Law Enforcement Digest

DECEMBER 2013

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

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HONOR ROLL

693rd Basic Law Enforcement Academy – June 4 through October 10, 2013

President:	Jordan A. Feldman, Lakewood PD
Best Overall:	Devin W. Tucker, Monroe PD
Best Academic:	Devin W. Tucker, Monroe PD
Best Firearms:	Buckley D. Jones, Seattle PD
Patrol Partner Award:	Eric M. Shuty, King County
Tac Officer:	Officer Russ Hicks, Fife PD

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NOTE REGARDING 2013 LED SUBJECT MATTER INDEX AND 2009-2013 FIVE-YEAR SUBJECT MATTER INDEX: For many years, the December LED has included an annual LED subject matter index covering all LED entries for the year. Beginning last year, the annual subject matter index is a separate document. It will be available on the Criminal Justice Training Commission's LED webpage at approximately the same time as the January 2014 LED (mid-December). Go to the Training Commission's Home Page at: https://fortress.wa.gov/cjtc/www/ and click on "Law Enforcement Digest." Additionally, the five-year subject index for years 2009-2013 will also be available at the same location.

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INITIATIVE 502 FINAL RULES ADOPTED: The Liquor Control Board (LCB) has released its final draft rules for I-502 implementation. The rules will be effective November 20, 2013 and will be codified in chapter 314-55 WAC. The rules can be accessed on the LCB website at: http://liq.wa.gov/marijuana/initiative_502_proposed_rules and clicking on "Download Adopted Rules."

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NINTH CIRCUIT UNITED STATES COURT OF APPEALS

BORDER PATROL AGENT'S ANSWERING OF SUSPECT'S CELL PHONE AND PASSING HIMSELF OFF AS SUSPECT EXCEEDED SCOPE OF SUSPECT'S CONSENT TO SEARCH CELL PHONE; CONSENT TO SEARCH PHONE IS NOT CONSENT TO ANSWER CALLS

United States v. Lopez-Cruz, ___ F.3d ___, 2013 WL 4838908 (9th Cir., Sept. 12, 2013)

Facts and Proceedings below: (Excerpted from Ninth Circuit opinion):

> One evening, border patrol agent Soto and his partner were patrolling Highway 80 near Jacumba, California, an area near the border with Mexico known for the smuggling of undocumented individuals. The agents began surveillance of Lopez because he was driving a car that they did not recognize as belonging to any of the residents of the nearby small town, and because he was "brake tapping," behavior that the agent recognized as consistent with people being "guided in to pick up somebody or something." When Lopez pulled over to the shoulder of the road to make a U-turn, the agents stopped their unmarked SUV behind him and activated the lights to indicate that they were law enforcement personnel.

> The agents walked up to the car and agent Soto asked Lopez where he was going and what he was doing. Lopez told him that he was going to pick up a friend, border patrol agent Amawandy, at a nearby casino. He also told the agent that the car that he was driving belonged to a friend. Agent Soto testified that he did not ask Lopez who the friend was, but that Lopez's "answers changed a lot."
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> During their discussion, agent Soto noticed two cell phones in the car's center console. Soto asked Lopez whether the phones were his and Lopez responded that the phones, like the car, belonged to a friend. The agent then asked, "Can I look in the phones? Can I search the phones?" Lopez consented by responding "yes." When conducting the search of the phones, Soto took them behind the car, out of Lopez's presence where he could neither "see [n]or hear what [the agent] was doing with the phones."
>
> Within about a minute, one of the phones rang. Rather than ignoring the call or asking Lopez's permission to answer it, the agent answered the phone and initiated a conversation with the caller. The caller asked, "How many did you pick up?" The agent responded, "none," and the caller hung up. The phone rang again less than two minutes later. The agent answered again and a different caller asked, "How did it go?" The agent replied in Spanish, "I didn't pick up anybody. There was [sic] too many Border Patrol in the area." The caller told him to return to San Diego. Shortly thereafter, the caller phoned again, believing she was speaking with Lopez, but instead informed agent Soto that there were two people next to a house where there was a lot of lighting, and gave instructions to drive there, flash his high beams, and the two people would come out.
>
> The agents arrested Lopez and followed the caller's instructions, which led them to pick up two people, who admitted to being Mexican citizens without documents.

ISSUES AND RULING: 1) Does the defendant have standing to contest the scope of the search of the cell phones, where they were not his phones? (ANSWER BY NINTH CIRCUIT: Yes)

2) Does consent to search a cell phone, without more, imply consent to answer phone calls? (ANSWER BY NINTH CIRCUIT: No, the officer exceeded the scope of the consent)

Result: Affirmance of United States District Court (Southern District California) order granting Andres Lopez-Cruz's motion to suppress evidence in his prosecution for conspiracy to transport illegal aliens.

ANALYSIS:

Standing

The government argued that the defendant did not have standing to contest the scope of the search of the cell phones. The Court explains, under the Fourth Amendment:

> To have standing to seek suppression of the fruits of the agent's search, Lopez must show that he personally had "a property interest protected by the Fourth

> Amendment that was interfered with . . . , or a reasonable expectation of privacy that was invaded by the search." United States v. Padilla, 111 F.3d 685, 688 (9th Cir. 1997) (quoting United States v. Padilla, 508 U.S. 77, 82 (1993)). Here, elements of both requirements support the district court's conclusion that Lopez had standing to contest the agent's reception of the phone calls.
>
> The reasonable expectation of privacy turns on (1) whether the person had "an actual (subjective) expectation of privacy," and (2) whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In short, it turns on whether the individual's subjective expectation of privacy is objectively reasonable. United States v. Ziegler, 474 F.3d 1184, 1189 (9th Cir. 2007) **March 07 LED:13** (citation omitted).

[Footnoted omitted]

The district court found that the cell phones were in the defendant's possession and being used by him at the time of the stop. The Ninth Circuit concludes that the defendant has standing to challenge the scope of the search of the phones.

Scope of Consent

The Court's analysis, excerpted from Ninth Circuit opinion, is as follows:

> The scope of consent is determined by asking "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" Florida v. Jimeno, 500 U.S. 248, 251 (1991). The test is an objective one. The district court explained that a reasonable person would not "believe that a consent to look at or search a cell phone would include consent to answer incoming calls." It held that Lopez's "consent in this case was limited to an examination of the phone itself and that further legal justification was required before the agents answered it."
>
> At the suppression hearing, the agent testified that he asked Lopez: "Can I look in the phones? Can I search the phones?" Lopez submitted a declaration that stated: "It never occurred to me that agents were going to answer incoming calls on the cell phone. Had I believed that agents would answer the phones, I never would have given my permission to search the phones." Applying the [Jimeno] "reasonable person" standard to these facts, the district court determined that Lopez's consent to search the phones did not extend to answering incoming calls. The district court's ruling was correct.
>
> Nonetheless, the government presses two arguments in support of its claim that answering incoming calls categorically falls within the scope of consent to search a phone. First, the government contends that answering a call is no different from pushing a button to read an incoming text message (which it assumes would fall within the scope of a general consent). Without deciding the constitutionality of whether an agent can read incoming text messages on a phone he has been given consent to search, we reject the government's attempt to liken incoming calls to text messages. When an agent answers the incoming call and engages the caller in conversation, as agent Soto did here, he intercepts a call intended for the individual in possession of the phone and pretends to be

that person in order to obtain information or create a new exchange with the caller. The agent's impersonation of the intended recipient constitutes a meaningful difference in the method and scope of the search in contrast to merely pushing a button in order to view a text message. The agent is not simply viewing the contents of the phone (whether incoming text messages or stored messages), but instead, is actively impersonating the intended recipient. Here, agent Soto did so by answering a call, concealing the fact that he was a border patrol agent, and leading the caller to believe that the information he was exchanging was with Lopez.

The government's second argument seeks to liken the consent given by Lopez to the contents of a search warrant. The government reasons that because we held that answering incoming calls did not exceed the scope of the relevant search warrant in two cases, United States v. Ordonez, 737 F.2d 793, 810 (9th Cir. 1984) (amended opinion), and United States v. Gallo, 659 F.2d 110 (9th Cir. 1981), the answering of incoming calls following a consent to search the phones does not exceed the scope of that consent. Because a search warrant is materially different from consent, the government's argument fails.

A search pursuant to a warrant is "limited by the extent of the probable cause" on which the warrant is based. In contrast, a search pursuant to consent is limited by the extent of the consent given for the search by the individual. Unlike a scope of the search warrant case, in which we review for whether the evidence seized was "reasonably related to the purpose of the search" (that is, reasonably related to the probable cause supporting the issuance of the warrant), Ordonez, 737 F.2d at 810, in a scope of consent case, we review for what "the typical reasonable person [would] have understood" the parties to have said to each other, Jimeno, 500 U.S. at 251.

Agent Soto did not have a warrant. Accordingly, he did not have authority to search for evidence that might have fallen within the scope of a warrant that he did not have. The only authority to search that agent Soto had was pursuant to Lopez's consent. Accordingly, the government's position that the reasoning of Gallo and Ordonez applies here is simply incorrect. An individual who gives consent to the search of his phone does not, without more, give consent to his impersonation by a government agent, nor does he give the agent permission to carry on conversations in which the agent participates in his name in the conduct of criminal activity.

Thus, we reject the government's position that consent to search a cell phone extends to answering incoming calls. Here, the agent's answering of the phone exceeded the scope of the consent that he obtained and, thus, violated Lopez's Fourth Amendment right. As a general matter, consent to search a cell phone is insufficient to allow an agent to answer that phone; rather, specific consent to answer is necessary.

[Some citations omitted]

LED EDITORIAL COMMENT: Consent searches are limited by the scope of the consent. In this case if the agent had sought and obtained voluntary consent "to search the phone and to answer any incoming calls or texts as if he were the suspect," then there would not have been a scope problem under these facts.

Additionally, because the agent removed the phone from the suspect, the suspect was not effectively able to withdraw consent. The case law on consent searches does not clearly establish a right to be present for withdrawal-of-consent purposes. In U.S. v. McWeeney, 454 F.3d 1030 (9th Cir. 2006) Oct 06 LED:03, the Ninth Circuit addressed circumstances where officers conducting a "consent" search of a car directed the disembarked, not-yet-seized, car occupants not to watch the search. The Court ruled the consent search invalid, arguably holding that, in ordering the suspects not to watch, the officers destroyed the continuing voluntariness, and hence the validity of, the consent. The McWeeney Court was not crystal clear when it indicated that a person does not have a constitutional right to observe a search to which he has consented, but that officers may not coerce a person into giving up his right to withdraw his consent. In light of McWeeney, an officer requesting consent to do what was done in the Lopez case (i.e., walk out of earshot of the suspect with the phone and take incoming calls) may want to ask for consent along these lines: "to take the phone out of your earshot, to search it and to answer any incoming calls or texts as if I were you."

Because of the intrusiveness of the search-and-answer-the-phone action, we think that such consent requests should be accompanied by Ferrier warnings (right to refuse, right to restrict scope and right to withdraw consent). See State v. Ferrier, 136 Wn.2d 103 (1998) Oct 98 LED:02 (adopting such a requirement for knock-and-talk consent searches of residences)

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WASHINGTON STATE SUPREME COURT

PUBLIC DUTY DOCTRINE DOES NOT BAR LAWSUIT FOR NEGLIGENCE IN SERVICE OF AN ANTIHARASSMENT ORDER; JURY VERDICT AGAINST CITY UPHELD

Washburn v. City of Federal Way, ___Wn.2d ___, 2013 WL 5652733 (October 17, 2013)

Facts: (Excerpted from Court of Appeals opinion)

> Roznowski and Kim began a troubled relationship in the 1990s. In 2008, Roznowski decided to end the relationship and move to California to live near her adult daughters. To move, Roznowski needed to sell her house. Kim stood in the way of the sale because, although he owned his own home, he resided at Roznowski's house and her home was filled with his belongings. Readying her property for sale therefore required ousting Kim and his possessions.
>
> In late April 2008, Roznowski and Kim argued about her demands that he remove his belongings from her property. This fight escalated and Roznowski called 911 because she feared Kim might assault her. Officers from the Department responded to the call and met with both Kim and Roznowski. Neither Roznowski nor Kim appeared harmed, and the officers did not detect any evidence of physical violence. Nonetheless, the officers told Kim to "take a walk" and collect himself. With Kim out of the house, one of the officers discussed the situation with Roznowski and told her she could attempt to obtain a no-contact order against Kim.
>
> Roznowski decided to seek court-ordered protection against Kim. She went to the King County Regional Justice Center, met with a domestic violence advocate,

discussed her options, and then sought and obtained a "Temporary Protection Order and Notice of Hearing – AH" (hereinafter antiharassment order) from the King County Superior Court. The antiharassment order prohibited Kim from surveilling Roznowski, contacting her, or entering or being within 500 feet of her residence.

Roznowski asked the [Police] Department to serve the antiharassment order. The Department's service file included Roznowski's petition for the antiharassment order, the order, and a law enforcement information sheet (LEIS). The LEIS allows petitioners to provide law enforcement with information related to serving the court orders. Roznowski's LEIS informed the officers that Kim was her domestic partner, Kim did not know she had obtained an antiharassment order, Kim did not know the antiharassment order would force him out of Roznowski's home, and that Kim would likely react violently to service of the order. In the field marked "Hazard Information," Roznowski noted that Kim had a history of assault. The LEIS also asked that a Korean interpreter help serve the antiharassment order based on Kim's limited proficiency in English.

[A police officer] served the antiharassment order two days later, early on a Saturday morning. [The officer] offered contradictory testimony regarding his preparation for service, indicating that he either did not read the order or the LEIS, or, at best, gave them a cursory glance. Either way, he did not bring an interpreter.

When [the officer] knocked on the door [of Roznowski's home], Kim answered. [The officer] saw Roznowski in the background inside the house while serving the antiharassment order, but he did not interact with her or inquire as to her safety. [The officer] confirmed Kim's identity, handed him the antiharassment order, informed him he needed to appear in court, and left. Roznowski was left to explain to Kim what had happened—she had restrained him from contacting her and he needed to vacate the home. Another argument ensued, and Kim eventually left to run an errand.

Kim finished his errand, returned to the house, and attacked Roznowski with a knife before attempting to take his own life. Medical personnel arrived to find Roznowski bleeding to death, with Kim lying beside her. [*Court's footnote: The 911 call prompting police and medical response to the house came from a friend of Kim's who was with Kim on the errand just before Kim returned to the house and killed Roznowski. The friend called police because some of Kim's statements led him to believe Kim might kill himself.*]

Medical intervention failed to save Roznowski, who died from blood loss from the multiple stab wounds Kim inflicted.

[Footnotes omitted]

Proceedings below:

On behalf of the estate of Ms. Roznowski, her two daughters sued the City of Federal Way on various negligence theories. The City moved to have the case dismissed on the theory that, under the "public duty" doctrine, the City had no duty upon which government liability could be based. That motion was denied, and a jury found negligence, based apparently on: (1) not

bringing a Korean interpreter as the petitioner had requested in the LEIS information to ensure that the respondent on the order understood the provisions of order, (3) not contacting the petitioner, who the officer could see was home; and (2) allowing the respondent, after service of the order, to remain at the protected and then-present petitioner's residence, and not even telling him that he needed to leave the premises.

The City appealed to the Court of Appeals, which rejected the City's argument on procedural grounds, concluding that the City had failed at trial to preserve its argument that the public duty doctrine precluded the lawsuit. See Washburn v. City of Federal Way, 169 Wn. App. 588 (Div. I, July 23, 2012) **Dec 12 LED:22**.

ISSUES AND RULINGS: 1) Does the "legislative intent" exception to the public duty doctrine apply under these facts to allow the lawsuit against the City of Federal Way for negligence in service of the antiharassment order? (ANSWER: Yes, the intent of chapter 10.14 RCW is to protect victims such as Roznowski);

2) Does the record support the jury's finding that the officer was negligent, in light of such facts as the officer's: 1) failure to read or at least pay attention to the LEIS information; 2) failure to bring a translator; 3) failure to contact the petitioner on the order, who the officer could see was present when the officer arrived; and 4) failure to direct the respondent on the order, Kim, to immediately leave the petitioner's residence, and to see to it that he did so? (ANSWER: Yes)

Result: Affirmance of Court of Appeals decision that affirmed a King County Superior Court order denying the City of Federal Way's motion for judgment as a matter of law, thus maintaining a judgment on a jury verdict against the City of Federal Way.

ANALYSIS:

In a 9-0 decision, the Washington Supreme Court disagrees with the Court of Appeals on the procedural issue, concluding that in the trial court the City of Federal Way properly preserved its argument that the public duty doctrine precluded the lawsuit. But the Supreme Court disagrees with the City of Federal Way's argument on the merits under the public duty doctrine.

In a lawsuit under Washington law based on a claim of negligence, the suing party must establish (1) breach of (2) a duty (3) proximately caused by the party being sued (4) resulting in damages. The Washburn negligence case focuses on duty and the public duty doctrine. Under the public duty doctrine that has been established entirely by Washington case law (not by statute), no civil liability may be imposed for merely negligent conduct by a public agency and its agents and employees unless it is shown that the would-be duty that was breached was an obligation owed to the injured person as an individual, and was not merely an obligation owed to the public in general. In other words, under the public duty doctrine, a general duty to all is a civil liability duty to no one individual.

There are four exceptions to the public duty doctrine. The exceptions allow a claim of duty in a negligence suit against a government agency. In short, these exceptions are: (1) failure to enforce, (2) legislative intent, (3) special relationship, and (4) rescue doctrine. If one of these exceptions applies, the government will be held as a matter of law to owe a duty for civil liability purposes to the individual plaintiff or to a limited class of plaintiffs. The Supreme Court concludes in a unanimous opinion in Washburn that the legislative intent exception applies.

The Court concludes that chapter 10.14 RCW, the antiharassment statute, creates a duty on law enforcement agencies to serve an anti-harassment order and to act reasonably in doing so.

The Court declares: "We hold this duty to act with reasonable care, under these facts, meant taking reasonable steps to guard against the possibility that Kim would harm Roznowski as a result of the service of the antiharassment order."

In key part the Court's analysis of the legislative intent issue is as follows:

> One of the exceptions to the public duty doctrine is the legislative intent exception. The exception allows a plaintiff to claim that a governmental entity owes him or her a legal duty where a legislative enactment "evidences a clear legislative intent to identify and protect a particular and circumscribed class of persons." Honcoop v. State, 111 Wn.2d 182, 188 (1988). Typically, we look to the legislature's statement of purpose to discover its intent. . . . The legislative intent exception recognizes that the legislature may impose legal duties on persons or other entities by proscribing or mandating certain conduct. . . .
> . . . .
>
> . . . . Washington's legislature showed an intent to protect specific individuals in passing chapter 10.14 RCW. As the legislature declared, "The legislature finds that serious, personal harassment through repeated invasions of a person's privacy by acts and words showing a pattern of harassment designed to coerce, intimidate, or humiliate the victim is increasing. The legislature further finds that the prevention of such harassment is an important governmental objective." RCW 10.14.010. To give effect to this intent to protect victims of harassment, chapter 10.14 RCW creates an antiharassment order to "prevent[] all further unwanted contact between the victim and the perpetrator" and requires municipal police officers to serve the order unless the petitioner chooses otherwise. RCW 10.14.010, .100(2). [Court's footnote: *RCW 10.14.100(2) provides that "[t]he sheriff of the county or the peace officers of the municipality in which the respondent resides shall serve the respondent personally unless the petitioner elects to have the respondent served by a private party."*]
>
> This statement of purpose satisfies the requirements of the legislative intent exception. By its terms, RCW 10.14.010 circumscribes a particular class of persons, those people suffering harassment at the hands of others. RCW 10.14.010 also evidences a legislative intent to protect that particular class of persons by announcing that the prevention of this unwanted contact rises to the level of an important governmental interest. Finally, chapter 10.14 RCW implements a means of achieving this goal, creating antiharassment orders that municipal police officers must serve unless the petitioner chooses otherwise. RCW 10.14.080, .100(2).
> . . . .
> Under the legislative intent exception, if the City's discharge of this duty to act, service of the order, constituted "culpable neglect," it bears liability in tort. . . .

The Washburn Court next explains as follows its view that the City owed and breached a duty to Roznowski to guard against the danger she faced at Kim's hands because, in the Court's view, the officer's actions created that danger:

> Actors have a duty to exercise reasonable care to avoid the foreseeable consequences of their acts. Restatement (Second) of Torts § 281 cmts. c, d (1965). This duty requires actors to avoid exposing another to harm from the foreseeable conduct of a third party. Restatement § 302. Criminal conduct is

generally unforeseeable. . . . Consequently, there is generally no duty to prevent third parties from causing criminal harm to others. Robb v. City of Seattle, 176 Wn.2d 427, 429-30 (2013) **April 13 LED:10**.

Criminal conduct is, however, not unforeseeable per se. . . . Recognizing this, we have adopted Restatement § 302B, which provides that, in limited circumstances, an actor's duty to act reasonably includes a duty to take steps to guard another against the criminal conduct of a third party. Robb.

Specifically, Restatement § 302B provides that "'[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.'" Robb. The duty to protect against the criminal acts of third parties can arise "'where the actor's own affirmative act has created or exposed the other to a recognizably high degree of risk of harm through such misconduct.'" Robb.

Governmental entities and employees, like municipal police officers, may owe a duty under Restatement § 302B. Robb, for example, involved a Terry stop conducted by two Seattle police officers. During the stop, the officers noticed several shotgun shells on the ground near the two men the officers detained. The officers failed to seize the shells, and after the stop, one of the men returned to the scene, retrieved the shells, and later used them to kill a motorist. The motorist's wife filed suit against the city of Seattle for the wrongful death. The city moved for summary judgment, apparently on public duty doctrine grounds. The trial court analyzed the question in terms of affirmative acts: if the officers had acted affirmatively, they owed a duty to the motorist under common law principles; if they had not, the public duty doctrine barred the suit. The trial court determined the officers had acted affirmatively, though negligently, and denied the city's motion for summary judgment.

Despite agreeing with the trial court's analytical framework, we reversed its decision to deny the City of Seattle's motion for summary judgment because we concluded that, absent some kind of special relationship between the plaintiff and defendant under Restatement § 302B, only misfeasance, not nonfeasance, could create a duty to act reasonably to prevent foreseeable criminal conduct. We determined the police lacked any special relationship with Robb and that their actions had constituted nonfeasance rather than misfeasance. We based this conclusion on the fact that the officers' conduct had not created a new risk to Robb. Instead, they had "failed to remove a risk" not of their own creation when they failed to pick up the shotgun shells. "Simply put, the situation of peril in this case existed before law enforcement stopped [the shooter], and the danger was unchanged by the officer's actions." Robb.

The Court of Appeals has also applied Restatement § 302B to governmental liability. Parrilla v. King County, 138 Wn. App. 427 (2007). In Parrilla, a fight broke out on a metro bus. The driver attempted to end the fight by pulling the bus over to the side of the road and ordering everyone off the bus. Every passenger left the bus except for one man, Courvoisier Carpenter, who was high on phencyclidine. The driver eventually exited the bus, leaving the motor running and Carpenter alone on the bus. Carpenter stole the bus and drove off, injuring several people, including the Parrillas. The Court of Appeals analyzed the

Parrillas' suit under Restatement § 302B and held that the county owed a duty to protect individuals like the Parrillas from Carpenter's foreseeable criminal acts. The Court of Appeals found the duty arose because the bus driver's affirmative acts exposed the Parrillas to foreseeable harm at Carpenter's hands. Specifically the Court of Appeals found the driver had acted affirmatively by getting off the bus and leaving a dangerous situation behind.

We hold that, under the facts of this case, [the officer], as part of his duty to act reasonably, owed Roznowski a duty to guard against the criminal conduct of Kim. We find several factors created this duty.

First, [the officer] knew, or should have known, that Kim could or would react violently to the service of the antiharassment order for several reasons. The LEIS itself alerted [the officer] to this fact. Roznowski filled out the LEIS by noting that Kim had a history of assault and would likely react violently to service of the antiharassment order. Further, the police are generally aware of the problem of separation violence. The testimony of [expert witnesses] Van Blaricom, Stamper, and Ovens all reflect this, as does the very existence of the LEIS itself, which police departments created to help alert officers serving these types of orders to the risks they faced.

Second, [the officer] knew, or should have known, that he was serving Kim at Roznowski's house. The LEIS and service file indicated as much. [The officer] also knew, or should have known, that the woman he saw in the background was Roznowski given that he served Kim at her house.

Given the first two factors—danger and Roznowski's presence—plus the possible need for a translator, when [the officer] handed Kim the antiharassment order and walked away, [the officer] created a situation that left Roznowski alone with Kim as Kim realized, or was about to realize, that Roznowski had ended their relationship. [The officer] should have realized that, like the bus driver in Parrilla, and unlike the officers in Robb, he had created a new and very real risk to Roznowski's safety based on Kim's likely violent response to the antiharassment order and his access to Roznowski.

The jury heard extensive testimony on the simple steps [the officer] could have taken to eliminate the risk to Roznowski. He could have ordered Kim to leave the house and stood by to make sure Kim did so without harming Roznowski. [Expert witnesses] Ganley and Van Blaricom testified that doing so would have prevented Kim from murdering Roznowski. [The officer], however, did neither of these things. He walked away, leaving Roznowski alone in her house with Kim and the reaction from the service of the antiharassment order.

The City argues Restatement § 302B creates no duty here because, like Robb, this is a case of nonfeasance rather than one of misfeasance. . . . The bulk of testimony offered by Washburn at trial concerned [the officer's] misfeasance in serving the antiharassment order. Washburn does tend to frame it in terms of a failure to perform, such as the failure to read the LEIS, the failure to bring an interpreter, and [the officer's] decision to walk away instead of standing by to monitor Kim. Washburn, however, offers these examples as a list of the ways [the officer] served the antiharassment order improperly.

> The City's other argument against imposing a duty under Restatement § 302B is that doing so runs counter to the justification for the public duty doctrine. The City notes that it has a statutory duty to serve orders like the one at issue here, and that imposing liability will deter beneficial services such as this. The City equates the existence of a duty with liability. As we have noted, governmental entities are not liable if they act reasonably. . . . Nor are governmental entities liable if their negligence does not proximately cause the plaintiffs' injuries. Unforeseeable intervening acts break the chain of causation between "the defendant's negligence and the plaintiff's injury." As mentioned above, criminal acts are often unforeseeable and thus may break the chain of causation.

[Footnotes omitted; some case citations and other citations omitted or revised]

LED EDITORIAL COMMENT: We once again remind officers that 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 e.g., 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).

TIMELY WARRANTLESS SEARCH OF PURSE INCIDENT TO ARREST UPHELD SIMPLY BECAUSE PURSE WAS IN ACTUAL POSSESSION OF ARRESTEE AT TIME OF ARREST, BUT COURT WARNS THAT WASHINGTON CONSTITUTION DOES NOT AUTHORIZE SEARCH INCIDENT BASED MERELY ON CONSTRUCTIVE POSSESSION OF AN ITEM

State v. Byrd, ___Wn.2d ___, 2013 WL 5570220 (Oct. 10, 2013)

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

> On the evening of November 17, 2009, [a] [Police Officer] ran the plates on a Honda Civic he observed parked on the side of the road. [The officer] determined that the plates were registered to an Acura Integra. He contacted the plate's owner, who confirmed that they were stolen. During [the officer's] investigation, Lisa Ann Byrd, and a companion, entered the Civic and drove away, with Byrd's companion driving. [The officer] initiated a felony traffic stop. He arrested and secured the driver, who claimed the car belonged to Byrd.
>
> [The officer] returned to the car and placed Byrd under arrest for possession of stolen property. At the time of her arrest, Byrd sat in the front passenger seat with her purse in her lap. Before removing Byrd from the car, [the officer] seized the purse and set it on the ground nearby. He secured Byrd in a patrol car and returned to the purse within "moments" to search it for weapons or contraband. Inside a sunglasses case in Byrd's purse, [the officer] found methamphetamine.
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> At the suppression hearing, the trial court conceded that "[t]he facts here fall slightly outside of being completely on point with Gant and Valdez" but nonetheless concluded that the search of Byrd's purse was valid only if it was motivated by concerns for officer safety or evidence preservation, as described in these cases. The trial court's questioning of [the officer] focused on whether these exigencies were present. ("[W]as there any concern . . . that she would be

> able to either access a weapon in the purse or destroy any evidence that might be in the purse?"). Because Byrd was secured and unable to access the purse, the court held [the officer's] search was unlawful and granted Byrd's motion to suppress.
>
> The Court of Appeals agreed, holding that the search of Byrd's purse had to be justified by concerns for evidence preservation or officer safety. State v. Byrd, 162 Wn. App. 612 (Div. III, 2011) **Oct 11 LED:21**. Because Byrd was restrained and could not obtain a weapon from or destroy evidence in her purse when [the officer] searched it, the court affirmed the trial court's order suppressing the fruits of the search.

[Case citations omitted or revised]

ISSUE AND RULING: Where Byrd had the purse on her lap and thus in her actual possession at or immediately prior to the point of her custodial arrest, was the warrantless search of her purse a lawful search incident to arrest even though the search of the purse did not occur until immediately after she had been handcuffed and secured in the back seat of a patrol car at the scene? (ANSWER: Yes, the search of the actually-possessed-at-time-of-arrest item was lawful as a search incident to arrest even though she was no longer a threat to obtain a weapon or destroy evidence in the purse; but the search would not have been justified absent exigent circumstances as to an item merely constructively possessed at or immediately prior to the time of arrest.)

Result: Reversal of Court of Appeals decision that affirmed the Yakima County Superior Court order suppressing evidence and dismissing the charge of possession of a controlled substance against Lisa Ann Byrd; case remanded for trial and for possible challenge by Ms. Byrd on the issue of whether probable cause supported her arrest.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

The Search Incident to Arrest Exception to the Warrant Requirement

> The search incident to arrest embraces not one but two analytically distinct concepts under Fourth Amendment and article I, section 7 jurisprudence. In United States v. Robinson, 414 U.S. 218 (1973), the United States Supreme Court explained that the exception "has historically been formulated into two distinct propositions."
>
> The first of these propositions is that "a search may be made of the area within the control of the arrestee." In Chimel v. California, 395 U.S. 752 (1969), the Court held that these searches must be justified by concerns that the arrestee might otherwise access the article to obtain a weapon or destroy evidence. New York v. Belton, 453 U.S. 454 (1981), was a short-lived exception to Chimel that permitted police to search the interior of a car incident to an occupant's arrest without demonstrating concerns for officer safety or evidence preservation. However, in [Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**], the Court overruled Belton, holding that all searches of an arrestee's surroundings, including the interior of a car, must comply with Chimel. Searches of an arrestee's surroundings require the same justifications under article I, section 7 [of the Washington constitution] [here, the majority opinion cites several

Washington decisions, including State v. Snapp, 174 Wn.2d 177 (2012) **May 12 LED:25**]

Under the second proposition of the search incident to arrest, "a search may be made of the person of the arrestee by virtue of the lawful arrest." Robinson. In Robinson, the Court held that under "the long line of authorities of this Court . . . and the history of practice in this country and in England," searches of an arrestee's person, including articles of the person such as clothing or personal effects, require "no additional justification" beyond the validity of the custodial arrest. Instead, a search of the arrestee's person is "not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

Unlike searches of the arrestee's surroundings, searches of the arrestee's person and personal effects do not require "a case-by-case adjudication" because they always implicate Chimel concerns for officer safety and evidence preservation. Thus, their validity "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." . . . .

The authority to search an arrestee's person and personal effects flows from the authority of a custodial arrest itself. Robinson. . . .

Because this exception is rooted in the arresting officer's lawful authority to take the arrestee into custody, rather than the "reasonableness" of the search, it also satisfies article I, section 7's requirement that incursions on a person's private affairs be supported by "authority of law." See State v. Grande, 164 Wn.2d 135 (2008) **Sept 08 LED:07** . . . .

This court has long recognized the distinction between searches of the arrestee's person and surroundings. . . . In State v. Johnson, 155 Wn. App. 270 (2010) **June 10 LED:18**, the Court of Appeals reaffirmed this distinction, holding that the search of an arrestee's purse was a search of her person, not a search of her vehicle. Notwithstanding the deep historical roots of these two doctrines, the Court of Appeals in this case overruled Johnson, dismissing the distinction between searches of a vehicle and searches of the arrestee's person and opining that "[a] search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse." Byrd, 162 Wn. App. at 617.

The Court of Appeals erred. Johnson is consistent with Robinson and remains good law because neither Gant nor Valdez requires case-specific showings of officer safety or evidence preservation to justify the search of an arrestee's person. . . . [T]hese cases deal only with searches of the area immediately around the arrestee, not searches of the arrestee's person. . . .

The lower courts in this case erred by conflating the two distinct branches of the search incident to arrest exception and the dissent would perpetuate the error. Although the dissent concedes that custodial arrest "always justifies a search of the arrestee's person," it complains that the officer could have delayed the search because no exigencies were present. This complaint overlooks the fact that exigencies are [conclusively] presumed when an officer searches an arrestee's person. The search incident to arrest rule respects that an officer who

takes a suspect into custody faces an unpredictable and inherently dangerous situation and that officers can and should put their safety first. [The recent U.S. and Washington Supreme Court decisions on car searches did not circumscribe] the State's authority to search an arrestee's person, and these searches remain valid under the Fourth Amendment and article I, section 7 so long as they are incident to a lawful custodial arrest, whatever exigencies the dissent perceives in hindsight. Assuming [the officer] had probable cause to arrest Byrd, the search of her purse was valid if it was a search of an article of her person, as discussed below.

The "Time of Arrest" Rule

Whether a search incident to arrest is governed by Chimel or Robinson turns on whether the item searched was an article of the arrestee's person. . . . Many courts, including Washington courts, draw a bright line between these two prongs of the search incident to arrest exception with the "time of arrest" rule.

Under this rule, an article is "immediately associated" with the arrestee's person and can be searched under Robinson, if the arrestee has actual possession of it at the time of a lawful custodial arrest. **[LED EDITORIAL NOTE: Here, the majority opinion cites a number of other-jurisdiction decisions addressing searches of backpacks, luggage, and a lunch bag]**.

The time of arrest rule reflects the practical reality that a search of the arrestee's "person" to remove weapons and secure evidence must include more than his literal person. In United States v. Graham, 638 F.2d 1111 (7th Cir. 1981), the court explained that "[t]he human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried." When police take an arrestee into custody, they also take possession of his clothing and personal effects, any of which could contain weapons and evidence. . . . The time of arrest rule recognizes that the same exigencies that justify searching an arrestee prior to placing him into custody extends not just to the arrestee's clothes, however we might define them, but to all articles closely associated with his person.

Washington courts have long applied this rule, holding that searches of purses, jackets, and bags in the arrestee's possession at the time of arrest are lawful under both the Fourth Amendment and article I, section 7. In State v. Bonds, 174 Wn. App. 553 (2013) **July 13 LED:15**, the Court of Appeals correctly reasoned that searches of an arrestee's person were untouched by [the recent U.S. and Washington Supreme Court car search decisions], and that a warrantless search of the arrestee's personal effects satisfies both the Fourth Amendment and article I, section 7. **[LED EDITORIAL NOTE: Here, the majority opinion cites a number of Washington appellate court decisions.]**

We caution that the proper scope of the time of arrest rule is narrow, in keeping with this "jealously guarded" exception to the warrant requirement. It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest. Some of our cases contain dicta, based on loose language from Belton, suggesting that the rule covers articles within the arrestee's reach. [See, e.g., State v. Smith, 119 Wn.2d 675, 681-82

1992) **Dec 92 LED:14**] (holding correctly that an arrestee's purse is an article of her person, but claiming a broader rule). This suggestion is incorrect. Searches of the arrestee's person incident to arrest extend only to articles "in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person." United States v. Rabinowitz, 339 U.S. 56, 78 (1950), (Frankfurter, J., dissenting) (describing the historical limits of the exception). Extending Robinson to articles within the arrestee's reach but not actually in his possession exceeds the rule's rationale and infringes on territory reserved to [the recent U.S. and Washington Supreme Court decisions restricting car searches incident to arrest].

Here, Byrd's purse was unquestionably an article "immediately associated" with her person. As the dissenting judge in the Court of Appeals astutely observed, "the purse was within Ms. Byrd's reach and could even be described as on her person, not only at the stop but at the time of arrest." The purse left Byrd's hands only after her arrest, when [the officer] momentarily set it aside. There was no "significant delay between the arrest and the search" that would "render[] the search unreasonable." Smith, 119 Wn.2d at 683 **Dec 92 LED:14**; [see United States v. Chadwick, 433 U.S. 1, 15 (1977)] (rejecting search of a footlocker more than an hour after arrest as too remote in time and place). Assuming [the officer] had probable cause to place Byrd under arrest, he had lawful authority to remove her and all articles closely associated with her person from the car, and the search was valid under the Fourth Amendment and article I, section 7.

Byrd's assertion that "[a]bsent the forced removal" her purse was "associated with the vehicle," either overlooks the time of arrest rule or asks us to tacitly overrule it. Byrd cites no authority for the claim that she could have shed the purse after being placed under arrest, and her proposed rule has no limits. If an officer cannot prevent an arrestee from leaving her purse in a car, what of other personal articles, such as an arrestee's jacket, baggie of drugs, or concealed firearm? We reject Byrd's claim and hold that if [the officer] had authority to seize Byrd and place her under custodial arrest, he also had authority to seize articles of her person, including her clothing and purse that were in her possession at the time of arrest.

Finally, Byrd asks us to hold that the purse was within a special zone of protection because it was "located in the car's constitutionally protected interior." This misstates the issue. Gant did not enact special constitutional protections for belongings inside cars; it restored the same protections all searches of an arrestee's surroundings enjoy under Chimel. Gant, 556 U.S. at 343 (citing Chimel, 453 U.S. at 460). These protections are no broader than Chimel and do not include the arrestee's person or her personal articles, even if the arrestee is in a car at the time of arrest.

Police may not evade Gant by removing an article from a car before searching it, but this is not because the federal and state constitutions specially protect articles in cars. It is because, under Chimel, the State must justify the warrantless search of every article not on the arrestee's person or closely associated with the arrestee's person at the time of his or her arrest. The distinction does not turn on whether a person is arrested in a car, on the street, or at home, but on the relationship of the article to the arrestee . . . . Here, if

> Byrd's arrest was lawful, the search of her purse was both reasonable and supported by authority of law.

[Footnotes omitted; some case citations omitted or revised for style]

Concurring opinion by Justice Gonzalez

Justice Gonzalez signs the majority opinion but also writes a short concurring opinion indicating that there may not have been probable cause to support the arrest of defendant Byrd. The majority opinion includes a footnote stating that the defendant is legally entitled to ask the trial court to look at the probable cause issue.

Dissenting opinion

Justice Fairhurst authors the dissenting opinion. She is joined by Justices Chambers, Owens and Wiggins. The dissenting opinion argues that the Court of Appeals ruled correctly that once Byrd was secured in handcuffs in the back seat of a patrol car, there was no justification under the search incident rule for a search of the purse.

LED EDITORIAL COMMENTS:

1. Is there a logical basis for the distinction between (A) items actually possessed and (B) items in the lunge area?

The Byrd majority opinion relies on doctrinal history and does not offer logic for its line-drawing distinction between: (A) items actually possessed by the arrestee at or immediately preceding the point of arrest (under Byrd, such items are always contemporaneously searchable, even after fully securing the arrestee in handcuffs in a patrol car, under a "bright line" rule without need for any justification other than the mere fact of a custodial arrest); and (B) items located within the lunge area but only constructively, not actually, possessed by the arrestee at or immediately preceding the point of arrest (under Byrd, such items are not searchable unless there exists actual, fact-based exigency of preventing the arrestee's access to weapons or destructible evidence).

The lack of a clear, logical underpinning for this distinction may be attacked by civil libertarian interests as well as law enforcement interests. The tug-of-war is never over. We expect that in future cases, one side will seek to shrink the search-incident authority granted to law enforcement by the Byrd majority, while the other side will seek to expand it. For now, it does not seem fruitful for Washington law enforcement officers to ponder the logic of the distinction between items actually possessed and those only constructively possessed. Officers must simply deal with the clear line drawn by the Byrd majority.

2. Does the Byrd decision affect the doctrine of car searches incident to arrest?

Byrd does not relax any of the restrictions on car searches incident to arrest in Arizona v. Gant, 556 U.S. 332 (2009) June 09 LED:13 or State v. Snapp, 172 Wn.2d 177 (2012) May 12 LED:25. In Byrd, the officer took the purse from the arrestee's lap before she got out of the car. The Court deemed the purse to be in her possession at or immediately preceding the arrest. But we think that Byrd does not authorize officers who have secured an arrestee in handcuffs in a patrol car to retrieve from a vehicle an item that an

occupant (1) actually possessed on or about his or her person immediately prior to arrest, and (2) left behind in the vehicle when getting out of the vehicle.

3. What is the nature and scope of the Byrd majority's "immediately preceding" element of the authority to search items actually possessed immediately preceding or at the point of arrest?

The Byrd majority clearly states that its rule extends to items possessed "immediately preceding" the point of arrest. We think that the Court was concerned that persons about to be arrested would anticipate the arrest and attempt to ditch an item before the officer begins the formal arrest process.

In some circumstances, a ditched item could be deemed unprotected from seizure and search restrictions because the item could, in any event, be deemed "abandoned" for purposes of search and seizure law (for instance, if the item were tossed into the bushes in a city park or onto a city street). But in some circumstances, ditching an item would not qualify as abandonment (for instance, if the item were handed to a friend or tossed into the arrestee's car or pickup truck bed or onto his home's porch). We think officers should proceed cautiously with this actually-possessed-immediately-preceding-arrest element of the Byrd test. A merely ambiguous furtive gesture by a car's lone-occupant-driver as she pulls over in a traffic stop probably will not translate to a conclusion that her purse, sitting apart from her on the passenger seat when the officer arrives at the driver-side window, was on her lap at the point when the officer made the traffic stop that led to a warrant arrest.

Another question raised by the "immediately preceding" element of the Byrd majority's standard is the temporal meaning of "immediately." Does "immediately preceding" extend search incident authority to all situations where a stop eventually leads to an arrest. For instance, an officer stops a driver for slowly rolling through a stop sign. The officer contacts the driver and sees some signs of possible intoxication. The officer asks the driver to get out of the car to perform field sobriety tests. The driver takes her jacket and purse off her lap and places them on the front passenger seat of the vehicle. She then gets out of her car. She fails field sobriety testing, and the officer arrests her for DUI. Were the jacket and purse in her actual possession "immediately preceding" the point of arrest? This scenario seems distinguishable from the facts in Byrd because there the defendant apparently knew she was being arrested before she got out of the vehicle. Only future case decisions will tell us the answer to our scenario.

4. Is the law now settled on authority to contemporaneously search items in the lunge area of a handcuffed arrestee where the items were actually possessed at or immediately before the point of arrest?

The Washington Supreme Court has heard oral argument and is reviewing the Court of Appeals decision in State v. MacDicken, 171 Wn. App. 169 (Div. I, Oct. 8, 2012) February 13 LED:16. In MacDicken officers searched a bag that an arrestee in an armed robbery investigation possessed at or immediately preceding the point of an arrest that occurred in a motel parking lot. The officers had handcuffed the arrestee, and he was standing a car's length away from the bag at the point of the search. MacDicken is currently before the Washington Supreme Court; oral argument was heard on September 19, 2013, and a decision is awaited.

In MacDicken the State and the defendant have engaged in argument over whether a person in handcuffs but not secured in a patrol car can be deemed to be a risk to lunge and obtain a weapon or destroy evidence that is located within what would constitute lunging distance if the arrestee were not handcuffed. But that debate seems moot now. We cannot see how the Court can rule for defendant MacDicken in light of the Court's decision in Byrd. Under the bright line rule of Byrd, because the arrestee in MacDicken was, just prior to the arrest, in immediate possession of the item that officers contemporaneously searched incident to arrest, the search appears to be per se lawful.

Note also that the Byrd majority decision announces that the Court of Appeals correctly decided State v. Bonds, 174 Wn. App. 553 (Div. II, April 23, 2013) July 13 LED:15 (search of pocket of pants that arrestee was wearing while he stood in handcuffs held lawful). The Washington Supreme Court has denied defendant Bonds' petition for review of the Court of Appeals decision.

5. What about the arrestee's items that are located in the lunge area of a handcuffed arrestee where the items were not actually possessed at or immediately before the point of arrest?

The defendant's petition for review is pending in the Washington Supreme Court in State v. Ellison, 172 Wn. App. 710 (Div. II, Jan. 8, 2013) March 13 LED:17. In Ellison, the arrestee was sleeping or hiding under a blanket on a back porch when officers pulled back the blanket to reveal him and a backpack that was sitting between his legs.

Officers placed Ellison in handcuffs as they arrested him. Officers moved the bag a short distance away and then searched it with arrestee Ellison standing in handcuffs nearby. The analysis by the Court of Appeals in Ellison assumed that the State was required to prove that exigent circumstances existed. The Court concluded that exigent circumstances did exist even though Ellison was handcuffed. Handcuffs are not escape-proof or an absolute protection from an arrestee. The Washington Supreme Court has stayed action on the petition pending its resolution of the MacDicken case.

In light of the Byrd decision, the first question to be answered is whether defendant Ellison would be deemed to be in "actual possession" of the backpack that was located between his legs. If so, and we think there is a strong argument that he was in actual possession of the item between his legs at the time of arrest, then the contemporaneous search was lawful under the bright line rule. If not, then the lunge question addressed in MacDicken and Ellison would be posed. We think that the Courts in MacDicken and Ellison correctly assessed the lunge risk question. Handcuffing without securing an arrestee in a locked patrol car does not provide absolute protection.

6. What about items that were not actually possessed at or immediately prior to arrest and are not searchable under an actual exigency theory after the arrestee has been fully secured in handcuffs in the back seat of a patrol car?

Law enforcement has long had to cope with the question of what to do with arrestee items that are in the surrounding area at the time of arrest but are not searchable under whatever may be the then-applicable, fluid doctrine of search incident to arrest. Whenever probable cause to search exists in such circumstances, securing the item and seeking a search warrant is the best course. In some cases, a consent search is an option. In some cases, an inventory rationale, if there is in fact an agency policy or established practice that is correctly followed, may justify inspecting a container or item

before transporting it to a jail or an agency property room. The Washington Supreme Court's Byrd decision does not eliminate or help resolve the dilemma faced in such circumstances. But Byrd does narrow the circumstances in which the dilemma will be presented.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

COMMON LAW MEDICAL NECESSITY DEFENSE IS NOT ABROGATED BY CHAPTER 69.51A RCW, WASHINGTON'S MEDICAL USE OF MARIJUANA ACT – In State v. Kurtz, ___ Wn.2d ___, 2013 WL 5310161 (Sept. 19, 2013), the Washington State Supreme Court holds 8-1 that the passage of Washington's medical marijuana law did not abrogate the pre-existing common law medical necessity defense.

The defendant was charged with manufacturing and possession of marijuana after police executed a search warrant and found marijuana and marijuana plants at his home. At trial, the defendant attempted to present medical authorizations in support of a common law medical necessity defense and a statutory medical marijuana defense. The state argued that Washington's Medical Use of Marijuana Act implicitly precludes use of the common law medical necessity defense in drug cases.

The Supreme Court describes the common law medical necessity defense as follows:

> . . . In [State v. Diana, 24 Wn. App. 908, 916 (1979)] the defendant argued a defense of medical necessity when he was charged with possession of marijuana. Following a discussion of the common law necessity defense, the court recognized a medical necessity defense could exist as a defense to marijuana possession in very limited circumstances, . . . The court remanded for the trial court to determine whether the evidence presented supported the defense. Specifically, the court instructed that medical necessity would exist in that case if "(1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease." Id.

[Footnote and some citations omitted]

After reviewing case law as well as the intent of the Medical Use of Marijuana Act, the Court concludes that the act does not abrogate the common law medical necessity defense:

> The Act contains no language expressing a legislative intent to abrogate the common law. To the contrary, a 2011 amendment to chapter 69.51A RCW added that "[n]othing in this chapter establishes the medical necessity or medical appropriateness of cannabis for treating terminal or debilitating medical conditions as defined in RCW 69.51A.010," suggesting the legislature did not intend to supplant or abrogate the common law. RCW 69.51A.005(3). In explaining the purpose of the Act the legislature stated that "[h]umanitarian compassion necessitates that the decision to use cannabis by patients with terminal or debilitating medical conditions is a personal, individual decision, based upon their health care professional's professional medical judgment and

discretion." RCW 69.51A.005(1)(b). To hold that this Act limits existing defenses for medical necessity would undermine the legislature's humanitarian goals.

Dissents: Justice Owens dissents arguing that the Act does abrogate the common law.

Result: Reversal of Thurston County Superior Court convictions of William Andrew Kurtz of possession and manufacturing of marijuana.

LED EDITORIAL COMMENT: Although the availability of a common law defense, in addition to the statutory ability to possess medical marijuana legally under the Medical Use of Marijuana Act, appears to be problematic, the common law defense is just that – a defense – which the defendant must raise at trial. Thus, this case should have little practical impact on officers in the field.

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WASHINGTON STATE COURT OF APPEALS

MIRANDA CUSTODY ISSUE: UNDER TOTALITY OF CIRCUMSTANCES, QUESTIONING IN SUSPECT'S RESIDENCE WAS NOT SO COERCIVE AS TO BE "CUSTODIAL"

State v. Rosas-Miranda, ___Wn. App. ___, 2013 WL 5297353 (Div. II, Sept. 17, 2013)

Facts:

During the course of events at one residence, members of the [Police Department] drug task force developed reason to believe that a nearby apartment occupied by Elvia and Angel Rosas-Miranda contained illegal drugs. The only task force member present who spoke fluent Spanish obtained valid consent from Elvia and Angel using Spanish language Ferrier warnings (warning of the right refuse consent, right to restrict scope, and right to retract consent at any time). What occurred after that is described by the Court of Appeals as follows:

> Once Elvia and Angel consented to the search of their apartment, [the Spanish-speaking officer] asked to speak with them in the front living room, while other officers searched the apartment. Eight or nine officers participated in the search, which took approximately 90 minutes. During the search, [the Spanish-speaking officer] remained in the front living room with Elvia, Angel, and the children, but he did not tell them to stay in the living room or to stay out of the other rooms. [The officer] did not put Angel or Elvia in handcuffs, direct them to sit on the couch, or otherwise restrict their movement. [The officer] made a concerted effort to remain in earshot of Elvia and Angel during the search in case they wanted to revoke or limit consent, because [the officer] was the only officer present who could communicate in Spanish. Occasionally, [the officer] asked to speak with Angel or Elvia privately, but he remained in earshot of the other person. [The officer] also stepped outside the apartment for approximately two minutes to speak with visitors who approached the apartment during the search.
>
> Police found both drugs and firearms. [The Spanish-speaking officer] asked Elvia about some plastic packaging material with residue that they found in the bathroom next to the toilet that the police suspected was heroin. Elvia told [the officer] that her brother, Carlos, had brought heroin to the apartment a few weeks earlier. She said that when the police came to the door, she was frightened so she retrieved the drugs from the closet and flushed the heroin down the toilet.

> After the conclusion of the search, [the Spanish-speaking officer] arrested Elvia and Angel for possession of drugs and, in Angel's case, for illegal possession of firearms. At that time, [the officer] put Elvia and Angel in handcuffs. [The officer] did not ask Elvia and Angel questions or otherwise attempt to elicit statements from them after he arrested them; nor did he advise Angel or Elvia of their Miranda rights.

Proceedings below:

The State charged Elvia and Angel with, among other crimes, unlawful possession of a controlled substance with intent to deliver (heroin and methamphetamine) within 1,000 feet of a school bus stop. The trial court denied Miranda-based motions by the defendants to suppress statements made to the Spanish-speaking officer. Elvia and Angel were tried in a joint jury trial and were found guilty as charged.

ISSUE AND RULING: Under the U.S. Supreme Court's 1966 decision in Miranda v. Arizona, where suspects are in custody, officers are generally required to Mirandize them before engaging in interrogation. Under the totality of the circumstances, including the large number of officers present during the consent search, was Elvia in custody inside her own residence for purposes of Miranda when she told the Spanish-speaking officer, in response to his questions, that she had just flushed heroin down the toilet? (ANSWER BY COURT OF APPEALS: No)

ANALYSIS: (Excerpted from Court of Appeals opinion)

> . . . . Police must give Miranda warnings when a suspect is subject to interrogation while in the coercive environment of police custody. State v. Heritage, 152 Wn.2d 210, 214 (2004) **Sept 04 LED:12**. . . .
>
> A suspect is in custody for purposes of Miranda when "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." Heritage. Courts examine the totality of the circumstances to determine whether a suspect was in custody. United States v. Craighead, 539 F.3d 1073, 1082 (9th Cir. 2008) **Oct 08 LED:04**. Police questioning within the confines of a person's own home may be custodial interrogation. Orozco v. Texas, 394 U.S. 324, 326-27 (1969); State v. Dennis, 16 Wn. App. 417, 421 (1976).
>
> In Dennis, we held that a suspect was in custody in his own apartment. In that case two officers approached the suspect's apartment to execute a search warrant and they discovered that the address on the search warrant was incorrect. One officer stayed outside the apartment while the other went to obtain a corrected warrant. When the suspect and his wife arrived home, a neighbor beckoned the suspect into an adjoining apartment while the suspect's wife went into the apartment she shared with the suspect. The officer waiting at the apartment complex became worried that the neighbor would tell the suspect that he was a police officer and that the suspect would return to his apartment and destroy contraband before the other officer arrived with the corrected search warrant. To avoid that, the officer knocked on the suspect's door, identified himself, and was granted permission to enter by the suspect's wife.

When the suspect returned from the neighbor's apartment, the officer was already inside the apartment. The officer, the suspect, and the suspect's wife sat down at the kitchen table and the officer told the suspect that he knew there were drugs in the refrigerator. The suspect was not placed under arrest or told that he could not leave, but when the suspect's wife requested that the officer move into the living room, he responded, "No, because I don't like to see you take anything out of the refrigerator that I cannot see." The officer suggested that the suspect produce the drugs voluntarily and save him the trouble of searching. The officer then told the suspect that another officer would return shortly with a search warrant. The officer again asked for the drugs to be produced without resorting to a search. In response, the suspect retrieved several packages of cocaine from the refrigerator and placed them on the table next to the officer.

On appeal, we determined [in Dennis] that the suspect was in custody for purposes of Miranda when, at the officer's urging, he took cocaine out of the refrigerator and set it on the table in front of the officer. We stated that "the atmosphere was . . . dominated by the officer's unwelcome presence and his insistence on remaining in a position where he could monitor and thus restrict the occupants' freedom of movement within their home." The officer also made it clear to the suspect that not cooperating would be futile because another officer was on his way with a search warrant. The suspect had reason to believe that he was not free to remove anything from the refrigerator and exit the room. We held that a reasonable person in the suspect's position would have "believed his freedom of movement was significantly restricted and that any attempt to leave would probably result in immediate physical restraint or custody." Thus, the suspect was in custody for purposes of Miranda and the officer should have advised him of his rights.

Under Dennis and Craighead we must determine whether, under the totality of the circumstances, a reasonable person in Elvia's position would have felt that her freedom was curtailed to a degree associated with formal arrest. Dennis is a helpful comparison because both interrogations occurred inside the suspects' residences after officers were granted permission to enter. The officer's manner of entry in Dennis, however, was more coercive and secretive. Here, in contrast, [the Spanish-speaking officer] insisted on receiving consent from both Angel and Elvia before entering their apartment. After being informed that she was free to withhold, limit, or revoke consent, Elvia expressly consented to [the officer's] entering and searching her apartment. The circumstances in Dennis were more coercive and created a police-dominated atmosphere not present here.

Also, the officer in Dennis impressed upon the suspect that the officer was in control, even inside the suspect's apartment. As noted, the officer refused to move into another room when the suspect's wife suggested it, insisted that he remain in the kitchen to monitor the suspect and the refrigerator, and asked the suspect to retrieve drugs that he suspected were in the refrigerator. When the officer told the suspect that a search warrant was on its way, the suspect immediately produced the drugs. Based on the officer's statements and conduct [in Dennis], a reasonable person in the suspect's position would believe that the officer was in control of the situation developing in the suspect's apartment.

In contrast, [the officer here] stayed within earshot of Elvia and Angel during the search of their apartment in case either person wanted to revoke or limit consent,

but he did not restrict their movement or tell them he was monitoring them. At times, [the officer] asked to speak to either Elvia or Angel around the corner in the hall, presumably out of sight from the other person, and he even stepped out of the apartment for a few minutes to translate for another officer. Moreover, Elvia was advised that the search of her apartment was voluntary and that she could revoke or limit consent at any time. Unlike in Dennis, the officers did not undercut Elvia's control by telling her that a search was inevitable. A reasonable person in Elvia's position would feel that she controlled the officers' presence in her apartment. A reasonable person would feel that she controlled whether the search would occur or continue. Thus, the atmosphere in Elvia's apartment was considerably less coercive and police-dominated than in Dennis, despite the presence of eight or nine officers in Elvia's apartment compared to only two officers in Dennis.

Because Elvia claims a violation of the Fifth Amendment, the Ninth Circuit's decision in Craighead is especially pertinent. In applying the dictates of Miranda to an in-home interrogation, Craighead focused on the extent to which the circumstances of the interrogation turned the otherwise comfortable and familiar surroundings of the home into a "police-dominated atmosphere." In its analysis the Ninth Circuit concluded that several factors were relevant to whether an interrogation created such an atmosphere:

> (1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.

In Craighead eight law enforcement officers from three different agencies went to Craighead's residence to execute a search warrant. All of the officers were armed and some unholstered their firearms in Craighead's presence. The officer in charge introduced herself and told Craighead that he was not under arrest, that any statement he might make would be voluntary, that he would not be arrested that day, and that he was free to leave. Craighead was directed to a storage room at the back of his house for a private interview, but was not given Miranda warnings. The officer in charge interviewed Craighead for approximately 20 to 30 minutes, while another officer leaned against the wall near the only exit with his back to the closed door. Craighead was never handcuffed. No threats or promises were made to induce him to speak, nor was any force used. During the interview Craighead confessed to possessing child pornography. He was not arrested at the end of the interview, but he was later charged with various crimes related to possession and distribution of child pornography.

Based on the totality of the circumstances and applying its announced factors, the Ninth Circuit reasoned that although Craighead was told that he was free to leave and that the interview was voluntary, the other circumstances weighed in favor of finding that Craighead's home had a police-dominated atmosphere akin to formal custody. Craighead reasonably believed that there was nowhere for him to go when he was escorted to a storage room in his own home and

observed by an armed guard standing by the only exit. Thus, the Ninth Circuit held that Craighead was in custody for purposes of Miranda.

Here application of the factors the Ninth Circuit suggested in Craighead leads to the same conclusion as our analysis of Dennis: that Elvia was not in custody. The first factor is the number of law enforcement personnel and whether they were armed. Eight or nine police officers participated in the search of Elvia's apartment. Only [the Spanish-speaking officer] and two other officers, however, initially approached the door and requested permission to search the apartment. Only [the Spanish-speaking officer] questioned Elvia. The record does not reflect whether the officers were armed. [*Court's footnote*: *[The Spanish-speaking officer] testified that he wore a tactical vest that said "POLICE," and that the vest had handcuffs, a holster for his firearm, and other small tools*.]

As in Craighead, the number of officers present weighs in favor of a police-dominated atmosphere. But in Craighead the eight officers, some with their weapons drawn, entered the suspect's home with a search warrant. Here, the eight or nine officers entered Elvia's apartment with her consent, and there is nothing in the CrR 3.5 hearing record to suggest that the officers, if armed, unholstered their firearms in Elvia's presence.

The second factor is whether the suspect was restrained by physical force or by threats. In Craighead the suspect was not physically restrained by force or threats; but he was interviewed in a closed storage room with an armed guard leaning near the door, suggesting that he was not free to leave. Elvia was not restrained during the search of her apartment and questioning by [the officer]. The trial court expressly found that Elvia was not handcuffed, not told to stay in one area of the apartment, and not told to stay out of any area of the apartment. . . . . The absence of restraint weighs against a finding that the atmosphere in Elvia's apartment was police-dominated.

The third factor is whether the suspect was isolated from others. In Craighead the suspect was escorted to and interviewed in a small storage room at the back of his residence. This created a police-dominated atmosphere inside the suspect's home by eliminating the comfortable and familiar surroundings that are the hallmark of an in-home interrogation. Here, Elvia was not isolated from others. Elvia, Angel, and the children remained, for the most part, together in the front living area. [The officer] spoke to Elvia privately in the hall around the corner from the living room, but stayed within earshot of Angel. Arguably, the officers isolated Elvia and Angel from their guests that approached the apartment during the search, but the record does not provide details other than that [the officer] stepped outside to talk to them and that Elvia and Angel did not. The third factor weighs slightly in favor of not finding a police-dominated atmosphere.

The fourth factor is whether the suspect was informed that he was free to leave or terminate the interview. In Craighead the suspect was told that he was free to terminate the interview and leave, but that was belied by the armed guard leaning against the wall with his back toward the storage room's sole exit. Moreover, a search warrant authorized the officers to search the suspect's home, so he could not expect the officers to leave until they completed their search. Here, Elvia was not informed that she was free to leave or terminate the interview, but she was advised that she was free to limit or revoke her consent to

> search her home at any time. Her ability to revoke consent and exclude the officers from her home is at least as potent an assertion of control as the ability to leave or terminate the interview. The fourth factor weighs against a finding that the atmosphere in Elvia's apartment during the interview was police-dominated.
>
> In sum, the number of officers inside Elvia's apartment contributed to the police-dominated atmosphere and weighs in favor of a finding that Elvia was effectively in custody. However, the fact that the officers were present only through informed Ferrier consent from Elvia alleviates the police-dominated atmosphere even in the presence of many officers. The other factors weigh in favor of finding that Elvia was not in custody. She was not restrained or isolated and was informed that the search of her apartment was voluntary and could be revoked or limited at any time. Under the totality of the circumstances, a reasonable person in Elvia's position would not believe that her freedom was curtailed to a degree associated with formal arrest. See Heritage, 152 Wn.2d at 218 **Sept 04 LED:12**. Thus, the trial court properly concluded that for purposes of Miranda, Elvia was not in custody, Miranda warnings were not required, and Elvia's statement to [the officer] was admissible as evidence.

[Some footnotes omitted, some case citations modified or omitted]

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NEXT MONTH

The January 2014 LED will include an entry on the recent United States Supreme Court decision in Stanton v. Sims, ___ U.S. ___, 2013 WL 5878007 (Nov. 4, 2013), unanimously granting a law enforcement officer qualified immunity from Civil Rights Act civil liability. The U.S. Supreme Court reverses the Ninth Circuit decision in Sims v. Stanton, 706 F.3d 954 (9th Cir. 2012) **February 13 LED:03; March 13 LED:04**, that denied qualified immunity to an officer who made a warrantless entry into the curtilage (a high-fence-and-gate-enclosed front yard) in a gang neighborhood in hot pursuit of a suspect whose only offense was disobeying an order to stop. The U.S. Supreme Court does not determine that the officer's action was lawful under the Fourth Amendment, but the Court holds that under presently existing case law the constitutional standard is not clearly established one way or the other.

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court

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

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

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

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