



Law Enforcement

SEPTEMBER 2013

Digest

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

HONOR ROLL

688th Basic Law Enforcement Academy – December 19, 2012 – May 1, 2013

President:	Bryce J. Smith, Clark County SO
Best Overall:	Steven D. Shalloway, King County SO
Best Academic:	Matthew T. Atkinson, Seattle PD
Best Firearms:	Matthew T. Atkinson, Seattle PD
Patrol Partner Award:	Conner J. Clifton, Franklin County SO
Tac Officer:	Sergeant Lisa Neymeyer – Port of Seattle Police Department

689th Basic Law Enforcement Academy – January 23 to May 30, 2013

President:	Albert J. Weinnig, Olympia PD
Best Overall:	Beau B. Collins, Redmond PD
Best Academic:	Bryant W. Gerfin, Lynwood PD
Best Firearms:	Beau B. Collins, Redmond PD
Patrol Partner Award:	Beau B. Collins, Redmond PD
Tac Officer:	Officer Russell Hicks – Fife Police Department

690th Basic Law Enforcement Academy – February 13 to June 20, 2013

President:	Christopher R. Mikles, Clark County
Best Overall:	Vincent J. Hupf, Seattle PD
Best Academic:	Vincent J. Hupf, Seattle PD
Best Firearms:	John A. Riddle, Everson PD
Patrol Partner Award:	James L. Sarff, Milton PD
Tac Officer:	Deputy Rebecca Lewis – Snohomish County Sheriff's Office

691st Basic Law Enforcement Academy – March 26 to August 1, 2013

President:	Peter D. Caffrey – King County Sheriff's Office
Best Overall:	Mark A. Williams – Yakima Police Department
Best Academic:	Mark A. Williams – Yakima Police Department
Best Firearms:	Allen L. McComas – South Bend Police Department
Patrol Partner Award:	Andrew M. Jones – Sauk-Suiattle Tribal Police Department
Tac Officer:	Officer Mark Best – Tacoma Police Department

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2013 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION’S INTERNET LED PAGE UNDER “SPECIAL TOPICS”:

- **Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution**
- **Article: “Initiation of Contact” Rules Under The Fifth Amendment**
- **Article: Eyewitness Identification Procedures: Legal and Practical Aspects**

These articles by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year. Note that the Eyewitness Identification Procedures article includes in footnote 2 on page 2 a reference to a Police Executive Research Forum (PERF) survey, published March 8, 2013, of law enforcement agency identification procedures.

BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) SUPREME COURT DIRECTS NINTH CIRCUIT TO RECONSIDER RULING IN SESSOMS V. RUNNELS THAT PRE-MIRANDA STATEMENT BY CUSTODIAL SUSPECT ABOUT ATTORNEY RIGHT EITHER: (1) CONSTITUTED INVOCATION OF MIRANDA RIGHTS EVEN IF AMBIGUOUS, OR (2) WAS AN UNAMBIGUOUS ASSERTION OF HIS ATTORNEY RIGHT – In Grounds v. Sessoms, ___ U.S. ___, 2013 WL 3213540 (June 27, 2013), the U.S. Supreme Court summarily: (1) grants the State of California’s petition for review of the decision in a case previously captioned and reported as Sessoms v. Runnels, 691 F.3d 1054 (9th Cir., August 16, 2012) **Nov 12 LED:06**; (2) vacates the Ninth Circuit’s decision; and (3) directs the Ninth Circuit to reconsider the Ninth Circuit’s August 16, 2012 decision in light of the U.S. Supreme Court’s decision in Salinas v. Texas, 537 U.S. ___, 133 S. Ct. 2174 (June 17, 2013) **Aug 13 LED:02**.

By a 6-5 vote, the Ninth Circuit panel had ruled in Sessoms v. Runnels, 691 F.3d 1054 (9th Cir., August 16, 2012) **Nov 12 LED:06** (despite the habeas standard that is highly deferential to State court rulings) that a custodial suspect’s question about availability of an attorney and his statement that his father had advised him to ask for an attorney – uttered to detectives before they gave him Miranda warnings and prior to any waiver of Miranda rights – should have been ruled by the California appellate court as either: (1) an ambiguous reference to his attorney right that must be honored as a preemptive Miranda request for an attorney precluding, despite such ambiguity in the assertion, any attempt at interrogation and also precluding clarification by the interrogating officers; or (2) alternatively, an unambiguous reference to his Miranda attorney right that likewise precludes interrogation or an attempt by officers to clarify.

Status: The case now awaits a new decision by the Ninth Circuit following reconsideration.

LED EDITORIAL COMMENT: The U.S. Supreme Court’s remand order did not provide guidance to the Ninth Circuit other than directing the Ninth Circuit to reconsider its 2012 decision in light of the U.S. Supreme Court’s 2013 decision in Salinas v. Texas. As we reported in the August 2013 LED entry at pages 2-7, Salinas was not a Miranda case and did not involve a custodial circumstance. But the Supreme Court in Salinas did follow the general principle that a person cannot assert his or her Fifth Amendment rights by mere silence or by implication. The assertion of the Fifth Amendment right to silence or the right to an attorney must be express and unambiguous.

Our best guess is that a majority of the U.S. Supreme Court is of the view that the Ninth Circuit’s decision in the Sessoms case is questionable at least as to the first of the decision’s two alternative rationales. We think that a majority of the U.S. Supreme Court questions the Ninth Circuit majority opinion’s view that a person can invoke Fifth Amendment right to attorney other than through an explicit assertion of rights. For purposes of Sessoms, the majority position on the U.S. Supreme Court appears to be that the assertion of the attorney right cannot be successfully made either implicitly or with an ambiguous reference to the attorney right, (1) regardless of whether the circumstances are custodial or non-custodial, and (2) regardless of whether the alleged assertion of rights occurred before or after the person was Mirandized. See, for example, Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) July 10 LED:02.

It is also possible that a majority of the U.S. Supreme Court questions the Ninth Circuit’s other rationale, i.e., the rationale that the California appellate courts were clearly wrong in holding that the words used by defendant Sessoms were ambiguous. We will report on the Ninth Circuit’s next decision in Sessoms following that Court’s reconsideration.

(2) ATTORNEY’S SOLICITATION OF PROSPECTIVE CLIENTS FALLS OUTSIDE THE LIMIT OF THE EXEMPTION FROM DRIVER’S PRIVACY PROTECTION ACT (DPPA) LIABILITY FOR OBTAINING INFORMATION FOR USE IN CONNECTION WITH JUDICIAL AND ADMINISTRATIVE PROCEEDINGS – In Maracich v. Spears, ___ U.S. ___, 133 S. Ct. 2191 (June 17, 2013) in a 5-4 opinion (Justices Kennedy, Thomas, Breyer, Alito and Chief Justice Roberts) the United States Supreme Court holds that the federal Driver’s Privacy Protection Act (DPPA) prohibits an attorney from obtaining and using personal information obtained from a state department of licensing to solicit prospective clients.

The syllabus (prepared by the Reporter of Decisions) summarizes the case in part as follows:

Respondent attorneys submitted several state Freedom of Information Act (FOIA) requests to the South Carolina [department of motor vehicles] DMV, seeking names and addresses of thousands of individuals in order to solicit clients for a lawsuit they had pending against several South Carolina car dealerships Using the personal information provided by the DMV, respondents sent over 34,000 car purchasers letters, which were headed “ADVERTISING MATERIAL,” explained the lawsuit, and asked recipients to return an enclosed reply card if they wanted to participate in the case. Petitioners, South Carolina residents, sued respondents for violating the federal [DPPA] by obtaining, disclosing, and using petitioners’ personal information from motor vehicle records for bulk solicitation without their express consent. Respondents moved to dismiss, claiming that the information was properly released under a DPPA exception permitting disclosure of personal information

“for use in connection with any civil, criminal, administrative, or arbitral proceeding,” including “investigation in anticipation of litigation.” 18 U.S.C. § 2721(b)(4). The District Court held that respondents’ letters were not solicitations and that the use of information fell within (b)(4)’s litigation exception. The Fourth Circuit affirmed, concluding that the letters were solicitation, but that the solicitation was intertwined with conduct that satisfied the (b)(4) exception.

Held : An attorney’s solicitation of clients is not a permissible purpose covered by the (b)(4) litigation exception.

(a) State DMVs generally require someone seeking a driver’s license or registering a vehicle to disclose detailed personal information such as name, address, telephone number, Social Security number, and medical information. The DPPA—responding to a threat from stalkers and criminals who could acquire state DMV information, and concerns over the States’ common practice of selling such information to direct marketing and solicitation businesses—bans disclosure, absent a driver’s consent, of “personal information,” e.g., names, addresses, or telephone numbers, as well as “highly restricted personal information,” e.g., photographs, social security numbers, and medical or disability information, § 2725(4), unless 1 of 14 exemptions applies. Subsection (b)(4) permits disclosure of both personal information and highly restricted personal information, while subsection (b)(12) permits disclosure only of personal information.

(b) Respondents’ solicitation of prospective clients is neither a use “in connection with” litigation nor “investigation in anticipation of litigation” under (b)(4).

(1) The phrase “in connection with” provides little guidance without a limiting principle consistent with the DPPA’s purpose and its other provisions. Such a consistent interpretation is also required because (b)(4) is an exception to both the DPPA’s general ban on disclosure of “personal information” and the ban on release of “highly restricted personal information.” An exception to a general policy statement is “usually read . . . narrowly in order to preserve the [provision’s] primary operation.” Reading (b)(4) to permit disclosure of personal information when there is any connection between protected information and a potential legal dispute would substantially undermine the DPPA’s purpose of protecting a right to privacy in motor vehicle records. Subsection (b)(4)’s “in connection with” language must have a limit, and a logical and necessary conclusion is that an attorney’s solicitation of prospective clients falls outside of that limit.

(2) An attorney’s solicitation of new clients is distinct from an attorney’s conduct on behalf of his client or the court. Solicitation “by a lawyer of remunerative employment is a business transaction,” Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 457, and state bars treat solicitation as discrete professional conduct. Excluding solicitation from the meaning of “in connection with” litigation draws support from (b)(4)’s examples of permissible litigation uses—“service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders”—which all involve an attorney’s conduct as an officer of the court, not a commercial actor. Similarly, “investigation in anticipation of litigation” is best understood to allow background research to determine if there is a supportable theory for a complaint or a theory sufficient to

avoid sanctions for filing a frivolous lawsuit, or to help locate witnesses for deposition or trial.

(3) This reading is also supported by the fact that (b)(4) allows use of the most sensitive personal information. Permitting its use in solicitation is so substantial an intrusion on privacy it must not be assumed, without clear and explicit language, absent here, that Congress intended to exempt attorneys from DPPA liability in this regard.

(c) Limiting (b)(4)'s reach also respects the statutory purpose and design evident in subsection (b)(12), which allows solicitation only of persons who have given express consent to have their names and addresses disclosed for this purpose. Subsection (b)(12) implements an important objective of the DPPA—to restrict disclosure of personal information in motor vehicle records to businesses for the purpose of direct marketing and solicitation. Other exceptions should not be construed to interfere with this objective unless the text commands it. Reading (b)(4)'s “in connection with” phrase to include solicitation would permit an attorney to use personal information from the state DMV to send bulk solicitations to prospective clients without their express consent, thus creating significant tension between the DPPA's litigation and solicitation exceptions.

...

(e) Respondents contend that a line can be drawn between mere trolling for clients and their solicitation, which was tied to a specific legal dispute, but that is not a tenable distinction. The DPPA supports drawing the line at solicitation. Solicitation can aid an attorney in bringing a lawsuit or increasing its size, but the question is whether or not lawyers can use personal information protected under the DPPA for this purpose. The mere fact that respondents complied with state bar rules governing solicitations also does not resolve whether they were entitled to access personal information from the state DMV database for that purpose. In determining whether obtaining, using, or disclosing personal information is for the prohibited purpose of solicitation, the proper inquiry is whether the defendant's purpose was to solicit, which might be evident from the communication itself or from the defendant's course of conduct. When that is the predominant purpose, (b)(4) does not entitle attorneys to DPPA-protected information even when solicitation is to aggregate a class action. Attorneys also have other alternatives to aggregate a class, including, e.g. soliciting plaintiffs through traditional and permitted advertising. And they may obtain DPPA-protected information for a proper investigative use.

...

Result: Reversal of Fourth Circuit U.S. Court of Appeals (and United States District Court (South Carolina)) dismissal of plaintiff's lawsuit for violation of the DPPA.

BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: NO QUALIFIED IMMUNITY FOR OFFICERS WHO USE CHOKEHOLD, APPLY PEPPER SPRAY AND APPLY SIGNIFICANT KNEE PRESURE TO THE BACK OF THE NON-RESISTANT BROTHER OF A PERSON THEY ARE ATTEMPTING

TO ARREST ON A WARRANT – In Barnard v. Theobald, ___ F.3d ___, 2013 WL 3285286 (9th Cir., July 1, 2013), a three judge panel of the Ninth Circuit denies qualified immunity to officers who, while attempting to handcuff the brother of a suspect they are attempting to arrest on a warrant, use a chokehold, apply pepper spray and apply significant knee pressure to the back.

The Court describes the facts as follows:

Around 11:30 p.m. on December 8, 2001, the Officers arrived at the home of Charles and Rita Barnard (Rita) to execute an arrest warrant. The warrant called for the arrest of David Barnard (David), Charles's brother, who was staying with Charles and Rita.

Upon arrival at the Barnard residence, the Officers knocked on the door, announced themselves as police officers, and demanded entry. Charles opened the door and came out on the landing. The Officers immediately confronted him. All of the Officers had their weapons drawn, and Officer Clark had his weapon pointed at Charles. At trial, Charles testified that the Officers appeared agitated, and that they were "shaking, they're screaming, yelling at me, 'Hey, motherf---er, put your hands up, put your f---ing hands up.'" Charles put up his hands.

The Officers asked Charles to identify himself. Charles told the Officers that his driver's license was in his bedroom, and asked the Officers to explain the purpose of their visit. The Officers explained that they had a warrant to arrest David. Charles told the Officers that David is his brother, and that he was asleep inside the house. The Officers ordered Charles to turn around and put his "f---ing hands on the wall." Again, Charles complied.

Standing behind Charles, Officer Theobald seized Charles's right arm and handcuffed his right wrist. Before Theobald could handcuff Charles's other arm, however, Theobald tripped on a flower pot that was on the Barnards' landing. Theobald fell backward, still holding onto the handcuffs that were attached to Charles's right wrist. Officer Radmanovich, who had been standing to Charles's left, grabbed for Charles's left (free) arm as Charles was being pulled down by Theobald, but Radmanovich tripped over one of Charles's legs, and all three men came crashing down; Radmanovich on top of Charles, and Charles on top of Theobald.

Officer Clark then joined the fracas. Clark came over to Charles, who was still lying on top of Theobald, and put Charles in a chokehold. Clark then tried to lift Charles up by his neck. Theobald, however, still had hold of the handcuff around Charles's right wrist. The other officers yelled at Theobald to release the cuff, which he did. Still holding Charles by the neck, Officer Clark then lifted Charles even higher off the ground and spun Charles around so that he was on his hands and knees with Officer Clark straddling his back. Charles testified that at some point during this time, his "legs went numb."

Clark kept Charles in a chokehold as he rode Charles to the floor. While Clark was sitting on Charles's back restraining him in a chokehold, Officers Theobald and Radmanovich ordered Charles to give them his "mother---ing" arms. With Clark on top of him, however, Charles could not comply with the Officers' order. Officer Theobald then instructed Clark to use his chemical agent (*i.e.*, pepper spray) to gain Charles's compliance. While still sitting on Charles's back, Officer

Clark released the chokehold and sprayed pepper spray into Charles's face. Clark then dropped his spray canister next to Charles. One of the Officers immediately picked up the can and pepper-sprayed Charles for a second time.

Soon thereafter, Officer Clark got off of Charles's back, and the other Officers handcuffed Charles's arms behind him. Both Officers Radmanovich and Theobald then dug one of their knees into Charles's back—Officer Radmanovich's knee pressed near Charles's neck and shoulders, and Officer Theobald's pressed into Charles's lower back.

At this point, Rita came to the front door to investigate the disturbance. Officer Clark ordered her to "put your f---ing hands up, [and] get on the f---ing wall." Clark then asked Rita to identify herself. Rita identified herself as Charles's wife.

Finally, David came to the front of the house. Officer Radmanovich got off of Charles in order to secure David. Meanwhile, Officer Theobald slid his knee up Charles's back towards his neck. For the next few minutes, as Officers Clark and Radmanovich secured the scene, Theobald kept his knee pressed firmly into the back of Charles's neck and shoulders. Charles repeatedly asked Theobald to get off of his neck, and told Theobald that he was in considerable pain. But Theobald refused to relent. Eventually, after the other Officers had secured David in the back of a police car, Theobald released his knee from the back of Charles's neck. Charles was taken to Clark County Detention Center, where he was held for three days on charges of battery on a police officer, resisting an officer, and obstructing a public officer.

The same morning Charles was released from jail, he sought medical treatment at University Medical Center. Charles complained to the attending physician of severe pain in his hip, neck and shoulders. A week later, Charles returned to the same doctor because his pain had still not subsided. Charles was referred to a specialist, who further referred Charles to physical therapy. But physical therapy was not enough to alleviate Charles's pain and other symptoms. Ultimately, over the course of many years, Charles underwent nine spinal surgeries in an effort to relieve the various symptoms he claims were caused by his encounter with the Officers. As of the time of trial, Charles's symptoms had still not subsided.

[Footnotes omitted]

The Court denies qualified immunity. At the time of the incident a reasonable officer would have known it violated clearly established law to use a chokehold on a non-resistant individual, pepper-spray him, and apply such knee pressure on his neck and back that it would cause the collapse of five vertebrae in his cervical spine.

Result: Affirmance of United States District Court (Nevada) jury verdict in favor of plaintiff and district court's denial of post trial motions.

(2) GOVERNMENT'S CONTINUED RETENTION OF OFFENDER'S BLOOD SAMPLE, TAKEN FOR PURPOSES OF OBTAINING A DNA PROFILE, ONCE HE HAD COMPLETED HIS TERM OF SUPERVISED RELEASE, IS REASONABLE UNDER ALL OF THE CIRCUMSTANCES FOR PURPOSES OF FEDERAL COURT RULE – In United States v. Kriese, ___ F.3d ___, 2013 WL 3242293 (9th Cir., June 28, 2013), a three-judge panel of the Ninth Circuit holds in a 2-1 decision that the government is not required under Federal Rule of

Criminal Procedure 41 to return an offender's blood sample, taken for purposes of obtaining a DNA profile, once the offender's term of supervised release is complete.

The government obtained the blood sample as a condition of the offender's supervised release from custody. Once he had completed the term of supervised release the offender made a motion for return of property under Federal Rule of Criminal Procedure 41 which provides in part that "[a] person aggrieved . . . by the deprivation of property may move for the property's return." Property "documents, books, papers, any other tangible objects, and information." Fed. R. Crim. P. 41(a)(2)(A).

The Court concludes that the offender is seeking the return of "property," and that he is "aggrieved," within the meaning of the Rule, because the government has retained the sample from which private information can be extracted."

The Court next considers whether the government's continued retention of the blood sample is "reasonable [] under all of the circumstances" for purposes of Rule 41 concluding that it is. The match confirmation process is described as follows:

When [Combined Offender DNA Index System] CODIS finds a Candidate Match, the [Federal DNA Database Unit] FDDU receives a CODIS Match Report.

At this point the original blood sample is used for confirmation. Upon receiving a CODIS Match Report, the FDDU retrieves the original blood sample from storage to perform further analysis—what the federal government has called in this case the "Match Confirmation" step. The FDDU locates the retained blood sample in storage using the specimen identification number. The FDDU then takes the retained sample, re-extracts junk DNA from it, and runs a new analysis. If the newly generated profile is the same as the one in CODIS that formed a Candidate Match, the match is confirmed and the accuracy of the match between the CODIS profile and the identified offender is ensured. The confirmation of the CODIS match is thus achieved by comparing the profile generated from the retained sample with the Codis profile. Although CODIS has not yet encountered such a "mismatch" or "misidentification" error, in the event that the generated profile did not match the CODIS profile, the lab would then determine what caused the error and, presumably, prevent similar errors from occurring in the future. The "Match Confirmation" is used to ensure the continued accuracy and integrity of the CODIS system. **LED EDITORIAL NOTE: The Court also explains that the match confirmation process is also a method of long-term quality control.** It is the government's primary justification for retaining the blood sample.

Result: Affirmance of United States District Court (Western District Washington) order denying Thomas Edward Kriesel, Jr.'s motion for return of his blood sample.

(3) CIVIL RIGHTS ACT LAWSUIT: PRISON OFFICIALS ARE ENTITLED TO ABSOLUTE IMMUNITY FROM SUIT WHEN CARRYING OUT FACIALLY VALID COURT ORDER – In Engebretson v. Mahoney, ___ F.3d ___, 2013 WL 3242512 (9th Cir., May 30, 2013), the plaintiff sued prison officials for their part in enforcing the sentencing provisions of a court order that was later invalidated. A three-judge panel of the Ninth Circuit holds that "prison officials charged with executing facially valid court orders enjoy absolute immunity from § 1983 liability for conduct prescribed by those orders."

Result: Affirmance of United States District Court (Montana) order dismissing plaintiff Jeses K. Engebretson's lawsuit against prison officials.

(4) CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT PANEL RULES IN FAVOR OF CITY IN USE OF DEADLY FORCE CASE INVOLVING NON-COMPLIANT MOTORIST ATTEMPTING TO DRIVE AWAY WITH OFFICERS IN AND OUTSIDE OF THE VEHICLE – In Gonzalez v. City of Anaheim, 715 F.3d 766 (9th Cir., May 13, 2013), a three-judge panel of the Ninth Circuit dismisses use of force claims against the City of Anaheim where officers: (1) used a flashlight to hit Gonzalez [the decedent] on the arm; (2) attempted to place Gonzalez in a carotid restraint; (3) one officer punched Gonzalez's head and face while the other officer attempted to restrain him; (4) struck the back of Gonzalez's head with the flashlight; and (5) shot Gonzalez's head at close-range.

Excessive Force Claims

The Court begins by explaining the standard:

Under the Fourth Amendment, police may use only such force as is “objectively reasonable in light of the facts and circumstances confronting them.” Graham v. Connor, 490 U.S. 386, 397 (1989) (internal quotation marks omitted). To determine whether the use of force was reasonable, we balance the level of force used against the need for that force. Graham suggests three factors that courts should consider when evaluating the need for force: (1) the severity of the crime, (2) whether the suspect posed an immediate threat to the officers or others, and (3) whether the suspect was actively resisting arrest. Id. at 396.

Flashlight Strikes

The Court first rejects the plaintiffs' allegations that the flashlight strikes to Gonzalez's arm constituted excessive force. “Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat. Striking Gonzalez in the arm was not excessive force given his stubborn refusal to follow the officers' commands.” [Citations omitted]

Attempted Carotid Restraint, Punches to Face, Flashlight Strikes to Back of Head

The Court then applies the Graham factors to evaluate the plaintiffs' allegations that the attempted carotid restraint, punches to Gonzalez's face, and flashlight strikes to Gonzalez's head constituted excessive force:

The first factor looks to the severity of the crime, and here it weighs in the officers' favor. The officers had reason to believe that Gonzalez possessed illegal drugs and was trying to destroy evidence. Generally this factor weighs in favor of the officers if they have “reason to believe” the suspect had committed a “felony-grade offense.” See Coles v. Eagle, 704 F.3d 624, 628–29 (9th Cir. 2012) **March 13 LED:05**.

The second Graham factor is the immediacy of the threat posed by Gonzalez to the officers or others. This is undoubtedly the most important factor. Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011) **Jan 12 LED:03** (en banc). Here, both officers testified that they saw Gonzalez reach down with his left hand between the driver's side door and the seat. At that moment, a reasonable officer in their position could be concerned that Gonzalez was concealing a weapon in that

area. Given Gonzalez's repeated refusal to obey the officers' orders and his multiple furtive reaches, the officers had reason to suspect danger. Then, when Gonzalez tried to shift the van into drive with an officer in the vehicle, the situation became substantially more dangerous, and the officers' justification for force increased commensurately. See, e.g., Scott v. Harris, 550 U.S. 372, 383–84 (2007) **Jan 07 LED:08** (officers were justified in ramming a fleeing suspect in a vehicle that posed significant risk to the public; reasonableness inquiry weighs the threat posed by the suspect against the force used by the officers). Because of the possibility of a hidden weapon and the threat the running vehicle posed, the second Graham factor weighs in favor the officers.

Finally, the last Graham factor asks whether Gonzalez was “actively resisting arrest or attempting to evade arrest by flight.” Coles, 704 F.3d at 629. Gonzalez engaged in active resistance both in his motions with his hands and by struggling with the officers. See Mattos, 661 F.3d at 445 (suspect who refused to get out of her car and stiffened her body and clutched at her steering wheel to frustrate officers engaged in active resistance). Then, when Gonzalez attempted to put the van in drive, his active resistance became attempted flight. Like the other factors, this factor weighs in favor of the officers.

Because all three Graham factors support the officers, they were justified in applying significant force. Not only was Gonzalez acting strangely, but the officers had reason to believe he was committing and then attempting to conceal a drug offense. He continually ignored the officers' commands and resisted their attempts to physically restrain him. And when he attempted to drive away with an officer in the passenger seat, he made a volatile situation all the more dangerous.

Gunshot to Head

The Court also rejects the deadly force claim, explaining:

First, even assuming that the van was traveling relatively slowly, the threat of acceleration—and the threat to Wyatt's life—remained. Wilkinson v. Torres, 610 F.3d 546, 552 (9th Cir. 2010) **Sept 10 LED:02** (deadly force was objectively reasonable even though “the vehicle was moving at a slow rate of speed,” “it could have gained traction at any time, resulting in a sudden acceleration. . . .”). Thus, the van's speed is not a material fact, even if it were actually disputed. The dissent does not address this point.

Second, the rough estimates of time taken and distance traveled stated in Wyatt's deposition were just that—rough estimates. Wyatt's story is “internally consistent” if we do not ascribe unfounded precision to his estimates. It would be surprising if an officer could recount precise quantitative details about an incident which took mere seconds over a year later. A minor inconsistency in officer testimony does not alone create a dispute of material fact. . . .

Third, one rough estimate divided by another does not provide meaningful evidence on the speed of the van. We cannot weigh the evidence, but we must look at the record as a whole. Wyatt also testified that, after Gonzalez managed to put the van into drive, he “floor[ed] the accelerator and violently accelerated northbound.” This acceleration was fast enough to slam the door shut, trapping

Wyatt in the vehicle. Wyatt further testified that when he shot Gonzalez, the van was going about “50 miles per hour.” Ellis confirmed this account of events in his deposition and stated in an interview conducted the day after the incident that Gonzalez “stomped down” on the gas pedal, causing the vehicle to accelerate so rapidly that the tires squealed. The most that a rational trier of fact could conclude from this record is that Wyatt is bad at estimating—hardly a reason to send this case to trial. . . .

The record taken as a whole does not support any inferences other than essentially what the officers claim: Wyatt was an unbuckled passenger in a rapidly accelerating van with an escaping and noncompliant suspect. Gonzalez’s flight could have killed or seriously injured Wyatt. This was not a case where Wyatt had time to deliberate and consider the most measured response; he testified that he tried to knock the vehicle’s gearshift out of gear and that he yelled at Gonzalez to stop. When these methods failed, further hesitation may have been fatal. Given the speed with which these events occurred, Wyatt was objectively reasonable in resorting to deadly force. Wilkinson, 610 F.3d at 553 (holding as objectively reasonable officer’s decision to shoot the driver of a van which was accelerating in close quarters with two officers; “absolute certainty of harm need not precede an act of self-protection”).

Substantive Due Process Claim

The Court also rejects the plaintiffs’ allegations that the officers’ conduct violated their substantive due process right to familial association. Such a claim requires that plaintiffs’ show that the officers’ conduct “shock[ed] the conscience.” Porter v. Osborn, 546 F.3d 1131, 1137 (9th Cir. 2008) **Jan 09 LED:02**. “Because the officers had no time to deliberate, the representatives must show that the officers had a ‘purpose to harm’ Gonzalez for reasons unrelated to legitimate law enforcement objectives.” Id.; see also Wilkinson, 610 F.3d at 554.

The Court concludes:

The representatives present no evidence to suggest that the officers, at any point, had a purpose “to cause harm unrelated to the legitimate object of arrest” or self-protection. Porter, 546 F.3d at 1140. At each stage of the encounter, the officers were forced to make split-second decisions. As explained above, the force that they used was not excessive or disproportionate to the quickly escalating situation. Nothing in the officers’ behavior suggests that there were ulterior motives at work.

Result: Affirmance of United States District Court (Central District California) order granting summary judgment in favor of City and dismissing the case.

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CLAIM FOR WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY IS ALLOWED TO PROCEED NOTWITHSTANDING PUBLIC EMPLOYEES RELATIONS COMMISSION (PERC) REMEDY – In Piel v. City of Federal Way, ___ Wn.2d ___, 2013 WL 3377417 (June 27, 2013), the Washington State Supreme Court holds in a 5-4 opinion that the availability of PERC remedies under chapter 41.56 RCW do not prevent an employee from bringing a tort lawsuit for termination in violation of public policy.

Result: Reversal of King County Superior Court order granting summary judgment dismissal of officer's lawsuit against city.

(2) PUBLIC RECORDS ACT LAWSUIT: SUPREME COURT, AMONG OTHER THINGS, INTERPRETS INVESTIGATIVE RECORDS EXEMPTION OF RCW 42.56.240(1) IN CASE THAT AROSE OUT OF ATTORNEY GENERAL'S OFFICE INVESTIGATION UNDER CONSUMER PROTECTION ACT OF COMPANY'S LENDING PRACTICES – In Ameriquet v. Office of the Attorney General, ___ Wn.2d ___, 300 P.3d 799 (May 9, 2013), Ameriquet sought to prevent the Attorney General's Office (AGO) from disclosing records in response to a public records request by arguing, among other things, that the e-mails were exempt from disclosure under the investigative records exemption, RCW 42.56.240(1). The Supreme Court rejects this argument, finding that the non-disclosure of the records, which were e-mails obtained as part of a Consumer Protection Act investigation, is not essential to effective law enforcement.

The Court also rejected Ameriquet's argument that the records were exempt from disclosure under the Consumer Protection Act, finding that they were not provided to the AGO in response to a civil investigative demand (CID), in which case they would be exempt, but were provided voluntarily.

However, the Court did hold that the AGO may not disclose records that contain Gramm-Leach-Bliley Act (GLBA) protected information, even after redacting out the protected information. The very act of redaction qualifies as "use" that is prohibited under the GLBA. See Ameriquet v. Office of the Attorney General, 170 Wn.2d 418 (2010) (Ameriquet I)(GLBA is an "other statute" under the PRA). "Only E-mails completely devoid of nonpublic personal information, including personally identifying information, may be disclosed in a nonaggregated format."

Result: Remand to Thurston County Superior Court.

(3) PUBLIC RECORDS ACT LAWSUIT: FIVE SUPREME COURT JUSTICES SIGN OPINION THAT PROVIDES A DETAILED FRAMEWORK FOR ANALYSIS OF PRA QUESTIONS, INCLUDING AN OUTLINE, A FLOWCHART AND A CATEGORIZED LISTING OF STATUTES; FOUR JUSTICES SIGN CONCURRING OPINION THAT CRITICIZES THE LEAD OPINION FOR ADDRESSING QUESTIONS NOT BEFORE THE COURT – In Resident Action Council v. Seattle Housing Authority, ___ Wn.2d ___, 300 P.3d 376 (May 9, 2013), the Washington State Supreme Court holds that the Seattle Housing Authority (SHA) violated the public records act (PRA) when it responded to a request from the Resident Action Council (RAC).

The majority summarizes the case as follows:

This direct appeal concerns the public disclosure of Seattle Housing Authority (SHA) grievance hearing decisions pursuant to the Public Records Act (PRA), chapter 42.56 RCW. SHA hearing decisions contain welfare recipients' personal information. This information is exempt from disclosure under the PRA, but the PRA requires redaction and disclosure of public records insofar as all exempt material can be removed. Accordingly, the PRA requires redaction of welfare recipients' exempt information contained in SHA's grievance hearing decisions. Applicable federal regulations do not exempt the hearing decisions from disclosure, nor do applicable federal regulations preempt the PRA. Thus, the trial court properly ordered SHA to produce the grievance hearing decisions pursuant to the redaction requirement of the PRA, properly ordered SHA to

produce the responsive records in electronic format and to establish necessary policies and procedures to ensure compliance with the PRA, and properly awarded statutory damages. We affirm the trial court and award respondent Resident Action Council (RAC) its attorney fees on appeal.

However, the majority then sorts the exemptions contained in the PRA into categories (it does not sort the myriad of “other statutes” providing exemptions), provides a procedure for agencies to follow in responding to PRA requests, and includes a flow chart:

A list of the 141 current PRA exemptions, preliminarily sorted into relevant types, is included as an appendix to this opinion. **[LED EDITORIAL NOTE: The appendix can be viewed online at the end of the Court’s opinion.]** The list includes (1) categorical-information exemptions, (2) categorical-record exemptions, (3) categorical-hybrid exemptions (exempting both information and records), (4) conditional-information exemptions, (5) conditional-record exemptions, and (6) conditional-hybrid exemptions. The list also includes four ambiguous exemptions that will require serious consideration and construction prior to any attempt at appropriate grouping. Further review may also disclose that an exemption listed in one group has been sorted incorrectly and actually belongs in another group. But this preliminary sorting of exemptions still should prove useful to agencies trying to navigate and comply with the PRA. Agencies should also be aware that many exemptions contain specified limitations, which must be followed when relevant. See, e.g., RCW 42.56.360(1)(j) (exempting “documents . . . received pursuant to a wellness program under RCW 41.04.362, but not statistical reports that do not identify an individual”).

In sum, an agency facing a request for disclosure under the PRA should take the following steps: First, determine whether any public records are responsive to the request—if not, the PRA does not apply. Second, insofar as certain public records are responsive, determine whether any exemptions apply generally to those types of records or to any of the types of information contained therein. An agency should be sure to consider any specified limitations to an exemption when discerning the exemption’s scope of potential application. If no exemption applies generally to the relevant types of records or information, the requested public records must be disclosed. Third, if an exemption applies generally to a relevant type of information or record, then determine whether the exemption is categorical or conditional. If the exemption is conditional and the condition is not satisfied in the given case, the records must be disclosed. Fourth, if the exemption is categorical, or if the exemption is conditional and the condition is satisfied, then the agency must consider whether the exemption applies to entire records or only to certain information contained therein. If the exemption applies only to certain information, then the agency must consider whether the exempted information can be redacted from the records such that no exemption applies (and some modicum of information remains). If the exemption applies to entire records, then those records are exempted and need not be disclosed, unless redaction can transform the record into one that is not exempted (and some modicum of information remains). If effective redaction is possible, records must be so redacted and disclosed. Otherwise, disclosure is not required under the PRA. These are the indispensable steps that an agency should take in order to properly respond to a PRA request. These steps are visually represented in the flowchart contained in figure 1. **[LED EDITORIAL NOTE: The flowchart can be viewed online in the Court’s opinion.]**

The “clearly unnecessary” inquiry under RCW 42.56.210(2) serves in rare cases to judicially override exemptions that otherwise apply to a specified type of information or record. The standard is quite high and is relevant to all categorical exemptions but only some conditional exemptions. In the case of a categorical exemption, all information or records of a specified nature are presumed exempt unless a court finds the exemption clearly unnecessary in a given instance. In the case of a conditional exemption, if the need to protect an identified interest is reviewed de novo, a court will not consider whether the conditional exemption is “clearly unnecessary” because the conditional exemption will be applicable in the first place only if it *is* necessary to protect an identified interest. However, if determining the need to protect an identified interest is vested in the discretion of an agency, it may be necessary for a court to consider whether the conditional exemption is “clearly unnecessary” under the circumstances, or in other words, whether the agency has abused its wide discretion.

Concurrence: Chief Justice Madsen authors a concurrence pointing out that the majority:

[G]oes far beyond reviewing the trial court’s actions. For example, the majority, without briefing or a trial court ruling subject to review, outlines and charts the procedures an agency should follow in responding to public records requests. The majority also takes it upon itself to classify various provisions of the PRA that are unrelated to the issues presented in this case. It appears that the majority is attempting to advise SHA in the development of the very policies and procedures required under the injunction. While this guidance may be helpful, it is unnecessary to the disposition of this case and is improper.”

Status: A petition for rehearing has been filed.

Result: Affirmance of King County Superior Court order granting injunctive relief to plaintiffs.

LED EDITORIAL COMMENTS: We agree with Chief Justice Madsen’s concurrence in which she points out that the majority goes far beyond the question presented in this case by providing procedures, charts and categorizing PRA exemptions. We hope that this portion of Resident Action Council can be classified as dicta (that portion of a decision not necessary to the court’s decision and therefore not precedent-setting). We are concerned that requestors and courts may turn to form over substance and seek to hold agencies to the requirements set out in this opinion, regardless of the appropriateness of an agency’s response to a public records request. As always public records officers should consult with their assigned agency legal advisor.

WASHINGTON STATE COURT OF APPEALS

PHYSICAL CONTROL DEFENSE FOR CAR MOVED SAFELY OFF THE ROADWAY DOES NOT APPLY WHERE DEFENDANT NEITHER MOVED THE CAR NOR DIRECTED ANOTHER PERSON TO MOVE THE CAR TO THE SAFE LOCATION

City of Yakima v. Godoy, ___ Wn. App. ___, 2013 WL 3379422 (Div. III, May 7, 2013)

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

Julio Mendoza Godoy's friend was having car problems on the night of May 26, 2007. Another friend drove Mr. Mendoza Godoy to the car, which was parked in an empty lot. Mr. Mendoza Godoy agreed to stay with the car and wait for a mechanic while his friends left to make a telephone call. He sat alone in the car and drank a beer. There is no dispute that Mr. Mendoza Godoy was intoxicated.

[A law enforcement officer] noticed the car as he drove by. He saw that Mr. Mendoza Godoy was holding an open beer can and that there was beer in the back seat. [The officer] arrested Mr. Mendoza Godoy and the city of Yakima charged him with physical control of a motor vehicle while under the influence of intoxicating liquor.

The case proceeded to a jury trial. The city of Yakima argued against instructing the jury that moving a car safely off the roadway is an affirmative defense. It reasoned that there was no evidence that Mr. Mendoza Godoy had moved the car. The court agreed. The jury convicted Mr. Mendoza Godoy.

He appealed to Yakima County Superior Court and that court affirmed. This court granted Mr. Mendoza Godoy's motion for discretionary review.

ISSUE AND RULING: While intoxicated, Godoy got into a parked car and sat in the driver's seat after someone else had moved the car off the roadway and parked it in an empty lot. Godoy had not directed that the car be moved to that location. In a prosecution for physical control under RCW 46.61.504(2) is Godoy entitled to present the defense for having moved a vehicle safely off the roadway? (**ANSWER:** No, because he neither moved the car to that location nor did he direct someone else to move the car to that location)

Result: Affirmance of Yakima County Superior Court conviction of Julio Mendoza Godoy for physical control in violation of RCW 46.61.504(2).

ANALYSIS: (Excerpted from Court of Appeals opinion)

Actual physical control of a vehicle while "under the combined influence of or affected by intoxicating liquor" is a crime in the State of Washington. RCW 46.61.504(l)(c). The statute also provides an affirmative defense to that crime. RCW 46.61.504(2). The affirmative defense provides, "No person may be convicted under this section if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." RCW 46.61.504(2) (emphasis added). The issue here is whether the court should have instructed the jury on this affirmative defense even though there is no evidence that Mr. Mendoza Godoy moved the car.

....

Mr. Mendoza Godoy argues that the defense at issue applies to any person in an automobile that is safely off the roadway. We reject that argument for several reasons.

First, it ignores the statute's plain language. The phrase "the person has moved the vehicle" is clear language and should be given its ordinary meaning. [*State v. Votava*, 149 Wn.2d 178, 183 (2003) **Aug 03 LED:10**]. The word "move" means "to go continuously from one point or place to another," "to go forward," "get along," or "make progress." Webster's Third New International Dictionary

1479 (1993). The word “moved” requires the defendant to do something other than sit idly in a vehicle. Mr. Mendoza Godoy’s interpretation of the statute would apply to defendants who have not moved the vehicle. It would make “the person has moved the vehicle” superfluous.

Second, it ignores the statute’s purposes. Statutory language should be construed in a way that carries out, not defeats, the statute’s purposes. The statute at issue aims to protect the public in two ways: “(1) deterring anyone who is intoxicated from getting into a car except as a passenger, and (2) enabling law enforcement to arrest an intoxicated person before that person strikes.” [Votava] In Votava, for example, the owner of a car rode as passenger and instructed the driver to park the car. The court reasoned that the owner could assert the “safely off the roadway” defense because directing the driver to park meant that he “moved” the car and, by not actually driving the car himself, he fulfilled one of the statute’s purposes.

Mr. Mendoza Godoy argues that the purposes of the statute would be supported here because Votava explained that “[a]llowing a defendant who did not drive to present the defense better advances the purposes of the statute.” However, he takes Votava’s language out of context. The language refers to a person who moved the car without driving it and that is not what happened here. Moreover, by getting into the driver’s seat of his friend’s car, Mr. Mendoza Godoy did exactly what the statute aims to deter. Mr. Mendoza Godoy’s interpretation of the statute renders an absurd result.

Finally, we reject Mr. Mendoza Godoy’s argument that this case is analogous to Votava and City of Spokane v. Beck, 130 Wn. App. 481 (2005) **March 06 LED:15**. The only similarity between Votava, Beck, and this case is that all three defendants sat intoxicated in the driver’s seats of their legally parked cars. Unlike in Votava, there was no evidence that Mr. Mendoza Godoy had moved the car. And Beck is unhelpful because there is nothing to indicate whether Mr. Beck moved his car or not; the issue was not addressed on appeal. Votava and Beck do not warrant a “safely off the roadway” instruction here.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COMMERCIAL DRIVER’S LICENSE (CDL) LANGUAGE IN IMPLIED CONSENT WARNINGS, GIVEN TO DRIVERS WHO HOLD A CDL AND ARE STOPPED WHILE DRIVING THEIR PERSONAL VEHICLES, IS NOT INNACURATE OR MISLEADING; STATUTE REQUIRING THE DEPARTMENT OF LICENSING TO CONTINUE A HEARING WHERE A CDL IS AT ISSUE AND OFFICER DOES NOT APPEAR DOES NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION – In Martin v. Department of Licensing, ___ Wn. App. ___, 2013 WL 3361239 (Div. II, April, 30, 2013, publication June 19, 2013), the Court of Appeals holds that implied consent warnings given to individuals who hold commercial driver’s licenses (CDL) and are stopped for driving while under the influence (DUI) while driving their personal vehicles, were not inaccurate or misleading.

Martin was arrested for DUI and read implied consent warnings, which included the following with regard to CDLs:

For those not driving a commercial motor vehicle at the time of arrest: if your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified.

[LED EDITORIAL NOTE: RCW 46.25.090(1)(b), which governs disqualification of CDLs, requires disqualification of a CDL where the person is driving a noncommercial motor vehicle with an alcohol concentration of .08 or more.] Martin did not express any confusion regarding the warnings. He provided two breath samples, both above the legal limit.

Relying on Division II's holding in Lynch v. Department of Licensing, 163 Wn. App. 697 (2011) **Feb 12 LED:21** and Division I's holding in Allen v. Department of Licensing, 169 Wn. App. 304 (Div. I, July 2, 2012) **Dec 12 LED:25**, the Court holds that the implied consent warnings are neither inaccurate nor misleading.

The Court also rejects Martin's argument his due process and equal protection rights were violated by a department of licensing (DOL) statute that requires hearing examiners to continue DOL hearings where a CDL is at issue and an officer fails to appear.

Result: Reversal of Cowlitz County Superior Court's reversal of department of licensing order suspending the personal driver's license and disqualifying the commercial driver's license of Roger R. Martin.

(2) KNOWLEDGE THAT THE PERSON IS INCAPABLE OF CONSENT BY REASON OF BEING PHYSICALLY HELPLESS IS NOT AN ESSENTIAL ELEMENT OF INDECENT LIBERTIES; EVIDENCE SUFFICIENT TO CONVICT DEFENDANT OF INDECENT LIBERTIES – In State v. Mohamed, ___ Wn. App. ___, 301 P.3d 504 (Div. I, May 28, 2013), the Court of Appeals holds that knowledge that a person is incapable of consent by reason of being physically helpless is not an essential element of indecent liberties, and that there is sufficient evidence to convict the defendant of indecent liberties.

The Court describes the facts as follows:

Mohamed, M.M., and M.M.'s boyfriend, Nolan Milgate, attended a party in Seattle in 2011. Mohamed met M.M. and Milgate for the first time at this party.

During the party, Mohamed and M.M. consumed alcohol. Mohamed also consumed marijuana. Mohamed and M.M. conversed during the party.

At the end of the party, Mohamed missed his ride home. The hostess told Mohamed that he could sleep on a couch on the first floor. M.M. and Milgate also spent the night at the house in an upstairs bedroom.

M.M. testified at trial that she was sleeping in bed with Milgate when she was awakened by someone touching her vagina. At first she thought it was Milgate. But then she felt fingers in her mouth and a penis penetrating her vagina. M.M. further testified that she realized that Mohamed was in the bed with her. M.M. moved away from Mohamed and woke up Milgate. She told Milgate that she had been raped.

Milgate grabbed Mohamed, and they started fighting. A neighbor saw the fighting through a window and called 911. Milgate also called for help. The police arrived, interviewed witnesses, and arrested Mohamed.

RCW 9A.44.100(1) defines indecent liberties, in part, as follows:

(1) A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another:

...

(b) When the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless;

...

The Court rejects the defendant's argument that the state was required to specifically allege that he knew the victim was incapable of consent by reason of being physically helpless at the time. The word "knowingly" modifies "causes".

The Court also concludes that there is sufficient evidence to convict the defendant of indecent liberties because she was asleep, and unable to consent, when the defendant first began the sexual contact. The Court explains:

Here, the State was required to prove that Mohamed "knowingly cause[d] another person who is not his or her spouse to have sexual contact with him or her or another . . . [w]hen the other person is incapable of consent by reason of being . . . physically helpless." RCW 9A.44.100(1). RCW 9A.44.010(2) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

RCW 9A.44.010(5) states, "physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act." This court has explained that "[t]he state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness."

[Citation omitted]

Result: Affirmance of King County Superior Court conviction of Mohamaud Suldan Mohamed for indecent liberties.

(3) GIVEN THE CIRCUMSTANCES OF THIS CASE, COURT FINDS SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ASSAULT IN THE THIRD DEGREE FOR REACHING TOWARD A PARK RANGER, AND RESISTING ARREST EVEN WHERE OFFICER DID NOT FORMALLY SAY "YOU ARE UNDER ARREST" – In State v. Calvin, ___ Wn. App. ___, 302 P.3d 509 (Div. I, May 28, 2013) the Court of Appeals concludes that under the facts of this case the defendant's actions in reaching toward a park ranger are sufficient for a conviction of assault three, and rejects the argument that the defendant could not be convicted of resisting arrest because the ranger never used the words "you are under arrest."

The Court describes the facts in part as follows:

[Larrabee State Park in Bellingham] . . . closes to day users half an hour after sunset. On April 10, [2010] [a Park Ranger] closed the gate at 8:30 p.m. At around 9:15 p.m., he discovered a car idling in front of the closed gate. [The Ranger] was driving a dark blue truck with a white stripe across it, a park shield on the door, and a law enforcement light bar on top. He was wearing his uniform.

When he pulled up, [the Ranger] saw Donald Calvin standing outside of his idling vehicle. [The Ranger] rolled his window down, shut off the ignition, and announced himself as a ranger. Calvin was aggravated, said that he just wanted to take a shower, and asked if [the Ranger] was going to let him in. [The Ranger] informed Calvin that the facilities were closed at that point and only available to campers. In a strained tone, Calvin asked how much it was going to cost him to get in. [The Ranger] responded that the price for camping was \$14.

Calvin approached the park vehicle and came within two feet of the open window. [The Ranger] was trained not to be approached in his vehicle. He became apprehensive because of Calvin's proximity to his window and the minimal lighting in the area. He exited his vehicle and repeated that Calvin could enter as a camper, but needed to leave if he had no intention of camping. Calvin asked for [the Ranger's] name. [The Ranger] responded by giving his first and last name, and Calvin shouted, "Well, at least you know your damn name." At that point, [the Ranger] thought Calvin might have been under the influence of intoxicants. He took out his flashlight and pointed it at Calvin's chest. Calvin said, "Get that F-ing light out of my face," put his hand up, and reached toward [the Ranger]. They were standing approximately five feet apart.

[The Ranger] told Calvin to get back. When Calvin did not retreat, he sprayed him with a quick burst of pepper spray. Calvin advanced such that [the Ranger] had to back up approximately 10 feet. He yelled at Calvin to get back and get on the ground. When Calvin kept coming with his hands toward his face in an aggressive posture, [the Ranger] struck him with his baton approximately six times.

Calvin began walking away. [The Ranger] holstered his baton and went after Calvin to arrest him for assault. He yelled, "Police, get on the ground," grabbed Calvin's left arm, and took him to the ground. He was able to cuff Calvin's left wrist, but Calvin would not yield his right arm. [The Ranger] told Calvin to quit resisting and give his arm, but Calvin struggled for approximately a minute before [the Ranger] could get the second cuff on. [The Ranger] read Calvin his rights and Whatcom County sheriffs took him from the scene. Calvin referred to [the Ranger] as "ranger dick."

RCW 9A.36.031, assault in the third degree, provides in part:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

...

g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

...

The Court concludes that the facts are sufficient for a rational trier of fact to conclude beyond a reasonable doubt that [the Ranger's].

RCW 9A.76.040, resisting arrest, provides:

(1) A person is guilty of resisting arrest if he or she intentionally prevents or attempts to prevent a peace officer from lawfully arresting him or her.

The Court also concludes that there was sufficient evidence to establish that Calvin knew [the Ranger] was a law enforcement officer, knew he was being placed under arrest, and attempted to prevent his arrest even though the Ranger did not specifically say "you are under arrest."

Result: Affirmance of Whatcom County Superior Court convictions of Donald L. Calvin for assault in the third degree and resisting arrest.

(4) NO DOUBLE JEOPARDY IN CHARGING AND CONVICTING DEFENDANT OF THIRD DEGREE THEFT FOR STEALING A PURSE AND SIX COUNTS OF SECOND DEGREE THEFT FOR STEALING CREDIT CARDS FROM WALLET INSIDE THE PURSE – In State v. Lust, ___ Wn. App. ___, 300 P.3d 846 (Div. III, May 21, 2013), the Court of Appeals rejects the defendant's double jeopardy argument that the third degree theft and second degree thefts are legally and factually identical because access devices are generic property and proving he stole the purse necessarily proves he stole the credit and debit cards inside.

The defendant stole a tavern patron's purse and removed six credit and debit cards from a wallet inside the purse. The State charged the defendant with one count of theft in the third degree for stealing the purse, and six counts of theft in the second degree for stealing the credit and debit cards.

The Court rejects the defendant's double jeopardy argument, explaining:

A person commits theft if he or she "wrongfully obtain[s] or exert[s] unauthorized control over the property . . . of another . . . with intent to deprive him or her of such property." RCW 9A.56.020(1)(a). Third degree theft applies if a person "commits theft of property . . . which . . . does not exceed seven hundred fifty dollars in value." RCW 9A.56.050(1)(a). . . . [One circumstance in which s]econd degree theft applies if a person "commits theft of . . . [a]n access device." Former RCW 9A.56.040(1)(c). An access device is "any card, plate, code, account number, or other means of account access that can be used . . . to obtain money, goods, services, or anything else of value." RCW 9A.56.010(1).

Here, the theft statute required proof Mr. Lust intended to deprive the tavern patron of the purse when he took it without her permission and he separately intended to deprive her of the credit and debit cards when he removed them from the wallet inside. While the third degree theft statute required proof the purse was valued under \$750, the second degree theft statute did not require this valuation for the credit and debit cards. And, while the second degree theft statute required proof the credit and debit cards were access devices, the third degree theft statute did not require this characteristic for the purse. Thus, as charged, each offense contains an element not included in the other and proving one offense does not necessarily prove the other. Theft of property valued under \$750 and theft of an access device are neither legally nor factually identical here.

It follows that Mr. Lust's convictions for both under RCW 9A.56.050(1)(a) and former RCW 9A.56.040(1)(c) did not violate the double jeopardy prohibition.

Result: Affirmance of Ferry County Superior Court convictions of David Michael Lust for one count of theft in the third degree and six counts of theft in the second degree.

(5) FIRST DEGREE ANIMAL CRUELTY STATUTE IS NOT VOID FOR VAGUENESS AS APPLIED; STARVATION AND DEHYDRATION ARE ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE ANIMAL CRUELTY, HOWEVER, EVIDENCE IS HELD TO BE SUFFICIENT TO ESTABLISH HORSES SUFFERED DEHYDRATION CAUSING SUBSTANTIAL AND UNJUSTIFIABLE PAIN AS RESULT OF DEFENDANT'S NEGLIGENCE; COURT HAS AUTHORITY TO ORDER DEFENDANT TO REIMBURSE COUNTY FOR COST OF CARING FOR HORSES – In State v. Peterson, ___ Wn. App. ___, 301 P.3d 1060 (Div. I, May 20, 2013), the Court of Appeals upholds the first degree animal cruelty statute against a vagueness challenge and affirms six counts of animal cruelty in the first degree where defendant deprived horses of food and water.

One method of committing animal cruelty in the first degree is as follows:

A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

RCW 16.52.205(2). The defendant argued that the statute's failure to define "unjustifiable physical pain" made the statute void for vagueness. The Court rejects the defendant's argument, explaining:

In context, the phrase "unjustifiable physical pain" gives fair notice of the objective standard of reasonableness that persons of ordinary intelligence would understand. "Unjustifiable" modifies "physical pain that extends for a period sufficient to cause considerable suffering" or death. "Unjustified" is defined as "not demonstrably correct or judicious; unwarranted in the light of surrounding circumstances." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2502 (2002). Pain is "a state of physical or mental lack of well-being or physical or mental uneasiness that ranges from mild discomfort or dull distress to acute often unbearable agony." State v. Zawistowski, 119 Wn. App. 730, 734 (2004) (quoting Webster's Third New International Dictionary 1621 (1969)).

As applied, the first degree animal cruelty statute gave Peterson fair warning of the proscribed conduct. The undisputed evidence established that the animal control officers repeatedly told Peterson that the horses were underweight, that she needed to provide food and water on a regular basis, and in early July, Officer Delgado warned Peterson that she risked criminal charges if she did not do so. In July and throughout August, Officer Davis told Peterson that she needed to feed and water the horses and get her horses up to an acceptable weight.

The Court holds that as applied to the defendant the statute is not void for vagueness.

The Court also holds that although starvation and dehydration are alternative means of committing animal cruelty in the first degree there is sufficient evidence the horses were dehydrated.

Finally, the Court holds that the trial court had authority to order the defendant to reimburse the county for the cost of caring for the horses.

Result: Affirmance of Snohomish County Superior Court convictions of Mary Dawn Peterson for six counts of animal cruelty in the first degree.

(6) UNDERREPORTING TAXABLE REVENUE AND UNDERPAYING TAXES DOES NOT ESTABLISH “THEFT” OF GAMBLING REVENUES – In State v. Lau, ___ Wn. App. ___, 300 P.3d 838 (Div. I, May 20, 2013), the Court of Appeals reverses the defendant’s theft convictions, holding that underreporting gambling revenue does not amount to theft.

RCW 9A.56.020(1) defines the crime of “theft” as follows:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.

Chapter 9.46 RCW, the Gambling Act, authorizes cities to tax pull-tab game operators at a rate not to exceed five percent of gross gambling receipts. The Washington State Gambling Commission licensed Lau to operate pull-tab games at the bars owned in the cities of Burien and Federal Way. Lau underreported the amount of gross gambling receipts for pull-tab sales.

Lau was charged with theft in the first degree of “property belonging to the City of Federal Way” and theft in the second degree of “property belonging to the City of Burien.”

The Court reverses the convictions finding that the State did not prove beyond a reasonable doubt that Lau obtained control over (1) the property of another or (2) another’s superior interest in the gross gambling receipts.

Result: Reversal of King County Superior Court convictions of William Lau for theft in the first and second degree.

(7) FOR CRIMES WITH DRIVING UNDER INFLUENCE AS AN ELEMENT, KNOWLEDGE OF HARMFUL SIDE EFFECTS OF PRESCRIPTION DRUGS NEED NOT BE PROVEN BY THE STATE, BUT LACK OF KNOWLEDGE MAY BE RELEVANT TO AFFIRMATIVE DEFENSE – In State v. Dailey, ___ Wn. App. ___, 300 P.3d 834 (Div. I, May 13, 2013), in a vehicular assault case based on the defendant’s causing of injury while driving under the influence of prescription drugs, the Court of Appeals rejects defendant’s arguments relating to his alleged lack of knowledge of the side effects of his prescription drugs.

The Dailey Court rejects defendant’s argument that knowledge of such side effects is an implied element of a crime with driving under the influence as an element (vehicular assault, DUI, vehicular homicides) that the State must prove beyond a reasonable doubt. The Dailey Court does indicate that the case law is unsettled on whether a defendant’s claim that he had no

knowledge of the side effects of a prescription drug would support an affirmative defense. The issue of availability of an affirmative defense cannot be addressed in this case, however, because the defendant presented no evidence of his alleged lack of knowledge of the possible side effects of his prescription drugs.

Result: Affirmance of King County Superior Court conviction of Christopher Michael Dailey for vehicular assault.

LED EDITORIAL COMMENT: Photographs of any warnings on prescription bottles found in the vehicle or on the defendant following an arrest for a crime with driving under the influence as an element would be helpful in combatting any such possible affirmative defense.

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/>].

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>]
