Law Enforcement Digest

JULY 2013

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

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NOTE REGARDING THE 2013 LEGISLATIVE UPDATE: In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. This year we are planning to include all of the legislation in a single LED edition, likely a stand alone edition similar to last year's 2012 Subject Matter

Index. However, if the Legislature passes any bills of interest to law enforcement that have an immediate effective date we will likely mention them as close to the effective date as possible.

Unless a different effective date is specified in a bill, the effective date of legislation passed during the 2013 regular session of the Washington Legislature will be July 28, 2013. The effective date of any legislation passed during the 2013 special session will depend upon the date that session concludes. We expect to post the 2013 Washington Legislative Update on the CJTC Internet LED Page at approximately the same time as the August LED, which will be mid-July.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

MARYLAND STATUTE AUTHORIZING COLLECTION OF DNA FROM ALL ADULTS ARRESTED FOR SERIOUS FELONIES SURVIVES FOURTH AMENDMENT CONSTITUTIONAL CHALLENGE – In Maryland v. King, ___ U.S. ___, 2013 WL 2371466 (June 3, 2013) the U.S. Supreme Court rules, 5-4, that a Maryland statute that authorizes law enforcement officers to collect DNA samples from all adults arrested for certain statutorily specified serious felonies does not violate the Fourth Amendment to the United States Constitution.

Justice Scalia writes a spirited and lengthy dissent that is joined by Justices Kagan, Ginsburg, and Sotomayor.

Result: Reversal of Maryland State Court of Appeals decision that reversed the rape conviction of defendant, Alonzo Jay King, Jr.

LED EDITORIAL NOTES AND COMMENTS: In Washington, DNA may only be collected from offenders convicted of an offense listed in RCW 43.43.754(1). If the Washington Legislature were to amend the RCW 43.43.754(1) to authorize taking DNA from arrestees under provisions similar to those at issue in Maryland v. King, it is likely that an "independent grounds" challenge would be raised under the Washington constitution, article I, section 7.

The Maryland statute authorizes Maryland law enforcement authorities to collect DNA samples from "an individual who is charged with . . . a crime of violence or an attempt to commit a crime of violence; or . . . burglary or an attempt to commit burglary." Md. Pub. Saf. Code Ann. §2–504(a)(3)(i) (Lexis 2011). Maryland law defines a crime of violence to include murder, rape, first degree assault, kidnapping, arson, sexual assault, and a variety of other serious crimes. Md. Crim. Law Code Ann. §14–101 (Lexis 2012). Our assessment of the majority opinion in Maryland v. King is that the same 5-4 majority would uphold a statute authorizing the collection of DNA from all felony arrestees without limitation to seriousness of the felonies.

We previously reported a Ninth Circuit Court of Appeals case where, under Fourth Amendment analysis, a 3-judge panel decision upheld by a 2-1 vote California's all-adult-felony-arrestee DNA legislation (Haskell v. Harris, 669 F.3d 1049 (9th Cir., Feb. 23, 2012) July 12 LED:05), but where the Ninth Circuit then set aside the panel decision and ordered a rehearing by an 11-judge panel (October 2012 LED:05). We think that the U.S. Supreme Court decision in Maryland v. King resolves the Fourth Amendment issue in Haskell in favor of the State of California, though maybe the Ninth Circuit will distinguish

Haskell based on the broader scope of the all-felonies provisions of the California statute.

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NINTH CIRCUIT COURT OF APPEALS

UNDER PARTICULAR CIRCUMSTANCES OF CASE, RE-ADVISING ARRESTEE OF MIRANDA RIGHTS AFTER SHE INVOKED ATTORNEY RIGHT, PLUS PROCESSING HER IN PRESENCE OF 77 MARIJUANA BRICKS AND PHOTOGRAPHING HER WITH THEM, DID NOT CONSTITUTE RE-INITIATION OF INTERROGATION IN VIOLATION OF MIRANDA

United States v. Morgan, ___F.3d ___, 2013 WL 2380467 (9th Cir., June 3, 2013)

Facts: (Excerpted from Ninth Circuit opinion)

> During inspection of Morgan's vehicle, [U.S. Border Patrol] agents found several bundles of drugs concealed in a speaker box. Morgan was arrested and, after being advised of her Miranda rights, she agreed to speak to agent Armour. However, after a brief conversation, Morgan invoked her right to counsel. At that point, agent Armour terminated the interview.
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> Agent Armour then transported Morgan and the seized drugs to the Casa Grande Border Patrol station located approximately two and a half hours away from the gate. At the station, the agents loaded the drugs, seventy-seven bricks of marijuana, onto a handcart and brought them to the area where Morgan was being processed so that agent Armour could keep an eye on the evidence while processing Morgan. Agent Armour testified that the drugs were brought to the same room because the evidence "ha[d] to be monitored by an agent at all times." He explained that while there were other agents in the station, he could not have asked them to watch the drugs for him for hours while he was processing Morgan's case, because the agents were also working on other matters. According to agent Armour, it is "common practice" to keep the seized evidence in the same room where an arrestee is being processed.
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> While processing Morgan, agent Armour read her a portion of a standard form—the I-214 Form—that contained the Miranda advisements. Morgan then signed the I-214 Form, acknowledging that the advisements were read to her and she understood her rights. Although the I-214 Form contained a waiver section, agent Armour did not read this section to Morgan or attempt in any way to secure from her a waiver of her Miranda rights.
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> According to agent Armour, agents at the Casa Grande Border Patrol station are required, as part of the routine processing of every arrestee, to read the Miranda warnings from the I-214 Form and to obtain an acknowledgement from the arrestee that the form was read. This is so regardless of whether the arrestee has previously invoked his or her Miranda rights at the scene of the arrest. In Morgan's case, agent Armour did not read the waiver of rights section to her because she had previously invoked her right to counsel.
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> After Morgan acknowledged her rights, she stated that she wished to speak to agent Armour. He replied that he could not talk to her without the presence of her attorney because she had already invoked her right to counsel. Morgan

replied that she did not need an attorney and wanted to waive her right to counsel. Agent Armour then gave her the opportunity to read and sign the waiver section of the I-214 Form. Agent Armour placed her in a jail cell while he finished processing the case. During Morgan's interview, which took place nearly three hours later, she admitted to smuggling marijuana.

Prior to her interview, and at some point during processing, an agent took Morgan's picture using a web cam. The picture shows Morgan standing behind the seized drugs. There is no evidence as to whether the picture was taken before or after she waived her Miranda rights on the I-214 Form. Agent Armour testified that the photograph was taken to be posted on Morgan's jail cell door so that the agents could readily identify the cell's occupant. However, agent Armour was unable to explain why the drugs were included in the picture.

Proceedings below:

Morgan was indicted for two federal drug crimes. The U.S. District Court denied her motion to suppress her statements to agent Armour. She then entered into a conditional plea agreement in which she reserved the right to appeal the denial of her motion to suppress.

ISSUES AND RULINGS: 1) Arrestee Morgan invoked her right to an attorney after receiving Miranda warnings in the agent's attempt to interrogate her. The agent stopped the interrogation and continued to process the arrest under station protocols. As part of station protocol, the agent read aloud from a form that re-advised Morgan of her Miranda rights. The agent did not read the waiver portion of the form to her. Morgan then told the officer that she wanted to talk, and that she did not want to wait to talk to an attorney first. Did the agent's reading of Miranda warnings from the form constitute prohibited re-initiation of interrogation with Morgan after she had invoked her Miranda right to an attorney? (ANSWER BY NINTH CIRCUIT: No)

2) In addition to the facts described in Issue 1, the officer processed Morgan in the presence of the seized drugs and took a picture of Morgan standing near the drugs. Do all of these facts in combination constitute prohibited re-initiation of interrogation with Morgan after she had invoked her Miranda right to an attorney? (ANSWER BY NINTH CIRCUIT: No)

Result: Affirmance of U.S. District Court (Arizona) conviction of Shirley Anne Morgan for two federal drug crimes.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

1) Re-advising of Miranda rights under local station protocol

Morgan argues that agent Armour's reading of the I-214 Form constituted a re-initiation of interrogation in violation of Miranda v. Arizona, 384 U.S. 436 (1966). It is undisputed that Morgan invoked her right to counsel when she was arrested at the San Manuel Gate. The issue, therefore, is whether Morgan was "interrogated" when agent Armour re-advised Morgan of her Miranda rights at the station.

The term "interrogation" refers to "express questioning" or its "functional equivalent," which includes "words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are

reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Here, agent Armour re-advised Morgan of her Miranda rights from the I-214 Form as part of the station's standard processing procedure. Agent Armour testified that the station has "a checklist for prosecution and one of the forms that has to be included in every prosecution" is the I-214 Form, which is read to every arrestee regardless of whether the arrestee has previously invoked his or her rights at the scene of the arrest. Because the reading of the I-214 Form is "normally attendant to arrest and custody," and agent Armour made no effort to question Morgan or secure a waiver of her rights, we hold that his actions were not the functional equivalent of express questioning such that they were an "interrogation" in violation of Miranda. See Guam v. Ichiyasu, 838 F.2d 353, 358 (9th Cir. 1988) ("The reading of Miranda warnings most certainly is an action 'normally attendant to arrest,' not to be considered police coercion.") **[LED EDITORIAL NOTE: Ichiyasu seems unpersuasive as authority under the facts of the Morgan case. In Ichiyasu, an arrestee interrupted an officer's initial effort to read him the Miranda warnings, and the arrestee blurted out an incriminating statement. The re-Mirandizing situation in Morgan seems to us to be very different from the initial warning situation in Ichiyasu.]**

2) Combined effect of restating Miranda rights plus processing, photographing with evidence

Alternatively, Morgan argues that the combination of circumstances—re-advising her of the Miranda rights, processing the drugs seized from her vehicle in her presence, and taking her photograph standing behind the seized drugs—constituted the "functional equivalent" of interrogation. We disagree. "The standard for determining whether an officer's comments or actions constitute the 'functional equivalent' of interrogation is quite high . . . ." United States v. Foster, 227 F.3d 1096, 1103 (9th Cir. 2000). Subjecting a suspect to "subtle compulsion," without more, is not the functional equivalent of interrogation. Innis, 446 U.S. at 303. Rather, a defendant must show that his statement "was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." [Innis]; see, e.g., United States v. Moreno-Flores, 33 F.3d 1164, 1169-70 (9th Cir. 1994) (holding that an agent's statements to the defendant that the agent had seized approximately 600 pounds of cocaine and that the suspect was in trouble were not the functional equivalent of interrogation because they did not invite a response from the suspect); Shedelbower v. Estelle, 885 F.2d 570, 573 (9th Cir. 1989) (holding that an officer's statements to the defendant that his accomplice was in custody, and that the victim identified the defendant's photograph as one of the men who raped her, were not the functional equivalent of interrogation because they were not the type of comments that would elicit an incriminating remark). As the Supreme Court explained in Innis, "the police . . . cannot be held accountable for the unforeseeable results of their words or actions." 446 U.S. at 301–02.

Here, Morgan was not subjected to the functional equivalent of interrogation. Agent Armour processed Morgan in the same room where the drugs were located because he needed to monitor the evidence at the same time. Even assuming that the photograph of Morgan was taken prior to the re-advisement of her Miranda rights, it was done as part of the station's processing procedure.

> These actions, coupled with the routine reading of the I-214 Form, were not unduly coercive, particularly in light of the fact that agent Armour made no attempt to secure a waiver of Morgan's rights or elicit any incriminating statements from her. In fact, even after Morgan expressly waived her rights, agent Armour waited nearly three hours before interviewing her. Cf. United States v. Orso, 266 F.3d 1030, 1033-34 (9th Cir. 2001) (holding that an officer's long and detailed conversation with the defendant about incriminating evidence against her was the functional equivalent of interrogation when viewed together with the officer's testimony that he purposely delayed Mirandizing defendant to elicit inculpatory statements), overruled on other grounds by Missouri v. Seibert, 542 U.S. 600 (2004).
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> However, there is no reasonable explanation for taking Morgan's photograph with the seized drugs. We are disturbed by, and in no way condone, this action, which at the very least appears gratuitous and unprofessional. Nevertheless, viewing the totality of the circumstances, we hold that agent Armour's actions were not "reasonably likely to elicit an incriminating response" and, therefore, did not constitute the functional equivalent of interrogation.

[Some case citations revised; subheadings inserted]

LED EDITORIAL COMMENTS: Despite the favorable ruling for the government, we have some concerns about the federal agent's actions (and the local station's protocols) in this case. The Ninth Circuit panel is correct that courts have set a relatively high bar for a defendant to establish that an officer re-initiated interrogation after a defendant asserted the Miranda right to an attorney or to remain silent. However, even if (as here) an officer is following a standard station or agency protocol, the re-Mirandizing of a person who has just invoked the right to an attorney or to silence in response to an initial reading of Miranda rights is likely to significantly confuse an arrestee as to whether the initial assertion of rights is being respected. Also, processing such an invoking arrestee in the presence of 77 bricks of marijuana and photographing that invoking arrestee with the 77 bricks may not always escape judicial condemnation as efforts to induce the arrestee to talk.

For more discussion of "Initiation of Contact Rules" under Miranda, see the article by John Wasberg (updated through August 2, 2012) on the Criminal Justice Training Commission's Internet LED page.

COURT HOLDS THAT 1) ACTIONS BY FBI AGENTS AT PAROLE OFFICE ADD UP TO CUSTODY FOR PURPOSES OF MIRANDA, AND 2) THEY BREACHED MISSOURI V. SEIBERT RULE BY TAKING A DELIBERATE TWO-STEP APPROACH TO MIRANDIZING

United States v. Barnes, 713 F.3d 1200 (9th Cir., April 18, 2013)

Facts and Proceedings below:

FBI agents wanted to question Barnes about a suspected drug transaction with a police informant, Mr. Craig, several months previously. The agents knew Barnes was on State parole. The agents convinced his parole officer to schedule a meeting with Barnes. She did not inform Barnes, who was required by the terms of his parole to attend the meeting, that FBI agents would be there. The parole officer normally met with Barnes on Thursdays, but she changed the meeting date to Wednesday. Also, she usually meets with parolees at the window to the

lobby of her office, without requiring them to be searched or escorted into the secure area. However, she changed the procedure for the meeting she had arranged for the FBI agents. Upon arrival, Barnes was searched and escorted into the interior of the building through an electronically locked door. The Barnes Court describes as follows what happened after that:

> When Barnes arrived at Kuckertz's office, he found two FBI agents waiting to question him about the transaction with Craig. The agents did not immediately advise Barnes of his Miranda rights. Instead, the agents told Barnes that they knew he had been involved in drug distribution at the Anchorage airport. Barnes denied the allegations. The agents then played a portion of one of the recorded phone calls between Barnes and Craig. After hearing the recording, Barnes admitted he remembered the transaction with Craig. Because Agent Eckstein thought Barnes "looked like he was going to continue talking," the FBI agents advised Barnes of his Miranda rights. Barnes waived his rights, and then confessed his involvement in the drug transaction. The indictment on drug charges soon followed.
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> Before trial, Barnes filed a motion to suppress his statements and the tangible evidence of the drugs Craig delivered to the FBI agents. The district court found that Barnes was subject to interrogation before the agents administered Miranda warnings and that the agents should have known their questions could elicit an incriminating response. Nonetheless, the district court found that Barnes was not in custody when this pre-Miranda warning interrogation occurred and that the post-Miranda incriminating statements were voluntarily made after the warnings were administered. [Barnes was convicted of distribution of a controlled substance.]

ISSUES AND RULINGS: 1) Was the questioning of Barnes by the FBI agents custodial from the start, thus requiring Miranda warnings at the beginning of the questioning? (ANSWER BY NINTH CIRCUIT: Yes);

2) Under the 2004 decision of the U.S. Supreme Court in Missouri v. Seibert, are Barnes's statements following the step-two Mirandizing inadmissible because the FBI agents used an impermissible, deliberate two-step approach to Mirandizing by initially questioning him without Miranda warnings? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Reversal of U.S. District Court (Alaska) conviction of Michael D. Barnes for distribution of a controlled substance.

ANALYSIS:

1) Miranda custody

In key part, the Barnes Court analyzes the Miranda custody issue as follows:

> . . . . To determine whether an individual was in custody, we must decide whether a reasonable person in the circumstances would have believed he could freely walk away from the interrogators. See United States v. Kim, 292 F.3d 969, 973-74 (9th Cir. 2002) [**See LED Editorial Comment below.**]. The following factors are pertinent in assessing the custody question: "(1) the language used to summon the individual; (2) the extent to which the defendant is confronted with evidence of guilt; (3) the physical surroundings of the interrogation; (4) the

duration of the detention; and (5) the degree of pressure applied to detain the individual." [Citation omitted] The first four factors weigh heavily in favor of determining that Barnes was in custody.

To begin, Barnes did not appear voluntarily but rather was told to appear for a meeting with his parole officer under threat of revocation of parole. The meeting was not his regularly scheduled weekly meeting on Thursday afternoons but was set for a Wednesday. Kuckertz misrepresented the purpose of the meeting and did not respond when Barnes called seeking to reschedule. Kuckertz acknowledged that it was unusual for her to see Barnes on a day other than Thursday, and that when she opted not to return his calls, she knew that Barnes was aware that failure to appear at the meeting would be a violation of his parole.

The FBI agents directly confronted Barnes with evidence of guilt before administering the Miranda warnings. They spent several minutes questioning Barnes, told him they had evidence he had met Craig at the airport, and played a tape recording of an incriminating phone call between Barnes and Craig.

This confrontation occurred with three law enforcement officials in a small office, behind a closed door, inside the Alaska Department of Corrections Probation building. Normally, Barnes's parole meetings occurred through a window in the lobby, but on this occasion he was searched and escorted through an electronically locked door where he was surprised by the FBI agents waiting to question him.

Nor was the approximately two hour meeting a typical parole check in. Normally Kuckertz meets with her parolees only briefly. Although the Miranda warnings were given after about ten to twenty minutes, the meeting was anything but a run-of-the-mill parole update. . . .

The fifth factor, the degree of pressure applied to detain Barnes, is neutral at best. Although Barnes was in a police-dominated, confined environment in which his presence was mandated by his parole terms, he was not handcuffed, arrested, or physically intimidated in any way. Even so, the scenario was not without pressure resulting from a combination of the surroundings and circumstances encompassed by the other factors. Taking into consideration all of the factors, particularly the role of the FBI agents and the location and duration of the interrogation, we hold that a reasonable person in Barnes's circumstances would not have felt free to leave. Thus, Barnes was in custody during the interrogation.

2) Two-step Miranda process

The Barnes Court includes a brief summary of the Ninth Circuit's interpretation of Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04** :

"When a law enforcement officer interrogates a suspect in custody but does not warn the suspect of his Miranda rights until after he has made an inculpatory statement, the inquiry is whether the officer engaged in "a deliberate two-step interrogation." [United States v. Williams, 435 F.3d 1148, 1150 (9th Cir. 2006) **April 06 LED:02**]. Such an interrogation occurs when an officer deliberately questions the suspect without Miranda warnings, obtains a confession or

> inculpatory admission, offers mid-stream warnings after the suspect has admitted involvement or guilt, and then has the suspect repeat his confession or elaborate on his earlier statements. If the FBI agents "deliberately employed the two-step strategy," we then "evaluate the effectiveness of the midstream Miranda warning to determine whether the postwarning statement is admissible." [Williams at 1160] (citing Seibert, 542 U.S. at 615).

[Some citations omitted]

The Barnes Court then provides extensive analysis (omitted here) of the facts to explain its conclusions: 1) that the FBI agents acted deliberately in not Mirandizing Barnes at the start of the questioning, and 2) that their mid-interrogation Miranda warnings (without a special added explanation that the suspect's un-Mirandized statements would not be admissible) did not effectively cure their error.

LED EDITORIAL COMMENT: Custody standard: The Ninth Circuit declares that the standard for "custody" is whether a reasonable person would have felt free to leave. This understates the test for Miranda custody, which asks "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." Stansbury v. California, 511 U.S. 318, 322 (1994) July 94 LED:02. Under this standard, Miranda warnings are not required in many Terry seizure circumstances. But having said that, we think that the totality of the circumstances in Barnes did add up to Miranda custody.

While parole and probation officers generally need not Mirandize parolees and probationers in regular visits because those routine circumstances are not deemed to be inherently coercive (i.e., custodial), we think it is legally risky for law enforcement officers to try to take advantage of the parole or probation visit to interrogate criminal suspects.

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BRIEF NOTES FROM THE NINTH CIRCUIT COURT OF APPEALS

(1) CONSTITUTIONAL DUE PROCESS PROTECTION: WHEN THE GOVERNMENT DESTROYS EVIDENCE BEFORE TRIAL, A SHOWING OF BAD FAITH IS REQUIRED FOR DISMISSAL BUT NOT FOR REMEDIAL ADVERSE-INFERENCE JURY INSTRUCTION – In United States v. Sivilla, ___F.3d ___, 2013 WL 1876649 (9th Cir., May 7, 2013), a 3-judge Ninth Circuit panel rules that the defendant is not entitled to dismissal of charges for the government's destruction of evidence because the government did not act in bad faith. But the panel rules that, in light of the government's negligence and the resulting prejudice, he is entitled to a jury instruction that would allow the jury to draw an adverse inference against the government as to the missing evidence.

Defendant was arrested for drug smuggling when $160,000 worth of cocaine and heroin was found in a federal border search of a specially cut manifold in his Jeep. At the time of trial, his theory of defense was that he was an unsuspecting "blind mule." He claims that someone altered his manifold without his knowledge, and that the nature of the alterations to the manifold was such that the drugs would have been easily accessible to those using him to unknowingly transport drugs, so that he would not have ever known that he had unwittingly transported the drugs.

His attorney had requested at the outset of the case that the government preserve exculpatory evidence. But through oversight, the federal agency did not preserve the Jeep, selling it after having taken what turned out to be poor quality pictures of the manifold. The buyer had then disassembled the Jeep for parts, so by the time of trial the best evidence regarding the nature of the Jeep's manifold was the poor quality pictures.

In order for destruction of evidence to rise to the level of a constitutional violation under the due process clause, a defendant must make two showings. First, defendant must show that the government acted in bad faith; that question generally turns on the government's knowledge of the apparent exculpatory value of the evidence at the time it was lost or destroyed. Second, the defendant must show that the missing evidence is exculpatory and of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. This two-part test requires the showing of bad faith where the evidence is only potentially useful and not materially exculpatory. For evidence to be materially exculpatory, its exculpatory nature must have been apparent at the time the evidence was destroyed.

In a pre-trial hearing in the Sivilla case, a border agent testified that at the time that the vehicle was released for sale, he had thought that there was not any additional evidentiary value in the vehicle in light of the fact that they had taken pictures. The U.S. Attorney convinced the U.S. District Court in the pre-trial hearing that the federal officers in good faith believed that it was not necessary to preserve the Jeep and its manifold.

The Ninth Circuit panel concludes that the U.S. District Court did not err in concluding that the federal agents had not acted in bad faith. But, as noted above, the Sivilla panel concludes that the District Court did err in denying defendant's request for a jury instruction allowing the jury to draw adverse inferences against the government regarding what the missing evidence would have shown. The panel's analysis of the latter issue provides in key part as follows:

> According to Judge Kennedy's controlling concurrence [in U.S. v. Loud Hawk, 628 F.2d 1139 (9th Cir. 1979)], "[o]ur principal concern is to provide the accused an opportunity to produce and examine all relevant evidence, to insure a fair trial." Courts must balance "the quality of the Government's conduct" against "the degree of prejudice to the accused," where the government bears the burden of justifying its conduct and the accused of demonstrating prejudice.
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> In evaluating the quality of the government's conduct:
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> > the court should inquire whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification . . . . It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused.
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> [U.S. v. Loud Hawk] Here, evidence was destroyed while in the government's custody. The government was negligent in failing to adhere to reasonable standards of care in its prosecutorial functions. The prosecutor promised to

protect the evidence but failed to take any affirmative action to that end. The government attorney prosecuting the case participated in the events leading to the failure to preserve. In total, the quality of the government's conduct was poor.

We now turn to the prejudice to the defendant:

> In analyzing prejudice, the court must consider a wide number of factors including, without limitation, the centrality of the evidence to the case and its importance in establishing the elements of the crime or the motive or intent of the defendant; the probative value and reliability of the secondary or substitute evidence; the nature and probable weight of factual inferences or other demonstrations and kinds of proof allegedly lost to the accused; the probable effect on the jury from absence of the evidence, including dangers of unfounded speculation and bias that might result to the defendant if adequate presentation of the case requires explanation about the missing evidence.

[U.S. v. Loud Hawk] Loud Hawk turned on the quality of the available secondary or substitute evidence, which in that case was quite high. Here, the opposite is true. Sivilla sought to use his inspection of the Jeep to rebut the prosecution's argument that he must have known that the drugs were in the Jeep because of how long and involved a process it was to remove them from the car. The government introduced the testimony of Officer Cardenas to prove this point. The photographs were the only substitute evidence available to Sivilla to rebut this argument. But the photographs are inadequate because they are pixelated and difficult to decipher. Any expert witness presented only with the photographs would have concluded that next to nothing could be determined from them. In order for Sivilla to mount his only defense, that he did not know the drugs were in the car, the defense's in-house expert witness for hidden compartments in vehicles would have needed access to the vehicle itself, not grainy and indecipherable photographs. The prejudice to the defendant was significant. Applying Loud Hawk's balancing test, a remedial jury instruction was warranted.

[Some citations omitted]

Result: Reversal of U.S. District Court federal drug crime convictions of Victor Hugo Sivilla; remand for retrial.

LED EDITORIAL NOTE: The Washington courts interpret the Washington constitution's due process protections relating to destruction of evidence consistent with the U.S. Supreme Court's interpretations of the U.S. constitution. See, for example, State v. Groth, 163 Wn. App. 548 (Div. I, Sept. 12, 2011) February 12 LED:15.

(2) CIVIL RIGHTS ACT LAWSUIT: "DISRUPTIVE BEHAVIOR" ELEMENT OF OTHERWISE OVERBROAD ORDINANCE ON CITY COUNCIL MEETING BEHAVIOR DOES NOT SAVE ORDINANCE FROM FREE SPEECH CHALLENGE IN LIGHT OF THE LAW REGARDING SEVERANCE; BUT QUALIFIED IMMUNITY GRANTED TO OFFICERS BASED ON RULINGS OF PROBABLE CAUSE TO ARREST AND NO EXCESSIVE FORCE – In Acosta v. City of Costa Mesa, ___F.3d ___, 2013 WL 1847026 (9th Cir., May 3, 2013), the 3-judge panel of the Ninth Circuit revises its earlier ruling on one issue in this civil case, but the

panel ultimately stays with the earlier determination that the individual law enforcement officer defendants are entitled to qualified immunity from civil liability.

In the Court's earlier decision, reported at 694 F.3d 960 (9th Cir., Sept. 5, 2012) **Dec 12 LED:09**, the Ninth Circuit panel ruled 2-1 that, while the City of Costa Mesa ordinance at issue addressing behavior at City council meetings is overbroad, the offending language could be severed from the ordinance to preserve its constitutionality under the Free Speech clause of the U.S. constitution. The dissenting opinion in the September 5, 2012 decision disagreed with the majority's severance ruling. The revised decision essentially adopts the analysis of the earlier dissenting opinion. The now-unanimous panel thus rules that under the circumstances of this case, the law on severance of offending provisions from legislation does not allow for severing language from the ordinance to save its constitutionality.

Costa Mesa Municipal Code § 2-61 makes it a misdemeanor for members of the public who speak at City Council meetings to engage in "disorderly, insolent, or disruptive behavior." The Ninth Circuit panel in Acosta agrees with the plaintiff that the phrase "insolent . . . behavior" makes the ordinance overbroad in violation of the First Amendment Free Speech clause. People have a Free Speech right to be "insolent" in a public meeting. And, while it does not violate Free Speech protections to prohibit "disruptive behavior" in public meetings, the revised opinion (for a now-unanimous panel) concludes that the phrase "insolent . . . behavior" cannot be severed from the statute to save its constitutionality.

The panel's now-unanimous opinion nonetheless concludes, as did the majority opinion for the September 5, 2012 decision, that undisputed evidence supports the conclusions that the officers in this case are entitled to qualified immunity on the questions of (1) whether they had probable cause to arrest plaintiff for disruptive behavior at a City council meeting; and (2) excessive force. The opinion also concludes that, at the time that the officers acted, the officers were reasonable in assuming that the ordinance was constitutional.

The analysis in the May 3, 2013 unanimous opinion on probable cause and excessive force is the same in salient part as the analysis on those issues that we summarized and excerpted in the **December 2012 LED**.

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

(3) FOURTH AMENDMENT RULING UNDER HODARI D. IS THAT GUN THAT SUSPECT TOSSED BEFORE HE COMPLIED WITH POLICE SEIZURE ORDER IS ADMISSIBLE EVEN THOUGH THE SEIZURE ORDER WAS BASED ON AN EARLIER UNLAWFUL POLICE SEARCH; RESULT WOULD BE DIFFERENT UNDER THE WASHINGTON CONSTITUTION – In United States v. McClendon, 713 F.3d 1211 (9th Cir., April 19, 2013), the Ninth Circuit declines to suppress a handgun tossed away by defendant even though the reason that he tossed the gun was that the police gave him a seizure order based on what they had found in an unlawful search of his effects earlier in the evening.

The McClendon decision illustrates a significant difference between (1) the definition of "seizure" under the Washington constitution, article I, section 7, in State v. Young, 135 Wn.2d 498 (1998) **Aug 98 LED:02**, and (2) the definition of "seizure" under the Fourth Amendment by the U.S. Supreme Court in California v. Hodari D., 499 U.S. 621 (1991). The McClendon decision also illustrates the reality that occasionally a case involving a search by State or local officers that violates the more restrictive search and seizure restrictions of the Washington constitution can be rescued by a federal prosecution.

In response to a frightened call from a home's elderly, disabled resident at around 2:20 a.m., city police officers contacted a woman who was in a car in the caller's driveway. The woman claimed the car had run out of gas, and that her male companion, whom she identified as Eddie McClendon, had left to get more gas. The officers proved the out-of-gas story to be a lie when they started the car. The woman consented to a search of her purse, which yielded illegal drugs. The officers arrested her.

The officers asked her about a backpack in the backseat area of the car. The woman told officers the backpack belonged to McClendon. The officers searched the backpack and found a sawed off shotgun with its serial number filed off, ammunition for the gun, and some other suspicious items, as well as a receipt with McClendon's name on it.

A records check revealed that there was a convicted felon named "Eddie McClendon" meeting the woman's description. A short time later, nearby in the neighborhood, officers spotted a man meeting McClendon's description. One officer asked the man if he was Eddie, and the man answered "yes, that's me." The man turned and began to walk away from the officers. The officers pulled their guns, told McClendon he was under arrest, and ordered him to show his hands. He did not stop or show his hands. He continued to walk away. As the officers approached the still-retreating McClendon, he tossed into the grass what was later determined to be a handgun. The officers then overtook, tackled, and handcuffed McClendon.

McClendon was charged in federal court with several federal gun crimes. McClendon lost a suppression motion, and, while preserving his right to appeal the suppression ruling, he pleaded guilty to one count of violating the federal statute prohibiting possession of firearms by felons.

On appeal, the federal government conceded that officers unlawfully searched the backpack and therefore did not have authority to seize or arrest McClendon when they pulled their guns, told him he was under arrest, and ordered him to show his hands. But the federal government argued that under the U.S. Supreme Court ruling in California v. Hodari D., 499 U.S. 621 (1991), McClendon was not seized at the point when he tossed the gun. Under Hodari D., he had not yet been seized because (1) he had not yet complied with the officers' orders, and (2) they had not yet physically touched him.

As noted at the outset of this LED entry, the Ninth Circuit panel agrees with the federal government's argument. Because McClendon tossed the gun before he was seized by the officers, the discovery and seizure of the gun was not the fruit of an unlawful seizure.

Result: Affirmance of U.S. District Court (Western District of Washington) conviction of Eddie Ray McClendon for the federal crime of being a felon in possession of a firearm.

LED EDITORIAL COMMENT: As noted above, a different result would have obtained if this case had been tried in the courts of the State of Washington. In State v. Young, 135 Wn.2d 498 (1998) Aug 98 LED:02, the Washington Supreme Court ruled that the Washington constitution, article I, section 7, takes a contrary view of what constitutes a "seizure," as compared to the Fourth Amendment interpretation by the U.S. Supreme Court in California v. Hodari D. Under the Washington constitution, a show of authority itself of the sort involved in McClendon will be a "seizure" even if (1) there is no compliance by the suspect, and (2) there is no physical touching by law enforcement.

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WASHINGTON STATE COURT OF APPEALS

VEHICLE STOP JUSTIFIED BY REASONABLE SUSPICION BOTH 1) THAT REGISTERED OWNER WAS COMMITTING CONTINUING OFFENSE OF FAILURE TO TRANSFER TITLE, AND 2) THAT PASSENGER WAS SUBJECT OF ARREST WARRANT; ALSO, SEARCHING POCKETS OF HANDCUFFED ARRESTEE MOMENTS AFTER HIS LAWFUL CUSTODIAL ARREST HELD PER SE JUSTIFIED BY FACT OF THE CUSTODIAL ARREST ALONE

State v. Bonds, ___Wn. App. ___, 299 P.3d 663 (Div. II, April 23, 2013)

Facts and Proceedings below (Excerpted from Court of Appeals opinion):

> After Bonds's arrest by law enforcement officers after a traffic stop, the State charged him with a felony violation of a no-contact order. Before trial, Bonds moved to suppress evidence of his identification obtained by the officers after the traffic stop, arguing that they had no reasonable basis for suspecting that a failure to transfer title offense had occurred or that Bonds was the car's passenger, and they stopped the car for pretextual reasons.
>
> At the suppression hearing, [Officer A] testified that on July 31, 2009, he was on patrol with [Officer B]. A random license plate records check [Officer A] ran on a car returned results with a "vehicle sold tag"; such a tag indicated that title to the vehicle had been sold and the new owner had failed to title the car in his own name within 45 days, a misdemeanor offense.
>
> At the same time [Officer A] ran the records check, [Officer B] "believed" he recognized the car's passenger as Bonds. Both officers worked on a daily basis with a Department of Corrections (DOC) officer who sometimes gave them a warrant list; based on this, both [officers] believed Bonds had an active warrant for his arrest. Although [Officer B] "wasn't a hundred percent certain" that Bonds was the vehicle's passenger, he "believed it enough that [he] would have stopped the car."
>
> Based on the "vehicle sold" records check result and their belief that Bonds was the passenger and had a warrant for his arrest, the officers stopped the car. [Officer A] approached the passenger's side of the car; when the passenger looked up, [Officer A] recognized him as Bonds from a photograph [Officer A] had previously seen. [Officer A] asked Bonds to produce a form of identification "to basically just confirm [his] suspicions that [Bonds] was the . . . passenger."
>
> After Bonds said he had no identification with him, [Officer A] asked him to step out of the car; when Bonds did so, [Officer A] placed him in "wrist restraints" and arrested him because he believed Bonds was lying about not possessing any identification. After searching Bonds, [Officer A] discovered identification confirming his identity "[i]n one of his pockets."
>
> While [Officer A] contacted Bonds, [Officer B] contacted the car's driver; at some point, the officers identified her as Surina Crumble. After [Officer A] detained Bonds, [Officer B] spoke with "Records" on his radio and learned that the car's new owner had properly transferred its title. [Officer A] then checked Bonds's records, confirmed that he had an active DOC arrest warrant, and discovered

that a no-contact order prohibited Bonds from having contact with Crumble. The officers subsequently transferred Bonds to jail.

The trial court denied Bonds's motion to suppress evidence. . . .
. . . .

The jury convicted Bonds [of felony violation of a no-contact order].

ISSUES AND RULINGS: 1) Where Officer A's random license plate check returned results with a "vehicle sold tag," such a tag indicated that title to the vehicle had been sold and the new owner had failed to transfer title to the car to his own name within 45 days, a misdemeanor offense. RCW 10.31.100 imposes a misdemeanor presence requirement and does not provide an exception to the misdemeanor presence requirement for the crime of failure to transfer title (RCW 46.12.101(6)). However, RCW 46.12.101(6) provides that the crime of failure to transfer title is a continuing offense. Did the records check justify a stop of the vehicle based on reasonable suspicion that the operator of the vehicle was committing the continuing offense of failure to transfer title? (ANSWER BY COURT OF APPEALS: Yes);

2) While Officer A was doing a records check, Officer B believed, based on his observation of a passenger and on his memory of previous intelligence, both that A) he recognized the passenger, and B) that an arrest warrant was outstanding for the passenger. Was the vehicle stop alternatively justified based on these facts? (ANSWER BY COURT OF APPEALS: Yes);

3) For the first time on appeal, defendant raised a challenge to the search of his pants pockets incident to his arrest. One element of being able to raise such a belated challenge to a police search is that the evidence must reflect that the defendant's theory is correct under the law and facts. Do police have automatic authority to search the pants pockets of an arrestee incident to arrest even though the arrestee is in handcuffs? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Pierce County Superior Court conviction of Santorio L. Bonds for felony violation of a no-contact order.

ANALYSIS:

1) The vehicle stop was lawful based on reasonable suspicion that the driver was committing the continuing offense of failure to transfer title

Defendant argued that the 2009 stop of the vehicle was unlawful based on a 2004 Washington Supreme Court decision holding that failure to transfer title, RCW 46.12.101(6) was not a continuing offense under the version of RCW 46.12.101(6) in effect at the time of that case. However, the Legislature amended RCW 46.12.101(6), effective June 12, 2008. See **May 08 LED:07-08**. The amendment made failure to transfer title a continuing offense for purposes of the misdemeanor presence requirement of RCW 10.31.100, thus meaning as to this offense that officers may lawfully make stops based on reasonable suspicion and make arrests based on probable cause that the crime is occurring in their presence.

Accordingly, the defendant's challenge to the vehicle stop for failure to transfer title is rejected by the Bonds Court. Part of the Bonds Court's analysis is grounded in State v. Phillips, 126 Wn. App. 584, 588 (2005) **June 05 LED:07**. Phillips held that officers with notice that a person's driver's license is suspended may stop any vehicle registered to that person and investigate whether the driver is the vehicle's registered owner (note that if officers learn that the registered owner is not in the vehicle, that justification for the seizure ends at the point when they make

that discovery – see State v. Penfield, 106 Wn. App. 157 (Div. III, 2001) **Aug 01 LED:12**). The circumstance here was analogous to that in Phillips, the Bonds Court holds.

2) The vehicle stop was lawful based on reasonable suspicion that passenger Bonds was the subject of an outstanding arrest warrant

In key part, the Bonds Court explains as follows its alternative rationale for upholding the stop:

> The trial court's findings demonstrate that, although [Officer B] was not absolutely certain that Bonds was the car's passenger, he believed it enough to perform a traffic stop. And [Officer B's] belief in Bonds's identity and both officers' belief that he had an outstanding warrant were based on information learned from the DOC officer with whom they daily worked. Thus, their beliefs were based on specific and articulable facts, not a mere hunch. Accordingly, the trial court's findings support its conclusion that reasonable suspicion that Bonds was the passenger and had an outstanding arrest warrant justified the investigative detention.

3) The search of the handcuffed Bonds' pants pockets was lawful as a search incident to arrest

For the first time on appeal, defendant raised a challenge to the search of his pants pockets incident to his arrest. One element of being able to raise such a late challenge to a police search is that the evidence must support the defendant's theory under the law and facts. The analysis by the Bonds Court on this issue is as follows:

> We have specifically addressed the issue of pocket searches of an arrested person's clothing and found them to be lawful as a search incident to arrest. State v. Jordan, 92 Wn. App. 25, 31 (1998) **Feb 99 LED:09**. We based this holding on Chimel v. California, 395 U.S. 752, 762-63 (1969), stating the underlying justifications for searches of an arrestee's person:
>
> > The Fourth Amendment limits the permissible scope of a warrantless search incident to arrest to the area within the arrestee's immediate control, i.e., places from which the individual might obtain a weapon or destroy incriminating evidence. Thus, we held that the scope of a search incident to arrest clearly, included Jordan's clothing and pockets because they were in his immediate control.
>
> Our holding in Jordan is consistent with past and relatively recent cases decided after Chimel. In 1973, the United States Supreme Court again addressed searches of an arrestee's person. United States v. Robinson, 414 U.S. 218, 221-23 (1973). Robinson approved a search by a law enforcement officer who searched the defendant incident to his arrest by patting him down, reaching into his coat pockets, and opening a cigarette pack discovered in one of those pockets; the cigarette pack contained heroin. The Robinson court observed that the authority to search an arrestee's person does not require a showing of some particular level of probability that weapons or evidence would be found on the person.

More recently, Arizona v. Gant, 556 U.S. 332, 340-43 (2009) **June 09 LED:13** and its progeny, are inapplicable here because they involved searches of the passenger compartments of cars, which may or may not be under an arrestee's control at the time of a search, depending on whether the arrestee is secured and removed from the car. Furthermore, in [State v. Valdez, 167 Wn.2d 761, 768-69 (2009) **Feb 10 LED:11**], our Supreme Court discussed the Fourth Amendment and reaffirmed Chimel's validity, observing that—under the twin Chimel justifications of "officer safety and the preservation of evidence of the crime prompting arrest"— "an officer may conduct a search incident to arrest of the arrestee's person and the area within his or her immediate control." When the Valdez court turned to article I, section 7, it observed that searches incident to arrest arose from and are permitted for the same justifications. [**LED EDITORIAL COMMENT: Note, however, that while this statement is true, the Washington Supreme Court in State v. Snapp, 174 Wn.2d 177 (2012) May 12 LED:25 concluded that Washington has a more restrictive rule for searches of vehicles incident to arrest of an occupant.**]

Unlike searches of vehicles incident to arrest, the arrestee's person, including the clothing he is wearing at the time of the search, is always under his immediate control, giving rise to a concern that he may access a weapon or destroy evidence concealed on his person. Handcuffing a defendant does not change this fact. As Division One of this court recently observed, "Cases exist where handcuffed individuals have acted extraordinarily, threatening officers and public safety." State v. MacDicken, 171 Wn. App. 169, 175 (Div. I, 2012) **Feb 13 LED:16**. "'Albeit difficult, it is by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach, and in so doing to cause injury to his intended victim, to a bystander, or even to himself. Finally, like any mechanical device, handcuffs can and do fail on occasion.'" MacDicken, 171 Wn. App. at 417 n. 17. Thus, our holding in Jordan that law enforcement officers may perform warrantless searches of an arrestee's person, including his clothing, is still valid under the federal and state constitutions.

Here, [Officer A] searched Bonds's pockets incident to his arrest, which was a lawful warrantless search of Bonds's person. Thus, Bonds fails to demonstrate manifest error and accordingly this issue is not preserved for our review.

[Some citations omitted or revised]

LED EDITORIAL COMMENT: The ruling by the Bonds Court on search incident to arrest is not at all surprising. Search of a handcuffed arrestee's pockets is reasonable to prevent the arrestee from getting at a weapon or getting at evidence and destroying or destroying it or tampering with it. More problematic is the question not posed by the facts of Bonds — lawfulness of a search of an item taken from the person of an arrestee (whether taken from the arrestee's pockets or from containers in the suspect's control at the point of arrest) where the search of the item does not occur until after officers have fully secured the handcuffed arrestee in a patrol car. That is the issue that may be answered by the Supreme Court in its review of State v. Byrd, 162 Wn. App. 612 (Div. III, 2011) Oct 11 LED:21. As of the deadline for this July 2013 LED, the Byrd case remained under review in the Washington Supreme Court (oral argument was heard by the Supreme Court on May 15, 2012). The Court of Appeals decided Byrd exclusively under the Fourth Amendment of the U.S. Constitution, not under article I, section 7 of the Washington

constitution, but it appears that the Washington Supreme Court is considering the case under both the Washington constitution and the federal constitution.

WHERE OFFICERS WERE SEARCHING FOR A DOMESTIC VIOLENCE SUSPECT REASONABLY SUSPECTED OF BEING PRESENT IN A THIRD PARTY'S RESIDENCE, FERRIER WARNINGS WERE NOT REQUIRED TO OBTAIN CONSENT TO SEARCH RESIDENCE FOR SUSPECT

State v. Dancer, ___Wn. App. ___, 300 P.3d 475 (Div. II, April 30, 2013)

LED EDITORIAL CROSS-REFERENCE NOTE: In a brief note that immediately follows this entry regarding the Dancer decision holding to be voluntary consent to a search of a residence for a person, we note that in another decision of Division Two of the Court of Appeals, the Court held to be involuntary a consent search of a residence for a person. In the latter case, State v. Westvang, as in Dancer, the officers did not give full Ferrier warnings to the resident when they sought consent. But in Westvang, unlike in Dancer, the State did not prove that at the time they requested consent the officers had reasonable suspicion that the person sought was in the target residence.

Facts and Proceedings below: (Excerpted from the Court of Appeals decision)

> On June 20, 2010, at 12:15 A.M., [a law enforcement officer] arrived at a 7-Eleven in response to a domestic violence report. The victim reported that her boyfriend, Sean Johnson, had assaulted her. The victim also reported that the couple's children were either at their shared residence or possibly at their next door neighbor, Dancer's, home.
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> [The officer] searched for Johnson at the couple's residence but did not locate him there. The police then used a K-9 unit to track Johnson. The dog led officers to the back of Dancer's home.
>
> [The first responding officer] knocked on Dancer's front door, and Dancer answered. As the two spoke, [the officer] was on the porch and Dancer remained in her doorway. Dancer confirmed that the children were in her home, but she denied Johnson's presence. Dancer also said she had observed Johnson leaving and indicated the direction he went.
>
> [The officer] asked Dancer if he could enter her home to search for Johnson. [The officer later] testified that Dancer was not a suspect in any crime but that he was unsure of Dancer and Johnson's relationship and wanted to search for Johnson inside Dancer's home. According to [the officer], he did not provide Miranda or Ferrier warnings because he was not searching for evidence or attempting to avoid obtaining a search warrant.
>
> Dancer gave [the officer] permission to enter her home. [The officer] did not open any drawers or cabinets and confined his search to areas of the home where a person might hide, including rooms and closets. [The officer] discovered a bedroom locked from the outside. He asked permission to enter the room, and Dancer unlocked the door. In the bedroom, [the officer] saw a glass methamphetamine pipe and baggies of methamphetamine in plain sight, which he collected. Dancer admitted owning the items. [The officer] did not arrest

> Dancer at that time; he continued to actively investigate the domestic violence incident and search for Johnson. Johnson was not in Dancer's home.
>
> Based on the methamphetamine [the officer] found, the State charged Dancer with one count of unlawful possession of methamphetamine. Before trial, Dancer moved to suppress all evidence, arguing that the evidence was the product of an unlawful warrantless search of her home in violation of state and federal constitutional protections. The trial court denied Dancer's motion, concluding that "[t]he lack of Ferrier warnings is not fatal to the consent that was given by the Defendant."
>
> The case went to trial on stipulated facts. The trial court found Dancer guilty and sentenced her to 240 hours of community service.

ISSUES AND RULINGS: 1) In State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**, the Washington Supreme Court held under article I, section 7 of the Washington constitution that in order to obtain consent to search a residence for illegal drugs under a "knock and talk" procedure, law enforcement officers must expressly warn the person of the rights to: A) refuse consent, B) restrict scope of the search, and C) retract consent at any time. In Dancer, where officers were searching for a domestic violence suspect reasonably suspected of being present in a third party's residence, were Ferrier warnings required to obtain the resident's consent to search her residence for the suspect? (ANSWER BY COURT OF APPEALS: No, Ferrier warnings were not required because the officers had reasonable suspicion that the person sought was inside the residence);

2) Does the evidence support the trial court's determination that the consent was voluntary? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Kitsap County Superior Court conviction of Cheryl E. Dancer for unlawful possession of methamphetamine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Ferrier warnings were not required

> . . . . Essentially, Dancer argues that police are always required to provide Ferrier warnings before obtaining consent to enter a home or conduct a warrantless search. We hold that (1) [the officer] reasonably suspected that Johnson was in Dancer's home and (2) [the officer] obtained Dancer's consent to enter her home and search for Johnson after informing Dancer that he wished to search for a crime suspect, thus, (3) no Ferrier warnings were required. . . .
> . . . .
>
> In Ferrier, police officers suspected a marijuana grow operation was located at a private residence. Recognizing that they lacked probable cause to obtain a search warrant, the officers decided to conduct a procedure referred to as a "knock and talk. The officers obtained consent to enter the residence and, once inside, revealed their suspicion and sought consent to search the home. The resident signed a written consent form, but the officers did not inform her that she had a right to refuse to consent to allow their entry, restrict the scope of the entry, or terminate it at any time.

Our Supreme Court held that the consent given in Ferrier was not truly voluntary absent warnings that the resident could refuse to consent to a search. The court recognized that any police request for consent to conduct a warrantless search is inherently coercive to some degree:

> [W]e believe that the great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search.

The Ferrier court noted that, "unlike a search warrant, a search resulting from a knock and talk need not be supported by probable cause, or even reasonable suspicion." Thus, the court held that "article I, section 7 is violated whenever the authorities [ ] fail to inform home dwellers of their right to refuse consent to a warrantless search." Standing alone, this broad language seems to support Dancer's arguments. However, later cases have narrowed the circumstances in which police are required to give Ferrier warnings when asking for consent to enter a home.

For example, in State v. Bustamante-Davila, 138 Wn.2d 964, 967-68 (1999) **Nov 99 LED:02** local law enforcement officers accompanied an Immigration and Naturalization Service (INS) agent to Bustamante-Davila's home based on a reasonable belief that he was subject to deportation under an immigration judge's "removal order." The INS agent asked Bustamante-Davila for consent to enter the home and he allowed them to enter without objection. When they entered Bustamante-Davila's home, the INS agent and a Longview police officer saw an illegally possessed rifle in plain view. After the trial court denied his motion to suppress the evidence seized from his home, Bustamante-Davila was convicted for second degree unlawful possession of a firearm. Our Supreme Court held that Bustamante-Davila's consent to the officers' entry was valid without Ferrier warnings, reasoning that the INS agent and local law enforcement officers did not employ the knock and talk procedure deemed offensive in Ferrier, nor did the search exceed the scope of the consent.

Our Supreme Court similarly upheld officers' warrantless entry into a home after receiving an apartment holder's consent based on the officers informing the apartment holder that they wished to enter to search for Harlan Williams, for whom they had an arrest warrant and who they reasonably suspected was at the apartment. State v. Williams, 142 Wn.2d 17, 27 (2000) **Dec 00 LED:14**. The court held that Ferrier warnings were not required under these circumstances. The court noted that, in Bustamante-Davila, it had "recently limited Ferrier to the kind of coercive searches the police employed [in Ferrier.]" The officers' suspicion that Williams was at the apartment was reasonable because the officers "first verified the accuracy of an informant's statement [that the defendant was residing in a particular apartment] and identified the defendant's vehicle in front of [that] apartment." Thus, the search in Williams did "not resemble a 'knock and talk' warrantless search that Ferrier intended to prevent."

Finally, in [State v. Khounvichai, 149 Wn.2d 557, 566 (2003) **Aug 03 LED:06**], our Supreme Court held that Ferrier warnings were not required where officers sought entry for the legitimate investigatory purpose of questioning an occupant about an alleged offense. In that case, two officers responded to a malicious mischief report at an address the complainant provided. The officers knocked on the door, and when a woman answered, they asked her whether the suspect was home. She told the officers that the suspect was her grandson and that he was at home, and the officers asked if they could enter to question him. She allowed the officers to enter, and one officer followed her to a room that smelled of marijuana. The suspect stepped out of the room and, when he saw the officer, turned and whispered to two other individuals in the room. One of those individuals, Khounvichai, quickly moved across the room and out of the officer's sight. Concerned that Khounvichai was reaching for a weapon, the officer grabbed his hand and a baggie of cocaine fell out. In affirming the trial court's denial of Khounvichai's suppression motion, our Supreme Court reiterated that Ferrier only applies where the police employ coercive procedures to obtain consent to search a home and not where officers request entry for a legitimate investigatory purpose. [**LED EDITORIAL COMMENT: Beware, however, of language in Khounvichai indicating that, if officers decide after entry that they have probable cause to search, generally a Ferrier consent request to expand the search is not an option. Rather, in that circumstance, absent exigent circumstances, a search warrant should be sought.**]

The State contends that these cases stand for the proposition that Ferrier warnings are only required where police employ the specific knock and talk procedure deemed offensive in Ferrier. In deciding this case, we need not determine the validity of this proposition and decide only the question presented here, which is whether police must give Ferrier warnings when asking for entry to search for a person the police reasonably suspect is on the premises.

We hold that where police obtain consent to enter and search a home for a person after informing the home's occupant of the purpose of the search and where the search is supported by a reasonable suspicion, that the person may be found in the home, the police need not advise the occupant that she may refuse or limit entry or the subsequent search.

Here, police obtained consent to search Dancer's home for Johnson, a crime suspect, based on a reasonable suspicion that Johnson was in Dancer's home: the victim stated that the children might be there, Dancer confirmed that the children were there, and the K-9 unit led the officers to Dancer's house. As in Khounvichai, the officers sought entry for a legitimate investigatory purpose and did not employ deception or coercion akin to that deemed offensive in Ferrier. Accordingly, under these circumstances, officers were not required to provide Ferrier warnings, and we affirm the trial court's denial of Dancer's suppression motion.

2) Voluntariness of consent

Whether consent is free and voluntary is a question of fact determined by the totality of the circumstances, including (1) whether police gave Miranda warnings before obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the police advised the consenting person of

> his right to refuse consent. . . . No one factor is dispositive, and other factors may be considered, including whether the person was cooperative or refused consent before granting consent, whether law enforcement had to repeatedly request consent, and whether the defendant was restrained.
>
> Here, Dancer freely and voluntarily consented to the search for Johnson, and [the officer] did not exceed the scope of her consent. [The officer] asked permission to enter a locked bedroom after Dancer gave him permission to enter her home and search for Johnson. Dancer consented and unlocked the door. In the bedroom, [the officer] saw a glass methamphetamine pipe and baggies of methamphetamine in plain sight.
>
> Police did not give Dancer Miranda warnings nor did they advise her of her right to refuse consent to their entry, their search for Johnson, or their request to unlock the bedroom door. But because Dancer was never in police custody or suspected of any crime, there was no reason for police to issue Miranda warnings or advise Dancer of her right to refuse consent. . . .
>
> Although police did not specifically ascertain the level of Dancer's education, [the officer] testified that he had numerous prior experiences with individuals unable to consent and that nothing about this situation indicated to him that Dancer was unable to provide voluntary consent. Specifically, [the officer] testified that "nothing [was] out of the ordinary" and that the "contact was appropriate." He also testified that he did not coerce or threaten Dancer. Additionally, the record establishes that Dancer was cooperative during the entire interaction and nothing suggests that she ever refused consent or that [the officer] repeatedly requested consent.

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

LED EDITORIAL COMMENT: We have our doubts that, if the Washington Supreme Court were to consider the issue, that Court would agree with Dancer's bright line rule requiring Ferrier warnings when officers (1) are seeking consent to search a residence for a person, and (2) do not have at least reasonable suspicion that the person sought is in the residence. But until the Washington Supreme Court does that (we don't know when the issue might come before that Court), officers will want to follow the rule.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WHERE STATE DID NOT PROVE AT HEARING THAT OFFICERS HAD REASONABLE SUSPICION SUBJECT OF ARREST WARRANT WAS PRESENT IN THIRD PARTY'S RESIDENCE WHEN THE OFFICERS ASKED THE RESIDENT FOR CONSENT TO SEARCH HER HOME FOR THAT PERSON, THE CONSENT CANNOT BE ESTABLISHED TO BE VOLUNTARY BECAUSE THE OFFICERS DID NOT GIVE FERRIER WARNINGS – In State v. Westvang, ___Wn. App. ___, 2013 WL 2217326 (Div. II, May 21, 2013), the Court of Appeals determines to be involuntary a consent to search a residence because Ferrier consent warnings were not given to the resident who consented to the search. Accordingly, the Court rules that drug-dealing evidence seized in "plain view" during the search must be suppressed.

In Westvang, one officer testified in a suppression hearing that, before going to Ms. Westvang's residence, he had learned from an informant that the subject of an arrest warrant sought in a fugitive sweep "could be found" at the residence of Ms. Westvang. A second officer testified that he had heard from an informant that the person sought "was known to frequent" Ms. Westvang's residence. The officers did not identify the informants, nor did they otherwise provide any evidence going to the credibility or basis of information by the informants.

Consistent with the analysis in the decision of the Court in State v. Dancer three weeks earlier (see **LED** entry immediately above), the Court of Appeals applies a rule requiring that when officers request consent from a resident to search his or her residence for a person, the officers must have at least reasonable suspicion that the person sought is in the residence if the officers are seeking consent without giving full Ferrier warnings, i.e., warnings of the rights to (1) refuse consent, (2) restrict scope of the search, and (3) retract the consent at any time. See State v. Ferrier, 136 Wn.2d 103 (1998) **Oct 98 LED:02**.

The Westvang Court analyzes the same Washington Supreme Court decisions that were central to the Court's analysis in Dancer. The Court also states that the Dancer and Westvang analysis is consistent with the Ferrier-based analysis by Division Three of the Court of Appeals in State v. Freepons, 147 Wn. App. 649 (Div. II, 2008) **Feb 09 LED:14**.

Result: Reversal of Cowlitz County Superior Court conviction of Christine Kay Westvang for possession of methamphetamine with intent to distribute.

(2) TRIAL COURT ERRED IN ALLOWING PROSECUTOR TO ARGUE THAT REFUSAL TO VOLUNTARILY SUBMIT TO WARRANTLESS DNA TEST IS EVIDENCE OF DEFENDANT'S GUILT – In State v. Gauthier, ___ Wn. App. ___, 298 P.3d 126 (Div. I, April 1, 2013), the Court of Appeals holds that the trial court committed error in allowing the prosecutor to argue that the defendant's refusal to submit to DNA testing was evidence of guilt.

The defendant declined to provide a voluntary DNA sample as part of a rape investigation. During trial, the prosecutor argued that the defendant's actions in declining to provide the sample were consistent with someone who is guilty.

The Court holds that obtaining a DNA sample is a constitutional search that may not be conducted absent a warrant or court order or recognized exception to the search warrant requirement. Where the defendant declines to provide a voluntary DNA sample, the prosecutor is not allowed to use the refusal as substantive evidence.

Result: Reversal of King County Superior Court conviction of Thomas M. Gauthier for second degree rape.

(3) SUFFICIENT FACTS TO GO TO A JURY IN THIRD DEGREE ASSAULT PROSECUTION WHERE NINE YEAR OLD TOOK GUN BELONGING TO HIS MOTHER'S BOYFRIEND TO SCHOOL AND ACCIDENTALLY SHOT A CLASSMATE – In State v. Bauer, ___ Wn. App. ___, 295 P.3d 1227 (Div. II, March 8, 2013), in a split decision, the Court of Appeals holds that the state has presented sufficient facts for the case to go to a jury in a third degree assault prosecution, where a 9 year old accidentally shot a classmate with defendant's (boyfriend of the 9 year old's mother) gun, which the child took from a dresser in a bedroom shared by the defendant and 9 year old's mother.

The 9 year old took a loaded gun from the top of a dresser in a bedroom shared by the defendant and the 9 year old's mother. (A search of the home revealed multiple loaded

weapons in areas readily accessible by children.) The 9 year old took the gun to school and toward the end of the day reached into his backpack and the gun accidentally discharged injuring a classmate.

The defendant was charged with assault in the third degree under RCW 9A.36.031(1)(d):

> With criminal negligence, causes bodily harm to another person by means of a weapon.

Criminal negligence is defined in RCW 9A.08.010(1)(d):

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

The Court of Appeals concludes that "cause" means proximate cause, which consists of both actual and legal cause.

The Court holds that the state presented sufficient evidence for a jury to conclude that the defendant's actions were both the actual and legal cause of the victim's injuries. Accordingly, the defendant's motion to dismiss is denied.

Result: Affirmance of Kitsap County Superior Court order denying Douglas L. Bauer's motion to dismiss the third degree assault charge.

(4) ALTHOUGH CITY CLERKS HAVE A MANDATORY DUTY TO TRANSMIT ORDINANCE TO THE COUNTY AUDITOR, THE COURT DENIES ACTION SEEKING TO COMPEL CITY CLERK TO DO SO BECAUSE IT WOULD HAVE BEEN USELESS UNDER THE FACTS OF THIS CASE (TRAFFIC CAMERA INITIATIVE) – In Eyman v. McGehee, 173 Wn. App. 684 (Div. I, Feb. 19, 2013), in a split opinion the Court of Appeals holds that although a city clerk has a mandatory duty to transmit initiative petitions to the county auditor for a determination of sufficiency, a mandamus action compelling the clerk to do so was not warranted under the facts of this case because it would have been a useless act. The Court is clear, however, that it is for the courts, not government officials, to determine the validity of proposed initiatives.

The court has previously held that traffic camera ordinances cannot be overridden by initiative, which is what the proposed initiative sought to do. See American Traffic Solutions, Inc., v. City of Bellingham, 163 Wn. App. 427 (Div. I, 2011), review denied, 173 Wn.2d 1029 (2012).

Result: Affirmance of King County Superior Court's denial of writ of mandamus compelling city clerk to transmit initiative petition to county auditor for determination of sufficiency.

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NEXT MONTH

The August 2013 **LED** will include a discussion of the Washington State Supreme Court decision in State v. Tyler, ___ Wn.2d ___, 2013 WL 2367952 (May 30, 2013), where the Court held that: (1) the impoundment of a vehicle was justified by a combination of a hazard, a driving while license suspended arrest, and exhaustion of reasonable alternatives; (2) the inventory was not pretextual; and (3) consent is not generally a requirement for inventory under the

Washington constitution. The Supreme Court decision in Tyler affirms the decision of the Court of Appeals in State v. Tyler, 166 Wn. App. 202 (Div. II, 2012) **June 12 LED:26**.

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

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

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

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

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