Law Enforcement Digest

December 2012

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

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NOTE REGARDING 2012 LED SUBJECT MATTER INDEX: For many years, the December LED has included our annual LED subject matter index covering all LED entries for the year. Beginning this year, the annual subject matter index will be a separate document. It can be found on the Criminal Justice Training Commission's LED page. Go to the Training Commission's Home Page at: https://fortress.wa.gov/cjtc/www/ and click on "Law Enforcement Digest."

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NINTH CIRCUIT U.S. COURT OF APPEALS

MEDIA PRESENCE AT EXECUTION OF SEARCH WARRANT VIOLATES FOURTH AMENDMENT; HOWEVER, EVIDENCE NEED NOT BE SUPPRESSED WHERE MEDIA DID NOT EXPAND THE SCOPE OF OR OTHERWISE AFFECT THE SEARCH; ADMISSION OF DECEASED OFFICER'S STATEMENTS AT TRIAL VIOLATES HEARSAY RULE

United States v. Duenas, 691 F.3d 1070 (9th Cir., Aug. 16, 2012)

Facts (Excerpted from Ninth Circuit Opinion):

> Ray and Lou lived on an isolated jungle property in Dededo, Guam, with Ray's mother, Ray's daughter, and another man. Ray's mother owned the property. A main house and a shipping container faced the dirt road leading up to the property. Behind the house and container, toward the rear of the property, was a make-shift four-room shack in which Ray and Lou lived.
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> At approximately 5:40 a.m. on April 19, 2007, [Guam PD] GPD officers, along with DEA and ATF agents, executed a search warrant at the Duenases' residence for evidence of narcotics trafficking. Ray and Lou were asleep in the room dubbed "Lou room/Ray's room" when the officers entered the residence. The search scene was "almost chaotic," according to Guam Chief of Police Paul

Suba. The district court characterized GPD's management of the scene as "woefully inadequate." Although up to forty officers were present, no single officer was clearly in charge of managing the scene. The testimony at trial demonstrated that members of the media and other civilians were allowed on the Duenas property during the search to film and photograph the scene. Journalist Eric Palacios testified that he arrived shortly after 9:00 a.m., following an anonymous phone call indicating that something was happening on Ysengsong Road, where the Duenases lived. Trina San Augustin, another journalist, testified that she too went to the Duenas property after receiving an anonymous call.

The media were instructed to remain in the front yard and were not permitted past the shipping container. Officers allowed the media to film and photograph stolen property as it was taken from the residence and surrounding structures and placed in a staging area in the front yard. GPD Officer Scott Wade escorted some members of the media down a jungle path to the rear of the property to view and photograph a marijuana patch. Officer Kim Santos said that she escorted Palacios further into the property "to where the SWAT officers were situated." Officer Allan Guzman testified that, in a highly unusual departure from protocol, Chief Suba took some journalists on a tour of the scene so they could film the items being staged, with the hope that theft victims could thereby identify their stolen property. Officer Wade also testified that he held a press conference at the edge of the front yard.

The presence of members of the general public contributed to the chaos at the search scene. Numerous citizens of Guam came to the Duenas residence during the search to identify items that had allegedly been stolen from them. Some of these people touched the items in the staging area, and several claimed property, which was released to them at the scene. For example, one police officer was permitted to retrieve a plasma television, and a local judge was permitted to retrieve a gavel—which she later returned after realizing it was not hers.

. . .

Meanwhile, Ray and Lou were arrested shortly after the search commenced and were taken to the Tamuning precinct. Thereafter, Ray and Lou each gave written and oral statements regarding the drugs and the stolen property. In his statement, Ray wrote that he had purchased numerous items, including firearms, plasma televisions, power tools, and jewelry, with either cash or methamphetamine. Ray added that he "received the drug 'ice' through a friend who needed help to find buyers." Officer Smith took Ray's statement, and later testified at a suppression hearing that Ray told him that he had been selling methamphetamine in exchange for stolen goods.

Ray, Officer Smith, and Special Agent Michelle Jong of the DEA gave contradictory testimony about how Ray came to give his statements to Officer Smith. After he was initially apprehended by the SWAT team, Ray complained of injury. He was eventually taken to the hospital by Officer Smith. Smith and Ray had once been friends and had worked together as cable installers, but had parted ways in 1997 when Smith entered the police academy. According to Smith, Ray called him over at the hospital and said, "Frank, the stuff at the house . . ." Smith testified that he interrupted Ray, telling him "Ray, this is not the time,

let's get you treated first, talk about this at the precinct." Ray was examined at the hospital and returned to the Tamuning precinct that afternoon.

Once Ray returned to the precinct, Special Agents Jong and Than Churchin attempted to interview him, after advising him of his Miranda rights. Jong stated that Ray said that he wanted to talk with an attorney before making a statement. Jong testified that she then ended the interview and told Ray she would look into getting him a Federal Public Defender. She also told Ray that if he wanted to speak with her, he would need to reinitiate contact. As she left the room, she encountered Officer Smith. Jong informed Smith that Ray had invoked his right to counsel. Smith then went into the conference room. When Jong saw Smith and Ray talking, she entered to ask whether Ray wanted her present. When he shook his head "no," she left, and had no more contact with Ray.

At the suppression hearing, Smith offered a different story: he testified that Jong did not tell him that Ray had asked for an attorney, but instead "informed me that he didn't want to talk to her, but wanted to talk to one of us." "I told her," Smith added, "I said I know why . . . I know him, and I told her that I would go and talk to him." Smith went into the conference room and said: "How are you doing, Ray?" Ray responded that he did not want to talk to the federal agents, because they scared him, but that he would talk to Smith. Smith then re-advised Ray of his Miranda rights. Ray signed a form waiving those rights and indicating that he was willing to make a statement. Ray then gave oral and written statements admitting to selling methamphetamine out of his home in exchange for stolen items; he also named his source.

Lou's statement acknowledged that police had found many items, including "bush cutters, generator, cars, laptops," and that both she and Ray were "aware of what's going on, that the item are stolen, we exchange dope & cash to merchandise." GPD Officer Albert Piolo testified at trial that he and Officer Smith took Lou's oral statement, and that she admitted to trafficking in methamphetamine for about a year and selling methamphetamine in exchange for, among other things, jewelry and a washing machine. Lou told the officers that she distributed about one gram of methamphetamine at a time. Special Agent Jong, who interviewed Lou separately, testified at trial that Lou said that she occasionally used methamphetamine, and kept about a gram at the house.

[Footnotes omitted]

Officer Smith testified at the suppression hearing but was killed by a DUI driver prior to the trial.

ISSUES: 1) Was there a Fourth Amendment violation where media were present during execution of search warrant? (ANSWER BY NINTH CIRCUIT: Yes, however, because the media presence did not expand the scope of or otherwise become part of or affect the search, suppression is not required (but a civil suit may be appropriate in this circumstance))

2) Did the admission of a deceased officer's prior testimony in a suppression hearing in this case violate the federal hearsay rule? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Affirmance in part, reversal in part, of United States District Court (Guam) convictions of Lourdes Castro Duenas of conspiracy to distribute more than 50 grams of methamphetamine,

possession of more than 50 grams of methamphetamine with intent to distribute, and being a felon in possession of firearms.

ANALYSIS:

Execution of Search Warrant

The Court begins its analysis with a discussion of Wilson v. Layne:

> The leading case that addresses the presence of the media during the execution of a search warrant is Wilson v. Layne, 526 U.S. 603 (1999) Aug 99 LED:12. In Wilson, U.S. Marshals and county police permitted a reporter and a photographer from the Washington Post to "ride-along" as they entered a home pursuant to an arrest warrant. The photographer took "numerous pictures" in the home during the execution of the warrant. The homeowners sued the Marshals under [Bivens v. Six Unnamed Agents of the Federal Bureau of Narcotics, 403 U.S. 288 (1971)] and the county police under 42 U.S.C. § 1983. The Court first noted "the 'overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic,'" adding that "the Fourth Amendment does require that police actions in execution of a warrant be related to the objectives of the authorized intrusion." In Wilson, the warrant made no mention of media presence or assistance, and "the presence of reporters inside the home was not related to the objectives of the authorized intrusion." The Supreme Court thus held that "it is a violation of the Fourth Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant."

[Some citations omitted].

The Court assumes that there was media presence in an area of the property where the defendant's had a legitimate expectation of privacy, but holds that the media presence does not require suppression because the media did not expand the scope or otherwise affect the search. The Court explains:

> Assuming that a Fourth Amendment violation occurred, we, like the district court, reject the Duenases' contention that suppression is the appropriate remedy. Because Wilson was a Bivens action, the Supreme Court was not required to address the application of the exclusionary rule. The Court expressly declined to decide "whether the exclusionary rule would apply to any evidence discovered or developed by the media representatives." We, similarly, have not previously decided whether the exclusionary rule applies to evidence obtained by police who have violated the Fourth Amendment by allowing the media to intrude into the location of the search.
>
> A Fourth Amendment violation does not automatically trigger the exclusionary rule. Rather, the rule applies only where the benefit of deterrence outweighs the rule's "'substantial social costs.'" Application of the exclusionary rule is a fact-intensive inquiry. "To apply the exclusionary rule to[a] unique set of facts . . . we must consider the rule's dual purposes: to deter similar police misconduct in the future and to preserve the integrity of the courts."

> The Eleventh Circuit has weighed the benefits and costs of applying the exclusionary rule in an analogous context. See United States v. Hendrixson, 234 F.3d 494, 496–97 (11th Cir. 2000). In Hendrixson, police were accompanied by a television reporter while searching a defendant's residence for methamphetamine. The reporter "arrived after the search was in progress and did not move, touch or handle anything in the residence." Although the Eleventh Circuit found that the media's presence violated the Fourth Amendment, it declined to suppress the evidence found during the search. The court emphasized that the purpose of the warrant clause of the Fourth Amendment is to prevent the police from conducting "general searches" that go beyond the scope of the warrant. In Hendrixson, the police did not exceed the parameters of the warrant, because the "media presence did not expand the scope of the search," the search was "actually carried out by the police themselves," and there was "no allegation that the reporter aided the search; he did not touch, move, or handle anything in the residence." The court suggested that the deterrence goals of the exclusionary rule in such circumstances could be better served through 42 U.S.C. § 1983 or Bivens actions.
>
> We agree with the Eleventh Circuit that where the media were present, but did not discover or develop any of the evidence later used at trial, the evidence need not be excluded. Here, the media did not expand the scope of the search beyond the warrant's dictates; nor did the media assist the police, or touch, move, handle or taint the admitted evidence in any way. Because the GPD complied with the terms of the warrant and the media did not disturb any evidence later admitted, the more appropriate remedy here, as the Eleventh Circuit concluded in Hendrixson, is a Bivens or a 42 U.S.C. § 1983 action.

[Footnotes and some citations omitted]

Deceased Officer's Statements

Evidence Rule 804(b) provides that:

> "Former testimony" is not hearsay if a declarant is unavailable. "Former testimony" is testimony that:
>
> (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
>
> (B) is now offered against a party who had . . . an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

The Court concludes that although defense counsel had an opportunity to cross examine Officer Smith during the suppression hearing, counsel's motive in cross examining was different at the suppression hearing than it would have been at trial. At the suppression hearing, the defendant's motive was to demonstrate that his statements were obtained in violation of Miranda. At trial the motive would be to challenge the substance of the statements. Accordingly, Officer Smith's prior testimony is hearsay and should not have been admitted at trial.

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

(1) CIVIL RIGHTS ACT LAWSUIT: OFFICER HELD ENTITLED TO QUALIFIED IMMUNITY AGAINST CLAIMS THAT: (1) EMERGENCY SPINAL TAP AT HOSPITAL ON INFANT OVER MOTHER'S OBJECTION WAS A DUE PROCESS VIOLATION, AND (2) TAKING AND KEEPING AGITATED MOTHER FROM EXAM ROOM VIOLATED FOURTH AMENDMENT – In Mueller v. Auker, 694 F.3d 989 (9th Cir., Sept. 10, 2012, amended Oct. 25, 2012), a 3-judge Ninth Circuit panel rejects the constitutional due process and Fourth Amendment claims against three law enforcement officers, among other persons, by the mother of an infant child who was given a spinal tap (1) against the mother's clearly expressed wishes, and (2) without court order.

The mother brought the infant to a hospital with a high fever (101 degrees) and other symptoms. The mother consented to some treatment. The mother, however, did not want a spinal tap performed despite the conclusion of the doctors at the scene that the tap was needed in the next few hours to rule out meningitis, which, if found, would require immediate treatment. Law enforcement officers were called to the scene.

Acting under Idaho statutes providing for administrative, non-judicial procedures for temporarily depriving parents of custody and placing children in "shelter care," child protective services personnel and the officer in the lead determined that the medical emergency trumped the mother's objection and the lack of consent from the father (who was not present). Officers escorted the highly agitated, yelling mother from the exam room where the spinal tap was to be performed, and the officers prevented her return to that exam room (the Ninth Circuit decisions in this case do not indicate that the officers applied any force, or that the mother physically resisted the officers).

Medical staff performed the spinal tap in the next few hours. The child did not have meningitis. The medical emergency was over at that point. **[LED EDITORIAL NOTE: Because the Ninth Circuit opinions do not say otherwise, we surmise that the child soon returned to good health, and that no medical problems were caused by the spinal tap.]** The mother and father sued in federal court challenging the constitutionality of the non-judicial, administrative procedures that occurred at the hospital, attacking the lack of consent and the mother's forcible exclusion from the exam room.

The father's lawsuit was addressed by a Ninth Circuit decision three years ago, in Mueller v. Auker, 576 F.3d 979 (9th Cir., Aug. 10, 2009) (the 2009 decision was not addressed in the **LED**; that decision contains more of the factual details, which are incorporated by reference in the 2012 decision digested here.). In the 2009 decision, a 3-judge panel ruled that the officers were entitled to qualified immunity on the father's constitutional due process claim.

Now, as noted above, the same 3-judge panel has ruled that the officers are entitled to qualified immunity on the mother's due process and Fourth Amendment claims. The panel's opinion concludes that the law at the time of the incident (and apparently, in light of the Court's analysis, presently) was not "clearly established." Thus, reasonably informed officers would not have believed that they were violating the mother's: (1) Fourteenth Amendment liberty interest in the care, custody, and control of their infant daughter (this issue relates to the spinal tap without parental consent), and (2) Fourth Amendment right against unreasonable search and seizure (this issue relates to the officers escorting the mother from the exam room and preventing her return to that room). Viewing the facts in the light most favorable to the mother, the officers nonetheless had a reasonable concern that the infant was in imminent danger, the Ninth Circuit panel concludes. It was reasonable to temporarily deprive the parents of custody and control of the child without a judicial hearing. Under the qualified immunity language of the U.S. Supreme

Court in Ryburn v. Huff, 132 S. Ct. 987, 992 (2012) **April 12 LED:03**, "a reasonable officer could have come to such a conclusion."

Result: Affirmance of U.S. District Court (Idaho) decision for officers.

LED EDITORIAL COMMENT: This case involved Idaho governmental actors following an Idaho statutory "shelter care" administrative procedure. Washington officers should consult their agency legal advisors for advance guidance on what they should do in such circumstances. Where such advance guidance has not been provided, officers should try to obtain such legal advice at the time that such circumstances arise. Thorny issues are presented in these circumstances.

(2) CIVIL RIGHTS ACT LAWSUIT: UNABANDONED ITEMS LEFT ON SIDEWALKS MOMENTARILY UNATTENDED BY HOMELESS PERSONS GET FOURTH AMENDMENT PROTECTION FROM SUMMARY SEIZURE AND DESTRUCTION BY GOVERNMENT – In Lavan v. City of Los Angeles, 693 F.3d 1022 (9th Cir., Sept. 5, 2012), a Ninth Circuit panel rules 2-1 in favor of an injunction in favor of nine homeless individuals living in the "Skid Row" district of Los Angeles. The ruling is that the plaintiffs are entitled to an injunction pending trial on their claims against the Los Angeles Police Department and other City of Los Angeles employees.

The homeless persons argue that the City's employees have violated their Fourth and Fourteenth Amendment rights under a policy and practice of seizing and immediately destroying their unabandoned personal possessions, temporarily left on public sidewalks, while the homeless persons attend to necessary tasks such as eating, showering, and using restrooms. The City does not deny that this is its policy and practice. The U.S. District Court agreed with the homeless persons' argument. The District Court issued what the Ninth Circuit panel characterizes as a "narrow" injunction barring the City from:

> 1. Seizing [personal] property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
>
> 2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

The standard for a District Court to issue a temporary injunction pending trial asks whether there is a strong likelihood of success of the lawsuit on the merits. The City of Los Angeles opposed this lawsuit on the rationale that there is no constitutional protection against summary seizure and immediate destruction of personal property in this circumstance. The majority opinion in the Lavan case rejects that argument, concluding that there is no merit to the City's argument. The dissenting opinion agrees with the City's argument.

Result: Denial of City's appeal of temporary injunction of U.S. District Court (Central District of California).

(3) CIVIL RIGHTS ACT LAWSUIT: "DISRUPTIVE BEHAVIOR" ELEMENT OF OTHERWISE OVERBROAD ORDINANCE ON CITY COUNCIL MEETING BEHAVIOR SAVES ORDINANCE FROM FREE SPEECH CHALLENGE; QUALIFIED IMMUNITY FOR ARREST IS GRANTED BASED ON PROBABLE CAUSE TO ARREST; NO EXCESSIVE FORCE FOUND – In Acosta v. City of Costa Mesa, 694 F.3d 960 (9th Cir., Sept. 5, 2012), a Ninth Circuit panel rules 2-1 that, while the City of Costa Mesa ordinance at issue, addressing

behavior at City council meetings, is overbroad, the offending language can be severed from the ordinance to preserve its constitutionality under the Free Speech clause of the U.S. constitution.

Costa Mesa Municipal Code § 2-61 makes it a misdemeanor for members of the public who speak at City Council meetings to engage in "disorderly, insolent, or disruptive behavior." The Ninth Circuit panel in Acosta agrees with the plaintiff that the phrase "insolent . . . behavior" makes the ordinance overbroad in violation of the First Amendment Free Speech clause. People have a Free Speech right to be "insolent" in a public meeting. But it does not violate Free Speech protections to prohibit "disruptive behavior" in public meetings. The majority opinion concludes that the phrase "insolent . . . behavior" can and should be severed from the ordinance. The dissenting opinion disagrees with the majority opinion that the case law on severance permits severance of the overbroad language in this case.

The majority opinion also concludes that there was probable cause for officers to arrest plaintiff for disruptive behavior at a City council meeting. The mayor directed Acosta not to ask audience members to stand and clap in support of his speech against the City's participation in an ICE program. But Acosta disobeyed that directive. Then, with the meeting in disarray, the Mayor declared the meeting in recess and directed Acosta to stop speaking. But Acosta continued his speech and refused to leave the podium. This constituted probable cause for an arrest for disruptive behavior. Therefore, the officers who arrested plaintiff Acosta for disruptive behavior at a Costa Mesa City Council meeting are entitled to qualified immunity on the arrest even if plaintiff Acosta is assumed, for the sake of argument, to be correct in his contention that he was arrested in retaliation for the views that he was expressing. Under the Free Speech Civil Rights Act case law, probable cause to make an arrest makes irrelevant any bad motive of law enforcement officers in making the arrest. **[LED EDITORIAL NOTE: Washington officers should beware, however, of Washington appellate case law making pretext relevant under the Washington constitution in the search and seizure context.]**

In addition, the majority opinion rejects under the following analysis Acosta's argument that officers used excessive force as they removed him from the meeting room:

> When effecting an arrest, the Fourth Amendment requires that officers use only such force as is "objectively reasonable" under the circumstances. . . . To determine whether the force used was reasonable, we must balance the "the nature and quality of the intrusion on the individual's Fourth Amendment interest against the countervailing governmental interests at stake." Graham v. Connor, 490 U.S. 386, 396-97 (1989). Furthermore, the reasonableness must be judged from the perspective of a reasonable officer on the scene and allow for the fact that officers often have to make split-second decisions under evolving and uncertain circumstances.
>
> We find that there was no excessive force here as a matter of law. The undisputed evidence shows that the officers used only the force reasonably necessary to remove Acosta from the meeting and no reasonable jury could find excessive force as a matter of law based on that evidence. The video submitted by Acosta shows that he did not leave the podium when first asked to step down and the crowd began yelling both in support and opposition to Acosta. He also concedes that he did not leave the podium immediately. Considering the volatility of the situation and the presence of a large crowd of hostile demonstrators, the amount of force the officers used—grabbing Acosta's arms and placing him in an upper body control hold—was reasonable. Furthermore, when later placing Acosta under arrest, Acosta was kicking and flailing his body

to actively resist the police. Holding him by his limbs to control him and prevent him from injuring an officer was also not unreasonable or excessive. Therefore, Acosta fails to meet prong one of Saucier and qualified immunity was properly granted to the officers on Acosta's excessive force claim. **[LED EDITORIAL NOTE: The reference to Saucier in the final sentence is to the U.S. Supreme Court decision in Saucier v. Katz, 533 U.S. 194 (2001). The Saucier decision stated a two-pronged test for qualified immunity. Prong One asks if a constitutional right was violated. If not, then qualified immunity applies. If a constitutional right was violated, then Prong Two asks if the right "clearly established" by applicable case law at the time of the conduct. If not, then qualified immunity applies.]**

[Some citations omitted]

Result: Reversal in part and affirmance in part of U.S. District Court (Central District of California); government defendants prevail in full.

(4) CIVIL RIGHTS ACT LAWSUIT: CORRECTIONAL INSTITUTION LOSES ARGUMENT THAT PRISONER'S CONSENT TO SEXUAL CONDUCT WITH CORRECTIONAL OFFICER PRECLUDES HIS EIGHTH AMENDMENT LAWSUIT REGARDING THAT CONDUCT; OFFICER'S COERCION OF SEX WILL BE PRESUMED IN THIS CONTEXT – In Wood v. Beauclair, 692 F.3d 1041 (9th Cir., Sept. 4, 2012), a Ninth Circuit panel rules 2-1 mostly in favor of a male prisoner in his Civil Rights Act lawsuit alleging that his in-prison sexual conduct with a female correctional officer violated his Eighth Amendment rights protecting him against cruel and unusual punishment.

The majority opinion rejects the prisoner's argument for a per se rule that a prisoner can never consent to sex with a correctional officer. But the opinion concludes that the correctional institution is not allowed to argue consent by the prisoner as a complete defense, and must, in light of the inherent power advantage that correctional officers have over prisoners, overcome a presumption that the consent was not consensual. The correctional institution must prove that no coercive factors were involved.

On a second issue, the majority opinion agrees with the prisoner that he need not, in order to support his Eighth Amendment claim, prove that he suffered physical or psychic harm. Instead, the prisoner need only establish that the actions of the correctional officer are offensive to human dignity.

Result: Reversal of United States District Court (Idaho) order granting summary judgment dismissal to prison officials.

(5) MACHINE GUNS ARE "DANGEROUS AND UNUSUAL WEAPONS" THAT ARE UNPROTECTED BY THE SECOND AMENDMENT – In United States v. Henry, 688 F.3d 637 (9th Cir., Aug. 9, 2012), the Ninth Circuit rejects a defendant's argument that he has a Second Amendment right to possess a homemade machine gun in his own home. The Court holds that machine guns are "dangerous and unusual weapons" that are not "typically possessed by law abiding citizens fro lawful purposes" and thus, they are unprotected by the Second Amendment. The Court cites District of Columbia v. Heller, 554 U.S. 570, 627 (2008) **Aug 08 LED:03** (striking down the District of Columbia's ban on handgun possession, but stating that the Second Amendment "does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, . . ." and the "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons'" limits the right to keep and carry firearms).

Result: Affirmance of United States District Court (Anchorage) conviction of Matthew Wayne Henry of illegal possession of homemade machine gun.

(6) SPLIT PANEL REJECTS STOP BY BORDER PATROL AGENTS, HOLDING THAT FACTS DO NOT ADD UP TO REASONABLE SUSPICION OF SMUGGLING OF ALIENS OR DRUGS – In United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir., July 25, 2012), a 2-1 majority of a Ninth Circuit panel rules that federal Border Patrol Agents did not have reasonable suspicion of illegal smuggling of aliens or drugs to justify a stop of a vehicle 70 miles from the U.S.-Mexican border on an interstate highway.

The majority opinion recognizes that the U.S. Supreme Court held in U.S. v. Arvizu, 534 U.S. 266 (2002) **April 02 LED:02** that, in determining whether there is reasonable suspicion for a stop for criminal activity, courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. But the majority finds that the following facts do not add up to reasonable suspicion of illegal smuggling of aliens or drugs:

1) The suspect's driving of a vehicle on a major interstate that may be used by alien and drug smugglers, 70 miles from the border is entitled to little weight (the majority opinion asserts that this fact is too inclusive of the general population);

2) The suspect's speeding and erratic driving pattern is also entitled to little weight (the majority opinion says that this fact is not highly probative of smuggling drugs or aliens, and border agents have no authority to stop vehicles for mere traffic violations);

3) The suspect's slowing down as he passed the a federal Border Patrol checkpoint was not relevant (the majority opinion accuses the government of trying to have it both ways by arguing in other cases that speeding up at a checkpoint is suspicious);

4) The suspect's failure to make eye contact with an agent who pulled alongside him was irrelevant (while the majority opinion acknowledges that failure to make eye contact is relevant under some circumstances, in this case the failure to make eye contact with drivers of other vehicles while speeding down a freeway is not relevant);

5) The truck's Mexican license plate only 70 miles from the Mexican border is given little weight (the majority opinion asserts that this fact is too inclusive of the general population);

6) The use of a F-150 pickup truck is afforded little weight (the majority opinion says that smugglers use numerous types of vehicles);

7) The uncharacteristic cleanliness of a truck with a Baja California plate is entitled to no weight (the majority opinion says that the experienced agent's claim of suspicion based on the vehicle's cleanliness was unsubstantiated and dubious, and the majority opinion also points out that, in another case, the government argued that a dirty vehicle supported reasonable suspicion).

The dissenting opinion accuses the majority opinion of failing to follow the direction from the U.S. Supreme Court in Arvizu that courts not isolate the facts but instead consider them together.

Result: Reversal of U.S. District Court (Central District of California) conviction of Rufino Ignacio Valdes-Vega for cocaine smuggling in violation of federal law.

(7) ORDER TO EMPTY POCKETS IS A SEARCH – In United States v. Pope, 686 F.3d 1078 (9th Cir., July 17, 2012), the Ninth Circuit Court of Appeals holds that a search occurs where a suspect empties his pockets as a result of an officer's order to do so (one of the suspect's pockets contained marijuana).

The Court in Pope holds, however, that the search was lawful under the Fourth Amendment as a search incident to arrest even though the officer gave the order before arresting the suspect. The Court holds that under the Fourth Amendment a search may qualify as a search incident to arrest in some circumstances despite the fact that the search precedes the arrest. Such circumstances were present here, the Court holds, where there was probable cause to believe the defendant possessed marijuana, there was a high risk that the evidence would be destroyed if the officer allowed the defendant to walk away, and the search was a very limited intrusion.

Result: Affirmance of United States District Court (Eastern District California) conviction of Travis Pope for possession of marijuana.

LED EDITORIAL COMMENT: We think that there is no question under the Fourth Amendment or the Washington constitution that a search occurs where a suspect empties his pockets or otherwise produces evidence in response to an officer's order to do so.

The search in Pope, however, while supportable under the Fourth Amendment, would not be justified as a search incident to arrest under article 1, section 7 of the Washington State Constitution. In State v. O'Neill, 148 Wn.2d 564 (2003) April 03 LED:03, the Washington Supreme Court held that an actual arrest must always precede a search in order for that search to qualify as incident to arrest. See also State v. Radka, 120 Wn. App. 43 (Div. III, 2004) March 04 LED:11 (Putting suspended driver in back seat of patrol car and telling him he is under arrest held not a "custodial arrest" for "search incident" purposes where he was not frisked, searched, or handcuffed, and he was allowed to use cell phone while sitting in the patrol car). Searching before arresting is not permitted under the Washington constitution as a search incident to arrest unless there are actual exigent circumstances to support that tactic. No such actual exigent circumstances were present in Pope. Although the opinion uses the word "exigent" when referring to the possibility that the evidence could be destroyed if the suspect were to be released without a search, the opinion does not use the word "exigent" in the narrow sense that the Washington courts use the term in interpreting the Washington constitution).

(8) CIVIL RIGHTS ACT LAWSUIT: SHOOTING PEPPERBALL PROJECTILE INTO EYE OF COLLEGE PARTIER HELD UNCONSTITUTIONAL SEIZURE IN VIOLATION OF ESTABLISHED CASE LAW, SO NO QUALIFIED IMMUNITY FOR OFFICERS – In Nelson v. City of Davis, 685 F.3d 867 (9th Cir., July 10, 2012), Timothy Nelson, a former student of the University of California at Davis ("U.C. Davis"), suffered permanent injury when he was shot in the eye by a pepperball projectile fired from the weapon of a U.C. Davis, California, police officer. The officer was located an estimated 45 to 150 feet away, as U.C. Davis and City of Davis police attempted to clear an apartment complex of partying students at an out-of-control party involving nearly 1000 people. The pepperball caused permanent injury to Nelson's eye. Some people scattered around the broad general area of the apartment complex were involved in actively riotous behavior. But there is no evidence that Nelson and the group in his vicinity taking cover in a breezeway of an apartment complex were engaged in any such behavior. (NOTE: Because this was an appeal in which the government defendants seek summary

judgment to avoid going to trial, the factual allegations by plaintiff Nelson and all reasonable inferences from those allegations are construed in the best light to Nelson.)

The 3-judge Ninth Circuit panel concludes (1) that the shooting of the pepperball constituted an unconstitutional seizure of Nelson, and (2) that the use-of-force case law at the time of the incident should have placed the law enforcement defendants on notice that the shooting of pepperballs in the direction of Nelson under the totality of the circumstances was an act of excessive force, thus precluding the summary judgment of qualified immunity sought by the defendant officers and their superiors named in the lawsuit.

Seizure?

The Ninth Circuit panel first rejects the law enforcement defendants' argument, among other arguments, that no seizure occurred because the officers did not intend to hit anyone with a projectile, and instead sought only to have the projectiles explode without hitting a person for area dispersal of pepper spray. Such subjective consideration is irrelevant, the panel asserts. The panel says that the application of force, viewed objectively, was a seizure because it was a knowing and willful action that had the result of terminating Nelson's freedom of movement. Therefore, shooting the projectile into Nelson's eye was a seizure.

Reasonable seizure?

Next, the panel determines that the use of force was unreasonable under the Fourth Amendment totality-of-circumstances balancing required under Graham v. Connor, 490 U.S. 386 (1989). To assess reasonableness under Graham requires balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." The panel concludes that Nelson's interest was "significant," outweighing the government's interest, which was "minimal at best."

As to the quality of the intrusion, the panel points out that through training the officers were well aware of the risks of injuries to persons that accompanies the use of pepperball projectiles, especially when fired from a distance such that accuracy is difficult to achieve. Also, the actual harm caused is relevant in any reasonableness analysis. The panel concludes that the risk of harm and actual harm "were significant and must be justified by substantial government interests." The panel then turns to the government interests involved.

To evaluate the need for the government's use of force against Nelson, the panel considers a number of factors under the test of Graham, including three important questions concerning (1) the severity of the crime at issue, (2) whether Nelson posed an immediate threat to the safety of the officers or others, and (3) whether he actively resisted arrest or attempted to evade arrest by flight.

The first factor, the severity of the crime at issue, weighs heavily in favor of Nelson because it appears that neither he nor his nearby companions was committing a crime. And even if one assumes that Nelson and his companions were trespassing, that minor offense alone would not justify shooting Nelson with a pepperball projectile, the panel asserts.

Turning next to the factual question of whether Nelson and his nearby companions posed an immediate threat to the safety of the officers and others, the panel sees no evidence of that. The panel notes that while officers had observed other students throwing things at officers and haphazardly in the complex, Nelson and his companions taking cover in a breezeway were not observed to be doing anything that would pose a threat to the officers or others.

Finally as to whether Nelson and his friends were actively resisting or attempting to evade arrest, the panel asserts that the behavior of Nelson and his nearby companions cannot be viewed as even passive non-compliance. The officers did not have any tools by which to amplify their voices so that they might be heard over the noise of the large crowd of partiers. Although Nelson may not have acted as the officers wished, their unannounced (or at least unheard) preferences are not substitutes for police orders. Next on this point, the panel then assumes for the sake of argument that Nelson could hear the officers' un-amplified orders to disperse:

> Even if we were to accept the officers' version of the events, and assume that they issued orders to disperse without sound amplification and at a distance of 45 to 150 feet from the group, Nelson's failure to comply immediately could only rise to the level of passive resistance. . . .
>
> Therefore, even if Nelson heard and was in non-compliance with the officers' orders to disperse, this single act of non-compliance, without any attempt to threaten the officers or place them at risk, would not rise to the level of active resistance. There is therefore no justification for the use of force to be found in the third Graham factor.

Finally on the question of whether Nelson and his group were actively resisting or attempting to evade arrest, the panel criticizes the officers for their use of force against Nelson where the officers had not used amplifiers to give orders, and in light of the officers admitted lack of any directives to the crowd as to how partiers were to comply with any order to disperse in light of the fact that officers blocked the primary route of egress from the party.

Clearly established law?

The final question in qualified immunity analysis is whether the case law was clearly established at the time of the incident such that the officers should have known that the conduct at issue would violate Nelson's rights. There was and is no case exactly on point involving pepperball projectiles. The panel concludes, however, that prior decisions addressing use of weapons with concussive force, as well as previous decisions addressing use of pepper spray, provide established case law on sufficiently analogous facts to preclude giving the law enforcement defendants in this case qualified immunity. Among the cases that the panel relies on for this point are: LaLonde v. County of Riverside, 204 F.3d 947 (9th Cir. 2000) **May 00 LED:12** (pepper spray); Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) **June 01 LED:05** (beanbag weapon) (note that the June 2001 LED reported an opinion in Deorle that was later amended twice, without significant relevant change either time, in the Ninth Circuit's analysis of the constitutionality of the use of the beanbag device); and Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002) (note that the **August 2000 LED** reported a 2000 version of the Ninth Circuit 3-judge panel's opinion in the Headwaters case, and that the final version of the 3-judge panel's 2002 opinion cited in Nelson did not make significant relevant changes from the bottom-line conclusion in the 2000 opinion addressing constitutionality of applying pepper spray to unlink passively resisting protestors).

Resut: Affirmance of U.S. District Court (Eastern District of California) decision denying summary judgment of qualified immunity to the law enforcement defendants.

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BRIEF NOTES FROM THE WASHINGTON COURT OF APPEALS

(1) WHERE MAN WAS AWARE THAT WOMAN OBJECTED TO MAN'S PRESENCE WITHIN HER HOME, MAN COULD NOT DEFEND AGAINST BURGLARY CHARGE ON THEORY THAT WOMAN'S 14-YEAR-OLD DAUGHTER CONSENTED TO HIS ENTRY AND PRESENCE – In State v. Cordero, ___ Wn. App. ___, 284 P.3d 773 (Div. III, Aug. 28, 2012), the Court of Appeals rules that it is not a defense to burglary that a 14-year-old girl resident of a home invited a man into the home and consented to his remaining there, where the man was well aware that the mother of the girl (1) was present, (2) did not want the man in her home, and (3) upon his entry, immediately ordered the man to leave.

A jury found that the defendant committed first degree burglary under RCW 9A.52.020 which provides:

> (1) A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

A jury conviction will be upheld against a challenge of insufficient evidence if, viewing the evidence in the best light for the State, a reasonable jury could reach the verdict at issue (even though the jury might well have reached a different verdict on the same evidence).

The opinion of the Court of Appeals sorts through conflicting testimony and concludes that there is sufficient evidence to support the jury's verdict on the following challenged points of fact on appeal: (1) that the defendant unlawfully entered the home; (2) that the defendant unlawfully remained in the home; and (3) that the man intended to commit a crime in the home (there was evidence supporting the State's theory that the man wanted to leave with the woman's 14-year-old daughter (who was receptive to his amorous feelings), and that he flashed a handgun and clicked it menacingly while in the home to further that purpose).

On the final point regarding intent to commit a crime in the home, the Court of Appeals notes that (1) recently, the man had been the subject of restraining orders, now expired, obtained by the mother in relation to the man's contact with the daughter, and (2) the mother had very recently warned the man that she "would call the cops" if he came around.

Result: Affirmance of Franklin County Superior Court conviction of Luis Antonio Cordero for first degree burglary.

(2) NO VIOLATION OF DEFENDANT'S RIGHT TO A FAIR TRIAL WHERE "FACILITY DOG" BELONGING TO PROSECUTOR'S OFFICE IS ALLOWED TO SIT NEXT TO DEVELOPMENTALLY DISABLED VICTIM WHILE THE VICTIM TESTIFIES – In State v. Dye, ___ Wn. App. ___, 282 P.3d 1130 (Div. I, Aug. 27, 2012), the Court of Appeals holds that the defendant's right to a fair trial was not violated when the trial court allowed a "facility dog", belonging to the prosecutor's office, to sit next to the developmentally disabled victim while the victim testified.

Result: Affirmance of King County Superior Court conviction of Timothy Lee Dye for residential burglary.

(3) COURT REJECTS DEFENSE ARGUMENT BASED ON TYPOGRAPHICAL AND PROCEDURAL ERRORS IN SEARCH UNDER A WARRANT; ALSO HOLDS THAT

ALTHOUGH PORTION OF WARRANT ADDRESSING "FIREARMS, SHELL CASES OR KNIVES" WAS OVERBROAD AND LACKED PROBABLE CAUSE, THAT PORTION COULD BE SEVERED – In State v. Temple, ___ Wn. App. ___, 285 P.3d 149 (Div. I, Aug. 20, 2012), the Court of Appeals rejects defense arguments challenging procedural errors in a search warrant and its execution, and the Court also holds that the portion of a search warrant that was overbroad and lacked probable cause could be severed from the rest of the warrant.

The Court of Appeals rejects defendant's argument that an error in the caption of a search warrant, reading "Redmond District Court," instead of East Division of the King County District Court, renders a search warrant invalid.

The defendant also argued that the cumulative effect of a number of procedural errors amounted to a constitutional violation. The alleged errors are: (1) the search warrant affidavit, the search warrant, the search warrant return, and the search warrant inventory were not filed with the issuing court; (2) the search warrant return was not accompanied by the inventory of property seized; (3) the police did not provide Temple with a copy of the warrant or a receipt for the property seized; and (4) the search warrant inventory was not made in the presence of any other person and falsely states that it was. The Court rejects this argument stating: "The rules for the execution and return of a valid search warrant are ministerial in nature. Absent a showing of prejudice to the defendant, procedural noncompliance does not compel invalidation of the warrant or suppression of its fruits." State v. Parker, 28 Wn. App. 425, 426-27 (1981).

Finally, the defendant argued the warrant was overbroad and lacked probable cause. The Court analyzes this issue as follows:

> The State concedes that the warrant's references to "firearms, shell cases or knives" were overbroad and not based on probable cause. Whether this overbreadth invalidates the warrant depends solely on whether the overbroad parts of the warrant can be severed. As our Supreme Court has noted, "'[I]t would be harsh medicine indeed if a warrant which was issued on probable cause and which did particularly describe certain items were to be invalidated in toto merely because the affiant and magistrate erred in seeking and permitting a search for other items as well.'" Therefore, under the severability doctrine, "'infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant' but does not require suppression of anything seized pursuant to valid parts of the warrant."
>
> State v. Maddox, 116 Wn. App. 796, 807-09 (2003) **Oct 03 LED:06** [affirmed by Supreme Court at 152 Wn.2d 499 (2004) **Dec 04 LED:18** in a decision that did not address the severability issue addressed by the Court of Appeals] sets out five factors for determining whether invalid parts of a warrant can be severed: (1) the warrant must lawfully have authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the part of the warrant that includes particularly described items supported by probable cause must be significant when compared to the warrant as a whole; (4) the searching officers must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officers must not have conducted a general search, i.e., one in which they "flagrantly disregarded" the warrant's scope.
>
> Temple disputes the last three elements of the Maddox test. He argues that the portion of the warrant supported by probable cause is minimal compared to the

> warrant as a whole and that the police conducted an improper generalized search because they could not reasonably expect to find a bladed weapon in a small bedside dresser or a small glass vial.
>
> The warrant's grant of authority to search for an ax, evidence establishing dominion and control over the ax, and evidence of dominion and control of the premises was significant when compared to its whole. Its grant of authority to search for any dangerous weapon or firearms, "all ammunition and shell casings," and evidence of ownership of firearms was not significant when similarly compared.
>
> Temple's characterization of the search as "generalized" ignores the "plain view" exception to the Fourth Amendment's warrant requirement. Under the plain view doctrine, an officer must (1) have a prior justification for the intrusion, (2) inadvertently discover the incriminating evidence, and (3) immediately recognize the item as contraband. Inadvertent discovery is no longer a requirement to establish the plain view exception under the Fourth Amendment. Once the police were lawfully in the room, the drug evidence was in plain view on a dresser and in an open dresser drawer. Thus, the police could seize it.
>
> Temple also claims that the warrant failed to meet the particularity requirement because it failed to identify which means of committing domestic violence assault was being investigated. . . .
>
> Temple correctly notes that the warrant in this case also fails to articulate which of the alternative means of committing second degree assault is at issue, but the similarity with Higgins ends there. The warrant clearly authorizes the police to seize particular types of weapons and other items. Although, as discussed above, the list was overbroad, once the offending provisions are severed, the warrant remains valid as it relates to evidence of dangerous bladed weapons, specifically the ax. The warrant was sufficiently particular to justify entry into Temple's bedroom to search for the wooden-handled ax or other similar weapons.

Result: Affirmance of King County Superior Court conviction of Matthew Alan Temple for violating the Uniform Controlled Substances Act.

(4) CONVICTION OF TWO COUNTS OF ATTEMPTING TO ELUDE A POLICE VEHICLE, BASED ON SEPARATE PURSUITS BY TWO SEPARATE LAW ENFORCEMENT AGENCIES, DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE – In State v. Chouap, ___ Wn. App. ___, 285 P.3d 138 (Div. II, Aug. 14, 2012) (amended Sept. 11, 2012) the Court of Appeals holds that conviction of two counts of attempting to elude a police vehicle does not violate Double Jeopardy where each count was based on a pursuit by a separate law enforcement agency, albeit over a short time span.

One agency initiated a pursuit of the defendant's vehicle, but terminated the pursuit when it became too dangerous. A short time later, a second agency located the vehicle, which was driving safely at the time but began to flee upon seeing the patrol car, and initiated a pursuit.

Under the following analysis, the Court rejects the defendant's argument that the conduct constituted a single unit of prosecution:

> Here, the essential question is whether attempting to elude a pursuing police vehicle is a continuing offense or whether the accused commits it anew with each pursuit. The evidence shows two separate pursuits, one in Tacoma by Tacoma police and one in Lakewood by Lakewood police. The first pursuit ended when the Tacoma police officers stopped pursuing Chouap because of his dangerous driving. At that point, the first crime of attempting to elude was completed because Chouap had successfully eluded the pursuing police vehicle.
>
> A short time later, a Lakewood police officer saw Chouap driving southbound on Bridgeport Way at a normal speed. The second pursuit then followed and continued through the assault on [the Deputy], ending when Chouap lost control of his car shortly thereafter. The second pursuit was separated from the first by time, by Chouap's return to lawful driving, and by different pursuing police officers. We hold that Chouap's double jeopardy rights were not violated by his two convictions for attempting to elude a police vehicle because each was a separate unit of prosecution.

Result: Affirmance of Pierce County Superior Court convictions of Kamara K. Chouap for two counts of attempting to elude a police vehicle and second degree assault.

(5) POLICE OFFICER'S TESTIMONY THAT VICTIM/DECEDENT SAID HE FEARED THE DEFENDANT VIOLATED THE CONFRONTATION CLAUSE; HOWEVER, COURT HOLDS THAT VIOLATION IS HARMLESS – In State v. Fraser, ___ Wn. App. ___, 282 P.3d 152 (Div. I, Aug. 13, 2012), the Court of Appeals holds that allowing a police officer to testify to the victim/decedent's statements that he feared the defendant violated the Confrontation Clause, however, the violation was harmless.

The defendant shot and killed his ex-girlfriend's current boyfriend. Evidence showed that the defendant was extremely jealous of the new relationship and had threatened the victim in the past.

At trial the court admitted a single sentence, taken from a longer statement given by the victim/decedent to a police officer prior to the shooting: "I am constantly being harassed and fear for my and my girlfriend's life." The statement was offered to prove the victim's state of mind, in particular, that he feared the defendant and would not have acted aggressively toward the defendant causing the defendant to "accidentally" shoot him in response.

The Court explains:

> The confrontation clause confers upon the accused the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. It applies to "witnesses" against the accused, ... Crawford v. Washington, 541 U.S. 36, 51, (2004) **May 04 LED:20**. The parties agree that the statement in question was testimonial. It was part of a formal signed statement [the victim/decedent] gave to the police, one he would reasonably expect to be available for prosecutorial use to prove some fact at a later trial. Id. Admission of a testimonial statement by an absent witness is generally permissible only where the declarant is unavailable, and only where the defendant had a prior opportunity to cross-examine. Id. at 59.

The Court concludes that because the statement was testimonial, and was offered for the truth of the matter, its admission violates the Confrontation Clause. However, because there was

overwhelming additional evidence that the victim feared the defendant, the admission of the statement was harmless.

The Court also rejects the defendant's Confrontation Clause challenge to the admission of two reports of his cell phone calls and text messages in the weeks leading up to the murder, on the basis that the defendant did not raise the objection at trial (and regardless any error is harmless).

Result: Affirmance of Snohomish County Superior Court conviction of Bud Michael Fraser for first degree murder.

(6) BACKSEAT PASSENGER'S MERE PROXIMITY TO WEAPON AND KNOWLEDGE OF WEAPON'S PRESENCE IS INSUFFICIENT TO CONVICT DEFENDANT OF UNLAWFUL POSSESSION OF A FIREARM BASED UPON CONSTRUCTIVE POSSESSION – In State v. Chouinard, 169 Wn. App. 895 (Div. II, Aug. 8, 2012), the Court of Appeals holds that there is insufficient evidence to convict the defendant of unlawful possession of a firearm, based upon constructive possession, where he was merely a backseat passenger in a vehicle in which he knew there was a rifle whose barrel was protruding from the trunk into the backseat.

While clearing a vehicle whose occupants were being investigated for a drive by shooting, an officer noticed that the "backrest on the backseat had been detached from the car, creating a gap between the backrest and the rear dash. He identified the rifle barrel, with an attached flash suppressor, protruding up from the trunk through this gap." When asked, the defendant, who had been a passenger in the back seat of the vehicle, said that he knew nothing about the [shooting], but did "acknowledge, however, that he had seen the gun behind the backseat."

The Court explains:

> Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found. See State v. Bowen, 157 Wn. App. 821, 828 (2010) **Feb 11 LED:19**; State v. Turner, 103 Wn. App. 515, 521 (2000) **March 01 LED:11**; State v. McFarland, 73 Wn. App. 57, 70 (1994), aff'd, 127 Wn.2d 322 (1995); State v. Reid, 40 Wn. App. 319, 326 (1985); State v. Echeverria, 85 Wn. App. 777, 783 (1997). But courts hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession. See State v. George, 146 Wn. App. 906, 923 (2008) **Feb 09 LED:22**; State v. Cote, 123 Wn. App. 546, 550 (2004) **June 05 LED:21**.

The Court finds the present case most analogous to George:

> Like George, here Chouinard rode as a backseat passenger, and then police stopped the vehicle in which he rode and found contraband near his seat. Both George and Chouinard knew the contraband was in the vehicle next to them, and in neither case did the State offer evidence that the defendants owned or used the contraband. Also, like George, which dealt with drug possession, a jury convicted Chouinard on a constructive possession theory, and there, Division One reversed for insufficient evidence, holding that, although George rode as a passenger in near proximity to the contraband with knowledge of the contraband's presence next to him, the State produced insufficient evidence to establish dominion and control and convict him for constructive possession. We

> apply this reasoning here. As in George, the State demonstrated Chouinard's mere proximity to the weapon and his knowledge of its presence in the vehicle. This evidence, alone, does not sustain a conviction for constructive possession of a firearm.

Result: Reversal of Pierce County Superior Court conviction of Marcus Anthony Chouinard of first degree unlawful possession of firearm.

LED EDITORIAL COMMENT: The proof standard implicated in the Chouinard case – where the defendant's challenge was to a conviction based on constructive possession – required the State to point to evidence sufficient to convince a jury beyond a reasonable doubt. As an abstraction, this proof standard is much higher than the probable cause standard for arrest. So, as an abstract proposition considering only these two proof standards, it is reasonable to assert (on a legal issue not posed in the case) that the ruling in Chouinard does not necessarily mean that an officer would not have probable cause to arrest a backseat passenger under these circumstances.

But a further complication for officers operating under the Washington constitution is the Washington Supreme Court decision in State v. Grande, 164 Wn.2d 135 (2008) Sept 08 LED:07. Grande held under article I, section 7 of the Washington constitution that the mere odor of marijuana coming from a vehicle during a traffic stop did not provide probable cause to arrest occupants of the vehicle (though the Court stated that the odor alone would provide probable cause to search the vehicle). Based on the abstract concepts noted in paragraph 1 of this comment and on precedent here (see, e.g., State v. Morgan, 78 Wn. App. 208 (1995) Jan 96 LED:10) and elsewhere, we think that a good argument can be made that Grande's no-PC-to-arrest ruling does not mean that officers always must have knowledge of facts sufficient to support a conviction for constructive possession in order to establish probable cause to arrest based on constructive possession.

But we must acknowledge that this question is further complicated by the fact that the Grande Court rejected a probable cause argument based on Maryland v. Pringle, 540 U.S. 366 (2003). Pringle is a U.S. Supreme Court precedent upholding an arrest of a front seat car passenger for illegal drugs, found in a consent search, which were hidden behind a backseat armrest of a car. The Grande Court declared that in Pringle the U.S. Supreme Court drew an inference of common enterprise (in that case, drug dealing) of all three car occupants that the Washington constitution does not allow. In light of Grande, we begrudgingly concede that the facts of Chouinard (very close proximity of a car passenger to a gun or illegal drugs or other contraband in the car plus the passenger's awareness of the contraband's presence) do not add up to probable cause that would support an arrest of the vehicle passenger. But we think that if officers have one additional fact supporting an inference of even temporary control of the contraband (for example, a furtive gesture in the area of the item, responses by car occupants to questioning, etc.) then, while the fact of at least temporary control might not always support a conviction for constructive possession of the contraband (see, e.g., State v. Cote, 123 Wn. App. 546, 550 (2004) June 05 LED:21), it could support probable cause to arrest.

(7) SUSPECT'S SELECTIVE SILENCE AT VARIOUS POINTS DURING INTERROGATION CANNOT BE USED AGAINST HIM AT TRIAL EXCEPT FOR IMPEACHMENT PURPOSES – In State v. Fuller, ___Wn. App. ___, 282 P.3d 126 (Div. II, Aug. 8, 2012), the Court of Appeals reverses defendant's convictions for first degree felony murder

and first degree premeditated murder, holding that the State should have not elicited a detective's testimony commenting on defendant's selective silence during Mirandized interrogation, and the prosecutor should not have made argument to the jury commenting on that selective silence.

During interrogation, the defendant did not either admit or deny certain factual accusations put to him by a detective. At trial the prosecutor elicited testimony from the detective to this effect. Also, at trial, the prosecutor's opening statement and closing argument brought these selective silences of the defendant to the attention of the jury. Citing such decisions as State v. Easter, 130 Wn.2d 228 (1996) **Jan 97 LED:13** and Hurd v. Terhune, 619 F.3d 1080 (9th Cir. 2010) **Oct 10 LED:04**, the Court of Appeals rules that the testimony and prosecutor arguments violated the defendant's right against self-incrimination. The Court rules further that these violations of defendant's rights were not harmless in light of the other evidence in the case, so the case must be retried.

The Fuller Court distinguishes the Court of Appeals decision in State v. Curtiss, 161 Wn. App.. 673 (2011) **Sept 11 LED:22**, in large part because in Curtiss the defendant testified at trial, and the evidence regarding her selective silence was used to impeach her. In Fuller, the defendant did not testify and did not even offer a theory of defense that could be impeached, the Fuller Court asserts.

Result: Reversal of Pierce County Superior Court convictions of Jaycee Fuller for first degree felony murder and first degree premeditated murder; remand for retrial.

(8) NO DOUBLE JEOPARDY VIOLATION IN CHARGING TWO ACTS OF MALICIOUS MISCHIEF COMMITTED AGAINST THE SAME VICTIM (POLICE DEPARTMENT) SEPARATELY – In State v. K.R., 169 Wn. App. 742 (Div. I, July 30, 2012), the Court of Appeals holds that the "unit of prosecution" aspect of the double jeopardy clause is not violated where the defendant is charged with and convicted of two counts of malicious mischief, one for carving an "S" into the wall of a holding cell, and the other for damaging a door handle of a police car an hour later.

The defendant argued that because the malicious mischief statute referred to the "property of another," and both pieces of property belonged to the police department, that he could only be charged with one count. The Court of Appeals rejects this argument, explaining that "[w]hen charging malicious mischief, the State may either charge a separate count for each item damaged, or if enough items are damaged as a result of a common scheme or plan, the State may decide to aggregate the damages in a single count so as to meet the threshold for charging a felony rather than a misdemeanor."

Result: Affirmance of King County Superior Court convictions of K.R. (juvenile) of two counts of malicious mischief in the third degree.

(9) COURT HOLDS THAT CITY FAILED TO PRESERVE ITS CHALLENGE TO A TRIAL COURT INSTRUCTION THAT ALLOWED JURY TO FIND THE CITY LIABLE FOR NEGLIGENCE IN THE SERVICE OF AN ANTI-HARASSMENT ORDER WHERE THE RESPONDENT ON THE ORDER KILLED THE PETITIONER SHORTLY AFTER SERVICE OF THE ORDER BY THE POLICE – In Washburn v. Federal Way, 169 Wn. App. 588 (Div. I, July 23, 2012), the Court of Appeals holds for procedural reasons that the City of Federal Way may not pursue its theory that the "public duty doctrine" requires, as a matter of law, reversal of a jury's verdict that a law enforcement officer breached a duty of care to the petitioner in the officer's service of an anti-harassment order.

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

> A court commissioner entered [a] proposed temporary protection order [with Roznowski as the petitioner and Kim as the respondent]. By its plain terms, it restrained Kim "from making any attempts to contact" Roznowski. It also restrained him "from entering or being within 500 feet" of her residence. . . .
>
> Roznowski then delivered copies of her petition and the temporary protection order to the City's police department for service on Kim. At the police department, she completed and submitted an additional document called a Law Enforcement Information Sheet (LEIS).
>
> Below the above directives in the LEIS, Roznowski provided additional information about Kim to the police. She stated that an interpreter who spoke Korean would be needed to serve Kim. She provided his residence address, but further specified that he could be served at her residence address.
>
> Under the portion of the LEIS seeking "Hazard Information" about Kim, Roznowski checked the box marked "Assault." The LEIS also states that Kim is a "current or former cohabitant as an intimate partner" and that Roznowski and Kim are "living together now." The LEIS states further that Kim did not know that he would be "moved out of the home." The LEIS also states that Kim did not know that she was obtaining the protection order.
>
> Significantly, Roznowski also stated in the LEIS that Kim was "likely to react violently when served."
>
> Early in the morning of May 3, 2008, [an officer] of the City's police department picked up a folder at police headquarters in order to perform the service of the protection order on Kim that Roznowski sought. The folder included Roznowski's affidavit and petition for a protection order, the temporary protection order entered by the commissioner, and the LEIS that we described earlier in this opinion.
>
> Around 8:00 a.m. that morning, [the officer] arrived near Roznowski's residence and parked his vehicle. He testified at trial that he did not completely read the papers in the folder prior to serving Kim. Thus, he was then unaware of the information about Kim contained in the LEIS and in Roznowski's affidavit supporting her petition for a protection order. It appears that he did not read the information in the LEIS stating that a Korean interpreter would be needed because there was no interpreter with the officer.
>
> [The officer] testified at trial that he knocked at the front door of Roznowski's home, and Kim answered. [The officer] asked Kim to identify himself. The officer then served the order on Kim. According to the officer, a brief conversation between the two followed.
>
> [The officer] testified that he told Kim that he had been served with an anti-harassment order and that there was a hearing date stated in the order. He asked Kim if he could read English and told Kim to read the order, which he

> testified that Kim then did. [The officer] also testified that he asked Kim if he had any questions.
>
> [The officer] testified that he "saw someone in the background" during the exchange with Kim at the door of Roznowski's home, but did not know whether the person "was male or female." He did not inquire further and returned to his parked vehicle. There, he completed the return of service form. The entire interaction with Kim took about five minutes and was completed by 8:13 a.m. [The officer] left the scene without taking any further action.
>
> The evidence at trial showed that Kim remained at Roznowski's residence after [the officer] departed. This was notwithstanding the protection order's direction that Kim was restrained from either entering or being within 500 feet of the residence or from contacting Roznowski.
> . . .
>
> Kim called a friend and asked him to come over. Kim left the house with his friend for a brief period to go to a bank. He withdrew funds, gave them to the friend, and asked that the friend give the funds to his nephew. The friend then drove Kim back to Roznowski's residence.
>
> The friend became concerned about Kim based on his actions and statements during the trip to the bank. The friend contacted police with these concerns. Police responded by going to Roznowski's house. They arrived at 11:55 a.m.
>
> Police discovered that Kim, in the ultimate act of domestic violence, had stabbed Roznowski 18 times with a knife. She died of her wounds at the scene of the crime.

[Footnotes omitted]

The jury instruction allowed the family of the deceased petitioner to argue to the jury, among other things, that the officer was negligent by: (1) not bringing a Korean interpreter (as the petitioner had requested on a LEIS) to ensure that the respondent on the order understood the provisions of order, and (2) allowing that respondent, after service of the order, to remain at the protected person's residence contrary to terms of order.

The City's primary theory on appeal was that the "public duty doctrine" barred the lawsuit. Under the public duty doctrine, no liability may be imposed for the negligent conduct of a public official (including a law enforcement officer) unless it is shown that the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., for civil liability purposes, a public agency's duty to all is a legal duty to no one). There are four exceptions to the public duty doctrine: (1) failure to enforce, (2) legislative intent, (3) special relationship, and (4) the rescue doctrine. The Court of Appeals offers no analysis on issues relating to the public duty doctrine because the Court concludes that, in its view of the trial court record and briefing on appeal, the City failed to take certain steps to preserve its right to raise the public duty doctrine issue.

Result: Affirmance of King County Superior Court order granting motion for new trial filed by the daughters of a domestic violence victim after a jury verdict awarding $1.1 million dollars solely in the estate's favor.

Status: The City has petitioned the Washington Supreme Court challenging the procedural ruling of the Court of Appeals that the City failed to preserve its public duty doctrine challenge to the lawsuit.

LED EDITORIAL COMMENT: The ruling in this case is a procedural one is not yet final. However, officers can still learn from this case. It is clear that, where the threshold question of a legal duty of the government does not preclude the lawsuit, courts are holding officers responsible for both reading the provisions of the orders that they are serving as well as additional information provided in the LEIS. See Osborne v. Seymour, 164 Wn. App. 820 (Div. II, Nov. 9, 2011) Aug 12 LED:24 (finding liability where police conducted a civil standby while husband entered home to retrieve belongings, where the sergeant in charge at the scene did not read order to determine that husband's order did not specifically authorize a civil standby, and wife's order specifically prohibited the husband from being on the premises).

(10) COMMERCIAL DRIVER'S LICENSE (CDL) LANGUAGE IN IMPLIED CONSENT WARNINGS, GIVEN TO DRIVERS WHO HOLD A CDL AND ARE STOPPED WHILE DRIVING THEIR PERSONAL VEHICLES, DID NOT INACCURATELY OR MISLEADINGLY IMPLY THAT CDL DISQUALIFICATION WOULD BE FOR SAME LENGTH OF TIME AS THE SUSPENSION OR REVOCATION OF PERSONAL LICENSE – In Allen v. Department of Licensing, 169 Wn. App. 304 (Div. I, July 2, 2012), the Court of Appeals holds that implied consent warnings did not inaccurately or misleadingly imply that commercial driver's license (CDL) disqualification would be for the same period of time as suspension/revocation of personal driver's license.

Based on a number of moving violations, the defendant was stopped. That led to his arrest for DUI. He ultimately provided BAC samples of 0.137 and 0.138, respectively. As a result, the Department of Licensing (DOL) suspended the defendant's personal driver's license for 90 days, and disqualified his CDL for one year. Both the suspension and disqualification were based on the defendant's BAC being .08 or greater. **[LED EDITORIAL NOTE: RCW 46.25.090(1)(b), which governs disqualification of CDLs, requires disqualification of a CDL where the person is driving a noncommercial motor vehicle with an alcohol concentration of .08 or more.]**

The implied consent warnings provide the following with regard to CDLs:

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

Relying on Division II's recent holding in Lynch v. Department of Licensing, 163 Wn. App. 697 (2011**) Feb 12 LED:21**, the Court holds that the implied consent warnings are neither inaccurate nor misleading.

Result: Affirmance of Snohomish County Superior Court that affirmed DOL's suspension of Jesse O. Allen's driver's license suspension, and disqualification of his CDL.

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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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