Law Enforcement Digest

JUNE 2014

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

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NOTE REGARDING THE 2014 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. Beginning last year, we have included all of the legislation in a single stand-alone LED edition, similar to the Subject Matter Index. Once complete, the 2014 Legislative Update will be available on the Criminal Justice Training Commission's LED webpage.

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UNITED STATES SUPREME COURT

ANONYMOUS 911 CALL CLAIMING PICKUP TRUCK HAD JUST RUN CALLER'S CAR OFF THE ROAD HELD BY SUPREME COURT UNDER FOURTH AMENDMENT TO PROVIDE REASONABLE SUSPICION JUSTIFYING A STOP FOR ONGOING CRIME OF DUI DESPITE LACK OF CORROBORATION BY RESPONDING OFFICER OF ERRATIC DRIVING

Navarette v. California, ___U.S. ___, 134 S. Ct. 1683 (April 22, 2014)

Facts and Proceedings below:

In Humboldt County, California, a woman phoned 911 and reported that another vehicle had just "run her off the road." The caller also provided the following information: (1) the incident occurred in the southbound lane of Highway 1 at mile marker 88; and (2) the responsible vehicle was a Ford 150 pickup truck, license number 8D94925, headed south. [Note: The caller apparently was a woman who identified herself, but no evidence was presented as to her identity, and the recording was not put into the record. The prosecution treated the call as anonymous, and the courts at all levels did the same.]

This caller's information was immediately broadcast to California Highway Patrol (CHP) cars in the vicinity. A short while later, a CHP officer headed north on Highway 1 spotted the truck southbound on Highway 1 at a location consistent with the truck having been at mile marker 88 when observed by the 911 caller. The officer did a U-turn and followed the suspect truck for about five minutes. He observed no erratic driving or violations, but, based on the call, he decided to pull the truck over on suspicion of DUI.

As the officer approached the stopped truck, he could smell the odor of marijuana coming from it. His subsequent investigation, the legality of which was not an issue in this case, led to discovery of 30 pounds of marijuana in the truck bed. The driver, Lorenzo Navarette, was arrested and charged with transportation of marijuana. Navarette filed a motion to suppress the evidence on grounds that the officer lacked reasonable suspicion to stop his truck. The motion was denied by the trial court, and he was convicted. The California Court of Appeals rejected his appeal, and the California Supreme Court denied review.

ISSUE AND RULING: Did the anonymous call about being run off the road provide reasonable suspicion for a stop on suspicion of the ongoing crime of DUI where (A) the caller's information was partially corroborated by the fact that the truck was spotted headed southbound at a location consistent with the call, but (B) the information was not corroborated by observation of any erratic driving or traffic violation in the approximately five-minute period during which the officer followed the truck before pulling it over? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 majority, the CHP officer had reasonable suspicion for a DUI stop)

Result: Affirmance of decision of California Court of Appeals and of Navarette's conviction for transporting marijuana.

ANALYSIS IN MAJORITY OPINION:

Justice Thomas is the author of the majority opinion. He is joined by Chief Justice Roberts and Justices Kennedy, Breyer and Alito.

Under the federal constitution's Fourth Amendment, officers must have reasonable suspicion to justify a stop of a vehicle to investigate a possible traffic offense or possible criminal activity. Generally, an anonymous report of past or even ongoing criminal activity will not provide reasonable suspicion for such a stop. However, the totality of the circumstances – including the details in the report and contemporaneousness of the report, any self-identification by the caller, the demeanor of the caller, the fact of multiple callers, and any corroboration of the report – may add up to reasonable suspicion under the Fourth Amendment.

The majority opinion acknowledges that this is a "close case." But the opinion determines that there is reasonable suspicion in the totality of the circumstances. The opinion bases this conclusion on the following facts: (1) the caller phoned 911, a system that "has some features that allow for identifying and tracing callers, and thus provides some safeguards against making false reports with immunity"; (2) the caller identified the responsible vehicle by make, model, and license plate number; (3) the caller described the incident in some detail, albeit that the detail was only the shorthand statement that she had been "run off the road"; (4) the caller immediately reported the incident; and (5) the officer stopped the truck about 18 minutes after the woman phoned 911 and the stop occurred "roughly 19 miles south of the location reported in the 911 call." The Court also noted that the caller was reporting a dangerous situation in that "[r]unning another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues."

Consequently, the majority opinion concludes that "the call bore adequate indicia of reliability for the officer to credit the caller's account," and that the officer "was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway." The majority opinion rejects the idea that reasonable suspicion of an ongoing DUI was negated by the fact that the officer failed to observe any erratic driving in the approximately five-minute period during which he followed the truck before stopping it. The majority opinion asserts that it is reasonable to assume that the truck driver was briefly inspired to drive more carefully when he saw a patrol car following him.

The majority opinion compares and contrasts two Supreme Court Fourth Amendment precedents addressing anonymous reports and the reasonable-suspicion-for-stop issue, discussing the precedents as follows:

> Our decisions in Alabama v. White, 496 U.S. 325 (1990) and Florida v. J.L., 529 U.S. 266 (2000) **May 00 LED:07**, are useful guides. In White, an anonymous

> tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. We held that the officers' corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. By accurately predicting future behavior, the tipster demonstrated "a special familiarity with respondent's affairs," which in turn implied that the tipster had "access to reliable information about that individual's illegal activities." We also recognized that an informant who is proved to tell the truth about some things is more likely to tell the truth about other things, "including the claim that the object of the tip is engaged in criminal activity."
>
> In J.L., by contrast, we determined that no reasonable suspicion arose from a bare-bones tip that a young black male in a plaid shirt standing at a bus stop was carrying a gun. The tipster did not explain how he knew about the gun, nor did he suggest that he had any special familiarity with the young man's affairs. As a result, police had no basis for believing "that the tipster ha[d] knowledge of concealed criminal activity." Furthermore, the tip included no predictions of future behavior that could be corroborated to assess the tipster's credibility. We accordingly concluded that the tip was insufficiently reliable to justify a stop and frisk.

DISSENTING OPINION:

Justice Scalia is the author of the dissent. He is joined by Justices Kagan, Sotomayor and Ginsburg. The dissent picks at all of the reasons given in the majority opinion. The first part of the dissent's analysis argues that there is nothing to support concluding that the anonymous caller was truthful. The caller's report of erratic driving was in no way corroborated by any observation by the officer. The dissent argues that the fact that the truck was later seen continuing south on the highway does not support concluding it had been driven erratically about 20 minutes earlier. The dissent also questions whether anonymous 911 callers generally are aware that their anonymity is at risk in using the 911 system such as to support concluding that they have an incentive to be truthful lest they be caught lying.

The dissent also argues that, even if, for the sake of argument, an anonymous 911 caller can be assumed to be truthful, a report of being "run off the road," without more detail, does not support a conclusion as to ongoing erratic driving. Such a report, the dissent argues, supports only the conclusion that 20 minutes earlier there was brief lapse of care in driving.

Finally, the dissent argues that the fact that the officer followed the truck for five minutes without observing any erratic driving or any traffic violation made a weak case for reasonable suspicion of ongoing DUI even weaker.

LED EDITORIAL COMMENTS:

1. Will article I, section 7 of the Washington constitution receive a different interpretation on the "reasonable suspicion" issue?

The Washington Supreme Court has not yet opined on whether the reasonable suspicion standard under article I, section 7 is different from that of the Fourth Amendment, nor

has the Washington Court of Appeals. But the Washington appellate courts have placed greater restrictions on Washington law enforcement under independent grounds rulings in a number of other categorical search and seizure circumstances in the past. And, while it is difficult to compare decisions made under the flexible totality of the circumstances test for reasonable suspicion, the Washington Court of Appeals (though not engaging explicitly in the 911-caller-veracity analysis of the majority and dissenting opinions in Navarette) arguably has interpreted the Fourth Amendment more restrictively than did the United States Supreme Court majority in Navarette as to whether an anonymous caller to 911 should be credited with a measure of veracity because of the possibility of being identified under the 911 system. See State v. Z.U.E., ___ Wn. App. ___, 315 P.3d 1158 (Div. II, Jan 7, 2014) May 14 LED:23, petition for Supreme Court review pending (several 911 calls by unknown citizens could not be credited with veracity for reasonable suspicion purposes of determining reasonable suspicion); State v. Cardenas-Muratalla, ___Wn. App. ___, 319 P.3d 811 (Div. I, Feb. 3, 2014) May 14 LED:19 (same as to a call from an unidentified 911 caller).

2. Making the best facts on "reasonable suspicion" issue

Where 911 callers have reported erratic or weaving driving, officers should of course, as the officer in Navarette did, follow the suspect vehicle and look carefully for any corroborating suspicious driving behavior or a traffic violation. Also, dispatchers should strive to get the callers to give as much detail as possible about their observations, as well as striving to get the callers to identify themselves and their present locations and contact information. And dispatchers should pass some elements of such information on to officers upon receipt.

3. Danger is a factor in the totality of the circumstances test.

The majority opinion in Navarette notes the danger posed by a drunk driver, but the opinion does not appear to make that consideration a significant part of its totality of the circumstances analysis. As we noted in the May 2014 LED in our editorial comments on State v. Cardenas-Muratalla, ___Wn. App. ___, 319 P.3d 811 (Div. I, Feb. 3, 2014) May 14 LED:19, the test for reasonable suspicion is relaxed in the special circumstances where significant danger to persons is posed by the suspected ongoing criminal activity. We noted in those comments that an anonymous contemporaneous report that a person has threatened another person with a gun may support a Terry seizure without need for corroborating observations. But the problem some courts have with putting an anonymous report of ongoing drunk driving in the same category as an anonymous report of a gun threat is that, in contrast to the gun threat circumstance, officers have a multitude of driving behaviors to look for in attempting to corroborate an anonymous report of drunk driving.

4. The Navarette majority and dissenting opinions expressly avoided addressing whether a stop for a completed crime or traffic violation was justified by the circumstances.

Both the majority opinion and the dissent expressly note that the analysis addresses only the justification for a stop for an ongoing crime and does not consider justification for a stop for a completed offense. For court decisions addressing restrictions on stops for completed misdemeanors and gross misdemeanors, see Johnson v. Bay Area Rapid Transit District, 724 F.3d 1159 (9th Cir., July 30, 2013) Oct 13 LED:09; and United States v. Grigg, 498 F.3d 1076 (9th Cir., Aug. 22, 2007) April 08 LED:06.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: 11-JUDGE PANEL OVERTURNS 3-JUDGE PANEL ON DEADLY FORCE ISSUE IN CASE INVOLVING PHYSICALLY RESISTING ARRESTEE TRYING TO DRIVE AWAY WHILE OFFICER ATTEMPTING TO ARREST HIM WAS INSIDE HIS CAR – In Gonzalez v. City of Anaheim, ___F.3d ___, 2014 WL 1274551 (9th Cir., March 31, 2014), an eleven-judge panel of the Ninth Circuit overturns a three-judge panel's decision on a police deadly force issue. The three-judge panel's decision was presented in the **September 2013 LED** at pages 11-14. Viewing the summary judgment evidence by drawing all inferences in favor of the plaintiffs, as is required in appeals from summary judgment orders in Civil Rights Act cases, a 7-4 majority of the eleven-judge panel rules that the deadly force issue must be tried to a jury.

The following is a staff summary of the Ninth Circuit's new decision in the case (the staff summary is not part of the opinion):

> The en banc court reversed the district court's summary judgment and remanded on a Fourth Amendment excessive deadly force claim, and affirmed the district court's summary judgment as to a Fourteenth Amendment claim and a non-deadly force portion of the Fourth Amendment claim, in a 42 U.S.C. §1983 action brought by successors of Adolph Gonzalez, who was shot and killed during an encounter with two Anaheim police officers.
>
> The court held that, based on the record, it could not say that a verdict in favor of the defendants on the claim of excessive deadly force was the only conclusion that a reasonable jury could reach. The court noted that there was significant inconsistency in the officers' testimony regarding what happened during the few seconds before Gonzalez was shot in the head, specifically whether Gonzalez's vehicle, which contained Officer Wyatt, was rapidly accelerating and posed an immediate threat to safety.
>
> The court held that the constitutional standard for using force less than deadly force was lower and that, given the circumstances, defendants were entitled to summary judgment on the uses of force leading up to the gunshot.
>
> The court affirmed the district court's summary judgment for defendants as to plaintiffs' claim that they had been deprived of a familial relationship with Gonzalez in violation of their Fourteenth Amendment right to substantive due process. The court held that plaintiffs produced no evidence that the officers had any ulterior motives for using force against Gonzalez.
>
> Dissenting in part and concurring in part, Judge Trott, joined by Chief Judge Kozinski and Judges Tallman, and Bea, wrote that given that Officer Wyatt was trapped in Gonzalez's van, his act of self defense was objectively reasonable, and he would therefore affirm the district court.
>
> Dissenting, Chief Judge Kozinski, joined by Judges Trott, Tallman, and Bea, wrote that how fast the vehicle was moving and how far it had traveled was beside the point given that it was undisputed that at the time he fired the fatal shot, Officer Wyatt was trapped inside a moving vehicle driven by a man who

had [actively and physically] resisted the verbal commands, physical restraints, lethal threats and the bodily force of two uniformed officers.

Result: Reversal in part of United States District Court (Central District of California) order granting summary judgment in favor of the City of Anaheim; case remanded for trial.

(2) CUSTODY FOR MIRANDA PURPOSES FOUND FOR 12-YEAR-OLD WHO WAS SUBJECTED TO ACCUSATORY AND DECEPTIVE QUESTIONING AT POLICE STATION – In United States v. I.M.M., ___F.3d ___, 2014 WL 1273792 (9th Cir., March 31, 2014), a three-judge panel of the Ninth Circuit rules that a 12-year-old was in custody and therefore should have been given Miranda warnings before a detective questioned the juvenile suspect about allegations that the juvenile had molested his 6-year-old cousin.

The test for Miranda custody status considers the totality of the objective circumstances in a given case, including but not limited to the nature of the location and how the suspect ended up there, how many officers are involved, what is said by the officers prior to and during questioning, the length and tenor of questioning, and any physical restraints. The custody question is whether a reasonable person would feel free to end the questioning and leave.

In J.D.B. v. North Carolina, ___ U.S. ___, 131 S. Ct. 2394 (2011) **Aug 11 LED:03**, the United States Supreme Court ruled that, for Miranda custody purposes, where a juvenile suspect's age is known to a law enforcement officer at the time of a suspect interview, or would have been objectively apparent to a reasonable officer, the officer and the courts must include consideration of the typical, reasonable reaction of a suspect of that age as part of the custody analysis. This consideration does not, the majority opinion contends, impermissibly require officers either (1) to consider circumstances unknowable to them, or (2) to anticipate the frailties or idiosyncrasies of the particular suspect being questioned. The majority opinion in J.D.B. emphasized that the ruling did not mean that a child's age will be a determinative, or even a significant, factor in every case. In this regard, the majority opinion indicated that the closer a juvenile is to age 18, the less impact the suspect's juvenile status will have. But the juvenile's age, if known or reasonably knowable, is a reality that courts cannot ignore in determining if a reasonable person would believe he or she was in custody, and various factors may weigh more heavily where a juvenile is the suspect than where an adult is the suspect.

In the I.M.M. case, the Ninth Circuit panel puts a substantial amount of weight on the child suspect's age of 12 in determining that a reasonable 12-year-old would not have believed he or she was free to stop the questioning and leave (in places the I.M.M. Court appears to be considering subjective factors particular to the 12-year-old defendant, but the Court claims ultimately to be applying an objective test). The Court notes that the child apparently was not told that he had a choice when a detective transported him and his mother, apparently with the mother's permission, on a 30-plus-minute drive to a police station. The Court also notes that at the station, the detective formally asked the mother for permission to question her son, but the son was neither directed to listen to the warnings to his mother nor given any separate warnings, except that the detective told him, after ushering his mother out of the room: "I read your mom those rights, okay, so at any time throughout the, the interview you don't feel comfortable, you can stop and you don't have to answer any questions." The juvenile said "yes" when asked if he understood.

The I.M.M. panel says that the following facts taken from the lower court record and the recording of the interrogation support its conclusion that a reasonable 12-year-old would have believed that he was in custody in the police station questioning: (1) the 12-year-old was not told that he had a choice of whether to go to the police station; (2) the 30-plus-minute transport from

home to the police station was in a police car; (3) the suspect's mother was not given a choice of whether to stay in the room during the questioning; (4) the 1-on-1 questioning occurred in a small interrogation room with the door shut with no admonition to the suspect that the door was not locked; (5) the detective, though in plain clothes, was visibly armed; (6) the detective was aggressively confrontational, accusatory and leading in his questioning; (7) the questioning lasted over 50 minutes; (8) when the detective left the room at one point, he instructed the boy to stay in the room and to knock on the door if he needed to use the bathroom; (9) when the suspect continued to deny his guilt, the detective lied and said that the suspect's grandfather, the boy's father-figure (who had told officers he had not seen any act of molestation), had told police that he had witnessed the molestation; and (10) the detective asked the boy whether he was saying that his grandfather was a liar.

Result: Reversal of United States District Court (Arizona) denial of I.M.M.'s suppression motion and conviction of I.M.M.; remand of case for retrial.

(1) General comments about "tactical" un-Mirandized questioning

We recognize that officers will sometimes make a considered decision, based on all of the circumstances and on their wealth of experience, that un-Mirandized questioning will be more fruitful. This is a difficult decision for officers, because the test for "custody" is an unpredictable, totality of the circumstances test. It seems quite risky where stationhouse questioning of a juvenile, especially a younger juvenile, is involved.

When officers make that difficult decision, extra effort must be made to make clear to the suspect that the circumstances of questioning are non-custodial. In that regard, we think that officers are on pretty thin ice – regardless of the age of their suspects – in conducting such un-Mirandized interrogations at the police station unless they first tell their suspects (who, by definition under our assumed scenario, are voluntarily there in the first place) that the suspects do not have to answer the questions and that they can leave at any time. Officers conducting such "tactical" un-Mirandized questioning should be prepared to allow the suspect to leave after the questioning is completed.

Also, in light of the discussion of the deception factor in the I.M.M. case, as well as some discussion tying the "custody" question to officer-deception in past Washington appellate court decisions (see, for instance, State v. Hensler, 109 Wn.2d 357 (1987) (no Miranda custody in non-deceptive, non-custodial questioning regarding illegal drug possession); State v. Walton, 67 Wn. App. 27 (Div. I, 1992) Jan 93 LED:09 (no Miranda custody in non-deceptive, non-custodial questioning of MIP suspect); State v. Ferguson, 76 Wn. App. 560 (Div. I, 1995) May 95 LED:10 (no Miranda custody in non-deceptive, non-custodial questioning of suspect as scene of MVA), officers probably should not use deception that would be permissible with a Mirandized suspect. The Washington appellate courts (1) have only occasionally talked about would-be "deception-custody" test; (2) have never explained the source of the test or its specifics for application; and (3) have never excluded a statement based on deception during non-custodial questioning. Nonetheless, the above-noted decisions lead us to suggest that deception that would be allowed in a Mirandized interrogation generally be avoided in tactical, non-custodial interrogations.

(2) Custody-determination factors

As we have done from time to time in the past in LED entries on cases involving the Miranda custody issue, we close this LED entry with a non-exhaustive list of some of the

things, in addition to age of a juvenile suspect and whether during the interrogation the juvenile suspect was isolated from a parent or other person accompanying him or her, that courts consider in trying to determine whether, balancing all of the objectively evaluated circumstances in their totality, Miranda custody exists –

- **Whether the officers informed the suspect that he or she was not under arrest and was free to leave at any time;**
- **Whether the officers informed the suspect that he or she did not have to answer their questions;**
- **Whether the suspect expressly consented to speak with law enforcement officers;**
- **The place of interrogation (e.g., how private or public was the setting), and, if a police station, the manner in which the suspect was transported to the station;**
- **The announced or objectively obvious purpose of the questioning;**
- **Whether the suspect was involuntarily moved to another area prior to or during the questioning;**
- **Whether there was a threatening presence of several officers, the locking or blocking of a door, and/or a display of weapons or physical force;**
- **Whether the officers deprived the suspect of documents or other things that would be not needed to continue on one's way;**
- **The length of the interrogation;**
- **The manner, tenor and tone of interrogation (e.g., friendly, low key and non-leading vs. accusatory, confrontational and leading);**
- **Whether the officers revealed to the suspect that he or she was the focus of their investigation and/or confronted him or her with incriminating evidence;**
- **Whether the officers used deception in the questioning;**
- **Whether the officers allowed the suspect to leave at the end of the questioning.**

(3) CIVIL RIGHTS ACT LAWSUIT: OFFICERS DID NOT USE EXCESSIVE FORCE IN FATALLY SHOOTING SUSPECT WHO LED THEM ON A 45-MINUTE HIGH-SPEED CHASE, TRIED TO SERIOUSLY HURT HIMSELF UPON EXITING HIS VEHICLE, TRIED TO PROVOKE OFFICERS INTO SHOOTING HIM, AND THEN ADVANCED ON OFFICERS HOLDING A LARGE ROCK OVER HIS HEAD – In Lal v. State of California, ___ F.3d ___, 2014 WL 1272781 (9th Cir., March 31, 2014), a three-judge panel of the Ninth Circuit holds that officers did not use excessive force in fatally shooting a suspect.

The Ninth Circuit's analysis is in part as follows:

> In determining whether an officer is entitled to qualified immunity, we consider (1) whether there has been a violation of a constitutional right; and (2) whether that right was clearly established at the time of the office's alleged misconduct. [Pearson v. Callahan, 555 U.S. 223, 232 (2009)]. Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Id. at 236.
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> The measuring rod for determining whether an official's conduct violates a plaintiff's constitutional right was set forth by the Supreme Court in Ashcroft v. al-Kidd, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011):
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> > A Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that every "reasonable official would

> have understood that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).
>
> The Supreme Court provided further guidance in Graham v. Connor, 490 U.S. 386 (1989). We have held that Graham directs courts to first consider the nature and quality of the alleged intrusion and to then "consider the governmental interests at stake by looking at (1) how severe the crime at issue is, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." [Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011) (en banc)]. Of these, the most important is whether the suspect posed an immediate threat to the safety of the officers or others.
>
> This is the crux of the appeal. The district court found both that Lal posed an immediate threat to the safety of the officers, and that, even if he did not, a reasonable officer could have thought he did. Both conclusions are sound.

[Some citations omitted]

The Court summarizes its conclusion as follows:

> This lawsuit arose out of a tragic event. Lal was so upset after an argument with his wife that he led the police on a high speed chase for 45 minutes before the officers were able to disable his pickup truck. In the four minutes that elapsed after Lal exited the truck, he first tried to seriously injure himself, tried to provoke the officers into shooting him by pantomiming shooting at them with his cell phone, threw rocks at the officers, and then, ignoring directions to stop, advanced upon two officers threatening them with a large rock he held over his head. At that moment, the only alternative force then available to the officers, pepper spray, would not have alleviated the danger of Lal hurling the rock at the officers. Moreover, there was no reason for the officers to believe that Lal would act rationally. Under the totality of the circumstances, the district court's determinations that the officers objectively feared immediate serious physical harm and that a reasonable officer could have believed that Lal threatened him with immediate serious danger are sound. That Lal may have been intent on committing "suicide by cop" does not negate the fact that he threatened the officers with such immediate serious harm that shooting him was a reasonable response.

Result: Affirmance of United States District Court (Northern District California) order granting summary judgment dismissal in favor of the state defendants.

(4) CALIFORNIA'S ALL FELONY-ARRESTEE DNA LEGISLATION SURVIVES FOURTH AMENDMENT-BASED REQUEST FOR INJUNCTION – Haskell v. Harris, 745 F.3d 1269 (9th Cir., March 20, 2014), an 11-judge panel modifies but essentially agrees with a 3-judge panel's decision in the case reported at 669 F.3d 1049 (9th Cir., Feb. 23, 2012) **July 12 LED:05** and holds that a lower court did not commit error in denying a request for a Fourth Amendment-based injunction of California's DNA and Forensic Identification Data Base and Data Bank Act. The California statute requires law enforcement officers to collect DNA samples from all adults arrested for felonies.

Significant in the analysis of the lead opinion is the United States Supreme Court's decision upholding a Maryland statute for taking DNA from all adults arrested for serious felonies, Maryland v. King, ___U.S. ___, 133 S. Ct. 1958 (June 3, 2013) **July 13 LED:03**. The Ninth Circuit's new lead opinion holds that at least in significant part the California statute satisfies the Fourth Amendment under the analysis of Maryland v. King. The lead opinion in Haskell, however, leaves room for a new injunction request that would attempt to distinguish California's statute from the statute at issue in Maryland v. King, in part because the Maryland statute was narrower and not an all-felony-arrests statute like California's statute.

One of the Ninth Circuit judges, Milan Smith, writes a concurring opinion arguing that the rationale of the majority opinion in Maryland v. King was so broad in its rationale that there can be no doubt that the California statute satisfies the Fourth Amendment under Maryland v. King.

Result: Affirmance of United States District Court's (Northern District California) denial of arrestees' motion for injunction.

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, or under the broader provisions of the California statute, it is likely that an "independent grounds" challenge would be raised under the Washington constitution, article I, section 7.

The Maryland statute authorizes law enforcement 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 of the United States Supreme Court in Maryland v. King agrees with Judge Milan Smith of the Ninth Circuit, i.e., 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.

(5) CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT PANEL DISMISSES LAWSUIT BROUGHT BY INDIVIDUAL MISTAKENLY ARRESTED AND DETAINED FOR A MONTH ON AN ARREST WARRANT FOR ANOTHER INDIVIDUAL WITH THE SAME NAME – In Rivera v. County of Los Angeles, 745 F.3d 384 (9th Cir., March 12, 2014), a three-judge panel of the Ninth Circuit rules 2-1 to dismiss a lawsuit brought by an individual who was mistakenly arrested on a warrant.

The plaintiff in this case was arrested and detained for a month based on an arrest warrant for an individual with the same first and last name, but a different middle name (which did not appear on the warrant), and apparently the same date of birth. This was the second time the plaintiff had been mistakenly arrested based on the warrant for the other "Santiago Rivera." He had been arrested and then released the first time with the issuance of a judicial clearance form indicating that he was not the subject of the warrant.

The Ninth Circuit Court Staff Summary (which constitutes no part of the opinion) summarizes the opinion as follows:

> The panel affirmed the district court's summary judgment in an action in which plaintiff, Santiago Rivera, alleged multiple constitutional and state law violations

arising out of his mistaken arrest and month-long detention based on a 1989 warrant which had been issued for another person, also named Santiago Rivera.

The panel rejected Rivera's claim that Los Angeles County violated the Fourth Amendment by issuing the 1989 warrant without including a number corresponding to the true subject's fingerprints. The panel held that the warrant satisfied the particularity requirement because it contained both the subject's name and a detailed physical description. The panel held that even if the Fourth Amendment did require Los Angeles County to include more detailed information in the 1989 warrant, Rivera failed to show that the County had a policy or custom of failing to do so.

The panel held that San Bernardino sheriff's deputies were not unreasonable in believing that Rivera was the subject of the warrant at the time of arrest given that the name and date of birth on the warrant matched Rivera's and the height and weight descriptors associated with the warrant were within one inch and ten pounds of Rivera's true size.

The panel held that Rivera's detention did not violate the Due Process Clause of the Fourteenth Amendment. The panel determined that Rivera had not presented any evidence that either Los Angeles County or San Bernardino County knew that Rivera was not the true subject of the warrant. Nor did the circumstances of this case suggest that further investigation into Rivera's identity was required, especially given that he had been provided procedural protections and court access.

. . . .

Result: Affirmance of United States District Court (Central District

California) order granting summary judgment dismissal in favor of county defendants.

LED EDITORIAL NOTE: Despite the favorable result for the agencies in this case, agencies may want to review the facts of this case to see if there is practicable room for improvement in their own procedures.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

TRIAL COURT HAD STATUTORY AUTHORITY TO IMPOSE A CONDITION OF PROBATION THAT PROHIBITED DEFENDANT, WHO WAS CONVICTED OF CRUELTY TO ANIMALS, FROM OWNING OR LIVING WITH ANIMALS DURING THE PROBATIONARY TERM – In State v. Deskins, ___Wn.2d ___, 322 P.3d 780 (March 27, 2014), the Washington State Supreme Court holds that a district court has statutory authority under RCW 3.66.067 and .068 to prohibit a defendant from owning or living with animals as a condition of probation.

The Supreme Court explains:

> "[A] court may impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes." Courts have a great deal of discretion when setting

> probation conditions for misdemeanors and are not restricted by the Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, which applies only to felonies.

[Citations omitted]

The Court finds that the district court's restriction tended to prevent future commission of crimes. It rejects the defendant's argument that the district court's authority was limited by the animal cruelty statute.

Justice Gordon McLoud authors an opinion joined by Justices Wiggins, Fairhurst and Johnson (James) concurs in the majority opinion on the issue digested in this **LED** entry, but dissents on a restitution hearing issue.

Result: Affirmance of Court of Appeals decision which had affirmed Pamela D. Deskins' conviction for transporting or confining animals in an unsafe manner. She was originally convicted in Stevens County District Court of three additional misdemeanors (animal cruelly in the second degree, harassment and tampering with physical evidence) but the harassment and tampering with physical evidence convictions were reversed by the Stevens County Superior Court (on RALJ appeal) decision, and the animal cruelty conviction was reversed by the Court of Appeals).

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) COURT REJECTS ACTION CHALLENGING VALIDITY OF CITY ZONING ORDINANCE PROHIBITING MEDICAL MARIJUANA "COLLECTIVE GARDENS" – In Cannabis Action Coalition v. City of Kent, ___ Wn. App. ___, 322 P.3d 1246 (Div. I, March 31, 2014), the Court of Appeals rejects a declaratory judgment action challenging the validity of city zoning ordinance prohibiting medical marijuana "collective gardens."

The Court of Appeals summarizes its opinion as follows:

> The Washington Constitution grants the governor the power to veto individual sections of a bill. The governor may exercise this power even when doing so changes the meaning or effect of the bill from that which the legislature intended. As a corollary of this power, when the governor's sectional veto alters the intent of the bill and the legislature does not override the veto, the governor's veto message becomes the exclusive statement of legislative intent that speaks directly to the bill as enacted into law.
>
> In this case, the governor vetoed over half of the sections in a 2011 bill amending the Washington State Medical Use of Cannabis Act (MUCA), substantially changing the meaning, intent, and effect of the bill. Although Engrossed Second Substitute Senate Bill (ESSSB) 5073 was originally designed to legalize medical marijuana through the creation of a state registry of lawful users, as enacted it provides medical marijuana users with an affirmative defense to criminal prosecution.
>
> Following the governor's sectional veto and the new law's effective date, the City of Kent enacted a zoning ordinance which defined medical marijuana "collective gardens" and prohibited such a use in all zoning districts. By so doing, Kent banned collective gardens.

> An organization and several individuals (collectively the Challengers) brought a declaratory judgment action challenging the ordinance. The Challengers claimed that ESSSB 5073 legalized collective gardens and that Kent was thus without authority to regulate or ban collective gardens. In response, Kent sought an injunction against the individual challengers enjoining them from violating the ordinance. The superior court ruled in favor of Kent, dismissed the Challengers' claims for relief, and granted the relief sought by Kent.
>
> We hold that neither the plain language of the statute nor the governor's intent as expressed in her veto message supports a reading of ESSSB 5073 that legalizes collective gardens. The Kent city council acted within its authority by enacting the ordinance banning collective gardens. Accordingly, the trial court did not err by dismissing the Challengers' actions and granting relief to Kent.

[Footnote omitted]

Result: Affirmance of King County Superior Court order denying declaratory judgment action challenging the validity of zoning ordinance.

(2) PUBLIC RECORDS ACT: WHERE AGENCY HAS AGREED TO DISCLOSE RECORDS BUT IS PROHIBITED FROM DOING SO BY A COURT ORDER AND THAT COURT ORDER IS LATER VACATED BY AN APPELLATE COURT, THE REQUESTOR IS NOT A "PREVAILING PARTY" ENTITLED TO ATTORNEYS FEES AND COSTS – In Robbins, Geller, Rudman & Dowd v. Vincent T. Gresham, ___ Wn. App. ___, 2014 WL 839895 (Div. II, March 4, 2014), the Court of Appeals holds that a PRA requestor is not a prevailing party where the agency is willing to disclose requested records but a trial court order enjoins it from doing so, even though the order is vacated. **[LED EDITOR'S NOTE: This LED entry does not discuss the primary PRA issues in this case, which relate to the trade secrets exemption.]**

Result: Vacation of Thurston County Superior Court order enjoining the Attorney General's Office from disclosing requested records.

(3) OFFICER'S MIS-READING OF LICENSE PLATE, WHICH RETURNED AS STOLEN, DOES NOT PROVIDE REASONABLE ARTICULABLE SUSPICION FOR TRAFFIC STOP – In State v. Creed, ___ Wn. App. ___, 319 P.3d 80 (Div. II, Feb. 20, 2014), the Court of Appeals holds 2-1 that an officer's mistaken reading of license plate, which returned as stolen, does not provide reasonable articulable suspicion for a traffic stop.

The majority opinion describes the facts as follows:

> As part of a routine check during his nighttime patrol, [an Officer] observed a car being driven by Joanne Creed and attempted to run its license plate number against the WACIC database. The WACIC database is a compilation of vehicle information and plate numbers from stolen vehicles and license plates, among other information. Although the number on Ms. Creed's license plate was 154 YDK, [the Officer] misread it and entered "154 YMK" into his computer. The WACIC printout returned for license plate 154 YMK indicated that it was stolen. Based solely on this information, [the Officer] initiated a traffic stop.
>
> After he activated his overhead lights and Ms. Creed pulled into a nearby parking space, [the Officer] realized that he had misread the plate number. While Ms. Creed waited in her car at the officer's direction, he ran the correct plate number

> and learned that she was not, in fact, driving a car with stolen plates. He approached Ms. Creed's driver's side door to inform her of his mistake and tell her she was free to go.
>
> As he approached, however, he saw Ms. Creed toss an item behind her driver's seat. He could not tell what it was. When he reached her door, he used his flashlight to illuminate the inside of her car. With the aid of his flashlight, he recognized the item on the floor behind her seat as a "'tar like' substance[ ]" inside small baggies, which appeared to be heroin. He placed Ms. Creed under arrest for possession of a controlled substance.
> . . .

[Footnotes omitted]

The Court concludes that the information relating to the mis-read plate did not provide reasonable suspicion for the traffic stop. "[W]hile police may sometimes reasonably rely on incorrect information provided by third parties, they may not reasonably rely on their own mistaken assessment of material facts."

Judge Korsmo dissents, arguing that the evidence should be admissible under the Exclusionary Rule's attenuation doctrine because the officer simply observed the evidence (the "tar like" substance) as he approached the driver to tell her that he had made a mistake.

Result: Affirmance of Yakima County Superior Court order granting defendant Joanne Alysee Creed's motion to suppress evidence obtained during a search of her vehicle.

(4) PUBLIC RECORDS ACT: RECORDS RELATING TO EMPLOYEE TERMINATION, BASED ON SUBSTANTIATED MISCONDUCT, ARE NOT EXEMPT FROM DISCLOSURE UNDER EITHER PERSONAL INFORMATION (RCW 42.56.230(3)) OR INVESTIGATIVE RECORDS (RCW 42.56.240(1)) EXEMPTION – In Martin v. Riverside School District No. 416, ___ Wn. App. ___, 2014 WL 346547 (Div. III, Jan. 30, 2014, publication ordered March 18, 2014), the Court of Appeals holds that records relating to teacher's termination are not exempt from disclosure under personal information or investigative records exemption.

The Court's analysis is in part as follows:

> "[W]hen a complaint regarding misconduct during the course of public employment is substantiated or results in some sort of discipline, an employee does not have a right to privacy in the complaint." Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 215 (2008). However, teachers have a right to privacy in their identities when the complaint involves unsubstantiated or false allegations because these allegations concern matters involving the private lives of teachers and are not specific instances of misconduct during the course of employment.
> . . .
>
> We conclude that Mr. Martin does not have a right to privacy in the records because the records contain substantiated allegations of misconduct that occurred during the course of employment. See Bellevue John Does, 164 Wn.2d at 215. His sexual encounter can be considered misconduct even though it does not fit the definition of sexual misconduct in WAC 181–88–060. Mr. Martin had a sexual encounter on school grounds, with a former student, during a holiday in

the school year. The District considered this conduct an inappropriate use of a school facility and a complete disregard for the school environment. Mr. Martin's actions involved misconduct.

The allegations of misconduct were substantiated. Mr. Martin admitted to his conduct. The District completed an investigation into the allegations and found that sexual intercourse occurred on school property with a former student and terminated Mr. Martin. The District did not need to wait until the arbitrator completed review of the decision before disclosing the record. The allegations were substantiated after the District's investigation and disciplinary action. Mr. Martin does not have a right to privacy in the records pertaining to the District's investigation and his termination resulting from the misconduct.

Furthermore, disclosure of Mr. Martin's identity and the requested records would not violate Mr. Martin's right to privacy. Mr. Martin fails to establish both prongs of RCW 42.56.050. Admittedly, the first prong is satisfied. "[D]isclosure of the identity of a teacher accused of sexual misconduct is highly offensive to a reasonable person." Bellevue John Does, 164 Wn.2d at 216. However, he fails to satisfy the second prong of the right to privacy test. The public has a legitimate interest in the disclosure of Mr. Martin's identity and the requested records. The identity of a public school teacher and the substantiated allegations regarding the teacher's misconduct that occurred on school grounds is of legitimate interest to the public. Also of legitimate public interest is the District's investigation and handling of the matter. As mentioned in Bellevue John Does, even when the allegations of misconduct are unsubstantiated, "the public may have a legitimate concern in the nature of the allegation and the response of the school system to the allegation." Id. at 217 n. 19. Disclosure of Mr. Martin's identity and the requested records would not violate Mr. Martin's right to privacy.

Result: Affirmance of Spokane County Superior Court order requiring disclosure of the records.

(5) PUBLIC RECORDS ACT: REGIONAL DRUG TASK FORCE IS NOT A SEPARATE LEGAL ENTITY SUBJECT TO SUIT – In Worthington v. WestNET, ___ Wn. App. ___, 2014 WL 941940 (Div. II, Jan. 28, 2014, publication ordered March 11, 2014), the Court of Appeals holds that regional drug task force, composed of member law enforcement agencies, is not a separate legal entity subject to suit and dismisses plaintiff's PRA lawsuit.

Result: Affirmance of Kitsap County Superior Court order dismissing John Worthington's PRA lawsuit against WestNET.

LED INTRODUCTORY NOTE ON STATE V. ALLEN AND STATE V. DAVIS, DAVIS AND NELSON – Over the past several months the Court of Appeals issued two cases which, for the most part, affirm convictions of some individuals who assisted Maurice Clemmons after he killed the four Lakewood police officers in November 2009. Due to space and our readers' general familiarity with the facts, we are only including discussions of the analysis.

(6) SUFFICIENT EVIDENCE TO CONVICT DRIVER OF ACCOMPLICE TO FIRST DEGREE PREMEDITATED MURDER IN DEATHS OF FOUR LAKEWOOD POLICE OFFICERS; ALSO EXIGENT CIRCUMSTANCES JUSTIFIED WARRANTLESS ENTRY INTO DEFENDANT'S HOTEL ROOM – In State v. Allen, 178 Wn. App. 893 (Div. II, Jan. 14, 2014), the Court of Appeals holds that there is sufficient evidence that the defendant knew he was assisting in the

commission of a crime, and exigent circumstances justified the warrantless entry of the defendant's hotel room.

The Court's analysis is in part as follows:

Sufficient Evidence of Accomplice

The Court rejects the defendant's argument that there was insufficient evidence to prove that he knew he was assisting in the commission of a crime. The Court explains:

> A person is guilty of a crime committed by another if he is an accomplice to the commission of the crime. RCW 9A.08.020(1), (2)(c). A person is an accomplice if, with knowledge that it will promote or facilitate the commission of the crime, he solicits, commands, encourages, or requests the other person to commit the crime or aids or agrees to aid the other in planning or committing the crime. RCW 9A.08.020(3). A person knows or acts with knowledge when he is aware of facts or circumstances described by a statute defining an offense or he has information that would lead a reasonable person in the same situation to believe that such facts exist. RCW 9A.08.010(1)(b). Physical presence and assent, without more, are insufficient to establish accomplice liability. State v. Roberts, 80 Wn. App. 342, 355 (1996). But the accomplice does not have to have specific knowledge of the elements of the principal's crime. State v. Hoffman, 116 Wn.2d 51, 104 (1991); State v. Davis, 101 Wn.2d 654, 655 (1984) (holding that the State is not required to prove that the accomplice knew the principal was armed).
>
> Here, there is sufficient evidence for the jury to find that Allen knew he was assisting Clemmons in the murders. In the week leading up to the murders, Allen twice heard Clemmons threaten to shoot police officers. Both times, Clemmons had displayed a gun. Allen also knew that Clemmons had removed his ankle monitor.
>
> On the morning of the murders, Allen and Clemmons drove past the coffee shop, where police cars were parked, before going to the car wash. A witness testified that there was only one person in the truck when it pulled into the car wash. Witnesses then saw Allen waving the sprayer without water coming out of it, and, when the truck was discovered about an hour later, it was not wet. From these facts, the jury could conclude that Allen, knowing about Clemmons's threats against police, dropped Clemmons off at the coffee shop and was pretending to wash the truck until Clemmons returned from the murders.
>
> Moreover, flight may be circumstantial evidence of guilty knowledge. State v. Bruton, 66 Wn.2d 111, 112 (1965). After the shootings, Clemmons, who had been shot and was bleeding, walked from the coffee shop to the car wash, and he and Allen got into the truck and quickly drove away. They then abandoned the truck in a grocery store parking lot a couple of miles from the car wash, and Allen checked into a motel in Federal Way under the name "Randy Huey." When police found Allen, he demonstrated guilty knowledge by giving several different versions of the events on the morning of the shooting before admitting that he was the driver. There was sufficient evidence for the jury to infer Allen's knowledge that he was assisting Clemmons in the murders by driving him to and from the coffee shop, and we affirm the jury's verdict.

[Footnote omitted]

Warrantless Entry On Exigent Circumstances

The Court also finds that exigent circumstances justified the warrantless entry of Allen's hotel room:

> At the suppression hearing, police testified that they learned of Allen's involvement in the shootings and his current location from informants. Based on this information, police went to room 25 of the New Horizons Motel in Federal Way, where Allen was allegedly staying, to question him. They did not have a warrant. At the motel, police asked the manager for the receipt for room 25, which was registered to "Randy Huey"—one of Allen's aliases—and had a copy of a driver's license with Allen's picture on it. They knocked on the door of room 25 and announced their presence, and Latanya Clemmons opened the door. Officers saw Allen inside the room, sitting on the bed next to some pillows. When he saw the officers, Allen said "I knew you were coming and coming hard." The officers could not see Allen's hands and he appeared to be moving toward the pillows, so a SWAT team entered the room and handcuffed him. Officers then placed him in a patrol car and drove him to the precinct for questioning.
>
> In the absence of exigent circumstances, the Fourth Amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to arrest the suspect. State v. Eserjose, 171 Wn.2d 907, 912 (2011) (citing Payton v. New York, 445 U.S. 573 (1980)). A guest in a hotel room is similarly entitled to constitutional protection against warrantless searches. Stoner v. California, 376 U.S. 483, 490 (1964). Washington courts have held that "'danger to [the] arresting officer or to the public'" can constitute an exigent circumstance. State v. Smith, 165 Wn.2d 511, 517 (2009) **March 09 LED:10** (quoting State v. Counts, 99 Wn.2d 54, 60 (1983)).
>
> The State bears the burden of proving that the exigent circumstances exception applies. Smith, 165 Wn.2d at 517. We determine whether the evidence supports a finding of exigent circumstances by looking at the totality of the situation. Smith, 165 Wn.2d at 518. We consider six factors in analyzing the situation:
>
> > (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry is made peaceably.
>
> State v. Cardenas, 146 Wn.2d 400, 406 (2002) **July 02 LED:09**. Because we analyze the totality of the situation, the State does not have to prove all six factors to show that exigent circumstances existed. Smith, 165 Wn.2d at 518.
>
> Here, the evidence supports the finding that exigent circumstances permitted the warrantless entry and Allen's arrest. The offense—the shooting of four police officers—was extremely grave and violent, and the arresting officers had information from multiple sources indicating that Allen was involved. Although

> some of the officers knew that Clemmons had been killed before they entered Allen's motel room, Clemmons's death did not decrease the gravity of his crimes or the officers' perception of Allen's involvement in them. And, because Allen's hands were not visible and he appeared to be reaching for something under the pillows, the officers could have reasonably believed he was reaching for a gun. Further, there was a strong reason to believe that Allen was on the premises—an informant told police he was in room 25 at the motel, police found his alias on a receipt for room 25, and the driver's license picture from the receipt matched the police's picture of him. Finally, there is evidence that the officers' entry was relatively peaceable. The officers knocked and announced their presence, then waited for someone to answer the door before entering the room. See Cardenas, 146 Wn.2d at 408 (holding that police entered a motel room peaceably when they were in uniform, announced their presence, and entered through an unlocked window).
>
> Police did not know whether Allen was armed, and there was no evidence that Allen was attempting to escape the motel room. But even if these two factors were not met, given the totality of the circumstances, including Allen's involvement in the shooting of four uniformed officers and simultaneous statement that he knew the officers were coming and "coming hard," exigent circumstances justified the police officers' warrantless entry and Allen's arrest. Therefore, the trial court correctly denied Allen's suppression motion.

Result: Affirmance of Pierce County Superior Court conviction of Darcus D. Allen for four counts of first degree premeditated murder.

(7) EVIDENCE ON STATE'S CONSTRUCTIVE POSSESSION THEORY HELD TO BE SUFFICIENT TO SUPPORT CONVICTIONS OF FIREARM POSSESSION CRIMES IN TWO CASES, INSUFFICIENT TO SUPPORT FIREARM POSSESSION CONVICTIONS IN ANOTHER CASE, IN PROSECUTIONS OF MAURICE CLEMMONS ACCOMPLICES – In State v. Davis, Davis, and Nelson, 176 Wn. App. 849 (Div. II, Sept. 20, 2013), the Court of Appeals holds that viewing the evidence of constructive possession in the light most favorable to the state (as the court must do in a challenge to the sufficiency of the evidence), there is sufficient evidence to support the defendants' convictions for their respective firearm possession charges.

The Court's analysis is in part as follows:

> Eddie [Davis], Douglas [Davis], and [Latricia] Nelson argue that sufficient evidence does not support their convictions for possession of a stolen firearm, and Eddie and Douglas argue that sufficient evidence does not support their convictions for unlawful possession of a firearm. Each argument is based on the claim that the individual in fact never possessed [Officer] Richards's stolen duty firearm. We hold that sufficient evidence supports Nelson's stolen firearm possession conviction and Eddie's convictions for unlawful possession of a firearm and stolen firearm possession, but that sufficient evidence does not support Douglas's convictions for unlawful possession of a firearm and stolen firearm possession.
>
> . . .
>
> A person commits first degree unlawful possession of a firearm when "the person owns, has in his or her possession, or has in his or her control any firearm after

having previously been convicted . . . of any serious offense as defined in this chapter." RCW 9.41.040(1)(a).

A person commits second degree unlawful possession of a firearm when the person "owns, has in his or her possession, or has in his or her control any firearm," under specified circumstances not including conviction of a serious offense. RCW 9.41.040(2)(a).

A person commits possession of a stolen firearm when "he or she possesses, carries, delivers, sells, or is in control of a stolen firearm." RCW 9A.56.310(1). The statute defines "possessing stolen property" as

> knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1). This definition applies to the crime of possession of a stolen firearm. RCW 9A.56.310(4).

Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29 (1969). A "defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item." State v. Jones, 146 Wn.2d 328, 333 (2002) **July 02 LED:11**. Dominion and control over an object "means that the object may be reduced to actual possession immediately," Jones, 146 Wn.2d at 333, but dominion and control need not be exclusive. State v. Cote, 123 Wn. App. 546, 549 (2004) **June 05 LED:20**. Mere proximity, however, is not enough to establish possession. Jones, 146 Wn.2d at 333.

To determine whether a defendant had constructive possession of a firearm, we examine the totality of the circumstances touching on dominion and control. State v. Jeffrey, 77 Wn. App. 222, 227 (1995); see also State v. Mathews, 4 Wn. App. 653, 656 (1971). Dominion and control over premises raises a rebuttable presumption of dominion and control over objects in the premises. State v. Cantabrana, 83 Wn. App. 204, 208 (1996); State v. Tadeo-Mares, 86 Wn. App. 813, 816 (1997) **Feb 98 LED:20**. A vehicle is considered a type of premises for purposes of determining constructive possession. State v. Turner, 103 Wn. App. 515, 521 (2000) **March 01 LED:11**.

In addition to the ability to take immediate possession, we may consider other factors indicating dominion and control, such as the ownership of the item or the defendant's ability to exclude others from possessing it. See State v. Partin, 88 Wn.2d 899, 906 (1977); Callahan, 77 Wn.2d at 31; State v. Wilson, 20 Wn. App. 592, 596 (1978). The cumulative effect of a number of these factors strongly indicates dominion and control, and, thus, constructive possession. Partin, 88 Wn.2d at 906.

1. Nelson's Possession of a Stolen Firearm

Nelson does not dispute that she knew the firearm was stolen while it was present in her residence. Citing Callahan, however, she argues that sufficient

evidence does not support finding that she actually or constructively possessed Richards's firearm, because she only had "fleeting possession" of it.
. . .

In contrast to Callahan, Nelson had dominion and control over her own residence. This allowed the jury to infer that she had dominion and control over the stolen firearm while it was in her residence. Further, Nelson actually possessed the firearm by picking it up, putting it in the Tommy Hilfiger bag, and putting the bag on a counter. Thus, she had physical custody of the firearm, which is the definition of actual possession found in Jones, 146 Wn.2d at 333.

In addition, she stowed and made the firearm available for Clemmons's use, actions with profound criminal purpose and which by their nature only took a very short time. Although her possession was of short duration, this evidence is sufficient to establish actual possession of the firearm, reading Callahan and Staley together. In addition, we note that this evidence is also sufficient to establish constructive possession of the firearm, even if her handling of it were deemed too momentary to constitute actual possession. In State v. Summers, 107 Wn. App. 373, 386-87 (2001), we held that "evidence of momentary handling, when combined with other evidence, such as dominion and control of the premises, or a motive to hide the item from police, is sufficient to prove possession." As noted, Nelson's dominion and control over the gun did not have to be exclusive to establish constructive possession. Here, Nelson had dominion and control over her own residence, establishing a rebuttable presumption that she had dominion and control over the stolen firearm while it was in her residence under Cantabrana. She picked the gun up, put it in the Tommy Hilfiger bag, and put the bag on a counter. She not only had the ability to reduce the gun to her immediate possession, but actually did so. Under the case law above, this establishes the dominion and control necessary for constructive possession.

The evidence is sufficient to support Nelson's conviction of possession of a stolen firearm.

2. Eddie's Unlawful Possession of a Firearm and Possession of a Stolen Firearm

As noted, Eddie was convicted of unlawful possession of a firearm and possession of a stolen firearm. He stipulated at trial to a prior qualifying conviction necessary to prove second degree unlawful possession of a firearm. However, citing Callahan, State v. Spruell, 57 Wn. App. 383 (1990), and Cote, he argues that the evidence demonstrates only his proximity to and momentary handling of the firearm and, thus, insufficiently establishes that he possessed it for purposes of either unlawful possession of a firearm or possession of a stolen firearm. We hold that the evidence is sufficient to support both convictions on the basis of Eddie's actual and constructive possession of the firearm while at Nelson's residence.

The evidence established that at her residence Nelson put the firearm in the Tommy Hilfiger bag and put the bag on a counter. When he was ready to leave, Clemmons asked, "Where's the gun?" and Eddie replied that the gun was on the counter in the bag and handed the bag to Clemmons. Thus, the evidence definitively established Eddie's knowledge of the presence and location of the gun, and the jury could rationally infer that Eddie was standing in close proximity

to the counter and, thus, the gun. In addition to Eddie's knowledge and proximity, he exercised at least passing control over the bag and; thus, the gun, when he handed the bag to Clemmons. Moreover, unlike Callahan, here no one claimed ownership or even [an] exclusive possession of the gun, weighing in favor of at least shared dominion and control. In sum, the cumulative weight of this evidence was sufficient to establish that Eddie could immediately reduce the gun to his actual possession, thereby exercising dominion and control over it and constructively possessing it.

The evidence also shows that Eddie actually possessed the firearm when he picked up the Tommy Hilfiger bag, which he knew contained the weapon, and handed it to Clemmons, who had just asked for the gun. Thus, Eddie had physical custody of the firearm, which is the definition of actual possession found in Jones, 146 Wn.2d at 333. Although of short duration, this evidence is sufficient to establish actual possession of the firearm consistently with Callahan and Staley under the reasoning applicable to Nelson's possession discussed above.

Whether viewed as actual or constructive possession, the evidence is sufficient to support Eddie's convictions of possession of a stolen firearm and unlawful possession of a firearm.

3. Douglas's Unlawful Possession of a Firearm and Possession of a Stolen Firearm

Douglas argues under Callahan, Spruell, Cote, and State v. Enlow, 143 Wn. App. 463 (2008) **Sept 08 LED:19**, that the evidence established only his proximity to Officer Richards's gun. We agree and conclude that the evidence is insufficient to establish that Douglas either actually or constructively possessed the firearm. Accordingly, the evidence is insufficient to support his convictions for unlawful possession of a firearm and possession of a stolen firearm.
. . .

Turning to the events in Nelson's residence, the State argues that Douglas constructively possessed the gun while it was in the bag on the counter because "anyone" could have taken possession of it. As discussed above, the jury could have inferred that Douglas was in close proximity to the bag, as he was close to Eddie and Clemmons while Eddie called Quiana. As noted, however, proximity alone is not enough to establish constructive possession. Jones, 146 Wn.2d at 333. Like the defendants in Callahan, Spruell, Cote, and Enlow, Douglas did not have dominion and control over Nelson's residence. As in Enlow, there was no evidence suggesting that Douglas even momentarily handled the gun while in Nelson's residence. Apart from proximity, no evidence suggested that Douglas had dominion and control over the firearm at Nelson's residence. Therefore, under Jones, the evidence was insufficient to establish that Douglas ever constructively possessed the firearm.

The State also argues in the following passage that Douglas actually possessed the gun while treating Clemmons's wound:

> As Douglas . . . was the one attending [Clemmons's] wounds . . . he would have been in close proximity to the gun and it is

> reasonable to infer that he would be the one to take the gun from [Clemmons] so that it would not accidentally discharge while he was treating [Clemmons's] wounds.
>
> In a sufficiency challenge the State is entitled only to reasonable inferences that can be drawn from the evidence. The record does not reveal the gun's location between the time Clemmons entered Nelson's residence and the time Nelson put the gun in the Tommy Hilfiger bag. Nor does the record show whether Clemmons still actually possessed it when Douglas treated his wound. Thus, there is no basis for inferring that Clemmons gave the gun to Douglas at that point. The State's argument is mere speculation that falls short of a reasonable inference from the evidence.
>
> The evidence is not sufficient to support Douglas's convictions of unlawful possession of a firearm and possession of a stolen firearm through the lens of either actual or constructive possession. We consequently reverse these convictions and, because double jeopardy bars retrial, remand for dismissal[.]

[Some footnotes and citations omitted]

Dissent: Judge Quinn-Brintnall dissents arguing that that there is sufficient evidence to support the jury's finding that Eddie Davis's and Latricia Nelson's convictions of possession of a stolen firearm were committed against a law enforcement officer, a finding relevant to sentencing enhancements [and not discussed in this LED entry.]

Result: Affirmance of Pierce County Superior Court convictions of Eddie Davis for first degree rendering criminal assistance, second degree unlawful possession of a firearm, and possession of a stolen firearm; reversal of Pierce County Superior Court convictions of Douglas Davis for first degree unlawful possession of a firearm and possession of a stolen firearm; and affirmance of Pierce County Superior Court convictions of Letricia Nelson for first degree rendering criminal assistance and possession of a stolen firearm. Remand for resentencing of Eddie Davis and Letricia Nelson.

LED EDITORIAL COMMENT: The Court also addressed a number of sentencing issues not discussed in this LED entry.

(8) PUBLIC RECORDS ACT: ADMINISTRATIVE LEAVE LETTER AND TWO PAYROLL SPREADSHEETS, WITH EMPLOYEE (TEACHER) NAMES REDACTED, ARE NOT EXEMPT FROM DISCLOSURE UNDER EITHER PERSONAL INFORMATION (RCW 42.56.230(3)) OR INVESTIGATIVE RECORDS (RCW 42.56.240(1)) EXEMPTION – In Predisik v. Spokane Sch. Dist. No. 81, ___ Wn. App. ___, 319 P.3d 801 (Div. III, Jan. 23, 2014, publication ordered Feb. 27, 2014), the Court of Appeals holds that redacted administrative leave letter and two payroll spreadsheets, which had teachers' names redacted, were not exempt from disclosure under personal information or investigative records exemption. Accordingly, the Court denies the teachers' motion for preliminary injunction seeking to prevent disclosure.

The three records at issue were an administrative leave letter, and two payroll spreadsheets, one concerning each teacher, which were created in response to a PRA request for information on all district employees on administrative leave, the names of the employees, and the reason for the leave if it was related to misconduct.

Result: Affirmance of Spokane County Superior Court order requiring disclosure of the records with the teachers' names redacted.

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NEXT MONTH

The July 2014 **LED** will include two recent decisions of the Washington Supreme Court:

(1) State v. Piatnitsky, ___Wn.2d ___, 2014 WL 1848366 (May 8, 2014) (ruling 5-4 that, under the requirements of Miranda, a custodial suspect's statement during interrogation that "I don't want to talk right now, man" must be viewed in context of what was said and done before that, and was merely his way of saying he was choosing to make a police-aided written statement over making a tape-recorded statement; the decision affirms State v. Piatnitsky, 170 Wn. App. 195 (Div. I, Aug. 20, 2012) **November 12 LED:11**); and

(2) State v. Trochez-Jimenez, ___Wn.2d ___, 2014 WL 1848455 ((May 8, 2014) (ruling unanimously that the Miranda-based initiation-of-contact bar was not triggered where a suspect in continuous custody asserted the right to an attorney under a Canadian "charter" to Canadian officers who were not agents of Washington officers, and therefore Washington officers lawfully got Miranda waiver when they contacted the suspect a short time later; the decision affirms State v. Trochez-Jimenez, 173 Wn. App. 423 (Div. I, Feb. 12, 2013) **April 13 LED:19**)

Space permitting the July 2014 **LED** will also include the recent Court of Appeals decision in Michelbrink v. Washington State Patrol, ___Wn. App. ___, 2014 WL 1632240 (Div. II, April 23, 2014) (In WSP Taser-training case, Court of Appeals allows a trooper to sue the WSP, applying the employer-intent exception to the workers' compensation statutory provisions that generally give employers immunity from employee lawsuits for injuries at work).

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

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

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and

clicking on “Opinions.” Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for “9” in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

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

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

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