Law Enforcement Digest

MAY 2014

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

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HONOR ROLL

698th Basic Law Enforcement Academy – November 5, 2013 through March 20, 2014

President:	Michael M. Huffman, Pierce County SO
Best Overall:	Christopher M. Berg, University of Washington PD
Best Academic:	Jeffrey A. Gudaitis, Pierce County SO
Best Firearms:	Michael M. Huffman, Pierce County SO
Patrol Partner Award:	Ashley M. Fitzgerald, Seattle Police Department
Tac Officer:	Deputy Rebecca Lewis, Snohomish County SO

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WASHINGTON LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS MEMORIAL CEREMONY IS SCHEDULED FOR FRIDAY, MAY 2, 2014 IN OLYMPIA AT 1:00

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. The medal honors those law enforcement officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year's Medal of Honor ceremony for Washington will take place Friday, May 2, 2014, starting at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus. The site is adjacent to the Supreme Court Temple of Justice.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all law enforcement personnel and all citizens who wish to attend. A reception will follow the ceremony.

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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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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

"MISDEMEANOR CRIME OF DOMESTIC VIOLENCE" UNDER FEDERAL FIREARMS CONVICTION-BASED PROHIBITION ON POSSESSION OF FIREARMS BROADLY INTERPRETED TO INCLUDE COMMON LAW BATTERY – In United States v. Castleman, ___ U.S. ___, 134 S. Ct. 1405 (March 26, 2014), the United States Supreme Court broadly interprets the federal firearms prohibition on possession of firearms by any person convicted of a "misdemeanor crime of domestic violence."

Castleman moved to dismiss his federal court indictment under 18 U. S. C. §922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." He argued that his previous conviction under a guilty plea for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child did not qualify as a "misdemeanor crime of domestic violence" because the crime charged did not necessarily involve violent force. The federal district court and the Court of Appeals for the Sixth Circuit agreed with Castleman,

though under differing rationales, that his previous conviction did not qualify as a "misdemeanor crime of domestic violence," but the Supreme Court disagrees.

The Supreme Court does not explain what defendant did to the mother of his child or what injuries she sustained. As it does in cases under §922(g)(9), the Court focuses on the indictment (charge) under the state statute under which he was convicted.

The lead opinion for the United States Supreme Court is authored by Justice Sotomayor and joined by five other justices. The lead opinion asserts that §922(g)(9)'s "physical force" requirement is satisfied by the degree of force that supports a common-law battery conviction, i.e., offensive touching. Under this definition of "physical force," the lead opinion concludes, Castleman's conviction qualifies as a "misdemeanor crime of domestic violence."

The lead opinion applies what it characterizes as "the modified categorical approach" to classifying convictions under the federal firearms prohibition. Under this approach, the lead opinion focuses on Castleman's state indictment to determine whether his conviction entailed the elements necessary to constitute the generic federal offense. Castleman pleaded guilty to "intentionally or knowingly caus[ing] bodily injury to" the mother of his child. The lead opinion states that the knowing or intentional causation of bodily injury necessarily involves the use of physical force. First, the lead opinion asserts, a "bodily injury" must result from "physical force." The common-law concept of "force" encompasses even its indirect application, making it impossible to cause bodily injury without applying force in the common-law sense. Second, the knowing or intentional application of force is a "use" of force.

Justice Scalia writes a concurring opinion in which he argues that the lead opinion interprets the statute too broadly, though he agrees with the outcome in this case. Justice Alito writes a concurring opinion joined by Justice Thomas arguing that the lead opinion should have been written to clearly limit the Court's interpretation in a 2010 decision of similar statutory language in a sentencing statute.

Result: Reversal of Sixth Circuit Court of Appeals decision that affirmed a District Court dismissal of an indictment under 18 U. S. C. §922(g)(9) against Castleman.

LED EDITORIAL NOTES; The Supreme Court decision overrules a Ninth Circuit Court of Appeals decision, Singh v. Ashcroft, 386 F.3d 1228 (9th Cir. 2004) that was not digested in the LED.

The Court addresses only the statutory issue and does not address any question under the Second Amendment of the federal constitution.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: OFFICERS' INITIAL ENTRY INTO ROOM OF MENTALLY ILL INDIVIDUAL WAS JUSTIFIED, HOWEVER, THERE ARE TRIABLE ISSUES OF FACT AS TO WHETHER OFFICERS' SECOND ENTRY WAS JUSTIFIED; COURT ALSO FINDS TRIABLE ISSUES OF FACT ON EXCESSIVE FORCE CLAIM; AND IN ISSUE OF FIRST IMPRESSION, HOLDS THAT TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) APPLIES TO ARRESTS – In Sheehan v. City and County of San Francisco, 743 F.3d 1211 (9th Cir., Feb. 21, 2014), a three-judge panel of the Ninth Circuit (with one judge dissenting on the excessive force claim) holds that officers were justified in their initial entry into

mentally ill woman's room, but not in their second entry; that there are triable issues of fact on her excessive force claim; and that Title II of the ADA applies to arrests.

The majority Ninth Circuit opinion summarizes the facts and holdings as follows:

> This case involves a near fatal tragedy in which police officers attempted to help a mentally ill woman who needed medical evaluation and treatment but wound up shooting and nearly killing her instead. They did so after entering her home without a warrant, causing her to react with violent outrage at the intruders. Fundamentally at issue is the constitutional balance between a person's right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but in a way that does not turn the intended beneficiary into a victim or a criminal.
>
> Teresa Sheehan, a woman in her mid–50s suffering from a mental illness, lived in a San Francisco group home that accommodated such persons. Her assigned social worker, Heath Hodge, became concerned about her apparently deteriorating condition and summoned the police for help in transporting her to a mental health facility for a 72–hour involuntary commitment for evaluation and treatment under California Welfare & Institutions Code §5150. Hodge deemed Sheehan "gravely disabled," because she was not taking her medication or taking care of herself, and a danger to others, because she had threatened him when he attempted to perform a welfare check on her. When San Francisco police officers Kimberly Reynolds and Katherine Holder arrived on the scene, they entered Sheehan's room, without a warrant, to confirm Hodge's assessment and take her into custody. Sheehan reacted violently to the officers' presence, grabbing a knife, threatening to kill the officers, telling the officers that she did not wish to be detained in a mental health facility and forcing the officers to retreat to the hallway, outside Sheehan's closed door, for their safety. The officers called for backup, but rather than waiting for backup or taking other actions to maintain the status quo or de-escalate the situation, the officers drew their weapons and forced their way back into Sheehan's room, presumably to disarm, subdue and arrest her, and to prevent her escape (although there do not appear to have been any means of escape available). Sheehan once again threatened the officers with a knife, causing the officers to shoot Sheehan five or six times. Sheehan, who survived, filed this 42 U.S.C. §1983 action against the officers and the city, asserting violations of her rights under the Fourth Amendment and the Americans with Disabilities Act, as well as tort and statutory claims under state law. The district court granted summary judgment to the defendants, and Sheehan appealed.
>
> Although a warrantless search or seizure in a person's home is presumptively unreasonable under the Fourth Amendment, our case law recognizes exceptions to the warrant requirement to render emergency assistance or respond to exigent circumstances. We hold that the officers were justified in entering Sheehan's home <u>initially</u> under the emergency aid exception because they had an objectively reasonable basis to believe that Sheehan was in need of emergency medical assistance and they conducted the search or seizure in a reasonable manner up to that point. Officers conducting a welfare search, where the objective is rescue, are expected to err on the side of caution, and under the circumstances of this case the officers reasonably could have believed that

Sheehan's situation presented a genuine emergency and that entering as they did was a reasonable means of providing her with assistance.

We nonetheless hold that there are triable issues of fact as to whether the second entry violated the Fourth Amendment. If the officers were acting pursuant to the emergency aid exception, then they were required to carry out the search or seizure in a reasonable manner. Similarly, if they were acting pursuant to the exigent circumstances exception, they were required to use reasonable force. Under either standard, a jury could find that the officers acted unreasonably by forcing the second entry and provoking a near-fatal confrontation. We therefore cannot say that the second entry was reasonable as a matter of law.

We further hold that there are triable issues of fact as to whether the officers used excessive force by resorting to deadly force and shooting Sheehan. The shooting was lawful when viewed from the moment of the shooting because at that point Sheehan presented an immediate danger to the officers' safety. Under our case law, however, officers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation. See Billington v. Smith, 292 F.3d 1177, 1189 (9th Cir. 2002). Here, Sheehan has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by unreasonably forcing their way back into her home, and she has also presented evidence from which a reasonable jury could find that the officers acted recklessly in doing so. She has therefore presented a triable issue of the unreasonable use of deadly force under Billington's provocation theory.

We hold that the district court properly rejected Sheehan's claims of municipal liability under Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978). Sheehan's claim that the city is liable on a failure to train theory fails because she concedes that the police department employed appropriate training materials to guide police officers' responses to persons they knew to be suffering from mental illness. That the officers may not have followed those policies does not establish that the city was deliberately indifferent to Sheehan's rights. Sheehan's claim that the city is liable for ratifying the officers' allegedly unconstitutional acts fails because there is no evidence that the city adopted or expressly approved the officers' actions.

Turning to an issue of first impression, we join the majority of circuits that have addressed the issue and hold that Title II of the Americans with Disabilities Act applies to arrests. **[LED EDITORIAL NOTE: Title II of the ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132.]** But we emphasize, as have those other circuits, that the exigencies surrounding police officers' decisions in the field must be taken into account when assessing the reasonableness of the officers' actions. We hold that, on the facts presented here, there is a triable issue whether the officers failed to reasonably accommodate Sheehan's disability when they forced their way back into her room without taking her mental illness

into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness.

Result: Affirmance in part, reversal in part, of United States District Court (Northern District California) order that had granted summary judgment to defendants.

(2) SECOND AMENDMENT RIGHT TO BEAR ARMS DOOMS SAN DIEGO COUNTY SHERIFF'S OFFICE POLICY THAT PREVENTS MOST LAW-ABIDING, PSYCHIATRICALLY-RESPONSIBLE ADULTS FROM LAWFULLY CARRYING A HANDGUN IN PUBLIC – In Peruta v. San Diego County, 742 F.3d 1144 (9th Cir., Feb. 13, 2014), a three-judge panel of the Ninth Circuit votes 2-1 to strike down a San Diego County Sheriff's Office policy that, in accord with California statutes deferring to local discretion, prevents most law-abiding citizens from getting licenses to carry handguns concealed. The Sheriff's policy combines with a California statutory prohibition on open carry of firearms in public to prevent most adults from carrying a firearm in public for the general purpose of self defense under most circumstances.

The majority opinion in Peruta concludes that there is a relatively broad right under the United States Constitution's Second Amendment for law-abiding, psychiatrically-responsible adults to carry firearms in non-sensitive public areas for self-defense purposes. The majority opinion does not try to spell out how this right is satisfied, but it concludes that the San Diego Sheriff's Office policy violates the right by denying concealed pistol licenses to law-abiding, responsible adults who seek them for self-defense purposes.

Result: Reversal of U.S. District Court (San Diego) decision that denied declaratory and injunctive relief from the San Diego Sheriff's Office policy.

LED EDITORIAL COMMENT: We believe that this Ninth Circuit decision does not impact Washington law enforcement. Both the Washington constitution's Article I, section 24 protection of the right to bear arms and the Washington statutory scheme on firearms are significantly more protective than the California scheme of the right to carry firearms in public, whether handguns are carried concealed with a license or firearms are carried openly without a license. It appears that only if the Washington constitution is amended or interpreted differently, and only if the Washington statutory scheme is amended would there be a problem under the Second Amendment as interpreted in Peruta.

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WASHINGTON STATE SUPREME COURT

IN STATE V. HINTON AND STATE V. RODEN THE WASHINGTON STATE SUPREME COURT ANALYZES DETECTIVE'S OPENING, READING, AND RESPONDING TO TEXT MESSAGES UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION AND PRIVACY ACT, CHAPTER 9.73 RCW

Hinton and Roden share the same facts, excerpted from the Supreme Court majority opinions:

> [Police] arrested Lee for possession of heroin and seized his iPhone. The iPhone, which continually received calls and messages at the police station, was handed over to [a Detective] when he started his shift that evening. The police apparently did not place the phone in an evidence or inventory locker or otherwise secure it after Lee's arrest. The record does not indicate how long officers kept possession of the phone before giving it to [the Detective].

> [The Detective] looked through the iPhone for about 5 or 10 minutes and saw a text message from a contact identified as "Z–Jon." It read, "I've got a hundred and thirty for the one-sixty I owe you from last night." Posing as Lee, [the Detective] sent Z–Jon a text message reply, asking him if he "needed more." Z–Jon responded, "Yeah, that would be cool. I still gotta sum, but I could use some more. I prefer to just get a ball, so I'm only payin' one eighty for it, instead of two Ts for two hundred." [The Detective] recognized that Z–Jon was using drug terminology, and through a series of exchanged messages, [the Detective] arranged a meeting with Z–Jon purportedly to sell him heroin. When Roden arrived for the transaction, he was arrested.

[Excerpted from Roden majority opinion]

> [The Detective] booked Roden into jail and heard the iPhone signal receipt of a new text message. [The Detective] read the text message from "Z–Shawn Hinton," which read, "'Hey, what's up dog? Can you call me? I need to talk to you.'" [The Detective] again posed as Lee, responded to the message, arranged another drug transaction, and arrested Hinton when he arrived at the meeting location.

DETECTIVE'S OPENING, READING, AND RESPONDING TO INCOMING TEXT MESSAGE (POSING AS THE RECIPIENT) FROM THE DEFENDANT VIOLATED THE DEFENDANT'S (SENDER OF TEXT MESSAGES) RIGHTS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION

State v. Hinton, ___ Wn.2d ___, 319 P.3d 9 (Feb. 27, 2014)

Proceedings below: (Excerpted from Supreme Court majority opinion)

> Hinton was charged with attempted possession of heroin. He moved to suppress the evidence obtained from the iPhone, arguing that the detective's conduct violated article I, section 7 of the Washington State Constitution, the Fourth Amendment to the United States Constitution, and the Washington privacy act. The trial court denied the suppression motion and found Hinton guilty on stipulated facts. Hinton appealed and argued the constitutional issues. The Court of Appeals affirmed. State v. Hinton, 169 Wn. App. 28 (2012) **Oct 12 LED:21**. We granted Hinton's petition for review to decide whether the detective's conduct violated the state or federal constitutions.

ISSUE AND RULING: Did a detective's conduct in opening, reading, and responding to a text message sent to an arrestee's iPhone, posing as the recipient, violate the sender's privacy rights under article I, section 7 of the Washington State Constitution where the detective acted without a search warrant or consent of the owner of the iPhone or other exception to the general search warrant requirement? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 Court)

Result: Reversal of Cowlitz County Superior Court conviction (affirmed by the Court of Appeals **Oct 12 LED:21**) of Shawn Daniel Hinton for attempted possession of heroin.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

> Whether individuals have an expectation of privacy in the content of their text messages under state law is an issue of first impression in Washington. Similarly, whether federal law protects the content of text messages has not been settled in

federal courts. In City of Ontario v. Quon, 560 U.S. 746 (2010) **Aug 10 LED:02**, the United States Supreme Court assumed, without deciding, that citizens do have a reasonable expectation of privacy in their text messages, but upheld a police department's review of an officer's text messages as reasonable under the Fourth Amendment. Several lower courts have held that people have an expectation of privacy under the Fourth Amendment in the content stored on their cell phones, including text messages. See United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007); United States v. Davis, 787 F. Supp. 2d 1165, 1170 (D. Or. 2011); United States v. Quintana, 594 F. Supp. 2d 1291, 1299 (M.D. Fla. 2009). Other courts have found a privacy interest in text messages stored by a service provider. See Missouri v. Clampitt, 364 S.W.3d 605, 611 (Mo. Ct. App .2012); State v. Bone, 12–KA–34 (La. App. 5 Cir. 09/11/12), 107 So.3d 49, 63–67. Fewer courts have addressed the privacy interests of a sender when police access a sender's text messages on a recipient's device. Compare State v. Patino, No. P1–10–1155A, slip op. (R.I. Super. Ct. Sept. 4, 2012) (finding sender had reasonable expectation of privacy in sent text messages accessed by police during search of recipient's cell phone), with Fetsch v. City of Roseburg, 2012 WL 6742665 (D. Or. Dec. 31, 2012) (finding sender had no reasonable expectation of privacy in text messages once sent to a third party). We do not reach the Fourth Amendment inquiry as we resolve this case under our state constitution, which "'clearly recognizes an individual's right to privacy with no express limitations'." State v. Young, 123 Wn.2d 173, 180 (1994) (quoting State v. Simpson, 95 Wn.2d 170, 178 (1980)).

. . .

Viewing the contents of people's text messages exposes a "wealth of detail about [a person's] familial, political, professional, religious, and sexual associations." United States v. Jones, ___ U.S. ___, 132 S. Ct. 945, 955 (2012) **March 12 LED:07** (Sotomayor, J., concurring) (discussing GPS (global positioning system) monitoring). Text messages can encompass the same intimate subjects as phone calls, sealed letters, and other traditional forms of communication that have historically been strongly protected under Washington law. Although text message technology rendered Hinton's communication to Lee more vulnerable to invasion, technological advancements do not extinguish privacy interests that Washington citizens are entitled to hold. The right to privacy under the state constitution is not confined to "a 'protected places' analysis," or "to the subjective privacy expectations of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives." [State v. Myrick, 102 Wn.2d 506, 513 (1984)]. We find that the officer's conduct invaded Hinton's private affairs and was not justified by any authority of law offered by the State.

The Court of Appeals relied on State v. Wojtyna, 70 Wn. App. 689 (1993) **Dec 93 LED:20**, where the court held that Wojtyna's phone number, displayed on a pager, was not a private affair protected under the state constitution. The court recognized that telephonic and electronic communications are strongly protected under Washington law, but found that situation different because "all that was learned from the pager was the telephone number of one party, the party dialing." In contrast, the nature and extent of information exchanged during a text messaging conversation can involve the same intimate details shared during

personal phone calls. Sophisticated text messaging technology enables "[l]ayered interpersonal communication[s]" that reveal "intimate . . . thoughts and emotions to those who are expected to guard them from publication." Patino, slip op. at 83, 70. Text messaging is an increasingly common mode of personal communication. Br. of Amicus Curiae Elec. Frontier Found. at 6 (noting statistic that users who text sent or received an average of 41.5 messages per day (citing Aaron Smith, Pew Research Ctr., Americans and Text Messaging (Sept. 19, 2011), available at http:// www.pewinternet.org/2011/09/19/americans-and-text-messaging/)). Text message use is expected to rise given that 95 percent of young adults, ages 18–29, use text messaging.

Many courts, in finding a legitimate expectation of privacy in the contents of one's cell phone, have recognized the private nature of text messages. See Zavala, 541 F.3d at 577 (finding that "cell phones contain a wealth of private information, including . . . text messages"); Finley, 477 F.3d at 259; Davis, 787 F. Supp. 2d at 1170; United States v. Gomez, 807 F. Supp. 2d 1134, 1140 (S. D. Fla. 2011); Quintana, 594 F. Supp. 2d at 1299; State v. Smith, 124 Ohio St. 3d 163, 169, 2009–Ohio–6426, 920 N.E.2d 949 (2009); cf. Quon, 560 U.S. at 760 (noting that text messaging communications are "so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification"). Despite the fact that a cell phone is carried on a person in public, text messages often contain sensitive personal information about an individual's associations, activities, and movements. Moreover, individuals closely associate with and identify themselves by their cell phone numbers, such that the possibility that someone else will possess an individual's phone is "unreflective of contemporary cell phone usage." Patino, slip op. at 70.

The historical treatment of phone calls and electronic communications supports finding that text messages are private affairs. In Gunwall, we noted Washington's "long history of extending strong protections to telephonic and other electronic communications." We detailed the history of statutory protection for telegrams, which was rooted in the 1881 Code, adopted before statehood. Id. Washington's privacy act, chapter 9.73 RCW, which prohibits anyone not operating under a court order from intercepting or recording certain private communications without the consent of all parties, is one of the most restrictive surveillance laws ever promulgated. State v. Roden, No. 87669–0, ___ Wn.2d ___, 2014 WL 766681, slip op. at 3 (Feb. 27, 2014) (citing State v. Faford, 128 Wn.2d 476, 481 (1996) **April 96 LED:02**). "In balancing the legitimate needs of law enforcement to obtain information in criminal investigations against the privacy interests of individuals, the Washington [privacy act], unlike similar statutes in . . . other states, tips the balance in favor of individual privacy at the expense of law enforcement's ability to gather evidence without a warrant." State v. Christensen, 153 Wn.2d 186, 199 (2004) **Feb 05 LED:09**. In fact, "[i]ntercepting or recording telephone calls violates the privacy act except under narrow circumstances, and we will generally presume that conversations between two parties are intended to be private." State v. Modica, 164 Wn.2d 83, 186 P.3d 1062 (2008) **Sept 08 LED:05**.

Our legislature used sweeping language to protect personal conversations from intrusion. See RCW 9.73.030(1)(a) (protecting "[p]rivate communication transmitted by telephone, telegraph, radio, or other device" (emphasis added)). Based on that broad language, this court has consistently extended statutory

privacy in the context of new communications technology, despite suggestions that we should reduce the protections because of the possibility of intrusion. See Faford, 128 Wn.2d 476 (cordless phone); Christensen, 153 Wn.2d 186 (same); State v. Townsend, 147 Wn.2d 666, 674 (2002) (e-mails). In State v. Roden, stemming from the same set of facts that gave rise to Hinton's appeal, we determined that the privacy act protected Roden's text messages from interception without consent or a court order. We have "repeatedly emphasized in considering constitutional privacy protections [that] the mere possibility that intrusion on otherwise private activities is technologically feasible will not strip citizens of their privacy rights." Faford, 128 Wn.2d at 485 (citing Young, 123 Wn.2d at 186; Myrick, 102 Wn.2d at 513–14). Even under the Fourth Amendment, the United States Supreme Court found that an individual making a phone call in a telephone booth had a reasonable expectation of privacy even though he made the calls from a place where he could have been seen. Katz, 389 U.S. 347.

The Court of Appeals extended rules applied to letters directly to text messages, concluding that any privacy interest in a text message is lost when it is delivered to the recipient. While text messages have much in common with phone calls and letters, they are a unique form of communication, and we will not strain to apply analogies where they do not fit. Courts have recognized that an individual maintains an expectation of privacy in sealed letters despite subjecting them to vulnerability in transit. See Ex parte Jackson, 96 U.S. (6 Otto) 727 (1877). But unlike letters, which are generally delivered to the home where they remain protected from intrusion, text messages are delivered to a recipient's cell phone instantaneously and remain susceptible to exposure because of a cell phone's mobility. Just as subjecting a letter to potential interception while in transit does not extinguish a sender's privacy interest in its contents, neither does subjecting a text communication to the possibility of exposure on someone else's phone. We find that Hinton retained a privacy interest in the text messages he sent, which were delivered to Lee's phone but never received by Lee.

The Court of Appeals erred by finding that Hinton lost his privacy interest in the text message communications because he sent them to a device over which he had no control. Given the realities of modern life, the mere fact that an individual shares information with another party and does not control the area from which that information is accessed does not place it outside the realm of article I, section 7's protection. In [State v. Jorden, 160 Wn.2d 121 (2007) **July 07 LED:18**], we held that the practice of checking names in a motel registry for outstanding warrants without individualized or particularized suspicion violated a defendant's privacy under article I, section 7. Because information contained in a motel registry is personal and sensitive, it is a private affair notwithstanding the fact that the area searched belongs to the motel and that an individual has no control or possessory interest in a motel's registry. Similarly, notwithstanding the fact that an individual voluntarily shares financial information with his bank and can assert no property or possessory interests in the bank's files, banking records are protected by the state constitution because they "may disclose what the citizen buys [and] what political, recreational, and religious organizations a citizen supports." Miles, 160 Wn.2d at 246 **Nov 07 LED:07**. This court has consistently declined to require individuals to veil their affairs in secrecy and avoid sharing information in ways that have become an ordinary part of life. See, e.g., Gunwall, 106 Wn.2d at 67 (finding that "'[a] telephone is a necessary

component of modern life'" and "'[t]he concomitant disclosure'" to the telephone company of the numbers dialed by the telephone subscriber "'does not alter the caller's expectation of privacy'" (quoting People v. Sporleder, 666 P.2d 135, 141 (Colo.1983))). Hinton certainly assumed the risk that Lee would betray him to the police, but Lee did not consent to the officer's conduct. The risk that one to whom we impart private information will disclose it is a risk we "'necessarily assume whenever we speak.'" Hoffa v. United States, 385 U.S. 293, 303 (1966) (quoting Lopez v. United States, 373 U.S. 427, 465 (1963)); see also, e.g., State v. Corliss, 123 Wn.2d 656 (1994) **June 94 LED:02** (holding petitioner's state constitutional privacy rights were not violated when an informant consented to allow police officers to overhear his conversations with petitioner **[LED EDITORIAL COMMENT: Corliss is known as the "tipped phone" case that law enforcement has relied on to listen in on phone conversations at their informant's end by having the informant tip the phone so that the voice of the other participant in the call is audible to the officer; we see nothing in Hinton or Roden that would undercut that practice.]**). But that risk should not be automatically transposed into an assumed risk of intrusion by the government. See, e.g., State v. Boland, 115 Wn.2d 571, 581 (1990) (finding that the "proper and regulated collection of garbage" is "necessary to the proper functioning of modern society" and exposure of garbage to a licensed trash collector "does not also infer an expectation of governmental intrusion").

This incidental exposure of private information in the course of everyday life is distinct from other kinds of voluntary disclosure that extinguish privacy interests under article I, section 7. . . . [W]here an individual voluntarily discloses information to a stranger, he cannot claim a privacy interest. See, e.g., Goucher, 124 Wn.2d at 784; State v. Hastings, 119 Wn.2d 229, 235-36 (1992) **Aug 92 LED:07** (finding no violation of private affairs because "the decision to allow strangers to enter was made absent coercion by the police and with full knowledge of the illegal activity occurring within"). But like an individual who places his trash on the curb for routine collection by a trash collector, or one who dials telephone numbers from his home phone, or one who shares personal information with a bank or motel, one who has a conversation with a known associate through personal text messaging exposes some information but does not expect governmental intrusion.

We are not persuaded that Hinton voluntarily exposed the text messages in a way that extinguished his privacy interest in the conversation. We reject the State's argument that the text messages were in plain view. The observation of that which is in plain view does not constitute a search because voluntary exposure to the public extinguishes any privacy interest. However, here only one nonincriminating message was arguably in the detective's plain view. This case does not ask whether viewing a single isolated message that appeared on the screen violated Hinton's rights, and describing the subsequent text messages as "in plain view" denies the scope and extent of the detective's intrusive conduct, which involved operating the phone and posing as Lee to send text messages back and forth with Hinton.

Cases where we upheld other police ruses do not condone the detective's conduct here. The State compares this situation to Goucher, 124 Wn.2d 778 **Dec 94 LED:14**, where an officer answered a telephone call from Goucher during a lawful search of a residence. When Goucher asked to speak to Luis, the

> detective told him that Luis had gone on a run but that he (the detective) could "handl[e] business." Because Goucher voluntarily chose to continue the conversation and "expose[ ] his desire to buy drugs to someone he did not know," we found that the communication was not private. Amicus curiae Washington Association of Prosecuting Attorneys (WAPA) cites Athan, 160 Wn.2d 354 **Aug 07 LED:02**, where police deceived Athan by convincing him to send an envelope by mail to a fictitious law firm invented by police. We found that when Athan voluntarily placed the envelope in the mail, he lost any privacy interest in his saliva on the envelope flap. We upheld both of these practices because the defendants in those cases voluntarily disclosed information to strangers and assumed the risk of being "'deceived as to the identity of one with whom one deals,'" a risk that is "'inherent in the conditions of human society.'" Hoffa, 385 U.S. at 303 (quoting Lopez, 373 U.S. at 465).
>
> But here, [the Detective] essentially posed as Lee and sent text messages to Hinton from Lee's cell phone. Unlike a phone call, where a caller hears the recipient's voice and has the opportunity to detect deception, there was no indication that anyone other than Lee possessed the phone, and Hinton reasonably believed he was disclosing information to his known contact. The disclosure of information to a stranger, [the Detective], cannot be considered voluntary like Goucher's choice to speak with someone he did not know who claimed to be "handling business" or Athan's choice to engage in business with an unknown law firm that was actually fictitious. Law enforcement is certainly permitted to use some deception, but "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent . . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." Chandler v. Miller, 520 U.S. 305, 322 (1997) (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)). Forcing citizens to assume the risk that the government will confiscate and browse their associates' cell phones tips the balance too far in favor of law enforcement at the expense of the right to privacy.

[Some citations omitted, some citations modified]

Dissent: Justice Jim Johnson filed a dissenting opinion joined by Chief Justice Madsen and Justices Owens and Wiggins. Justice Johnson would hold that Hinton did not have a privacy interest in text messages he sent that were delivered to a third party's cell phone, and thus he does not have standing to challenge the search.

DEFENDANT'S TEXT MESSAGES TO ARRESTEE'S CELLULAR TELEPHONE WERE "PRIVATE" COMMUNICATIONS WITHIN THE MEANING OF THE PRIVACY ACT, CHAPTER 9.73 RCW, AND DETECTIVE'S OPENING, READING, AND RESPONDING TO INCOMING TEXT MESSAGES (POSING AS THE RECIPIENT) WAS AN "INTERCEPTION" IN VIOLATION OF THE PRIVACY ACT

State v. Roden, ___ Wn.2d ___, 2014 WL 766681 (Feb. 27, 2014)

Proceedings below: (Excerpted from Supreme Court majority opinion)

> Roden was charged with attempted possession of heroin. Roden moved to suppress the evidence obtained from the iPhone, claiming the evidence was obtained in violation of article I, section 7 of the Washington State Constitution,

the privacy act, and the Fourth Amendment to the United States Constitution. The trial court denied the suppression motion and found Roden guilty on stipulated facts.

On appeal, Roden argued that the detective's conduct violated the privacy act. The Court of Appeals affirmed. State v. Roden, 169 Wn. App. 59 (2012) **Oct 12 LED:21**, and Roden petitioned this court for review under both the privacy act and the state and federal constitutions. We accepted review.

ISSUES AND RULINGS: 1) Is a text message exchange, via cellular telephone, a "private" communication subject to the Privacy Act, chapter 9.73 RCW? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 Court)

2) Did a detective's conduct in opening, reading, and responding to text messages, posing as the recipient, constitute an "interception" in violation of the Privacy Act? (ANSWER BY SUPREME COURT: Yes, rules a 5-4 Court)

Result: Reversal of Cowlitz County Superior Court conviction (affirmed by the Court of Appeals **Oct 12 LED:21**) of Jonathan Nicholas Roden for attempted possession of heroin.

STATUTORY LANGUAGE AT ISSUE:

The Privacy Act provides in relevant part:

> [I]t shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
>
> (a) Private communication transmitted by telephone, telegraph, radio, or other device between two or more individuals between points within or without the state by any device electronic or otherwise designed to record and/or transmit said communication regardless how such device is powered or actuated, without first obtaining the consent of all the participants in the communication.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

A. Private Communication

> The act does not define the word "private," but we have adopted the dictionary definition: "'belonging to one's self . . . secret . . . intended only for the persons involved (a conversation) . . . holding a confidential relationship to something . . . a secret message: a private communication . . . secretly: not open or in public.'" State v. Townsend, 147 Wn.2d 666, 673 (2002) **March 03 LED:11** (internal quotation marks omitted) (quoting Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178, 190 (1992) **Aug 92 LED:06**). The question of whether a particular communication is private is generally a question of fact, but one that may be decided as a question of law if the facts are undisputed. Id. (citing State v. Clark, 129 Wn.2d 211, 225 (1996) **July 96 LED:07**). In determining whether a communication is private, we consider the subjective intention of the parties and may also consider other factors that bear on the reasonableness of the participants' expectations, such as the duration and subject matter of the communication, the location of the communication, and the presence of potential

third parties. We will generally presume that conversations between two parties are intended to be private. State v. Modica, 164 Wn.2d 83, 89 (2008) **Sept 08 LED:05**.

Roden's messages to Lee were private communications. Text messages encompass many of the same subjects as phone conversations and e-mails, which have been protected under the act. Roden manifested his subjective intent that the text messages would remain private by sending them to the cell phone of a personal contact. Roden did not use a group texting function, which enables text messages to be exchanged between multiple parties, or indicate in any other manner that he intended to expose his communications to anyone other than Lee. Moreover, the illicit subject matter of Roden's text messages indicates that he trusted the communication was secure and private.

. . .

Sophisticated text messaging technology enables "[l]ayered interpersonal communication[s]" that reveal "intimate . . . thoughts and emotions to those who are expected to guard them from publication." Text messaging is an increasingly prevalent mode of communication and text messages are raw and immediate communications. State v. Hinton, No. 87663–1, slip op. at 16 (Wash. Feb. 27, 2014). Individuals closely associate with and identify themselves by their cell phone numbers, such that the possibility that someone else will possess an individual's phone is "unreflective of contemporary cell phone usage."

The possibility that an unintended party can intercept a text message due to his or her possession of another's cell phone is not sufficient to destroy a reasonable expectation of privacy in such a message. The Court of Appeals below relied on State v, Wojtyna, 70 Wn. App. 689 (1993) **Dec 93 LED:20**, where it noted that one who transmits a message to a pager "'runs the risk that the message will be received by whomever is in possession of the pager.'" The Court of Appeals' reliance on Wojtyna overlooks the significant differences between pager and text message communications. There, the court held that Wojtyna's phone number, as displayed on a pager that he messaged, was not a private communication under the privacy act. The back-and-forth text messaging conversation here is much more like e-mail exchanges and telephone calls – which the act plainly protects – than a simple informational statement that is sent to a pager. . . . As text messaging increasingly becomes a substitute for more traditional forms of immediate communication, text messages should be afforded the same protections from interception that are recognized for telephone conversations. We have repeatedly affirmed traditional expectations of privacy in the context of new communications technology notwithstanding some possibility of interception.

. . .

B. Interception

The messages that Roden sent to Lee were opened, read, and responded to by an officer before they reached Lee. The statute does not define the term "intercept." Where there is no statutory definition to guide us, words should be given their ordinary meaning. Finding the detective's action to be an interception is consistent with the ordinary definition of "intercept"—to "stop . . . before arrival .

> . . or interrupt the progress or course." Webster's Third New International Dictionary 1176 (2002). Unlike in Townsend, where the defendant communicated directly with the officer's fictitious online profile, the detective here intercepted text messages directed to an actual acquaintance.
> . . .
> [The Detective] did not merely see a message appear on the iPhone. Instead , he manipulated Lee's phone, responded to a previous text from Roden, and intercepted the incoming text messages before they reached Lee. Whether it is also a violation of the act to access text messages that have already been received by the intended recipient and remain in storage is not the question before us today. We decline to find there was no interception here based on the fact that the messages were in electronic storage when they reached the phone—a technicality that has no relevance under our state statute.

[Some citations omitted, some citations revised; subheadings revised]

Dissent: Justice Wiggins filed a dissenting opinion joined by Chief Justice Madsen and Justices Jim Johnson and Owens. Justice Wiggins would hold that there was no interception, and thus no Privacy Act violation, because the text messages reached their intended destination without interruption. Among other things, Justice Wiggins' opinion points out the extreme result yielded by the majority's interpretation of "intercept": "Indeed, adopting the majority's reasoning, any passerby who happens upon a lost or misplaced cell phone violates the privacy act if, during the time he or she possesses the phone, the phone receives a text and the possessor happens to see the incoming message. And hapless is the concerned citizen who proactively sends a message to a stored contact in an effort to return the phone to its rightful owner, for he or she has almost certainly committed a misdemeanor. . . ."

LED EDITORIAL COMMENT:

The ramifications of the rulings in Hinton and Roden are not clear. We will monitor the case law, as well as continue to ponder and explore those ramifications with others. Relevant case law developments will of course be reported in the LED. We may also share useful insights of others of which we learn.

We think that there may have been different results in both cases if the detective had not responded to the text message posing as the recipient, but instead had merely opened and viewed the text message. The Hinton opinion noted that the text message may have been in plain view but that was not the issue before the Court because the detective had responded to the message. But as the Wiggins' dissent in Roden points out, the majority opinion in Roden appears to challenge common sense by making such viewing of an unopened text message an "intercept." Under the Court's analysis the conduct that resulted in a Privacy Act violation by the detective in Roden would also result in a violation when performed by a private citizen. Maybe the majority opinion in Roden did not mean to go this far. We must wait for a future decision to learn that.

We do not think that Roden raises any Privacy Act concerns with law enforcement looking at already-opened text messages on a recipient's cell phone without the recipient's consent. There are constitutional issues with this, of course. The United States Supreme Court is currently considering in two cases to be decided by the end of this June regarding whether law enforcement officers violate the Fourth Amendment rights of an owner of a cell phone in searching a phone that they seize incident to arrest. See the announcement in the March 2014 LED at page 3 (those decisions almost

certainly will not provide guidance as to any Fourth Amendment rights of the senders of those messages.) Ideally, in the absence of exigent circumstances, officers should get a search warrant as to already-opened text messages or at least consent from the phone's owner.

Additionally, the Hinton opinion notes that the recipient did not consent to the detective's conduct. It is unclear, based on Hinton, whether consent by an intended recipient to open incoming text messages would be sufficient against a sender's constitutional privacy right in a sent text message not yet opened by the intended recipient. And it is unclear, based on Roden, whether consent by a recipient would make, for purposes of the Privacy Act's two-party consent prescription, the communication not private or the viewing not an intercept as to sent text messages not yet opened by the intended recipient. Accordingly, in light of the uncertainty in the law, the safest approach for officers seeking to open and respond to text messages not yet opened by the intended recipient is to obtain a search warrant allowing them to view text messages received by the device before it was seized. It would also be advisable to specifically include language in the warrant authorizing officers to respond to text messages (and/or telephone calls) posing as the recipient. Then, in order to lawfully read (and respond to) messages that arrive after the device is seized, in light of the "intercept" holding in Roden, officers should obtain an order authorizing interception under the Privacy Act. The probable cause showing for the intercept order would likely be along the following lines: 1) the cell phone owner was arrested for "X Crime"; 2) a search of the phone (pursuant to the search warrant) shows communication between individuals regarding the crime under investigation for purposes of the Privacy Act order; and 3) at least one of the new incoming text messages is from one of those individuals.

Also stirred up by Hinton and Roden are constitutional and Privacy Act questions raised by ruses in which officers obtain consent by a cell phone owner to tell a sender to communicate by phone call or text with a purported cohort (an undercover officer). Hinton and Roden may have left room for such ruses, but only future decisions will tell.

Although only time will tell, it is likely that the Hinton and Roden analysis will also extend to other forms of electronic communication such as e-mail messages, private social network communications, and other private messages.

As always we encourage officers to consult with their assigned agency legal advisors and/or local prosecutors.

Finally, we thank Susan Storey, Senior Deputy Prosecuting Attorney, King County, and Pam Loginsky, WAPA Staff Attorney, for their expert insight regarding the matters addressed in this Comment.

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WASHINGTON STATE COURT OF APPEALS

COURT REJECTS LAWSUIT AGAINST COUNTY AND DEPUTY SHERIFFS ALLEGING INVASION OF PRIVACY THROUGH INTENTIONALLY UNLAWFUL SEARCH OF HOME

Youker v. Douglas County, ___Wn. App. ___, 2014 WL 97315 (Div. III, Jan. 9, 2014)

Facts and Proceedings below: (Excerpted from majority opinion)

> In April 2007, Ms. Youker visited the sheriff's office to report her ex-husband, Mr. Youker, was a convicted felon with a rifle in his possession. Deputies [A] and [B] learned Mr. Youker had in effect a no-contact order against Ms. Youker and she had an outstanding arrest warrant. Ms. Youker offered to show the deputies the gun's location in the home where she claimed to have resided with Mr. Youker for the previous five months despite the no-contact order.
>
> The deputies drove Ms. Youker to the home where, in Mr. Youker's absence, she signed a consent to search form. A dog recognized her and allowed her to pass to the door that she knew was unlocked to allow Mr. Youker's employees access to business inventory. The deputies entered the home and seized the gun from under a bed Ms. Youker claimed to share with Mr. Youker. Ms. Youker showed them her clothing in half the bedroom closet and her mail sent to that address on the bed's side table. Back at the sheriff's office, Deputy [A] learned Ms. Youker's arrest warrant was for violating the no-contact order and arrested her. Deputy [A] arrested Mr. Youker the next day. Mr. Youker told Deputy [A] the gun belonged to Ms. Youker and she had resided in his home for the previous four months.
>
> The State charged Mr. Youker with first degree unlawful firearm possession. State prosecutors later dropped the charge because the United States indicted him for the same incident. Federal prosecutors eventually dropped the indictment because evidence suggested Mr. Youker might not have owned the gun.
>
> In April 2009, Mr. Youker sued the county and the deputies for privacy invasion, false arrest, false imprisonment, and malicious prosecution. The Youkers each gave evidence contradicting their prior alleged statements in material ways, generally claiming Ms. Youker did not reside in Mr. Youker's home at the time of the search. The trial court summarily dismissed all claims. Mr. Youker's first appeal followed. This court reversed and remanded solely regarding his privacy invasion suit, finding, "[T]he basis for dismissing [the] claim, at least with respect to damages directly related to the search, was insufficiently briefed below and on appeal." Youker v. Douglas County, 162 Wn. App. 448, 453 (2011).
>
> On remand, the trial court again summarily dismissed Mr. Youker's privacy invasion suit. The court "specifically f[ound] that there are issues of fact on . . . consent to search," but concluded these issues were not material because Mr. Youker could not prove damages.

ISSUE AND RULING: Is there sufficient evidence to go to a jury on the question of whether, in relying on Ms. Youker's consent to conduct a warrantless search, the deputies' conducted an intentionally unlawful search such as to support a lawsuit for governmental invasion of privacy for Tort law purposes? (ANSWER: No, rules a 2-1 majority, there is no evidence of an intentionally unlawful search)

Result: Affirmance of Douglas County Superior Court order dismissing Jason Youker's lawsuit alleging governmental invasion of privacy.

Status: Mr. Youker has petitioned the Washington Supreme Court for discretionary review.

ANALYSIS: (Excerpted from the majority opinion)

> A person may sue the government for common law privacy invasion if it intentionally intrudes upon his or her solitude, seclusion, or private affairs. . . . Reid v. Pierce County, 136 Wn.2d 195, 206, 213-14 (1998) **Feb 99 LED:09**; Restatement (Second) of Torts §652B (1977). The defendant's intrusion, whether physical or nonphysical, must substantially interfere with the plaintiffs' seclusion in a manner highly offensive or objectionable to a reasonable person. . . . "The intruder must have acted deliberately to achieve the result, with the certain belief that the result would happen." Fisher v. Dep't of Health, 125 Wn. App. 869, 879 (2005). While "[i]ntent is not a factor" under article I, section 7 of our state constitution, our Supreme Court has refused to create a constitutional cause of action for governmental privacy invasions. Reid, 136 Wn.2d at 213-14. Likewise, we decline to do so here.
>
> Reasonable minds could solely conclude the deputies lacked intent to intrude upon Mr. Youker's seclusion. It is uncontested they were legitimately investigating Ms. Youker's report about a gun in Mr. Youker's home. The record contains no suggestion they acted under pretext. She signed a consent to search form after stating she had resided in the home for five months. When the deputies approached the home with Ms. Youker, they were greeted by a friendly dog and found papers and clothing belonging to her in the bedroom. Even Mr. Youker, when first contacted, said Ms. Youker had lived with him for four months. The deputies did not have the benefit of hindsight regarding the Youkers' later conflicting statements. Considering the information available to them at the time, no trier of fact could find the deputies "deliberately embarked on a course of conduct guaranteed to result in an unlawful [search] with the intent of causing distress or embarrassment to [Mr. Youker]." Fisher, 125 Wn. App. at 879.

[Some citations omitted, others revised for style]

LED EDITORIAL COMMENT: While the result in this case is good for law enforcement so far, the facts do illustrate why it is safer to seek a search warrant than rely on consent. Even if a civil lawsuit cannot proceed where a consenting person changes his or her story, criminal cases are at risk when that happens. In State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02, Washington's Supreme Court rejected the "apparent authority" doctrine for third party consent followed by the United States Supreme Court under the Fourth Amendment. So, a consenter who changes his or her story after the search can put a consent search in jeopardy in Washington criminal cases.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) ANONYMOUS CALL ABOUT NON-THREATENING MAN WITH A GUN IN A HIGH CRIME AREA OF SEATTLE DID NOT PROVIDE REASONABLE SUSPICION FOR TERRY STOP – In State v. Cardenas-Muratalla, ___Wn. App. ___, 319 P.3d 811 (Div. I, Feb. 3, 2014), the Court of Appeals rules that an anonymous call to 911 at 9:45 p.m. that a person in a high crime area of downtown Seattle had, moments earlier, shown a gun to the caller, was not, without more, sufficient to justify a police officer's stop and frisk of a person meeting the caller's description.

The Court of Appeals rules the Terry stop to be unsupported by reasonable suspicion because the evidence in the record is that the 911 caller reported that he did not feel alarmed or intimidated when shown the gun, and there is no evidence that the person with the gun pointed it at anyone or discharged it. Central to the legal analysis by the Court of Appeals is the United States Supreme Court's Fourth Amendment precedent of Florida v. J.L., 529 U.S. 266 (2000) **May 00 LED:07**. J.L. held police did not have "reasonable suspicion" for a Terry stop based solely on an anonymous telephone report that a young black male in a plaid shirt standing at a bus stop was carrying a gun. In J.L., when the officers arrived at the bus stop, they did not observe any suspicious behavior by the male in the plaid shirt before they made a Terry seizure.

The Cardenas-Muratalla Court rules that the facts that the suspect in this case – (1) looked startled when he noticed the two police officers and (2) started to walk away – did not make this case different from J.L. on the reasonable suspicion issue. The Court cites the Washington Supreme Court decision in State v. Greenwood, 163 Wn.2d 534 (2008) **July 08 LED:04** for the proposition that such conduct does not provide reasonable suspicion for a stop.

In key part, the fact-based portion of the analysis by the Court of Appeals is as follows:

> Here, neither the informant nor the informant's tip was reliable. The officers knew nothing about the 911 caller. The caller did not give his name, and the 911 operator was unable to reach the caller on a call-back. Further, the tip was not the report of any criminal activity. The informant said Cardenas-Muratalla showed him his gun, but that he (the informant) did not feel threatened. Carrying a firearm is a crime if it is carried or displayed in a manner that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons [*Court's footnote: RCW 9.41.270; see also RCW 9A.36.011, .021 (assault)*.], or if it is willfully discharged in a place where there is a reasonable likelihood that humans, domestic animals, or property will be jeopardized. [*Court's footnote: Seattle Municipal code 12A.14.071*.]. There is no evidence in the record that the 911 caller reported being intimidated or alarmed when the suspect showed him the gun or that the suspect discharged the gun or pointed it at anyone. In fact, the caller told the 911 operator, "He didn't threaten me. It's just that he showed me. I seen it. . . . Just calling to tell you, just calling to tell you." That is the only evidence in the record about the emotional state of the 911 caller or about Cardenas-Muratalla's actions that prompted the 911 call. The tip did not provide information raising a reasonable suspicion of criminal activity. Moreover, the unreliable informant's tip was not corroborated by any observations by the officers of suspected criminal activity. Cardenas-Muratalla's presence in a high crime area at night, looking startled upon seeing the patrol car, and walking away from the doorway while talking on a cell phone do not justify a stop. Although [one of the two officers involved] claimed that Cardenas-Muratalla "fluffed" his sweatshirt when he saw the officers, this claim not only contradicts [the second officer's] testimony but also is not supported by the video evidence in the record. Under the totality of the circumstances, the Terry stop in this case was not reasonable. The trial court's findings of fact on Cardenas-Muratalla's motion to suppress the gun are not supported by substantial evidence. The trial court erred in denying the motion. Because the gun was the basis for Cardenas-Muratalla's prosecution [for unlawful possession of a firearm by a felon], his conviction of unlawful possession of a firearm must be reversed.

[One footnote omitted]

Result: Reversal of King County Superior Court conviction of Jose Manuel Cardenas-Muratalla for unlawful possession of firearm in the first degree.

LED EDITORIAL COMMENT: The Cardenas-Muratalla Court indicates in footnote 12 that if the anonymous 911 caller had instead reported that the man with the gun had pointed the gun at him or threatened him or had shot someone, the anonymous call alone would have justified a Terry stop. Footnote 12 cites a number of decisions from the courts of this state and other jurisdictions to support this point. There is discussion in the J.L. decision of the United States Supreme Court that supports this point. Ideally, even in such situations, officers will be looking to observe corroborating evidence as they approach to make a stop.

The Cardenas-Muratalla Court also points out in its analysis that under Washington law it is not a crime to carry a gun openly in public or show the gun to another person if these things are done in a manner that neither (1) manifests intent to intimidate another person nor (2) warrants alarm for safety of other persons. On this point, the Court cites a City of Seattle ordinance that parallels RCW 9.41.270.

(2) PUBLIC RECORDS ACT: ANTI-SLAPP STATUTE IS NOT IMPACTED BY CITY'S DECLARATORY JUDGMENT ACTION UNDER THE PRA, RCW 42.56.540 – In Egan v. City of Seattle, ___ Wn. App. ___, 317 P.3d 568 (Div. I, Feb. 3, 2014), the Court of Appeals rejects a PRA requestor's motion brought under Washington's anti-SLAPP statute.

In 2010 the Washington Legislature passed RCW 4.24.525, the Washington Act Limiting Strategic Lawsuits Against Public Participation, otherwise known as Washington's anti-SLAPP statute. An anti-SLAPP lawsuit "is a mertiless suit filed primarily to chill a defendant's exercise of First Amendment rights."

In the present case, the Seattle Police Department received a public records request from James Egan for internal administrative investigations of four officers. Included in the investigative files were a number of dash cam videos. The City withheld the videos citing as its exemption RCW 9.73.090(1)(c). RCW 9.73.090(1)(c) is part of the Privacy Act and governs in car video. RCW 9.73.090(1)(c) provides that "[n]o sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded." The City of Seattle is involved in pending litigation, before the Washington State Supreme Court, regarding the application of RCW 9.73.090(1)(c) to the PRA. See Fisher Broadcasting v. City of Seattle, No. 87271–6, argued before the Supreme Court on May 14, 2013.

Mr. Egan threatened to sue. The City brought an action for declaratory judgment, under the PRA, RCW 42.56.540, asking for a determination of the applicability of RCW 9.73.090(1)(c)'s prohibitions against the release of the in car video requested by Mr. Egan. Mr. Egan filed a motion to strike and dismiss the lawsuit under the anti-SLAPP statute.

The PRA specifically allows declaratory judgment actions to be brought by agencies (or persons named in a record or to whom a record specifically pertains). See RCW 42.56.540. The person who requests the public record at issue is a necessary party and must be joined in any action brought under RCW 42.56.540. Burt v. Washington State Dep't of Corrections, 168 Wn.2d 828, 833 (2010).

The Court explains:

> Here, the City's declaratory judgment action under RCW 42.56.540 asked the court to determine whether the City had properly applied RCW 9.73.090(1)(c) in denying Egan's PRA request for the dash-cam videos. Under that statute, Egan is a necessary party. Because the legislature's intent in adopting RCW 4.24.525 was to address "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," this court looks to First Amendment cases to aid in its interpretation. Egan argues the anti-SLAPP statute applies because the City sought relief because of Egan's "threat" to sue. But the gravamen of the City's suit was whether a PRA exemption applied to Egan's original request, not to suppress Egan's right to bring an action. There was no question that Egan retained his right to bring an action under the PRA. But Egan was a necessary party under RCW 42.56.540. The City's declaratory action did not interfere with Egan's right to petition. . . .

[Citations and footnotes omitted]

The Court notes that "to hold that the anti-SLAPP statute would prohibit the City from seeking declaratory and injunctive relief would vitiate the section of the PRA expressly providing for such actions." Concluding "[b]ecause we construe the PRA to allow the City to seek declaratory and injunctive relief and we determine that the City's action was not primarily concerned with limiting Egan's protected activity, we conclude the anti-SLAPP statute does not apply here."

Result: Affirmance of King County Superior Court order denying PRA requestor's anti-SLAPP motion.

(3) STATE IS NOT REQUIRED TO PAY THE COST OF DUPLICATING A 911 RECORDING FOR A NON-INDIGENT DEFENDANT – In State v. Brown, ___ Wn. App. ___, 316 P.3d 1110 (Div. III, Jan. 16, 2014), the Court of Appeals holds that the state is not required to pay the cost of duplicating discovery for a non-indigent defendant. In this case, the defendant requested a copy of a 911 recording as part of discovery. The prosecutor informed the defendant that he could listen to the recording or pay $17 for a copy.

Result: Affirmance of Spokane County Superior Court order denying Daniel Lee Brown's motion to dismiss charges, or alternatively to suppress a 911 recording, in his prosecution for felony harassment.

(4) AFFIDAVIT SHOWS PROBABLE CAUSE TO SEARCH FOR MARIJUANA GROW OPERATION EVEN THOUGH IT DOES NOT ADDRESS WHETHER SUSPECT HAS PERMIT TO GROW MEDICAL MARIJUANA – In State v. Ellis, ___Wn. App. ___, 315 P.3d 1170 (Div. III, Jan. 9, 2014), the Court of Appeals rules:

> Considering all, we hold an affidavit supporting a search warrant presents probable cause to believe a suspect committed a CSA [Uniform Controlled Substances Act, chapter 69.50 RCW] violation where, as here, it sets forth enough details to reasonably infer the suspect is growing marijuana on his or her property. The affidavit need not also show the MUCA [Medical Use of Cannabis Act, chapter 69.51A RCW] exception's applicability.

The Ellis Court notes that in State v. Fry, 168 Wn.2d 1 (2010) **March 10 LED:13**, (A) four justices of the Washington Supreme Court opined that the MUCA's mere affirmative defense did

not destroy probable cause supporting a search warrant, (B) four justices concurred in the result against the defendant without disclosing their analysis, and (C) one justice (former justice Richard Sanders) dissented and argued the opposite view to that of the lead opinion. In Ellis, Judge Brown authors a lead opinion (in which Judge Siddoway concurs) that agrees with the analysis in the Fry lead opinion. The Ellis lead opinion asserts that the Fry lead opinion's analysis is not undercut by the Washington Legislature's amendments to the MUCA in 2011.

The Ellis lead opinion further states that, because the search warrant was issued in March 2012, the Court did not consider whether November 2012 amendments to the RCWs by Initiative 502 impacts the Fry analysis.

The Ellis lead opinion disagrees on this issue with an unpublished 2012 suppression ruling by the United States District Court for Eastern Washington in United States v. Kynaston (reversed under a July 24, 2013 unpublished opinion by the Ninth Circuit based on the Fourth Amendment's "good faith" exception to the Exclusionary Rule).

Judge Fearing writes a concurring opinion in Ellis. He explains why he thinks that former justice Sanders was the only one who got it right in Fry. But Judge Fearing concurs in Judge Brown's decision because he recognizes that the Court of Appeals must defer to decisions by the Supreme Court.

Result: Affirmance of Spokane County Superior Court conviction of Daniel K. Ellis for unlawful possession of a firearm in the second degree.

LED EDITORIAL COMMENT: Because only four justices of the Washington Supreme Court joined in the lead opinion in Fry, it is a distinct possibility that the Washington Supreme Court will grant review in Ellis and take another look at the MUCA-based probable cause issue.

(5) DIVISION ONE AGREES WITH DIVISION THREE THAT AFFIDAVIT SHOWS PROBABLE CAUSE TO SEARCH FOR MARIJUANA GROW OPERATION EVEN THOUGH IT DOES NOT ADDRESS WHETHER SUSPECT HAS PERMIT TO GROW MEDICAL MARIJUANA – In State v. Reis, ___Wn. App. ___, 2014 WL 1284863 (Div. I, March 31, 2014), the Division One of the Washington Court of Appeals agrees with Division Three's interpretation noted in the immediately preceding LED entry.

Result: Affirmance of King County Superior Court order denying the suppression motion of William Michael Reis (this appeal was heard in the Court of Appeals on discretionary review prior to trial; if Reis does not move for and obtain review in the Washington Supreme Court, this case will go back to the Superior Court for trial).

(6) 911 CALLS BY UNKNOWN CITIZENS, OFFICERS' TALK WITH ON-SCENE WITNESS, AND OFFICERS' ATTEMPT TO CORROBORATE REPORT ABOUT POSSIBLE UNDERAGE GUN POSSESSION HELD NOT TO ADD UP TO REASONABLE SUSPICION FOR INVESTIGATIVE STOP – In State v. Z.U.E., ___ Wn. App. ___, 315 P.3d 1158 (Div. II, Jan 7, 2014), the Court of Appeals rules that several 911 calls from persons who could not be shown to be credible and who provided little as to the basis of their suspicions, plus officers' talk with an on-scene witness who saw little of relevance, plus the officers' on-scene observations do not add up to reasonable suspicion to justify an investigative stop. The Court of Appeals summarizes as follows its ruling that reverses a trial court's (1) denial of a suppression motion and (2) conviction of unlawful possession of marijuana:

> Police officers conducted an investigative stop of Z.U.E. [identified by initials because he was tried as a juvenile] based solely on information provided by 911 callers even though police officers did not know the reliability of the callers, did not know the factual basis of the caller's assertion of criminal activity, did not observe circumstances corroborating the reports of criminal activity, and could not corroborate that the information was obtained in a reliable fashion. Further, although a report of a possession of a gun in public can raise public safety concerns that could allow for a less stringent reliability analysis, here there was no indication of an immediate threat to public safety at the time of the stop.
>
> Under the totality of these circumstances, we hold that the trial court erred in concluding that the circumstances supported an investigative stop of Z.U.E.'s vehicle. Accordingly, we reverse the trial court's denial of ZUE's motion to suppress evidence obtained in an unlawful investigative stop. Because that evidence was the only basis for Z.U.E.'s conviction for possession of a controlled substance, we further vacate Z.U.E.'s conviction and dismiss the charge with prejudice.

[Footnote omitted]

The Z.U.E. Court describes the facts of the case as follows:

> On the afternoon of October 2, 2011, [police] received a 911 call reporting that an individual was running with a gun in the area of Oakland Park. The caller stated that (1) the man was a shirtless black male, 18 to 19 years old, 5 feet 10 inches tall, 145 pounds, and appeared almost bald with short dark hair; and (2) he was holding a gun down by his side, ducking in and out of houses and cars, and at one point he was seen holding the gun in a ready position. At least three officers responded to Oakland Park, which was a known gang hangout and the site of multiple gang-related incidents in the previous year.
>
> As the officers were responding, dispatch advised that multiple callers had reported that more individuals were involved and that approximately eight of those individuals – including the shirtless man with a gun – were in a two-door white car. Dispatch subsequently advised that a caller had reported that the car was gray, not white, the shirtless man with a gun had gotten into the car, and the car was headed toward Union on Center Street. These callers were not identified.
>
> Dispatch updated the officers again, stating that another caller had observed a black female handing a gun to the shirtless male. The caller described her as 17 years old, medium height, slim, and wearing a black jacket, blue jeans and black shoes with blue trim.
>
> [Police] had limited information on the 911 callers. The record reflects that the first caller gave his name, telephone number, and address to dispatch. Another caller provided her first name, cell phone number, and location. One caller was uncooperative and merely reported a fight and a man with a gun. The officers knew the name of one of the callers, but did not know how many 911 callers there were or the callers' identities. The officers also did not attempt to contact or obtain more information from any of the callers before conducting the investigative stop.

When the officers arrived in the area they did not see anyone in the park. As they checked the area they observed two females walking about one-half block away, and one of the females appeared to match the caller's description of the woman who handed off the gun. However, they continued to search for the man with the gun rather than make contact with the female subject.

The officers then contacted an unnamed woman at an apartment building overlooking the park. The woman stated that there had been a large brawl in the park, several of the participants had their shirts off, and the participants left in four separate vehicles. But she could not provide any information about the subjects or their vehicles. She did not say anything about a male or a female with a gun.

As they continued their area check the officers again saw the two females, who now were in a parking lot in front of a flower shop at the intersection of Center and Union. This location was near the area where dispatch had reported the gray car carrying the shirtless man with a gun was headed. The women approached a small gray car, and officers noticed that one of the women exactly matched the description of the woman who handed off the gun except she was not wearing a black jacket. One of the officers testified that the female's age, race, build, attire, as well as time and proximity led him to believe that she may have been involved in the park incident. The woman got into the back seat of the gray car, which appeared to have two men in the front seat. The two men were wearing shirts and both had hair, so they did not match the description of the bald, shirtless man.

Based on the available information, the officers believed they were investigating a minor in possession of a firearm and a gang-related assault with a deadly weapon. The officers approached the vehicle on foot with their firearms drawn, using a "'felony stop'" technique. The officers instructed the occupants of the vehicle to put their hands up, which they did. The officers waited a few minutes for other officers to arrive and then directed the vehicle occupants to exit the vehicle one at a time. The driver and two female passengers exited the vehicle and were detained in handcuffs without incident.

Z.U.E., another passenger, was the last person to exit the vehicle. One of the officers believed Z.U.E. was not responding to instructions and became concerned that he was reaching for a concealed weapon. As a result, the officer "touch[ed]" his electronic control tool to Z.U.E., handcuffed Z.U.E., and arrested him for obstruction. Officers searched Z.U.E. incident to arrest and found marijuana on his person. Officers did not locate any guns.

Result: Reversal of Pierce County Superior Court adjudication of juvenile Z.U.E. for unlawful possession of marijuana.

LED EDITORIAL NOTE: Because of space limitations, we have not discussed the Z.U.E. Court's exhaustive discussion of principles and case law relating to determination of reasonable suspicion based on citizen reports. Officers may wish to go the Courts' website [http://www.courts.wa.gov/opinions] to review the full decision. We think this case was a close one.

(7) PUBLIC RECORDS ACT: DETERMINATION OF BAD FAITH UNDER RCW 42.56.565(1) (PROHIBITING PRA PENALTIES IN CASES BROUGHT BY INMATES ABSENT BAD FAITH) DOES NOT REQUIRE INTENTIONAL WRONGFUL ACT – In Francis v. Department of Corrections, 178 Wn. App. 42 (Div. II, Nov. 19, 2013), the Court of Appeals holds that a determination of bad faith under RCW 42.56.565(1) does not require commission of an intentional, wrongful act, and the trial court's determination that the Department of Corrections (Department) acted in bad faith was correct under the facts of this case.

RCW 42.56.565(1) provides:

> A court shall not award penalties under RCW 42.56.550(4) to a person who was serving a criminal sentence in a state, local, or privately operated correctional facility on the date the request for public records was made, unless the court finds that the agency acted in bad faith in denying the person the opportunity to inspect or copy a public record.

The Court explains:

> The evidence before the trial court showed that McNeil staff spent no more than 15 minutes considering Francis's request and did not check any of the usual record storage locations. Absent any countervailing evidence showing justification, this evidence shows that the Department did not act in good faith. *[Court's Footnote: We do not hold that 15 minutes or any other specific length of a records search conclusively shows an absence of good faith.]* Furthermore, the title of one of the documents ultimately produced by the Department, "Personal Property for Offenders," by itself establishes the document's likely relevance to Francis's request, which was reasonable and specific. Nonetheless, the Department instead sent Francis documents plainly not responsive to his request. *[Court's Footnote: Francis had requested documents concerning the prohibition against fans and hot pots, but the Department initially provided a copy of a policy permitting the disputed items.]* Furthermore, the Department did not produce the relevant policy until eight months after Francis filed suit. On these facts, the court below did not err in finding bad faith.

Result: Affirmance of Pierce County Superior Court's bad faith determination and award of penalties to Shawn D. Francis.

LED EDITORIAL COMMENT: This case arose from a motion for summary judgment in which facts must be viewed in the light most favorable to the plaintiff. We are not so sure that the Department's conduct in this case amounted to bad faith (as opposed to negligence or sloppiness). Regardless, the lesson to be learned from this case is that a court may find bad faith absent an intentional act.

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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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