Law Enforcement Digest

JUNE 2013

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

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ANNOUNCEMENT REGARDING LED DISTRIBUTION: As LED readers are aware, LEDs are posted to the Washington State Criminal Justice Training Division's (WSCJTC) LED webpage about the middle of each month. (For example, the May LED was posted in the middle of April.) Beginning with the May 2013 LED, the WSCJTC will also include a link to the most recent LED edition in the "Weekly Training Announcement" e-mail, which is sent by the Advanced Training Division, specifically Leanna Bidinger, Statewide Regional Training Coordination/Leadership Program Manager. Agencies may wish to ask that their training coordinators forward the link to officers.

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2013 LEGISLATION: We have been promising that we would mention any bills with immediate effective dates in the LED, rather than waiting until the Legislative Update is complete. Chapter 116, Laws of Washington is one such bill. It is a corrective bill to I-502.

We may describe it in more detail in the upcoming Legislative Update, but wanted to make sure readers are aware of its passage.

CORRECTING THE DEFINITION OF THC CONCENTRATION ADOPTED BY INITIATIVE MEASURE NO. 502 TO AVOID AN IMPLICATION THAT CONVERSION, BY COMBUSTION, OF TETRAHYDROCANNABINOL ACID NOT DELTA-9 TETRAHYDROCANNABINOL IS NOT PART OF THE THC CONTENT THAT DIFFERENTIATES MARIJUANA FORM HEMP

Chapter 116 (ESB 2056) Effective: May 1, 2013

RCW 69.50.101(ii) is amended to read as follows:

"THC concentration" means percent of delta-9 tetrahydrocannabinol content per dry weight of any part of the plant *Cannabis*, or per volume or weight of marijuana product, or the combined percent of delta-9 tetrahydrocannabinol and tetrahydrocannabinolic acid in any part of the plant *Cannabis* regardless of moisture content.

Additionally, as we have noted in the past few LEDs, in prior years we have included the legislative update over the course of two or more LED editions. 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.

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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UNITED STATES SUPREME COURT

SCIENTIFIC FACT OF NATURAL DISSIPATION OF ALCOHOL IN BLOODSTREAM IS NOT PER SE EXIGENCY THAT JUSTIFIES NONCONSENTING BLOOD TEST IN CRIMINAL CASES WHERE DRIVING UNDER THE INFLUENCE IS AN ELEMENT OF THE CRIME

Missouri v. McNeely, ___U.S. ___, 2013 WL 1628934 (April 17, 2013)

Facts and Proceedings below:

A Missouri State Highway Patrol officer pulled over McNeely. He smelled of alcohol and exhibited several indicators of intoxication. McNeely failed field sobriety testing, then refused testing on a portable device and said he would also refuse testing on a stationhouse breath-testing device. The trooper took McNeely to a hospital. After McNeely refused consent to a blood alcohol test, the trooper directed a qualified hospital staff person to draw blood. The trooper's understanding of the law was that the law did not require a search warrant because the natural dissipation of alcohol in the bloodstream made the circumstances per se exigent.

The trial court disagreed with the trooper, as did the Missouri State Supreme Court, which held (1) that the mere fact of natural dissipation of alcohol in the blood does not constitute per se exigent circumstances, and (2) that no other evidence in this case suggested such exigency.

ISSUE AND RULING: Does the natural dissipation of alcohol in the bloodstream constitute a per se exigency that justifies non-consenting blood testing in criminal cases involving driving under the influence of alcohol as an element of the crime? (ANSWER BY THE U.S. SUPREME COURT: No, rules a majority of the U.S. Supreme Court)

Result: Affirmance of suppression ruling of the Missouri courts below.

ANALYSIS:

Four separate opinions were issued by the Supreme Court justices. None of the opinions conclude that under the Fourth Amendment an officer must always get a search warrant to take a blood sample without consent in a DUI case. But the majority view on the Court is that the natural dissipation of alcohol in the bloodstream does not alone automatically create exigent circumstances that justify a non-consenting blood draw. Instead, the majority view is that a case-by-case, totality-of-the-circumstances analysis is always required on this exigent circumstances question.

Justice Sotomayor authors the lead opinion. She is joined by Justices Kagen, Scalia and Ginsburg. Important to her lead opinion is that the blood draw involves a significant physical intrusion of bodily integrity, i.e., an intrusion beneath the skin and into a vein.

The Sotomayor opinion indicates that getting a search warrant should be the default rule in DUI cases where officers decide to pursue a blood test. She says that the mere fact that alcohol in the blood dissipates over time is not enough, by itself, to do away totally with the requirement for a search warrant, the position that the State of Missouri took in this case. Her opinion stresses that state and local governments and court systems have adopted a number of new procedures that make it easier, and faster, to get blood-test warrants, and that those procedures will mean that "[o]ur ruling will not severely hamper law enforcement."

Because the State of Missouri argued to the Supreme Court only for a per se rule, the lead opinion does not address whether the facts of this case add up to exigent circumstances. The lead opinion and other opinions do not give much guidance on what will constitute exigent circumstances in cases where DUI is an element of the crime. The Sotomayor lead opinion does recognize that biological metabolizing of alcohol in the blood and logistical limitations of local systems for obtaining search warrants are among the factors to be considered on the exigent circumstances question. Also apparently relevant in the view of the lead opinion is whether delay in beginning the process of seeking a search warrant is necessitated by circumstances related to the number of officers and others available to deal with injuries to the suspect or others and investigate the scene of an accident.

Justice Kennedy writes an opinion that concurs with most of the analysis in the lead opinion. No other Justice joins his opinion. He agrees that "always dispensing with a warrant for a blood test when a driver is arrested for being under the influence of alcohol is inconsistent with the Fourth Amendment." But he emphasizes that local and state authorities still have the power to work out "rules and guidelines that give important, practical instruction to arresting officers," and that those kinds of rules and guidelines may permit blood testing without a warrant "in order to preserve the critical evidence" of blood alcohol content. He adds that as further cases develop, the Supreme Court may decide "to provide more guidance than it undertakes to give today."

Chief Justice Roberts is joined by Justices Alito and Breyer in an opinion concurring in part and dissenting in part from the lead opinion. He suggests that in light of the time it takes to get a

suspect from the scene of the stop to a medical facility and take a blood draw, it makes sense to have a categorical rule that exigent circumstances exist if it would take longer to obtain a search warrant than it would take to get the suspect to the point of a blood draw. Justice Sotomayor's lead opinion rejects this idea under the following analysis:

> . . . . Although we agree that delay inherent to the blood-testing process is relevant to evaluating exigency, we decline to substitute The Chief Justice's modified per se rule for our traditional totality of the circumstances analysis.
>
> For one thing, making exigency completely dependent on the window of time between an arrest and a blood test produces odd consequences. Under The Chief Justice's rule, if a police officer serendipitously stops a suspect near an emergency room, the officer may conduct a nonconsensual warrantless blood draw even if all agree that a warrant could be obtained with very little delay under the circumstances (perhaps with far less delay than an average ride to the hospital in the jurisdiction). The rule would also distort law enforcement incentives. As with the State's per se rule, The Chief Justice's rule might discourage efforts to expedite the warrant process because it categorically authorizes warrantless blood draws so long as it takes more time to secure a warrant than to obtain medical assistance. On the flip side, making the requirement of independent judicial oversight turn exclusively on the amount of time that elapses between an arrest and BAC testing could induce police departments and individual officers to minimize testing delay to the detriment of other values. The Chief Justice correctly observes that "[t]his case involves medical personnel drawing blood at a medical facility, not police officers doing so by the side of the road." But The Chief Justice does not say that roadside blood draws are necessarily unreasonable, and if we accepted The Chief Justice's approach, they would become a more attractive option for the police.

Justice Thomas authors a dissent joined by no other Justice. He argues in vain for the view that dissipation of alcohol in the blood does constitute a per se exigency in DUI cases.

LED EDITORIAL COMMENTS:

(1) Breath: RCW 46.20.308 (Implied Consent) provides that the test to determine alcohol content or the presence of any drug shall be of breath except in designated circumstances. We believe that the McNeely ruling does not apply to breath tests. The pivotal concern of the U.S. Supreme Court majority was the physical intrusion of blood draws. Because breath tests do not involve such physical intrusion, we believe that the U.S. Supreme Court will not take a similar restrictive approach to breath tests.

(2) Blood: RCW 46.20.308 provides for blood draws under two different categories of circumstances. First, a blood draw is authorized where a person is arrested for DUI, physical control or violation of RCW 46.61.503 (under 21) and is incapable of providing a breath sample due to physical injury, physical incapacity, or other physical limitation, or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility. Under this first category the person has the same right to refuse as they do with a breath test. RCW 46.20.308(2). Second, a blood draw is authorized where an individual is unconscious or is under arrest for vehicular homicide, vehicular assault, or where an individual is under arrest for the crime of DUI which arrest results from an accident in which there has been serious bodily injury to

another person. Under this second category, the blood test may be administered without consent. RCW 46.20.308(3).

There may be an argument that McNeely does not impact blood draws under RCW 46.20.308(2). However, in light of McNeely we believe that the safest course of action is for officers to obtain a warrant prior to any blood draw.

We think that RCW 46.20.308(3)'s provisions allowing for warrantless blood draws for specific offenses are overridden by McNeely. While some cases might involve exigent circumstances in light of the totality of the circumstances of the particular case, the default rule is the requirement of a search warrant, and the government will be required to prove exigent circumstances on a case by case basis. In the event an officer is unable to obtain a search warrant, and can articulate specific facts establishing an exigency, the officer should read the special evidence warnings before proceeding with a warrantless blood draw.

Some examples of exigencies might include:

- **Officer responds to a collision scene with multiple injuries and death. Due to the number of tasks the officer must perform, there is insufficient time to obtain a warrant within two hours of the driving and no other officer is available to seek the warrant.**
- **Medical personnel inform the officer that the suspect will require a blood transfusion or medication. Based on the officer's training and experience, he/she knows that this will impact the results of the blood draw and the officer does not have sufficient time to obtain a warrant prior to the transfusion or procedure.**
- **Medical personnel inform the officer that the suspect must immediately be transported to another facility or taken into the operating room or another area of the hospital where the officer will not have access.**
- **After several attempts, the officer is unable to locate a judge to hear the warrant application.**

Exigent circumstances will be evaluated on a case by case basis, in light of the totality of the circumstances. Officers should carefully document the facts supporting exigent circumstances. Additionally, while we believe that obtaining a blood sample within two hours of driving is a relevant factor supporting exigent circumstances, officers should take care not to create the exigency through unnecessary delay.

(3) Although the parameters of McNeely will need to be fleshed out through future litigation, the most cautious approach is to obtain a search warrant prior to conducting a non-consensual blood draw, rather than relying on the implied consent or special evidence warnings. A template is available on the Washington Association for Prosecuting Attorneys (WAPA) website:
http://www.waprosecutors.org/docs/Search-Warrant-for-Blood-2011%20.pdf.

As always we encourage officers to consult with their assigned agency legal advisors and/or local prosecutors in determining what procedures to follow. We may revisit McNeely in the future if the collective wisdom of legal advisors and prosecutors comes up with additional guidance.

TRESPASS-BASED 4TH AMENDMENT THEORY HOLDS THAT POLICE EXCEEDED SCOPE OF HOME RESIDENT'S IMPLIED INVITATION FOR VISITORS TO COME ONTO FRONT

PORCH WHERE OFFICER AND K-9 WENT ONTO PORCH, NOT FOR THE PURPOSE OF TALKING TO THE RESIDENT, BUT INSTEAD FOR THE OBJECTIVELY MANIFESTED PURPOSE OF CONDUCTING SEARCH, BY HAVING K-9 SNIFF FOR MARIJUANA GROW

Florida v. Jardines, ___U.S. ___, 2013 WL 1196577 (March 26, 2013)

LED INTRODUCTORY EDITORIAL COMMENT: In a 1998 decision in State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov 98 LED:06, Division One of the Washington Court of Appeals held that article I, section 7 of the Washington constitution prohibited the warrantless taking a drug-sniffing dog to the front door of a home to sniff for a marijuana grow. The Court of Appeals concluded that the enhanced sense of smell of the dog made the police action a search of the home violating the privacy rights of the homeowner. The Dearman Court held that a search warrant was required for this investigative action. The Dearman Court apparently distinguished using a dog to sniff at packages and other containers intercepted in transit in the mail and at bus stations and like situations. Under an arguably-logic-challenging (or at least hairsplitting) rationale, the Dearman Court appeared to accept the proposition that the latter non-residential, non-person sniffing operations (i.e., sniffing packages intercepted in transit versus sniffing at homes) do not constitute a search under the Washington constitution (previous Washington Court of Appeals decisions had relied on the categorical facts that the search detects only contraband and does not physically intrude into the container). But the Dearman Court held that the heightened privacy protection of a residence requires a different answer as to whether a privacy-invading search occurs with the use of the dog at the front door of a home.

In the March 26, 2013 Jardines decision of the U.S. Supreme Court digested here, the lead opinion for the Court (the only opinion that sets the Fourth Amendment precedent for this case) does not rely on the arguably-logic-challenging privacy invasion rationale that the Washington Court of Appeals relied on in Dearman. For Washington officers who must follow both the Washington constitution and the federal constitution's Fourth Amendment, this means that they must take into account both the privacy intrusion rationale of Dearman and the trespass/property law rationale of Jardines. Where this could make a difference for Washington officers – as compared to officers subject only to Fourth Amendment restrictions – as we discuss a bit more in our follow-up editorial comments below, is where a drug-sniffing dog is taken on a sniffing operation along resident-shared walkways and hallways at motels, hotels and apartment buildings.

We once again remind officers that opinions we express in LED editorial comments are not legal advice, and that officers should consult their assigned agency legal advisors and/or local prosecutors on issues covered in the LED.

Facts and Proceedings below: A detective of the Miami-Dade law enforcement agency in the Florida area received an unverified tip that marijuana was being grown in the home of Jardines. A team of officers followed up by going to Jardines' home. After watching the home for about 15 minutes, and seeing no vehicles or activity around the home, a canine handler was sent onto Jardines' openly accessible front porch. Within a minute or two on the porch, the dog alerted in a way that convinced the handler that the dog had detected the presence of narcotics in the home. The dog and handler then retreated from the porch.

Officers obtained a search warrant, and a search yielded marijuana plants. Jardines was charged for the marijuana grow, but the Florida trial court suppressed the evidence on grounds that the use of the dog violated Jardines' privacy rights under the Fourth Amendment. An

intermediate Florida appellate court disagreed, but the Florida Supreme Court then affirmed the trial court's suppression order.

ISSUE AND RULING: The law enforcement team's purpose, objectively manifested under the totality of the circumstances, which include the fact that an officer took a drug-sniffing dog onto Jardines' front porch, was not to talk to him, but instead was to search for a marijuana grow operation. Under these circumstances, did the team's actions constitute a "search" that violated Jardines' rights under a trespass-based (or property rights) theory, i.e., by exceeding the implied invitation of homeowner Jardines for members of the public to come onto his front porch to contact him? (ANSWER BY U.S. SUPREME COURT: Yes, rules a 5-4 majority)

Result: Affirmance of Florida Supreme Court decision that affirmed a Florida trial court decision suppressing evidence seized in a warrant search.

ANALYSIS:

Justice Scalia's Lead Opinion For The Majority Rests On A Property/Trespass Rationale

Justice Scalia is author of the lead opinion for the majority. Justice Thomas joins only in the Scalia opinion. Justice Kagen is author of a concurring opinion that is joined by Justices Ginsburg and Sotomayor. Justice Kagen agrees completely with the trespass-based theory of Justice Scalia's opinion, but her opinion also states an alternative, privacy-based theory the merits of which Scalia and Thomas decline to address.

The Scalia opinion states that the police entry onto Jardines' front porch must be held a warrantless search (for which the government offered no justification) on the trespass-based rationale that the police exceeded the implied invitation that a home resident is deemed to extend to citizens and police alike to come onto his front porch to talk to him. The implied invitation, or license, to come onto the porch was violated, Scalia asserts, because the police did not have the purpose of talking to Jardines but instead had the objectively manifested purpose of conducting a search from the front porch area.

A home resident is generally deemed to have extended an implied invitation to come onto his front porch (which is part of the otherwise protected "curtilage" of the home, i.e., the area immediately surrounding the home that has qualified privacy protection). The resident impliedly invites persons to contact him there unless the resident has taken substantial steps (e.g., posting, gating, fencing) to discourage such contacts. But Justice Scalia's lead opinion explains as follows that residents cannot be deemed to have impliedly invited police or others to come onto their front porch with the objectively manifested intent, not to talk to the resident, but to conduct a search:

> . . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is "no more than any private citizen might do." Kentucky v. King, 563 U. S. ___, 131 S.Ct. 1849 (2011) **Aug 11 LED:08**.
>
> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no

customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. [Court's footnote*: The dissent insists that our argument must rest upon "the particular instrument that Detective Bartelt used to detect the odor of marijuana"—the dog. It is not the dog that is the problem, but the behavior that here involved use of the dog. We think a typical person would find it "'a cause for great alarm'" (the kind of reaction the dissent quite rightly relies upon to justify its no-night-visits rule) to find a stranger snooping about his front porch with or without a dog. The dissent would let the police do whatever they want by way of gathering evidence so long as they stay on the base-path, to use a baseball analogy—so long as they "stick to the path that is typically used to approach a front door, such as a paved walkway." From that vantage point they can presumably peer into the house through binoculars with impunity. That is not the law, as even the State concedes.*]

To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

The State points to our decisions holding that the subjective intent of the officer is irrelevant [under the Fourth Amendment]. See Ashcroft v. al-Kidd, 563 U. S. ___ (2011); Whren v. United States, 517 U.S. 806 (1996) **Aug 96 LED:09**. But those cases merely hold that a stop or search that is objectively reasonable is not vitiated by the fact that the officer's real reason for making the stop or search has nothing to do with the validating reason. Thus, the defendant will not be heard to complain that although he was speeding the officer's real reason for the stop was racial harassment. Here, however, the question before the court is precisely whether the officer's conduct was an objectively reasonable search. As we have described, that depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered. Here, their behavior objectively reveals a purpose to conduct a search, which is not what anyone would think he had license to do.

The State argues that investigation by a forensic narcotics dog by definition cannot implicate any legitimate privacy interest. The State cites for authority our decisions in United States v. Place, 462 U.S. 696 (1983), United States v. Jacobsen, 466 U.S. 109 (1984) , and Illinois v. Caballes, 543 U.S. 406 (2005) **March 05 LED:03, April 05 LED:02**, which held, respectively, that canine inspection of luggage in an airport, chemical testing of a substance that had fallen from a parcel in transit, and canine inspection of an automobile during a lawful traffic stop, do not violate the "reasonable expectation of privacy" described in [Katz v. United States, 389 U.S. 347 (1967)].

Just last Term, we considered an argument much like this. [United States v. Jones, ___U.S. ___, 132 S.Ct. 945 (2012) **March 12 LED:07**] held that tracking an automobile's where abouts using a physically-mounted GPS receiver is a

> Fourth Amendment search. The Government argued that the Katz [privacy] standard "show[ed] that no search occurred," as the defendant had "no 'reasonable expectation of privacy' " in his whereabouts on the public roads, —a proposition with at least as much support in our case law as the one the State marshals here. . . But because the GPS receiver had been physically mounted on the defendant's automobile (thus intruding on his "effects"), we held that tracking the vehicle's movements was a search: a person's "Fourth Amendment rights do not rise or fall with the Katz formulation." The Katz reasonable-expectations test "has been added to, not substituted for," the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.
>
> Thus, we need not decide whether the officers' investigation of Jardines' home violated his expectation of privacy under Katz. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred.
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> For a related reason we find irrelevant the State's argument (echoed by the dissent) that forensic dogs have been commonly used by police for centuries. This argument is apparently directed to our holding in Kyllo v. United States, 533 U.S. 27 (2001)) **Aug 01 LED:07**, that surveillance of the home is a search where "the Government uses a device that is not in general public use" to "explore details of the home that would previously have been unknowable without physical intrusion." But the implication of that statement (inclusio unius est exclusio alterius) is that when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant.

[Two footnotes omitted; some case and record citations revised or omitted]

Justice Kagan's Concurring Opinion Would Have Added A Privacy-Based Rationale

As noted above, Justice Kagan's concurring opinion agrees in all respects with Justice Scalia's trespass-based rationale. But her opinion suggests that the Court should have included a separate privacy-based rationale that the Scalia opinion expressly declines to address on its merits. The Kagen theory is captured in the following passage of her concurrence:

> If we had decided this case on privacy grounds, we would have realized that Kyllo v. United States, 533 U.S. 27 (2001) **Aug 01 LED:07**, already resolved it. The Kyllo Court held that police officers conducted a search when they used a thermal-imaging device to detect heat emanating from a private home, even though they committed no trespass. Highlighting our intention to draw both a "firm" and a "bright" line at "the entrance to the house," we announced the following rule:
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> > "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

> That "firm" and "bright" rule governs this case: The police officers here conducted a search because they used a "device . . . not in general public use" (a trained drug-detection dog) to "explore details of the home" (the presence of certain substances) that they would not otherwise have discovered without entering the premises.
>
> And again, the dissent's argument that the device is just a dog cannot change the equation. As Kyllo made clear, the "sense-enhancing" tool at issue may be "crude" or "sophisticated," may be old or new (drug-detection dogs actually go back not "12,000 years" or "centuries," but only a few decades), may be either smaller or bigger than a breadbox; still, "at least where (as here)" the device is not "in general public use," training it on a home violates our "minimal expectation of privacy"—an expectation "that exists, and that is acknowledged to be reasonable." That does not mean the device is off-limits, as the dissent implies, it just means police officers cannot use it to examine a home without a warrant or exigent circumstance. . . . .

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

Justice Alito's Dissent Disagrees With Scalia's Trespass Theory And Kagan's Privacy Theory

Justice Alito's dissent is joined by Chief Justice Roberts and Justices Kennedy and Breyer. As to Justice Scalia's trespass theory, the dissent acknowledges that under prior case law from lower courts around the nation, absent exigent circumstances, police were not allowed (1) to search around the front porch area or other areas of curtilage of a home in the middle of the night, or (2) to hang around on the front porch of a home for an extended period of time without attempting to contact the resident. Justice Alito's dissent argues as follows, however, that the police team's actions in the Jardines case was reasonable in light of the resident's implied invitation to contact him at his front porch:

> As I understand the law of trespass and the scope of the implied license, a visitor who adheres to these limitations is not necessarily required to ring the doorbell, knock on the door, or attempt to speak with an occupant. For example, mail carriers, persons making deliveries, and individuals distributing flyers may leave the items they are carrying and depart without making any attempt to converse. A pedestrian or motorist looking for a particular address may walk up to a front door in order to check a house number that is hard to see from the sidewalk or road. A neighbor who knows that the residents are away may approach the door to retrieve an accumulation of newspapers that might signal to a potential burglar that the house is unoccupied.
>
> As the majority acknowledges, this implied license to approach the front door extends to the police. As we recognized in Kentucky v. King, 563 U. S. ___, 131 S. Ct. 1849 (2011) **Aug 11 LED:08**, police officers do not engage in a search when they approach the front door of a residence and seek to engage in what is termed a "knock and talk," i.e., knocking on the door and seeking to speak to an occupant for the purpose of gathering evidence. ("When law enforcement officers who are not armed with a warrant knock on a door, they do no more than any private citizen might do"). See also 1 LaFave §2.3(e), at 592 ("It is not objectionable for an officer to come upon that part of the property which has been opened to public common use" (internal quotation marks omitted)). Even when

> the objective of a "knock and talk" is to obtain evidence that will lead to the resident's arrest and prosecution, the license to approach still applies. In other words, gathering evidence—even damning evidence—is a lawful activity that falls within the scope of the license to approach. And when officers walk up to the front door of a house, they are permitted to see, hear, and smell whatever can be detected from a lawful vantage point. California v. Ciraolo, 476 U.S. 207, 213 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares"); [State v. Cada, 923 P.2d 469, 477 (Idaho App. 1996)] ("[P]olice officers restricting their activity to [areas to which the public is impliedly invited] are permitted the same intrusion and the same level of observation as would be expected from a reasonably respectful citizen" (internal quotation marks omitted)); 1 LaFave §§2.2(a), 2.3(c), at 450–452, 572–577.
>
> Detective Bartelt did not exceed the scope of the license to approach respondent's front door. He adhered to the customary path; he did not approach in the middle of the night; and he remained at the front door for only a very short period (less than a minute or two).
>
> The Court concludes that Detective Bartelt went too far because he had the "objectiv[e] . . . purpose to conduct a search." What this means, I take it, is that anyone aware of what Detective Bartelt did would infer that his subjective purpose was to gather evidence. But if this is the Court's point, then a standard "knock and talk" and most other police visits would likewise constitute searches. With the exception of visits to serve warrants or civil process, police almost always approach homes with a purpose of discovering information. That is certainly the objective of a "knock and talk." The Court offers no meaningful way of distinguishing the "objective purpose" of a "knock and talk" from the "objective purpose" of Detective Bartelt's conduct here.
>
> The Court contends that a "knock and talk" is different because it involves talking, and "all are invited" to do that. But a police officer who approaches the front door of a house in accordance with the limitations already discussed may gather evidence by means other than talking. The officer may observe items in plain view and smell odors coming from the house. . . . So the Court's "objective purpose" argument cannot stand.

[Some case and record citations omitted or revised]

LED EDITORIAL COMMENTS:

(1) Is a search warrant generally required to take a drug-sniffing dog onto the front porch of a residence to sniff for illegal drugs?

The Florida Supreme Court declared that probable cause, not necessarily a search warrant, would justify taking a drug-sniffing dog to the front porch of a home with the sole purpose of having the dog sniff for drugs. The U.S. Supreme Court's lead opinion does not address whether a search warrant would be required under the Fourth Amendment. For Washington officers, the interesting academic question as to whether a search warrant is required in this context is irrelevant in light of the Washington Court of Appeals decision in State v. Dearman, 92 Wn. App. 630 (Div. I, 1998) Nov 98 LED:06, holding that a warrant is required in this context. The only safe approach for Washington

officers is to seek a search warrant to take a drug-sniffing dog to a person's front porch to sniff for drugs. In theory, if exigent circumstances could be established, that would make it unnecessary to get a warrant to bring a dog onto the porch to sniff for drugs, but we have a difficult time positing such exigent circumstances for a drug case (though of course we can envision exigent circumstances that would justify the warrantless taking of a dog trained to sniff for explosives onto a person's front porch).

(2) Are K-9 officers barred from taking their drug-sniffing dogs with them when the officers wish to go to a home's front door merely to talk to a resident?

We think it is likely that if a drug-sniffing dog alerts in this circumstance, Washington courts will rule that an unlawful search has occurred, at least under the Washington constitution (and probably also under the Fourth Amendment).

(3) May a drug-sniffing dog be taken by an officer to a motel, hotel or apartment complex walkway or hallway that is generally open to the public, where the dog is being used to sniff for drugs near the entrance doors of individual residences in such buildings?

We think that, while this may be lawful under Jardines' property-law-based Fourth Amendment ruling, the chances are more than 50% that it would be held by a Washington Court to violate the Washington constitution under the privacy-based search ruling of the Washington Court of Appeals in Dearman.

(4) Are officers (whether they identify to an occupant their police role or act in an undercover role) permitted, if not accompanied by a drug-sniffing dog, to knock on the front door and use a ruse of inquiring about some other subject when their actual purpose is to use their own sense of smell to try to detect whether marijuana is being grown in the premises (assume that the contact occurs at a reasonable hour of the day)?

We hope that this is permitted under Jardines, but only time and future court decisions will tell. Because all jurisdictions in the U.S. are subject to the Fourth Amendment, court decisions around the country will provide guidance in interpreting Jardines.

(5) May a drug-sniffing dog be used to sniff for a marijuana grow from a location outside the curtilage of a residence, e.g., from curbside?

Because of the trespass/property law rationale that Justice Scalia's lead opinion took, this appears to be lawful under the Fourth Amendment. A closer question is presented under Dearman's privacy rationale, but our guess is that this is also permitted under Dearman, which was concerned with sniffing within the curtilage of the home, and which appeared to accept that certain other types of drug-dog sniffing (for instance drug-dog sniffing of packages intercepted in the mail) did not constitute searches.

(6) In State v. Rose, 128 Wn.2d 388 (1996) March 96 LED:02, the Washington Supreme Court ruled, 5-4, that an officer did not violate article I, section 7 of the Washington constitution when the officer went onto a front porch of a residence at nighttime while investigating whether the resident was growing marijuana on the property, and from that location, after knocking, the officer shined his flashlight through an un-curtained picture window to look inside the living room where the officer observed cut marijuana and a scale on a table. Does the Washington Supreme Court ruling in Rose stand up to scrutiny under Jardines?

We hope that this is permitted under Jardines, but only time and future court decisions will tell. A significant difference from Jardines is that in Rose, before looking through the window, the officer knocked on the door in an attempt to contact the resident.

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BRIEF NOTES FROM THE NINTH CIRCUIT COURT OF APPEALS

(1) NINTH CIRCUIT WILL RECONSIDER DECISION THAT HELD THAT FEDERAL OFFICERS LACKED REASONABLE SUSPICION OF SMUGGLING OF ILLEGAL ALIENS OR OF DRUGS – On April 25, 2013, the Ninth Circuit withdrew the 3-judge panel's Valdes-Vega decision reported in the **December 2012 LED**. See United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir., July 25, 2012) – **Dec 12 LED:12** (split panel rejects stop by border patrol agents, holding that the list of facts relied on by federal officers all are too ambiguous and therefore do not add up to reasonable suspicion of smuggling of aliens or drugs). The Ninth Circuit's April 25, 2013 order directed rehearing of the appeal by an en banc (i.e., 11-judge) panel.

(2) CIVIL RIGHTS ACT LAWSUIT: IN A REVERSAL OF ITS PRIOR OPINION, THE NINTH CIRCUIT HOLDS THAT AN OFFICER WHO FATALLY SHOT A DRIVER THAT HAD RAMMED HER VEHICLE INTO POLICE VEHICLES AT END OF A HIGH SPEED CHASE IS NOT ENTITLED TO QUALIFIED IMMUNITY FROM DUE PROCESS-BASED LIABILITY – In A.D. v. California Highway Patrol, ___ F.3d ___, 2013 WL 1319453 (9th Cir., April 3, 2013) a three-judge Ninth Circuit panel reverses its prior opinion, which it previously withdrew, and denies qualified immunity to an officer who shot a driver who rammed her vehicle into police vehicles. See A.D. v. Markgraf, California Highway Patrol, 636 F.3d 555 (9th Cir. April 6, 2011) **Nov 11 LED:03,** withdrawn by 636 F.3d 555 (9th Cir., April 6, 2012) **July 12 LED:04**.

Qualified immunity shields government officials from damages in lawsuits brought under 42 U.S.C. § 1983 when the constitutional right at issue was not clearly established. Appeals from denial of qualified immunity typically occur prior to trial because if an officer is entitled to qualified immunity the damages claims are dismissed and there is no trial. However, the appeal in this case arose after a jury trial and verdict in favor of the plaintiffs by way of a motion for judgment notwithstanding the verdict. The Ninth Circuit originally held that the officer was entitled to qualified immunity. However, after a petition for rehearing the Ninth Circuit withdrew its original opinion and ordered the parties to submit supplemental briefing on two issues, one of which related to the degree of deference to give to the jury's implicit finding that the officer used deadly force with the purpose to cause harm unrelated to legitimate law enforcement objective.

The Court first notes that:

> Plaintiffs argue that, when Markgraf shot and killed Eklund, he violated their Fourteenth Amendment due process rights by interfering with the liberty interest they (like all children) have in the "companionship and society" of their mother. . . . Police conduct violates due process if it "shocks the conscience." Porter v. Osborn, 546 F.3d 1131, 1137 (9th Cir. 2008) **Jan 09 LED:02**. Conscience-shocking actions are those taken with (1) "deliberate indifference" or (2) a "purpose to harm . . . unrelated to legitimate law enforcement objectives." The lower "deliberate indifference" standard applies to circumstances where "actual deliberation is practical." Wilkinson v. Torres, 610 F.3d 546, 554 (9th Cir. 2010) **Sept 10 LED:02**. However, in circumstances where an officer cannot practically deliberate, such as where "a law enforcement officer makes a snap judgment

> because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives." The parties do not dispute that the heightened "purpose to harm" standard applies to this case.

[Some citations omitted]

The Court concludes that because the jury already found that the officer acted with a purpose to harm unrelated to legitimate law enforcement objective, the officer cannot be entitled to qualified immunity.

Result: Affirmance of United States District Court (N.D. California) jury verdict in favor of plaintiffs.

(3) PROSECUTOR'S FAILURE TO DISCLOSE IMPEACHMENT EVIDENCE VIOLATED BRADY – In Milke v. Ryan, ___ F.3d ___, 2013 WL 979127 (9th Cir., March 14, 2013), a three-judge panel of the Ninth Circuit holds that a prosecutor's failure to disclosure impeachment evidence violates Brady v. Maryland, 373 U.S. 83 (1963).

The defendant in this case was convicted of murder for the death of her four year old son. The defendant's boyfriend and a friend shot the victim. The defendant confessed her involvement to a detective. She subsequently maintained her innocence. The Court describes the trial as a swearing match between the detective and the defendant. The jury believed the detective and convicted the defendant who was then sentenced to death.

In her petition for habeas corpus, the defendant claimed that the state had violated Brady by failing to disclose impeachment evidence. She attached a number of documents that had not been disclosed by the prosecutor. One was an internal administrative investigation where the detective was disciplined for sustained misconduct involving dishonesty – taking liberties with a female motorist and then lying about it to his superiors. She also attached a number of court orders from criminal cases. "In four of the cases, state judges threw out indictments or confessions because [the detective] had lied to a grand jury or a judge. . . . In four cases, judges threw out confessions or vacated convictions because [the detective] had violated suspects' Miranda and other constitutional rights during interrogations, often egregiously. . . ."

The Court describes the elements of a Brady claim as follows, and then easily concludes that a Brady violation occurred:

> Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." [Kyles v. Whitley, 514 U.S. 419, 438 (1995) **Sept 95 LED:04**]. Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. See [United States v. Bagley, 473 U.S. 667, 674–76 (1985); Giglio v. United States, 405 U.S. 150, 154 (1972)]. The prosecutor is charged with knowledge of any Brady material of which the prosecutor's office or the investigating police agency is aware. See Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (per curiam).
>
> A Brady violation has three elements. [Strickler v. Greene, 527 U.S. 263, 281–82 (1999)]. First, there must be evidence that is favorable to the defense, either because it is exculpatory or impeaching. Second, the government must have willfully or inadvertently failed to produce the evidence. Third, the suppression

must have prejudiced the defendant.

[Some citations omitted]

The Court also states:

> The state is charged with the knowledge that there was impeachment material in [the detective's] personnel file. After all, the state eventually produced some of this evidence in federal habeas proceedings and has never claimed that it could not have disclosed it in time for Milke's trial. There can be no doubt that the state failed in its constitutional obligation of producing this material without any request by the defense.
>
> The state also had an obligation to produce the documents showing [the defendant's] false and misleading statements in court and before grand juries, as well as the documents showing the Fifth Amendment and Fourth Amendment violations he committed during interrogations. The prosecutor's office no doubt knew of this misconduct because it had harmed criminal prosecutions. The police must have known, too.

Result: Conditional grant of writ of habeas corpus setting aside Debra Jean Milke's convictions, with a discovery order requiring all documents to be disclosed; reversing United States District Court (Arizona).

LED EDITORIAL COMMENT: Brady material is evidence that is favorable to the defendant. Evidence is favorable if it is either exculpatory or impeachment. In this case the sustained internal administrative investigation that involved dishonesty is exactly the type of material that is considered Brady material, because it could be used to impeach the officer's credibility. Additionally, court orders that determine an officer testifying in his or her official capacity to be untruthful would likely be considered Brady material as well. However, a court order relating to a Miranda or Fourth Amendment violation is not typically material that would be considered Brady material, because the order does not necessarily impeach the officer's veracity. It may be that their mere existence in the Milke case, combined with the rest of the facts, led the court to consider them Brady material for the purposes of impeaching the officer. As always we encourage officers to consult with their assigned agency legal advisors and/or local prosecutors. Prosecutors may have differing views on what is and is not Brady material.

(4) CIVIL RIGHTS ACT LAWSUIT: PROBABLE CAUSE TO ARREST FOR MISDEMEANOR VIOLATION OF NOISE ORDINANCE DOES NOT PRECLUDE PLAINTIFF'S FIRST AMENDMENT FREE SPEECH CLAIMS BASED ON RETALIATORY BOOKING – In Ford v. City of Yakima, 706 F.3d 1188 (9th Cir., Feb. 8, 2013), a three-judge Ninth Circuit panel, holds in a 2-1 decision, that even though officers had probable cause to arrest the plaintiff for the misdemeanor violation of a city noise ordinance, the plaintiff can still proceed with a First Amendment retaliation claim alleging that he was only booked into jail because he exercised his First Amendment right to criticize police officers.

The defendant was stopped and arrested for violation of a city noise ordinance. The defendant responded by protesting and yelling and claiming that the stop was racially motivated. He was told by the arresting officer that if he continued to "run his mouth" and talk over the officer he would go to jail, but if he cooperated he would receive a citation and be able to leave. The defendant did not fully cooperate (though he eventually appeared to cooperating in the citation

process). The officer booked him into jail. Ford was acquitted of violating the noise ordinance, and he later sued the officer and agency in federal court.

The Ninth Circuit majority concludes:

> [The defendant's First Amendment rights were] violated when the officers booked and jailed Ford in retaliation for his protected speech, even though probable cause existed for his initial arrest. Ford's criticism of the police for what he perceived to be an unlawful and racially motivated traffic stop falls "squarely within the protective umbrella of the First Amendment and any action to punish or deter such speech . . . is categorically prohibited by the Constitution." Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990).
> . . .
>
> At the time the officers acted in 2007, the law in this Circuit gave fair notice that it would be unlawful to jail Ford in retaliation for his First Amendment activity. Police officers have been on notice at least since 1990 that it is unlawful to use their authority to retaliate against individuals for their protected speech. See Duran, 904 F.2d at 1375–78 (holding that a police officer's traffic stop and subsequent arrest of an individual who directed obscene gestures and words toward that officer was unlawful because it was well-established that police officers may not exercise their authority for personal motives, especially in response to an individual's criticism or insults); see also Beck v. City of Upland, 527 F.3d 853, 871 (9th Cir. 2008) (holding that Duran clearly established that police officers could not use their power to retaliate against an individual for his free speech). Moreover, this Court's 2006 decision in [Skoog v. City of Clackamas, 469 F.3d 1221, 1232 (9th Cir. 2006)] established that an individual has a right to be free from retaliatory police action, even if probable cause existed for that action. In that case, Skoog claimed that a police officer seized his property to retaliate against his filing a lawsuit against another officer. We held that although the officer's search and seizure was supported by probable cause, it was unlawful because the officer's primary motivation was to retaliate against Skoog's exercise of his First Amendment rights.
>
> Thus, Duran clearly established that police officers may not use their authority to punish an individual for exercising his First Amendment rights, while Skoog clearly established that a police action motivated by retaliatory animus was unlawful, even if probable cause existed for that action. The officers' conduct in this case falls squarely within the prohibitions of Duran and Skoog. . . . Duran addressed a retaliatory arrest and Skoog applied to a retaliatory search and seizure, but the unlawfulness of a retaliatory booking and jailing was nevertheless apparent from those cases. After Duran, any reasonable police officer would have known that it was unlawful to use his authority to retaliate against an individual because of his speech. Likewise, any reasonable police officer would have understood that Skoog's prohibition on retaliatory police action extended to typical police actions such as booking and jailing. Therefore, this case involved the kind of "mere application of settled law to a new factual permutation" in which we assume an officer had notice that his conduct was unlawful. See Eng v. Cooley, 552 F.3d 1062, 1076 (9th Cir. 2009) (quoting Porter v. Bowen, 496 F.3d 1009, 1026 (9th Cir. 2007)).

> A reasonable officer would have understood that he did not automatically possess the authority to book and jail an individual upon conducting a lawful arrest supported by probable cause. Washington law clearly enumerates the limited factors that would allow a police officer to book and jail an individual who has been arrested for a misdemeanor. CrRLJ 2.1(b)(2). A reasonable officer would have been aware of the law governing his ability to book and jail an individual he lawfully has arrested. Moreover, a reasonable officer would have been aware that Washington law explicitly states that its rules "shall not be construed to affect or derogate from the constitutional rights of any defendant." CrRLJ 1.1. Thus, a reasonable police officer would have understood that he could not exercise his discretion to book an individual in retaliation for that individual's First Amendment activity. . . .

[Footnotes and some citations omitted]

Dissent: The dissenting Judge argues that once the defendant was detained he had a diminished First Amendment right and that he must show an absence of probable cause for his booking.

Result: Reversal of United States District Court (E.D. Wash.) order granting summary judgment to City; remanded for trial.

LED EDITORIAL COMMENT: Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 2.1(b) allows officers to issue a citation and notice to appear, in lieu of booking, whenever a person is arrested or could have been arrested for a misdemeanor or gross misdemeanor. Subsection (b)(2) provides the following with respect to release:

> **(2) Release Factors. In determining whether to release the person or to hold him or her in custody, the peace officer shall consider the following factors:**
> **(i) whether the person has identified himself or herself satisfactorily;**
> **(ii) whether detention appears reasonably necessary to prevent imminent bodily harm to himself, herself, or another, or injury to property, or breach of the peace;**
> **(iii) whether the person has ties to the community reasonably sufficient to assure his or her appearance or whether there is substantial likelihood that he or she will refuse to respond to the citation and notice; and**
> **(iv) whether the person previously has failed to appear in response to a citation and notice issued pursuant to this rule or to other lawful process.**

CrRLJ 2.1(b)(2) has not previously been applied by a Washington appellate court as a basis for holding that booking an offender was unlawful on grounds that none of the listed "release factors" were present in a case. We are not confident that the Ford decision correctly interpreted Washington law in doing so. Washington agencies should consult their legal advisors and/or prosecutors for guidance on interpretation of CrRLJ 2.1(b)(2).

We think it is likely that this case would have turned out differently if the underlying crime had been more serious than a noise violation. Additionally, in this case nobody disputed that the officer had probable cause to arrest the defendant for the noise violation. But the civil action was not based on the arrest, but rather the booking. Thus, we believe that case law holding that probable cause is a complete defense to an action

for false arrest is still sound. See Hanson v. Snohomish, 121 Wn.2d 552, 563 (1993) Jan 94 LED:08; Bender v. City of Seattle, 99 Wn.2d 582, 592 (1983).

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WASHINGTON STATE SUPREME COURT

ARREST BY OFFICER WHO WAS NOT IN THE OBSERVATION POST AND DID NOT SEE GROSS MISDEMEANOR VIOLATION OF SEATTLE DRUG-LOITERING ORDINANCE HELD NOT TO MEET RCW 10.31.100 MISDEMEANOR-PRESENCE RULE; ALSO, FELLOW-OFFICER OR POLICE TEAM RULE DOES NOT APPLY SUCH AS TO MAKE ARREST LAWFUL UNDER RCW 10.31.100'S MISDEMEANOR-PRESENCE REQUIREMENT

State v. Ortega, ____Wn.2d ___, 297 P.3d 57 (March 21, 2013)

Facts and Proceedings below:

A Seattle Police officer positioned in a second-floor observation post observed Ortega engage in several apparent transactions that fit a City of Seattle ordinance's definition of drug-loitering, a gross misdemeanor crime. **[LED EDITORIAL NOTE: At the Supreme Court, the State did not argue that the police had probable cause to arrest Ortega for a felony drug crime. Nor did the defendant argue that the police lacked probable cause to arrest Ortega for the gross misdemeanor of drug-loitering under Seattle's ordinance.]**

The observing officer directed officers to arrest Ortega. The other officers had not observed the suspicious conduct of Ortega. One of them arrested Ortega, and he searched Ortega incident to the arrest. The officer found crack cocaine and $780 in cash. The observing officer subsequently confirmed that Ortega was the violator.

The Superior Court ruled the arrest lawful, denied Ortega's motion to suppress the evidence seized incident to arrest, and convicted him of the felony of possessing cocaine with intent to deliver. The Court of Appeals, Division One, affirmed the conviction. State v. Ortega, 159 Wn. App. 889 (Div. I, 2011) **April 11 LED:17.**

ISSUE AND RULING: An observing officer saw Ortega engage in drug-loitering activity. The observing officer directed other officers to make an arrest. One of the officers made an arrest and searched Ortega incident to the arrest. He found crack cocaine and $780 in cash. The observing officer was not present when the arrest and search-incident occurred.

Where the arrest was for the gross misdemeanor crime of drug-traffic loitering, a crime that does not come with any of the exceptions to the misdemeanor-presence rule set forth in RCW 10.31.100, did the arrest of Ortega violate the misdemeanor-presence rule? (ANSWER BY SUPREME COURT: Yes, rules a unanimous Court, because (1) the crime did not occur in the presence of the officers on the street who made the arrest; and (2) the observing officer cannot be deemed to have been involved in making the arrest, even though (a) he directed others to make the arrest, (b) maintained communication with the other officers on the street, and (c) subsequently confirmed in-person that Ortega was the violator)

Result: Reversal of Court of Appeals decision that affirmed the King County Superior Court conviction of Gregorio B. Ortega (aka Martin Dominguez Hernandez) for possession of cocaine with intent to deliver.

ANALYSIS IN LEAD OPINION:

Misdemeanor-presence rule and RCW 10.31.100

Historically, the common law (case-law-developed rules) did not permit arrest for a non-felony crime unless the crime occurred in the presence of the officer making the arrest. This is known as the misdemeanor-presence rule. "Presence" in this context means perceived by the senses of the arresting officer.

RCW 10.31.100 codifies the common law rule, but modifies it by, among other things, including a list of specific crimes and categories of non-felony crimes that are exceptions to Washington's misdemeanor-presence requirement. The unnumbered first paragraph of RCW 10.31.100 provides: "A police officer having probable cause to believe a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section." (Emphasis added)

It was undisputed in Ortega that none of the exceptions in subsections (1) through (10) of RCW 10.31.100 applies to the facts of the Ortega case. The focus in Ortega was whether the arrest met the misdemeanor-presence requirement of the second sentence of the first unnumbered paragraph of RCW 10.31.100, underlined above.

Arresting officer

The Court of Appeals in the Ortega case held that the misdemeanor-presence rule was met because the observing officer could be deemed to have made the arrest, in that he "directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm the arresting officers had stopped the correct suspects." The Supreme Court's lead opinion rejects that proposition. Under Washington law, an arrest occurs when an officer manifests an intent to take a person into custody and actually seizes or detains such person (such as telling the person he is under arrest, handcuffing him, and placing him in a patrol car). The question is whether an officer acts in a manner that would cause a reasonable person to believe that he is under arrest. In this case, the Supreme Court lead opinion concludes, the observing officer was not present when Ortega was "arrested" and was searched incident to his arrest.

Investigative stop option

In the following passage, the lead opinion appears to suggest that the arrest would have been lawful under RCW 10.31.100 if the observing officer had directed the other officers to merely detain Ortega in an investigative stop under Terry v. Ohio, and the observing officer had then come to the scene to make the arrest himself:

> Simply because an officer is not present during the commission of a misdemeanor, and therefore may not arrest the suspect, does not mean that the officer is powerless to enforce the law. An officer who did not witness a misdemeanor may still stop and detain a person reasonably suspected of criminal activity. Terry v. Ohio, 392 U.S. 1,; . . . . In this case, assuming [the officer on the street] reasonably suspected that Ortega had committed a criminal act, he could have detained Ortega until [the officer in the observation post] arrived to make the arrest. Alternatively, if [the officer on the street] lacked even

> reasonable suspicion of illegal activity, he could have made contact with Ortega and attempted to establish probable cause. . . . .

Fellow officer or police team rule

The State argued in the alternative in Ortega that the Court should apply what is known as the "fellow officer" rule (also known as the "police team" rule) to, in effect, consider the arresting officer (even though he was not the observing officer) to have perceived the criminal offense for purposes of the misdemeanor-presence rule. The "fellow officer" rule has been applied in Washington Court of Appeals decisions in felony cases to consider the cumulative knowledge of all involved officers in determining that there was probable cause to arrest for a felony. The Ortega lead opinion does not disapprove of that analysis for felony cases, but the opinion rejects the argument that the "fellow officer" rule applies in misdemeanor or gross misdemeanor cases in a way that one can consider the arresting officer to have perceived the criminal offense with his or her own senses.

Legislative fix

The lead opinion in Ortega recognizes that the Legislature has authority to amend RCW 10.31.100 to authorize the arrest procedure used in Ortega for crimes such as the gross misdemeanor of drug-loitering under the Seattle ordinance.

ANALYSIS IN CONCURRING OPINION:

Chief Justice Madsen writes a concurrence that is joined by Associate Justice Wiggins. The Madsen concurrence agrees in all respects with the analysis in the majority opinion and then encourages the Legislature to amend RCW 10.31.100 to authorize the arrest procedure that was followed in this case.

LED EDITORIAL COMMENTS:

(1) The Ortega ruling restricts arrests for only those gross misdemeanors and misdemeanors that are NOT exceptions to RCW 10.31.100's misdemeanor presence requirement: We chose to summarize, instead of quote, the Supreme Court lead opinion's analysis, partly for brevity purposes, and partly because some imprecise language used by the Court in a few places in the opinion could be misleading. There is language in the lead opinion that might suggest that an officer making an arrest for a misdemeanor or gross misdemeanor must himself or herself have probable cause to arrest for the offense, even if the misdemeanor/gross misdemeanor is one of those that is either specifically or categorically excepted under RCW 10.31.100 from the misdemeanor-presence requirement.

But we think that such an argument must be rejected if one gives a careful contextual reading to the lead and concurring Supreme Court opinions, as well as giving a contextual reading to the briefing in the case.

Also, the statute itself requires rejection of such an argument. The first unnumbered paragraph of RCW 10.31.100 provides that an officer having probable cause to believe a person has committed a felony (per subsection 1) or has committed a gross misdemeanor or misdemeanor coming within one of the exceptions in the statute may arrest the person. The fellow officer/police team rule of common law supplements the statute to allow an arrest for a felony even if the officer making the arrest does not

himself or herself have probable cause (for instance if merely acting on direction from another officer to make an arrest for the felony). Without the fellow officer/police team rule, an officer could not lawfully arrest for a felony under RCW 10.31.100(1) unless the officer himself or herself had probable cause (which would impractically require each officer to compile facts rather than act on a directive from another officer to make any misdemeanor/gross misdemeanor arrest regardless of whether crime was covered by one of the subsections of RCW 10.31.100).

RCW 10.31.100's first unnumbered paragraph further provides that an officer having probable cause as to certain misdemeanors and gross misdemeanors may arrest the person. As with felonies, we think that the fellow officer/police team rule allows an arrest for a misdemeanor or gross misdemeanor that comes within a 10.31.100 exception even if the officer making the arrest does not himself or herself have probable cause to arrest (for instance if the officer is acting on a directive from another officer or agency to make an arrest for the misdemeanor/gross misdemeanor). We think that the Ortega lead opinion's holding/language that the fellow officer/police team rule does not apply to misdemeanors or gross misdemeanors was addressing only those misdemeanors and gross misdemeanors that do not come within an exception to the in-presence requirement. In other words, we do not think that the Ortega decision precludes application of the fellow officer/police team rule for those misdemeanors that come within 10.31.100 exceptions.

(2) Investigative stop option: As we note regarding a quoted passage above, we believe that the lead opinion suggests (though a bit ambiguously) that it would be permissible for the observing officer to direct the other officers to detain the suspect under Terry and wait for the observing officer to come to the scene and make the arrest. Of course, because Terry stops are limited in duration to the short period of time necessary to investigate suspicious circumstances, the observing officer would need to move quickly to get to the scene, confirm that the correct suspect is being held, and make the arrest.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

NO CONTACT ORDER THAT CONTAINS VISITATION PROVISION IS NOT A "PARENTING PLAN" FOR PURPOSES OF CUSTODIAL INTERFERENCE – In State v. Veliz, ___ Wn.2d ___, 2013 WL 865413 (March 7, 2013), in a 5-4 opinion, the Washington State Supreme Court holds that a domestic violence protection order that includes a child visitation provision is not a "court-ordered parenting plan," which is a necessary element of first-degree custodial interference.

One means of committing custodial interference in the first degree is:

> (2) A parent of a child is guilty of custodial interference in the first degree if the parent takes, entices, retains, detains, or conceals the child, with the intent to deny access, from the other parent having the lawful right to time with the child pursuant to a court-ordered parenting plan, and:
> (a) Intends to hold the child permanently or for a protracted period; or
> (b) Exposes the child to a substantial risk of illness or physical injury; or
> (c) Causes the child to be removed from the state of usual residence.

RCW 9A.40.060(2). "Court ordered parenting plan" is not defined.

The Supreme Court holds that "the legislature intended '[court ordered] parenting plan' to mean the specific type of document a court orders pursuant to the dissolution proceedings chapter, 26.09 RCW." Accordingly, the child visitation provisions of a domestic violence protection order do not satisfy this element.

Result: Reversal of Court of Appeals decision affirming Franklin County Superior Court conviction of Jose R. Veliz for custodial interference in the first degree.

LED EDITORIAL COMMENT: The Majority Opinion also suggests that the defendant could have been charged under subsection (1) in which case the state would not have needed to prove the "parenting plan" element that is required in subsection (2).

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WASHINGTON STATE COURT OF APPEALS

ASSAULT VICTIM'S STATEMENT TO MEDICAL PERSONNEL AT HOSPITAL IN PRESENCE OF OFFICER WHO HAD PREVIOUSLY QUESTIONED HER AT HER HOME AND WHO WAS COLLECTING EVIDENCE FROM HER AT THE HOSPITAL, HELD TO BE TESTIMONIAL FOR SIXTH AMENDMENT CONFRONTATION RIGHT PURPOSES – In State v. Hurtado, ___Wn. App. ___, 294 P.3d 838 (Div. I, Feb. 19, 2013), the Court of Appeals rules under the federal constitution's Sixth Amendment right to confrontation that a domestic violence victim's statement identifying her assailant to medical personnel at the hospital in the presence of a police officer was "testimonial" and therefore was improperly admitted into evidence at trial because the victim did not testify at trial. But the Court rules the trial court's constitutional error harmless in light of the weight of the other evidence of guilt in the case.

Two officers questioned the swollen-faced victim at her home shortly after the attack. She identified defendant as her assailant, and another officer quickly located and arrested defendant nearby. Defendant had blood on a sleeve. Meanwhile, medics transported the victim to the hospital. One of the officers who had talked to the victim at her home followed the medics to the hospital and was present in the hospital room throughout the time the victim talked to medical personnel. The officer was present when she told them that her boyfriend was the assailant. During that time, the officer also collected the victim's tank top as evidence because it had blood on it.

The confrontation clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**. In the years following Crawford, the U.S. Supreme Court has, on several occasions, more fully explained what is testimonial hearsay in the context of police interrogations. See Michigan v. Bryant, 131 S. Ct. 1143 (2011) **May 11 LED:03**; Davis v. Washington, 547 U.S. 813 (2006) **Sept 06 LED:03**. Where the police are involved in procuring an unconfronted statement, whether the statement is testimonial depends upon the "primary purpose" for the interrogation during which the statement was made. See State v. Reed, 168 Wn. App. 553 (Div. I, June 4, 2012) **November 12 LED:18** (portions of victim's statements to 911 operator and initial statements to police upon arrival at scene were, viewed objectively, made during the course of an ongoing emergency and thus are non-testimonial for confrontation clause purposes).

Where the police questioning is directed at establishing the facts of a past crime, in order to provide evidence to convict the perpetrator, the product of such an interrogation is necessarily

testimonial. In contrast, statements to the police are nontestimonial when made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency, such as finding a fleeing or dangerous suspect. The existence of an ongoing emergency at the time of an encounter between an individual and the police is among the most important.

In the Hurtado case, there was no question that by the time the victim made her statements to medical personnel at the hospital, there was no longer an ongoing police emergency. But case law has held that statements to medical personnel for treatment purposes are not testimonial if (1) they are made for diagnosis and treatment purposes, (2) there is no indication that the witness expected the statements to be used at trial, and (3) the medical personnel are not employed by or working with the State. See State v. Sandoval, 137 Wn. App. 532 (2007); see also State v. Fisher, 130 Wn. App. 1 (Div. II, 2005) **June 05 LED:11**.

The problem for the Hurtado Court, however, is that the officer who had already questioned the victim at her home and who was collecting physical evidence from her at the hospital was present while she talked to the medical personnel about her injuries and who had caused them. The Court of Appeals rules that a reasonable person would have believed under these circumstances that the statements would be used at trial.

The Hurtado Court, as noted above, goes on to rule that the error in admitting the victim's statements at the hospital was harmless in light of the other evidence of defendant's guilt. In light of that ruling, the Court declines to address defendant's separate argument under the Washington constitution's separate confrontation right.

Result: Affirmance of King County Superior Court conviction of Hector R. Hurtado for second degree assault, witness tampering, and two counts of domestic violence misdemeanor violation of a court order.

LED EDITORIAL COMMENT: The Court of Appeals likely would have ruled the statements to be non-testimonial if the officer had not been in the room when the victim made them.

For a thorough discussion of recent federal case law developments under the Sixth Amendment's confrontation clause, viewed in large part from a practical law enforcement officer perspective, see the three-part article, "Confrontation clause developments and their impact on effective investigation and prosecution: one step forward after two steps back?" in The Federal Law Enforcement Informer (The Informer (Internet address: [http://www.fletc.gov/training/programs/legal-division/the-informer]). The Informer is a monthly publication of the Department of Homeland Security, Federal Law Enforcement Training Center (FLETC), Legal Training Division. Subscription is available by free, secure email service. The Informer provides summaries of federal appellate court decisions, and it also provides occasional articles on federal case law (note that on some search and seizure issues, Washington case law is more restrictive on law enforcement officers than federal law). Part 1 of the confrontation clause article appeared in The Informer for December 2011, Part 2 of the article appeared in The Informer for January 2012, and Part 3 appeared in The Informer for July 2012.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) CORPORATION IS "PERSON" FOR PURPOSES OF IDENTITY THEFT; COURT REJECTS VAGUENESS CHALLENGE – In State v. Evans, ___ Wn.2d ___, 2013 WL 1490589 (April 11, 2013), in an 8-1 opinion (Justice Wiggins dissenting) the Washington State Supreme Court holds that the definition of "person" for purposes of the identity theft statute includes a corporation and the statute is not vague.

The defendant was convicted of second degree identity theft after he stole a business check from his employer, made the check out to himself for $500, and then forged the signature on the check.

RCW 9.35.020(1) provides: "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." For purposes of the identity theft statute, person is given the definition of RCW 9A.04.110(17) which defines person to include "any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association." (Emphasis added.)

The Court concludes that a corporation is relevant for purposes of identity theft because the legislature intended to protect corporations and small businesses from identity theft.

The Court also rejects the defendant's vagueness challenging holding that the statute provides fair warning of prohibited conduct.

Result: Affirmance of decision of Court of Appeals (State v. Evans, 164 Wn. App. 629 (Div. II, 2011) **Feb 12 LED:14**) that affirmed the Grays Harbor County Superior Court conviction of Derrick Robert Evans for identity theft.

(2) UNLAWFUL PRACTICE OF LAW STATUTE APPLIES TO BOTH LAWYERS AND NON-LAWYERS – In State v. Janda, ___ Wn. App. ___, 2012 WL 7861460 (Div. I, Oct. 1, 2012, publication ordered April 9, 2013), the Court of Appeals holds that the unlawful practice of law statute applies to those who have never been lawyers.

RCW 2.48.170 provides that "[n]o person shall practice law in this state . . . unless he or she shall be an active member" of the state bar. RCW 2.48.180 criminalizes the unlawful practice of law and provides that the unlawful practice of law occurs when "a nonlawyer practices law, or holds himself or herself out as entitled to practice law." RCW 2.48.180(2)(a). There are two categories of "nonlawyers": persons who are authorized by the Washington State Supreme Court to engage in the limited practice of law but who engage in practice outside that authorization, or any person who is not an active member of the bar in good standing.

The Court rejects the defendant's argument that the phrase "not an active member" limits the statute's application to those who once were, but no longer are, lawyers.

Result: Affirmance of King County Superior Court conviction of Steven Andrew Janda for unlawful practice of law and theft (not discussed in this LED entry).

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

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

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

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

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

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