Law Enforcement Digest

OCTOBER 2014

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

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HONOR ROLL

703rd Basic Law Enforcement Academy – April 23 through August 29, 2014

President:	Jesse C. Buffum, Anacortes PD
Best Overall:	Christopher A. McClanahan, Grand Coulee PD
Best Academic:	Edwin M. Scheepers, Anacortes PD
Best Firearms:	Christopher A. McClanahan, Grand Coulee PD
Patrol Partner Award:	Samuel T. Conley, Seattle PD
Tac Officer:	Officer Shelly Hamel, Renton PD

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ANNOUNCEMENT REGARDING LAW ENFORCEMENT DIGEST EDITOR: Beginning with the November 2014 LED, AAG Shelley Williams will be the editor of the LED. AAG Williams currently advises the Criminal Justice Training Commission and the Washington State Patrol and has provided assistance reviewing the LED since June 2011. As longtime LED readers know, retired Senior Counsel John Wasberg was the LED editor from 1978 through 1999, and co-editor from January 2000 through May 2011. Assistant Attorney General Shannon Inglis was co-editor from

January 2000 through May 2011, and editor from June 2011 through this LED issue. Mr. Wasberg and Ms. Inglis may continue to provide some volunteer assistance to AAG Williams on the LED. It has been an honor to serve as your LED editor.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) PAYTON RULE BARRING FORCED ENTRY OF A RESIDENCE TO ARREST A SUSPECT WHERE THERE IS NEITHER AN ARREST WARRANT NOR EXIGENT CIRCUMSTANCES ALSO BARS ORDERING THE PERSON OUT OF HIS HOME – In United States v. Nora, ___F.3d ___, 2014 WL 4235955 (9th Cir., Aug. 28, 2014), a three-judge panel of the Ninth Circuit rules that police officers violated the rule of Payton v. New York, 445 U.S. 573 (1980) when they ordered a man out of his home where no exigent circumstances existed and they did not have an arrest warrant or search warrant to support their actions.

In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court ruled under the Fourth Amendment that officers with probable cause to arrest a person, but no arrest warrant or search warrant, are not authorized to forcibly enter the person's residence unless a search warrant exception, such as the exigent circumstances exception, is supported by the facts. Subsequent case law has held under Payton that a law enforcement order to exit a home is subject to the same restriction as is forcible law enforcement entry.

In the Nora case, the officers had probable cause to believe that Nora had committed the crime of carrying a loaded firearm in public, a misdemeanor under California law. They had no information to suggest that Nora had threatened anyone with the handgun or had pointed it at anyone. The officers knew that Nora was in his home, and that he did not want to come out to talk to them.

At least 20 officers surrounded the home with weapons drawn, and an officer used a public address system to order Nora and others in the house to come out. After a standoff of 20 to 30 minutes, Nora came out of the house.

The Court holds that the facts outlined above do not support a conclusion that there were exigent circumstances. The fact that the crime suspected at the time of the order to exit was only a misdemeanor under California law is a factor in the panel's ruling. [**LED Editorial Note:** The officers were not in hot pursuit, so the panel did not discuss the United States Supreme Court decision in Stanton v. Sims, ___U.S. ___, 134 S. Ct. 3 (Nov. 4, 2013) **Jan 14 LED:03** (suggesting that hot pursuit of a misdemeanant into a residence may be lawful under the Fourth Amendment, and holding that at least the case law has not clearly established that such hot pursuit of misdemeanants violates the Fourth Amendment).]

Citing Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009) **May 11 LED:06**, the panel notes that Courts have declared that exigent circumstances in a non-fresh pursuit circumstances will always be particularly difficult to establish when the crime under investigation is not a felony. Furthermore, nothing in the facts of this case suggested any exigency; there was no chance of escape from the surrounded house, and there was no evidence that the officers or anyone else was in danger from the suspect.

Accordingly, the panel suppresses evidence seized from the suspect incident to his arrest outside his home, as well as suppressing his statements following his arrest and suppressing evidence seized under a search warrant that was supported by these fruits of the Payton violation.

Result: Reversal of United States District Court (Central District of California) conviction of Johnny Cassel Nora for possession of cocaine with intent to distribute.

(2) CIVIL RIGHTS ACT LAWSUIT: JURY MUST DECIDE WHETHER FATAL SHOOTING BY FOUR POLICE OFFICERS WAS JUSTIFIED UNDER THE FACTS – In Cruz v. City of Anaheim, ___F.3d ___, 2014 WL 4236706 (9th Cir., Aug. 28, 2014), a three-judge panel of the Ninth Circuit reverses a District Court's grant of summary judgment to four officers in a fatal police shooting case. The panel concludes that the record contains disputed material facts on whether the legal standard of the Fourth Amendment for use of deadly force, which asks whether there was a significant threat of death or serious physical injury to the officers or others, was met at the time of the shooting.

Cruz was a gang member and drug dealer. He was known to carry a handgun, and when officers stopped his vehicle, they knew that an informant had reported that Cruz had recently said that he "was not going back to prison." The four officers alleged that they shot Cruz after he exited his vehicle, and after each of them saw Cruz reach for what they believed was a hidden gun in the waistband of his pants. The panel explains that when police shoot and kill a person, the person most likely to be able to rebut the police account is dead. Accordingly, in fatal police shootings, in determining whether to grant summary judgment to law enforcement, the court "must carefully examine all the evidence in the record to determine whether the [account by the police] is internally consistent and consistent with the known facts." All reasonable inferences from the evidence must be drawn in favor of the plaintiffs.

Essentially undisputed facts that the panel concluded might cause a jury to disbelieve the four officers' accounts were: (1) Cruz's gun was lying on the front passenger seat, and he did not have a gun on his person – a jury could conclude that it does not make sense that he would he be reaching toward his waistband for a hidden gun that was not located there; (2) Cruz was still suspended by his seat belt after he was shot and killed – this does not fully square with the four officers' accounts that they shot him after he exited his vehicle; (3) one of the four officers was involved two years later in shooting an unarmed man under very similar circumstances (including the officer's allegation that the suspect was reaching for a non-existent hidden gun in his waistband just before the officer shot him) – this could be viewed by a jury as a curious coincidence in light of what the panel believes to be the unusualness of the alleged circumstances; (4) all four officers claimed that they saw Cruz reaching for his waistband – in light of the positioning of the officers and Cruz and the SUV with its driver's side car door ajar, a jury could disbelieve that all four officers would have been able to see from their different positions whether Cruz was reaching toward his waistband; (5) two of the officers testified that they saw Cruz reach for his waistband with his right hand – this might be viewed as implausible by a jury in light of the fact that Cruz was left-handed; and (6) the testimony of the only non-police witness suggested that, at the time that he was shot, Cruz may have been in a somewhat different position and posture than is alleged by the officers.

Result: Reversal of United States District Court (Central District of California) summary judgment order as to the four officers; remanded for trial.

(3) EXTENSIVE TESTIMONY REGARDING TRAINING AND CERTIFICATION AS WELL AS TESTIMONY REGARDING CANINE'S 100 PERCENT RELIABILITY RATING IN THE FIELD IS HELD SUFFICIENT TO ADMIT EVIDENCE OF POSITIVE CANINE ALERT UNDER FLORIDA V. HARRIS – In United States v. Gadson, ___ F.3d ___, 2014 WL 4067203 (9th Cir., Aug. 19, 2014), a three-judge panel of the Ninth Circuit holds evidence of a canine alert

admissible where the Government presented extensive testimony regarding training and certification, as well as testimony regarding the canine's 100 percent reliability rating in the field.

The defendant was charged with multiple drug related crimes. At trial, the Government sought to introduce testimony from an investigator whose narcotics detection canine, Marley, had given positive alerts for the presence of narcotics when presented with several bundles of cash found at Gadson's home and on his person.

The investigator's trial testimony was as follows:

> Before testifying to the jury, Investigator Moore testified extensively during voir dire about his experience and his dog's training and reliability in the field. Investigator Moore and Marley were certified as a K–9 team in June 2010. Investigator Moore testified that he had been a canine handler since May 2010 and had received four-and-a-half weeks of training. Marley had been trained by another officer to detect marijuana, heroin, cocaine, and methamphetamine. According to Investigator Moore, Marley had practiced in a variety of training scenarios to ensure that he was reliably detecting the presence of various odors rather than simply associating them with one specific set of circumstances. The police department logs showed that Marley had a reliability rating of 100 percent in the field and had made only one potential false positive alert. Investigator Moore also noted the limits to Marley's abilities: while he could detect the presence of four different drugs, he was unable to distinguish between individual drugs, and so an alert as to a pile of cash would indicate only that it had at some point been near one or more of those four drugs.
>
> At the conclusion of the voir dire, the court ruled that Investigator Moore and Marley were "adequately trained and experienced to testify, to give an opinion that possibly could assist the jury in some way" and overruled Wilson's objection that the canine evidence was inadmissible without a Daubert hearing.

Relying on Florida v. Harris, __ U.S. ___, 133 S. Ct. 1050 (2013) **May 13 LED:07**, the Ninth Circuit rejects the defendant's contention that the trial court erred in admitting evidence of Marley's alert. The Court explains:

> The Supreme Court has largely disposed of Gadson's argument that dog sniff evidence is inherently unreliable. In Florida v. Harris, the Supreme Court held that the Florida Supreme Court erred by imposing an unnecessarily strict standard for evaluating whether the alert of a drug detection dog provided probable cause to search a vehicle. ___ U.S. ___, 133 S. Ct. at 1056-57. According to Harris, a court can conclude that a "dog performs reliably in detecting drugs" based on the dog's training, test results, field history, and other case-specific facts. Id. at 1057-58. For example, "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert," although a defendant must be given the "opportunity to challenge such evidence of a dog's reliability." Id. at 1057. This conclusion disposes of Gadson's claim that dog sniff evidence is per se unreliable because it is based on "junk science."
> . . .
>
> Given Harris's determination that a dog's alert that meets certain reliability requirements may be sufficient to "make a reasonably prudent person think that a

> search would reveal contraband or evidence of a crime," we conclude that a dog's alert that meets such requirements is also sufficiently reliable to be admissible under Rule 702. Under the standard enunciated in Harris, the evidence regarding the reliability of Marley's alert was more than adequate. Investigator Moore gave extensive testimony regarding his and Marley's training and certification. He also testified regarding Marley's reliability rating of 100 percent in the field. The defendants did not proffer evidence to the contrary. Accordingly, the district court did not abuse its discretion in admitting evidence of Marley's alert.

Result: Affirmance of United States District Court (Alaska) conviction of Anthony Gadson for conspiracy to distribute more than 500 grams of cocaine, possession with intent to distribute controlled substances, possession of firearms in furtherance of their conspiracy and possession of controlled substances, and retaliation against a witness.

(4) POLICE OFFICER'S ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADHD) DOES NOT SUBSTANTIALLY LIMIT MAJOR LIFE ACTIVITIES OF WORKING OR INTERACTING WITH OTHERS AND ACCORDINGLY IS NOT A "DISABILITY" UNDER AMERICANS WITH DISABILITIES ACT (ADA) – In Weaving v. City of Hillsboro, ___ F.3d ___, 2014 WL 3973411 (9th Cir., Aug. 15, 2014), a three-judge panel of the Ninth Circuit holds that an officer's Attention Deficit Hyperactivity Disorder (ADHD) is not a disability under the Americans with Disabilities Act (ADA) because it does not limit a major life activity.

The ADA prohibits discrimination against qualified individuals with disabilities. 42. U.S.C. § 12112(a). A disability is "a physical or mental impairment that substantially limits one or more major life activities" or "a record of such an impairment," or "being regarded as having such an impairment." 42 U.S.C. § 12102(1). Work is a major life activity under the ADA. 42 U.S.C. § 12102(2)(A). Additionally, the Ninth Circuit has held that interacting with others is also a major life activity. McAlindin v. County of San Diego, 192 F.3d 1226 (9th Cir. 1999).

The officer in this case alleged that his termination violated the ADA because his ADHD substantially limited his ability to interact with others which in turn substantially limited his ability to work. The Ninth Circuit found that the officer's ADHD did not substantially limit his ability to work, and in fact, aside from his interpersonal problems he showed superior knowledge and technical competence as a police officer. The Court also rejected the officer's claim that his ADHD substantially limited his ability to interact with others. The Court noted: "a 'cantankerous person' who has '[m]ere trouble getting along with coworkers' is not disabled under the ADA." McAlindin, 192 F.3d at 1325.

Result: Reversal of United States District Court (Oregon) jury verdict in favor of employee.

(5) CIVIL RIGHTS ACT LAWSUIT: PRISON OFFICIALS' DENIAL OF CATARACT SURGERY TO INMATE BASED ON "ONE EYE" POLICY AMOUNTS TO DELIBERATE INDIFFERENCE – In Colwell v. Bannister, ___ F.3d ___, 2014 WL 3953769 (9th Cir., Aug. 14, 2014), a three-judge panel of the Ninth Circuit holds 2-1 that the denial of cataract surgery to an inmate based on department policy where cataract surgery is denied if an inmate can function in prison with one good eye amounts to deliberate indifference.

The Court's majority opinion summarizes:

> We hold today, as numerous other courts considering the question have, that blindness in one eye caused by a cataract is a serious medical condition. We

> also hold that the blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that "one eye is good enough for prison inmates" is the paradigm of deliberate indifference.

Result: Reversal of United States District Court (Nevada) order granting summary judgment dismissal in favor of prison officials.

(6) CIVIL RIGHTS ACT LAWSUIT: PRISON GUARD'S ALLEGED DETAILED READING OF LETTER FROM PRISONER TO HIS ATTORNEY HELD TO VIOLATE SIXTH AMENDMENT – In Nordstrom v. Ryan, ___F.3d ___, 2014 WL 3893088 (9th Cir., Aug. 11, 2014), a three-judge panel of the Ninth Circuit addresses the allegation of plaintiff (a prisoner) that a prison guard made a detailed reading of the prisoner's clearly marked letter to his attorney, instead of just skimming the letter, and then told the inmate to "go pound sand" when the inmate complained.

The majority opinion explains that the Court must take the plaintiff's allegations as true in a circumstance such as this one where the plaintiff has appealed from a trial court's dismissal of his complaint for failure to state a valid Civil Rights Act claim. The majority opinion goes on to hold that the plaintiff's allegations support a Civil Rights Act lawsuit under the Sixth Amendment's protection of the right to counsel. The Ninth Circuit court staff's summary (not a part of the opinion) of the majority and dissenting opinions is as follows:

> The panel reversed the district court's dismissal, for failure to state a claim, and remanded in an action brought by an Arizona state prisoner who alleged constitutional violations when prison officials read a confidential letter he intended to send to his lawyer, instead of merely scanning and inspecting the letter for contraband.
>
> The panel held that plaintiff's allegations that prison officials read his legal mail, that they claimed entitlement to do so, and that his right to private consultation with counsel had been chilled stated a Sixth Amendment claim. The panel also held that the allegations supported a claim for injunctive relief.
>
> Dissenting, Judge Bybee stated that the Sixth Amendment does not prevent prison officials from reading legal letters with an eye toward discovering illegal conduct and that plaintiff also failed to allege any actual injury.

Result: Reversal of decision of United States District Court (Arizona) that dismissed the prisoner's lawsuit; case remanded for trial.

(7) FBI AGENT'S PROCESS IN SEEKING EYEWITNESS IDENTIFICATION FROM A SUSPECTED ROBBERY ACCOMPLICE WAS FLAWED FOR NOT ADMONISHING THAT SUSPECTS MIGHT NOT BE IN PHOTO LINEUP, BUT WAS NOT IMPERMISSIBLY SUGGESTIVE, SO JURY COULD ASSESS WHAT WEIGHT TO GIVE THE IDENTIFICATION EVIDENCE – In United States v. Carr, ___F.3d ___, 2014 WL 3805588 (9th Cir., Aug. 4, 2014), a three-judge panel of the Ninth Circuit rules under federal constitutional due process analysis that eyewitness identification testimony by a Ms. Fields against her three male armed robbery accomplices was properly submitted to the jury by the trial judge.

Ms. Fields testified at the trial of the three robbery defendants and identified each of them as the robbers. She testified that she was recruited by an old boyfriend to be a driver for the three men, all of whom previously were strangers to her. She said that she met the three men for the first time at an apartment where they took about ten minutes to sort out their roles for the

robbery of a credit union, and they then traveled in a two-car convoy to the target credit union and pulled the robbery.

She had gotten away after the robbery, but 18 months later an FBI agent interviewed her. The agent explained at the outset of an audio-recorded interview that she could be facing charges that were "very serious," and he repeated this admonition at least three more times in the interview, also suggesting at points in the interview that her cooperation may help her with any charges against her, though explaining that he did not make charging decisions and could not promise her leniency for any cooperation. After the initial admonition about the seriousness of the matter, the agent next explained that surveillance cameras had captured images of Ms. Fields' car at the robbery scene, and that witnesses had identified her as the driver of the car.

The agent then, without contemporaneous explanation, sequentially (one-by-one) placed a dozen photos of similar-looking men face up in a single stack the table, the final three of which were photos of the three other robbery suspects. The agent did not tell her that pictures of the suspects may not be among the dozen photos and did not otherwise follow a standard photo lineup procedure.

At that point, the agent Mirandized Ms. Fields and began to question her about the robbery, at which point she spontaneously grabbed the top three photos and told the agent that they were the three men involved in the robbery. She then asked a question that resulted in the following tape-recorded exchange:

> Fields: How long will this take?
>
> Agent Taglioretti: It'll take a while, it could take like two years
>
> Fields: Oh no!
>
> Agent Taglioretti: Yeah, it could take one year. You know it could be over in one year. But right now . . . .
>
> Fields: (Crying) unless I pin it on these guys
>
> Agent Taglioretti: I'm sorry?
>
> Fields: Unless I pin it on, will I have to (inaudible) with them
>
> Agent Taglioretti: Well, I have to talk to the prosecutor. It's possible he could fashion it so that you're not going to court with them . . . .

The defendants argued unsuccessfully at trial that the identification procedure was impermissibly suggestive (1) because the FBI agent did not tell Ms. Fields that photos of the three suspects might not be in the stack of a dozen pictures, and (2) on the theory that the FBI agent coerced her pretrial identifications by emphasizing the seriousness of her involvement and the need for her cooperation. They raised the same arguments on appeal.

The Ninth Circuit panel explains that convictions based on eyewitness identification at trial following a law enforcement-conducted pretrial identification by photograph will be set aside for a constitutional due process violation only if the pretrial photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. This involves a three-part inquiry.

First, the appellate court must determine if the law enforcement-conducted pretrial identification procedure was impermissibly suggestive. Second, even if the pretrial identification procedure is determined to have been unduly suggestive, the court must determine whether the identification, under all of the circumstances, nonetheless was sufficiently reliable that it does not implicate the defendant's due process rights. Third, even if the pretrial identification procedure is held to have been impermissibly suggestive and even if the identification is determined to have been unreliable, the appellate court must examine the trial court's failure to exclude the identification to determine whether the error was harmless. In this case, the Ninth Circuit panel does not get past the first inquiry, concluding that while the identification procedure could have been better conducted, it was not impermissibly suggestive. It is for the jury to determine how to weigh the evidence of suggestiveness in determining the facts.

The Ninth Circuit panel appears to find no problem in the context of the due process issue with regard to the FBI agent emphasizing the seriousness of the matter and the need for cooperation in questioning a suspected accomplice. In any event, the defense attorneys were able to attack Ms. Fields' reliability at trial both in cross examination and in argument to the jury. **[LED EDITIORIAL COMMENT: We cannot determine from the Carr opinion whether Ms. Fields was in custody at the time of the questioning, and we cannot determine if the FBI agent urged her cooperation before Mirandizing her. Telling a suspect at the outset of a custodial interrogation, prior to Mirandizing the suspect, of the need for cooperation would be determined to be a Miranda violation negating any waiver in a prosecution against the suspect. But assuming that Ms. Fields both was in custody during the questioning and was urged to cooperate before being Mirandized, such a Miranda violation is not inherently coercive, and therefore probably would not make the suspect's identification of her accomplices impermissibly suggestive for purposes of a prosecution of one of her accomplices.]**

The Ninth Circuit panel does see a suggestiveness flaw in the FBI agent's failure to admonish Ms. Fields that pictures of the other robbery suspects might not be among the dozen pictures stacked on the table. But the Court concludes that the flaw was not so suggestive as to require taking away from the jury the factual question of reliability of the identification.

The robbery defendants also argued that Ms. Fields' identification testimony was unreliable because of the 18-month gap between the robbery and the pretrial identification procedure with the FBI agent. The Ninth Circuit panel declares that because such a gap has nothing to do with suggestiveness of law enforcement identification procedures, the gap would never come into consideration unless there is independent impermissible suggestiveness in those procedures.

Result: Affirmance in part and reversal in part of United States District Court (Central District of California) judgments against three robbery defendants (the armed robbery convictions of all three defendants are affirmed).

LED EDTORIAL NOTE: For more information on the law and practical considerations relating to identification procedures, see the article "Eyewitness Identification Procedures: Legal and Practical Aspects," by John R. Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) available on the CJTC's Internet LED page under "Special Topics."

(8) POINTING GUNS AND HANDCUFFING A SHOOTING SUSPECT DID NOT TRANSFORM INVESTIGATORY STOP INTO AN ARREST, AND UNDER FOURTH AMENDMENT OFFICERS HAD REASONABLE SUSPICION TO MAKE STOP BASED ON ANONYMOUS

911 CALL – In United States v. Edwards, ___ F.3d ___, 2014 WL 3747130 (9th Cir., July 31, 2014), a three-judge panel of the Ninth Circuit holds that contact with the defendant was an investigatory stop despite the intrusive methods, and an anonymous call provided reasonable suspicion for contact under a Fourth Amendment analysis.

The Court describes the facts relayed to 911 as follows:

> On May 3, 2012, at 7:40 p.m., the Inglewood Police Department received a 911 call from an unidentified male reporting that a "young black male" at the corner of West Boulevard and Hyde Park Boulevard was shooting at passing cars, including the caller's. The caller provided additional details about the suspect during the five-minute call, telling the 911 dispatcher that the shooter was between 5 feet 7 inches and 5 feet 9 inches in height and "maybe 19, 20" years old. The caller initially said that the shooter was wearing "all black" but later clarified that he was wearing a black shirt and gray khaki pants. The caller also reported that the shooter had a black handgun and, after shooting, was entering "Penny Pincher's Liquor" store.

Officers responded to the area and located a suspect matching the description. Officers contacted the defendant, handcuffed him, and patted him down for weapons at which time a .22 caliber revolver fell out of the defendant's pants.

A. Investigatory Stop

The Court concludes that the stop was an investigatory stop, and that the officers' felony-stop measures (pointing their guns at a suspect in a shooting, forcing him to kneel, and handcuffing him) were justified under the dangerous circumstances and did not transform the investigatory stop into an arrest. "The officers' legitimate safety concerns justified their on-the-spot decision to use intrusive measures to stabilize the situation before investigating further." The Court notes that the officers had sufficiently detailed information to reasonably believe that the defendant could be the shooter and could be armed and dangerous, and he was the only person in the vicinity of the liquor store who fairly matched the description of a man who reportedly had been shooting at passing cars just minutes before police arrived.

B. Reasonable Suspicion

Relying on Navarette v. California, ___ U.S. ___, 134 S. Ct. 1683 (2014) **June 14 LED:03** and United States v. Terry-Crespo, 356 F.3d 1170 (9th Cir. 2004), the Court concludes that the five-minute 911 call provided officers with reasonable suspicion for the investigatory stop. The Court summarizes:

> In this case, the tip was an anonymous 911 call from an eyewitness reporting an ongoing and dangerous situation and providing a detailed description of a suspect. In light of Navarette, we conclude that the anonymous call leading to Edwards' detention exhibited sufficient indicia of reliability to provide the officers with reasonable suspicion.

The Court notes the following factors:

1. Under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigative stop.'

2. The caller reported an ongoing emergency situation even more dangerous than the suspected drunk driving in Navarette.
3. The caller had eyewitness knowledge of the shooting.
4. The caller, although anonymous, used the 911 emergency system, also lending further credibility to his allegations.

Result: Affirmance of United States District Court (Central District California) conviction of Reginald Aaron Edwards for being a felon in possession of a firearm.

LED EDITORIAL COMMENTS: As we commented in the June 2014 LED regarding Navarette: The Washington Supreme Court has not yet opined on whether the reasonable suspicion standard under article I, section 7 is different from that of the Fourth Amendment, nor has the Washington Court of Appeals. But the Washington appellate courts have placed greater restrictions on Washington law enforcement under independent grounds rulings in a number of other categorical search and seizure circumstances in the past. And, while it is difficult to compare decisions made under the flexible totality of the circumstances test for reasonable suspicion, the Washington Court of Appeals (though not engaging explicitly in the 911-caller-veracity analysis of the majority and dissenting opinions in Navarette) arguably has interpreted the Fourth Amendment more restrictively than did the United States Supreme Court majority in Navarette as to whether an anonymous caller to 911 should be credited with a measure of veracity because of the possibility of being identified under the 911 system. See State v. Z.U.E., ___ Wn. App. ___, 315 P.3d 1158 (Div. II, Jan 7, 2014) May 14 LED:23, review granted and oral argument in Washington Supreme Court set for September 18, 2014 (several 911 calls by unknown citizens could not be credited with veracity for reasonable suspicion purposes of determining reasonable suspicion); State v. Cardenas-Muratalla, ___Wn. App. ___, 319 P.3d 811 (Div. I, Feb. 3, 2014) May 14 LED:19 (same as to a call from an unidentified 911 caller). See also the entry below in this month's LED at pages 21-22 addressing State v. Saggers, ___Wn. App. ___, 2014 WL 3929108 (Div. I, August 11, 2014).

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WASHINGTON STATE SUPREME COURT

SUFFICIENT EVIDENCE TO CONVICT MAN OF LURING UNDER RCW 9A.40.090 WHERE HE RODE BY ON A CHILD'S SUPERMAN BMX BICYCLE AND SAID TO 9-YEAR-OLD: "DO YOU WANT SOME CANDY? I'VE GOT SOME AT MY HOUSE"

State v. Homan, ___ Wn.2d ___, 2014 WL 3765309 (July 31, 2014)

Facts: (Excerpted from the majority opinion)

> Early one summer evening in the small rural community of Doty, Washington, 9–year–old C.C.N. was sent by his mother to the nearby store to buy milk. As he was walking along the road toward the general store, Homan, a 37–year–old man, rode past on a child's Superman BMX bicycle. As Homan rode by, he said, "Do you want some candy? I've got some at my house." C.C.N. said nothing and continued walking. Homan rode on without slowing, stopping, or looking back. There were two other children nearby, but Homan was closest to C.C.N. when he spoke.
>
> C.C.N. did not know Homan and told his mother about the incident when he returned home. She drove him back into town where they saw Homan on his

> Superman BMX bicycle. C.C.N.'s mother called the sheriff's office, and [a sergeant] spoke with Homan, who admitted riding his bicycle in the general store's vicinity.

ISSUE AND RULING: Did Homan engage in invitation and enticement for purposes of the luring statute, RCW 9A.40.090, when he said, as he rode his bicycle by the 9-year-old boy: "Do you want some candy? I've got some at my house."? (ANSWER BY THE STATE SUPREME COURT: Yes, rules a 7-2 majority; Justice Owens dissents and is joined by Justice Charles Johnson)

[**LED Editorial Note:** The same 7-2 majority declines to address the issue of whether the luring statute is overbroad in violation of First Amendment free speech protection, instead remanding the case to the Court of Appeals for that court to address this issue after taking further briefing and argument on the issue.]

Result: Affirmance of Lewis County Superior Court conviction of Russell David Homan of luring. [**LED Editorial Note:** The Court of Appeals had reversed the conviction **March 13 LED:13**; the Supreme Court reverses that decision.]

ANALYSIS:

RCW 9A.40.090 provides that a person commits the crime of luring if the person:

> (1)(a) Orders, lures, or attempts to lure a minor or a person with a developmental disability into any area or structure that is obscured from or inaccessible to the public or into a motor vehicle;
>
> (b) Does not have the consent of the minor's parent or guardian or of the guardian of the person with a developmental disability; and
>
> (c) Is unknown to the child or developmentally disabled person.
>
> (2) It is a defense to luring, which the defendant must prove by a preponderance of the evidence, that the defendant's actions were reasonable under the circumstances and the defendant did not have any intent to harm the health, safety, or welfare of the minor or the person with the developmental disability.
> . . .

The Court explains:

> Case law defines "lure" as an invitation accompanied by an enticement. State v. Dana, 84 Wn. App. 166, 176 (1996) **June 97 LED:13**.
>
> The parties do not dispute that Homan was a stranger to C.C.N. and that Homan did not have C.C.N.'s mother's consent to speak to C.C.N. Thus, the only issue is whether Homan attempted to lure C.C.N. into an area or structure obscured from or inaccessible to the public. The Court of Appeals held that the evidence failed to prove both an invitation and an enticement. We disagree and reverse the appellate court.
>
> We hold that Homan's statement "[d]o you want some candy? I've got some at my house" is an invitation and an enticement, proof of which is sufficient to

sustain a luring conviction. RCW 9A.40.090 does not require proof of unlawful purpose or intent.

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WASHINGTON STATE COURT OF APPEALS

PROBABLE CAUSE NEXUS BETWEEN (A) GREENHOUSES WHERE MARIJUANA GROW WAS SEEN IN OVERFLIGHT AND (B) HOME AND SHED ON RURAL PROPERTY PARCEL HELD ESTABLISHED IN AFFIDAVIT FOR SEARCH WARRANT; BUT AT TRIAL, DEFENDANT SHOULD HAVE BEEN ALLOWED TO TRY TO ESTABLISH FOR JURY THAT SHE WAS A DESIGNATED PROVIDER UNDER THE MEDICAL USE OF CANNABIS ACT (MUCA)

State v. Constantine, ___Wn. App. ___, 2014 WL 3778168 (Div. III, July 31, 2014)

Facts and Proceedings below:

LED INTRODUCTORY EDITORIAL NOTE: The opinion of the Court of Appeals is not clear as to whether the facts of the law enforcement investigation described in the opinion were all set forth or inferable from the affidavit supporting the search warrant in this case, but we assume based on the approach of the opinion that all of the investigative facts were at least inferable from the search warrant affidavit.

On June 30, 2010, a task force detective and a deputy sheriff flew in a helicopter over property in a rural area near Tonasket, Washington. The officers observed two greenhouses. One greenhouse was partially uncovered, revealing approximately 20 large growing marijuana plants. The officers noted other buildings on the property, including a small stick built house located just east of the greenhouses and a small stick built shed west of the greenhouses. The officers confirmed that the address of the property was 44 Reevas Basin Road and that it was owned by Mr. Morgan Hale Davis, who lived there with his wife, Adriane Constantine (the defendant in this case).

The detective flew over the property again one week later, on July 6. The tops of the greenhouses were covered with plastic, but the detective saw dark green coloring through the plastic. The detective believed the green color to be growing marijuana plants.

The next day, the detective obtained a warrant to search the two greenhouses, the house, and the shed on the parcel of property at 44 Reevas Basin Road. The search warrant authorized searching for evidence of manufacturing marijuana, including books, records, receipts, ownership of the residence, and identifying information. In addition to a narrative of the events described above, the affidavit included an aerial photograph of the property taken during the July 6 flyover. The affidavit stated, "In this photo you can clearly see the greenhouses to the left of the house. The larger of the two greenhouses was half opened when the initial flight was done. This is the one that I could see growing marijuana plants in. Everything in the photo including the outbuildings is on the same parcel of property. There are no other driveways or houses except for the one in the photo that have access to these marijuana plants."

The application for the warrant also established that the residence was approximately 50 to 70 feet from the greenhouses; that the buildings were well separated from other structures or homes on other parcels, with the nearest other structure to the property being located over 700 yards away; and that only one access road approached the property and dead-ended on Mr. Davis' property.

Officers executing the search warrant were greeted by Ms. Constantine. Officers found approximately 121 growing marijuana plants. The plants were primarily found in the greenhouses, with the exception of a few plants found growing outdoors. Inside the residence, officers found various quantities of processed marijuana, packaged marijuana, marijuana seeds, paperwork, receipts, cash, an electronic scale, and packaging material. In the small shed, officers found several dried marijuana plants.

Proceedings below:

Ms. Constantine was arrested and charged with one count of manufacture of marijuana under RCW 69.50.401(1). She moved to suppress the evidence found in the house and the shed. She argued that the officers lacked probable cause to search the house and shed based on her theory that there was no nexus between the greenhouses and the house and shed. The trial court denied the motion.

Ms. Constantine sought to present a designated-provider affirmative defense under the pre-2011 version of the Medical Use of Cannabis Act (MUCA) (formerly the Medical Use of Marijuana Act – MUMA). She hinged her defense on her contention that only 15 of the plants were hers, and that she was providing marijuana to a Mr. Gilbert, the alleged qualifying medical patient. The trial court ruled that the law required Ms. Constantine to call Dr. Orvald (the alleged medical provider) as a trial witness to establish whether Mr. Gilbert suffered from a terminal or debilitating medical condition. Ms. Constantine did not call Dr. Orvald, so the trial court did not submit to the jury her affirmative defense of being a MUCA designated provider. A jury found her guilty of manufacture of marijuana.

ISSUES AND RULINGS: (1) Did the affidavit for the search warrant show a nexus between the greenhouses and the home and shed, and thus establish probable cause to search the house on the Davis-owned parcel of property where the aerial photograph and other evidence in the affidavit showed that: (A) the land, house, greenhouses, garden area, and outbuildings were all within a clearly defined living compound; (B) the home was approximately 50 to 70 feet from the greenhouses, and there were no other houses nearby, with the nearest other structure, on another parcel of property, located over 700 yards away; and (C) only one access road approached the property owned by Mr. Davis, and the road dead-ended on the property? (ANSWER: Yes, rules a unanimous 3-judge panel)

(2) Did the trial court err in requiring Ms. Constantine to present Dr. Orvald to testify in support of her affirmative defense of designated provider under the pre-2011 version of MUMA? (ANSWER: Yes, rules a 2-1 majority; Judge Korsmo dissents on this issue)

Result: Reversal of Okanogan County Superior Court conviction of Adriane Constantine for manufacture of marijuana; case remanded to Superior Court for re-trial in which Constantine will be allowed to present her affirmative defense of designated provider under MUCA.

ANALYSIS: (Excerpted from majority opinion for Court of Appeals; subheadings revised)

1. Probable cause nexus between (A) the greenhouses and (B) the home and shed

> "Judges looking for probable cause in an affidavit may draw reasonable inferences about where evidence is likely to be kept, including nearby land and buildings under the defendant's control." State v. Gebaroff, 87 Wn. App. 11, 16 (1997) **Nov 97 LED:20**.

Here, the nexus requirement is met. The warrant contains information that Mr. Davis, Ms. Constantine's husband, owns and controls the property on which the buildings stand and that the type of evidence sought could be found in the greenhouses, the house, and the shed. The relevant facts are that officers observed at least 20 marijuana plants growing in a greenhouse on Mr. Davis's property. Located close to the greenhouses were a home and a shed. These buildings were on a clearly defined living compound owned by Mr. Davis. Only one road driveway [sic] accessed both the greenhouses and the house, and dead ended on the property.

The illegal activity identified in the affidavit is the manufacture of a controlled substance, with intent to deliver marijuana. The affidavit requested a warrant to search the greenhouses, house, and shed for books, records, receipts, notes, ledgers and other papers related to the manufacture and processing of marijuana; for names and addresses of others that may be involved in the illegal possessing and trafficking of marijuana; ownership of the residence; any and all records and receipts showing dominion and control over the house at 44 Reevas Basin Road; and any or all other material evidence in violation of RCW 69.50.401, to include but not limited to drug paraphernalia for packaging, weighing, distributing, and using marijuana. It is reasonable to believe that items to be seized would be found in the house located adjacent to the greenhouses. It is also reasonable to believe that the house would be used by the persons tending the marijuana in the two greenhouses and would also be used to package and weigh the large amount of marijuana that is grown in the greenhouses.

Despite Ms. Constantine's contention, State v. Thein, 138 Wn.2d 133 (1999) **Aug 99 LED:05** does not control the outcome of her appeal. Thein establishes that general statements regarding the common habits of drug dealers are not sufficient to establish probable cause when considered alone. But here, probable cause was supported by more than an implied assumption of where evidence may be kept. It was not unreasonable for the issuing judge to believe that evidence of the crime would be found in the house based on Mr. Davis's ownership and control of the property where both the observed criminal activity and the house were located, the proximity of the home to the criminal activity, and the type of evidence sought in the warrant. . . .

2. Designated provider affirmative defense under pre-2011 version of MUCA

One asserting the designated provider affirmative defense must make a prima facie showing that he or she was assisting a "qualifying patient." Former RCW 69.51A.040(3) (2007); State v. Ginn, 128 Wn. App. 872, 879 (2005) **Oct 05 LED:20**. A "qualifying patient" means a person who (a) is a patient of a health care professional; (b) has been diagnosed by that health care professional as having a terminal or debilitating medical condition; (c) is a resident of the state of Washington at the time of such diagnosis; (d) has been advised by that health care professional about the risks and benefits of the medical use of marijuana; and (e) has been advised by that health care professional that they may benefit from the medical use of marijuana. RCW 69.51A.010(4).

Here, the trial court interpreted RCW 69.51A.010(4) as requiring a defendant to prove that the patient actually have a terminal or debilitating medical condition. However, that subsection does not require this; rather, it requires a defendant to prove that the patient "has been diagnosed" as having a terminal or debilitating medical condition. The legislature, within constitutional limitations, may proscribe [sic] what proof is needed for an affirmative criminal defense. The legislature chose to allow designated providers to rely upon a signed medical authorization without also requiring such providers to suffer criminal penalties if their reliance was misplaced. Here, it is uncontested that Dr. Orvald diagnosed Mr. Gilbert as having a terminal or debilitating medical condition. This diagnosis is sufficient. Whether the diagnosis is correct or true is not relevant. Because the correctness or the truth of the diagnosis is not relevant, the court erred in requiring Dr. Orvald to testify.

The State argues that State v. Fry, 168 Wn.2d 1 (2010) **March 10 LED:11** requires Ms. Constantine to prove that she had a specific medical condition that qualified under the statute. We disagree. In Fry, Mr. Fry was diagnosed by his doctor with various conditions, none of which met that statutory definition. . . . The majority opinion did not decide whether a conclusory statement signed by a physician that his patient had a terminal or debilitating medical condition would be sufficient. However, the concurring opinion of Justice Chambers, signed by three other justices, notes that a conclusory statement signed by a physician should be sufficient. . . . This portion of Justice Chambers's concurring opinion was expressly approved by Justice Sanders in his dissent. . . . Thus, there were five justices who held that a conclusory statement signed by a physician that his patient has a terminal or a debilitating condition should be sufficient.

The State urges us to affirm on the alternative basis that Ms. Constantine possessed much more than 15 marijuana plants, the number permitted under Mr. Gilbert's authorization. We decline to affirm on this alternative basis. Although a defendant must show by a preponderance of the evidence that she or he is entitled to the medical use of marijuana act's defense, when deciding whether to permit an issue to go to the jury, "the trial court must interpret the evidence most strongly in favor of the defendant." State v. Otis, 151 Wn. App. 572 (2009). Here, during the motion in limine argument, Ms. Constantine asserted that she was responsible for growing only the 15 plants allowed in accordance with Mr. Gilbert's authorization, and that the remaining plants belonged to her husband and were segregated. Because we must interpret the evidence most strongly in favor of Ms. Constantine, given this record, we hold that the number of plants possessed by her is an issue of fact for the jury.

In conclusion, we hold that the trial court erred by requiring Dr. Orvald to testify in support of Ms. Constantine's affirmative defense. We therefore reverse Ms. Constantine's conviction, and remand this case for a new trial.

[Some citations omitted and others revised; footnotes omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) PROBABLE CAUSE NEXUS BETWEEN (A) GREENHOUSES WHERE MARIJUANA WAS SEEN IN OVERFLIGHT AND (B) HOME AND SHED ON RURAL PROPERTY PARCEL

HELD ESTABLISHED IN AFFIDAVIT FOR SEARCH WARRANT; AND BASED ON STATE V. ELLIS, COURT HOLDS THAT PROBABLE CAUSE TO SEARCH FOR MARIJUANA GROW OPERATION CAN BE ESTABLISHED IN CASE UNDER PRE-2011 MEDICAL USE OF CANNABIS ACT WITHOUT ADDRESSING WHETHER SUSPECT IS AUTHORIZED UNDER MUCA TO GROW MEDICAL MARIJUANA – In State v. Davis, ___Wn. App. ___, 2014 WL 3778165 (Div. III, July 31, 2014), the Court of Appeals rejects defendant's two arguments that a search warrant did not establish probable cause to search his house and sheds on his property.

One of defendant Davis' challenges to probable cause attacked the nexus between (A) overflight evidence regarding a marijuana grow operation in greenhouses and (B) a home and shed shared by Mr. Davis and his wife, Ms. Constantine on the same parcel of rural property as the greenhouses. On this challenge, the Court of Appeals addresses essentially the same facts and rejects essentially the same argument as in the case of the defendant's wife in State v. Constantine, a decision that is digested immediately above in this October 2014 LED. [**LED Editorial Note:** The same judges were on the appellate panel for each case, each opinion was authored by the same judge, and each appellate opinion was issued on the same day; note also that the defendants were tried separately in superior court and have been represented by different attorneys).] This LED entry regarding the Davis decision will not address the Court's description of the facts or the Court's analysis other than to direct the reader to see the Constantine entry immediately above.

Mr. Davis' other challenge to probable cause argued that probable cause as to a grow operation is negated in this case because the affidavit for the search warrant did not address whether the marijuana grow might qualify for an affirmative defense under the Medical Use of Cannabis Act (MUCA). The Court first rejects the defendant's contention that the Court should apply the 2011 amendments to MUCA, ruling that the 2011 amendments are not retroactive. The Court then applies its ruling in State v. Ellis, 178 Wn. App. 801 (2014) review denied, __Wn.2d __ (2014) **May 14 LED:22** in holding that a warrant to search for a marijuana grow need not consider or address any defense under the pre-2011 version of MUCA.

Result: Affirmance of Okanogan County Superior Court conviction of Morgan Hale Davis for manufacturing marijuana.

(2) EVIDENCE OF FORENSIC SCIENTIST'S "LONG HISTORY OF INCOMPETENCE" IS NOT MATERIAL WHERE THERE WAS NO EVIDENCE OF CROSS CONTAMINATION, THUS THERE IS NO BRADY VIOLATION – In State v. Davila, ___ Wn. App. ___, 2014 WL 4114314 (Div. III, Aug. 21, 2014), the Court of Appeals holds that there is no Brady violation where the prosecution did not disclose that the forensic scientist who originally analyzed the evidence had been terminated based on incompetence.

The Court of Appeals summarizes the case as follows:

> A jury found Julio Davila guilty of second degree murder. The key piece of evidence tying Mr. Davila to the murder was a baseball bat containing Mr. Davila's DNA. During trial, Mr. Davila did not know that the forensic analyst who tested the DNA had been fired from her job due to a long history of incompetence in conducting DNA tests. The trial court denied Mr. Davila's motion for a new trial based on the prosecution's failure to disclose this information. On appeal, Mr. Davila contends the State's failure to disclose material evidence impeaching an important witness for the State violates Brady. He also contends the prosecutor committed misconduct by arguing inconsistent theories of culpability at two separate trials.

[Footnotes omitted.]

Three elements are necessary to establish a Brady violation: (1) the State failed to disclose evidence that is favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence was suppressed by the State, either willfully or inadvertently; and (3) the evidence was material, meaning that the non-disclosure impacted the outcome of the trial.

1. The Court finds that the evidence was favorable to the accused:

   > Due to the prospect of contamination or false results, Ms. Olson's extensive history of poor performance and incompetence would have been favorable evidence that should have been disclosed. This evidence would have opened an area of impeachment which Mr. Davila was unaware of at the time of trial. As such, it constitutes evidence that was favorable to him on the issue of guilt.

2. The Court finds that the evidence was suppressed by the State, concluding "the prosecutor had constructive possession of the information and, therefore, wrongfully suppressed it.

3. The Court finds that the evidence was not material:

   > Admittedly, Ms. Olson's incompetence raises general concerns about the adequacy of the DNA testing. Nevertheless, there is no evidence that Ms. Olson tampered with or mishandled the evidence in this particular case. At most, Mr. Davila has established that Ms. Olson was fired from her job for incompetence related to other testing, but nothing in the record shows that her incompetence compromised the evidence at issue here. Ms. Heath peer reviewed Ms. Olson's work and found no evidence of protocol violations. While evidence of Ms. Olson's incompetence could have been used for impeachment purposes, it was not material to the accuracy of Ms. Olson's work in this case. Based on the paucity of evidence that contamination actually occurred in this case, we conclude that the defendant received a fair trial resulting in a verdict worthy of confidence. . . .

The Court concludes that there was no Brady violation because there was no evidence of DNA cross contamination in this case and, therefore, the nondisclosure of the information was not material.

Result: Affirmance of Spokane County Superior Court conviction of Julio J. Davila for second degree murder.

(3) PUBLIC RECORDS ACT: BAD FAITH FOR PURPOSES OF RCW 42.56.565(1), WHICH PROHIBITS PENALTY AWARDS TO INMATES IN PRA CASES ABSENT BAD FAITH, REQUIRES A WANTON OR WILLFUL ACT OR OMISSION BY PUBLIC AGENCY – In Faulkner v. Department of Corrections, ___ Wn. App. ___, 2014 WL 4086310 (Div. III, Aug. 19, 2014), the Court of Appeals holds that the trial court correctly denied penalties to an inmate in a Public Record Act (PRA) case where there was no showing that the Department of Correction (DOC) acted in bad faith in responding to the request.

RCW 42.56.565(1) prohibits the award of penalties to inmates for violations of the PRA unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy the public record.

Inmate Faulkner submitted a public records request to the DOC for two records related to rejected mail. Mr. Faulkner ultimately sued the DOC over the request. The trial court found no violation as to one of the records, but a violation – in the initial response – as to the second record. Although the trial court found that a violation occurred, it declined to award penalties because there was no showing of bad faith as required by RCW 42.56.565(1). Mr. Faulkner appeals.

The Court of Appeals concludes that the DOC did not act in bad faith. The Court explains: "In the PRA context, bad faith incorporates a higher level of culpability than simple or casual negligence. We hold that to establish bad faith, an inmate must demonstrate a wanton or willful act or omission by the agency."

The Court of Appeals also distinguishes the facts of this case from those of Francis v. Dep't of Corrections, 178 Wn. App. 42, 51–52 2013), review denied, 180 Wn.2d 1016, 327 P.3d 55 (2014), **May 14 LED:25**, where Division II of the Court of Appeals found bad faith.

Result: Affirmance of Franklin County Superior Court order finding a violation of the PRA but declining to award penalties.

(4) DIGITAL PHOTOS AND VIDEOS DEPICTING SEX ABUSE OF CHILD SUFFICIENTLY AUTHENTICATED BY CHILD'S GRANDMOTHER EVEN THOUGH SHE DID NOT DO THE RECORDING AND WAS NOT PRESENT WHEN THE RECORDINGS WERE MADE – In State v. Sapp, ___ Wn. App. ___, 2014 WL 3928834 (Div. III, Aug. 12, 2014), the Court of Appeals rejects the argument of a child sex abuser that digital photos and a video recording (pulled from a digital camera and memory card) of his sex abuse of a child were not properly authenticated as evidence. Defendant argued that there was inadequate authentication because no one testified from personal knowledge of the events recorded, i.e., no one testified as to having been present at the time and place of the events.

Under Evidence Rule 901(a), a party may authenticate a recording through "evidence sufficient to support a finding that the matter in question is what the proponent claims." The Sapp Court holds that the trial court did not abuse its discretion in admitting the exhibits because it was sufficient for authentication purposes that the grandmother of the victim testified from her personal knowledge: (1) to the identity of the persons depicted in the exhibits; (2) to the approximate age of the victim at the time of the creation of the recordings (and hence to the approximate time of creation of the recordings); and (3) the location where the recordings were made (the residence of the perpetrator). The Court also concludes that there was sufficient authentication even for those exhibits as to which the grandmother was not asked by either party to identify the location depicted (the Court notes as to the latter exhibits that the grandmother identified the persons depicted and the approximate age of the victim at the time of the recordings, and the Court further notes that the location in all likelihood was the same as for the other exhibits, i.e., the perpetrator's residence).

Result: Affirmance of Spokane County Superior Court convictions of Glenn E. Sapp for felony communication with a minor for immoral purposes (five counts), two counts of rape of a child in the first degree (two counts), and child molestation (two counts).

(5) AT THE POINT WHEN OFFICERS BECAME REASONABLY CONVINCED THAT A 911 PHONE CALL ABOUT A MAN THREATENING A WOMAN WITH A SHOTGUN WAS BOGUS, THEY WERE REQUIRED TO RELEASE THE SUSPECT INSTEAD OF CONTINUING TO QUESTION HIM WHILE HE WAS CUFFED AND IN A PATROL CAR – In State v. Saggers, ___Wn. App. ___, 2014 WL 3929108 (Div. I, Aug. 11, 2014), the Court of Appeals indicates that officers may have initially acted lawfully based on reasonable suspicion of an emergent risk of imminent violence when they first seized a suspect based on an anonymous phone call from a pay phone at a gas station. The caller gave a contemporaneous "eyewitness" account of a man threatening a woman with a shotgun outside a residence at a particular address specified by the caller. The unknown caller actually gave a name ("Abraham Anderson"), but he gave no other identifying information, and apparently the name was never confirmed as matching any actual person. The caller had left the pay phone and gas station by the time that an officer reached the gas station pay phone to try to contact him.

The Court of Appeals notes that in State v. Cardenas-Muratella, 170 Wn. App. 307, 313 (Div. I, 2014) **May 14 LED:19** and in other decisions, courts have relaxed the standard for reasonable suspicion and allowed reliance on an anonymous call that provides some basis for believing that there is an emergent risk of imminent violence, as opposed to non-violent circumstances. The Saggers Court does, however, suggest in discussion of Navarette v. California, ___U.S. ___, 134 S. Ct. 1683 (2014) **June 14 LED:03** that an anonymous call from a pay phone may not be entitled to the same weight as an anonymous call from a cell phone. In Navarette, the United States Supreme Court gave some weight to an anonymous cell phone call because a cell phone caller to 911 should be aware that it is possible under modern technology that he or she might be identified. This same possibility does not exist as to an anonymous call from a pay phone, the Saggers Court notes. Nonetheless, on balance, the Court of Appeals suggests, as already noted, that the report of imminent danger may have justified the officers' initial decision to detain and question the suspect in this case.

But the Court of Appeals rules that even if the possibility of imminent danger justified initial reliance on the call from the unknown person, such reliance became unreasonable when the officers subsequently developed information, while at the scene of the alleged crime, that, in the view of the Court of Appeals, negated any reasonable suspicion that the suspect had committed a crime. Accordingly, the Court of Appeals rules, the officers should have released the detainee before they learned from him in continuing questioning, while he sat handcuffed in a patrol car, that he owned a shotgun that was locked in a case in a bedroom in his home. That admission (and his subsequent consent to a search) had led to the detainee's arrest when the officers subsequently learned that he had a prior conviction that barred him from possessing a firearm. The Court rules that the shotgun must be suppressed as the fruit of the officers' unlawful continuing detention of the defendant.

Result: Reversal of King County Superior Court conviction of Andrew Davis Saggers for unlawful possession of a firearm in the second degree.

LED EDITORIAL NOTE: We have presented here only a brief summary of the Court's Saggers opinion. The Court's opinion is lengthy, both in its detailed presentation of the complicated facts of the case and in its discussion of case law relating to anonymous reports under the highly-fact-based reasonable suspicion standard. Readers may wish to go to the Washington Courts website to read the Saggers opinion in its entirety.

LED EDITORIAL COMMENT: The Saggers opinion is a bit troubling in that the Court asserts conclusively that its review of the question of whether the officers had continuing reasonable suspicion is "de novo review," i.e., review that is wholly

independent of the trial court's determination. The proper standard of review requires that the appellate court review the findings of fact by the trial court for substantial supporting evidence and defers to those findings, and then the appellate court determines if the findings of fact support the trial court's conclusions of law. The Court of Appeals does not address any particular findings of fact by the trial court on the reasonable suspicion issue, instead simply making its own independent determination that the trial court record fails to support the legal conclusion that the officers had continuing reasonable suspicion throughout the detention of the defendant.

(6) WHERE OFFICER SEPARATES DEFENDANT FROM BACKPACK NEARLY TEN MINUTES PRIOR TO PLACING HIM UNDER ARREST, AND SUBSEQUENTLY SEARCHES BACKPACK FOR EVIDENCE, COURT OF APPEALS RULES 2-1 THAT SEARCH IS NOT VALID AS A WARRANTLESS SEARCH INCIDENT TO ARREST – In State v. Brock, ___ Wn. App. ___, 2014 WL 3842916 (Div. I, Aug. 4, 2014), the Court of Appeals rules 2-1 that a warrantless search did not qualify as a search incident to arrest because the search did not meet the "time of arrest" rule.

In Brock, an officer encountered the defendant trespassing in a park at 3 am (the park closes at 11:30 pm). The officer exercised his discretion not to arrest the defendant for trespassing. But the officer did perform a lawful Terry frisk of the person of the baggily-clothed man, and the officer asked the defendant to put down his backpack. The defendant complied.

Finding no weapons on the defendant, the officer asked the defendant for his identification. The defendant said he did not have identification documents on his person and gave the officer a name (Dorien Halley), a DOB, and a SSN. Due to officer safety concerns, the officer directed defendant to stand on the curb 12 to 15 feet away from the patrol truck and took the defendant's backpack to his patrol truck while running the defendant's information through ACCESS. When ACCESS did not return any confirmation for what turned out to be false ID information, the officer decided to arrest the defendant for providing false information.

The officer placed the defendant under arrest, told the defendant "he was not necessarily going to jail," and did not place the defendant in handcuffs. The officer then decided to look for the defendant's identification in the backpack – this investigatory decision was not based on officer safety or preservation of evidence. In the backpack, the officer found a wallet-like object, and in the object he found meth and marijuana. The length of time between (1) the point of taking the backpack and (2) the point of arresting the defendant for providing false information and searching the backpack was about 10 minutes. Following the search of the backpack, the officer arrested the defendant for the drug crimes and placed him in handcuffs.

The defendant was charged and convicted of drug possession. On appeal, the defendant argued that because the backpack was taken from his possession about ten minutes before arrest, the officer could not lawfully search the backpack incident to arrest. Division I agrees in a 2-1 vote.

The majority opinion in Brock explains that under the Washington case law interpreting article I, section 7 of the Washington constitution, the "time of arrest" rule for warrantless search of the person incident to arrest permits an automatic search of articles of personal property "in the actual and exclusive possession of an arrestee at or immediately preceding the time of arrest." The Brock majority opinion concludes that the 10-minute gap between (1) the taking of the backpack and (2) the arrest and search puts the search outside the "time of arrest" rule.

The majority opinion distinguishes this case from the recent Washington Supreme Court opinion in State v. MacDicken, 179 Wn.2d 936 (2014) **April 14 LED:10** that found the officers properly searched an arrestee's duffle bag that he was carrying at the time of arrest. Unlike MacDicken, where the officers searched the arrestee's bag almost immediately after simultaneously taking the bag and arresting the defendant, the officer in Brock separated the defendant from the backpack ten minutes before arrest, and the defendant thus did not have actual possession of the backpack at or immediately preceding the time of arrest.

The majority opinion also distinguishes this case from State v. Ellison, 172 Wn. App. 710 (Div. II, Jan. 8, 2013) **March 13 LED:17** (review denied by Washington Supreme Court on June 13, 2014) where the officers lawfully searched a backpack incident to arrest soon after separating the bag from the arrestee to place him in handcuffs and arrest him. Here, the Court reasoned the defendant was not separated from the backpack for the specific purpose of arresting him – rather the officer separated the defendant from the backpack during a Terry stop for officer safety purposes. And about 10 minutes passed between the point of taking the backpack and placing the defendant under arrest for providing false information. The majority concludes its analysis as follows:

> Brock's backpack was neither on his person nor within his area of control at the time of his arrest. While Officer Olson had probable cause to arrest Brock when he seized the backpack, it is the arrest itself—not probable cause—that constitutes the necessary authority of law to search under article I, section 7. State v. O'Neill. 148 Wn.2d 564, 585-86 (2003) **April 03 LED:03**. Therefore, to find that this was a valid search incident to arrest, we must conclude that, for the purposes of what is in an arrestee's possession, "immediately prior to arrest" includes either the time between a valid Terry stop and the actual resulting arrest or the time between seizure of the backpack during the Terry stop and the resulting arrest. To date, the language in the Washington Supreme Court's opinions has not gone this far. We decline to do so here.

Justice Becker dissents, arguing that the "time of arrest" rule accommodates what the officer did here. She recognizes that officers have considerable discretion whether or not to make arrests, and she expresses concern that the majority's ruling provides "an undesirable incentive for hasty arrests."

Result: Reversal of King County Superior Court convictions of Antoine Lamont Brock for identity theft, forgery, and violation of the Uniform Controlled Substances Act.

Status: The King County Prosecutor has filed a petition seeking discretionary review by the Washington Supreme Court.

(7) PUBLIC RECORDS ACT: DEPARTMENT OF LICENSING'S SEARCH FOR RECORDS WAS ADEQUATE AND TIMELY AND ITS REDACTIONS WERE PROPER – West v. Dep't of Licensing, ___ Wn. App. ___, 2014 WL 3842982 (Div. I, June 9, 2014, publication ordered Aug. 1, 2014), the Court of Appeals holds that the Department of Licensing's (DOL) search for records was adequate and timely and that its redactions were proper.

Plaintiff alleged that the DOL violated the PRA by failing to reasonably search for, identify, and produce records related to motor vehicle fuel tax payments to Indian Tribes. The Court of Appeals holds that DOL's search for responsive records was both adequate and timely, and that DOL properly redacted and withheld information pursuant to a statutory exemption.

Result: Affirmance of Thurston County Superior Court order granting summary judgment to the Department of Licensing.

(8) PUBLIC RECORDS ACT: RECORDS SUBJECT TO A PROTECTIVE ORDER IN CIVIL LITIGATION, BECAUSE PRODUCTION WOULD BE UNDULY BURDENSOME, ARE NOT EXEMPT FROM DISCLOSURE UNDER RCW 42.56.290, THE "CONTROVERSY" EXCEPTION TO THE PRA – In Washington State Dep't of Transportation v. De Sugiyama, ___ Wn. App. ___, 2014 WL 3734123 (Div. II, July 29, 2014), the Court of Appeals holds that records subject to a protective order in a civil case, on the basis that their production would be unduly burdensome, are not exempt from disclosure under the "controversy" exception to the PRA.

RCW 42.56.290 provides:

> Records that are relevant to a controversy to which an agency is a party but which records would not be available to another party under the rules of pretrial discovery for causes pending in the superior courts are exempt from disclosure under this chapter.

The Court distinguishes the records in this case from records subject to a protective order on the basis that they are privileged, undiscoverable or unavailable. In such cases those records would be exempt from disclosure. In the present case, the records were subject to a protective order simply because their production would be unduly burdensome.

Result: Affirmance of Pierce County Superior Court order denying motion for declaratory and injunctive relief.

(9) THREE RULINGS: (1) CHALLENGE TO GOVERNMENT INVESTIGATIVE CONDUCT AS "OUTRAGEOUS" FAILS TO MEET NEAR-IMPOSSIBLE STANDARD; (2) AS TO MANUFACTURING CHARGE, POSSESSION OF 15 PROVIDER-DESIGNATION FORMS AT ONE TIME DOES NOT PRECLUDE MEDICAL MARIJUANA DEFENSE UNDER STATE V. SHUPE'S VIEW OF PRE-2011 VERSION OF CHAPTER 69.51 RCW; (3) AS TO DELIVERY CHARGE, MEDICAL MARIJUANA DEFENSE PRECLUDED WHERE DECOY PATIENT'S FAKE AUTHORIZATION WAS ON PAPER THAT WAS NOT TAMPER-RESISTANT – In State v Markwart, ___ Wn. App. ___, 329 P.3d 108 (Div. III, July 3, 2014), the Court of Appeals addresses several issues in a case in which law enforcement did a sting in late winter and early spring of 2011 against a defendant who held himself out to be a medical marijuana provider.

1. The facts of this case do not support this due process-based challenge claiming outrageous governmental misconduct. Defendant argued on appeal that the government acted outrageously in violation of his due process rights in, among other things: (1) performing a sting against him as a medical marijuana provider who was trying to comply with chapter 69.51 RCW, the Medical Use of Cannabis (formerly Marijuana) Act (MUCA); and (2) falsifying and forging documents and using paper that was not tamper-resistant for undercover and informant purchasers' fake "qualifying patients" paperwork. The Court of Appeals notes that under the Washington and federal precedents, this due process-based defense is "nearly impossible to establish." The focus is exclusively on the conduct of government actors. The defendant must establish that the government's conduct "shocks the sense of universal justice." And the defendant must distinguish a long line of precedents in contraband cases where courts have consistently recognized that some deceit and unlawfulness is required for law enforcement to enforce drug laws and other contraband laws. Among the Washington appellate decisions discussed in Markwart are State v. Lively, 130 Wn.2d 1 (1996) **Jan 97 LED:07** (Lively is the

only Washington appellate decision upholding a defendant's outrage challenge; in Lively an informant took advantage of a hopelessly addicted, suicidal, young single mother who was extremely emotionally dependent on the informant, particularly after he proposed marriage to her); State v. Rundquist, 79 Wn. App. 786 (1995) **March 96 LED:18** (WDFW agents' sting); Dodge City Saloon, Inc. v. Washington State Liquor Control Board, 168 Wn. App. 388 (2012) **Sept 12 LED:13** (WSLCB agents' sting).

2. A MUMA defense is available on a manufacturing change even where a grower possessed 15 provider-designation forms at one time. The Court of Appeals applies its ruling in State v. Shupe, 172 Wn. App.341 (2012), review denied (2013) **March 13 LED:22** to rule that, under the pre-2011 MUMA statutory scheme applicable to defendant's conduct that occurred before 2011 amendments took effect, defendant can present to the jury a medical marijuana defense against a manufacturing marijuana charge even though he possessed 15 provider-designation forms at one time while he was growing marijuana. **[LED EDITORIAL NOTE: We noted in the March 2013 LED entry regarding Shupe that the purported ambiguity/loophole in the pre-2011 law that the Shupe Court relied on to give the defendant there a loophole was clarified/closed by a 2011 amendment to MUMA. Similarly, the 2011 amendment to MUMA noted in the March 2013 LED would appear to preclude the MUMA defense that the Court of Appeals allows under the Markwart facts of having more than one provider-designation at one time.]**

3. The would-be MUMA provider needs to ensure that the patient's authorization is on paper that is tamper-resistant. The Court accepts the State's concession that under MUMA a provider is not required to investigate whether a physician's authorization form is forged. But the Court also accepts the State's argument that it is the provider's obligation under MUMA to ensure that the patient-authorization forms are on tamper-resistant paper.

Result: Affirmance of Whitman County Superior Court convictions of Tyler John Markwart on three counts of delivery of marijuana; vacation of conviction for manufacturing marijuana and possessing marijuana with intent to sell, and remand of case for re-trial on those latter charges.

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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 "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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

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