Law Enforcement Digest

FEBRUARY 2010

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

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Readers brace yourselves. This month's LED delivers more troubling news from the federal and state appellate courts than any LED since the LED became a monthly publication in 1979.

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Bryan v. McPherson, ___ F.3d ___, 2009 WL 5064477 (9th Cir. 2009) (decision filed December 28, 2009)

INTRODUCTORY LED EDITORIAL NOTES: We would not be surprised (1) to see this highly publicized and controversial decision reversed by an 11-judge Ninth Circuit panel, or (2) to see the U.S. Supreme Court accept review and to reverse the decision or to at least significantly modify its analysis. But for now, the decision is the law of the Ninth Circuit and exposes Washington law enforcement officers to Civil Rights Act liability.

Our LED editorial commentary will be relatively limited. Law enforcement agencies will need to work together with each other and with their legal advisors to develop procedures responsive to the Bryan decision.

Factual and procedural background: (Excerpted from Ninth Circuit opinion)

> Carl Bryan's California Sunday was off to a bad start. The twenty-one year old, having stayed the night with his younger brother and some cousins in Camarillo, which is in Ventura County, planned to drive his brother back to his parents' home in Coronado, which is in San Diego County. However, Bryan's cousin's girlfriend had accidently taken Bryan's keys to Los Angeles the previous day. Wearing the t-shirt and boxer shorts in which he had slept, Bryan rose early, traveled east with his cousins to Los Angeles, picked up his keys and returned to Camarillo to get his car and brother. He then began driving south towards his parents' home. While traveling on the 405 highway, Bryan and his brother were stopped by a California Highway Patrolman who issued Bryan a speeding ticket. This upset him greatly. He began crying and moping, ultimately removing his t-shirt to wipe his face. Continuing south without further incident, the two finally crossed the Coronado Bridge at about seven-thirty in the morning.
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> At that point, an already bad morning for Bryan took a turn for the worse. Bryan was stopped at an intersection when Officer McPherson, who was stationed there to enforce seatbelt regulations, stepped in front of his car and signaled to Bryan that he was not to proceed. Bryan immediately realized that he had mistakenly failed to buckle his seatbelt after his earlier encounter with the police. Officer McPherson approached the passenger window and asked Bryan whether he knew why he had been stopped. Bryan, knowing full well why and becoming increasingly angry at himself, simply stared straight ahead. Officer McPherson requested that Bryan turn down his radio and pull over to the curb. Bryan complied with both requests, but as he pulled his car to the curb, angry with himself over the prospects of another citation, he hit his steering wheel and

yelled expletives to himself. Having pulled his car over and placed it in park, Bryan stepped out of his car.

There is no dispute that Bryan was agitated, standing outside his car, yelling gibberish and hitting his thighs, clad only in his boxer shorts and tennis shoes. It is also undisputed that Bryan did not verbally threaten Officer McPherson and, according to Officer McPherson, was standing twenty to twenty-five feet away and not attempting to flee. Officer McPherson testified that he told Bryan to remain in the car, while Bryan testified that he did not hear Officer McPherson tell him to do so. The one material dispute concerns whether Bryan made any movement toward the officer. Officer McPherson testified that Bryan took "one step" toward him, but Bryan says he did not take any step, and the physical evidence indicates that Bryan was actually facing away from Officer McPherson. Without giving any warning, Officer McPherson shot Bryan with his taser gun. One of the taser probes embedded in the side of Bryan's upper left arm. The electrical current immobilized him whereupon he fell face first into the ground, fracturing four teeth and suffering facial contusions. Bryan's morning ended with his arrest and yet another drive – this time by ambulance and to a hospital for treatment.

Bryan sued Officer McPherson and the Coronado Police Department, its police chief, and the City of Coronado for excessive force in violation of 42 U.S.C. section 1983, assault and battery, intentional infliction of emotional distress, a violation of a California statute, as well as failure to train and related causes of action. On summary judgment, the district court granted relief to the City of Coronado and Coronado Police Department, but determined that Officer McPherson was not entitled to qualified immunity at this stage of the proceedings. The court concluded that a reasonable jury could find that Bryan "presented no immediate danger to [Officer McPherson] and no use of force was necessary." In particular, it found that a reasonable jury could find that Bryan was located between fifteen to twenty-five feet from Officer McPherson and was not facing him or advancing toward him. The court also found that a reasonable officer would have known that the use of the taser would cause pain and, as Bryan was standing on asphalt, that a resulting fall could cause injury. Under the circumstances, the district court concluded it would have been clear to a reasonable officer that shooting Bryan with the taser was unlawful.

ISSUES AND RULINGS: Viewing the factual allegations in the light most favorable to Mr. Bryan, as the Court of Appeals must do in reviewing Officer McPherson's request for qualified immunity:

1) Did the officer use excessive force in violation of the Fourth Amendment when he used the taser? (ANSWER: Yes, because Mr. Bryan did not present an immediate threat, and because, if Officer McPherson perceived that Mr. Bryan had mental health issues, this factor would not provide a basis for using the taser in light of the lack of immediate danger);

2) Is Officer McPherson entitled to qualified immunity from Civil Rights Act liability on the rationale that he could have reasonably, although mistakenly, believed that his use of the taser under these circumstances did not violate a clearly established constitutional right? (ANSWER: No)

Result: Affirmance of U.S. District Court (Southern District of California) denial of qualified immunity to Officer McPherson; case remanded for trial.

ANALYSIS:

1) Excessive force

The Bryan panel begins its analysis with a recitation of the fundamental objective reasonableness test for law enforcement use of force under the Fourth Amendment. One must balance the amount of force applied against the need for that amount of force. The Bryan panel declares that the totality of the circumstances (relating to both the force used and the threat involved) must be looked at in every case to determine if a particular use of force was reasonable. The Court asserts as a general proposition that tasers constitute an intermediate, significant level of force that must be justified by a strong government interest that compels the employment of such force.

The Court views the factual allegations in the light most favorable to Mr. Bryan, as the Court of Appeals must always do under the applicable standard of review of the U.S. District Court decision. The Bryan panel determines the use of force in this case to be excessive in light of the Court's assessment that, although Mr. Bryan was shouting expletives and gibberish to himself, failed to remain in his car (Mr. Bryan contends that he did not hear the officer tell him to get back in his car), and otherwise seemed volatile and erratic, he did not, in the panel's estimation, pose an immediate threat to the officer or bystanders (there were in fact no bystanders and there was no traffic). The following facts weigh against the use of the taser, the Bryan panel says:

• Mr. Bryan was obviously unarmed, being dressed in only tennis shoes and boxer shorts;

• he did not make a verbal threat to the officer;

• he stood, without advancing, about 19 to 24 feet away, thus exhibiting resistance that was more passive than active;

• he did not attempt to flee;

• he was not facing the officer when the officer tased him, and thus he posed less, if any, threat to the officer;

• the seatbelt infraction for which he was stopped was not inherently dangerous or violent;

• the officer failed to first warn Mr. Bryan before tasing him; and

• while officers are not compelled under the Fourth Amendment to use only the least intrusive degree of force possible, the determination of reasonableness requires an officer to consider such alternatives and the courts take into account the availability of such alternatives when assessing reasonableness – the Bryan panel asserts that here the officer knew that backup officers were en route to the scene, and that on their arrival the options for dealing with Mr. Bryan in a less intrusive manner would be expanded.

Officer McPherson raised an alternative argument, apparently for the first time on appeal. The argument was that Officer McPherson believed Mr. Bryan to be mentally ill and subject to detention for that reason. The Bryan panel responds that, in light of the lack of immediate threat to Officer McPherson: "To the contrary: if Officer McPherson believed Bryan was mentally disturbed he should have made greater effort to take control of the situation through less intrusive means."

2) Qualified immunity

Officer McPherson would be entitled to qualified immunity from Civil Rights Act liability if he could have reasonably, though mistakenly, believed that his use of the taser under these circumstances did not violate a clearly established constitutional right. The Bryan panel rejects Officer McPherson's request for immunity, explaining: "No reasonable officer confronting a situation where the need for force is at its lowest – where the target is a nonviolent, stationary misdemeanant twenty feet away – would have concluded that deploying intermediate force without warning was justified."

[Some citations and internal quotation marks omitted]

LED EDITORIAL COMMENTS: The Bryan decision has brought praise from some civil liberties interest groups, and it has brought some vigorous criticism and serious concern from some law enforcement officers and government attorneys. But to us the decision seems very fact specific. We think that the Ninth Circuit panel was unrealistic in its assessment of the level of danger and the need for force in this case. We therefore disagree with the Court's application of the reasonableness test of the Fourth Amendment in this factual situation. However, and maybe we are engaging in wishful and/or unrealistic thinking, we do not see the decision as the broad precedent that some others do. Perhaps changing a couple of the numerous "facts" considered by the Bryan panel – for instance, having Mr. Bryan facing toward, not away from (or trying to walk away from), the officer, and the officer warning Mr. Bryan before tasing him – would change the result. But that is just our assessment from the safe confines of our offices. Law enforcement agencies should confer with one another and consult their own legal counsel on this and other legal issues.

With all respect and empathy for the difficult and dangerous job that law enforcement officers have, and with a recognition that there is often a big gap between what actually happened and what the courts describe at the "facts," we pass along some additional thoughts that we have heard from others regarding or responding to the Bryan case: 1) always warn if practicable before applying the taser; 2) consider where the person might fall when tased; 3) for any application of force, try to view it in your mind's eye as being videotaped and consider how it might be perceived by non-law enforcement reviewers (e.g., jurors or judges); 4) always write a good report with attention to the factual details and the need at law to have reasonable justification for the application of force.

CIVIL RIGHTS ACT LAWSUIT: UNLAWFUL FOURTH AMENDMENT "SEIZURE" OCCURRED WHEN CASEWORKER AND LAW ENFORCEMENT OFFICER INTERVIEWED POSSIBLE CHILD SEX ABUSE VICTIM AT ELEMENTARY SCHOOL WITHOUT PARENTAL CONSENT, COURT ORDER, OR EXIGENT CIRCUMSTANCES

Greene v. Camreta, ___ F.3d ___, 2009 WL 4674129 (9th Cir. 2009) (decision filed December 10, 2009)

INTRODUCTORY LED EDITORIAL NOTES: As we noted above with respect to the Bryan decision regarding taser use, we would not be surprised (1) to see this controversial decision reversed by an 11-judge Ninth Circuit panel, or (2) to see the U.S. Supreme Court accept review and to reverse this child-interview decision or to at least significantly modify its analysis. But for now, the decision is the law of the Ninth Circuit and exposes Washington law enforcement officers to Civil Rights Act liability. As with the taser case (Bryan), our LED editorial commentary will be relatively limited. Also, as with Bryan, we believe Camreta to be fairly fact specific, and hence more limited as a precedent than some have suggested. But others see it differently. Law enforcement agencies will need to work together with each other and with their legal advisors to review their practices and procedures in light of the Camreta decision.

Our focus in the LED is on law enforcement civil liability exposure. For that reason, and to save space, in our Camreta fact excerpts below, we have omitted the Court's description of the facts that relate to the Greene family's challenges to the social services caseworker's post-interview actions of: (1) removing the would-be-sex-victim daughters from their mother's custody, and (2) excluding the mother from a medical facility while the daughters underwent physical examinations. We have also omitted from our summary of the Ninth Circuit's analysis any mention of the Ninth Circuit's analysis of those aspects of the case.

Note that the Washington's DSHS has responded to the Ninth Circuit Camreta decision by making some revisions to DSHS policies for CPS caseworkers for those circumstances when the caseworkers are working together with law enforcement officers in the interviewing of possible child abuse.

Facts and Procedural background: (Excerpted from Ninth Circuit decision)

> Nimrod Greene ("Nimrod") was arrested on February 12, 2003, for suspected sexual abuse of F.S., a seven-year old boy. Nimrod's arrest was based on statements made by F.S. to his parents and similar statements later made to investigators, all alleging that Nimrod had touched F.S.'s penis over his jeans when Nimrod was drunk in F.S.'s parents' home. F.S. reported that Nimrod had done this to him once before. In addition, F.S.'s mother told officers that Sarah, Nimrod's wife, "had talked to her about how she doesn't like the way Nimrod makes [their daughters, S.G. and K.G.,] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." Along the same lines, F.S.'s father told officers that:
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> > Nimrod himself has made some type of prior comment about how his wife Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with Nimrod when he has been drinking. [F.S.'s father] said neither he nor his wife [ ] have any direct knowledge of abuse at the Greene home, but this type of comment and/or accusation has come in several ways from Sarah and Nimrod.
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> The Oregon Department of Human Services ("DHS") heard of these allegations about a week after Nimrod's arrest. The next day, Bob Camreta, a caseworker with DHS, learned that Nimrod had been released and was having unsupervised contact with his daughters. Camreta was assigned to assess the girls' safety. Based on his training and experience as a DHS caseworker, Camreta was "aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason,[he was] concerned about the safety and well-being of Nimrod Greene's own small children.
>
> Three days after hearing of Nimrod's release, Camreta visited S.G.'s elementary school to interview her. Camreta thought the school would be a good place for the interview because it is a place where children feel safe and would allow him "to conduct the interview away from the potential influence of suspects, including parents." According to Camreta, "[i]nterviews of this nature, on school premises, are a regular part of [child protective services] practice and are consistent with DHS rules and training." Sarah was not informed of, nor did she consent to, the

interview of her daughter. Camreta also did not obtain a warrant or other court order before the interview.

Throughout the interview Camreta was accompanied by Deputy Sheriff Alford. Upon arriving at the school, Camreta told school officials that he and Alford were there to interview S.G. and requested use of a private office. Terry Friesen, a counselor at the elementary school, visited S.G. in her classroom and told the child that someone was there to talk with her. Friesen took S.G. to the room where Camreta and Alford were waiting and left.

Camreta interviewed S.G. for two hours in Alford's presence. The interview was not recorded. Alford, who had a visible firearm, did not ask any questions during the interview. According to Camreta, S.G. told him:

• 'When he drinks he tries to do it,' meaning, 'he tries to touch me somewhere in my private parts. Then I go to my room and lock the door."

• The last incident occurred "'just last week'" on the outside of her clothing and she had tried to tell him to stop. "The touching of private parts started when she was three."

• "The touching involved the chest and buttock areas, outside of clothing. Her father sometimes 'mumbled' during the touching."

• "Her mother knew about the touching . . . " and it was "'one of our secrets' with her little sister, K.G.'"

Camreta maintains that he "certainly did not coerce [S.G.] or try to induce her into making any accusations."

In contrast, S.G. recounted the interview as follows:

> [Camreta] ask[ed] me if sometimes my dad touched me all over my body. I thought back to the times when my dad hugged me, kissed me, gave me piggy-back rides, rides on his shoulders and horsey rides. I remembered all of my dad's touches with fondness. He was a very loving father, and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me. So I told the man, yes, my dad touches me all over. And then the man started asking me if sometimes those were bad touches, and I said, no they weren't, but he kept asking me over and over again, and I would say, no, I don't think my dad touched me in a bad way. He would say, "No, that's not it," and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said. And then after a while, he said I could go. I believe I was there for two hours.

According to Sarah, later that night S.G. told her that when Camreta asked her what bad things her father had done, she initially told him "nothing," but that Camreta kept asking questions and confused her. S.G. stated that she was "scared" when Friesen left her with Camreta and Alford, although she did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. With respect to Alford's presence, S.G. stated that she is generally comfortable

around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him.

. . . .

On March 6, 2003, Nimrod was indicted on six counts of felony sexual assault of F.S. and S.G.

. . . .

Nimrod eventually stood trial on charges of sexual abuse but the jury did not reach a verdict. Faced with a retrial, Nimrod accepted an Alford plea with respect to the alleged abuse of F.S. The charges concerning S.G. were dismissed.

. . . .

Sarah filed this action on behalf of herself, S.G., and K.G. under 42 U.S.C. section 1983 alleging that: (1) Camreta and Alford's in-school seizure of S.G. without a warrant, parental consent, probable cause, or exigent circumstances violated the Fourth Amendment; (2) Camreta violated the Greenes' rights under the Fourteenth Amendment by intentionally presenting false information to the Juvenile Court to obtain an order to remove the children from Sarah's custody and by removing the children from Sarah's care; and (3) Camreta and the KIDS Center violated the Greenes' Fourteenth Amendment rights by unreasonably interfering with Sarah's right to be with her children and with the children's right to have their mother present during an intrusive medical examination.

The district court granted summary judgment to all defendants. As to the in-school interrogation, the court held that S.G. had been seized when she was taken from her classroom and interviewed by Camreta and Alford but that the seizure was "objectively reasonable under the facts and circumstances of this case." Moreover, even if the Greenes' constitutional rights had been violated, the district court held, Camreta and Alford were entitled to qualified immunity because "no reasonable school official, caseworker, or police officer would have believed [their] actions violated the Fourth Amendment."

With respect to the removal of S.G. and K.G. from Sarah's custody and Sarah's exclusion from their medical examinations, the court held that there were no due process violations because the girls were removed from Sarah's custody pursuant to a court order and Sarah was given an opportunity to be heard at the custody hearing. The court also concluded that (1) Camreta was, in any event, entitled to absolute quasi-judicial immunity regarding the removal of the girls; and (2) excluding Sarah from the examinations did not violate the Fourteenth Amendment because Sarah did not have custody at that time and the examinations conformed with Oregon statutory and administrative law.

ISSUES AND RULINGS: Viewing the factual allegations in the light most favorable to the Greene family, as the Court of Appeals must do under the applicable standard for reviewing the U.S. District Court ruling:

1) Considering the totality of the circumstances, including the fact that an obviously armed law enforcement officer investigating possible criminal activity was present at the interview, did the interview constitute a Fourth Amendment "seizure"? (ANSWER: Yes);

2) Does the "special needs" exception to the Fourth Amendment warrant requirement apply to exclude child sex abuse interviews with reported victims such as this interview (in light of the totality of the circumstances of this case)? (ANSWER: No, not in light of the involvement of a law enforcement officer in the interview, as well as the law enforcement investigative purpose of the interview);

3) Where the caseworker and law enforcement officer waited three days after receiving the initial report of possible parental child sex abuse before interviewing the child, and where they returned the child to her parents' custody after the interview, does the exigent circumstances exception to the warrant requirement apply? (ANSWER: No)

4) Are the caseworker and the law enforcement officer entitled to qualified immunity from Civil Rights Act liability for the unlawful "seizure" on the rationale that they could have reasonably, though mistakenly, believed that their conduct did not violate a clearly established constitutional right? (ANSWER: Yes)

Result: Affirmance in part and reversal in part of ruling of U.S. District Court (Oregon); the caseworker and the law enforcement officer are held qualifiedly immune related to the unlawful seizure of the child at her elementary school; the caseworker is held not immune for the subsequent actions of (1) removing the daughters from the mother's custody, and (2) excluding the mother from the medical center while the daughters underwent physical examinations; case remanded for trial on the latter two issues.

ANALYSIS:

1) Justification is required for those child interviews that constitute "seizures"

The analysis by the three-judge panel in Camreta recognizes that not all interviews of child victims will necessarily be "seizures" under the Fourth Amendment. But if the interview does constitute a seizure, then it cannot be conducted in the absence of (1) exigent or emergency circumstances, (2) consent from a person with authority to give consent, or (3) a court order authorizing the interview.

2) "Seizure" is determined under a totality of the circumstances test

Whether an interview of a child victim that involves some participation by a law enforcement officer, or is conducted at the officer's behest, constitutes a "seizure" depends on the totality of the circumstances of the interview. The Fourth Amendment test applied in a Seventh Circuit decision relied upon by the Ninth Circuit panel in Camreta in accepting the government parties' concession that a seizure of the child witness occurred is essentially the same as the test for whether a criminal suspect has been seized by law enforcement. The question is whether the interviewed child would have felt free to leave or to otherwise decline the officer's request and terminate the interview.

Many factors will determine whether an interview of a would-be child victim is a "seizure" under the Fourth Amendment analysis. For example: 1) What was the length of the interview? 2) What was the location of the interview (home, street, principal's office, counselor's office, etc.)? 3) Who initiated or triggered the interview (for instance, did the victim call police or tell someone who then called the police, or instead did the police contact the victim as part of an ongoing investigation)? 4) What were the number of interview participants and their respective roles in the interview? 5) Did the interviewers tell the child that he or she was free to leave at any time and did not have to answer their questions? 6) Was the law enforcement office in uniform and was his or her firearm visible? 7) What was the language and tone of the interviewers? 8) How aggressive or confrontational was the questioning (for example, did the interviewer(s)

repeatedly challenge any denials by the child victim)? 9) Was there any physical contact by the interviewers of the person being interviewed?

Without discussion of the various factors, the three-judge panel in Camreta concludes, as previously noted, that the interview of the child at her elementary school was a "seizure." **[LED EDITORIAL NOTE/COMMENT: The government parties conceded in the Ninth Circuit that the interview was a "seizure," so there is some question whether further review in this case could produce a different ruling on this issue.]**

3) The "special needs doctrine" does not apply here in light of the law enforcement involvement and law enforcement purposes of the interview

The Ninth Circuit panel in Camreta notes what is known as the "special needs doctrine" under the Fourth Amendment, which excludes from the Fourth Amendment restrictions some governmental activity which is essentially divorced from law enforcement investigatory purposes. The Camreta panel notes that Oregon statutes and practices and procedures (which are very similar to those in Washington) closely link social services caseworkers and law enforcement agencies in the investigation of possible child abuse. Under such an investigatory scheme, the Camreta panel appears to be saying, it will seldom be the case that a child abuse interview by a social services caseworker would ever not have law enforcement investigation as one of its purposes. Hence, it seldom be that a caseworker interview will qualify as "special needs." In any event, here the social worker and the officer were both involved in the interview, and the law enforcement investigative purpose, at least in part, of the interview was clear. Under these circumstances, the "special needs doctrine" does not apply, the Camreta panel concludes.

4) Exigent circumstances were not present in this case

Exigent or emergency circumstances permit an officer or caseworker to seize a child without a warrant or parental consent if the investigator "reasonably believes" that: 1) medical issues need to addressed immediately, or 2) the child is or will be in danger of serious harm if the interview or physical exam is not immediately completed. Here the caseworker and law enforcement officer waited three days after receiving the initial report of possible parental child sex abuse before interviewing the child. And they returned the child to her parents' custody after the interview. Under these circumstances, the Camreta panel concludes that the exigent or emergency circumstances exception to the warrant requirement does not apply.

5) In the absence of a court order or exigent circumstances, consent from a parent was required and was not obtained

Consent from school officials does not substitute for parental consent, the Camreta panel explains, so there was no valid consent to talk to the grade school child in this case.

6) Qualified immunity applies

The Camreta panel concludes that Ninth Circuit precedents were not clear on the "seizure" issue presented in this case. Therefore, the caseworker and the law enforcement officer are held entitled to qualified immunity from Civil Rights Act liability for the unlawful "seizure." They could have reasonably, though mistakenly, believed that their conduct did not violate a clearly established constitutional right. Of course, this ruling will be of no help to caseworkers and law enforcement officers in cases whose factual circumstances occur after December 10, 2009, the date of announcement of the Ninth Circuit's decision in Camreta.

LED EDITORIAL COMMENTS: Some of the following comments have been lifted from suggestions from the Washington Association of Prosecuting Attorneys. Other comments are our own best guesses. Officers and law enforcement agencies should consult their own agency legal advisors and/or local prosecutors for guidance.

1. *Court orders may be obtained for interviews of would-be child victims*

Consult your agency legal advisor and/or local prosecutor.

2. *Documentation and audio-recording will help prove that no "seizure" occurred in the interviewing of a would-be child victim*

The Ninth Circuit panel in Camreta was obviously troubled by the fact that there was no audio-recording of the interview in that case. Ideally, the interview will be audio-recorded. Officers and CPS workers should at least document in detail the circumstances of the interview. This documentation will assist in subsequent efforts to prove that under the totality of the circumstances (see non-exhaustive list of factors above in part 2 of the "analysis") the interview was not a "seizure."

3. *Consent may be obtained to interview a would-be child victim*

For a child 12 years of age or older, consent by the child is possible, though the totality of circumstances will be considered in assessing whether the child's consent was voluntary. For a child under 12 years of age, consent must be obtained from a parent or guardian; consent from a non-suspect parent will be sufficient. Written consent is always preferable for the obvious reason that it is easier to prove.

4. *Exigent circumstances may justify a "seizure" to interview a would-be child victim*

An argument that exigent circumstances exist will be more compelling if the interview is conducted with urgency and before the child returns home to either the alleged abuser or the perceived threat. Note that in Camreta, (1) the interview occurred three days after the caseworker and officer learned that the suspect in the case had been released from jail and was having contact with the children, and (2) the child was sent home after the interview.

Assume that a 10-year-old child tells a friend at school that her father has been touching her private parts every night, the friend immediately tells a teacher, and the teacher immediately reports the abuse to law enforcement and CPS. If a joint law enforcement-CPS interview with the child at the school occurs the day of receipt of the report, a solid argument could be made that exigent circumstances justified the interview without court order or parental consent.

Law enforcement officers should include language in their reports as to why the officers believe there are exigent circumstances to interview of the child without the consent of the parent. Factors to be considered include: recently obtained information that the child has been abused, current access by the suspect to the child, and new information about prior injuries or current troubling behavior by or to the child. The officer's report should also reference whether a decision was made following the interview to place the child into protective custody, and if so, why or why not.

Documentation of interviews conducted under asserted "exigent circumstances" is very important. Again, audio-recording the interview is strongly encouraged, because that best documents the interview. At a minimum, law enforcement and CPS caseworkers should document (1) identities of those present for the interview, (2) the circumstances

and physical setup of the interview, and (3) in near-verbatim fashion, the questions asked (by whom) and the responses by the child.

5. A *child's statements likely will be admitted into evidence in a criminal trial even if the interview of the child victim violates the constitution per the Camreta decision*

We do not think that the perpetrator would have standing to challenge the constitutionality of the interview in a sex crime prosecution.

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WASHINGTON STATE SUPREME COURT

"INDEPENDENT GROUNDS" RULING IN VALDEZ GOES BEYOND ARIZONA V. GANT; WASHINGTON LAW ENFORCEMENT OFFICERS ARE GENERALLY PRECLUDED BY THE WASHINGTON CONSTITUTION FROM SEARCHING VEHICLES "INCIDENT TO ARREST" ONCE THE OCCUPANT-ARRESTEE HAS BEEN SECURED; AND WHILE VALDEZ INVOLVES A VEHICLE SEARCH, THE REASONING IN THE COURT'S LEAD OPINION MIGHT BE EXTENDED TO RESTRICT SEARCHES OF PERSONS INCIDENT TO ARREST

State v. Valdez, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4985242 (2009)

Facts and Proceedings below: (Excerpted from lead opinion for Supreme Court authored by Justice Sanders)

> On May 10, 2005, [Officer A] stopped a minivan with only one working headlight as it was leaving an apartment complex. Jesus David Buelna Valdez was driving the minivan, and Reyes Rios Ruiz was a passenger. After Valdez presented [Officer A] with identification, [the officer] conducted a records search and learned Valdez had an outstanding arrest warrant.
>
> [Officer B] arrived to assist [Officer A], whereupon [Officer A] arrested Valdez, handcuffed him, and placed him in the backseat of his patrol car. [Officer A] then asked Ruiz to exit the minivan and began to search it. [Officers A and B] found no evidence of contraband but noticed several loose panels under the dashboard. [Officer A] called for a canine unit to assist with the search of the minivan. [Officer C and his dog] responded.
>
> Based upon further inspection with the canine unit, [Officer C] noticed a loose molded cup holder. [Officer C] removed the cup holder and insulation and found two packages of methamphetamine weighing approximately two pounds. The passenger, Ruiz, was then also arrested.
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> Valdez and Ruiz were both interrogated at the police station. Both were advised of their Miranda rights and agreed to answer questions. Each then admitted ownership of the methamphetamine and the intent to sell it in Vancouver. These confessions are not challenged.
>
> The defendants moved to suppress the methamphetamine found during the warrantless search of the minivan. The trial court denied this motion, reasoning the search was properly within the scope of a search incident to arrest and the evidence was admissible under State v. Stroud, 106 Wn.2d 144 (1986). After a stipulated facts trial, the defendants were found guilty of possession of a controlled substance, methamphetamine hydrochloride, with intent to deliver.

> The defendants appealed the trial court's denial of their motion to suppress the methamphetamine. The Court of Appeals, Division Two reversed and remanded with instructions to suppress. State v. Valdez, 137 Wn. App. 280 (Div. II, 2007) **April 07 LED:08**. The Court of Appeals divided the events into an initial search and the subsequent canine unit search. The first was upheld as it was contemporaneous with Valdez's arrest and thus was a search incident to arrest; the second was held to be an impermissible warrantless search because too much time had passed between Valdez's arrest and the arrival of the canine unit, so the second search was no longer contemporaneous and could not be justified based upon a threat to officer safety or the preservation of evidence. The court also held Ruiz's confession, standing alone, was insufficient to prove his criminal charge under our corpus delecti rule.

ISSUES AND RULINGS: 1) Did the search of the vehicle incident to arrest violate the Fourth Amendment? (ANSWER: Yes, per Arizona v. Gant, because there was no reason to believe that evidence of the "crime of arrest" – evidence relating to the underlying crime of the arrest warrant – would be found in the vehicle);

2) Did the vehicle search incident to arrest violate article I, section 7 of the Washington constitution? (ANSWER: Yes, because the arrestees were secured in a patrol car)

Result: State loses; affirmance of Court of Appeals decision that reversed the Clark County Superior Court convictions of Jesus David Buelna Valdez and Reyes Rios Ruiz for possession of a large quantity of methamphetamine hydrochloride with intent to deliver.

ANALYSIS IN LEAD OPINION AUTHORED BY JUSTICE SANDERS:

1) Fourth Amendment

The lead opinion by Justice Sanders addresses at length the history leading up to, and the U.S. Supreme Court decision in, Arizona v. Gant, 129 S.Ct. 1710 (2009) **June 09 LED:13**. In Gant, the U.S. Supreme Court changed the course it had been following for the previous three decades and created a more restrictive Fourth Amendment rule for the trigger to vehicle searches incident to custodial arrest of a vehicle occupant (some of the U.S. Supreme Court justices claimed unconvincingly in Gant that they were not changing direction and had simply been previously misunderstood by virtually everyone in the United States). We summarized that new rule of Gant as follows in the June 2009 **LED** at page 21:

> After officers have made a custodial arrest of a motor vehicle occupant - including searching the arrestee's person – and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may **automatically** search the vehicle – without a search warrant and without need for justification under any other exception to the search warrant requirement – the passenger compartment of the vehicle and any unlocked containers in that compartment **if and only if** A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.

Justice Sanders' lead opinion in Valdez asserts that there is a special Fourth Amendment-based reason that, per Gant, permits, even after an arrestee has been secured, a warrantless search of a vehicle if there is reason to believe that the vehicle contains evidence of the crime of arrest. That reason, the Sanders opinion asserts, is that under Fourth Amendment case law, there is a reduced expectation of privacy in a vehicle, and that right of privacy is outweighed by law enforcement needs that are heightened by a vehicle's mobility. Justice Sanders opinion implies that there is no such reduced expectation of privacy for vehicles under article I, section 7 of the Washington constitution.

2) Article I, section 7 of Washington constitution

Justice Sanders' lead opinion in Valdez next addresses at length the history leading up to, and the Washington Supreme Court decision in, State v. Stroud, 106 Wn.2d 144 (1986). In Stroud, the Washington Supreme Court generally adopted under article I, section 7 of the Washington constitution what was reasonably believed at the time by virtually everyone to be the Fourth Amendment rule for the trigger to authority to conduct warrantless vehicle searches incident to arrest. Justice Sanders then criticizes as follows the Stroud opinion's balancing of privacy interests and reasonable law enforcement needs, an exercise that his opinion declares is not appropriate under article I, section 7:

> To the extent Stroud relied on or was persuaded by its interpretation of [the U.S. Supreme Court decision in N.Y. v. Belton, 453 U.S. 454 (1981)] that interpretation failed to adequately account for the distinction between the language of the Fourth Amendment and article I, section 7. The Stroud court balanced privacy interests guaranteed under article I, section 7 with concerns for law enforcement ease and expediency. It is not the place of the judiciary, however, to weigh constitutional liberties against arguments of public interest or State expediency. The search incident to arrest exception, born of the common law, arises from the necessity to provide for officer safety and the preservation of evidence of the crime of arrest, and the application and scope of that exception must be so grounded and so limited. Stroud's balancing of interests is inappropriate under article I, section 7.

[Some citations omitted]

Sanders' lead opinion in Valdez explains as follows the Washington Supreme Court's change of course to reject Stroud and its standard for vehicle searches:

> Although Stroud focused on the *scope* of the search incident to arrest exception in the automobile context, the language of Stroud also incorrectly broadened the circumstances under which the exception was applicable, ("During the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence."), ("[The search is] permissible due to the lawful arrests of the occupants. The fact that the defendants were in custody in the patrol car during the search is immaterial."). However, after an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception**. Stroud's expansive interpretation to the contrary was influenced by an improperly broad**

interpretation of Belton . . . and that portion of Stroud's holding is overruled.

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained. **A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.**

[Some citations omitted; bolding added]

3) Application of federal and state constitutions

Finally, the Sanders opinion concludes by explaining as follows how the Fourth Amendment, on the one hand, and article I, section 7, on the other hand, apply to the facts of the Valdez case:

Here, at the time of the search the arrestee was handcuffed and secured in the backseat of a patrol car. The arrestee no longer had access to any portion of his vehicle. The officers' search of his vehicle was therefore unconstitutional under both the Fourth Amendment and article I, section 7.

Under the Fourth Amendment the arrestee was secured and not within reaching distance of the passenger compartment at the time of the search so neither officer safety nor preservation of evidence of the crime of arrest warranted the search. Furthermore the arrestee was arrested based upon an outstanding arrest warrant; the State has not shown that it was reasonable to believe that evidence relevant to the underlying crime might be found in the vehicle.

Under article I, section 7 the search was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed. The arrestee had no access to his vehicle at the time of the search.

The search violated both the Fourth Amendment and article I, section 7. The evidence gathered during that search is therefore inadmissible. . . . Evidence of the methamphetamine found underneath the loose, molded cup holder is therefore suppressed.

Ruiz also challenged his conviction on lack of evidence grounds. The Court of Appeals properly determined his conviction, when the methamphetamine was suppressed, was based solely on his confession. "A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime." . . . Such is the case for both Ruiz and Valdez. Their convictions are based solely on confessions and so must be reversed for lack of evidence.

[Some citations omitted]

Justice Alexander's concurrence: Justice Alexander writes a concurring opinion that is joined by no one. He suggests that there is no need for the Court to address the Fourth Amendment when a case is resolved under article I, section 7.

Justice Alexander's concurrence also vaguely and conclusorily asserts that the search went outside the vehicle passenger area (Justice Alexander offers no explanation for his latter thought. Our guess is that his thought is directed at the officers' removal of the loose, molded cup holder in the vehicle passenger area to look behind it. But that search technique seems supportable under State v. Boursaw, 94 Wn. App. 629 (Div. I, 1999) **May 99 LED:07** allowing officers to remove an easily removable ashtray to search behind it during a vehicle search incident to arrest, because this did not constitute a dismantling of the interior of the vehicle).

Justice James Johnson's concurrence: Justice James Johnson also writes a concurring opinion that is joined by no one. He asserts that the Washington Supreme Court should have decided the Valdez case exclusively under the Fourth Amendment, thus avoiding addressing issues under the Washington constitution.

LED EDITORIAL COMMENTS:

As always, we caution that our comments express our personal views. We urge Washington law enforcement agencies to consult their own agency legal advisors and local prosecutors with any questions regarding Valdez and other cases we digest in the LED.

1) ***What is the "new" (using that word loosely) independent grounds rule under article I, section 7 for the trigger to law enforcement authority to conduct a vehicle search incident to arrest?***

Answer: We set forth above in part 1 of the Valdez "analysis" what we had summarized in the June 2009 LED as the Fourth Amendment rule of Arizona v. Gant for law enforcement authority to conduct vehicles searches incident to custodial arrests of vehicle occupants. Using "strikeout" for deletions of language and underlining for new language of the rule to show how the Valdez decision appears to have shrunk Washington officers' authority, we now summarize the Washington rule:

> **After officers have made a custodial arrest of a motor vehicle occupant – including searching the arrestee's person – and have secured the arrestee in handcuffs in a patrol car, and while the vehicle is still at the scene of the arrest, they may automatically search the vehicle – without a search warrant and without need for justification under any other exception to the search warrant requirement – NEVER.**
>
> ~~**the passenger compartment of the vehicle and any unlocked containers in that compartment if and only if A) they proceed without unreasonable delay; and B) they have a reasonable belief that the passenger compartment contains evidence of: 1) the crime(s) for which the officers originally decided to make an arrest, or (2) any other crime(s) for which the officers have developed probable cause to arrest before beginning the search of the passenger compartment.**~~

It is probably no consolation to any current Washington law enforcement officers, but the Valdez Court's "independent grounds" ruling regarding MV search incident under article I, section 7 in Valdez is not new. Essentially the same "independent grounds" rule was created by the Washington Supreme Court in State v. Ringer, 100 Wn.2d 686 (1983). That search incident ruling in Ringer (along with the Court's "independent grounds"

elimination of the PC-car-search rule of the "Carroll Doctrine") brought an immediate hue and cry from many Washingtonians who saw Ringer as undermining law and order. Included in the response was an unsuccessful initiative campaign involving the combined efforts of the AGO, prosecutors and law enforcement interests seeking an amendment to the Washington constitution to prevent any further personal-values-driven "independent grounds" rulings (the campaign was inspired by similar constitutional amendment campaigns that had succeeded in limiting "independent grounds" rulings in California and Florida).

While the initiative campaign that was sparked by Ringer did not, unfortunately, succeed, the campaign may have gained the attention of the Washington Supreme Court. Less than three years after deciding Ringer, the Washington Supreme Court reverted back to essentially its pre-Ringer MV search incident rule in State v. Stroud, 106 Wn.2d 144 (1986) (though not then or thereafter restoring the PC-car-search rule of the "Carroll Doctrine"). Whether there will again be a hue and cry by Washingtonians – and whether the Washington Supreme Court will re-re-revise its interpretation of article I, section 7 – remains to be seen.

2. ***What effect does the Valdez decision have upon the Washington Supreme Court's October 2009 decision in State v. Patton?***

Answer: In the December 2009 LED, we reported on the Washington Supreme Court's vehicle-search-incident ruling in State v. Patton, 167 Wn.2d 379 (2009). We said in the December 2009 LED that the Patton opinion appeared to have adopted the Fourth Amendment rule of Gant as the article I, section 7 rule. Obviously, we were wrong, and it appears to us that Valdez decision has rendered completely inoperative *Patton's* discussion of the search incident rule. We find it strange that Justice Sanders' lead opinion in Valdez does not even mention Patton.

3. ***May a passenger compartment search be conducted after securing the occupant-arrestee in some circumstances where unarrested vehicle occupants or unarrested passers-by are in the vicinity of the vehicle?***

Answer: Probably under some circumstances. U.S. Supreme Court Justice Alito's dissent in Arizona v. Gant suggested that a search of the vehicle passenger area might be justified by the presence of unsecured persons not subject to seizure (1) who had been occupants in the vehicle prior to the arrest, or (2) who were outside the vehicle but have gathered near the scene of the arrest. This seems to us to be a stretch in most cases because of the inability of the officers in most cases to state an objective basis for believing that these non-arrested persons would be likely to go into the vehicle to gain access to evidence, contraband or a weapon. But the better that officers observe and report on the objective facts that they believe support their actions, the better chance that their actions will be upheld.

Note also that if the arrestee is unsecured when the search incident of the vehicle is undertaken, then a search incident may be justified. But this approach is not only physically dangerous, but also might be attacked as pretextual. Note the following footnote in the U.S. Supreme Court's lead opinion in Gant: "*Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. Cf. 3 W. LaFave, Search and Seizure § 7.1(c), p. 525 (4th ed.2004) (hereinafter LaFave) (noting that the availability of protective measures "ensur[es] the nonexistence of circumstances in which the arrestee's 'control' of the car*

is in doubt"). But in such a case a search incident to arrest is reasonable under the Fourth Amendment."

4. *Is Valdez's lead opinion stating mere "dicta" when the opinion states that there is a general bar under article I, section 7 to a MV search incident once the arrestee is secured?*

"Dicta" is discussion in an opinion that is not necessary to support the resolution of the case. Dicta is not binding precedent. It has been suggested by some that because in Valdez there was no evidence of the crime of arrest (on an arrest warrant), one can treat as dicta the discussion in the case that would make irrelevant facts relating to the likelihood of the presence or absence of the crime of arrest once the arrestee is secured in a patrol car.

We hope that in the near future some prosecutors will select some cases with good facts and make that argument. But we think the "dicta" argument is unlikely to succeed with the current makeup of the Washington Supreme Court. Our guess is that the Washington Supreme Court will respond to the "dicta" argument with an assertion that the discussion was central to the "independent grounds" ruling regarding the car search.

5. Does dicta in *Valdez foreshadow an "independent grounds" limit on the scope of searches of persons incident to arrest where there is no basis for believing the search might discover evidence of the crime of arrest?*

Answer: We hope not. Justice Sanders lead opinion contains obvious dicta (in light of the fact that Valdez did not involve an issue regarding a search of the person) that emphasizes the idea that any search incident to arrest – whether of car or of a person – has two purposes: 1) search for weapons, and 2) search for evidence of the crime of arrest. There is some language in an early U.S. Supreme Court decision on search incident that might appear to limit the search for evidence exclusively to evidence related to the crime of arrest. But subsequent U.S. Supreme Court opinions, as well as opinions from the Washington courts and most other courts throughout the U.S., have not suggested that the evidence search is limited to only a look for evidence of the crime of arrest.

We see a likely new argument that prosecutors will encounter based on the evidence-of-the-crime-of-arrest discussion that Justice Sanders has sprinkled throughout Valdez's lead opinion. That is the argument that the officer's search of, for instance, a cigarette pack during a search of the person incident to arrest on a failure-to appear warrant exceeded the permissible scope because it was not reasonable to believe: 1) that the cigarette pack contained a weapon (see State v. Horton, 136 Wn. App. 29 (Div. III, 2006) Jan 07 LED:02, restricting the scope of a frisk); and 2) that the arrest on such a warrant does not support any kind of search for evidence or contraband.

If such an argument succeeds in our appellate courts, we would guess that more folks are going to be booked into jail and more thoroughly searched there.

5. *Does dicta in Valdez undermine the state and federal court interpretations that allow, in non-vehicle, search-incident circumstances a search of the "lunge area" based on the location of the arrestee at the point when the arrest process starts?*

Answer: Again, we hope not. The Washington Supreme Court held in State v. Smith, 119 Wn.2d 675 (1992) Dec 92 LED:04 that the scope of a search of a person incident to arrest is generally determined by the location of the arrestee at the time that the arrest process began. Justice Alito's dissent criticizing the majority opinion in Arizona v. Gant

suggested that this approach might be contrary to the principles underlying Gant, but we think that the Gant and Valdez are focused on the overbreadth of search-incident authority where vehicles are involved, and that the Court will not use the same rationale to limit the scope of searches of the person incident to arrest.

6. *Does Valdez undermine case law that authorizes officers to frisk/sweep the interior of a vehicle, prior to making an arrest, based on reasonable and articulable suspicion that a weapon is present in the vehicle and may be used by the arrestee or someone else against the officer?*

Answer: No. The U.S. Supreme Court majority opinion in Gant opinion expressly explained that the vehicle frisk rule of Michigan v. Long, 463 U.S. 1032 (1983) is not affected by the decision in Gant. While Valdez does not address this point, we do not think that Valdez undermines the car frisk authority of Washington officers.

7. *If Washington officers seize evidence in a search incident that violates article I, section 7 under Valdez but not the Fourth Amendment under Gant, will the evidence be admissible in a federal court criminal prosecution?*

Answer: Yes.

FIELD (OR "SOCIAL") CONTACT HELD TO HAVE DEVELOPED INTO AN UNLAWFUL SEIZURE WITHOUT REASONABLE SUSPICION AT THE POINT DURING THE FIELD CONTACT WHEN THE OFFICER REQUESTED CONSENT TO FRISK

State v. Harrington, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4681239 (2009)

Facts and Proceedings below: (Excerpted from Supreme Court opinion authored by Justice Sanders)

> At roughly 11:00 p.m. on August 13, 2005, [law enforcement officer A] was driving his marked patrol car north on Jadwin Avenue in Richland. [Officer A] noticed Harrington walking south along the sidewalk. [Officer A] made a U-turn, drove south past Harrington, and pulled into a driveway. The officer did not activate his lights or siren. [Officer A] exited his patrol car and approached Harrington who was then walking toward the officer. [Officer A] testified he "contact[ed]" Harrington because "[t]hat area, late at night, a gentleman walking – social contact. See what he was up to, just to talk."
>
> When close enough, [Officer A] asked, "Hey, can I talk to you" or "Mind if I talk to you for a minute?" Harrington replied either "Yeah" or "Yes." The two men began a conversation, standing approximately five feet apart. [Officer A] positioned himself off the sidewalk on the grass. [Officer A] testified Harrington's path was not obstructed by either [Officer A] or the patrol car. [Officer A] asked Harrington where he was coming from. Harrington responded he was coming from his sister's house. Asked where his sister lived, Harrington replied he did not know. [Officer A] considered that lack of knowledge "a little suspicious." [Officer A] testified Harrington was acting "quite nervous, pretty fidgety" throughout the encounter. [Officer A] also noticed bulges in Harrington's pockets. Early in the encounter Harrington put his hands into his pockets, prompting [Officer A] to ask Harrington to remove his hands. Harrington took his hands out when initially asked but repeatedly put his hands back into his pockets before quickly removing them again. Their conversation lasted between two and five minutes.

> During that time frame [Officer B] coincidentally drove south past the encounter. After noticing an officer speaking alone with an individual, [Officer B] made a U-turn and parked his marked patrol car in the northbound lane of traffic, approximately 10 to 30 feet from Harrington and [Officer A]. [Officer B] exited his car and stood seven or eight feet from Harrington. [Officer B] did not speak to either Harrington or [Officer A]. When testifying [Officer B] could not recall whether he activated any pattern of lights when he made the U-turn or when he parked his car in the lane.
>
> After [Officer B] appeared [Officer A] asked if he could pat down Harrington for officer safety. [Officer A] told Harrington he was not under arrest at that moment. Harrington answered, "Yeah." During the pat down [Officer B] felt a hard, cylindrical object in Harrington's front right pocket. [Officer A] asked what it was, to which Harrington responded, "My glass." Asked for clarification, Harrington added, "My meth pipe." [Officer A] then told Harrington he was under arrest. Incident to arrest the officers searched Harrington and discovered a pipe and baggie. Both contained methamphetamine.
>
> Harrington agreed to a bench trial on stipulated facts. Defense counsel moved to suppress the evidence based on illegal seizure. After hearing testimony from both [Officers A and B], the trial court denied Harrington's suppression motion. The Benton County Superior Court found Harrington guilty of unlawful possession of a controlled substance – methamphetamine. Harrington appealed to the Court of Appeals, which affirmed the conviction by a two-to-one vote, over a forceful dissent by Judge Dennis J. Sweeney. State v. Harrington, 144 Wn. App. 558 (Div. III, 2008) **July 08 LED:17**.

ISSUE AND RULING: Under article I, section 7 of the Washington constitution, considering all of the circumstances, was Harrington unlawfully seized without reasonable suspicion at the point when the officer asked for Harrington's consent to a frisk? (ANSWER: Yes, rules a unanimous Supreme Court in an opinion authored by Justice Richard Sanders)

Result: Reversal of Court of Appeals decision (see **July 08 LED:17**) that affirmed the Benton County Superior Court conviction of Dustin Warren Harrington for unlawful possession of methamphetamine.

ANALYSIS: (Excerpted from Supreme Court opinion authored by Justice Sanders)

> Article I, section 7 of our state constitution grants greater protection to individual privacy rights than the Fourth Amendment. . . . The text focuses on disturbance of private affairs, which casts a wider net than the Fourth Amendment's protection against unreasonable search and seizure. Because searches and seizures incontrovertibly disturb private affairs, article I, section 7 envelops search and seizure.
>
> Pursuant to article I, section 7 seizure occurs when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." The standard is "a purely objective one, looking to the actions of the law enforcement officer. . . ." State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**. The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. An encounter between a citizen and the police is consensual if a reasonable person under the circumstances would feel free to walk away.

In Young we embraced a nonexclusive list of police actions likely resulting in seizure: "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" "'In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.'" Young. Harrington bears the burden of proving a seizure occurred in violation of article I, section 7. Young.

. . .

a. Social contact

Washington courts have not set in stone a definition for so-called social contact. It occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying "hello" to a stranger on the street and, at the other end of the spectrum, an investigative detention (i.e., Terry stop). See generally Terry v. Ohio, 392 U.S. 1 (1968). The phrase's plain meaning seems somewhat misplaced. "Social contact" suggests idle conversation about, presumably, the weather or last night's ball game – trivial niceties that have no likelihood of triggering an officer's suspicion of criminality. The term "social contact" does not suggest an investigative component.

However its application in the field – and in this court – appears different. For example we have categorized interactions where officers ask for an individual's identification as [a] social contact. "Article I, section 7 does not forbid social contacts between police and citizens: '[A] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.'" Young. ("[N]ot every public street encounter between a citizen and the police rises to the stature of a seizure. Law enforcement officers do not 'seize' a person by merely approaching that individual on the street or in another public place, or by engaging him in conversation."). In Young we found effective law enforcement techniques not only require passive police observation, but also necessitate interaction with citizens on the streets.

Here [Officer A] described his initial interaction with Harrington as a social contact. [Officer A] did not activate his police emergency lights or siren. His patrol car was not in sight. [Officer A] approached Harrington on foot and asked whether he could talk to Harrington. Harrington consented to speak with the officer without duress or compulsion. During the conversation [Officer A] allowed Harrington freedom to use the sidewalk. [Officer A] did not otherwise block Harrington's egress from the site. Under existing law [Officer A's] initial actions did not rise to the level of seizure. Analyzing this encounter under Washington's purely objective standard, a reasonable person at the beginning of the conversation would not have thought [Officer A] restrained that person's freedom of movement. [*Court's footnote: But see a recent empirical study published by Northwestern University Law School's Journal of Criminal Law and Criminology. David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment's Seizure Standard, 99 J. Crim. L. & Criminology 51 (2009). Noting "people feel compelled to comply with authority figures," . . . the study of 406 respondents*

found "most people would not feel free to leave when they are questioned by a police officer on the street . . . ."]

Subsequent events quickly dispelled the social contact, however, and escalated the encounter to a seizure.

b. Arrival of second police officer

In Young we embraced a nonexclusive list of police actions likely resulting in seizure, including "'the threatening presence of several officers.'" While we have never squarely addressed the number of officers necessary to constitute a threatening presence, . . . other jurisdictions have found the factor difficult to meet in circumstances similar to Harrington's. . . . [Discussing cases]

[Officer B] arrived a few minutes after the initial contact. He did not communicate with either Harrington or [Officer A]. Instead [Officer B] stood seven or eight feet away from the duo. [Officer B] was the only other officer to arrive. Harrington undoubtedly noted [Officer B's] presence. A second officer's sudden arrival at the scene would cause a reasonable person to think twice about the turn of events and, for this reason, [Officer B's] presence contributed to the eventual seizure of Harrington.

c. Request to remove hands from pockets

The progressive intrusion into Harrington's privacy snowballed quickly after [Officer B's] arrival. Lower courts in Washington have found an officer's request to keep hands out of one's pockets does not independently rise to the level of a seizure. See State v. Nettles, 70 Wn. App. 706 (Div. I, 1993) **Nov 93 LED:09**. The Nettles court found that asking a person to remove his hands from his pockets was no more intrusive than asking for identification. Elsewhere, directing an individual to merely remove hands from pockets has been held to fall short of a seizure. [Discussing cases from other jurisdictions]

Nonetheless asking a person to perform an act such as removing hands from pockets adds to the officer's progressive intrusion and moves the interaction further from the ambit of valid social contact, particularly if the officer uses a tone of voice not customary in social interactions. . . . [Officer A] concedes he asked Harrington to remove his hands from his pockets in order "to control Mr. Harrington's actions."

d. Request to frisk

A nonconsensual "protective frisk for weapons" is warranted when a "reasonable safety concern exists . . . when an officer can point to 'specific and articulable facts' which create an objectively reasonable belief that a suspect is 'armed and presently dangerous.'" State v. Collins, 121 Wn.2d 168 (1993) **July 93 LED:07**. The officer need not be absolutely certain the individual is armed, only that a reasonably prudent person in the same circumstances would be warranted that their safety, or that of others, was in danger. In State v. Belieu, 112 Wn.2d 587 (1989), we articulated the principle differently: "[C]ourts are reluctant to substitute their judgment for that of police officers in the field. 'A founded suspicion is all that is necessary, some basis from which the court can determine

that the detention was not arbitrary or harassing.'" A nonconsensual investigative detention is a seizure, albeit a legal intrusion if proper safeguards are met.

The reasoning in State v. Soto-Garcia, 68 Wn. App. 20 (Div. II, 1992) **March 93 LED:09**, . . . persuades us that a series of police actions may meet constitutional muster when each action is viewed individually, but may nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively. In Soto-Garcia, [a police officer] performed a social contact with Marcelo Soto-Garcia as the latter walked out of an alley. Soto-Garcia approached [the officer's] patrol car when the officer pulled to the side of the road. [The officer] asked Soto-Garcia where he was coming from and where he was going. [The officer] asked for Soto-Garcia's name, in response to which Soto-Garcia produced identification. [The officer] ran identification and warrant checks in Soto-Garcia's presence. When the checks came back clean, [the officer] asked if Soto-Garcia had any cocaine on his person. Soto-Garcia denied having cocaine. [The officer] then asked if he could search Soto-Garcia, who replied, "'Sure, go ahead.'" [The officer] reached into Soto-Garcia's shirt pocket and discovered cocaine.

The Soto-Garcia court held [the officer's] combined acts aggregated to seize Soto-Garcia. "The atmosphere created by [the officer's] progressive intrusion into Soto-Garcia's privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter." The court then inquired whether Soto-Garcia's subsequent consent to search was valid in light of the prior illegal seizure, answering in the negative. "Soto-Garcia's consent to the search was obtained through exploitation of his prior illegal seizure." Accordingly the court found suppression of the cocaine proper.

Similar to Soto-Garcia, Harrington endured a progressive intrusion at the hands of [Officer A]. [The Soto-Garcia officer's] progressive intrusion included an inquiry about Soto-Garcia's identification, warrant check, direct question about drug possession, and request to search – all of which, combined, formed a seizure. The independent elements of Harrington's seizure are different, but the effect is the same. Before [Officer A's] request to search, he did not ask for Harrington's name or address, did not conduct a warrant check, and did not ask if Harrington carried drugs. Instead [Officer A] initiated contact with Harrington on a dark street. He asked questions about Harrington's activities and travel that evening and found Harrington's answers suspicious. A second officer arrived at the scene and stood nearby. [Officer A] asked Harrington to remove his hands from his pockets to control Harrington's actions. Then [Officer A] asked to frisk, without any "'specific and articulable facts'" that would create an objectively reasonable belief that Harrington was "'armed and presently dangerous.'" *[Court's footnote: Harrington's bulgy clothing, inability to recall his sister's address, and putting his hands in his pockets do not amount to specific and articulable facts creating an objectively reasonable belief that Harrington was armed and presently dangerous.]* The facts in both Soto-Garcia and this case create an atmosphere of police intrusion, culminating in a request to frisk. **[LED EDITORIAL NOTE: In truth, there was no request to frisk in Soto-Garcia; rather, the officer in Soto-Garcia requested consent to search for cocaine. See LED EDITORIAL COMMENT BELOW.]**

> Requesting to frisk is inconsistent with a mere social contact. If [Officer A] felt jittery about the bulges in Harrington's pockets, he should have terminated the encounter – which [Officer A] initiated – and walked back to his patrol car. Instead [Officer A] requested a frisk.
>
> When [Officer A] requested a frisk, the officers' series of actions matured into a progressive intrusion substantial enough to seize Harrington. A reasonable person would not have felt free to leave due to the officers' display of authority.
>
> We note this progressive intrusion, culminating in seizure, runs afoul of the language, purpose, and protections of article I, section 7. Our constitution protects against disturbance of private affairs – a broad concept that encapsulates searches and seizures. Article I, section 7 demands a different approach than does the Fourth Amendment; we look for the forest amongst the trees. As Judge Sweeney wrote, "We do a disservice to the public and to police by moving the so-called 'social contact' into just another form of seizure, albeit without any cause or suspicion of crime or danger to the public or the police." Harrington, 144 Wn. App. at 564 (Sweeney, J., dissenting).
>
> Because Harrington's consent to the search was obtained through exploitation of a prior illegal seizure, suppression of the evidence is required.

[Some citations and footnotes omitted]

LED EDITORIAL COMMENTS: 1. WHAT IS AN OFFICER TO DO? The Harrington opinion is troubling because it shows a lack of understanding of the dilemma of patrol officers. The opinion is not realistic in its apparent assumptions (1) that a patrol officer can just ignore or watch from a distance all pedestrian civilians who are out late at night, and (2) that an officer who does choose to contact such civilians should just walk away if the civilian does not comply with the officer's request that the person keep his hands out of his pockets. We would think that, rather than turning his or her back on the civilian, the patrol officer would generally, for safety reasons, want to instead attempt to induce the civilian to voluntarily move along. While "move along" orders are generally not authorized or enforceable under the Fourth Amendment, encouraging the civilian in that direction seems the most reasonable approach in light of the Harrington ruling.

The Harrington opinion also seems to suggest that the officer should have first asked for the civilian's name and address, and then conducted a warrant check and asked about drugs. We do not see how that affects the constitutional analysis of whether the request for consent to frisk was a "seizure." But we do appreciate what appears to be the Harrington opinion's view that such inquiries in field contacts do not transform the contacts into seizures.

2. THE CIRCUMSTANCES IN THE SOTO-GARCIA CASE WERE MUCH DIFFERENT FROM THOSE IN HARRINGTON: The Harrington opinion glosses over the major difference between the facts in Soto-Garcia and the facts in Harrington. The officer in Soto-Garcia requested consent to search for cocaine, not consent to frisk for weapons. But the Supreme Court did equate the two types of consent requests, and officers will need to deal with that. We think that a law enforcement officer's request for consent to conduct either a search or frisk during a field contact will not be deemed to be a "seizure" if the officer first (1) advises the civilian that he or she need not talk to the officer and is free to

go on his or her way, and (2) gives Ferrier warnings (advising of right to refuse, right to restrict scope, and right to retract at any time) in asking for the consent.

RCW 46.63.030: WHERE THE INFRACTION OF SECOND DEGREE NEGLIGENT DRIVING DID NOT OCCUR IN LAW ENFORCEMENT OFFICER'S PRESENCE, OFFICER COULD NOT LAWFULLY ISSUE A CITATION FOR THAT INFRACTION

State v. Magee, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350254 (2009)

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

> On April 9, 2005, the state patrol dispatched a trooper to State Route (SR) 512 after receiving reports from other drivers that a vehicle was traveling the wrong direction on the highway. When the trooper arrived, she found Magee parked facing the wrong direction on the shoulder of the SR 512 on-ramp, nose to nose with another vehicle. Magee explained that he had been called by a friend whose car had broken down and that he was there to help jump-start the car. In order to more easily facilitate the jump-start, Magee told the trooper that he had turned his car around and pulled in front of his friend's car on the shoulder. There is some dispute, and the record is unclear, as to exactly how Magee maneuvered his car and whether he backed it down the on-ramp or turned it around on the shoulder. But Magee contends he never traveled the wrong direction on the traveled portion of the road. Although the trooper never actually saw Magee driving, she concluded that Magee must have driven against traffic in order to reach his position and issued him a notice of infraction for negligent driving in the second degree. RCW 46.61.525.
>
> Magee contested the infraction in district court. At the hearing, the trooper admitted she had not witnessed Magee's driving. The district court judge nevertheless found that Magee committed negligent driving in the second degree. The trial judge observed that unless Magee's vehicle was airlifted into position, he must have committed the offense. The judgment was affirmed by the superior court on RALJ appeal. The Court of Appeals also affirmed.

ISSUE AND RULING:

RCW 46.63.030(1) authorizes a Washington law enforcement officer to issue a citation for a traffic infraction under the following circumstances:

> (a) When the infraction is committed in the officer's presence;
>
> (b) When the officer is acting upon the request of a law enforcement officer in whose presence the traffic infraction was committed;
>
> (c) If an officer investigating at the scene of a motor vehicle accident has reasonable cause to believe that the driver of a motor vehicle involved in the accident committed a traffic infraction;
>
> (d) When the infraction is detected through the use of a photo enforcement system under RCW 46.63.160; or
>
> (e) When the infraction is detected through the use of an automated traffic safety camera under RCW 46.63.170.

Does RCW 46.63.030(1) support the officer's issuance of an infraction notice under the facts of this case? (ANSWER: No, rules a unanimous Washington Supreme Court)

Result: State loses; reversal of Court of Appeals decision that affirmed a Pierce County Superior Court decision that in turn affirmed a District Court judgment determining that Andrew L. Magee committed second degree negligent driving; that adjudication is ordered vacated.

ANALYSIS: (Excerpted from Supreme Court opinion)

> RCW 46.63.030 plainly requires us to conclude that an officer must either be present when the infraction occurs or meet one of the other statutory circumstances before issuing a ticket. There is no contention subsections (b) through (e) apply in this case. Instead, the State argues that the trooper actually witnessed the citable offense because the negligent behavior was "ongoing." But negligent driving in the second degree is a moving violation. For the infraction to be valid, the movement must have been made in the officer's presence. Magee's driving occurred before the trooper arrived, the trooper never saw Magee operating his vehicle negligently, and none of the other circumstances outlined in RCW 46.63.030 were present. The trooper did not have authority to issue the notice of infraction.

JUSTICE MADSEN'S CONCURRENCE:

Justice Madsen files a concurring opinion not joined by any other justice. She agrees with the analysis and result of the lead opinion authored by Justice Chambers. She points out, however, that the law allows prosecutors and city attorneys to file on infractions in circumstances, as here, where officers lack authority to cite based on RCW 46.63.030.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SUPREME COURT HOLDS THAT TO JUSTIFY A WARRANTLESS SEARCH OF A RESIDENCE IN FOLLOWING UP A PROBATION VIOLATION, A PROBATION OFFICER MUST HAVE PROBABLE CAUSE THAT THE VIOLATOR RESIDES THERE; COURT ALSO REJECTS THE STATE'S ARGUMENT THAT THE WASHINGTON CONSTITUTION CONTAINS AN INEVITABLE DISCOVERY EXCEPTION TO ITS EXCLUSIONARY RULE – In State v. Winterstein, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 4350257 (2009), the Washington Supreme Court rules that: 1) a probation officer must have probable cause to believe that a probationer resides at a particular residence before searching that residence based on reasonable suspicion of a probation violation; and 2) the inevitable discovery exception to the Exclusionary Rule applicable under the Fourth Amendment does not apply under article I, section 7 of the Washington constitution. The lead opinion authored by Justice Debra Stephens remands the case to the superior court for a new suppression hearing to determine if the probation officers and law enforcement officers involved in the residential entry in this case had probable cause to believe that probationer Winterstein resided at the residence that they searched in relation to his suspected probation violation.

Justice James Johnson authors a concurring opinion that is joined by Justices Fairhurst and Owens. His concurrence agrees with the result of remanding the case for a new suppression hearing. The concurring opinion: 1) asserts that, in light of the evidence produced in the previous suppression hearing, the superior court should have no difficulty concluding that the officers had probable cause to believe that the residence entered was Winterstein's then-current residence; and 2) argues that the lead opinion's discussion of the "inevitable discovery" exception to the Exclusionary Rule is "dicta" (i.e., discussion not necessary to resolve the

Winterstein case and hence not binding precedent), and therefore that the discussion does not resolve this "independent grounds" question.

The lead opinion by Justice Stephens, however, directly responds to Justice James Johnson's assertion that the lead opinion's discussion of the inevitable discovery exception is only dicta. Her opinion asserts that the discussion of the inevitable discovery exception to exclusion is necessary because the case is being remanded to the superior court for further proceedings in which the inevitable discovery theory of the State would otherwise be raised.

Result: Reversal of Cowlitz County Superior Court conviction of Terry Lee Winterstein for unlawful manufacture of methamphetamine; case remanded for new suppression hearing.

LED EDITORIAL COMMENTS:

1. PROBABLE CAUSE REQUIREMENTS FOR RESIDENCE SEARCHES IN PROBATION VIOLATION INVESTIGATIONS: The lead opinion in Winterstein includes a footnote stating that the defendant did not argue that the search was unlawful on the alternative ground that he was not at home at the time of the search. The footnote states that the Court is leaving that argument to another day in a case where the argument is made. We think that officers should have probable cause to believe that a probationer is at home before conducting a warrantless search of his or her residence in relation to a probation violation. We think that is the Fourth Amendment standard, and we hope that the Washington Supreme Court will not adopt an even more restrictive standard requiring actual presence of the probationer (see the discussion in our comments in a slightly different context – warrantless entry to arrest on a misdemeanor arrest warrant – in State v. Hatchie, 161 Wn.2d 390 (2007) Oct 07 LED:06).

2. INEVITABLE DISCOVERY EXCEPTION TO EXCLUSIONARY RULE: The rejection of the inevitable discovery exception to the Exclusionary Rule is troubling, for one thing because the rule will result in evidence being excluded in circumstances where it is undeniable that evidence would inevitably have been discovered For instance, if a judge in chambers signs a search warrant for a residence at the same moment that other officers make a warrantless entry (later determined to be unlawful) of the residence and see evidence in plain view, the evidence will be excluded even though it inevitably would have been seized under the warrant.

Even more troubling is one of the lead opinion's rationales for rejecting the inevitable discovery exception to exclusion. Quoting a previous Washington Supreme Court decision, the lead opinion asserts that one of the purposes of the Exclusionary Rule is to "protect[] the integrity of the judicial system by not tainting the proceedings with illegally obtained evidence." This sounds reasonable on its face, but carrying the rationale to its extreme could jeopardize the Exclusionary Rule's limitation that allows unlawfully obtained evidence to be admitted to impeach defendants, as well as the concept of "attenuation" (which limits the cause-and-effect reach of a constitutional violation), and the requirement in many circumstances that a defendant have "standing" in order to challenge admission of unlawfully obtained evidence. Also, the judicial integrity rationale seems to be a clear death knell for any application of a good faith exception to exclusion; to date the Washington Supreme Court has avoided resolving whether the "good faith" exception has any life under article I, section 7.

Also troubling is the lead opinion's assertion that a good reason not to have an inevitable discovery exception to exclusion is that such an exception is difficult to define and administer. That seems a lame excuse, particularly in light of the complicated rules that the Washington Supreme Court has created in other areas of constitutional law.

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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.supremecourtus.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 CJTC's 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 co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. LED editorial commentary and analysis of statutes and court decisions express the thinking of the writers 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's internet site at [https://fortress.wa.gov/cjtc/www/led/ledpage.html].