analyzing the string of events that unfolded at the Huff residence was entirely unrealistic. The majority looked at each separate event in isolation and concluded that each, in itself, did not give cause for concern. But it is a matter of common sense that a combination of events each of which is mundane when viewed in isolation may paint an alarming picture.
>
> Fourth, the panel majority did not heed the District Court's wise admonition that judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation. With the benefit of hindsight and calm deliberation, the panel majority concluded that it was unreasonable for petitioners to fear that violence was imminent. But we have instructed that reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" and that "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments — in circumstances that are tense, uncertain, and rapidly evolving." Graham v. Connor, 490 U.S. 386 (1989). Judged from the proper perspective of a reasonable officer forced to make a split-second decision in response to a rapidly unfolding chain of events that culminated with Mrs. Huff turning and running into the house after refusing to answer a question about guns, petitioners' belief that entry was necessary to avoid injury to themselves or others was imminently reasonable.
>
> In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent. And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court.

[Citations to record omitted; some case citations omitted]

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

(1) CIVIL RIGHTS ACT LAWSUIT: LAWSUIT ARISING OUT OF NEVADA STATE PRISON HELD NOT TO VIOLATE EIGHTH AMENDMENT BECAUSE HARASSING ACT OF GUARD NOT "HARMFUL ENOUGH," BUT CLAIM FOR RETALIATION MUST GO TO TRIAL – In Watison v. Carter, ___ F.3d ___, 2012 WL 432296 (9th Cir., Feb. 13, 2012), a three judge panel rules in a 2-1 vote: (1) that a male prison guard's inappropriate act of unjustifiably touching a male prisoner's leg and smirking while the prisoner was sitting on the toilet was not "harmful enough" to rise to the level of an Eighth Amendment violation under Civil Rights Act case law; (2) but that the allegations by the prisoner about a variety of negative actions alleged to have been committed by prison employees in response to the prisoner's complaint about the incident must go to trial on the question of whether any of those actions were retaliatory within the meaning of Civil Rights Act case law.

Dissent: The dissenting judge argues that the panel should have ruled that the case must be tried on the Eighth Amendment issue as well as the retaliation issue.

Result: Reversal in part of U.S. District Court (Nevada) dismissing the prisoner's lawsuit.

(2) CIVIL RIGHTS ACT LAWSUIT: PARENTS OF DRIVER SHOT AND KILLED BY POLICE OFFICER MAY NOT SUE THE POLICE WHERE: (A) A PASSENGER IN THE VEHICLE WAS CONVICTED AS ACCOMPLICE FOR ASSAULTING POLICE WITH THE

VEHICLE, AND (B) SHOOTING WAS HELD JUSTIFIED BY JURY IN EARLIER CRIMINAL CASE – In Beets v. County of Los Angeles, ___ F.3d ___, 2012 WL 414668 (9th Cir., Feb. 10, 2012), a three-judge panel holds that Heck v. Humphrey, 512 U.S. 477 (1994) bars a Civil Rights Act lawsuit brought by parents of a driver who a police officer shot and killed when the driver attacked police with a pickup truck.

In its 1994 decision in Heck, the U.S. Supreme Court held that a Civil Rights Act lawsuit cannot be pursued where the lawsuit is based on a factual theory that is inconsistent with a criminal conviction arising from the same nucleus of facts. Under the doctrine of favorable termination, if injunctive or monetary judgment in favor of a plaintiff would necessarily imply that a conviction or sentence is invalid, the action is not cognizable absent a prior determination of invalidity of the conviction or sentence. Heck, 512 U.S. at 487. In Beets, the Ninth Circuit panel concludes that Heck bars a Civil Rights Act lawsuit by the parents of the driver who attacked police with his vehicle. Heck bars the suit, the Court holds, because a passenger in the vehicle was convicted of being an accomplice in the attack on the officer, and this conviction included express factual determinations by the jury that the officer who shot the driver both: (1) was acting within the scope of his duties, and (2) did not use excessive force in shooting the driver.

Result: Affirmance of U.S. District Court (Central District of California) order dismissing the lawsuit.

(3) CIVIL RIGHTS ACT LAWSUIT: ALLEGATIONS SUFFICIENT TO GO TO TRIAL WHERE FAMILY ALLEGES DETECTIVE WAS AT LEAST RECKLESS IN OMITTING FROM SEARCH WARRANT AFFIDAVIT FACT THAT SON-SUSPECT WAS IN PRISON, SO COULD NOT HAVE COMMITTED CRIME OR HIDDEN WEAPONS FROM THAT CRIME IN FAMILY HOME – In Bravo v. City of Santa Maria (California), 665 F.3d 1076 (9th Cir. Dec., 9, 2011), a 3-judge Ninth Circuit panel summarizes as follows the case and the Court's holding in the Court's opening paragraph:

> Hope Bravo and Javier Bravo Sr., along with their minor granddaughter E.B. (collectively "the Bravos"), appeal the adverse summary judgment grant in their 42 U.S.C. § 1983 action arising out of the nighttime SWAT team search of their home for weapons suspected of being used in a drive-by shooting and stored in the Bravo home by their son, Javier Bravo Jr. ("Javier Jr."). The Bravos allege their Fourth Amendment rights were violated by the issuance and execution of a search warrant whose application failed to disclose that Javier Jr. was at that time, and for over six months had been, incarcerated in the California prison system and therefore not only was not present in the Bravo home, but moreover could not have been involved in the shooting or the storage of weapons used in it. Because the Bravos presented sufficient evidence establishing a genuine issue as to whether [the] omission [by Detective A] of this material fact was intentional or reckless, as opposed to merely negligent, we reverse the summary judgment grant in his favor and remand.

In a Civil Rights Act (CRA) lawsuit, a grant by the trial court of summary judgment to civil defendant law enforcement, as happened in this case, cannot be upheld if, viewing the evidence in the best light for the plaintiffs, any genuine issue of material fact remains for a fact-finder to resolve under the law governing that case. Law enforcement officers can be held liable under the CRA if they commit deception by intentionally or recklessly making material misstatements or omitting material facts in a search warrant affidavit.

The Ninth Circuit panel rules that there was a basis for a reckless-omission-based CRA lawsuit in the failure by [Detective A] to include in the search warrant affidavit the fact that the adult, gang-member son of the Bravos had been in prison at the point when the crime under investigation was committed, and had been in prison at all times since, through the date of the

application. The omission was material because its inclusion of the information likely would have resulted in denial of the search warrant for the Bravos' home, the panel concludes. That is because the information negates probable cause to search for "any and all guns, ammunition" and other things sought under the warrant, which request was based entirely on the son's own suspected involvement (not any involvement of any other Bravo family member) in hiding weapons and ammunition for other gang members who were suspected of having committed the drive-by shooting under investigation.

The panel also concludes that there is sufficient evidence in the record to present a fact question as to whether the omission was at least reckless (as opposed to merely negligent, which would not be actionable). That conclusion is based on the following facts, as described in the Ninth Circuit panel's opinion (the first three paragraphs excerpted here are from the preliminary, "background" section of the opinion, while the fourth paragraph excerpted is from the later, discussion/analysis section of the opinion):

> [Based on information from a number of informants and on other information, Detective A] prepared an affidavit in support of a "multiple location gang association warrant," which [Santa Maria Police Department] SMPD obtained four days later from a Santa Barbara County Superior Court Judge. The warrant was sealed for the informants' protection and authorized search of seven individuals suspected of harboring weapons and evidence relating to the drive-by shooting, as well as search of those persons' residences and vehicles, and search of any persons or vehicles present at the time of the warrant' execution. The warrant authorized the seizure of guns of the caliber used at the shooting, all other firearms, ammunition, and casings, and any indicia of gang membership. . .
>
> [Detective A's] affidavit listed Javier Jr.'s [the gang member son's] address as the Bravo residence and contained a brief summary of Javier Jr.'s criminal history report, commonly known as a "rap sheet." The affidavit specifically noted Javier Jr.'s recent conviction for violation of California Penal Code § 496(A), receiving stolen property, but failed to mention that Javier Jr. had been sentenced and was over six months into serving a two-year sentence in state prison for that crime. Deposed in this litigation, [Detective A] admits he obtained Javier Jr.'s criminal history from his rap sheet and may have seen the two-year sentence entry, which appeared just two lines below the conviction entry, but does not recall with certainty whether he observed it or not. He further testified that, in any event, even if he had seen the sentence on Javier Jr.'s rap sheet, ordinarily it "wouldn't be something [he] would check into."
>
> Detective Lara testified that he called the Santa Barbara County Sheriff's Office ("SBSO") substation, consistent with standard SMPD practice, to ascertain the custody status of the individuals named in the warrant application and was told by an unidentified substation employee that Javier Jr. was not in custody. Upon learning that James Franklin, another suspect originally named in the warrant application, was in custody, the officers removed his name from the application. No substation employee, however, recalls receiving such a call from Lara. Furthermore, several SBSO employees explained that their database contains only information on persons in county jail, not those in state prison, and that the only way to determine a person's state custody status is to call the state prison system's Inmate Locator number. No SMPD officer claims to have taken any other action to determine whether Javier Jr. or any of the other named individuals was in state custody at the time.
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> . . . .

> . . . . In opposing summary judgment, the Bravos submitted deposition testimony by [Lieutenant C], who stated "that a reasonably competent police officer, had he seen [the two-year sentence on Javier Jr.'s rap sheet], would have done additional follow-up." Ralston further testified that he told [Detectives A and B] he "was disappointed that they didn't pay attention to [the two-year sentence] or didn't see it" because he thought it was "pertinent to the investigation," "was something that should have been observed," and was "important to know. . . . Important enough to tell the judge when you were seeking the warrant." Similarly, the SBSO Sheriff's Commander testified that "if the reason for the gang association warrant was because [Javier Jr.] was associated with that residence and I knew that he was not, in fact, there, that he was in prison, I'd ask a lot more questions about the warrant and the people who lived there and do some more background checks and find out why, in fact, that residence had been identified as a possible search warrant." All this and other evidence in the record suggests that [Detective A's] omission of this material fact was more than "mere negligence."

Result: Reversal of U.S. District Court (Central District of California) grant of summary judgment to the law enforcement defendants; remand to District Court for trial on the "judicial deception" issue and for resolution of other issues not addressed in this LED entry.

LED INTRODUCTORY EDITORIAL NOTE REGARDING ENTRIES ON THE GLENN AND YOUNG DECISIONS DIGESTED IMMEDIATELY BELOW: To save space in an effort to reduce a backlog of LED cases, we are providing considerably shorter entries than usual on these two Ninth Circuit decisions on civil liability for use of force. We note that both Glenn and Young involve review of trial court summary judgment rulings for the law enforcement officers being sued in the cases, and that appellate court review of such summary judgment rulings (1) assumes the truth of the plaintiffs' fact claims and (2) views those fact claims in the best light for the plaintiffs. We also remind readers who want the factual and analytical details on these Ninth Circuit rulings that, as we note at the close of each month's LED, the full text of Ninth Circuit decisions can be accessed at http://www.ca9.uscourts.gov/.

(4) CIVIL RIGHTS ACT LAWSUIT: GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER USE OF LESS-THAN-LETHAL BEANBAG SHOTGUN, AND SUBSEQUENT USE OF LETHAL FORCE AGAINST DRUNK AND "SUICIDAL" YOUNG MAN, WAS REASONABLE USE OF FORCE UNDER FACTS ALLEGED BY PLAINTIFF – In Glenn v. Washington County, 661 F.3d 460 (9th Cir., Nov. 4, 2011, Amended Dec. 27, 2011), a three-judge Ninth Circuit panel concludes that a case must go to trial on fact questions relating to whether officers used excessive force where they used a beanbag gun on a drunk 18-year-old threatening suicide with a pocket knife, and then shot him with bullets almost immediately after he was hit by the beanbags and he made a movement that could have been the result of being hit by the beanbags.

Among other things, the Ninth Circuit panel concludes that under the reasonableness test for use of force under the Fourth Amendment, the use of a beanbag shotgun is not lethal force but poses a significant danger of harm and requires a strong government interest to justify it. The panel further concludes that a fact-finder could determine from the allegations by the plaintiffs: (1) that the officers should not have used the significant level of force of a beanbag shotgun so early in the confrontation with an apparently suicidal, drunk young man who did not appear to be a threat to the officers or others at the point when the beanbags were used; (2) that the officers' warnings prior to using the beanbag weapon were not adequate in light of the chaotic circumstances and the mental status of the young man; (3) that any need to use lethal force was the product of having knocked the young man off balance with beanbags, plus the arguably

unreasonable positioning of police and other police tactics that unnecessarily placed bystanders in peril once the beanbag weapons had been used.

Result: Reversal of United States District Court (Oregon) dismissal of excessive force claim; case remanded for trial.

(5) CIVIL RIGHTS ACT LAWSUIT: GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER USE OF PEPPER SPRAY AND BATON AGAINST BROCCOLI- AND TOMATO- EATING TRAFFIC DETAINEE WHO WAS A JACKASS BUT NOT A SAFETY THREAT IN REFUSING TO GET BACK INTO HIS VEHICLE WAS REASONABLE UNDER THE FACTS ALLEGED BY PLAINTIFF – In Young v. County of Los Angeles, 655 F.3d 1156 (9th Cir., Aug. 26, 2011), a three-judge panel concludes that a case must go to trial on fact questions relating to whether a law enforcement officer was reasonable in using pepper spray and a baton on a traffic detainee who refused to get back in his vehicle while the officer wrote a traffic citation.

Most of the communications in the contact described here were audiotaped. It was mid-morning. Plaintiff Young, a 46-year-old probation officer, was not wearing his seat belt while driving his pickup truck. He was in his workout clothes on his way to the gym. He was eating a snack of broccoli and tomatoes. Deputy Wells was on his police motorcycle when he stopped Young for the seatbelt violation. Young could not initially find the vehicle registration. When Young found the registration, he got out of his truck and walked it back to Deputy Wells. The deputy took the registration and told Young "just have a seat in the truck." Young replied, "I don't feel like sitting in my truck man." Instead, Young walked past his truck, took a seat on the curb, and resumed eating his snack.

Deputy Wells unsuccessfully ordered Young several times to get back in his truck, finally telling him that the ticket could not be processed until Young complied. Still not seeing compliance, Deputy Wells walked over behind Young and pepper-sprayed him without warning. Young then stood up, stating "I'm an officer of the law." Young also complained about the lack of a warning about the pepper spray. Deputy Wells continued to apply pepper spray and replied that he was not required to give a warning.

Deputy Wells then pulled his baton. He was able to land a shin blow, but Young did not comply by taking a prone position on the ground for handcuffing until a backup officer arrived. Young alleges that Deputy Wells hit him once more with the baton after he was on the ground with the backup officer sitting on his back. After the backup officer had put on the handcuffs, Young complained about their tightness. The backup officer responded "Well, you know what, that's part of not going along with the program."

The Ninth Circuit panel asserts that in the appellate briefing the attorneys for Deputy Wells did not contend that Deputy Wells reasonably felt threatened by Young's non-compliance or actions during the contact. The panel concludes that a jury could find Deputy Wells to have been unreasonable both in his use of pepper spray and in his use of his baton. Among other things, the panel further concludes that a jury could determine based on Young's allegations and the audiotape evidence that Deputy Wells had the following reasonable, lesser-force alternatives to using the "intermediate" force modes of pepper spray and baton. Those alternatives are: (1) warning of a possible arrest for obstructing; (2) warning that force would be used to make an arrest; (3) trying first to handcuff Young; or (4) waiting for the backup officer to arrive to aid with the compliance efforts.

The panel also concludes that Deputy Wells is not entitled to qualified immunity because, under the factual allegations (assuming their truth) and previous case law, a reasonable officer would have known that the uses of pepper spray and baton were not justified.

The panel rejects Young's false imprisonment claim, explaining "a police officer issuing a traffic citation does not violate the Fourth Amendment by ordering a driver to reenter his vehicle for the duration of a traffic stop. Based upon this holding, we conclude that Wells's order that Young reenter his vehicle was a lawful one that, [under California law], Young was required to obey."

Result: Reversal of United States District Court (Central District of California) order granting summary judgment on excessive force and negligence claims; affirmance of District Court order granting summary judgment to law enforcement on the false imprisonment claim.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) STATE'S FAILURE TO PROVE INTERPRETER GAVE IMPLIED CONSENT WARNINGS REQUIRES REVERSAL OF CONVICTIONS BASED ON BLOOD DRAW – In State v. Morales, ___Wn.2d ___, 2012 WL 243576 (Jan. 26, 2012), the Washington Supreme Court rules, 8-1, that the State failed to establish that a hospital blood draw from a Spanish-speaking vehicular assault suspect satusfued the warnings requirement of RCW 46.20.308.

A person under arrest for vehicular assault is subject to a warrantless mandatory blood alcohol test under RCW 46.20.308. The suspect, however, generally must first be given the special evidence warning under the statute. The warning must advise the suspect that he or she will be subjected to a blood alcohol test, and that he or she has the right to choose any qualified person to administer additional tests.

Prior to the mandatory blood draw in this case, the arresting law enforcement officer asked a hospital Spanish-language interpreter to read the special evidence warning of RCW 46.20.308 in Spanish to vehicular assault arrestee, Jose Morales, who did not understand English. The officer did not speak Spanish and could not verify that the warning was accurately read to Morales by the interpreter, or that Morales' response was that he understood the warning. The interpreter was not called to testify at trial, nor was the alleged signed special evidence form introduced into evidence.

The Supreme Court majority holds that the State failed to prove that Morales was adequately informed of his right to an independent blood alcohol test, and that this failure requires reversal of certain of Morales' convictions that depended on evidence obtained in the blood test.

Dissent: Justice James Johnson dissents on dual rationales, first contending that in all probability the interpreter accurately read the warning to Morales, and, second, alternatively, any error in admitting the blood test results was harmless in light of other evidence in the case.

Result: Reversal of Court of Appeals ruling that affirmed the Lewis County Superior Court convictions of Jose Matilde Morales for (1) DUI, and (2) for vehicular assault by driving a vehicle (a) under the influence of intoxicants, and (b) in a reckless manner; case remanded for possible retrial on charges on which the convictions were reversed. The Supreme Court does not reverse Morales' convictions for (1) hit and run, and (2) vehicular assault committed by means of disregard for safety of others (note that the jury had convicted Morales on all three alternatives under which vehicular assault can be committed, and his appeal challenged the results as to only two of those three alternatives).

LED EDITORIAL COMMENT: The result in this case could have been avoided by calling the hospital interpreter to testify at trial. Legal advisors and prosecutors are also considering other options that may be available to avoid the result in this case without having to call the interpreter at trial. One such option might be to utilize a language line interpreter and tape record the conversation. Another option being discussed is to make a video of the warnings being read and play the video for the suspect. If the collective wisdom of legal advisors and/or prosecutors reveals a "best practices" or suggestion in

this regard, we will include that information in a future LED. Meanwhile, as always we urge consultation with agency legal advisors and/or prosecutors on this and other issues, including consideration of the option of seeking a search warrant for blood in some vehicular assault and vehicular homicide cases where an interpreter is not available. See City of Seattle v. St. John, 166 Wn.2d 941 (2009)(approving of the use of search warrants for blood in DUI cases).

(2) TERMINATION OF JUVENILE OFFENDER'S OBLIGATION TO REGISTER AS A SEX OFFENDER, BASED IN PART ON RECOMMENDATION OF TREATMENT PROVIDER, IS EQUIVALENT PROCEDURE TO A "CERTIFICATE OF REHABILITATION" BASED ON A FINDING OF REHABILITATION UNDER RCW 9.41.040(3) ENTITLING JUVENILE TO RESTORATION OF FIREARMS RIGHTS – In State v. RPH, 173 Wn.2d 199 (Dec. 1, 2011) the Supreme Court holds 7-2 that termination of a juvenile offender's obligation to register as a sex offender is an equivalent procedure to a "certificate of rehabilitation" based on a finding of rehabilitation, thus entitling him to restoration of his right to possess a firearm.

RPH pled guilty to first degree child rape (a class A felony and sex offense). As a result he was required to register as a sex offender and informed that he could not possess a firearm. Seven years later, as an adult, RPH moved for relief from the duty to register as a sex offender and to have his firearm rights restored. The superior court relieved him from the duty to register but denied the motion for restoration of firearms rights. The superior court's order relieving RPH from the registration requirement was based in part on a letter from his treatment provider indicating that he had completed treatment and that the provider recommended relief from the duty to register.

RCW 9.41.040 provides in part:

> (1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.
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> (b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.
>
> (2)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:
>
> (i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section, . . .
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> . . . .
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> (3) Notwithstanding RCW 9.41.047 or any other provisions of law, as used in this chapter, a person has been "convicted", whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, ... Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other

equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court' disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4)(a) . . . . Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(i) Under RCW 9.41.047; and/or

(ii)(A) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

. . .

[Emphasis added]

The majority's analysis is as follows:

Former RCW 9A.44.140(4)(b)(ii) (2000) provided that a court may relieve a person of the duty to register for a sex offense committed when the person was under the age of 15 if the person has not been adjudicated of any additional sex offenses or kidnapping offenses during the 24 months following the adjudication and "proves by a preponderance of the evidence that future registration . . . will not serve the purposes of RCW 9A.44.130, 10.01.200, 43.43.540, 46.20.187, 70.48.470, and 72.09.330." It is our view that the order of the superior court terminating RPH's registration requirement, which was based in part on a submission from his treatment provider, is tantamount to a determination that RPH is rehabilitated. It is, in sum, equivalent to a certificate of rehabilitation based on a finding of rehabilitation.

Our holding is entirely consistent with a prior decision of this court, State v. Radan, 143 Wn.2d 323 (2001) **June 01 LED:05**. There we concluded that an early discharge from supervision by Montana authorities of a person who had been convicted in that state of first degree theft, combined with a letter from that state's department of corrections recommending discharge, was a procedure equivalent to a certificate of rehabilitation based on a "'finding of the rehabilitation'" under RCW 9.41.040(3). In reaching this decision, our court did not rely on the fact that Montana's early discharge of the defendant, Richard Radan, automatically restored all of his civil rights, including the right to bear arms. Rather, we looked to what the discharge procedure in Montana was based on in reaching our conclusion that it was equivalent to a certificate of rehabilitation pursuant to RCW 9.41.040(3).

Here we have a situation very similar to that in Radan, albeit with a superior court judge of this state discharging RPH. The fact that the discharge was ordered by

> a court, rather than a department of corrections of another state, does not render the discharge any less equivalent to a certificate of rehabilitation. Indeed, in our view, it carries more force. In sum, we consider the superior court's order discharging RPH from the necessity of registering as a sex offender to be equivalent to a certificate of rehabilitation under RCW 9.41.040(3). RPH should, therefore, not be barred from exercising the right to possess firearms.

[Footnote omitted]

Dissent: Chief Justice Madsen files a dissent joined by Justice Wiggins, arguing that RCW 9.41.040(4)(a) prohibits RPH from ever having his firearm rights restored, there is no procedure in Washington for granting a "certificate of rehabilitation," (see State v. Masangkay, 121 Wn. App. 904, 906 (2004) **Oct 04 LED:19**), and the majority's opinion is not supported by Radan.

Result: Reversal of King County Superior Court order (and Court of Appeals) termination duty to register, but denying firearm restoration.

LED EDITORIAL COMMENTS: In this case RPH was convicted of a sex offense that was a class A felony. Accordingly, he is not entitled to petition for restoration under RCW 9.41.040(4)(a). Thus, he argues, and the majority agrees, that the order relieving him of his duty to register as a sex offender is the "equivalent procedure [to a certificate of discharge] based on a finding of rehabilitation" under RCW 9.41.040(3). The Court relies on Radan, however, Radan involved a Montana procedure that the Washington State Supreme Court found was "equivalent" given the circumstance. Additionally, RCW 9.41.041(3) applies where a "conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person." (Emphasis added.) The duty to register is not a conviction, but rather a result of a conviction. Relief from the duty does not impact the conviction. The conviction was not the subject of a "certificate of rehabilitation or other equivalent procedure based on the rehabilitation of the person."

We agree with Chief Justice Madsen's persuasive dissent. But the Supreme Court majority has spoken, and that is the last word on the meaning of the statute until and unless the Washington Legislature amends the statutes. It remains to be seen what other situations, if any, the Washington Supreme Court will determine to be analogous to the circumstances of Radan and RPH. Agencies should consult their legal advisors for guidance. RCW 9.41.040(4)(a) addresses restoration but specifically provides that it does not apply where to individuals who have been convicted of a sex offense or class A felony.

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WASHINGTON STATE COURT OF APPEALS

WHERE OFFICERS HAD PROBABLE CAUSE TO BELIEVE A CAR CONTAINED CONTRABAND IN SOME UNKNOWN AREA, COMPARTMENT, OR CONTAINER, THE OFFICERS LAWFULLY SECURED THE CAR – INCLUDING A PURSE BELONGING TO AN OCCUPANT AS TO WHOM INDIVIDUALIZED PC TO ARREST DID NOT EXIST – FOR A REASONABLE PERIOD WHILE OFFICERS SOUGHT A SEARCH WARRANT FOR THE CAR AND ITS CONTENTS

State v. Campbell, ___ Wn. App. ___, 2011 WL 7396695 (Div. III, Dec. 29, 2011, publication ordered Feb. 14, 2012)

Facts and Procedural background: (Excerpted from Court of Appeals opinion)

On an evening in September 2008, [police officers] attempted to conduct a controlled buy of 700 pills of MDMA . . . ., more commonly referred to as ecstasy, from an individual named Jeffrey Joseph based on information received from a confidential informant. When Mr. Joseph arrived that night at the agreed location - - a picnic area off of a grocery store parking lot in Electric City - - it was as a passenger in a sport utility vehicle (SUV) being driven by Dante Smith. Three others were in the car, one being Maya Campbell.

Only Mr. Joseph stepped out of the car to discuss the drug transaction with the officers' informant. Officers were positioned near the picnic area and one was close enough to overhear parts of the negotiations between the informant and Mr. Joseph. [Part of] the conversation overheard was Mr. Joseph's statement that he had the pills in the car and, at another point, that he needed to discuss terms with his unidentified "partner." Mr. Joseph's actions (walking to and from the car to confer with a passenger or passengers) supported his representation. For some reason Mr. Joseph became apprehensive about the situation, however, and left with his companions without completing any sale.

Officers stopped the car shortly after it departed, based in part on Mr. Joseph's statement that drugs were in the car. Ms. Campbell was in the front passenger seat when the car was stopped. Because officers had received information that Mr. Joseph was armed, they conducted a felony stop with weapons drawn and ordered the occupants of the car to hold their hands outside of the car windows. The occupants complied, and one by one were ordered out of the car. When Ms. Campbell got out, she left her purse in the front passenger floorboard area. While Mr. Smith reportedly gave [one of the officers] consent to search the car, the officers instead applied for a warrant on the advice of the prosecutor and police chief.

While officers awaited the warrant, Ms. Campbell, among others, was detained. While being detained, she asked [the officer who had requested consent] if she could get her purse out of the car so that she could leave. [The officer] responded that she could not, as officers were applying for a search warrant for the contents of the car. It took approximately two hours from the time of the initial stop to obtain the search warrant. The search of the car led to the discovery of 750 pills of MDMA, found in Ms. Campbell's purse. Ms. Campbell was later arrested and charged with one count of possession of a controlled substance with intent to deliver as well as one count of simple possession.

The trial court conducted a CrR 3.5 hearing in March 2009 to determine the admissibility of several statements made by Ms. Campbell before and after her arrest. Among the court's conclusions reached based on evidence presented at that hearing was that Ms. Campbell's continued detention at the scene while awaiting the search was not supported by probable cause and was therefore unlawful. In December 2009, a CrR 3.6 hearing was held to address the validity of the search of Ms. Campbell's purse. . . .

After hearing argument from both sides, the trial court reviewed the telephonic warrant authorizing the search and noted that it described the place to be searched as "the vehicle," without any express limitations. . . . The court concluded that officers were not required to return the purse to Ms. Campbell because they had authority to secure the area to be searched while the warrant was being obtained and that the search was lawfully performed. . . . .

The case proceeded to trial. Ms. Campbell was convicted.

ISSUE AND RULING: Law enforcement officers had probable cause to believe that a car that was not then occupied contained contraband in some unknown area, compartment, or container. Did that probable cause authorize officers to seize and hold – for the time reasonably required to obtain a search warrant and conduct a search – not only the car, but also a purse belonging to an occupant as to whom individualized probable cause to arrest did not exist? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Grant County Superior Court conviction of Maya Michelle Campbell for one count of possession of a controlled substance with intent to deliver and one count of simple possession.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Ms. Campbell argues that the search of her purse was unlawful because it would not have occurred but for her unlawful detention and resulting inability to retrieve her purse and leave. She does not contest the validity of the search warrant itself, nor does she dispute the officers' authority to order her out of the car as they did. The State responds that Ms. Campbell would have had no right to retrieve her purse even if she was not detained, due to the officers' authority to secure the car while they sought a search warrant.
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> . . . .
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> In State v. Terrovona, 105 Wn.2d 632 (1986), the Washington Supreme Court held that if officers have probable cause to search, they may seize a residence for the time reasonably needed to obtain a search warrant. This authority has been extended to vehicles. State v. Flores-Moreno, 72 Wn. App. 733 (1994) **Feb 95 LED:10**; State v. Huff, 64 Wn. App. 641 (1992) **April 98 LED:09**.
>
> Once probable cause to search the car and its contents was established, officers acquired authority to seize it and deny access to it for a reasonable time while they sought a search warrant. This authority did not depend upon the lawful detention of Ms. Campbell. It therefore makes no difference whether she was lawfully detained at the scene or should have been allowed to leave; officers would have been entitled to deny her permission to retrieve her purse from the car in either case. This interference with Ms. Campbell's possessory rights was reasonable, given that the purpose was to safeguard her privacy rights by first obtaining a search warrant.
>
> Ms. Campbell likens her situation to State v. Worth, 37 Wn. App. 89, 893-94 (1984)in which the search of a purse belonging to a guest and within the guest's immediate control during the search of a home she was visiting was held to be an unlawful search, the court holding that "readily recognizable personal effects . . . which an individual has under his [or her] control and seeks to preserve as private" were extensions of the person that were not subject to the warrant authorizing only a premises search. But the Court of Appeals framed the issue as being "whether [the] search warrant comprehended within its scope, Worth's purse," which it concluded it did not, noting that "the search warrant was not issued on the basis of any information about Penny Jean Worth," and "neither the authorities who sought the warrant nor the magistrate who issued the warrant knew that Worth resided with [the owner of the premises]." It was because the purse did not come within the scope of the warrant that it found the search of Ms. Worth's purse to be an impermissible search of her person.

In [State v. Hill, 123 Wn.2d 641 (1994) **June 94 LED:04**, citing Worth, 37 Wn. App. 889], our Supreme Court embraced the principle that "generally officers have no authority under a premises warrant to search personal effects an individual is wearing or holding." But the defendant in Hill had not challenged the trial court's finding that "'[a]lthough there was some evidence that the sweatpants were defendant's, it is not clear that this was obvious to the officer before he searched the pants; the pants were on the floor near the door and not obviously associated with the defendant.'" So the court concluded Mr. Hill's effort to come within the search limitation recognized in Worth failed on account of the court's unchallenged, irreconcilable finding.

Ms. Campbell faces a different problem bringing herself within the material circumstances of the Worth and Hill cases. On the one hand, she was the only woman in the SUV, the purse was found on the floorboard of the front passenger seat where she was sitting, and she and others identified it to officers as her purse. The State cannot argue that it was not recognizable as her personal effect. But the distinction made by the trial court is viable: the probable cause for the search warrant in Ms. Campbell's case was associated with the vehicle and all of its contents and the purse came within the scope of the warrant.

Circumstances can exist where probable cause may exist for a search of an individual's property even though officers do not have equivalent probable cause that the owner of the property is involved in crime. Cf. Zurcher v. Stanford Daily, 436 U.S. 547 (1978) (Fourth Amendment does not prevent issuance of a warrant to search property simply because the owner or possessor is not reasonably suspected of criminal involvement); see also 2 Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 4.10(b) at 747-48 (4th ed. 2004) (distinguishing entitlement to search a visitor's belongings where police have grounds to believe items sought in the warrant might be concealed there).

Both Worth and Hill implicitly recognize that personal property belonging to someone other than the owner of premises can be subject to a warrant for a premises search where probable cause exists and the scope of a warrant is accordingly broad: Worth's holding depends on its reasoning that no probable cause brought Worth's purse within the scope of the warrant. Hill's holding that "generally officers have no authority under a premises warrant to search personal effects an individual is wearing or holding" implies that sometimes they do.

The undisputed findings of the trial court in this case - - verities on appeal - - are that [the officer] denied Ms. Campbell access to her purse because he believed it to be within the scope of the warrant that was being applied for and that the search warrant eventually obtained was for the vehicle and its contents. Mr. Joseph's statements and behavior in the course of his negotiations provided reason for officers to believe that the drugs, while in the car, were in an unknown location, and that another unknown occupant of the car was a "partner" in the potential sale. Ms. Campbell does not assign error to the trial court's conclusions that the search warrant was valid and that the search of the vehicle did not exceed its scope. Because the purse fell within the scope of the warrant, officers were not required to release it while awaiting the warrant and its search, once the warrant was obtained, was not an unlawful search of Ms. Campbell's person. [Court's footnote: *We find this a sufficient basis for rejecting Ms. Campbell's appeal but agree with the State that, in addition, Ms. Campbell did not have immediate control over her purse at the time the search warrant was executed.*

Left on the floorboard when Ms. Campbell got out of the car, the purse ceased being an extension of Ms. Campbell's person.]

[Some footnotes, citations omitted]

FRISK OF COMPANION OF DRUG PARAPHERNALIA ARRESTEE HELD JUSTIFIED IN LIGHT OF FACTUAL BASIS FOR STOP OF THE TWO MEN (I.E., TWO SUSPECTS' EARLIER PRESENCE IN SUSPECTED STOLEN VEHICLE) PLUS THEIR NERVOUS BEHAVIOR AND THEIR CONTINUED IGNORING OF OFFICER'S REQUESTS TO KEEP THEIR HANDS IN VIEW, NOT TURN AWAY, AND NOT APPROACH THE OFFICER

State v. Ibrahim, 164 Wn. App. 503 (Div. III, Oct. 27, 2011)

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

> Yasin Ahmed Ibrahim and David A. Soto sat in a car behind an abandoned motel in Yakima about 8:00 a.m. on April 22, 2009. [Officer A] pulled into the motel lot and saw both men walk from the car. The car was registered in Seattle. [Officer A] looked inside the car and saw that the ignition assembly had been broken apart and he saw a screwdriver on the floorboard of the car. Mr. Ibrahim and Mr. Soto were by this time walking north up First Avenue. [Officer A] got in his car and caught up with the men. He then got out and asked if they had a moment to speak with him. They said sure. Mr. Soto had thrown something to the ground as [Officer A] approached. The two men did not cooperate with [Officer A]. They were very nervous. They continued to put their hands in their pockets and turn away from the officer despite his requests that they keep their hands where he could see them and not turn away. Both men continued to move into the officer's space, again despite his repeated requests that they step back. [Officer A] called for backup.
>
> [Officers B and C] arrived. [Officer A] directed [Officer B] to search the area where Mr. Soto had thrown something to the ground. [Officer B] found a pipe used to smoke dope. [Officer A] arrested Mr. Soto, searched him incident to that arrest, and found other drug paraphernalia. [Officer A] directed [Officer C] to search Mr. Ibrahim. He did so based on Mr. Ibrahim's conduct during the earlier investigation of the status of the car both men had been in. [Officer C] found a .22 caliber revolver in Mr. Ibrahim's pocket. Mr. Ibrahim was booked into jail on a charge of alien in possession of a firearm, and the State later charged him by information with that crime.
>
> Mr. Ibrahim is not a citizen of the United States, but he is a lawful permanent resident. Mr. Ibrahim moved to suppress both his statements to police and the pistol seized by police. He argued that the circumstances here did not justify the frisk. The court disagreed and refused to suppress either the pistol or Mr. Ibrahim's statements to police about where he got the pistol. The court concluded that the officers had sufficient concerns for their safety to justify the frisk.
>
> Mr. Ibrahim also moved to dismiss, arguing that the statute under which he was charged was unconstitutional on several grounds. Essentially, he argued that the statute denied him equal protection of law (as a legal alien) and, in particular, his Second Amendment right to possess a firearm. The court disagreed, concluded that the statute did none of this, and denied Mr. Ibrahim's motion. The statute was repealed in 2009. Former RCW 9.41.170, repealed by Laws of 2009, ch. 216, § 8, effective July 26, 2009.

. . . .

> The court . . . , based on stipulated facts, convicted Mr. Ibrahim of being an alien in possession of a firearm. And the court sentenced him to 126 days with credit for the 126 days he had already served in the county jail.

ISSUE AND RULING: Was the frisk of the companion of the arrestee justified in light of the factual basis for the initial stop of the two suspects (i.e., their earlier presence in a possibly stolen vehicle), combined with the two suspects' nervous behavior and their continued ignoring of the officer's requests to keep their hands in view, to not turn away, and to not approach the officer? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Yakima County Superior Court conviction of Yasid Ahmed Ibrahim under the since-repealed statute requiring him to register his firearm; the Court of Appeals holds that the gun was lawfully seized, but, under analysis not addressed in this LED entry, that the former statute violated the equal protection rights of aliens.

ANALYSIS OF FRISK ISSUE: (Excerpted from Court of Appeals opinion)

> Mr. Ibrahim contends that the officer did not have grounds to frisk him because there was no reasonable basis to conclude that he might be armed and dangerous. Mr. Ibrahim characterizes his conduct as cooperative, even if a bit nervous. And he urges that this is not enough to justify the search. He also notes that the whole affair took place on a busy street in broad daylight with other police officers on the scene, which also should have militated against the necessary findings that he was armed and dangerous.
>
> . . . .
>
> . . . . [Under the federal constitution's Fourth Amendment and under the Washington constitution, one exception to the constitutional warrant requirement is a Terry stop, named after the U.S. Supreme Court decision in Terry v. Ohio, 392 U.S. 1 (1968).] The stop is authorized if police have a reasonable suspicion of criminal activity. But a frisk for weapons requires something more. The officer must have a reasonable concern for his safety to justify the frisk. And the search must go no farther than that necessary to assure the safety of the officer. So the elements the State must show to support a Terry frisk are that (1) the initial stop is legitimate, (2) a reasonable safety concern exists to justify a protective frisk for weapons, and (3) the scope of the frisk was limited to the protective purpose.
>
> . . . . Mr. Ibrahim's primary objection . . . . appears to rest on the second prong of the test for a Terry frisk. He argues that the officer did not have the necessary reasonable concern that Mr. Ibrahim was armed and presently dangerous.
>
> And while Terry uses the words armed and presently dangerous, the actual measure appears to be more modest; absolute certainty is not required. Our Supreme Court has suggested that courts should be reluctant to substitute their judgment for that of the officer on the scene. State v. Collins, 121 Wn.2d 168 (1993) **July 93 LED:07**. ""A founded suspicion is all that is necessary, some basis from which the court can determine that the [frisk] was not arbitrary or harassing."" Collins . . . .
>
> To the facts justifying the initial Terry stop, the record adds the following findings: both men were looking around, both continued to place their hands in their pockets or out of the officer's sight despite his requests that they keep their hands visible, both men continued to turn sideways away from the officer, and

> both men continued to come into the officer's space, again, despite his repeated requests that they step away from him.
>
> Mr. Ibrahim characterizes his conduct as simple nervousness. We conclude that his conduct showed more than simple nervousness and therefore supports the officer's pat down, especially given the appropriate deference to the officer on the street trying to protect himself.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) PROSECUTOR LAWFULLY SHARED WITH DEFENSE ATTORNEYS BRADY INFORMATION RELATING TO ADVERSE PERSONNEL ACTION IN OFFICER'S PRIOR JOB – In Doyle v. Lee, ___ Wn. App. ___, 2012 WL 313949 (Div. III, Feb. 2, 2012), the Court of Appeals holds that a prosecutor acted lawfully in sharing with defense attorneys information relating to a local law enforcement officer's adverse personnel action involving alleged dishonesty. The personnel action occurred in the law enforcement officer's previous law enforcement employment in another state. The prosecutor provided the information to defense attorneys in cases where the officer was a potential witness. The Doyle Court bases its holding on this issue on the U.S. Supreme Court decision in Brady v. Maryland, 373 U.S. 83 (1983). In Brady, the U.S. Supreme Court interpreted the Due Process protections of the U.S. constitution as requiring the government to share potentially exculpatory information with defendants.

Result: Affirmance of Kittitas County Superior Court order that dismissed officer's lawsuit that, among other things, sought injunctive relief against the Grant County Prosecutor's Office; award of attorney fees for the prosecutor on appeal.

LED EDITORIAL NOTE: The Doyle decision does not provide factual details relating to the allegations of misconduct in the out-of-state law enforcement job.

(2) SENTENCE PROVISION AGAINST POSSESSING "GANG PARAPHERNALIA" TOO VAGUE AND THEREFORE VOID UNDER CONSTITUTIONAL DUE PROCESS PROTECTION – In State v. Villano, ___Wn. App. ___, 2012 WL 312118 (Div. III, Jan. 26, 2012), the Court of Appeals holds that a sentencing provision that a defendant not possess "gang paraphernalia" was too vague and therefore must be stricken.

Result: Affirmance of Franklin County Superior Court conviction of Doroteo Villano for first degree arson; reversal of "gang paraphernalia" possession prohibition in his sentence.

(3) CIVIL RIGHTS ACT LAWSUIT: COURT GRANTS QUALIFIED IMMUNITY TO OFFICERS WHO ENTERED A HOME TO SEIZE FIREARMS AFTER MAKING A MANDATORY ARREST FOR DOMESTIC VIOLENCE ASSAULT IN THE FOURTH DEGREE; COURT ALSO HOLDS THAT OFFICERS ARE IMMUNE FROM LIABILITY UNDER RCW 10.99.070 – In Feis v. King County Sheriff's Office, ___ Wn. App. ___, 267 P.3d 1022 (Div. I, Dec. 19, 2011) the Court of Appeals holds that it was not clearly established that entering a home to search for and seize weapons after making a mandatory arrest for domestic violence assault violated the constitution, and thus, officers are entitled to qualified immunity from a federal Civil Rights Act lawsuit. The Court also holds that the officers are immune from liability from state-law liability under RCW 10.99.070, which provides immunity for law enforcement good faith action arising from an incident of domestic violence brought by any party to the incident.

On March 31, 2007, after making a mandatory arrest of David Feis for domestic violence assault in the fourth degree, and transporting the defendant to the jail, officers asked the victim

(Feis's stepson) if there were weapons in the house and if he would like them removed. The victim responded affirmatively and accompanied the officers into the home where they removed four firearms. The defendant filed a lawsuit which alleged, among other things, a claim under 42 U.S.C. §1983 based on the entry into the home and seizure of the firearms.

Qualified Immunity

Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts meeting a two-pronged test: (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The U.S. Supreme Court recently held in two cases that lower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first. See Pearson v. Callahan, 555 U.S. 223, 236 (2009); Ashcroft v. al-Kidd, ___U.S. ___, 131 S.Ct.2074 (2011**). [LED EDITORIAL NOTE: Prior to Pearson the Supreme Court had required lower courts to first determine whether or not there was a constitutional violation, before moving to the second question. See Saucier v. Katz, 533 U.S. 194 (2001)].**

The Court of Appeals defines the right at issue as follows:

> [T]he right at issue here is the right to be free from law enforcement officers entering one's home to seize firearms after a resident of the house has been arrested for a domestic violence assault and the victim, whom officers believe also lives in the home, has requested that the officers remove the firearms from the residence and directed the officers to the location of the firearms. Furthermore, here, the sufficiently particularized right also incorporates the fact that witnesses to the assault, who are family members of both the suspected assailant and the victim, provided corroborating accounts of the assault and implied a history of domestic violence in the household. Only when the right at issue is particularized to this extent can law enforcement officers be expected to determine whether their contemplated conduct violates the suspect's constitutional rights under the circumstances then existing. Thus, Feis failed to allege violation of a sufficiently particularized right. In any event, we need not, as aforementioned, consider whether the properly particularized right here at issue was in fact violated, or whether such a right exists today, as we determine that the existence of such a right was not clearly established when the incident occurred.

The Court then determines that the right at issue was not clearly established at the time the officers entered the plaintiff's home:

> Ultimately, we must decide whether a reasonable officer confronted with the circumstances in which [the officers] found themselves could have believed that a search of Feis's car and home to recover his firearms was lawful. See al-Kidd, ___ U.S. ___, 131 S. Ct. at 2083 (An officer violates clearly established law when a particularized right is so clear that "every 'reasonable official would have understood that what he is doing violates that right.'") In making this determination, we assess the objective reasonableness of the [officers'] actions. [The officers] were dispatched to the Feis home to respond to a report of domestic violence. Upon arriving at the scene, the officers encountered multiple family-member witnesses who corroborated aspects of one another's statements that Feis [stepfather/suspect] had assaulted Joshua [stepson/victim]. The officers observed physical evidence at the scene consistent with the witnesses' reports, such as the ruts behind the tires of Feis's car and the red mark on Joshua's face. Joshua had fled the scene and was waiting at a church across

> the street from the Feis home when the officers arrived. The officers observed that Feis was clearly angry with Joshua. Feis voiced his frustration with Joshua's laziness. Hope [wife/mother] was crying and otherwise visibly upset, and collapsed shortly after officers arrived. Statements made by the victim and other family members suggested that there was a history of domestic violence in the Feis home.
>
> Joshua repeatedly referred to the Feis residence as his home, giving officers the reasonable impression that he resided at the Feis home at the time of the alleged assault. After Feis was arrested, Joshua requested that officers remove Feis's firearms from the home and directed the officers to the location of the firearms. [One of the officers] stated that she was concerned for Joshua's safety. Given these factual circumstances and the ambiguity regarding the community caretaking exception as it existed in 2007, a reasonable officer could have believed that entry into the Feis home in order to comply with Joshua's request that the officers remove his assailant's firearms was justified by the need to render assistance to assure Joshua's safety.
>
> Feis has failed to allege violation of a sufficiently particularized and clearly established right so as to rebut the officers' assertion of qualified immunity. A reasonable, properly-trained and informed officer confronted with the same circumstances as the [officers] in this case would not have known beyond debate that a warrantless search to retrieve firearms violated Feis's Fourth Amendment right. Because the alleged constitutional right to be free of such a search in such circumstances was not clearly established when the conduct occurred, the [officers] are entitled to immunity from Feis's federal claims.

[Footnotes omitted]

State Law Immunity

The Court also holds that the officers are immune from state-law liability under RCW 10.99.070 which provides:

> A peace officer shall not be held liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

The Court explains:

> Law enforcement officers are thus immunized from civil liability for conduct "in the course of an arrest or other on-the-scene action such as entering the home to break up a fight." Roy v. City of Everett, 118 Wn.2d 352, 357–58 (1992) **May 92 LED:06**. The on-the-scene search conducted by [the officers] after Feis's arrest for a domestic violence assault falls within the purview of RCW 10.99.070. The search clearly was an action "arising from an alleged incident of domestic violence," and Feis is clearly a "party to the incident."

Result: Affirmance of King County Superior Court order dismissing lawsuit based on qualified immunity.

LED EDITORIAL COMMENT: Because the Court of Appeals opted to consider only the second prong of the qualified immunity analysis it did not opine on, and thus we do not know, whether the officers' actions in this case would have violated a constitutional right. All we know is that it was not clearly established that the officers' actions would

have violated a constitutional right. The Court's analysis suggests that the law not only was not clearly established on March 31, 2007 when the law enforcement actions were taken, but also was not clearly established at the time of issuance of the Court's opinion in this case. As always, we encourage officers to consult with their agency legal advisors and/or local prosecutors.

(4) SPECIAL MIRANDA WARNING TO JUVENILES ABOUT THE POSSIBILITY OF ADULT COURT PROSECUTION HELD NOT ABSOLUTELY REQUIRED – In State v. Miller, ___Wn. App. ___ , 267 P.3d 524 (Div. III, Dec. 8, 2011), the Court of Appeals recognizes that it may be the best practice for police to convey to juveniles who are the subject of custodial interrogation the notion that talking to police may result in prosecution as an adult. But the Court rules under the facts of this case that an officer's giving of Miranda warnings without the special juvenile warning about the possibility of trial as an adult for his crime did not violate the rights of the 17-year-old armed robbery suspect.

Defendant Miller was arrested for armed robbery. Prior to a custodial interrogation, he was given the standard Miranda warnings that are given to adult suspects. The interrogating officer had previously dealt with defendant Miller. The officer thought that Miller was age 18. But in fact, Miller was age 17. Miller "waived" his rights and made some incriminating statements. Miller was tried for robbery in the first degree as an adult (note: under the "auto-decline" Juvenile Code provisions of RCW 13.04.030(1)(e)(iv), trial as an adult was required based on Miller's age and the crime charged). He was convicted as charged. On appeal, he argued as he had at the trial court that, because he was not told that he might be tried as an adult, his Miranda waiver was not valid.

The Miller Court notes that officers in Washington routinely provide an additional warning to juvenile suspects along the following lines when seeking a Miranda waiver: "If you are under the age of 18, anything you say can be used against you in a juvenile court prosecution for a juvenile offense and can also be used against you in an adult court criminal prosecution if you are to be tried as an adult." The question in Miller was whether failure to give a warning along these lines precluded a finding of a valid waiver.

The Miller Court discusses the Washington Supreme Court decision in State v. Luoma, 88 Wn.2d 28 (1977). Luoma addressed whether such special warnings to all juvenile interrogation subjects are required in order for their Miranda waivers to be deemed valid. The Miller Court concludes that the analysis in Luoma does not absolutely require a special warning to every juvenile interrogation subject, nor do U.S. Supreme Court precedents. The totality of the circumstances must be considered in determining whether a waiver is valid, the Miller Court asserts. Where a juvenile's waiver of rights is involved, the giving or not giving of the special warning is just one of the factors to be considered.

The Miller Court goes on to conclude that under all of the circumstances: (1) the trial court correctly found that defendant Miller would not have been confused about the seriousness of the matter or the potential consequences of answering police questioning in light of the standard adult Miranda warning that he received; and (2) the trial court correctly found that defendant Miller gave a voluntary and knowing waiver of his rights under Miranda.

Result: Affirmance of Grant County Superior Court conviction of Cody Wayne Miller for robbery in the first degree.

LED EDITORIAL COMMENT: Despite the pro-State result in this case, the best approach for Washington officers is to uniformly give the special warning whenever conducting custodial interrogation of a juvenile. Waiver of rights is a fact-based issue, so it is not always easy to predict whether a valid waiver will be found. Also, one never knows how

the Washington Supreme Court would, if it again addresses the issue, deal with this issue that the Court has not addressed for over a quarter century.

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NEXT MONTH

The May 2012 LED will include the first part of what will likely be a two part 2012 Legislative Update. Space permitting it will also include the United States Supreme Court opinions in Messerschmidt v. Millender, ___ U.S. ___, 2012 WL 555206 (Feb. 21, 2012) where the Court reverses the Ninth Circuit and holds that detectives are entitled to qualified immunity for a search warrant application, and Howes v. Fields, ___ U.S. ___, 2012 WL 538280 (Feb. 21, 2012) where the Court holds that a jail inmate was not in custody for purposes of Miranda when he was questioned about uncharged offenses allegedly committed prior to his incarceration.

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "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 (CJTC) LED is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page is [http://www.atg.wa.gov].

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The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the

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

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