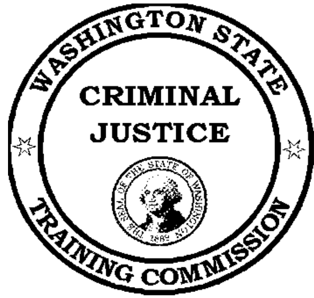

Law Enforcement Digest

February 2016

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

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UNITED STATES SUPREME COURT
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CIVIL RIGHTS LAWSUIT: OFFICER'S ACTIONS IN FIRING SIX SHOTS AT A FLEEING SUSPECT'S VEHICLE DID NOT VIOLATE CLEARLY ESTABLISHED LAW WHEN THE SUSPECT WAS INTOXICATED, DROVE AT SPEEDS BETWEEN 85-100 MPH, AND HAD THREATENED TO SHOOT LAW ENFORCEMENT OFFICERS.
Mullenix v. Luna, __ U.S. __, 136 S. Ct. 305, 193 L. Ed. 2d. (November 9, 2015).

A police officer followed Israel Leija to a drive-in restaurant to serve an arrest warrant. While Leija sat in his car, the officer informed him that he was under arrest. Leija then sped off from the restaurant and onto an interstate highway. During the pursuit, Leija twice called the police dispatcher and threatened to shoot at the police officers with a gun. "The dispatcher relayed Leija's threats, together with a report that Leija might be intoxicated, to all concerned officers."

Officers responded to the chase by pursuing Leija and setting up spike strips to disable the vehicle. One officer, tasked with setting up the spike strips, considered "another tactic: shooting at Leija's car to disable it." This officer "had not received training in this tactic and had not attempted it before[.]" The officer asked dispatch to contact his supervisor and ask if the supervisor thought shooting at the vehicle "was worth doing."

Before the supervisor responded, the officer took "a shooting position on the overpass, 20 feet above" the interstate highway where Leija was expected to drive through. "Approximately three minutes after [the officer] took up his shooting position, he spotted Leija's vehicle, with [another officer] in pursuit. As Leija approached the overpass, [the officer] fired six shots. Leija's car continued forward beneath the overpass, where it engaged the spike strip, hit the median, and rolled two and a half times. It was later determined that Leija had been killed by [the officer's] shots, four of which struck his upper body. There was no evidence that any of [the officer's] shots hit the car's radiator, hood, or engine block."

Leija's estate then sued the officer under 42 U.S.C. § 1983 (Section 1983) by claiming that the officer exercised excessive force and violated Leija's Fourth Amendment rights. The district court denied the officer's motion for summary judgment based on qualified immunity. The Fifth Circuit Court of Appeals affirmed the district court's denial, and reasoned the officer "was not entitled to qualified immunity because the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment." The United States Supreme Court disagreed.

Under Section 1983, a plaintiff may sue a police officer for violation of clearly established rights. A police officer may assert a defense of qualified immunity if: (1) the officer did not violate the plaintiff's constitutional rights; or (2) the constitutional right was not clearly established at the time of the incident. In this case, the key question "is whether the violative nature of *particular* conduct is clearly established."

The United States Supreme Court reasoned, *under the facts of this case*, that the officer's actions did not violate clearly established constitutional rights:

> In this case, [the officer] confronted a reportedly intoxicated fugitive, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to

> shoot police officers, and who was moments away from encountering an officer at [the location where spike strips were set up].
> . . .
> By the time [the officer] fired, Leija had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location.
> . . .
> [The officer] explained that he feared Leija might attempt to shoot at or run over the officers manning the spike strips. [The officer] also feared that even if Leija hit the spike strips, he might still be able to continue driving in the direction of the other officers.
> . . .
> In fact, [the officer] hoped his actions would stop the car in a manner that avoided the risks to other officers and other drivers that relying on spike strips would entail.
> . . .
> Ultimately, whatever can be said of the wisdom of [the officer's] choice, this Court's precedents do not place the conclusion that he acted unreasonably in these circumstances "beyond debate."

Based on the specific facts of this case and the lack of United States Supreme Court's precedents finding that shooting at a suspect in this situation was unreasonable, the Court found that the officer was entitled to qualified immunity.

LED EDITORIAL NOTE: In this case, the United States Supreme Court did not address whether the officer's actions actually violated Leija's Fourth Amendment rights. Rather, the Court found that there were no previous cases that held an officer shooting at a fleeing suspect (who was named in an arrest warrant, intoxicated, driving at high rates of speed, and threatening to shoot law enforcement officers) violated clearly established constitutional rights. Since there were no cases addressing this situation, the officer's actions were "not beyond debate." In other words, reasonable minds could differ on whether or not the officer's actions violated a constitutional right. As a result, the constitutional right was not clearly established and the officer was entitled to qualified immunity. As always, officers are encouraged to discuss use of force issues with their agencies' legal advisors.

***BRADY*: PROSECUTION VIOLATED *BRADY* BY FAILING TO DISCLOSE TO THE DEFENSE: (1) STATEMENTS THAT CAST DOUBT ON KEY WITNESS' CREDIBILITY; (2) KEY WITNESS' REQUESTS FOR A PLEA DEAL IN EXCHANGE FOR HIS TESTIMONY; AND (3) WITNESS' MEDICAL RECORDS.** Wearry v. Cain, __ U.S. __, 136 S. Ct. 1002 (March 7, 2016).

In 1998, Eric Walber was brutally murdered. While in prison, Sam Scott contacted the police and said Michael Wearry had committed the murder. "Scott initially reported that he had been friends with the victim; that he was at work the night of the murder; that the victim had come looking for him but had instead run into Wearry and four others; and that Wearry and the others had later confessed to shooting and driving over the victim before leaving his body on [a road]." In fact, however, Walber had not been shot and his body was found in a different location.

Scott then gave additional and materially inconsistent statements. "By the time Scott testified as the State's star witness at Wearry's trial, his story bore little resemblance to his original account." At trial, Scott testified that "he had been playing dice with Wearry and others when the victim drove past. Wearry, who had been losing, decided to rob the victim." During cross-examination, Scott admitted that he had changed his story several times.

Eric Brown was the prosecution's other primary witness. At the time of his testimony, Brown was incarcerated on other charges unrelated to the murder. "Consistent with Scott's testimony, Brown testified that on the night of the murder he had seen Wearry and others with a man who looked like the victim." During his testimony, Brown admitted "that he made a prior inconsistent statement to the police, but had recanted and agreed to testify against Wearry, not for any prosecutorial favor, but solely because his sister knew the victim's sister." In closing argument, the prosecutor told the jury "that Brown has no deal on the table and was testifying because the victim's family deserves to know."

At trial, Wearry presented an alibi defense that he was at a wedding at the time of the murder. Nonetheless, based on Scott and Brown's testimony, in addition to circumstantial evidence, the jury convicted Wearry of capital murder. He was sentenced to death.

Wearry later learned that three categories of information were not disclosed to his defense team before or during trial: (1) "police records show[ing] that two of Scott's fellow inmates had made statements that cast doubt on Scott's credibility" such as Scott's statement that he "wanted to make sure Wearry gets the needle cause he jacked me over"; (2) "contrary to the prosecution's assertions at trial, Brown had twice sought a deal to reduce his existing sentence in exchange for testifying against Wearry;" and (3) "medical records on Randy Hutchinson" that would have shown he could not have run into the street to flag down the victim as described by Scott. The United States Supreme Court found that the prosecution's failure to disclose this information to Wearry's defense team violated his due process right to exculpatory evidence.

The Fourteenth Amendment's due process clause requires the prosecution to disclose material evidence favorable to a criminal defendant. Favorable evidence includes both exculpatory and impeachment evidence. "Evidence qualifies as material when there is any reasonable likelihood it could have affected the judgment of the jury." If the undisclosed evidence would "undermine confidence" in the jury's verdict, then a court will reverse the conviction and order a new trial.

Here, the Supreme Court characterized the prosecution's case as "a house of cards, built on the jury crediting Scott's account rather than Wearry's alibi." The Supreme Court reasoned that the withheld evidence was material because:

> Scott's credibility, already impugned by his many inconsistent stories, would have been further diminished had the jury learned that Hutchinson may have been physically incapable of performing the role Scott ascribed to him, that Scott had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that Scott may have implicated Wearry to settle a personal score. Moreover, any juror who found Scott more credible in light of Brown's testimony might have thought differently had she learned that Brown may have been motivated to come forward not by his sister's relationship with the victim's sister - as the prosecution had insisted in its closing argument - but by the possibility of a reduced sentence on an existing conviction.
> . . .
> Even if the jury - armed with all of this new evidence - *could* have voted to convict Wearry, we have no confidence that it *would* have done so.

As a result, the Supreme Court reversed Wearry's conviction.

<u>LED EDITORIAL NOTE</u>: *Brady* evidence is not limited to exculpatory evidence that may show the suspect did not commit a crime. *Brady* evidence includes potential impeachment evidence that can be used by defense counsel to call a witness's credibility

into question. As shown in this case, impeachment evidence includes a witness' motivation to testify against the suspect (e.g., Scott wanted to make sure Wearry "got the needle"), or information that shows a witness could not have seen what he testified to (e.g., Scott's testimony that Hutchinson ran into the street when Hutchinson's medical records indicated that he would not have been able to run at the time). Police officers have an affirmative duty to disclose any potentially exculpatory or impeachment evidence to prosecutors. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

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WASHINGTON STATE COURT OF APPEALS

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IMPLIED CONSENT WARNINGS: BREATH TEST RESULTS INADMISSIBLE BECAUSE OFFICER DID NOT READ COMPLETE IMPLIED CONSENT WARNING.
State v. Robison, __ Wn. App. __, __ P.3d __, 2016 WL 664111 (February 16, 2016).

In June 2013, a Trooper stopped a vehicle for traffic violations. The driver, Darren J. Robison, smelled of alcohol and marijuana. During the stop, Robison admitted that he had smoked marijuana within the last couple of hours. The Trooper took Robison to a police station, read Implied Consent Warnings, and Robison submitted to a breath test. Robison's breath tests reported breath alcohol results over the legal limit.

Based on the breath test results, Robison was charged with driving under the influence (DUI). Before trial, Robison moved to suppress the breath test results by arguing that the Trooper did not provide complete Implied Consent Warnings.

At the time of the stop, the Implied Consent Warning statute, RCW 46.20.308(2) provided:

> The officer shall warn the driver, in substantially the following language, that:
> …
>
> > (c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if:
> >
> > > (i)The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath or blood is 0.08 or more *or that the THC concentration of the driver's blood is 5.00 or more*.

The Implied Consent Warnings read to Robison did not include language that his driving privileges could be suspended, revoked, or denied if the test indicated the THC concentration is 5.00 or more. As a practical matter, however, the breath test instrument that Robison used to provide a breath sample tested only alcohol content and not THC content.

The district court denied the suppression motion and reasoned that since the breath test instrument cannot detect THC, the Implied Consent Warnings informing Robison of the consequences of the alcohol results were accurate. On appeal, the superior court found that the Implied Consent Warnings were incomplete and misleading, and reversed the district court. The Court of Appeals agreed with the superior court.

The Implied Consent Warning statute requires an officer: (1) to "inform the driver of his right to refuse the test or to have additional tests done;" (2) to inform the driver "that refusal to take the test will result in license revocation, that the refusal may be used at a criminal trial, and the driver may be eligible for an ignition interlock device;" and (3) to inform the driver "about the consequences of certain test results." In this case, the issue was whether the Implied Consent Warning read by the Trooper accurately informed Robison "about the consequences of certain test results."

The Implied Consent Warnings read to Robison omitted "the consequences of results showing a prohibited level of THC concentration in his blood." In cases involving incomplete warnings, "the State [has] to prove the improper warning was harmless beyond a reasonable doubt." In this case, the State could not make that showing.

The Court of Appeals reasoned that since "Robison smelled of marijuana when arrested and admitted smoking marijuana to the arresting officer," it could not be shown "beyond a reasonable doubt that Robison would have agree to take the breath test had he received the THC warning." As such, Robison's breath test results are inadmissible.

LED EDITORIAL NOTE: **At the time of Robison's arrest for DUI, the Implied Consent Warning form may not have had warnings about the consequences of a breath test result showing a THC concentration of 5.00 or more. The Implied Consent Warning statute has been amended since 2013. At this time, RCW 46.20.308(2) does not require an officer to warn an impaired driving suspect that his/her driving privileges "will be suspended, revoked, or denied for at least ninety days" if the test indicates that the THC concentration of the driver's blood is 5.00 or more.**

Post *Robinson*, some criminal defendants are filing motions to suppress their breath tests on the grounds that the officer did not read that section of the ICW that contains the warnings to drivers who are under the age of twenty-one. Officers are encouraged to check with their local prosecuting attorney to see whether this portion should be read to all drivers, or only those who are clearly under the age of 21. As always, officers are encouraged to discuss these issues with their agencies' legal advisors.

SEARCH AND SEIZURE: NATURAL DISSIPATION OF THC IN THE BLOOD STREAM ALONE IS NOT AN EXIGENCY TO JUSTIFY A WARRANTLESS BLOOD DRAW.
City of Seattle v. Pearson, __ Wn. App. __, __ P.3d __, 2016 WL 783911 (February 29, 2016).

At about 3:23 p.m., Tamisha Pearson was driving her car and struck a pedestrian. Pearson was a qualifying patient authorized to use medicinal marijuana.

Officers, including a Drug Recognition Expert (DRE), arrived at the scene at 4:06 pm. The DRE administered field sobriety tests and believed that Pearson's performance "suggested impairment." Another officer administered a preliminary breath test (PBT). The PBT result did not show evidence of alcohol. But, Pearson told the officer "that she is authorized to consume medicinal marijuana and that she had smoked earlier in the day." The officer then arrested Pearson for vehicular assault and driving under the influence (DUI).

The officer transported Pearson to the hospital for a blood draw. At approximately 5:26 pm, they arrived at the hospital. "At approximately 5:50 pm, a nurse drew Pearon's blood without her consent and without a warrant." A subsequent toxicology test "determined Person's THC concentration was approximately 20 nanograms." The City of Seattle charged Pearson with DUI.

Before trial, Pearson moved to suppress the blood test results by arguing there were no exigent circumstances justifying a warrantless blood draw. At the suppression hearing, a toxicologist "testified that THC dissipates from blood very quickly . . . [and] by three to five hours, the THC level is below the detection limit of the [Toxicology Laboratory]." However, this toxicologist also testified "that THC can be detected in the blood of a chronic user of marijuana for up to seven days, even if that user abstains from smoking marijuana."

A Seattle Police officer also testified at the suppression hearing about the process to obtain a search warrant for blood. Specifically, the officer "testified that obtaining a warrant for [a] blood test in a DUI scenario - usually done via e-mail - takes about an hour to an hour and a half." The officer also testified that officers could apply for a search warrant by telephone, but he did not know how long that would take. The trial court initially granted the motion to suppress, then granted the prosecution's motion for reconsideration and found that exigent circumstances justified the warrantless blood draw. The Court of Appeals disagreed.

Under both the state and federal constitutions, a blood draw is a search. Before an officer directs a blood draw from an impaired driving suspect, the officer must have a warrant, or an exception to the warrant requirement must apply to the situation. Exigent circumstances are a recognized exception to the warrant requirement. However, whether exigent circumstances exist in a particular situation will depend on the facts.

"The [exigency] exception applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." "The natural dissipation of an intoxicating substance in a suspect's blood may be a factor in determining whether exigent circumstances justify a warrantless blood search." But, a court will "determine whether an exigency existed based on the totality of the circumstances."

In this case, the Court of Appeals found that there were no exigent circumstances justifying the warrantless blood draw. The Court of Appeals noted these facts:

> The undisputed evidence shows the accident occurred at 3:23 pm, and [the officers] arrived at 4:06 pm. Pearson told [the arresting officer] that she smoked marijuana earlier in the day. He transported Pearson to the hospital at 4:57 pm. A nurse drew Pearson's blood around 5:50 pm.
>
> [The officer who testified at the suppression hearing told the trial court] that obtaining a warrant usually takes between 60 and 90 minutes, but it can take longer. He also said under the best circumstances, it can take an hour. He described the availability of municipal court, district court, and superior court judges to review and sign warrants. He also explained warrants can be secured via telephone.
>
> [The arresting officer] obtained a blood sample approximately 2.5 hours after the accident.

Based on these facts, the Court of Appeals found that the officer could have obtained a warrant without creating "a significant delay in collecting a blood sample." First, Pearson frequently consumed medicinal marijuana. The testifying toxicologist "was aware of studies showing a test could detect THC in the blood of chronic cannabis user even several days after that person smoked marijuana." Second, since there were eight officers that responded to the incident, "another officer could have transported Pearson to the hospital while [the arresting officer]

obtained a warrant, thereby minimizing or eliminating any delay." As a result, the Court of Appeals concluded that the blood test results should have been suppressed by the trial court.

LED EDITORIAL NOTE: **When multiple officers respond to an impaired driving incident, an officer may need to explain in the report what the other officers on the scene were doing and why they could not apply for a search warrant while the arresting officer transported the suspect to the hospital. In some situations, another officer at the scene may be able to apply electronically or telephonically for a search warrant. In other situations, the additional officers may be unable to apply for a warrant because they are engaged in other tasks such as directing traffic, taking witness statements, or administering aid. Additionally, if a suspect is transported to a hospital for medical treatment (and not just for an evidentiary blood draw), an officer may want to consider whether the medical treatment could impact the suspect's alcohol, THC, or other drug levels.**

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The Law Enforcement Digest (LED) is edited by Assistant Attorney General Shelley Williams of the Washington Attorney General's Office. Questions and comments regarding the content of the LED are welcome and should be directed to Ms. Williams at ShelleyW1@atg.wa.gov. 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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