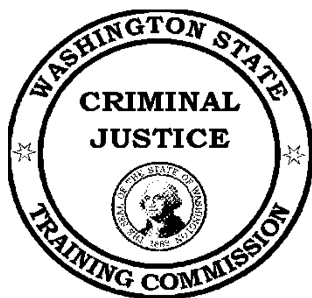

Law Enforcement Digest

AUGUST 2012

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

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HONOR ROLL

681st Basic Law Enforcement Academy – February 14, 2012 through June 20, 2012

President:	Joshua S. Rile, Kennewick PD
Best Overall:	James B. Walker, Bellingham PD
Best Academic:	Nathanael G. Gobble, Spokane PD
Best Firearms:	Ryan G. Ellis, Seattle PD
Patrol Partner Award:	Kevin M. Hake, Moses Lake PD
Tac Officer:	Deputy Rebecca Lewis, Snohomish County SO

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ANNOUNCEMENT: THE 2012 EDITION OF "CONFESSIONS, SEARCH, SEIZURE AND ARREST: A GUIDE FOR POLICE OFFICERS AND PROSECUTORS" BY WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS (WAPA) STAFF ATTORNEY PAMELA B. LOGINSKY, IS NOW AVAILABLE ON THE LED WEBPAGE UNDER THE SPECIAL TOPICS HEADING

Most LED readers are familiar with the excellent and comprehensive summary on law-enforcement-related law topics by Pam Loginsky, staff attorney for the Washington Association of

Prosecuting Attorneys (WAPA). Ms. Loginsky updates the summary annually. The June 2012 version of her summary (348 pages) is now available in PDF format (along with several additional, relatively-current, other-source summaries and outlines of interest to law enforcement) on the Criminal Justice Training Commission's Internet LED page. Ms. Loginsky's summary is under a link at: **"Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors June 2012."** Information is provided on topics of interest to law enforcement in addition to the topics noted in the title. Also included, as the closing item, is a table of comparison of arrest, search and seizure case law under the Washington and federal constitutions.

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BRIEF NOTES FROM THE UNITED STATES SUPREME COURT

(1) EIGHTH AMENDMENT OF U.S. CONSTITUTION PROHIBITS MANDATORY SENTENCE OF LIFE WITHOUT PAROLE FOR JUVENILE OFFENDER IN ANY CIRCUMSTANCE – In the consolidated appeal of Miller v. Alabama and Jackson v. Hobbs, ___U.S. ___, 2012 WL 2368659 (June 25, 2012), a 5-4 majority of the U.S. Supreme Court holds that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for offenses committed by persons when they are under the age of 18. It is still permissible for a court to sentence an offender to life without parole for an offense committed before age 18, but, because of the prohibition of Eighth Amendment against cruel and unusual punishment, the trial court can do so only after considering the offender's age at the time of commission of the crime and other relevant sentencing considerations.

The U.S. Supreme Court previously held in Roper v. Simmons, 543 U.S. 551 (2005) that a death sentence is barred by the Eighth Amendment for any crime, whatever the circumstances, committed before the offender reaches age 18. And the Court held in Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011 (2010) **July 10 LED:08**, that the Eighth Amendment bars a sentence of life without parole for a non-homicide offense committed before the offender is age 18. The decision in Miller/Jackson continues the trend of Roper and Graham.

Result: Reversal of life-without-parole sentences by Alabama and Arkansas courts in the Miller and Jackson cases; remand of cases to the Alabama and Arkansas courts for further proceedings not inconsistent with this U.S. Supreme Court decision.

LED EDITORIAL NOTE: The State of Washington is among the many states whose sentencing laws are impacted by this ruling and will need to be revised.

(2) MUCH OF ARIZONA IMMIGRATION LAW HELD PREEMPTED BY FEDERAL LAW – In Arizona v. United States, ___U.S. ___, 2012 WL 2368661 (June 25, 2012), the case involving Arizona's attempt to supplement federal immigration enforcement through state legislation, the Supreme Court reviews four parts of the statute. A 5-3 majority (Justice Kagan did not participate in the decision) holds that three of the four provisions are preempted by federal law regulating immigration, while the eight voting Justices agree (though under differing analysis) that a fourth provision of the Arizona statute – which requires law enforcement officials in certain specified circumstances to check, prior to release, the immigration status of detained individuals reasonably suspected of being in the U.S. illegally – cannot be held to preempted in the current posture of the case involving only a facial challenge to the law.

1. Law enforcement checks on immigration status are permitted for now. Part of the Arizona statute requires law enforcement officers and other officials, in certain specified circumstances, to check the immigration status of persons (reasonably suspected to be in the

U.S. illegally) whom they detain before releasing them after a stop or arrest. The majority opinion holds that the lower federal court was wrong to hold this provision preempted by federal immigration law before the provision was allowed to go into effect. The opinion notes that the Arizona statute expressly prohibits stops based on race or national origin and provides that law enforcement actions must be conducted consistent with federal immigration and civil rights laws. However, the majority opinion leaves to future litigation the assessment of whether the immigration-status check provision, as applied by Arizona law enforcement officers and officials, should be invalidated based on such application.

LED EDITORIAL COMMENT ON LAW ENFORCEMENT CHECKS ON IMMIGRATION STATUS: The Arizona statute imposes a mandate on state and local officers in Arizona. The majority opinion and the opinions of the dissenting justices in this case recognize that state and local law enforcement officers in the U.S. generally have discretion to check with detainees and with federal officials on immigration status, so long as such officers do not unlawfully extend the duration of a detention without an objective justification, and so long as such officers otherwise comply with constitutional and statutory requirements. The majority opinion leaves open for future consideration, however, such questions as "whether reasonable suspicion of illegal entry or another immigration crime would be a legitimate basis for prolonging a detention, or whether this too would be preempted by federal law."

State and local officers in Washington of course must also comply with limitations imposed by any agency policies and local ordinances in this subject area. Finally, as always, we urge officers and agencies to consult their own legal advisors and local prosecutors on this and other legal matters addressed in the LED.

2. Arizona's state law crime for being In the U.S. illegally is preempted by federal law. The majority opinion concludes that the U.S. Congress has left no room for states to regulate in this field, even to implement the federal prohibition on being in the U.S. illegally.

3. Arizona's state law ban on working in the State of Arizona is preempted by federal law. Congress has chosen not to make working in the U.S. without proper authorization a federal crime. The majority opinion concludes, among other rationales on this issue, that states cannot enact criminal penalties where Congress has decided not to impose any penalties in this area.

4. Warrantless arrest provision for individuals believed to have committed deportable crimes is preempted by federal law. Another part of the Arizona statute authorizes state law enforcement to arrest an individual without a warrant if law enforcement has probable cause to believe the individual has committed a deportable offense. The majority opinion concludes that this provision is preempted because the question of whether and when to arrest someone for being unlawfully in the country is a question solely for the federal government to control.

Result: Decision of the Court of Appeals for the Ninth Circuit is affirmed in part and reversed in part; the case is remanded for further proceedings not inconsistent with this decision.

(3) THREE MIRANDA HOLDINGS IN NOVEMBER 2011 U.S. SUPREME COURT DECISION: (1) SEIBERT BAR AGAINST ADMISSION OF ALL STATEMENTS OBTAINED IN 2-STEP ATTEMPT TO FINESSE MIRANDA IS DISTINGUISHED ON FACTS OF THIS CASE; (2) URGING A PROPERLY MIRANDIZED SUSPECT TO MAKE A DEAL BEFORE HIS ACCOMPLICE DOES IS LAWFUL; AND (3) SUSPECT'S ATTEMPT TO ANTICIPATORILY INVOKE MIRANDA RIGHTS DURING NON-CUSTODIAL QUESTIONING WILL NOT BAR

LATER POLICE CONTACT TO OBTAIN WAIVER FOR QUESTIONING – In Bobby v. Dixon, ___U.S. ___, 132 S. Ct. 26 (2011), the Supreme Court issues a unanimous opinion without attribution of authorship to any individual Justice (i.e., a "per curiam" opinion) in which the Court, for exclusion of evidence purposes, distinguishes the facts of the case from those of Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**. Missouri v. Seibert established a bar against a two-step law enforcement scheme to finesse Mirandizing under which law enforcement officers would intentionally engage in custodial questioning without Miranda warnings in Step One, and then, with the cat out of the bag for the suspect, engage in Mirandized questioning in Step Two.

Seibert remains good law after the decision in the Dixon case; the two-step approach is still unlawful, generally will result in inadmissibility of the statements obtained in both steps of the interrogation, and should be avoided by law enforcement interrogators. But, in a ruling that is of more practical value to prosecutors attempting to salvage a case than to law enforcement interrogators planning interrogation strategy, Dixon holds that Seibert does not apply to exclude the statements in the Step Two questioning under the facts of Dixon, where, among other things and most importantly, none of the suspect's statements in the unlawful un-Mirandized Step One custodial questioning in Dixon could be exploited in the Step Two questioning.

Two other important Miranda rulings in Dixon (that are important to law enforcement officers planning interrogation strategy) are:

(1) A defendant's attempt to invoke his Miranda right to an attorney during non-custodial questioning by police does not bar police from contacting him several days later, taking him into custody, obtaining a Miranda waiver, and interrogating him – as the U.S. Supreme Court has held previously, Miranda rights cannot be invoked anticipatorily (for discussion of Miranda limits on law enforcement officers initiating contact with suspects who have attempted to invoke their Miranda rights to silence or to an attorney, see the article on the CJTC Internet LED page, "Initiation of Contact" Rules Under Fifth Amendment); and

(2) Law enforcement's tactic of urging the defendant during properly Mirandized custodial questioning to "cut a deal" before his accomplice does is not an unlawful coercive technique under the Firth Amendment, just as, the Dixon Court points out, falsely telling a suspect during properly Mirandized questioning that his accomplice has already confessed is not unlawfully coercive nor improper trickery under the Fifth Amendment.

Result: Reversal of Sixth Circuit United States Court of Appeals decision granting writ of habeas corpus.

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NINTH CIRCUIT U.S. COURT OF APPEALS

VEHICLE IMPOUND-INVENTORY HELD TO VIOLATE FOURTH AMENDMENT ON GROUNDS THAT (1) COMMUNITY CARETAKING RATIONALE FOR IMPOUND NOT MET AND (2) INVENTORY WAS PRETEXTUAL; ALSO, COURT INDICATES AN ARREST CANNOT SUPPORT IMPOUND-INVENTORY IF IMPOUND-INVENTORY PRECEDES THE ARREST

U.S. v. Cervantes, 878 F.3d 798 (9th Cir., May 16, 2012)

Facts and Proceedings below:

Cervantes was suspected by Los Angeles Police Department (LAPD) narcotics detectives of being presently involved in narcotics trafficking, but (as the Ninth Circuit panel held under facts and analysis not set forth in this LED entry) detectives had not developed probable cause to search his vehicle for narcotics. A narcotics detective radioed a patrol officer to develop a lawful reason to stop Cervantes's vehicle. **[LED EDITORIAL NOTE 1: This federal case was reviewed under the federal constitution's Fourth Amendment, so pretext in making a traffic stop would not taint police actions. If this had been a case tried under the Washington constitution, article I, section 7, the pretext stop that followed the narcotics detective's request would have tainted the evidence obtained in subsequent police action at the scene of the stop. See State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05. Questions about other search and seizure issues would have been rendered moot by the pretext stop.]**

Two patrol officers stopped Cervantes for failing to come to a complete stop behind the limit line of an intersection. The officers developed probable cause to arrest Cervantes related to the status of his drivers' license, but the officers did not immediately arrest Cervantes. The officers first impounded the vehicle in place and conducted an inventory search at the scene. An officer searched a cardboard box in the rear passenger area and found that it contained approximately two kilograms of cocaine. After the discovery of the cocaine, the officers arrested Cervantes for unlawfully transporting narcotics.

Cervantes moved to suppress the cocaine. The federal district court denied Cervantes's motion to suppress, finding that the officers had lawfully impounded Cervantes's vehicle pursuant to California statutes and LAPD policy, and that the impoundment and search were justified under the community caretaking exception to the Fourth Amendment's warrant requirement.

ISSUES AND RULINGS: 1) Was the impoundment of Cervantes's vehicle reasonable under the Fourth Amendment based on community caretaking considerations (assuming the inventory was not a pretextual investigatory search)? (ANSWER BY NINTH CIRCUIT: No, rules a 2-1 majority; while police department policy and California statutes may have arguably supported the impoundment, no community caretaking rationale supported impoundment; also, because the impoundment and inventory preceded the on-scene arrest of Cervantes, the procedure apparently did not comply with California statutes); 2) Alternatively, was the inventory a pretextual investigatory search? (ANSWER BY NINTH CIRCUIT: Yes, rules a 2-1 majority)

Result: Reversal of U.S. District Court (Central District of California) order denying Cervantes's motion to suppress evidence.

ANALYSIS BY MAJORITY: (Excerpted from majority opinion)

1. Community Caretaking

> Under the community caretaking exception [of the Fourth Amendment], "police officers may impound vehicles that jeopardize public safety and the efficient movement of vehicular traffic." Miranda v. City of Cornelius, 429 F.3d 858, 864 (9th Cir. 2005). Once a vehicle has been legally impounded, the police may conduct an inventory search, as long as it conforms to the standard procedures of the local police department. South Dakota v. Opperman, 428 U.S. 364, 375-76 (1989). **[LED EDITORIAL NOTE 2: Washington officers are reminded that while the Fourth Amendment of the U.S. constitution, per Opperman, essentially defers to "standard procedure" of the given police department on the conduct of inventory searches of lawfully impounded vehicles, the**

Washington constitution, article I, section 7, imposes additional restrictions on inventory searches. See, e.g., State v. White, 135 Wn.2d 761 (1998) Sept 98 LED:08.] However, "an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Florida v. Wells, 495 U.S. 1, 4 (1990).

. . . . [A] vehicle can be impounded under [California Vehicle Code] § 22651(h)(1) only if impoundment serves some "community caretaking function." United States v. Caseres, 533 F.3d 1064, 1074 (9th Cir. 2008). In Caseres, we found the inventory search to be unconstitutional—even though the driver was driving on a suspended license—because the government presented no evidence that the impoundment served any caretaking function. As we stated in Caseres, if "the government fail[s] to establish a community caretaking function for the impoundment" then it "fail[s] to establish the constitutional reasonableness of the seizure and subsequent inventory search."

Neither [Officer Coley nor Officer Sanchez] provided any testimony that Cervantes's vehicle was parked illegally, posed a safety hazard, or was vulnerable to vandalism or theft. To the contrary, Officer Colley testified that Cervantes appropriately pulled over to the curb when he was stopped in a residential neighborhood. While it is true that Cervantes's vehicle was not in close proximity to his home at the time it was impounded, compare Caseres, 533 F.3d at 1075 (noting that defendant's vehicle was two houses away from his home), the government presented no evidence that the vehicle would be vulnerable to vandalism or theft if it were left in its residential location, or that it posed a safety hazard, and thus failed to meet its burden to show that the community caretaking exception applied. Id.; Hallstrom v. City of Garden City, 991 F.2d 1473, 1477 n. 4 (9th Cir. 1993) (upholding the towing of a car from a public parking lot, not a residential street, under the community caretaking exception).

Nor can the government justify the impoundment by simply citing to sections of the California Vehicle Code and the LAPD's policy on impoundments and inventory searches. The fact that an impoundment complies with a state statute or police policy, by itself, is insufficient to justify an impoundment under the community caretaking exception. . . . "[T]he decision to impound a vehicle after the driver has violated a vehicle regulation must consider the location of the vehicle, and whether the vehicle was actually 'impeding traffic or threatening public safety and convenience' on the streets, such that impoundment was warranted." [Quotation from South Dakota v. Opperman, 428 U.S. 364 (1976)]. No such showing was made here.

Moreover, it is not clear that Officers Colley and Sanchez even complied with the California Vehicle Code when they impounded Cervantes's vehicle. According to California Vehicle Code § 22651(h)(1), an officer may impound and remove a vehicle "[w]hen an officer arrests a person driving or in control of a vehicle for an alleged offense and the officer is, by this code or other law, required or permitted to take, and does take, the person into custody." Cal. Vehicle Code § 22651(h)(1) (emphases added). Pursuant to California Vehicle Code § 14602.6(a)(1), "[w]henever a peace officer determines that a person was driving a vehicle while his or her driving privilege was suspended or revoked . . . the peace officer may either immediately arrest that person and cause the removal

and seizure of that vehicle or, if the vehicle is involved in a traffic collision, cause the removal and seizure of the vehicle without the necessity of arresting the person . . . ." Cal. Vehicle Code § 14602.6(a)(1) (emphases added). While the purported reason for the impoundment of Cervantes's car was his alleged [driver's license violation], according to both officers, Cervantes was arrested and taken into custody only after the vehicle was impounded and the inventory search had already resulted in the discovery of narcotics.

2. Pretext

Finally, local police department policies that give officers discretion to choose whether to impound a vehicle are not improper so long as police discretion is exercised "according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." Colorado v. Bertine, 479 U.S. 367, 375 (1987). . . . **[LED EDITORIAL NOTE 3: Under Fourth Amendment case law to date, impound-inventory is the only search and seizure doctrine where pretext can make a search or seizure unlawful. Under case law interpreting article I, section 7 of the Washington constitution, not only will pretext make an impound-inventory unlawful, but pretext will also make certain other types of police searches and seizures unlawful.]**

Here, Cervantes argues that the community caretaking exception does not apply because the impoundment and subsequent inventory search of his vehicle was a pretext to search for narcotics. We agree. We reach this conclusion based on the fact that Officers Sanchez and Colley stopped Cervantes's vehicle at the direction of Detective Hankel, who was investigating Cervantes for narcotics trafficking. Officers Sanchez and Colley both stated that LAPD narcotics detectives had informed them that they were investigating suspected narcotics trafficking by Cervantes and that they were asked to assist with the investigation by conducting a lawful traffic stop of Cervantes's vehicle. The happy accident of [developing probable cause to arrest Cervantes based on the status of his driver's license] cannot excuse the officers' investigatory motive for the vehicle impoundment and inventory search.

[Footnote omitted; some citations omitted or revised; subheadings inserted]

The dissenting judge disagrees with the majority judges regarding: (1) what the trial court record shows regarding the location of Cervantes's vehicle (and attendant possible traffic hazard and possible risks of theft or vandalism); (2) the level of deference that should be given to the trial judge's findings on these points of fact; (3) the majority's legal view that formal arrest must always precede impoundment under the Fourth Amendment; (4) what the trial court record shows regarding the allegedly pretextual impound-inventory; and (5) the level of deference that should be given to the trial judge's findings of fact that relate to the pretext question.

LED EDITORIAL COMMENTS: This case did not involve an argument that officers had a reasonable alternative to impoundment, so that issue cannot be assessed in reading the Ninth Circuit majority and dissenting opinions in the case. But readers should note that under both the Fourth Amendment and article I, section 7 of the Washington constitution, officers generally must consider reasonable alternatives to impoundment before impounding a vehicle based on community caretaking. See, e.g., State v. Reynoso, 41 Wn. App. 113 (1985).

Also, on an issue that is addressed in Cervantes, we think that the majority opinion is probably correct that officers violated the Fourth Amendment by conducting an impound-inventory prior to arresting the driver. Even if there might be some question on this point under the Fourth Amendment, it seems almost a certainty that the Washington Supreme Court would take that approach under article I, section 7 of the Washington constitution (just as the Washington Supreme Court held in State v. O'Neill, 148 Wn.2d 564 (2003) April 03 LED:03 that formal arrest must precede a search that would qualify as "incident to arrest"). Accordingly, officers should not begin the impound-inventory process until after: (1) they have made any on-scene arrest that they intend to make; (2) they have determined that no exception (e.g., consent, emergency, etc.) to the search warrant requirement (other than impound-inventory) supports a warrantless search, and therefore they do not search on that basis; and (3) they have determined that they will not seek a search warrant. Officers should anticipate and be prepared at the time of a suppression hearing to discuss booking restrictions, their department's experiences with released individuals returning to their vehicle and driving off, and like concerns relating to justifying impound-inventory.

As always, we urge law enforcement readers to consult their local legal advisors and prosecutors on legal issues addressed in the LED.

LED EDITORIAL CROSS-REFERENCE NOTE: In the June 2012 LED beginning at page 25, we digested the pro-State Washington Court of Appeals impound-inventory decision in State v. Tyler, 166 Wn. App. 202 (Div. II, 2012). On June 5, 2012, the Washington Supreme Court granted discretionary review in Tyler. Oral argument in Tyler is not yet scheduled and will not occur before the Supreme Court's 2012 fall term.

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

(1) CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT HOLDS THAT PARENTS HAVE A SUBSTANTIVE DUE PROCESS RIGHT TO CONTROL AUTOPSY PHOTOGRAPHS AGAINST UNWARRANTED GOVERNMENT EXPLOITATION; FORMER PROSECUTOR'S DELIVERY OF CHILD AUTOPSY PHOTOGRAPHS TO THE MEDIA VIOLATED THIS RIGHT, HOWEVER, HE IS ENTITLED TO QUALIFIED IMMUNITY – In Marsh v. County of San Diego, 680 F.3d 1148 (9th Cir., May 29, 2012) the Ninth Circuit Court of Appeals holds that where a former prosecutor delivered child autopsy photographs to the media, in an effort to vindicate himself, he violated the mother's substantive due process rights. However, the prosecutor is entitled to qualified immunity from damages because the right was not clearly established at the time.

The Court describes the facts as follows:

> In 1983, Brenda Marsh's two-year-old son, Phillip Buell, died from a severe head injury while in the care of her then-boyfriend, Kenneth Marsh. Charged with Phillip's death, Marsh claimed that Phillip was injured when he fell off the couch and landed on the fireplace hearth. Marsh was convicted of second-degree murder and imprisoned. Almost two decades later, he filed a second habeas petition, which the San Diego County Superior Court granted at the request of the San Diego District Attorney. The DA's recently-consulted expert couldn't conclude beyond a reasonable doubt that Phillip was the victim of child abuse. Marsh's conviction was set aside and he was released.

> After his release, Marsh sued the County of San Diego and the medical personnel who conducted Phillip's autopsy. During this proceeding, Marsh's attorneys deposed Jay S. Coulter, the San Diego Deputy District Attorney who had prosecuted Marsh for murder in 1983. Coulter disclosed that, while he was Deputy District Attorney, he photocopied sixteen autopsy photographs of Phillip's corpse. Coulter also mentioned that, after he retired, he kept one of these as a "memento of cases that I handled." Coulter eventually gave a copy of this photograph, along with a memorandum he wrote titled "What Really Happened to Phillip Buell?", to a newspaper and a television station.

The Court holds that the substantive protection of the due process clause of the United States Constitution "protects a parent's right to control the physical remains, memory and images of a deceased child against unwarranted public exploitation by the government." The disclosure of autopsy photographs, "without any legitimate governmental purpose—'shocks the conscience' and therefore violates Marsh's substantive due process right." The disclosure also violates a state created liberty interest.

However, the Court concludes that the prosecutor is entitled to qualified immunity from damages because the constitutional rights that the prosecutor violated were not clearly established at the time. That is because "this is the first case to address the federal privacy interest in death images. While we believe the right is sufficiently grounded in federal law, we can't fault a state actor for failing to anticipate our ruling."

Result: Affirmance of United States District Court (Southern District California) order granting summary judgment, in part, in favor of defendants.

(2) ADMISSION OF STATEMENTS OF OFFICER WHO SERVED MERELY AS INTERPRETER DOES NOT VIOLATE EVIDENTIARY RULES OR DEFENDANT'S RIGHTS UNDER THE CONFRONTATION CLAUSE UNDER THE FACTS OF THIS CASE – In United States v. Romo-Chavez, 681 F.3d 955 (9th Cir., May 23, 2012) the Ninth Circuit Court of Appeals holds that under the facts of this case, where a Customs and Border Patrol (CBP) officer served as an interpreter, his interpretation of the defendant's statements are admissible at trial as if they are the defendant's own statements.

Defendant was detained at the Mexico-Arizona border by CBP officers. At one point during the detention, a CBP officer was called to serve as an interpreter while another officer Mirandized and interviewed the defendant. The officer was fluent in Spanish, but not a certified interpreter. At trial, the defendant's statements, made through the interpreter/officer, were admitted into evidence (as a party opponent admission) through the testimony of the interviewing officer.

The Court analyzes the issue as follows:

> When an out-of-court statement is offered to prove the truth of the matter asserted, it is hearsay and generally inadmissible. Fed. R. Evid. 802. However, a party may introduce the out-of-court statements of his opponent as party admissions. Fed. R. Evid. 801(d)(2). Therefore, Romo-Chavez's statements were admissible if "the translated statements" made by Officer Hernandez "fairly should be considered the statements" of Romo-Chavez.
>
> Whether statements made through an interpreter should be considered statements of the original declarant "require[s] an analysis of the facts on a case-by-case basis." Generally, we consider "the following four factors . . . : (1) which

party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated."

The first factor weighs slightly in favor of Romo-Chavez. Officer Hernandez was supplied by—indeed was an employee of—the government. But "[t]he fact that [Hernandez] is a government employee does not, by itself, necessarily prevent" his translations from being admissible. Though never dispositive, this factor would have greater weight if Officer Hernandez had "acted as both a translator and a federal law enforcement officer," by "ask[ing] the types of questions he 'normally would ask' in his capacity" as a government agent. But while Officer Hernandez did read Romo-Chavez his Miranda rights off a pre-printed card, the record indicates that he did not initiate any of the questions.

The second factor weighs in favor of the government. The district court found that Officer Hernandez had no motive to distort the translation, and Romo-Chavez presents no reason why this finding was clearly erroneous. We do not presume, as Romo-Chavez would have us do, that a public servant is inherently biased.

The third factor, the skill of the translator, also weighs in favor of the government. Whether an individual speaks a foreign language with sufficient fluency to act as a translator in a given situation is a question of fact. The evidence establishes that Officer Hernandez grew up in El Paso speaking Spanish, studied it in school, spoke it at home with his wife, and conducted interviews in it on a regular basis.

. . .

Because Romo-Chavez took no action after the translation, the fourth factor—whether those actions were consistent with the translated statement—is not relevant in this case. When evaluating this factor, we look to objective action rather than a party's litigation position. Romo-Chavez's post hoc, self-serving denial is insufficient to tip this factor in his favor.

Taking these factors together, the district court did not err in concluding that Officer Hernandez served merely as a language conduit for Romo-Chavez.

The Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him." However, this right is not implicated here because Officer Hernandez's translations are properly construed as Romo-Chavez's own statements. Even if it were, however, it was satisfied by Officer Hernandez's appearance at trial. He may not have remembered the interview, but "'[t]he Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.'" All the Confrontation Clause requires is the ability to cross-examine the witness about his faulty recollections.

[Citations and footnotes omitted]

Result: Affirmance of United States District Court (Arizona) convictions of Claudio Romo-Chavez for knowing possession of methamphetamine with intent to distribute and importing the substance into the United States.

(3) NINTH CIRCUIT DENIES PRELIMINARY INJUNCTIVE RELIEF, CONCLUDING THAT THE USE OF MEDICAL MARIJUANA IS NOT PROTECTED BY THE AMERICANS WITH DISABILITIES ACT – In James v. City of Costa Mesa, ___ F.3d ___, 2012 WL 1815677 (9th Cir., May 21, 2012), the Ninth Circuit holds in a 2-1 decision, reviewing the denial of preliminary injunctive relief, that the use of medical marijuana is not protected by Title II of the Americans with Disabilities Act (ADA), which prohibits discrimination against persons with disabilities in the provision of public services. Accordingly, plaintiffs are unlikely to succeed on the merits of their case.

The Court describes the plaintiffs as "severely disabled California residents" who obtained medical marijuana authorizations under California law. They obtained their medical marijuana through collectives located in the cities of Costa Mesa and Lake Forest, California. However, both cities have taken steps to close marijuana dispensing facilities operating within their boundaries. In part, the majority opinion summarizes the crux of the issue as follows:

> Title II of the ADA prohibits public entities from denying the benefit of public services to any "qualified individual with a disability." The plaintiffs alleged that, by interfering with their access to the medical marijuana they use to manage their impairments, Costa Mesa and Lake Forest have effectively prevented them from accessing public services, in violation of Title II. As the district court recognized, however, the ADA also provides that "the term 'individual with a disability' does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12210. This case turns on whether the plaintiffs' medical marijuana use constitutes "illegal use of drugs" under § 12210.

The Court concludes that because the ADA defines "illegal drug use" by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use, the plaintiffs are unlikely to succeed on the merits of their case.

Result: Affirmance of United States District Court (Central District California) denial of preliminary injunction.

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WASHINGTON STATE COURT OF APPEALS

TRIPLE-MURDER DEFENDANTS LOSE: (1) RECORDED, UNDERCOVER, ROYAL CANADIAN MOUNTED POLICE (RCMP) "MR. BIG" STING DID NOT UNLAWFULLY COERCE THEIR INCULPATORY STATEMENTS; (2) "OTHER SUSPECT" EVIDENCE WAS PROPERLY LIMITED AS SPECULATIVE; AND (3) ANY IMPROPER LAW ENFORCEMENT OFFICER TESTIMONY SUGGESTING THE DEFENDANTS' GUILT OR LACK OF CREDIBILITY WAS CURED BY INSTRUCTION – In the consolidated case of State v. Rafay and State v. Burns, ___Wn. App. ___, 2012 WL 2226989 (Div. I, June 18, 2012) the Court of Appeals rejects a long list of arguments by triple-murder defendants, Atif Rafay and Sebastian Burns, challenging their aggravated first degree murder convictions for the murders of Rafay's mother, father and sister in mid-July 1994 in Bellevue, Washington. For space reasons, this LED entry will provide only a relatively brief description of the rulings on just three of the many issues addressed by the Court of Appeals in its very lengthy opinion.

1) Recorded “Mr. Big” sting by Royal Canadian Mounted Police (RCMP)

After the murders occurred, the then-18-year-olds, Rafay and Burns, went to Vancouver, Canada, where they had previously lived. To aid the Bellevue police investigation of Rafay and Burns, as well as to pursue their own investigation of the possible murder conspiracy having occurred in Canada, the RCMP used an undercover scheme that they had used many times in the investigation of Canadian crimes.

The undercover agents had many video- and audio-recorded contacts with Rafay and Burns as they pretended to bring the suspects into a made-up criminal enterprise. Ultimately, the RCMP agents tricked Burns into talking about his brutal murders of the three members of the Rafay family with a baseball bat. The motive of Burns and Rafay was to get the Rafay estate’s money in order, among other things, to make a movie.

Prior to trial, Rafay and Burns moved to exclude the evidence obtained in the Mr. Big sting on grounds that the scheme violated their federal and state constitutional rights against self incrimination. They argued, among other things, that the undercover RCMP officers’ words and actions impliedly threatened violence to Rafay and Burns if the police were to arrest the defendants for their involvement in the would-be criminal enterprise. The purported threat existed, they argued, because the defendants would assume that they posed some risk to the criminal enterprise if they revealed the enterprise’s secrets to the police. The trial court denied the motion, and the Court of Appeals holds that the trial court’s finding of no coercion is supported by the extensive record in the case, which includes the many enlightening video- and audio-recorded contacts between the defendants and the RCMP agents. While the undercover officers portrayed their fictional criminal organization as one that on occasion had used violence to achieves its ends, the evidence supported the trial court’s finding that the defendants were not coerced by the statements of the undercover officers.

The lead case relied on by the defendants is the U.S. Supreme Court decision in Arizona v. Fulminante, 499 U.S. 279 (1991). In Fulminante, the undercover agent was an imprisoned former police officer pretending to the prison population to be a member of organized crime. Fulminante was a young, short, slightly-built child molester. The undercover agent promised child molester Fulminante protection from other prisoners, but only if Fulminante would tell the agent about Fulminante’s murder of his step-daughter. The U.S. Supreme Court held that Fulminante’s admission to the agent regarding the murder was coerced. In light of the bottom-rung status of child molesters in prison, together with Fulminante’s other individual vulnerabilities, the Supreme Court concluded that the agent was presenting Fulminante with a very real threat of physical harm from other inmates if he did not confess the murder to the undercover agent.

The Rafay/Burns Court factually distinguishes the Fulminante case. Rafay and Burns were not like an imprisoned vulnerable person, nor were they ever presented with threats of physical harm, the Court concludes.

Another aspect of the “Mr. Big” sting was a promise by the RCMP undercover agents to destroy alleged evidence related to the murders (the evidence did not exist). That ploy likewise did not constitute impermissible coercion, the Court of Appeals holds. The Court concludes its analysis of the coercion issue with the following discussion:

> Viewed in their entirety, the circumstances in the case, including the defendants' private conversations, their participation in the scenarios leading up to the

> confessions, and their conduct and statements during the confessions themselves, indicate that Project Estate did not vitiate the defendants' ability to make independent or rational decisions or otherwise overcome their will. Although psychological and financial factors undoubtedly played a role in the relationship between the defendants and the undercover officers, the record does not indicate that those extrinsic considerations were overwhelming. Rather, defendants made a deliberate choice after weighing competing options, including their long-term personal goals, to accept the assistance of another criminal to eliminate their legal problems. A confession is voluntary "'so long as that decision is a product of the suspect's own balancing of competing considerations.'" The evidence in the record strongly supports the trial court's determination that defendants' confessions were voluntary.

[Footnote and case citation omitted]

2) "Other suspect" evidence

The Court of Appeals upholds – after extended analysis of the defendants' contentions, the facts, and the law regarding admissibility of "other suspect" evidence – the trial court's rejection as too speculative the defendants' attempts to present certain "other suspect" evidence.

3) Officer testimony that defendants claim suggested their guilt or lack of credibility

During testimony, law enforcement officers testified briefly in ways that Rafay and Burns argue constituted improper suggestions of their guilt or lack of credibility. In each instance, defense counsel objected, and the trial court struck the testimony and instructed the jury to ignore it.

Generally, no witness may offer testimony in the form of an opinion regarding the defendant's guilt or veracity. State v. Demery, 144 Wn.2d 753 (2001) **Dec 01 LED:15**. Such testimony invades the exclusive province of the jury to make an independent determination of the relevant facts. State v. Kirkman, 159 Wn.2d 918 (2007) **[LED EDITORIAL NOTE: See also State v. Hager, 171 Wn.2d 151 (2011) May 11 LED:09.]** The improper testimony of a police officer raises additional concerns because "an officer's testimony often carries a special aura of reliability." Kirkman. But testimony that is based on inferences from the evidence, does not comment directly on the defendant's guilt or on the veracity of a witness, and is otherwise helpful to the jury, does not generally constitute an opinion on guilt.

One officer testified that Rafay's demeanor at the crime scene was "robotic." A second officer testified that Burns gave him a grin or wry smile at the crime scene, which "kind of shocked" the officer. And a third officer testified that when Rafay was told at the crime scene that he would need to go to the police station for questioning, Rafay seemed "very concerned." The Court of Appeals concludes that these comments were primarily attempts by the officers to describe the defendants' demeanor, and were therefore not improper. The Court says that when viewed in context, the jury would likely have viewed the comments as a reference to the defendants' behavior rather than as an indirect opinion on guilt or veracity.

In addition, the Court concludes, these challenged comments were brief and isolated, and the trial court immediately directed the jury to disregard them. Under the circumstances, the curative instructions were to the jury were remedied any impropriety or potential prejudice.

A fourth officer testified (1) that Rafay was just "chilling with his buddy" in the period immediately after the murders rather than "attending to any of the business that I think you need to attend to

after the death of a family;" (2) that one of the defendants engaged in activity suggesting that he "wanted to be noticed" when at another location during the time around the occurrence of the murders (implying that the behavior was to aid an alibi); (3) that he did a reenactment of one defendant's explanation of his discovery of the crimes, and that based on the reenactment, "I don't believe that he saw what he said he saw."

The Court of Appeals concludes that these brief, isolated statements from the fourth officer were improper comments, but that (1) taking into account the trial judge's striking of the testimony, and (2) putting the comments in context with the wealth of admissible evidence about these matters, the jury was able to and did make its factual determinations based solely on the evidence properly admitted.

Result: Affirmance of King County Superior Court convictions of Atif Ahmad Rafay and Glen Sebastian Burns for three counts of aggravated murder in the first degree.

RECORDINGS OF CONVERSATIONS WITH UNDERCOVER BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS (ATF) AGENT, MADE IN JAIL VISITING ROOM PURSUANT TO COURT ORDER AUTHORIZING RECORDINGS, WERE LAWFUL UNDER PRIVACY ACT, CHAPTER 9.73 RCW, FOR THREE ALTERNATIVE REASONS, INCLUDING THE REASON THAT THE CONVERSATIONS WERE NOT PRIVATE

State v. Babcock, ___ Wn. App. ___, 2012 WL 2018842 (Div. II, June 5, 2012)

Facts and Proceedings below:

Local law enforcement were investigating threats to kill being made by a jail inmate, against individuals associated with his conviction. A sergeant enlisted the assistance of an Bureau of Alcohol, Tobacco, and Firearms (ATF) agent, who, posing as a hit man, met with the inmate three times in the jail visitor's room. The sergeant applied for and received court authority to record the conversations without Babcock's consent.

The Court of Appeals describes the jail visitor's room as follows: "[It] has three cubicles with glass separating the inmate from the visitor and a phone-like mechanism to talk through. The cubicles have separators so that three inmates can have visitors at the same time. Posted signs state that conversations in the visiting room are subject to monitoring by the jail administration. A chime notifies the inmates that the monitoring system is engaged. The monitoring system cannot record the conversations over the phone-like device."

During the first two meetings the sergeant placed an audio recording device in a cubicle underneath the table on Babcock's side. The ATF agent wore a recording device during the first meeting and an audio/visual recording device during the second and third meetings. During the first meeting "[t]he recording [from the device under the table], although garbled, picked up parts of what Babcock said;" the ATF agent's recording device on his person failed. During the second meeting, the recording device under the table failed; the ATF agent's recording device "picked up very little audio and only some unclear images of this meeting." During the third meeting, no device was placed under the table, but the sergeant "videotaped the monitors in the control room, which showed Babcock entering the visiting room, talking with [the ATF agent], and then leaving the visiting room; the monitors did not pick up any audio." The ATF agent's audio/video recording device on his person failed.

The trial court rejected Babcock's Privacy Act challenge and convicted Babcock of conspiracy to commit murder, first degree solicitation to commit murder, and felony harassment.

ISSUE AND AND RULINGS: Are the recordings of conversations between Babcock and the undercover ATF agent admissible for three alternative reasons: (1) because the conversations were not private for purposes of chapter 9.73 RCW, the Privacy Act; (2) because the conversations met one of the Act's exemptions as they conveyed a threat of bodily harm; and (3) because the court orders authorizing the recordings were valid because the applications for the orders meet RCW 9.73.090(2)(f)'s requirement that an application for court-ordered recording establish that normal investigative procedures would be unsuccessful or too dangerous? (ANSWERS BY COURT OF APPEALS: Yes to all three questions)

Result: Affirmance of Clark County Superior Court conviction of Donald R. Babcock for first degree conspiracy to commit murder, first degree solicitation to commit murder, and felony harassment.

ANALYSIS:

RCW 9.73.030 provides in part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
> . . .
>
> (b) Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.
>
> (2) Notwithstanding subsection (1) of this section, wire communications or conversations . . . (b) which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands, . . .

The Privacy Act only applies to private conversations. The Court of Appeals explains an inmate's lessened privacy expectation as follows:

> Inmates have a lesser privacy expectation while incarcerated. State v. Modica, 136 Wn. App. 434, 448 (2006). **Sept 08 LED:13**. Although inmates do not lose all constitutional protections while in custody, reducing an inmate's Fourth Amendment privacy protection is justified by the needs and objectives of the prison institution, especially safety within the facilities. Hudson v. Palmer, 468 U.S. 517, 524–26 (1984) (inmate did not have a privacy interest in his cell), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986); see also United States v. Hearst, 563 F.2d 1331, 1345–46 (9th Cir.1977) (taping a conversation between an inmate and her visitor did not violate the Fourth Amendment). Similarly, an inmate has diminished privacy rights under Washington's Privacy Act and inmates should expect reduced privacy rights. See Modica, 136 Wn. App. at 448 (inmate did not have a reasonable privacy interest in his phone calls while incarcerated); State v. Haq, 166 Wn. App. 221, 260 (2012) **Aug 12 LED:20** (introduction of defendant's jailhouse phone calls into trial did not violate defendant's privacy rights).

The Court holds that the defendant did not have an objectively reasonable expectation of privacy in his conversations with the undercover ATF agent and thus, the conversations were not private under the Privacy Act.

The Court concludes in the alternative that the conversations were not protected by the Privacy Act because they met the exception in RCW 9.73.030(2)(b) for conversations conveying threats of bodily harm. The ATF agent testified that the recorded conversations included Babcock requesting that the ATF agent murder a witness. The court held that Babcock's request of the ATF agent satisfied the "threat of bodily harm" exception to the Privacy Act.

Finally, the Court concludes, as another alternative reason for rejecting the defendant's challenge under the Privacy Act, that the sergeant's court orders authorizing the recordings were valid under RCW 9.73.090(2), which provides for court-ordered, one-party consent recordings based on probable cause in the investigation of felonies. The Court explains as follows why it rejects the defendant's argument that the applications failed to meet RCW 9.73.090(2)(f)'s requirement that an application for conducting court-ordered recording establish that normal investigative procedures would be unsuccessful or too dangerous:

> [The sergeant] points out that inmates are not trained in undercover work; thus, they are unskilled in identifying a serious threat among mere jailhouse chatter. And, he noted that the nature of the jail setting makes it dangerous for inmates to participate in an undercover investigation. We conclude that the affidavits were minimally adequate to show that other investigative methods would be insufficient . . .

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) MAN WHO VIOLATED DOMESTIC VIOLENCE NO-CONTACT ORDER EXCLUDING HIM FROM EX-WIFE'S RESIDENCE NOT ALLOWED TO ARGUE THAT SHE HAD CONSENTED TO HIS PRESENCE, AND THAT THEREFORE HE HAD NOT COMMITTED BURGLARY – In State v. Sanchez, 166 Wn. App. 304 (Div. III, Jan. 31, 2012), the Court of Appeals rejects defendant's argument that his residential burglary conviction should be reversed based on the fact that, although he was subject to a DV no-contact order excluding him from his ex-wife's residence, he was lawfully inside the residence based on her consent. Her consent, he argued, meant that he had not entered or remained unlawfully in the premises for purposes of the burglary statutes. The Court of Appeals explains that only a court can amend a DV order that excludes a person from a residence. The person protected by a DV order cannot waive its protection. Therefore, defendant was unlawfully inside the premises.

The Sanchez Court discusses the following decisions, among others: State v. Dejarlais, 136 Wn App. 939 (1998) **March 98 LED:16** (protected party cannot waive the provisions of a domestic violence protection order or otherwise consent to contact in the face of a contrary court order); and State v. Wilson, 136 Wn. App. 596 (2007) **April 07 LED:17** (holding that, because a no-contact order did not bar the defendant from living at a particular address, his entry of the residence that he shared with the person protected by the order was not a per se unlawful entry of the house under the burglary statutes – the Sanchez Court agrees with the analysis in Wilson, but distinguishes the facts of Wilson from the facts of Sanchez).

Result: Reversal of Chelan County Superior Court order dismissing residential burglary charge against Eliseo Contreras Sanchez; case remanded for trial.

(2) DEFENDANT LOSES CONSTITUTIONAL, STATUTORY CHALLENGES TO ADMISSION OF JAIL'S RECORDINGS OF HIS PHONE CONVERSATIONS WITH FAMILY – In State v. Haq, 166 Wn. App. 221 (Div. I, Jan. 30, 2012), the Court of Appeals rejects a murder defendant's constitutional and statutory challenges to admission of recordings of his phone conversations with family members while he was in jail awaiting trial for his crimes committed in a lone attack on the staff of the Jewish Federation of Greater Seattle in July 2006.

While awaiting trial, Haq was kept in solitary confinement in the King County Jail. He was allowed one hour each day to use the telephone. The jail recorded conversations between Haq and his parents, who live in Eastern Washington. In accordance with jail policies, written notice of the recording of telephone calls was provided to Haq and posted next to each telephone. Additionally, before every phone call, Haq's parents received audio notice that the conversation would be recorded.

The Haq Court holds that admission into evidence of the recordings of Haq's phone conversations with his family members did not violate: (1) the Rules of Evidence; (2) his statutory rights under the limits on recordings in the Privacy Act (chapter 9.73 RCW); or (3) his constitutional protections of (a) right to counsel (note that no conversations involved his attorneys); (b) right to equal protection (he made this argument based on differences between the King County Jail recording and governing statute and DOC's recording scheme and governing statute); or (c) right to privacy. Along the way, the Court notes recent decisions ruling in favor of admission of recordings at the King County Jail in State v. Archie, 148 Wn. App 198 (Div. I, 2009) **March 09 LED:22** and State v. Modica, 164 Wn.2d 83 (2008) **Sept 08 LED:05**.

Result: Affirmance of King County Superior Court convictions and exceptional sentences of Naveed Afzal Haq for one count of first degree aggravated murder, three counts of first degree attempted murder, two counts of second degree attempted murder, and one count each of unlawful imprisonment and malicious harassment.

(3) STATE MAY MAKE PLEA BARGAIN CONDITIONAL ON DEFENDANT NOT MOVING FOR IDENTIFICATION OF A CONFIDENTIAL INFORMANT – In State v. Shelmidine, 166 Wn. App. 107 (Div. II, Jan. 24, 2012), the Court of Appeals rejects defendant's argument that, because the State's plea bargain offer was conditioned on the defendant not seeking to learn a confidential informant's identity, the State's offer interfered with her constitutional rights to effective assistance of counsel and to due process. The Court of Appeals relies in part on the Washington Supreme Court decision in State v. Moen, 150 Wn.2d 221 (2003) **Nov 03 LED:12**, in which the Supreme Court ruled that it does not violate constitutional due process protection for the State to follow a policy of refusing to plea bargain with a criminal defendant who successfully compels disclosure of the State's confidential informant in a civil forfeiture action.

Result: Affirmance of Clallam County Superior Court denying the motion of Nerissa Shelmidine to either (1) dismiss charges for delivery of ecstasy or (2) direct withdrawal of counsel.

(4) DEFENDANT CHARGED WITH MANUFACTURE AND POSSESSION OF MARIJUANA SHOULD HAVE BEEN PERMITTED TO PRESENT AN AFFIRMATIVE DEFENSE THAT HE IS A DESIGNATED PROVIDER UNDER THE MEDICAL MARIJUANA STATUTE, CHAPTER 69.51A RCW; 2011 AMENDMENTS TO THE STATUTE ARE NOT RETROACTIVE – In State v. Brown, 166 Wn. App. 99 (Div. II, Jan. 24, 2012) the Court of Appeals holds that defendant should have been permitted to present an affirmative defense that he is a designated provider under RCW 69.51A.040, which provides an affirmative defense for designated providers. The Court also holds that the 2011 amendments to chapter 69.51A RCW are not retroactive.

The facts and proceedings (excerpted from the Court of Appeals opinion) are as follows:

> In August 2009, Thurston County Sheriff's deputies contacted Brown at his residence because they had received a tip that Brown was selling marijuana. Brown admitted that he was a designated provider of medical marijuana and that he grew and possessed marijuana. The State charged Brown with unlawful possession of a controlled substance, marijuana, with intent to deliver and unlawful manufacture of a controlled substance, marijuana. At a pretrial hearing, [a sergeant] testified that Brown admitted he was the medical marijuana provider for three different people. Brown provided the deputy documentation to support his claim -- medical marijuana prescriptions and signed forms designating Brown as the designated provider for Donald Wise and Carl Brewster. Brown also produced for the deputy a medical marijuana prescription for Ernestine Ann Wiggins but not a designated provider form.
>
> Brown argued that a material issue of fact existed regarding whether he provided marijuana to more than one person at a time. The trial court found that Brown admitted he was a designated provider to three people and that, as a matter of law, Brown was the designated provider for more than one person at a time. The trial court rejected Brown's argument that "at any one time" meant that Brown had to provide marijuana to more than one person at the same point in time. The trial court found that Brown failed to present a prima facie case that he had complied with the medical marijuana statute and denied Brown the opportunity to present the defense to the jury.

Because the Court holds that the 2011 amendments to the medical marijuana laws do not apply retroactively, it analyzes the case under the 2007 version of the statute as follows. Both the 2007 version and the 2011 amendments require that a designated provider be "the designated provider to only one patient at a time." RCW 69.51A.010(1)(d). The Court of Appeals analyzes the case as follows:

> . . . The trial court found that since Brown was designated on more than one designated provider form, he was a designated provider for both Wise and Brewster in violation of the law. The court concluded as a matter of law that Brown did not meet the definition of a "designated provider." Brown contends that under RCW 69.51A.010(1)(d), "designated provider to only one patient at any one time" means something more than simply possessing the designated provider forms.
>
> At the pretrial hearing, [the sergeant] testified that Brown admitted he provided medical marijuana to three different persons. Brown provided documentation to support his claim -- medical marijuana prescriptions and signed forms designating Brown as the designated provider for Wise and Brewster. Brown also produced a medical marijuana prescription for Wiggins, but not a designated provider form. At the motion for reconsideration hearing, the trial court accepted Brown's offer of proof that Brewster would testify that Brown had not provided him marijuana.
>
> These facts raise a material issue of fact whether Brown was the designated provider to Wise, Brewster, and Wiggins at one time. Whether and when someone is a designated provider to a particular patient is a factual issue. Possession of designated provider forms is relevant circumstantial evidence, but

does not dispose of the issue. Because Brewster would testify that he never received any marijuana from Brown, and Brown did not have a designated provider form for Wiggins, a reasonable trier of fact, viewing the evidence in the light most favorable to Brown, could conclude that Brown was a designated provider only to Wise.

Result: Reversal (for retrial) of Thurston County Superior Court conviction of G.B. Brown for unlawful manufacture of marijuana and possession of marijuana with intent to deliver.

(5) EVIDENCE HELD SUFFICIENT TO CONVICT DEFENDANT OF ATTEMPTING TO ELUDE WHERE DEFENDANT IMMEDIATELY ACCELERATED FROM 25 MPH TO 50 MPH IN A 25-MPH ZONE, FRIGHTENED A PEDESTRIAN, RAN A STOP SIGN, AND IMMEDIATELY EXITED HIS VEHICLE AND RAN ONCE HE STOPPED HIS VEHICLE – In State v. Perez, 166 Wn. App. 58 (Div. III, Jan. 24, 2012) the Court of Appeals holds that the following evidence, as described by the Court, is sufficient to convict the defendant of attempting to elude a police vehicle in violation of RCW 46.61.024:

> [A police sergeant was on patrol] on the afternoon of June 8, 2010. He drove an unmarked gray 2009 Ford Crown Victoria squad car with exempt plates, a spotlight, and internal emergency lights, (rather than the traditional external light bar and police push bar). [The sergeant] wore his uniform.
>
> At around 4:13 p.m., [the sergeant] passed Christopher Perez driving in the opposite direction. [The sergeant] believed Mr. Perez's license had been suspended so he turned around to follow Mr. Perez. A camera mounted in the patrol car recorded the pursuit. [The sergeant] caught up to Mr. Perez. Mr. Perez increased his speed from 25 miles per hour (the posted speed limit) to at least 50 miles per hour. A single car separated the patrol car from Mr. Perez's car.
>
> [The sergeant] activated his emergency lights and passed the intervening car. He then watched as Mr. Perez sped past a pedestrian walking a dog; the pedestrian threw up his arms and his dog bolted. [The sergeant] briefly activated his siren to warn the pedestrian that he too would pass. Mr. Perez ran a stop sign at an intersection. [The sergeant] followed Mr. Perez into the parking lot of an apartment complex. Mr. Perez got out of his car and ran. [The sergeant] pursued on foot, caught up with him, and arrested him.

The Court holds that there was sufficient evidence to convict the defendant of attempting to elude, explaining:

> [The sergeant] recognized Mr. Perez and believed he had a suspended license. He turned his patrol car around, activated his emergency lights, and followed Mr. Perez. Mr. Perez immediately accelerated to over 50 miles per hour in a 25-mile-per-hour zone. Mr. Perez frightened a pedestrian, scared a dog, and then ran a stop sign. [The sergeant] activated his siren briefly. Mr. Perez threw open his car door, left the door open, and ran.
>
> The jury watched the entire 40-second pursuit and could easily infer that Mr. Perez saw the police and tried to get away by car and later on foot.

Result: Affirmance of Grant County Superior Court conviction of Christopher Perez for attempting to elude a pursuing police vehicle.

(6) EVIDENCE HELD SUFFICIENT TO CONVICT DEFENDANT OF FORGERY WHERE FAKE SOCIAL SECURITY CARD AND FAKE PERMANENT RESIDENT CARD WERE SEIZED FROM DEFENDANT AFTER HE SHOPLIFTED FROM A STORE – In State v. Vasquez, 166 Wn. App. 50 (Div. III, Jan. 24, 2012) the Court of Appeals holds that there is sufficient evidence to convict the defendant of forgery.

The defendant was detained by a grocery store security guard for suspected shoplifting. The guard patted the defendant down to check for weapons and to locate identification. He located a social security card and a permanent resident card in the defendant's wallet. The defendant said he got the social security card and permanent resident card from a friend in California for $50 each and admitted that they were fakes.

The forgery statute provides in part:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

RCW 9A.60.020(1). A "forged instrument" is "a written instrument which has been falsely made, completed, or altered," RCW 9A.60.010(6), and a "written instrument" is "(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; . . . ." RCW 9A.60.010(7).

The Court rejects the defendant's challenge to the sufficiency of the evidence explaining:

> The intent to commit the crime of forgery may be inferred from surrounding facts and circumstances if such intent is "'a matter of logical probability.'" State v. Esquivel, 71 Wn. App. 868, 871 (1993) **May 94 LED:04** (quoting State v. Woods, 63 Wn. App. 588, 591 (1991)). Indeed, Esquivel suggests that the unexplained possession of a forged instrument makes out a prima facie case of guilt against the possessor because forgery does not require that anyone actually be defrauded. Esquivel, 71 Wn. App. at 871. . . .
> . . .
>
> Here, the cards belonged to Mr. Vasquez and were fakes. The cards had his real name on them but someone else's social security number. Mr. Vasquez reported that he had previously worked in the area. Like the immigration cards in Esquivel, the only value of the cards would be to falsely represent Mr. Vasquez's right to legally be in the country. The jury here could reasonably infer intent to defraud from his possession of the fake cards and his admission that he had previously worked in the area.

Result: Affirmance of Yakima County Superior Court conviction of Vianney Vasquez for two counts of forgery.

(7) PUBLIC RECORDS ACT LAWSUIT: SNOHOMISH COUNTY DID NOT VIOLATE THE PUBLIC RECORDS ACT BY REQUESTING CLARIFICATION OF REQUEST – In Levy v. Snohomish County, ___Wn. App. ___, 272 P.3d 874 (Div. I, Jan. 23, 2012, published ordered

March 19, 2012), the Court of Appeals holds that county's request for clarification of an inmate's public records act (PRA) request was warranted and reasonable. Fifty nine days that elapsed between receipt of the request and response was not unreasonable, especially where much of the delay resulted from mailing delays caused by requestor's incarceration.

Result: Affirmance of Snohomish County Superior Court order granting summary judgment in favor of County and dismissing lawsuit.

(8) EVIDENCE HELD INSUFFICIENT TO CONVICT DEFENDANT OF STALKING, BY REPEATEDLY FOLLOWING OR HARASSING, WHERE DEFENDANT MAINTAINED CONTINUOUS PHYSICAL PROXIMITY AND VISUAL CONTACT WITH 87-YEAR-OLD VICTIM WHILE ON BUS AND AFTER FOLLOWING HER OFF OF THE BUS – In City of Seattle v. Meah, ___ Wn. App. ___, 267 P.3d 536 (Div. I, Dec.12, 2011), the Court of Appeals holds that, in light of the Washington Supreme Court's interpretation in State v. Kintz, 169 Wn.2d 537 (2010) **Oct 10 LED:13** of the analogous Washington stalking statute (see RCW 9A.46.110), there is not sufficient evidence to support a conviction for stalking. To establish stalking, the government must prove defendant repeatedly followed or harassed a victim. In Meah, defendant maintained continuous physical proximity and visual contact with the victim while on a bus and in following her immediately when she got off the bus; because there was no break in contact, the Court of Appeals holds that his conduct could not be deemed to be repeated under the stalking law.

The factual evidence that the Court of Appeals finds insufficient on stalking is described by the Court of Appeals as follows:

> The evidence presented at trial establishes that Meah was riding a bus on Aurora Avenue in Seattle on March 6, 2009. At approximately 11:30 p.m., 87–year–old Vera Galbreath boarded the bus and sat directly behind the driver, placing her shopping cart on the seat beside her. Meah, who was seated across the aisle, asked Galbreath if he could sit by her, to which she shook her head no. He continued to talk to her, despite Galbreath's efforts to ignore him by closing her eyes. Eventually, Meah slapped her knee in an attempt to gain her attention. Worried by Meah's persistence and nervous that he might follow her off of the bus at her normal stop, Galbreath contemplated leaving the bus at a different stop where more people would be present.
>
> Instead, Galbreath exited the bus at her usual stop on Aurora Avenue at North 80th Street. Meah followed her off of the bus, continuing his efforts to talk to her. Meah followed Galbreath for two blocks, ignoring her attempts to wave him away. Meah repeatedly told Galbreath, "I want to know you," to which she replied, "Well, I don't want to know you."
>
> Eventually, a passer-by, Collin Ballard, observed the encounter. Worried about Galbreath's safety, Ballard drove two blocks ahead, stopped his car, and waited for Galbreath and Meah to approach. Galbreath's facial expressions and body language conveyed her fear and distress. After briefly speaking with Galbreath, Ballard called 911. An officer was dispatched and arrived at the scene three minutes later.

Result: Vacation of King County Superior Court order, which had affirmed a Seattle Municipal Court conviction of Akbar Meah for Stalking.

(9) CIVIL RIGHTS ACT LAWSUIT: WHERE DOMESTIC VIOLENCE PROTECTION ORDER DID NOT SPECIFICALLY AUTHORIZE OFFICERS TO CONDUCT A "CIVIL STANDBY," OFFICER WHO CONDUCTED THE "CIVIL STANDBY" WHILE A FELLOW OFFICER INVOLVED IN COMPETING DV PROTECTION ORDERS REMOVED BELONGINGS FROM THE HOME VIOLATED THE FOURTH AMENDMENT – In Osborne v. Seymour, 164 Wn. App. 820 (Div. II, Nov. 9, 2011) the Court of Appeals holds an officer civilly liable under 42 U.S.C. §1983 for conducting a civil standby while a fellow law enforcement officer involved in competing domestic violence protection orders removed belongings from the home.

This case involves domestic violence protection orders obtained by both a husband (police officer) and wife. The facts (taken in the light most favorable to the party against whom summary judgment was granted by the trial court, i.e., the officer being sued) are:

The wife obtained a temporary protection order which stated in part:

> [I]t is hereby ORDERED . . . that the Respondent . . . is RESTRAINED from:
>
> [A]ssaulting, harassing, or contacting the petitioner [Osborne] in any manner.
>
> Going upon the premises of the petitioner's residence or workplace.
>
> . . .
>
> WARNING: VIOLATION OF THE PROVISIONS OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE . . . ONLY THE COURT CAN CHANGE THE ORDER UPON WRITTEN APPLICATION.

The officer-husband's order, obtained the following day, included a request for "possession of essential personal belongings." RCW 26.50.080 provides that an issuing court may authorize police officers to accompany petitioners to obtain personal property:

> (1) When an order is issued under this chapter upon request of the petitioner, the court may order a peace officer to accompany the petitioner and assist in placing the petitioner in possession of those items indicated in the order or to otherwise assist in the execution of the order of protection. The order shall list all items that are to be included with sufficient specificity to make it clear which property is included. Orders issued under this chapter shall include a designation of the appropriate law enforcement agency to execute, serve, or enforce the order.
>
> (2) Upon order of a court, a peace officer shall accompany the petitioner in an order of protection and assist in placing the petitioner in possession of all items listed in the order and to otherwise assist in the execution of the order.

Domestic violence protection orders contain a series of check boxes with language similar to the following:

☐ Law enforcement shall assist petitioner in obtaining:

☐Possession of petitioner's ☐ residence ☐ personal belongings located at:
☐the shared residence ☐ respondent's residence ☐ other: _________
☐ Custody of the above-named minors, including taking physical custody for delivery to petitioner (if applicable).

☐ Other:

None of the boxes on the officer-husband's order were checked. He obtained the assistance of the sergeant in his department who supervised the domestic violence unit. The sergeant conducted a civil standby while the officer-husband entered the home and removed a number of items.

The wife sued her husband, the sergeant, the county and a number of others claiming (among her numerous claims) that the sergeant violated the Fourth Amendment by entering her home and otherwise acting to conduct the civil standby.

The Court of Appeals holds that there was no authority for the sergeant to conduct the civil standby. The Court denies qualified immunity, holding that a reasonable officer (especially one who is the supervisor of the domestic violence unit) would not have believed that there was authority to enter the home under the circumstances where the box on the husband's order was not checked, and the wife had an order prohibiting the husband from entering the premises.

Result: Affirmance of Pierce County Superior Court summary judgment order holding that the sergeant was liable under the Fourth Amendment.

LED EDITORIAL COMMENTS: In this case the Court placed significance on the fact that the sergeant who conducted the civil standby was the domestic violence unit supervisor, but had not read the order to see that it did not authorize a civil standby. In addition to the fact that the husband's order did not specifically authorize a civil standby, the wife's order specifically prohibited the husband from being on the premises. The Court also faulted the sergeant for not sharing full information with his legal advisor.

Calls relating to domestic violence are not only dangerous for officers from an officer safety standpoint, but may also result in civil liability. Officers would be wise to carefully review any order to see that it specifically authorizes a civil standby before conducting one. Officers may also want to consider declining a civil standby unless the other party is present and consents to the civil standby. (Where the other party does not consent it may be adviseable to require the parties to return to court for further clarification of the order.) Additionally, where there are competing orders, officers should follow the more restrictive order. As always officers should consult with their agency legal advisors for specific guidance.

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

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

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

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

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

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