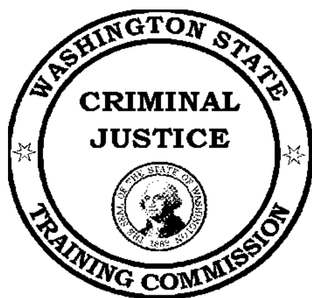

Law Enforcement Digest

AUGUST 2013

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

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NOTE REGARDING THE 2013 LEGISLATIVE UPDATE: In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. This year we have included all of the legislation in a single stand alone LED edition, similar to last year's 2012 Subject Matter Index. The 2013 Washington Legislative Update will be posted on the CJTC Internet LED Page at approximately the same time as this August LED.

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INITIATIVE 502 INITIAL DRAFT RULES: The Liquor Control Board (LCB) has released its initial draft rules for I-502 implementation. The rules can be accessed on the LCB website at: http://liq.wa.gov/marijuana/initial-draft-rules and clicking on "Download Initial Draft Rules."

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UNITED STATES SUPREME COURT

UN-MIRANDIZED SUSPECT'S SELECTIVE SILENCE WITH NO EXPRESS ASSERTION OF FIFTH AMENDMENT RIGHTS DURING NON-CUSTODIAL AND OTHERWISE NON-COERCIVE QUESTIONING BY GOVERNMENT INVESTIGATORS MAY BE USED AGAINST DEFENDANT IN A CRIMINAL PROSECUTION

Salinas v. Texas, ___U.S. ___, 2013 WL 2922119 (June 17, 2013)

Genovevo Salinas voluntarily met with Houston, Texas law enforcement officers to talk about a double homicide. It is undisputed in this case that he was not in custody and had not been Mirandized. After Salinas had answered some questions, he was asked if he thought that ballistics testing would match his shotgun to shell casings found at the crime scene. He suddenly went silent, looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began to tighten up. Further questions were then asked on other matters. Salinas freely answered those questions.

Salinas was not held that day. But after officers further investigated, he was arrested and charged with two murders. Part of the evidence admitted against him was police testimony about his silence and physical reactions during the initial non-custodial session when he was asked the question asking for his prediction whether ballistic testing of his shotgun would provide a match to shotgun shell casings.

The Texas appellate courts upheld the conviction.

ISSUE AND RULING: May an un-Mirandized suspect's mere selective silence in response to a particular question during non-custodial and otherwise non-coercive questioning be used against him in a criminal prosecution if the suspect does not expressly raise his Fifth Amendment right not to answer the question? (ANSWER BY U.S. SUPREME COURT: Yes, rules a 5-4 majority, the evidence is admissible unless the suspect expressly raises his or her Fifth Amendment rights)

Result: Affirmance of decision of Texas Court of Criminal Appeals affirming two murder convictions of Genovevo Salinas.

ANALYSIS

Justice Alito's lead opinion

Justice Alito is joined by Chief Justice Roberts and Justice Kennedy in the lead opinion for the majority result. The lead opinion's concludes that the defendant's Fifth Amendment right against self-incrimination is grounded in the defendant's failure at the time of the non-custodial police questioning to expressly assert his Fifth Amendment right to silence in response to the question about ballistics testing. The key part of the reasoning of that opinion is as follows:

> We have previously recognized two exceptions to the requirement that witnesses invoke the [Fifth Amendment] privilege, but neither applies here. First, we held in Griffin v. California, 380 U.S. 609, 613-615 (1965), that a criminal defendant need not take the stand and assert the privilege at his own trial. That exception reflects the fact that a criminal defendant has an "absolute right not to testify." Turner v. United States, 396 U.S. 398, 433 (1970) (Black, J., dissenting); see United States v. Patane, 542 U.S. 630, 637 (2004) (plurality opinion). Since a defendant's reasons for remaining silent at trial are irrelevant to his constitutional right to do so, requiring that he expressly invoke the privilege would serve no purpose; neither a showing that his testimony would not be self-incriminating nor a grant of immunity could force him to speak. Because petitioner [Salinas] had no comparable unqualified right during his interview with police, his silence falls outside the Griffin exception.
>
> Second, we have held that a witness' failure to invoke the privilege must be excused where governmental coercion makes his forfeiture of the privilege involuntary. Thus, in Miranda, we said that a suspect who is subjected to the "inherently compelling pressures" of an unwarned custodial interrogation need not invoke the privilege. Due to the uniquely coercive nature of custodial interrogation, a suspect in custody cannot be said to have voluntarily forgone the privilege "unless [he] fails to claim [it] after being suitably warned." Minnesota v. Murphy, 465 U.S. 420, 429-30 (1984).
>
> For similar reasons, we have held that threats to withdraw a governmental benefit such as public employment sometimes make exercise of the privilege so costly that it need not be affirmatively asserted. Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (public employment). See also Lefkowitz v. Cunningham, 431 U.S. 801, 802-804 (1977) (public office); Lefkowitz v. Turley, 414 U.S. 70, 84-85 (1973) (public contracts). And where assertion of the privilege would itself tend

> to incriminate, we have allowed witnesses to exercise the privilege through silence. See, e.g., Leary v. United States, 395 U.S. 6, 28-29 (1969) (no requirement that taxpayer complete tax form where doing so would have revealed income from illegal activities); Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77-79 (1965) (members of the Communist Party not required to complete registration form "where response to any of the form's questions . . . might involve [them] in the admission of a crucial element of a crime"). The principle that unites all of those cases is that a witness need not expressly invoke the privilege where some form of official compulsion denies him "a 'free choice to admit, to deny, or to refuse to answer.'" Garner, 424 U.S., at 656-657 (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).
>
> Petitioner [Salinas] cannot benefit from that principle because it is undisputed that his interview with police was voluntary. As petitioner himself acknowledges, he agreed to accompany the officers to the station and "was free to leave at any time during the interview." That places petitioner's situation outside the scope of Miranda and other cases in which we have held that various forms of governmental coercion prevented defendants from voluntarily invoking the privilege. The dissent elides this point when it cites our precedents in this area for the proposition that "circumstances, rather than explicit invocation, trigger the protection of the Fifth Amendment." The critical question is whether, under the "circumstances" of this case, petitioner was deprived of the ability to voluntarily invoke the Fifth Amendment. He was not. We have before us no allegation that petitioner's failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment.

[Some citations omitted or revised]

In a footnote, the Alito opinion notes that Doyle v. Ohio, 426 U.S. 610 (1976) is not relevant in this case. In Doyle, the Supreme Court held under constitutional Due Process (not self-incrimination) protections that when a defendant has been placed in custody and given Miranda warnings, his failure to speak may not be introduced in evidence at his subsequent criminal trial. Doyle reasoned that, first, the Miranda warnings implicitly promise that silence will not be used against the suspect (by warning that giving up the right to silence will be used against him), and, second, after the warnings have been given, a decision to remain silent is "insolubly ambiguous." In that context, Due Process protections preclude arguing that silence supports an inference that the suspect was admitting his guilt. Once a person is advised of the right to remain silent, silence may merely reflect a decision to take the advice received.

Justice Thomas' concurring opinion

Justice Thomas is joined by Justice Scalia in an opinion also in support of the majority result. The Thomas opinion states a broader rationale for admissibility of evidence of the defendant's failure to answer questions during non-custodial questioning. The Thomas opinion argues that an officer's testimony about a suspect's silence in this context does not compel the defendant's testimony, and thus that no Fifth Amendment violation would have occurred even if the defendant had expressly invoked his right to silence. The opinion appears to argue for overruling of Griffin v. California, 380 U.S. 609, 613-615 (1965), which held that a criminal defendant need not take the stand and assert the privilege at his own trial, and that therefore the prosecutor may not comment on the defendant's failure to take the stand.

Justice Breyer dissent

Justice Breyer is joined in a dissenting opinion by Justices Ginsburg, Kagan and Sotomayor. His opinion argues that the Fifth Amendment right against self-incrimination bars admission of testimony about defendant's silence in this context.

Apparent holding of the fragment U.S. Supreme Court majority

Under somewhat elusive U.S. Supreme Court jurisprudence for determining precedence from fragmented opinions in a case, it appears that the "holding" of the Salinas case is the narrower rationale of the 3-judge lead opinion authored by Justice Alito. "When a fragmented Court decided a case and no single rationale explaining the result enjoys the assent of five justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). It is possible that future courts will hold that the there is no concurrence of rationale in the two opinions supporting the judgment, and therefore that there is no precedential holding in Salinas. But it appears that there is such concurrence, because both the lead opinion and concurring opinion rely on Fifth Amendment analysis.

LED EDITORIAL COMMENTS: 1) Does the Salinas decision impact officers operating under the Washington state constitution?

Yes. In 1996, the Washington Supreme Court held that it violated the Fifth Amendment right to silence of a vehicular assault defendant to admit his silence in response to police questioning in the non-custodial circumstances of on-scene investigation of an injury MVA. See State v. Easter, 130 Wn.2d 328 (1996) Jan 97 LED:13. The Easter opinion and subsequent Washington appellate court decisions to date have held that the federal and state constitutional protections of the right against self-incrimination are identical. The Salinas decision is squarely inconsistent with Easter. Thus, Salinas overrules Easter and revises the law that Washington courts are to follow.

2) Defendant Salinas was allowed to go freely on his way after the non-custodial questioning. He was later arrested. If he had terminated the non-custodial session with an assertion of his Fifth Amendment right to silence or right to counsel, would there have been any restriction on the officers' Mirandizing him and seeking to question him when they later arrested him?

No. See Bobby v. Dixon, 565 U.S. ___, 132 S. Ct. 26 (2011) August 12 LED:05 (a suspect's assertion of the Fifth Amendment attorney right in non-custodial questioning does not bar officers from subsequently making an arrest and seeking a Miranda waiver).

3) How clear does the un-Mirandized, non-custodial person need to be in asserting the Fifth Amendment right against self-incrimination?

This is largely uncharted territory. The lead opinion in Salinas does not attempt to make clear what an un-Mirandized non-custodial suspect must say in that context to expressly invoke the Fifth Amendment right not to incriminate himself or herself.

For a Mirandized custodial suspect, an unambiguous statement that the suspect does not want to talk to the officer sufficiently raises the constitutional right to silence such that the police should stop that interrogation session, and the response to any further

questions will be inadmissible. See discussion of Berghuis v. Thompkins, 560 U.S. 370 (2010) July 10 LED:02 in Initiation of Contact article on the CJTC Internet page.

But, we have not found case law that addresses what words from an un-Mirandized, non-custodial suspect raise the Fifth Amendment right such as to bar admitting evidence of any continuation of the non-custodial questioning at trial. If the person says he or she is relying on "the right to silence" or "the right not to talk to the police" or "the right against self-incrimination," that should suffice. A suspect's statement that he or she wishes to talk to an attorney, not the police, should also suffice. But only future appellate court decisions interpreting Salinas will tell.

We are also unaware of any case law on the remedy for a situation where an officer would ignore the suspect's assertion of the Fifth Amendment right in the non-custodial context. But we assume the remedy for an officer ignoring the assertion of the Fifth Amendment right in this non-custodial context is the same as for ignoring the assertion of rights in a custodial, Mirandized interrogation ((1) exclusion of evidence and (2) potential Civil Rights Act liability that is generally more a theoretical than a real risk). Also, under the totality-of-circumstances test for determining Miranda custody, continuing to interrogate a person who has claimed his or her Fifth Amendment right may change what was a non-custodial questioning session into a custodial questioning session requiring Miranda warnings.

4) How should an officer respond to a selective assertion of the right to silence, i.e., an expression of the desire to not to talk about certain select matters (but not all matters)?

If a Mirandized suspect in a custodial interrogation in progress says "I don't want to talk about subject X but I will talk about subjects Y and Z", implying willingness to talk about other subjects, officers may continue the interrogation but should respect the selective assertion of the right to silence. The same probably applies if an un-Mirandized subject in a non-custodial questioning context such as that in Salinas says the same thing to selectively assert the right to silence.

5) May an officer lawfully and accurately tell an un-Mirandized, non-custodial person who has not asserted the Fifth Amendment right against self-incrimination that the person's silence may be used against the person in a future prosecution?

The law is clear that an officer violates the Fifth Amendment by telling a Mirandized custodial suspect that his or her exercise of rights by failing to answer certain questions can be used in a future prosecution. But the Salinas lead opinion declares, as follows, that an officer may lawfully and accurately tell a non-custodial, non-Mirandized suspect who has not invoked his Fifth Amendment right to silence that his failure to answer certain questions can be used in a future prosecution:

> **[Salinas] worries that officers could unduly pressure suspects into talking by telling them that their silence could be used in a future prosecution. But as [Salinas] himself concedes, police officers "have done nothing wrong" when they "accurately stat[e] the law." We found no constitutional infirmity in government officials telling the defendant in [Minnesota v. Murphy, 465 U.S. 420, 436-38 (1984)] that he was required to speak truthfully to his parole officer, . . . and we see no greater danger in the interview tactics [Salinas] identifies. So long as police do not deprive a**

witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation.

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BRIEF NOTE FROM THE NINTH CIRCUIT COURT OF APPEALS

COURT HOLDS THAT AFFIDAVIT DOES NOT ADD UP TO PROBABLE CAUSE TO SEARCH HOME COMPUTER FOR CHILD PORN IN DESCRIBING ONLY: (1) SUSPECT'S 10-YEAR-OLD CONVICTIONS AS JUVENILE FOR CHILD MOLESTING AND POSSESSING "OBSCENE" MATERIALS; (2) HIS RECENT ALLEGED ACT OF CHILD MOLESTING; AND (3) DETECTIVE-AFFIANT'S TRAINING AND EXPERIENCE AND CONCLUSIONS – In United States v. Needham, ___F.3d ___, 2013 WL 2665889 (9th Cir., June 14, 2013), a 3-judge Ninth Circuit panel rules (with varying degrees of enthusiasm in the three separate opinions) that a detective's affidavit for a search warrant did not provide probable cause support for a warrant to search a child molesting suspect's home computer for child pornography, but that the Fourth Amendment's "good faith" exception to exclusion of evidence applies. The decision follows the legal principles announced in the Ninth Circuit decision in the Civil Rights Act case of Dougherty v. City of Covina, 654 F.3d 892 (9th Cir. 2011) **Nov 11 LED:03**, where qualified immunity was granted to a detective under similar circumstances.

The detective's affidavit provided: (1) a detailed account of an investigation of a very recent incident in which defendant Needham was suspected of molesting a five-year-old child in a mall restroom; (2) information about juvenile court convictions of Needham for child molesting and possession of "obscene materials" about 10 years earlier, which had resulted in Needham being a registered sex offender; (3) a statement from the detective that the detective's experience and training was that persons involved in such behavior are likely to possess child pornography on a home computer; and (4) the detective's conclusion that defendant had a home computer containing child pornography.

In the Civil Rights Act decision in 2011 in Dougherty, two majority judges followed the reasoning of opinions from the Second and Sixth Circuits of the U.S. Court of Appeals (while acknowledging that an Eighth Circuit decision disagreed) in holding that in the absence of some evidence that the suspect is interested in child pornography, mere evidence of child molesting will not support a search warrant for a home computer for child pornography. Such an affidavit is not saved, the majority asserted in Dougherty, by the inclusion in the affidavit of a detective's training-and-experience assertion that persons involved in such behavior are likely to possess child pornography on a home computer. The majority also noted that the detective did not provide any information as to whether the suspect even had a home computer. The majority opinion in Dougherty concluded, however, that the detective is entitled to qualified immunity because the law as of the time of the conduct was not clearly established in the Ninth Circuit at the time the detective obtained the search warrant.

The lead opinion in Needham concludes that Dougherty is a Ninth Circuit precedent that controls on both the probable cause and exclusionary rule issues in Needham. On the exclusionary rule issue, the lead opinion states that law enforcement conduct that qualifies for qualified immunity at the time of the conduct also qualifies under the Fourth Amendment's "good faith" exception to the exclusionary rule. **[LED EDITORIAL NOTE: Note that the Washington Supreme Court has held, though not in the specific context of a search warrant affidavit, that the exclusionary rule of the Washington constitution's article I, section 7 does not contain a good faith exception to exclusion of evidence. See generally State v. Adams, 169 Wn.2d 487 (2010) Oct 10 LED:15.]**

A second judge's opinion in Needham agrees that Dougherty is controlling precedent in the Ninth Circuit on both the PC and exclusionary rule issues, but the opinion complains that Dougherty was wrongly decided and should have held that not only did the affidavit not establish PC, but also that qualified immunity did not apply. The third judge's opinion in Needham likewise agrees that Dougherty is controlling Ninth Circuit precedent, but complains that the Dougherty panel should have instead held that the evidence established probable cause for the requested search under a common sense view, and that the same reasoning supports PC to search for child pornography in the Needham case.

Result: Affirmance of federal child pornography conviction of Nicholas James Needham by U.S. District Court (Central District of California).

LED EDITORIAL COMMENT: The Washington Supreme Court similarly ruled in the drug case of State v. Thein, 138 Wn.2d 133 (1999) Aug 99 LED:15 that a detective's experience-and-training statement could not make up for deficiencies in an affidavit to establish probable cause to search.

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WASHINGTON STATE SUPREME COURT

IMPOUND-INVENTORY HOLDINGS: 1) IMPOUNDMENT OF VEHICLE WAS JUSTIFIED BY COMBINATION OF HAZARD, DRIVING WHILE LICENSE SUSPENDED ARREST, AND EXHAUSTION OF REASONABLE ALTERNATIVES; 2) INVENTORY WAS NOT PRETEXTUAL; AND 3) CONSENT IS NOT GENERALLY A REQUIREMENT FOR INVENTORY UNDER WASHINGTON CONSTITUTION

State v. Tyler, ___ Wn.2d ___, 2013 WL 2367952 (May 30, 2013)

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

> On November 12, 2009, [a deputy sheriff] saw a car exceeding the speed limit on the highway just west of the Hood Canal Bridge. When he checked the license plate, he learned that the vehicle's owner was a woman whose driver's license was suspended. He stopped the car for speeding and the driver, Larry Dean Tyler, pulled onto the paved shoulder of the highway. [The deputy] testified he stopped less than a foot from the fog line. As [the deputy] approached the car, he saw that both the driver and the passenger were men. The passenger had been making furtive movements and [the deputy] was concerned there might be a weapon in the car, but then it appeared to him that the passenger was trying to hide what seemed to be a can of beer. It turned out to be an alcoholic caffeinated beverage.
>
> [The deputy] asked Tyler for identification and Tyler produced a Medicare card and explained he had no valid driver's license. When he checked with dispatch, [the deputy] found out that both men's drivers' licenses were suspended. The deputy arrested Mr. Tyler for driving while his license was suspended, handcuffed him, and put him in the backseat of the patrol car. [The deputy] had called for another officer to assist and this officer took the passenger into custody based on outstanding warrants but subsequently released him when uncertainty arose as to whether the warrants were extraditable.

[The deputy] asked for consent to search the car, but both men refused. Tyler told [the deputy] that the owner of the car was his girlfriend and she was unable to retrieve the car because she was in jail in another county. The passenger was unable to drive since he did not have a valid driver's license. With Tyler's permission, the passenger used Tyler's cell phone to try to find someone to drive the vehicle away. While he located someone to come get him, he was not able to find a driver for the car.

[The deputy] testified that the car was stopped about one foot inside the fog line next to a one-lane, congested part of the highway where the speed limit was 60 miles per hour, about one quarter mile from the bridge. Traffic coming off the bridge has two lanes and vehicles are accelerating and frequently passing each other. Close by is an intersection where accidents frequently occur.

Because there was no one to drive the car from the scene, [the deputy] called a private towing company after deciding to impound the car for roadway safety. He also testified he impounded the car because the driver had a suspended license. When the tow truck arrived about 30 minutes after Tyler was stopped, [the deputy] turned the car and the car keys over to the tow truck driver.

While waiting for the tow truck to arrive, [the deputy] filled out a standard Washington State Patrol tow form as he and the other officer conducted an inventory search of the car's passenger compartment. [The deputy] testified this search was conducted in accord with department policies to secure personal property and protect the department and the towing company. During this search, the officers saw some stereo equipment that was loose in the back seat, and when they looked at the equipment to record it [the deputy] could see a clear plastic "baggie" underneath the driver's seat, clearly visible from the backseat. The contents of the baggie field-tested positive for methamphetamine. [*Court's foonote: [The deputy] also found a small closed container under the driver's seat. We do not address the search of this container because Tyler was not charged with possession of its contents.*]

Mr. Tyler was charged with unlawful possession of methamphetamine, use of drug paraphernalia, and third degree driving while his license was suspended or revoked. At a CrR 3.6 hearing he moved to suppress the evidence that was obtained during the vehicle search, arguing that the search was an unconstitutional pretextual search.

The [trial] court concluded that once the driver and passenger were removed from the car, there was no reason for a general exploratory search. However, "[a]ny evidence of using the impound as a pretext for a warrantless search is rebutted by the officer's offer to let the passenger call for help." On January 29, 2010, Tyler moved for reconsideration. He conceded that "the impound was reasonable," but argued that [the deputy] could not conduct an inventory search once Tyler denied permission to search the car. Then on February 3, 2010, Tyler moved to reopen the CrR 3.6 hearing to permit examination of [the deputy] about an e-mail [the deputy] had written that was produced after the CrR 3.6 hearing in response a defense public records request. Tyler maintained that this e-mail showed that [the deputy] was predisposed to engage in pretextual vehicle searches.

> The court denied both motions. Following a stipulated facts bench trial, Tyler was convicted of possession of methamphetamine and driving while his license was suspended or revoked in the third degree. He appealed, and the Court of Appeals affirmed the convictions. State v. Tyler, 166 Wn. App. 202 (2012) **June 12 LED:26**.

[Record citations omitted]

ISSUES AND RULINGS: 1) Considering the hazardous location of the vehicle, the arrest of Tyler for driving while suspended, and the deputy's exploration of reasonable alternatives to impoundment, was the officer's impoundment decision constitutional? (ANSWER BY SUPREME COURT MAJORITY: Yes; NOTE: The majority opinion does not explicitly state whether the impoundment analysis is under both the State and federal constitutions, but that appears to be so: (A) in light of the opinion's citations to decisions made under either State or federal constitutional analysis or both, and (B) in light of the following language: "in Washington impoundment is inappropriate when reasonable alternatives to impoundment exist");

2) Considering the record relating to the deputy's intra-agency email message discussing impounds and inventories, did the trial court abuse its discretion in denying defendant's motion to reopen the suppression hearing to explore whether the inventory was a pretext for an investigatory search? (ANSWER BY SUPREME COURT MAJORITY: No, rules an 8-1 majority);

3) Does article I, section 7 of the Washington constitution require that officers always request consent from a vehicle's owner or, if the owner is not present, the vehicle's operator, before conducting an inventory of the contents of a lawfully impounded vehicle? (ANSWER BY SUPREME COURT MAJORITY: No, rules an 8-1 majority, consent is generally not required prior to an inventory search)

Result: Affirmance of decision of Court of Appeals (reported at **June 12 LED:26**) that affirmed the Jefferson County Superior Court convictions of Larry Dean Tyler of unlawful possession of a controlled substance and driving while license suspended in the third degree.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

1) Deputy's decision to impound the vehicle

> A vehicle may be lawfully impounded (1) as evidence of a crime, when the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense; (2) under the "community caretaking function" if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft and (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle; and (3) in the course of enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment. State v. Williams, 102 Wn.2d 733, 742-43 (1984) (citing State v. Simpson, 95 Wn.2d 170, 189 (1980)).
>
> However, if there is no probable cause to seize the vehicle and a reasonable alternative to impoundment exists, then it is unreasonable to impound a citizen's vehicle. State v. Houser, 95 Wn.2d 143, 153 (1980); State v. Hill, 68 Wn. App.

300, 305 (1993) (even when authorized by statute "impoundment must nonetheless be reasonable under the circumstances to comport with constitutional guaranties"; "in Washington, impoundment is inappropriate when reasonable alternatives exist"); State v. Bales, 15 Wn. App. 834, 837 (1976); see In re Impoundment of Chevrolet Truck, 148 Wn.2d 145, 151 n. 4 (2002) **Feb 03 LED:02**. The police officer does not have to exhaust all possible alternatives, but must consider reasonable alternatives. State v. Coss, 87 Wn. App. 891, 899 (1997) **Feb 98 LED:17**. Reasonableness of an impoundment must be assessed in light of the facts of each case. Id. . . . However, facts subsequent to impoundment do not bear on whether the impoundment was reasonable. . . .
. . .

According to [the deputy], he impounded the car because it posed a safety hazard, there was no one available to drive it away, and Tyler's license was suspended.

If not impounded, the vehicle would have been left as an unattended vehicle creating a public safety hazard. It was parked very close to a very busy, congested single lane section of the highway, where traffic was traveling at 60 miles per hour. The community caretaking function is plainly implicated. In addition, under RCW 46.55.113(1), "summary" impoundment is authorized when the driver of the vehicle is arrested for driving while his license is suspended. Under RCW 46.55.113(2)(b) and (d), impoundment is authorized when an officer finds a vehicle unattended on the highway where it jeopardizes public safety or when an officer arrests the driver and takes him into custody.

[The deputy] explored alternatives. The vehicle owner could not drive the car because she was incarcerated and apparently also had a suspended license. She was not available to assist. The passenger did not have a valid license, and after [the deputy] asked Mr. Tyler to loan his cell phone to the passenger to attempt to locate a driver to retrieve the car, the effort was unsuccessful. [The deputy] testified that if someone had been found who could have retrieved the car within about 30 minutes, he would not have impounded the car. Although Tyler says that [the deputy] did not ask him whether there was a person who could retrieve the car, [the deputy] testified that Tyler deferred the task of trying to find a driver to his passenger.

We conclude the trial court correctly determined that the impound was proper. The vehicle threatened public safety if left where it was. In addition, Tyler had been arrested for, among other things, driving with a suspended license. [The deputy] explored reasonable alternatives to impoundment.

2) General legal propositions regarding inventories of impounded vehicles

Inventory searches have long been recognized as a practical necessity. State v. Gluck, 83 Wn.2d 424, 428 (1974) (citing State v. Montague, 73 Wn.2d 381 (1968); . . . .). A noninvestigatory inventory search of a vehicle may be conducted in good faith after it is lawfully impounded. Houser, 95 Wn.2d at 154. The requirement that an inventory search be conducted in good faith is a limitation that precludes an inventory search as a pretext for an investigatory search. Id. at 155; Montague, 73 Wn.2d at 385 ("this court" would not "have any hesitancy in suppressing evidence of crime found during the taking of the

inventory, if we found that . . . impoundment of the vehicle was resorted to as a device and pretext for making a general exploratory search of the car without a search warrant").

Warrantless inventory searches are permissible because they (1) protect the vehicle owner's (or occupants') property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger. State v. White, 135 Wn.2d 761, 769-70 (1998) **Sept 98 LED:08**; Houser, 95 Wn.2d at 154; Gluck, 83 Wn.2d at 428. An inventory search must be restricted to the areas necessary to fulfill the purpose of the search. Houser, 95 Wn.2d at 154. For example, to protect against the risk of loss or damage to property in the vehicle, the search "should be limited to protecting against substantial risks to property in the vehicle and not enlarged on the basis of remote risks." Id. at 155.

3) Defendant's motion to reopen hearing to address pretext issue regarding inventory

Mr. Tyler contends that the search in this case was pretextual. He first argued pretext when he moved to suppress the evidence against him. In denying the motion to suppress, the court explained that any evidence of pretext was "rebutted" by [the deupty's] "offer to let the passenger call for help, once he knew the owner was in jail and not available to assist to retrieve her vehicle." The court said that the arresting officer had compelling reasons to impound the vehicle, and once this occurred, it was "incumbent upon him to inventory its content before turning it over to the tow truck driver."

Initially, Mr. Tyler's briefing intertwines his argument of pretext with his argument that consent to search must be obtained from the owner, the owner's spouse, or the driver before an inventory search may occur. We address the latter issue of consent below and conclude that [the deputy] was not required to obtain Mr. Tyler's consent before conducting an inventory search. We therefore do not accept Tyler's invitation to analyze consent and pretext as a composite, and instead consider consent only insofar as it is factually implicated here because [the deputy] asked if Tyler would consent to a search, which Tyler refused to do.

The trial court did not abuse its discretion when it denied the motion to suppress. The record supports the officer's decision to impound. The vehicle could not safely be left where it was because it posed a considerable hazard to public safety. Alternatives to impoundment were sought but not found. When [the deputy] learned the owner could not retrieve the vehicle and the passenger could not drive it, he asked Tyler to lend his cell phone to the passenger so the passenger could try to find someone to retrieve the vehicle. His willingness to permit the vehicle to be removed from the scene cuts strongly against pretext.

Once [the deputy] determined impoundment was the only reasonable course left, he followed all appropriate steps for impounding the vehicle. Among these steps was the necessity to provide for the vehicle to be towed to a safe location. [The deputy] called the private towing company that was next on the rotation for such calls. Under state law, "for all vehicle impounds after June 30, 2001," "[a]ll law enforcement agencies must use" "a uniform impound authorization and inventory form" that the Washington State Patrol has provided by rule, and by July 1, 2003, these agencies must also adopt "uniform impound procedures" that the state

patrol has developed. RCW 46.55.075. In accord with the statutory directive, [the deputy] filled out the standardized Washington State Patrol form provided by rule, "Authorization to Tow/Impound and Inventory Record." This form required entry of the vehicle's mileage, license plate number, VIN (vehicle identification number), make and model, and style, and whether there was any damage to the exterior of the vehicle. In addition, the form requires that the officer list items found in the vehicle. [The deputy] filled this form out while assisted by another officer. There were three amplifiers and one speaker in the backseat of the car, and the need to record these items led [the deputy] to where he could see the methamphetamine evidence clearly in view.

As mentioned, before conducting the inventory search, [the deputy] asked both Tyler and the passenger if they consented to a search. Both denied consent. [The deputy] was not required to obtain consent from Tyler, but the briefing before us indicates that requesting consent to search is frequent, and nearly standard, for many law enforcement agencies and officers.

Tyler maintains, though, that [the deputy] testified to his "understanding of inventory consent searches," and Tyler says this testimony reveals "the type of general exploratory search that is conducted to obtain evidence." This mischaracterizes the testimony. [The deputy] was testifying about the scope of a search that can be conducted when consent is given; nothing suggests that he understood he was addressing an "inventory consent search." As an experienced officer, [the deputy] would have been familiar with the consent exception to the warrant requirement and would have readily testified about the scope of a search pursuant to consent when asked about a consent search (he was not asked about an "<u>inventory</u> consent" search).

. . . .

Tyler moved to reopen the suppression hearing to introduce evidence of an e-mail that [the deputy] wrote that Tyler contends supports his claim that the search was pretextual. Evidently Tyler obtained this e-mail between the date he moved for reconsideration of his motion to suppress and the date of his motion to reopen. The trial court denied this motion and Tyler's motion for reconsideration in the same ruling. The Court of Appeals affirmed this ruling, finding no abuse of discretion.

The subject line of the e-mail states: "RE: Search incident to arrest" and [the deputy] sent it to other sheriffs department personnel in an attempt to persuade them that he should be trained as a K-9 officer. Six paragraphs of the e-mail address reasons why another K-9 unit would be useful, practicalities of costs and other burdens involved in training for and maintaining a second unit, and ways to mitigate these problems.

The first paragraph, Tyler contends, shows that [the deputy] was predisposed to conduct pretextual inventory searches in order to circumvent the decision in <u>Arizona v. Gant</u>, 556 U.S. 332 (2009) **June 09 <u>LED</u>:13**. This paragraph contains an apparent reference to *<u>Gant</u>:*

> This unfortunate ruling hinders our ability to continue the efforts that have been enforce [sic] for some time. The obvious way to

> circumvent this is impounding the vehicle and performing an inventory search. The problem with this is that we must afford the person the chance to contact someone else and determine if it is safely off of the roadway or not. It also obviously limits what we can search as well. The other way around this case and that is [sic] the use of a K-9.

Tyler's pretext theory rests on the idea that an inventory search can be substituted for the search incident to arrest search that was allowed prior to Gant. [*Court's footnote: Gant does not alter the analysis applicable under other recognized exceptions to the warrant requirement (when the "justifications" for a search incident to arrest "are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies"*).

In denying the motions for reconsideration and to reopen, the trial court explained that it had determined the impound was reasonable and then said that once the impoundment occurred [the deputy] had no alternative but to conduct an inventory search to protect himself, his department, and the tow company from possible future claims. The court said that "to do an impound without doing an inventory would be inappropriate, if not foolish." . . . .

[D]enying the motion to reopen is sufficiently justified by [this] reason . . . as the Court of Appeals held. State law required that [the deputy] list the inventory of the vehicle before turning it over to the private towing company. In addition, [the deputy] testified that cataloguing the contents is done to protect the contents and to protect the sheriffs office and tow company from accusations of theft. He also testified that sheriffs office policies required him to conduct an inventory search once a vehicle was impounded; cataloguing the contents of the vehicle was "standard" and done "every time" a vehicle was impounded. Although he testified that he was unaware of any written policies, he testified that he had been trained in the standards he used and these standards had remained the same for the 10 years he had been with the department.

The point of the e-mail was not to try to circumvent Gant or encourage the department to disobey the law (or express his own intentions to do so), but to try to convince the sheriffs department to send [the deputy] for K-9 training. The first paragraph of the e-mail does not say what Tyler urges in any event. The paragraph actually explains that inventory searches themselves are more restrictive than the searches possible under the search incident to arrest searches that were permissible prior to Gant. [The deputy] says in the first paragraph that an inventory search will require the officer to explore whether someone other than the driver can move the vehicle and that the scope of the search is more restrictive (closed containers and trunks cannot be searched), Thus, contrary to Tyler's apparent claim, [the deputy] recognized that a vehicle search cannot simply be substituted for a search incident to arrest as it existed prior to Gant.

The Court of Appeals properly concluded that the trial court did not abuse its discretion in denying the motion to reopen.

4) Absence of general consent requirement for inventories under Washington constitution

Tyler argues that law enforcement officers must obtain the express consent of the vehicle's owner or the owner's spouse or, if the owners are not available, the driver before conducting an inventory search. He maintains the inventory search here was unlawful because it occurred after he denied consent and the officers did not attempt to obtain the owner's consent. The Court of Appeals held that consent is not a requirement for an inventory search. We agree.

Consent is recognized as an independent basis for a warrantless search, ... and thus, if accepted, Tyler's argument would to a significant extent nullify the inventory exception to the warrant requirement where searches of impounded vehicles are concerned.

As explained, inventory searches are limited searches for limited purposes. Houser*,* 95 Wn.2d at 153. When conditions justify a reasonable inventory search, in good faith and without pretext, the officer's purpose is unrelated to discovering contraband or evidence of criminal activity. Rather, the officer is concerned with securing the vehicle and property within the vehicle. For this reason, under article I, section 7, as under the Fourth Amendment, the "criteria governing the propriety of inventory searches are largely unrelated to the justifications for other exceptions to the warrant requirement." Houser*,* 95 Wn.2d at 154 (citing South Dakota v. Opperman*,* 428 U.S. 364, 370 n.5 (1976); . . . .; see White*,* 135 Wn.2d at 767 (Houser sets forth an article I, section 7 analysis). We are concerned with whether, under article I, section 7, the purposes and scope of an otherwise valid inventory search justify a search in the absence of consent.

Initially, we address Tyler's overall claim that citizens' privacy interests are inadequately protected under current law. We do not agree with this sweeping statement. The vehicle search is a limited search, as noted, and unchecked searches are not permitted. An inventory cannot occur if there is no lawful basis for impounding the vehicle; officers are not free to impound just any vehicle parked on the street or any vehicle they stop for traffic infractions. [*Court's footnote: The Court of Appeals listed some of the reasons that justify impoundment: "Reasonable cause for impoundment may, for example, include the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute which provides therefor as in the case of forfeiture." Bales, 15 Wn. App. at 835-36 (quoting State v. Singleton, 9 Wn. App. 327, 332-33 (1973))*]. As explained, and generally speaking, officers must also consider reasonable alternatives to impoundment, and if they fail to do so, any subsequent search may be found unlawful.

Private interests are also protected because of the limited scope of permissible inventory search. An inventory search is permitted only to the extent necessary to achieve its purposes. Houser*,* 95 Wn.2d at 155. Searches of locked trunks

and locked containers is prohibited under the vehicle inventory exception because privacy interests exhibited by placement of any property in such containers and in trunks outweigh the need to inventory the contents to protect the property or protect against false claims of theft. White, 135 Wn.2d at 766-67. Indeed, under article I, section 7, the officer must obtain permission to search the locked trunk or a locked container. [Court's footnote: *Given modern vehicle design, there may be a question as to when a trunk is locked if it can be accessed from the interior of the vehicle. However, that question is not presented here. Moreover, no question is presented regarding locked containers.*] Houser, 95 Wn.2d at 156; see White, 135 Wn.2d at 771. The only exception is where manifest necessity exists. White, 135 Wn.2d at 772; see, e.g., State v. Ferguson, 131 Wn. App. 694, 703-04 (2006) **April 06 LED:17** (presence of chemical fumes indicated likelihood that highly combustible materials were being transported in the vehicle's trunk and presented manifest necessity for search).

Because of the privacy interests at stake, pretextual searches are prohibited, even if the search would otherwise be permissible under the inventory exception. But consent is not necessary to protect from pretextual searches. Indeed, trial courts are better positioned to determine whether a search was pretextual, which is sometimes a difficult a determination. . . . In addition, privacy interests in contents of abandoned vehicles would not be protected by a consent requirement such as Tyler proposes.

In addition to our conclusion that privacy interests are protected under current law, we believe that the purposes of the inventory search could in fact be impeded by a rule requiring consent before a vehicle inventory search can occur. These purposes are to protect private property in unlocked areas of the vehicle, prevent false claims against law enforcement agencies and others, and ensure the safety of law enforcement officers and others from dangerous items located in vehicles.

The rule that Tyler proposes could not be applied when police impound abandoned vehicles and the owner is not available. RCW 46.55.085 requires impoundment of abandoned vehicles left within a highway right-of-way. Under RCW 46.55.113 police may impound a vehicle that blocks or obstructs a roadway. The owner may not be available or locatable within a reasonable time, and using a telephone to attempt to contact an owner is problematic because the identity of the person on the other end of the call cannot be confirmed. Impounding the vehicle without inventorying its contents could expose the property within to damage or theft, impeding the goal of protecting property in an impounded vehicle.

Protection against false claims of theft may be hampered. Although we noted in White, 135 Wn.2d at 770 n.9, that police become involuntary bailees when they impound a vehicle, and therefore they have a duty of slight care for purposes of false claims of theft, inventory searches nevertheless protect them from false claims alleging they have failed to meet even this standard. [Court's footnote: *There may be circumstances where the driver has no authority over the contents of the vehicle, raising the possibility that obtaining the consent of the driver would not insulate the law enforcement agency from false claims.*]

In addition, the lesser duty of care does not apply in the cases where private tow truck operators obtain possession of the vehicle and its contents. In general, these companies are common carriers owing the highest degree of care. Conger v. Cordes Towing Serv., Inc., 58 Wn.2d 876, 878 (1961). Regardless of the standard of care, however, the inventory conducted by officers and the requirement that inventoried property be listed on the standard inventory form required under RCW 46.55.075 is the clearest protection for these private companies.

The inventory search exception furthers officer and public safety. This includes assisting law enforcement officers to identify and avert any danger posed by firearms and other dangerous items left unsecured in an uninventoried vehicle where they might be accessed. See Colorado v. Bertine, 479 U.S. 367, 373 (1987). We have recognized that in most instances there is little danger and its possibility will not justify a search in every case, Houser, 95 Wn.2d at 154 n.2, and there are generally thousands of vehicles on the streets or in other places generally not thought to pose such dangers. Nonetheless, it is a consideration for deciding whether consent furthers the purposes of the vehicle inventory search.

In a related vein, although recognizing these are not frequent occurrences, the State and amici have offered examples of cases where harm to individuals, property, and pets has resulted where vehicles have not been subjected to even a limited search before vehicles are towed from the scene and stored in lots. Amicus curiae Towing and Recovery Association of Washington has cited a number of news stories across the country in which children, human remains, and explosives have been found during inventory searches or after impoundment. A consent requirement would impede discovery of such problems during routine inventory searches.

We decline to add a consent requirement to the inventory search exception. The exception is already carefully limited to protect privacy interests recognized under article I, section 7. Even if consent might add additional protection in some cases, this does not mean it is constitutionally necessary. Unless manifest necessity exists, we have, as noted, required obtaining consent to search lock containers and vehicle trunks, where privacy interests are greater. Whether consent should be required in other subcategories of inventory searches is not a question posed by this case, and we will not speculate.
. . . .

[LED EDITORIAL NOTE: At this point in its analysis, the majority opinion engages in extensive analysis, largely omitted here, that ultimately rejects loose language in two prior decisions (State v. Williams, 102 Wn.2d 733 (1984) and State v. White, 135 Wn.2d 761 (1998) Sept 98 LED:08) suggesting that consent might be a general requirement under article I, section 7 for conducting inventory searches.]
. . . .

In short, neither Williams nor White required us to analyze the issue whether consent should be required and accordingly there is little analysis of the question, and the dicta in these cases rests on authority that does not support importing a consent requirement into the vehicle inventory search exception under article I,

section 7. We have, nonetheless, concluded that consent is required in certain, limited circumstances (absent manifest necessity, consent is required to search locked containers and locked trunks because these areas are not subject to an inventory search after the vehicle is impounded). Whether a consent requirement should be imposed in any other, limited vehicle impoundment contexts is not presented by the circumstances of the present case.

We decline to adopt a requirement that consent of the owner, the owner's spouse, or the driver is a necessary prerequisite for evidence obtained in a vehicle inventory search to be admissible.

[Revised subheadings supplied; record citations omitted; some footnotes omitted; some case citations omitted or revised]

DISSENT BY JUSTICE CHAMBERS

Justice Chambers writes a short dissent joined by no other justice. He appears to argue that the Court should have held (1) that the inventory in this case was a pretextual investigative search, and (2) that the Court should have adopted a rule under the Washington constitution generally requiring a consent/waiver request as a prerequisite to conducting an inventory.

LED EDITORIAL COMMENTS: Under the Fourth Amendment, both (1) the decision to impound a vehicle for safekeeping (as in Tyler) and (2) the scope of such an impound-inventory search must be consistent with the particular law enforcement agency's standardized (though not necessarily written) procedures or practices. South Dakota v. Opperman, 428 U.S. 3654 (1976); Colorado v. Bertine, 479 U.S. 367 (1987). Impoundment for safekeeping also must not be pretextual and must meet a community caretaking rationale in order to satisfy the Fourth Amendment. U.S. v. Cervantes, 703 F.3d 1135 (9th Cir. 2012) Feb 13 LED:07; Aug 12 LED:06 (holding, among other things, that an impound for safekeeping of an arrestee's car did not meet community caretaking standards because, while the car was not in the neighborhood of the arrestee's home, the car was lawfully and safely parked at curbside in a residential area, and the government did not present any evidence that the vehicle posed a safety hazard or was particularly vulnerable to vandalism or theft).

The Fourth Amendment rule for impoundments for safekeeping, however, does not require that reasonable alternatives to impoundment always be considered so long as, per Opperman and Bertine, officers are following standardized procedures or practices of their agency. But as the Tyler Supreme Court opinion points out, under article I, section 7 of the Washington constitution, reasonable alternatives to impoundment must always be considered. In addition, the Ninth Circuit has held (see U.S. v. Johnson, 936 F.2d 1082 (9th Cir. 1991) that in federal court prosecutions, while the Fourth Amendment does not ordinarily include the more restrictive search-and-seizure rules under State constitutions, the Fourth Amendment requirement that impound and inventory actions must follow an agency's standardized procedures includes, for Washington officers and agencies, following any article I, section 7 requirements for impound and inventory.

For inventory searches of impounded vehicles, the federal and State constitutional rules also differ. The following passage from the excerpt above from the Tyler majority opinion recognizes that the same general rationales guide rules for impound-inventory searches under both the Washington constitution's article I, section 7 and the federal constitution's Fourth Amendment: "(1) protect the vehicle owner's (or occupants')

property, (2) protect law enforcement agencies/officers and temporary storage bailees from false claims of theft, and (3) protect police officers and the public from potential danger." But the Washington Supreme Court has construed these rationales differently, placing greater restrictions on inventory searches under article I, section 7.

Thus, State v. Houser, 95 Wn.2d 143 (1980) April 81 LED:01 and State v. White, 135 Wn.2d 761 (1998) Sept 98 LED:08 bar officers from searching a locked trunk during an inventory (even if a trunk latch in the vehicle passenger area can be used to unlock the trunk), unless officers have manifest necessity to look in the trunk. For a "manifest necessity" case, see State v. Ferguson, 131 Wn. App. 694 (2006) April 06 LED:17, where an inventory trunk search was held justified by the smell of fumes apparently coming from the trunk. Houser also held that a closed container should simply be inventoried as a closed unit and should not be opened during an inventory search absent reason to believe the container contains a dangerous item. Interesting to us is that the Tyler majority opinion repeatedly refers to the Washington inventory search rule as restricting searches of locked trunks and locked containers (none of those majority opinion references are to restriction on searching "closed" containers). Also, a footnote in Tyler notes: "[The deputy] also found a small closed container under the driver's seat. We do not address the search of this container because Tyler was not charged with possession of its contents." We wonder if this footnote, together with the majority opinion's repeated references to "locked containers," suggests that the Washington Supreme Court is willing to take another look at Houser's rule for inventory searches of closed but not locked containers found in inventory-searchable areas of a vehicle.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) DIVIDED COURT UPHOLDS ADMISSIBILITY OF EVIDENCE AGAINST ARTICLE I, SECTION 7 CHALLENGE, BUT JUSTICES FAIL TO AGREE ON WHETHER THAT IS (A) BECAUSE THE OFFICERS' SEARCH WAS LAWFUL, OR (B) INSTEAD, BECAUSE AN EXCEPTION TO THE WASHINGTON EXCLUSIONARY RULE APPLIES – In State v. Smith, ___Wn.2d ___, 2013 WL 2445048 (June 6, 2013), a majority of the Washington Supreme Court rejects an article I, section 7 challenge to admissibility of evidence that supports defendant's multiple convictions for violent and other crimes committed in a motel room on October 21 and 22, 2006. But no clear majority of the Court agrees on the rationale for admissibility of the evidence. The justices thus cannot reach a majority for a clear holding on whether the evidence is admissible: (1) because the officers' actions in discovering the victims and the other evidence in the motel room were lawful (and, if so, which of two alternative theories supports the actions); or (2) instead, because, although the search was unlawful, victims' constitutional rights or a variation of the attenuation exception to the Washington constitution's exclusionary rule, or a combination of the two, applies to make the evidence admissible.

In October 2006, as part of a regular agency practice that is lawful under the federal constitution's Fourth Amendment, officers in a Pierce County law enforcement agency randomly checked names in a motel's guest registry. Among other things, they were looking for names of persons with outstanding arrest warrants. Motel guest Christopher Leon Smith had a warrant. They knocked on Smith's motel room door. When he opened the door, the officers saw a bloodied adult woman inside the room. The officers entered the room and learned that the woman and her 12-year-old daughter, also inside, had been assaulted (including a rape of the child) in the hours immediately preceding the officers' arrival.

Smith was charged with multiple felonies. Before trial, the Washington Supreme Court invalidated the practice of random motel guest registry searches in an independent grounds ruling under article I, section 7 of the Washington constitution. See State v. Jorden, 160 Wn.2d 121 (2007) **July 07 LED:18**.

At a suppression hearing, Smith argued that the evidence was the fruit of the unlawful registry search and therefore must be suppressed. The trial court admitted the evidence from the unlawful search under the inevitable discovery exception to the exclusionary rule.

Smith was convicted of first degree assault for his attack on the woman, and for second degree rape of a child and first degree rape as to the child. He was also convicted of two counts of first degree kidnapping and two counts of felony harassment.

Smith appealed. While his case was on appeal, the Washington Supreme Court ruled that there is no inevitable discovery exception to exclusion of evidence under article I, section 7 of the Washington constitution. See State v. Winterstein, 167 Wn.2d 620 (2009) **Feb 10 LED:24** (rejecting the State's argument that an inevitable discovery exception similar to the Fourth Amendment exception applies under the Washington constitution).

The Court of Appeals nonetheless upheld Smith's convictions, concluding by 2-1 vote that, while under Winterstein the State could not rely on the inevitable discovery exception to exclusion, the evidence against Smith was admissible under two separate exceptions to the exclusionary rule of article I, section 7: (1) an "attenuation" exception, and (2) the independent source doctrine. State v. Smith, 165 Wn. App. 296 (Div. II, Dec. 6, 2011) **July 12 LED:18** (see **July 2012 LED** at pages 19 through 21 for the Court of Appeals' discussion of the attenuation and independent source theories). **[LED EDITORIAL NOTE: The State could not argue that the officers acted in objectively reasonable reliance on court precedents allowing random motel registry checks because the Washington Supreme Court has ruled, contrary to the U.S. Supreme Court's interpretation of the Fourth Amendment, that the Washington constitution does not contain a case-law based "good faith exception" to exclusion of evidence. See State v. Adams, 169 Wn.2d 487 (2010) Oct 10 LED:15.]**

As noted above, the Washington Supreme Court likewise affirms the convictions. But also as noted above, the Court does so under split voting and a mix of opinions that yields no clear majority rationale or holding for the result.

Justice Stephens' lead opinion

The lead opinion by Justice Stephens is signed by Justices Owens, Wiggins, and Charles Johnson. The opinion purports to apply a substantive rule that it calls a "save life exception" to the search warrant requirement (a subset of the community caretaking exception) to justify the admission of the officers' observations of the victims, the victims' testimony, and the evidence that the officers later found in a motel dumpster based upon information gained from the victims after entry of the room. The lead opinion says that the save life exception applies if: (1) officers have a reasonable belief that assistance is immediately required to protect life or property; (2) their primary motivation is to protect life or property, not to arrest and seize evidence; and (3) the officers have probable cause to associate the emergency with the place to be searched.

Lawful presence by officers at the time of their rescue-triggering observations is not required under this save life exception, the lead opinion asserts. Thus, the lead opinion wants the save life exception applied here, even though the officers were at the motel room threshold solely because of their unconstitutional random search of the motel registry. The lead opinion does

not cite any case law authority from any Washington court or any court in any other jurisdiction that has applied any variation of the community caretaking exception where initially unconstitutional police actions lead officers directly to discovery of circumstances requiring their immediate emergency action. Because there is not a majority vote for the lead opinion's application of the save life exception in this circumstance, a question remains as to whether the exception applies in this circumstance.

[LED EDITORIAL COMMENT ABOUT LEAD OPINION'S DISCUSSION OF "SAVE LIFE EXCEPTION": The lead opinion's use of the term "save life exception" is taken from a section heading in a treatise that collects mostly Washington case law, Washington Practice, Criminal Practice and Procedure. Not one word in the treatise and not one of the cases cited in the treatise (and nothing in the parties' briefing in this case) provides any support for the lead opinion's assertion that there exists a save life subset of the community caretaking exception to the search warrant requirement that applies where officers' unconstitutional actions place them in position to observe a person in need of life or other assistance. We are aware of no case law from any state or federal court anywhere that would support that proposition. Indeed, we think that such a rule would be contrary to the federal constitution's Fourth Amendment case law; the government is not allowed under the Fourth Amendment to justify an unlawful search based on what was found in the search, nor is the government allowed to slice off the inconvenient, initial unlawful part of officers' continuous actions that lead to discovery of evidence, whatever that evidence may be (though the Fourth Amendment's inevitable discovery exception to the exclusionary rule would make the evidence admissible in many circumstances, such as here).]

On the exclusionary rule issues, Justice Stephens' lead opinion notes that the "independent source" exception to exclusion of evidence cannot be applied in this case because there is no qualifying independent source. The unconstitutional search of the motel guest registry directly led to the officers' presence at the motel room doorway, and there is no "independent" source that accounts for the officers' discovery of the crime victims and evidence, the opinion explains.

The lead opinion does appear to express doubt as to whether victim testimony generally can be deemed to be the fruit of an unlawful search for exclusionary rule purposes, but, unlike Justice González's concurring opinion, the lead opinion does not make that doubt the basis for its position on the admissibility of the evidence.

Chief Justice Madsen's concurring opinion

In an opinion not joined by any other justice, Chief Justice Madsen concurs in the result of the affirmance of the convictions, but she would overrule State v. Jorden, 160 Wn.2d 121 (2007) **July 07 LED:18** and hold under the analysis of her dissent in Jorden that the motel guest registry search was lawful. She disagrees with the reasoning in Justice Stephens' lead opinion as being an unsupported expansion of the community caretaking exception. She also opines that Justice Gonzalez's concurring opinion arguing for an exception to exclusion of the victims' testimony and other evidence is not supportable.

Justice Gonzalez's concurring opinion

Justice Gonzalez authors a summary opinion that is joined by Justices Fairhurst and James Johnson. The short opinion does not provide thorough analysis but apparently would uphold the admission of the victims' testimony (as well as other evidence obtained by the officers at the motel) under (1) a theory regarding a right of a victim under article I, section 35 of the

Washington constitution to testify against an attacker, or (2) a variation of what is known under the Fourth Amendment as the "attenuation" exception to the exclusionary rule, or (3) a combination of these theories.

Justice Chambers' dissenting opinion

Justice Chambers' lone dissent would declare the evidence inadmissible. He criticizes as unwise and unsupported by case law of this or any other state Justice Stephens' proposed application of a save life exception to the search warrant requirement in these circumstances where officers made their observations as the immediate direct result of their unconstitutional random search of the motel guest registry. Justice Chambers argues further that the immediate direct causal connection between the registry search and the officers' presence at the doorway also makes this an inappropriate case for applying an attenuation exception to exclusion of evidence (assuming for the sake of argument that the Washington constitution supports such an exception to exclusion, a question that remains after Smith).

Result: Affirmance of Pierce County Superior Court convictions of Christopher Leon Smith for first degree rape and second degree rape of a child, first degree assault, and two counts each of first degree kidnapping and two counts of felony harassment.

(2) GIVING AFFIRMATIVE DEFENSE INSTRUCTION TO THE JURY, OVER THE DEFENDANT'S OBJECTION, VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONTROL HIS DEFENSE – In State v. Coristine, ___ Wn.2d ___, 300 P.3d 400 (May 9, 2013), the Washington State Supreme Court holds that where the trial court gave an affirmative defense instruction to the jury, at the prosecutor's urging but over the defendant's objection to the giving of the instruction, the defendant's Sixth Amendment right to control his own defense was violated.

Result: Reversal of Court of Appeals decision affirming Spokane County Superior conviction of Brandon S. Coristine for second degree rape.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

WASHINGTON STATE CRIMINAL JUSTICE TRAINING COMMISSION'S IMMUNITY STATUTE, RCW 43.101.390, RECEIVES BROAD APPLICATION IN DISMISSAL OF BASIC LAW ENFORCEMENT ACADEMY STUDENT POLICE OFFICER'S CLAIM AGAINST WSCJTC FOR INJURY – In Ent v. Washington State Criminal Justice Training Commission, ___ Wn. App. ___, 2013 WL 1808243 (Div. I, April 29, 2013), the Court of Appeals applies RCW 43.101.390, CJTC's immunity statute, to dismiss the personal injury claim of a BLEA cadet who fainted and hit his head after standing at "parade rest" during a graduation ceremony.

RCW 43.101.390 provides:

> The commission, its boards, and individuals acting on behalf of the commission and its boards are immune from suit in any civil or criminal action contesting or based upon proceedings or other official acts performed in the course of their duties in the administration and enforcement of this chapter.

The Court holds that the statute is not ambiguous and immunity applies to the entire chapter 43.101 RCW, including the CJTC's training activities. In so holding the Court rejects the plaintiff's argument that the statute only applies to the CJTC's certification responsibilities.

Result: Affirmance of King County Superior Court order dismissing Scott D. Ent's lawsuit against CJTC.

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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

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