Law Enforcement Digest

NOVEMBER 2012

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

****

HONOR ROLL

683rd Basic Law Enforcement Academy – May 1, 2012 through September 11, 2012

President:	Andre L. Loranc – Okanogan Police Department
Best Overall:	Einar J. Agledal – Yakima Police Department
Best Academic:	Dylan D. Rice – Puyallup Police Department
Best Firearms:	Einar J. Agledal – Yakima Police Department
Patrol Partner Award:	Ryan G. Harberts – Bonney Lake Police Department
Tac Officer:	Sgt. Lisa Neymeyer – Port of Seattle Police Department

****

NOVEMBER 2012 LED TABLE OF CONTENTS

****

Facts and Proceedings below:

In this appeal by a government agency from a denial of summary judgment on the issue of qualified immunity, the Ninth Circuit panel is required to assume that all factual disputes in this case are resolved in favor of the plaintiff, Ms. Karl, who is a former support staff employee of the police department of the City of Mountlake Terrace. Ms. Karl alleges that she was retaliated against by an official in the department for her testimony about department employees in a deposition in a law enforcement officer's Civil Rights Act lawsuit against the department. The District Court denied summary judgment on qualified immunity to the City, concluding (1) that there were disputed facts on whether Ms. Karl was the victim of retaliation; and (2) that qualified immunity could not be granted because the case law clearly established at the time of the alleged retaliatory job actions that retaliation in this context violates the First Amendment.

ISSUE AND RULING: At the time of the alleged retaliatory job actions, was the law clearly established that retaliation for testimony in a deposition in a civil suit in this factual context violates the First Amendment? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Affirmance of United States District Court (Western District of Washington) denial of qualified immunity.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

> The First Amendment shields public employees from employment retaliation for their protected speech activities. See Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) **Aug 06 LED:05**; Connick v. Myers, 461 U.S. 138, 140 (1983). Out of recognition for "the State's interests as an employer in regulating the speech of its employees," however, we must "arrive at a balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees," Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). We strike this balance when evaluating a First Amendment retaliation claim by asking "a sequential five-step series of questions." First, we consider whether the plaintiff has engaged in protected speech activities, which requires the plaintiff to show that the plaintiff: (1) spoke on a matter of public concern; and (2) spoke as a private citizen and not within the scope of her official duties as a public employee. If the plaintiff makes these two showings, we ask whether the plaintiff has further shown that she (3) suffered an adverse employment action, for which the plaintiff's protected speech was a substantial or motivating factor. If the plaintiff meets her burden on these first three steps, thereby stating a prima facie claim of First Amendment retaliation, then the burden shifts to the government to escape liability by establishing either that: (4) the state's legitimate administrative interests outweigh the employee's First Amendment rights; or (5) the state would have taken the adverse employment action even absent the protected speech.
>
> Here, the parties' dispute concerns only the first, second, and fifth steps of the analysis.

Public Concern

> Just as speech whose content exposes potential government misconduct is speech on a matter of public concern, so too is speech made in the context of

litigation brought to expose such wrongful conduct. "So long as either the public employee's testimony or the underlying lawsuit meets the public concern test, the employee may, in accord with Connick, be afforded constitutional protection against any retaliation that results."

This is not a "close case." Karl's testimony rises to the level of a public concern because it was offered in the course of a § 1983 lawsuit alleging violation of constitutional rights.

Speaker Status

A public employee's speech is not protected by the First Amendment when it is made pursuant to the employee's official job responsibilities. Garcetti, 547 U.S. at 426. . . .

[The defendant] suggests two reasons why he thinks Karl's testimony "owes its existence" to her job: (1) her relevant knowledge was acquired by virtue of her position as the Confidential Administrative Assistant to the Chief of Police, and (2) she was paid her regular salary during her deposition. Both of these arguments miss the mark. While Karl's knowledge about certain work-related matters may owe its existence to her job as a confidential assistant, her testimony in the [other] litigation does not. That Karl was subpoenaed to testify on matters related to her employment is not dispositive. . . . Furthermore, though her employer may have paid her regular salary while she was being deposed, Karl's testimony in the [other] litigation was the product of a subpoena and cannot fairly be characterized as "commissioned or created" by the City. Garcetti, 547 U.S. at 422. The district court did not err in determining that Karl spoke as a private citizen in the [other] litigation and not pursuant to her official job duties.

But-for Causation

. . . A subordinate officer who is not the final decision maker can still be liable under § 1983 if he "'set[s] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" Gilbrook v. City of Westminster, 177 F.3d 839, 854 (9th Cir. 1999) (quoting Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978)) (explaining that a final decision maker's nonretaliatory employment decision "does not automatically immunize a subordinate against liability for her retaliatory acts"). Nonetheless, [the defendant] may avoid liability if he shows that a "final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, . . . negate[s] any causal link" between his retaliatory motive and the adverse employment action. . . .

Here, the record before the district court revealed evidence that [the defendant] was motivated by retaliatory animus in: (1) relating to the new Chief of Police that Karl's work as a Confidential Administrative Assistant was deficient; (2) seeking to transfer Karl to a position where he could directly supervise her; (3) encouraging her to accept the position by reminding her she could be fired if she refused; (4) imposing unreasonable and arbitrary performance targets on Karl alone; and (5) advising [the new chief] that Karl was critical of the training program and had made inadequate progress in her new position as a records

specialist. The court further found disputed issues of material fact as to whether [the new chief] conducted an independent investigation into Karl's performance that would sever the causal link between [the defendant's] retaliatory motive and Karl's termination. Although [the city manager] was the only individual with authority to terminate Karl, the district court determined that Karl adequately adduced evidence showing that [the city manager's] decision was based wholly on [the new chief's] recommendation, which, in turn, was based on information provided by [the defendant]. These findings of disputed issues of material fact are unreviewable on interlocutory appeal. Thus, viewing the record in the light most favorable to Karl, we cannot say that [the defendant] has met his burden to show that the City would have fired Karl even in the absence of her protected speech activities. The district court therefore correctly held that Karl adequately alleged a violation of her First Amendment free speech rights, and that [the defendant] is not entitled to qualified immunity on this ground.

Clearly Established

We therefore consider whether existing law at the time of [the defendant's] conduct in 2008 provided him "fair notice" that the First Amendment prohibits retaliating against an employee for providing subpoenaed deposition testimony during another person's civil rights lawsuit. . . . Although there is no case in our circuit with the same facts as those presented here, a reasonable official in [the defendant's] position would have known that it was unlawful to retaliate against an employee for providing subpoenaed deposition testimony in connection with a civil rights lawsuit alleging government misconduct.

First, a reasonably competent official would have known that a public employee's subpoenaed deposition testimony addresses a matter of public concern when it is given in connection with a judicial or administrative proceeding involving allegations of "significant government misconduct." . . .

Second, a reasonable official would also have known that a public employee's speech on a matter of public concern is protected if the speech is not made pursuant to her official job duties, even if the testimony itself addresses matters of employment. . . .

Finally, it was clearly established at the time of [defendant's] conduct that a subordinate officer can be liable under § 1983 for retaliating against an employee even if he also has legitimate, non-retaliatory motives. . . . Under the "mixed motive" analysis established by [the U.S. Supreme Court in its 1977 Mt. Healthy decision], the intensely fact-bound question is simply whether the employer "would have reached the same [adverse employment] decision even in the absence of the [employee's] protected conduct." Furthermore, we held in 1999 that "a subordinate cannot use the nonretaliatory motive of a superior as a shield against liability if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct."

[Footnotes and some citations omitted]

LED EDITORIAL NOTE: See Dahlia v. Rodriguez, 689 F.3d 1094 (9th Cir., Aug. 7, 2012) below in this November 2012 LED where the Court concludes that a detective's reporting

of abuse interrogation tactics was made in the course of his official duties and thus not entitled to First Amendment protection.

****

BRIEF NOTES FROM THE NINTH CIRCUIT U.S. COURT OF APPEALS

(1) BY 6-5 VOTE, NINTH CIRCUIT PANEL RULES THAT CUSTODIAL SUSPECT'S AMBIGUOUS REQUEST FOR AN ATTORNEY PRIOR TO ANY WAIVER OF MIRANDA RIGHTS MUST BE HONORED AS A MIRANDA REQUEST FOR AN ATTORNEY TERMINATING ANY ATTEMPT AT INTERROGATION AND PRECLUDING CLARIFICATION – In Sessoms v. Runnels, 691 F.3d 1054 (9th Cir., Aug. 16, 2012), a 6-5 majority of a Ninth Circuit panel grants a writ of habeas corpus to a California prisoner, ruling that his State of California conviction for murder must be set aside due to admission at trial of his confession. The majority judges rule that the confession was obtained in violation of the requirement under Miranda v. Arizona that custodial police questioning stop when a person asserts his rights to silence or to an attorney.

The lead opinion signed by all six in the majority recognizes that the suspect's statement to the officers about his attorney right was ambiguous, but that lead opinion concludes that an ambiguous reference to the attorney right, *if made prior to any waiver of Miranda rights*, is sufficient to constitute an assertion of the Miranda right to an attorney, requiring law enforcement officers to immediately stop interrogation efforts.

Tio Sessoms was 19 years old when he traveled from California to Oklahoma where his father lived. Sessoms told his father that he was wanted in a recently committed burglary-robbery-murder in California. His father told him to turn himself in to police, but to ask for an attorney before any questioning. Sessoms turned himself in to Oklahoma police and was placed in jail. Several days later, two California detectives arrived at the Oklahoma jail. Sessoms met with the detectives in an interrogation room.

After the detectives briefly introduced themselves and before they administered Miranda warnings, the following exchange occurred:

> Sessoms: There wouldn't be any possible way that I could have a — a lawyer present while we do this?
>
> [Detective]: Well, uh, what I'll do is, um —
>
> Sessoms: Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.

The detectives did not treat Sessoms' statement as an assertion of his right to an attorney that would require that they end the potential interrogation session. They instead next tried to talk Sessoms out of asserting his attorney right when they responded by talking to Sessoms about (1) how consulting an attorney would likely have the down-side result that he would not get to tell the detectives his side of the story, and (2) how the detectives already had a detailed statement about the crime from Sessoms' accomplice in the crime. Then the detectives administered the Miranda warnings, after which Sessoms waived his Miranda rights and gave a statement. **[LED EDITORIAL COMMENT: The focus of this case at the current procedural stage of the case is solely on whether the officers should have taken Sessoms' attorney references in the above block-quoted exchange as a clear invoking of his attorney right. Because of this focus, there was no discussion in the opinions of the majority or dissent**

in this case as to whether the detectives violated Sessoms' rights by trying to talk him out of asserting his Miranda rights. But we view those efforts by the detectives to be troubling and something to be avoided by interrogating officers.]

Sessoms' statements during the interrogation were admitted at his trial. He was convicted of murder, robbery, and burglary. He was sentenced to life without parole. He lost his appeals in the California courts. He then lost on a petition for habeas corpus relief in the U.S. District Court. His appeal to the Ninth Circuit was rejected by a 2-1 vote of a 3-judge panel, but the Ninth Circuit set the case for review before the 11-judge panel whose decision is being reported in this LED entry.

The U.S. Supreme Court's 1966 Miranda opinion declares that where a suspect asserts his or her Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. Case law under Miranda, however, has established that where a suspect has initially waived his or her Miranda rights, the suspect's subsequent assertion of the right to counsel or to silence during the interrogation must be unambiguous or the questioning may continue. See Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** (ambiguous reference to right to counsel - - "Maybe I should talk to a lawyer"); Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) **July 10 LED:02** (silence in the face of questioning held not to be an implied assertion of right to silence).

The lead opinion for the majority in Sessoms rules that even under the highly deferential review standard for habeas corpus review, the Califrornaia conviction must be reversed. That lead opinion holds that the Davis rule requiring clarity and not recognizing ambiguous assertions of the right to counsel has no application where a suspect has not first waived the right to an attorney. Instead, the lead majority opinion asserts, if the suspect makes an ambiguous statement about the right to an attorney after hearing and before waiving his Miranda rights, the interrogation must cease.

The lead opinion holds in the alternative that even if Davis applies to an ambiguous statement about the right to an attorney after hearing the warnings and before waiving one's Miranda rights, Davis does not apply to an ambiguous statement about the right to an attorney in a custodial setting where the statement is uttered before the Miranda warnings have even been administered. In the circumstance where the suspect beats the interrogators to the punch and asserts his Miranda rights before the interrogators give the Miranda warnings, then, according to the lead opinion, an ambiguous statement about the attorney right (or, by logical extension, the right to silence) must be deemed an invocation of the Miranda right.

Four of the judges in the majority sign a concurring opinion that argues in the alternative that the statement by Sessoms was an unambiguous assertion of his right to an attorney, and under that alternative view, the discussion in the lead opinion for the majority limiting the Davis decision would not be necessary.

The dissent for the five judges disagreeing with the majority argues that under the highly deferential review standard for habeas corpus review in federal court of state court convictions, the California courts' rulings on the Miranda-assertion issue should not be set aside. The dissenting opinion also appears to disagree with the lead opinion for the majority on both of that lead opinion's efforts to use U.S. Supreme Court precedents to limit the Davis rule (about the need for suspects' assertions of Miranda rights to be clear) to post-waiver circumstances.

Result: Reversal of decision of U.S. District Court (Eastern District of California) denying the habeas corpus petition of Tio Sessoms in which he seeks relief from his convictions and sentence; case remanded for possible retrial.

Status: Time remains for the State of California to seek review in the U.S. Supreme Court.

LED EDITORIAL CROSS REFERENCE NOTE: See also the Miranda-assertion analysis in the Washington Court of Appeals decision in State v. Piatnitsky, ___Wn. App. ___, 282 P.3d 1184 (Div. I, Aug. 20, 2012) below in this month's LED beginning at page 11.

LED EDITORIAL COMMENTS: We doubt that a majority of the U.S. Supreme Court would agree with the Seesoms majority opinion if the U.S. Supreme Court were to address the same Miranda-assertion issue. We believe the approach and tenor of the U.S. Supreme Court majority on the assertion-of-silence issue in Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) July 10 LED:02 reflects a general tenor and approach to Miranda assertion that is inconsistent with the majority opinion's approach in Sessoms. Also, Washington courts are free to disagree with the federal constitutional interpretation in the majority opinion in Sessoms. Having said that, we think officers pursuing custodial interrogation are safest legally if they treat all ambiguous references to the right to silence or the right to counsel – whether the suspect's reference is uttered before or after Miranda warnings and/or waiver – in the same way, by clarifying the statement and then re-Mirandizing.

(2) CIVIL RIGHTS ACT LAWSUIT: DISCLOSURE BY POLICE OFFICER OF ALLEGEDLY ABUSIVE INTERROGATION TACTICS WAS MADE IN THE COURSE OF HIS OFFICIAL DUTIES AND THUS NOT PROTECTED BY THE FIRST AMENDMENT; LAWSUIT BASED ON RETALIATION FOR OFFICER'S REPORTING MUST BE DISMISSED – In Dahlia v. Rodriguez, 689 F.3d 1094 (9th Cir., Aug. 7, 2012) a three-judge panel of the Ninth Circuit concludes, relying on Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. 2009) and its interpretation of California law, that a police detective's disclosure of abusive interrogation tactics by other officers was made in the course of his official duties and thus not protected by the First Amendment.

Four days after Detective Dahlia of the City of Burbank Police Department, disclosed the alleged use of abusive interrogation tactics by his colleagues to the Los Angeles Sheriff's Department, he was placed on administrative leave by the Chief. Detective Dahlia filed a civil lawsuit for retaliation alleging that his placement on administrative leave was in retaliation for reporting the abusive interview tactics.

The Court's analysis in part is as follows:

> "It is well settled that the state may not abuse its position as employer to stifle 'the First Amendment rights [its employees] would otherwise enjoy as citizens to comment on matters of public interest.'" Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)). We make a five-step inquiry to resolve First Amendment retaliation claims:
>
> > (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee

> differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.
>
> . . . "[S]tatements are made in the speaker's capacity as citizen if the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform." Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127 n. 2 (9th Cir. 2008) (internal citations and quotation marks omitted).
> . . .
>
> Three years after the Supreme Court's decision in Garcetti [v. Ceballos, 574 U.S. 410 (2006) **Aug 06 LED:05**], a divided three-judge panel of our court decided Huppert v. City of Pittsburg, 574 F.3d 696 (9th Cir. 2009). Huppert involved a police officer who had participated, at the order of his superiors, in several investigations regarding police corruption. After the investigations concluded, and despite orders that he not memorialize his findings, Huppert drafted and circulated a report to his superiors and city officials. Huppert also notified the FBI of the police corruption and cooperated with its investigation.
>
> The majority opinion held that Huppert's cooperation with the FBI—which took place on his own time, was not part of his official job description, and was not at the behest of any official orders—was, nonetheless, also part of his official duties. In reaching that conclusion, the panel majority, interpreting "California's jurisprudence," held as a matter of law that California police officers are required, as part of their official duties, to disclose information regarding acts of corruption:
> . . .
>
> Nevertheless, Huppert plainly holds that, as a matter of California law, disclosure of police misconduct by fellow police officers contrary to the instructions of superiors is a core professional duty of California police officers, and such speech is thus not protected by the First Amendment. . . . We feel compelled, like the district court, to follow Huppert, despite our conclusion that it was wrongly decided and unsupported by the sole authority it relies upon. If Huppert, who independently cooperated with the FBI to expose and investigate corruption and memorialized that corruption against his superiors' orders, was acting "pursuant to his professional duties," then Dahlia, who cooperated with a Los Angeles Sheriff's Department investigation of police misconduct, must also have been acting pursuant to his professional duties.

[Footnotes and some citations omitted]

Result: Affirmance of United States District Court (Central District California) order granting summary judgment dismissal in favor of police department.

LED EDITORIAL COMMENT: Because Huppert was a decision by a panel of the Ninth Circuit, the Dahlia panel is bound by Huppert. The Dahlia panel acknowledges this, concludes that according to Huppert Dahlia's speech was made in the course of his official duties, and then goes on to criticize the Huppert opinion and explain why the Dahlia panel thinks Huppert was wrongly decided. Because Huppert was decided in part based on the Court's interpretation of California law as requiring police officers to disclose information regarding corruption as part of their official duties, it is possible

that in a similar case arising out of a state other than California, the Court might find the officer's speech protected.

See Karl v. City of Mountlake Terrace, 678 F.3d 1062 (9th Cir., May 8, 2012) above in this November 2012 LED beginning at page 3, where the Court concludes, among other things, that the plaintiff's deposition testimony in another employee's civil rights lawsuit was made in her personal capacity and thus entitled to First Amendment protection.

(3) CIVIL RIGHTS LAWSUIT: EXCESSIVE FORCE CLAIMS AGAINST OFFICERS EXECUTING SEARCH WARRANT GET DIFFERENT ASSESSMENT FOR THE CLAIMS BY NON-THREATENING CHILDREN AT SCENE THAN FOR THE CLAIMS BY ADULTS – In Avina v. United States, 681 F.3d 1127 (9th Cir., June 12, 2012), a three-judge Ninth Circuit panel follows Ninth Circuit precedent in making a differing assessment of the "excessive force" claims by children than the claims of adults present at the scene of search warrant execution.

As always in appellate review of summary judgment rulings by the trial court, the Ninth Circuit panel's decision views the facts in the best light to the non-moving party, in this case the suing Avinas. Thomas and Rosalie Avina sued the United States under the Federal Tort Claims Act (FTCA) for assault and battery and intentional infliction of emotional distress after agents from the Drug Enforcement Administration (DEA) executed a search warrant for illegal drugs at their mobile home. Irrelevant to the analysis, at least in theory and on the face of the Ninth Circuit decision, is that, due to an investigator's inadvertent error in reporting a license plate number belonging to Avina rather than the license plate of a suspected drug dealer, the lawfully issued search warrant erroneously targeted the Avina residence.

Upon entering the home, the agents pointed guns at the adults, Thomas and Rosalie, handcuffed them and forcefully pushed Thomas to the floor. The agents handcuffed the Avina's fourteen-year-old daughter on the floor and then handcuffed their eleven-year-old daughter on the floor and pointed their guns at her head. At no point did the children act in a threatening manner toward the agents. The agents removed the handcuffs from the children after approximately thirty minutes.

The Ninth Circuit panel holds, based in large part on the U.S Supreme Court decision in Muehler v. Mena, 544 U.S. 93 (2005) **May 05 LED:02**, that the U.S. District Court properly granted summary judgment in favor of the United States as to adults Thomas and Rosalie because the DEA agents' use of force against them was reasonable. The agents were executing a search warrant at the residence of a suspected drug trafficker. This presented a dangerous situation for the agents and the use of handcuffs on the adult members of the family was reasonable to minimize the risk of harm to the officers and the Avinas.

In addition, the agents did not act unreasonably under the analysis in Muehler v, Mena when they forcefully pushed Thomas Avina to the floor. At the time of the push, Avina was refusing the agents' commands to get down on the ground. Because this refusal occurred during the initial entry, the agents had no way of knowing whether Avina was associated with a suspected drug trafficker-resident.

The panel rules, however, that the District Court improperly granted summary judgment to the federal government concerning the DEA agents' conduct toward the Avinas' non-threatening minor daughters. A key Ninth Circuit precedent considered by the panel is Tekle v. U.S., 511 F.3d 839 (9th Cir. 2007). [**LED EDITORIAL NOTE: The October 2006 LED reported a 2006 version of the Tekle decision; while the three-judge Ninth Circuit panel revised the wording of its decision in some respects in the final, 2007 version of the decision, the**

key elements of the analysis regarding the use of force against non-threatening children did not change from the analysis in the version presented in the October 2006 LED.]

The Avina panel holds that a jury could find based on the allegations by the Avinas that the agents engaged in excessive force when they pointed their guns at the eleven-year-old daughter's head while she was handcuffed on the floor. The panel also rules that a jury could find that the agents acted unreasonably in forcing the two girls to lie face down on the floor for thirty minutes with their hands cuffed behind their backs.

Genuine issues of fact existed, the panel rules, as to whether the actions of the agents were excessive in light of girls' ages and the limited threats they posed. Therefore, the case must be remanded for trial on the claims brought on behalf of the children.

Result: Reversal in part of U.S. District Court's grant of summary judgment to the federal government; case remanded for trial.

****

WASHINGTON COURT OF APPEALS

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 POLICE-AIDED WRITTEN STATEMENT OVER MAKING TAPE-RECORDED STATEMENT

State v. Piatnitsky, ___Wn. App. ___, 2012 WL 3568788 (Div. I, Aug. 20, 2012)

Facts:

Piatnitsky and another suspect were arrested in the early-morning of October 19, 2008, for, among other crimes, a suspected criminal homicide by firearm that had occurred a few hours earlier. They were then transported to precinct offices. At some point prior to arrival at the precinct, each was advised of his Miranda rights by an officer involved in the arrest and transport. At the precinct, Detectives [A] and [B] sought to interview the two suspects.

The detectives first attempted to interview Young. But they stopped that effort when Young quickly requested an attorney. They then sought to interview Piatnitsky. What happened next is described in the Court of Appeals majority opinion as follows:

> The detectives then interviewed Piatnitsky, beginning at 7:10 a.m. on the morning of October 19. Piatnitsky first put his head on the table in the interview room and told the detectives that he wanted to sleep. Detective [B] then got him a soda, which "seemed to help him a little bit to talk." Piatnitsky told the detectives that he understood the rights that had been read to him earlier that morning. Then, as a ruse, the detectives told Piatnitsky that Young had given them a statement. Piatnitsky replied that they should let Young go and that he, Piatnitsky, would take the blame. During this "rapport building" portion of the interview, Piatnitsky indicated to the detectives that he wanted to convey his version of the events, in his own words, and that he was willing to give an audio-recorded statement.
>
> At 8:10 a.m., the detectives began an audio-recorded interview of Piatnitsky. At the beginning of the interview, Detective [A] asked Piatnitsky if he recalled being

advised of his Miranda rights earlier that morning by another officer and whether he understood those rights. Piatnitsky replied, "I have a right to remain silent. . . . That's the, that's the only one I remember. . . . That's the one I, I should be doing right now." Detective [A] reminded Piatnitsky, "Well, you know, like we told you, you don't have to talk to us."

Detective [A] then began to read to Piatnitsky his Miranda rights. Piatnitsky said, "I'm not ready to do this, man." Detective Allen replied, "You just told us that you wanted to get it in your own words on tape. You asked us to turn the tape on, remember?" Piatnitsky responded, "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want . . . I don't want to talk right now, man." Detective Keller said, "Okay, but let's go over the rights on tape, and then you can write it down, okay." Piatnitsky replied, "All right, man." Detective [A] then read to Piatnitsky each of his Miranda rights and asked Piatnitsky if he understood each of those rights. Piatnitsky replied in the affirmative.

Detective [A] then stated:

> Okay. I'm gonna give you the form. I just read you these rights. You read 'em earlier. Why don't you sign that you understand these rights right here. And I understand that you don't want to, you don't want to talk about this on tape, and that's your right too, so we'll take a written statement from you; but I want, I want to go ahead and read the waiver of the rights that you're gonna sign here in a second. You understand that you, you've either had read or you have [had] read to you the above explanation of rights and that you understand them. You've decided not to exercise these rights at this time. The following statement is made freely and voluntary and without threats or promises of any kind. Do you understand that? If you understand, you're willing to talk to us, sign that, and then we'll take a, I'll turn the tape off, and um, I'll, we'll write down a statement.

Detective [B] then asked Piatnitsky, "Are you sure you don't want to do it on tape like you said you did; you want to get [it] in your own words?" Piatnitsky replied, "Yes, sir." Detective [A] said, "So you'd rather take a written statement, do a written one." Piatnitsky replied, but his reply was mumbled. In the transcript of the audio-recorded interview, his reply was transcribed as "Yes. I don't know (unintelligible)." Detective [A] then stated, "Okay, it's too hard to talk about; you'd rather write it." The detectives turned off the audiotape at 8:15 a.m.

Piatnitsky signed the waiver of constitutional rights form that Detective [A] read to him during the audio-recorded interview. After the audiotape was turned off, Piatnitsky provided the detectives with a written statement, in which he admitted to shooting both victims with a stolen shotgun. Both detectives asked Piatnitsky questions, and Detective [B] handwrote those statements that Piatnitsky indicated that he wanted to be included in the account. Detective [B] wrote only those statements that Piatnitsky specifically requested to be written. Piatnitsky looked at the statement several times during the questioning, read the completed statement, and indicated changes to be made, which he thereafter initialed. In addition, Piatnitsky drew a map for the detectives, depicting the school where the shotgun had been hidden prior to the crime.

> The interview ended when the detectives attempted to question Piatnitsky regarding the fact that he was hiding in a closet behind a washing machine when he was discovered by police. Piatnitsky became upset with Detective [A] and told the detectives that he was "done talking." At that point, the detectives concluded the interview.

[Footnotes omitted]

Proceedings below:

Piatnitsky was charged with murder in the first degree and other crimes. He lost a suppression motion challenging the admissibility of his statements during the interrogation. The trial judge concluded after a hearing that when Piatnitsky told the detectives that he did not want to "talk," in context, Piatnitsky was not exercising his right to silence but instead was merely explaining his choice of making a police-aided written statement over making a tape-recorded statement.

At trial, both Detectives [A] and [B] testified regarding Piatnitsky's statements, and his written statement was admitted as an exhibit at trial. Piatnitsky was charged with murder in the first degree, murder in the second degree, attempted murder in the first degree, assault in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree. A jury found Piatnitsky guilty of murder in the first degree, attempted murder in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree.

ISSUE AND RULING: After Piatnitsky had waived his Miranda rights and had talked to detectives for a while, he told the detectives that he was willing to give a tape-recorded statement. But after the detectives turned on the tape recorder, Piatnitsky apparently changed his mind about the tape recording when he said, "I'm not ready to do this, man?" and then, when a detective reminded Piatnitsky that he had moments earlier agreed to give a recorded statement, Piatnitsky said: "I just write it down, man. I can't do this. I, I, I just write, man. I don't, I don't want . . . I don't want to talk right now, man."

The trial court determined that Piatnitsky's statement, "I don't want to talk right now, man" be placed in the context of all that had occurred up to that point, and, when that contextual review is made, Piatnitsky was not exercising his right to silence but instead merely explaining his choice of making a police-aided written statement over making a tape-recorded statement. Is the trial court's factual finding supported by substantial evidence, and is the trial court's legal conclusion that Piatnitsky did not invoke his right to silence correct? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, Piatnitsky's statement, when viewed in the full context, was not an unambiguous assertion of his right to silence; Judge Dwyer writes the majority opinion, joined by Judge Leach; Judge Becker authors a dissent).

Result: Affirmance of King County Superior Court conviction of Samuel Mikhail Piatnitsky of murder in the first degree, attempted murder in the first degree, possessing a stolen firearm, and unlawful possession of a firearm in the second degree.

ANALYSIS BY MAJORITY JUDGES DWYER AND LEACH:

The U.S. Supreme Court's 1966 Miranda opinion declares that where a suspect asserts his or her Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. Case law under Miranda, however, has established that where a suspect has initially waived his or her Miranda rights, the suspect's subsequent assertion

of the right to counsel or to silence during the interrogation must be unambiguous or the questioning may continue. See Davis v. U.S., 512 U.S. 452 (1994) **Sept 94 LED:02** (ambiguous reference to right to counsel - - "Maybe I should talk to a lawyer"); State v. Radcliffe, 164 Wn.2d 900 ((2008) **Dec 08 LED:18** (ambiguous reference to right to counsel - - "Maybe I should contact an attorney"); Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) **July 10 LED:02** (silence in the face of questioning held not to be an implied assertion of right to silence).

Under the U.S. Supreme Court precedent of Smith v. Illinois, 469 U.S. 91 (1984), law enforcement officers are not allowed to talk a person out of an unambiguous assertion of Miranda rights. The proper focus in the Piatnitsky case, therefore, is on what was said and done up to Piatnitsky's statement, "I don't want to talk right now, man," before the detectives responded to it.

The majority opinion in Piatnitsky concludes after lengthy analysis of the facts and the law that when viewed in context, Piatnitsky's statement that "I don't want to talk right now" was expressing his decision to give a written statement, as opposed to giving a tape recorded statement. His statement was not an unambiguous assertion of his right to silence, the majority judges conclude.

ANALYSIS BY DISSENTING JUDGE BECKER:

Among other things, Judge Becker argues in her dissenting opinion that the majority's opinion is inconsistent with the opinion that she authored in State v. Nysta, 168 Wn. App. 30 (Div. I, 2012) **July 12 LED:09**. In Nysta, the Court of Appeals rejected the State's argument that a defendant's reference to his wish for an attorney consult, made in the context of a discussion with detectives regarding a possible polygraph exam, was not ambiguous, but instead was a clear assertion of his attorney right that should have brought the interrogation to a halt.

In Nysta, Judge Becker was joined by Division One Court of Appeals Judges Spearman and Appelwick in a 3-0 decision. The Nysta opinion rejected the State's argument that the suspect's reference to his attorney right must be placed in the context of the discussion about the polygraph, and in that context was an ambiguous statement. The Nysta opinion concluded tha the State was giving an improperly "elaborate contextual interpretation" to the "plain" words used by the suspect, which, as in Piatnitsky, did not include any qualifying words like "maybe" as in Davis and Radcliffe. The State recently petitioned the Washington Supreme Court for discretionary review in Nysta (the petition is tentatively set to be considered on October 9, 2012). The majority opinion in Piatnitsky does not address the Nysta decision.

LED EDITORIAL COMMENTS: 1. Piatnitsky and Nysta appear to be inconsistent. We think that the Piatnitsky majority opinion is inconsistent with the decision in Nysta, and that the Piatnitsky majority opinion is correct, while the Nysta opinion is incorrect. We think that the detectives in Piatnitsky and Nysta acted consistently with the case law in interpreting the statements in context to be ambiguous statements that did not clearly assert the right to silence (Piatnitsky) or to an attorney (Nysta). We strongly doubt that the U.S. Supreme Court, currently the last word on Miranda issues in the Washington courts, would rule that the suspects were clearly asserting their Miranda rights in these two cases.

2. Washington's constitution is in step with the federal constitution in interpreting the rights to silence and to an attorney in the context of custodial interrogations. As we have noted in our LED commentary on numerous occasions, the Washington courts have consistently followed the federal constitutional rulings and have never expressly relied on independent Washington constitutional grounds for rulings in this interrogations subject area as they have in the subject area of arrest, search and seizure. See our most recent comment to this effect, supported by case citations, in follow-up to the U.S. Supreme Court

decision in Berghuis v. Thompkins, ___ U.S. ___, 130 S. Ct. 2250 (2010) July 10 LED:02. But we have noted on numerous occasions that the Washington Supreme Court could choose at some point in the future to adopt an independent grounds approach to the interrogations area.

It also should be noted that the question of whether a person has waived or has invoked Miranda rights remains a mixed question of fact and law that is analyzed under the totality of the circumstances of the particular case. The safest legal course for ensuring admissibility of a statement is for interrogators to seek clarification when dealing with a suspect who has manifested that he or she understands the warnings but then says or does something ambiguous that might be construed as asserting the right to an attorney or to silence. The officer might ask, depending on the circumstances, something along the lines of: "Are you telling me that you do want to talk to me further at this time?" or "Are you telling me that you do not want to talk to me any further at this time?" And, if the suspect says that he or she wishes to go forward with the questioning, the officer should re-Mirandize to avoid any appearance of ignoring a possible assertion of Miranda rights. While, under Smith v. Illinois, 469 U.S. 91 (1984), an officer is not allowed to talk a person out of an unambiguous assertion of Miranda rights, and while it is possible that a reviewing court will conclude that the statement was not ambiguous and therefore the questioning should have stopped, it nonetheless appears more fair and reasonable (and thus gives the government a better chance to win on the Miranda-assertion issue) if the officer responds to an ambiguous assertion by clarifying the statement, and then re-Mirandziing.

Finally, as always, law enforcement officers and agencies are urged to consult their own legal advisors and local prosecutors for guidance on legal issues.

DEFENDANT CAUGHT WITH ILLEGAL DRUGS HAS AUTOMATIC STANDING TO CHALLENGE THE SEARCH OF APARTMENT WHERE HE WAS A GUEST, BUT HIS STANDING DOES NOT ALLOW HIM TO CHALLENGE SEARCH AS IF HE WERE ONE OF APARTMENT'S TENANTS

State v. Libero, 168 Wn. App. 612 (Div. II, June 5, 2012)

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

> On May 14, 2010, Libero was a guest at Jessica Guerrero and Thomas Soeby's apartment. [Police] had received a complaint about an odor of marijuana coming from the apartment, and [two Officers] responded, arriving just after midnight. Both officers smelled an odor of marijuana from the hall outside the apartment. The officers knocked on the door and Guerrero answered. Soeby and Libero were also in the apartment. Guerrero told the officers that Soeby was her boyfriend and that he lived at the apartment.
>
> Officer [A] could see a marijuana plant just inside the apartment and he instructed Libero and Soeby to come into the hall. [The Officer] noticed green vegetable matter on the front of Libero's shirt. Libero told [the Officer] that the plant was his and that he had found it alongside some railroad tracks.
>
> Officer [B] asked Guerrero who the apartment belonged to and she said it was hers. Soeby admitted to Officer [A] that he had a small amount of marijuana. Officer [B] entered the apartment with Soeby to retrieve the marijuana. But upon

> entering the apartment Officer [B] saw a large amount of vegetable matter that he recognized as marijuana and he brought Soeby back out of the apartment.
>
> Officer [B] then asked Guerrero to sign a form consenting to search the apartment, which Guerrero did. The officers did not obtain Soeby's consent to search the apartment. The police then entered the apartment and found marijuana leaves "all over the floor" of the living room as well as on a coffee table, along with a large number of marijuana pipes.
>
> The State charged Libero with possession of over 40 grams of marijuana and with unlawful use of drug paraphernalia. Libero moved to suppress the evidence found in the apartment under CrR 3.6, arguing that the search was unlawful without Soeby's consent. The trial court denied this motion, concluding that although Libero had automatic standing to challenge the search, the search was lawful as to Libero based on Guerrero's consent.

[Footnotes omitted]

ISSUES AND RULINGS: (1) Where defendant was in possession of illegal drugs at the time of the challenged search, and the crime charged is drug possession, does he have automatic standing to raise a challenge to the search? (ANSWER BY COURT OF APPEALS: Yes);

(2) Was the search lawful based on the consent of a tenant where Libero was not a tenant but only a guest at the apartment? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Lewis County Superior Court conviction of Justin A. Libero for possession of over 40 grams of marijuana and use of drug paraphernalia.

Automatic Standing

The Court of Appeals concludes that the defendant has automatic standing because he was in possession of illegal drugs at the time of the challenged search, and the crime charged was illegal possession of those drugs:

> Ordinarily, standing to challenge a search or seizure under the Fourth Amendment and article I, section 7 of the State Constitution requires a defendant to have a legitimate expectation of privacy in the place searched or the thing seized. *[Court's Footnote: A casual visitor who is not an overnight guest has no legitimate expectation of privacy in the premises where he is located. Because Libero was a visitor, he lacked a legitimate expectation of privacy in Guerrero and Soeby's apartment.]* State v. Boot, 81 Wn. App. 546 (1996) **Nov 96 LED:09**. But a defendant who has no legitimate expectation of privacy may still be able to assert automatic standing. State v. Evans, 159 Wn.2d 402, 406–07 (2007) **March 07 LED:15**. Although the United States Supreme Court has abolished automatic standing under the federal constitution, it remains valid under Washington article I, section 7. See Evans.
>
> Automatic standing applies when (1) possession is an essential element of the offense charged and (2) the defendant was in possession of the contraband at the time of the search or seizure. Evans. "A defendant who has acquired automatic standing in effect stands in the shoes of an individual properly in possession of the property that was searched or seized."

Libero was charged with possessing more than 40 grams of marijuana, an offense in which possession is an essential element. RCW 69.50.4013. And it is undisputed that he possessed at least some of the marijuana. Because both elements are met, Libero had automatic standing to challenge the search.

Validity of Search

The State bears the burden of proof to show that a warrantless search was based on valid consent, including the burden to show that the consenting person had the requisite authority to consent to a search. See State v. Morse, 156 Wn.2d 1, 7, 14 (2005). One person's consent to search premises is invalid against anyone present with authority to control the premises equal to or greater than the consenting person. State v. Leach, 113 Wn.2d 735, 744 (1989). But "consent to search by a host is always effective against a guest within the common areas of the premises." State v. Vy Thang, 145 Wn.2d 630, 638–39 (2002) **May 02 LED:05**.

. . .

Guerrero's consent to search the apartment was not binding on Soeby because he had equal rights to control the premises and was present. But Guerrero's consent was binding on Libero because he was a guest.

Without citation to authority, Libero's argument assumes that automatic standing not only allows him to challenge the search of the apartment, but confers upon him the same rights as Soeby. We reject this argument.

The purpose of automatic standing is to allow a defendant charged with a possessory offense to challenge the legality of a search or seizure without being subject to self-incrimination. But a defendant asserting automatic standing must still assert his own rights, not those of a third party. Automatic standing does not permit a defendant to collaterally attack a search on the basis that it violated another's rights, as Libero seeks to do here. The search, based on Guerrero's consent, was valid against Libero. Accordingly, we reject Libero's arguments.

In sum, automatic standing does not allow Libero to assert Soeby's rights. It allows him only to challenge the legality of the search without establishing the legitimate expectation of privacy normally required for standing to challenge a search or seizure. The search's invalidity against Soeby did not render it invalid as to Libero. Accordingly, Libero's claim that the search was invalid fails.

LED EDITORIAL COMMENTS: In State v. Leach, 113 Wn.2d 735 (1989) the Washington State Supreme Court held that where two business "partners" were both present and had dominion and control over the business premises, officers were required to ask both for consent to search. In State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02 the Court held that the Leach rule was violated where officers obtained consent to search the apartment from a houseguest who answered their knock on the apartment entry door, while the leaseholder was present in a back bedroom. See also Georgia v. Randolph, 547 U.S. 103 (2006) May 06 LED:05 (Under the Fourth Amendment, which imposes a less restrictive mutual consent rule than does the Washington constitution, if two persons with authority to consent to a search of an area are both present and one consents and the other objects, officers do not have a valid consent to search the area). Accordingly, in Libero,

if Soeby had been charged and had challenged the search (we do not know if he was charged with any crime and if so whether he challenged the search), he likely would have prevailed. However, as the Court of Appeals points out, Libero's automatic standing does not provide him with standing to assert Soeby's rights.

PORTIONS OF VICTIM'S STATEMENTS TO 911 OPERATOR AND INITIAL STATEMENTS TO POLICE UPON ARRIVAL AT SCENE WERE, VIEWED OBJECTIVELY, MADE DURING THE COURSE OF AN ONGOING EMERGENCY AND THUS ARE NONTESTIMONIAL FOR CONFRONTATION CLAUSE PURPOSES

State v. Reed, 168 Wn. App. 553 (Div. I, June 4, 2012)

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

> At approximately 2:00 p.m. on June 23, 2010, Nat Emily Ta placed a 911 call. Ta told the operator that her boyfriend, Cleo Reed, was "choking" her, "scratching" her, had "punched [her] lip," and was continuing to threaten her. Reed, who remained at the scene, could be heard shouting in the background during the call. Ta said that Reed had recently been in jail. The call disconnected before the operator could determine Ta's location.
>
> Ta called 911 again at approximately 11:00 p.m. Ta told the operator that "this mother f----- he just beat me up right now." She explained that Reed had again been "choking [her]," and that she was "bleeding on [her] nose." She told the operator that the attack had occurred while the couple was driving with Reed's cousin. Ta stated that she was "pregnant right now" and that Reed had left her by the side of the road in an unfamiliar area of Renton. Ta struggled to convey her location to the operator. She told the operator that she needed a "cop" but did not require medical assistance.
>
> The operator continued to question Ta while Ta waited in the parking lot of a McDonald's restaurant for police to arrive. Ta gave a detailed description of Reed, described Reed's use of cocaine and alcohol, and alluded to prior violent acts by Reed. She told the operator that she needed to "put his ass back in jail."
>
> [A Police Officer] was the first officer to arrive at the scene. Upon [the Officer's] arrival, Ta ran to his patrol car. Without prompting, Ta exclaimed that "my boyfriend beat me up, choked me, [and] wouldn't let me out of my car." Ta was "hysterical" and "crying uncontrollably." She was out of breath and spoke in "short, brief sentences." After once again declining medical treatment, Ta described the incident in greater detail.
> . . .
>
> . . . [T]he trial court ruled admissible portions of Ta's two 911 calls and her initial, spontaneous, statements to [the Officer] after determining that these statements were nontestimonial for purposes of the confrontation clause. The trial court concluded that the latter portions of Ta's second 911 call and all statements made to officers following her initial statements to [the Officer] were testimonial. Accordingly, these statements were not admitted at trial.

[Footnote omitted]

ISSUE AND RULING: Were the victim's statements to 911 operators and to officers who first arrived on the scene testimonial such that their admission at trial violated the defendant's rights under the Confrontation Clause of the Sixth Amendment? (ANSWER BY COURT OF APPEALS: No (as to portions of the victim's statements)

Result: Affirmance of King County Superior Court conviction of Cleo Palmer Reed for second degree assault and witness tampering.

ANALYSIS: (Excerpted from the Court of Appeals opinion)

> The confrontation clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The confrontation clause bars the admission of "testimonial" hearsay unless the declarant is unavailable to testify and the defendant had a prior opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 53–54 (2004).
>
> . . [I]n the years following [Crawford], the Court has, on several occasions, more fully delineated the parameters of testimonial hearsay in the context of police interrogations. See Michigan v. Bryant, ___ U.S. ___, 131 S. Ct. 1143 (2011) **May 11 LED:03**; Davis v. Washington, 547 U.S. 813 (2006) **Sept 06 LED:03**. Where the police are involved in procuring an unconfronted statement, whether the statement is testimonial depends upon the "primary purpose" for the interrogation during which the statement was made. Davis. Where the interrogation is "directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator," the product of such an interrogation is necessarily testimonial. Davis. In contrast, statements are nontestimonial when made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Davis. Accordingly, "the existence of an 'ongoing emergency' at the time of an encounter between an individual and the police is among the most important
> . . .
>
> Our inquiry is guided by four relevant factors. First, we examine the timing of the statements relative to when the described events occurred. Where a speaker has described events as they were actually occurring, such statements are indicative of an ongoing emergency. Conversely, a description of past events is less likely to demonstrate a present need for assistance.
>
> Second, we assess the nature of what was asked and answered during the interrogation to determine whether the elicited statements were necessary to resolve a present emergency or merely to determine what happened in the past. For instance, a 911 operator's effort to establish an assailant's identity—"so that the dispatched officers might know whether they would be encountering a violent felon"—would tend to indicate that the elicited statements were nontestimonial.
>
> Third, we consider the threat of harm posed by the situation as judged by a "reasonable listener." A plain call for help "against a bona fide physical threat" strongly suggests that the speaker is facing an ongoing emergency. On the other hand, where it is clear that the threat posed by the perpetrator—to either

the victim, the police, or the public—has been neutralized, such circumstances tend to indicate that no ongoing emergency exists.

Finally, we evaluate the level of formality of the interrogation. The greater the formality of the encounter, the more likely it is that a statement elicited during that encounter is testimonial. In contrast, disorganized questioning in an exposed, public area that is neither tranquil nor safe tends to indicate the presence of an ongoing emergency.

. . .

Turning to the merits of Reed's confrontation clause challenge, it is clear that the trial court properly determined that Ta's statements in the first 911 call were nontestimonial. An objective evaluation of the "circumstances in which the encounter occurs and the statements and actions of the parties" demonstrates that the primary purpose of the investigation was to meet an ongoing emergency. Although the record does not indicate that Ta was being choked or punched during her conversation with the operator, Ta made clear that Reed's actions occurred in the recent past. As our Supreme Court has observed, where statements are made "within minutes of the assault," such statements may properly be considered as "contemporaneous[ ] with the events described." Indeed, Ta stated during the call that Reed was "threatening me right now." Moreover, the operator's focus on ascertaining Ta's location indicates that the primary purpose of the interrogation was to provide emergency assistance. The record does not reflect that the operator was attempting merely to determine "what had happened in the past." In addition, there is little doubt that a reasonable listener would conclude that Reed posed a bona fide physical threat to Ta. Reed was present throughout the call and can be heard shouting angrily in the background. Finally, the lack of formality of the interrogation favors admissibility—Ta made these statements from an unsafe location, outside of police protection, and in the presence of an angry, vocal assailant. The court did not err by determining that these statements were nontestimonial.

The trial court also properly admitted statements made during the first portion of Ta's second 911 call. As in Ta's previous 911 call, Ta described very recent events to the operator. Ta told the operator that Reed had "just beat me up right now." She stated that these events took place within minutes of her placing the call, repeatedly telling the operator that the assault had occurred "just right now." Moreover, the nature of the questions asked indicates that the purpose of the interrogation was to resolve an emergency. The operator's questions during this portion of the call were designed to ascertain Ta's location, her need for medical assistance, and to determine whether Reed remained in the area where he could continue to pose a threat to Ta and responding officers. Furthermore, as in the first call, the interrogation lacked formality—a distressed and frightened Ta struggled to communicate even the basic circumstances of her situation from a public area with which she was obviously unfamiliar. All of these circumstances demonstrate that the primary purpose of the second 911 call was to enable a response to Ta's emergency.

Nevertheless, Reed contends that, because Reed had left the scene of the assault prior to Ta's 911 call—a fact that was clearly communicated to the operator—no reasonable listener could have determined that Reed posed the type of continuing threat that is necessary to demonstrate the existence of an

ongoing emergency. However, insofar as Reed asserts that the absence of an assailant from the scene of a domestic assault necessarily establishes the lack of an emergency, Reed is mistaken. See Bryant, 131 S.Ct. at 1158 ("The Michigan Supreme Court erroneously read Davis as deciding that 'the statements made after the defendant stopped assaulting the victim and left the premises did not occur during an "ongoing emergency."'" (quoting People v. Bryant, 483 Mich. 132, 149 n. 15 (2009)). Although the Court in Bryant noted that, in the context of domestic violence, a court should assess the presence of an ongoing emergency "from the perspective of whether there was a continuing threat to [the victim]," this does not mean that the departure of a domestic assailant necessarily eliminates the potential threat.

. . .

Finally, Reed contends that Ta's initial statements to [the Officer] upon this officer's arrival at the scene constitute testimonial statements. Reed first asserts that, because the trial court determined that Ta's statements during the latter portions of her second 911 call were testimonial, it cannot be that the emergency persisted beyond the point at which her answers "'evolve[d] into testimonial statements.'" We disagree.

The purpose of an interrogation must be objectively evaluated from the statements and actions of the parties to the encounter. It is certainly possible that a responding officer's obvious focus on eliciting testimonial statements—even during an emergency—will render the declarant's responses testimonial. This does not mean that the emergency necessarily has ended. Where a subsequent questioner clearly refocuses the inquiry on resolving that emergency, a trial court should not ignore the purpose of the subsequent interrogation, objectively viewed. Reed's proposed per se rule of exclusion is without support in the case law.

Here, our review of the circumstances of Ta's encounter with [the Officer] indicates that Ta's initial, spontaneous statements were made, not to "prove past events potentially relevant to later criminal prosecution," but to secure police assistance in responding to an emergency. As in the 911 calls, both the timing of Ta's statements and the lack of formality of the encounter favor admission of Ta's statements. These statements, which occurred only six minutes after Ta placed the second 911 call, were made under circumstances that lacked the formality typical of a police interrogation designed to elicit information for later use in a prosecution. The interrogation (such as it was) took place in an exposed and unfamiliar public place—a far cry from the calm and structured setting of the station house, where Ta would have been alerted to "the possible future prosecutorial use of [her] statements."

Moreover, objectively viewed, Ta's behavior under these circumstances indicates that the purpose of her statements was to secure police protection. Upon [the Officer's] arrival at the scene, Ta ran to his vehicle and, without prompting, exclaimed that she had been attacked. Ta was "hysterical" and "crying uncontrollably." She was out of breath and bleeding from her mouth. Furthermore, although [the Officer's] arrival temporarily eliminated the threat that Reed might return to do further harm to Ta, this protection was contingent upon his continued presence at the scene. Accordingly, Ta's initial statements are most reasonably understood as a victim's efforts to inform the police of an

> emergency, thus ensuring that an officer remain at the scene to provide assistance. Of course, once this police protection was secured, reasonable participants in Ta's and [the Officer's] circumstances would understand that the threat to Ta was neutralized and the emergency had ended. Consequently, as the trial court correctly determined, Ta's subsequent statements to [the Officer] and to later arriving officers were testimonial and, thus, inadmissible. However, because an objective evaluation of the circumstances makes clear that Ta's initial, spontaneous statements were primarily intended to secure police assistance, the trial court did not err by determining that these statements did not implicate the confrontation clause.
>
> The trial court properly determined that Ta's statements during the first 911 call, her statements during the first portion of the second 911 call, and her initial, spontaneous statements to [the Officer] were nontestimonial. . . .

[Footnotes and some citations omitted]

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

Additionally, although no independent state grounds issue was presented in this case, Washington has a separate layer of confrontation clause analysis under the Washington state constitution. See State v. Pugh, 167 Wn.2d 829 (2009) April 10 LED:15.

****

BRIEF NOTES FROM THE WASHINGTON COURT OF APPEALS

(1) RADIOLOGIST'S REPORT EXPLAINING THAT CT SCAN SHOWED NASAL FRACTURE WAS NOT "TESTIMONIAL" WITHIN THE MEANING OF CASE LAW ON SIXTH AMENDMENT RIGHT TO CONFRONTATION, AND THEREFORE THE REPORT WAS LAWFULLY ADMITTED DESPITE STATE'S FAILURE TO CALL RADIOLOGIST TO TESTIFY – In State v. Clark, ___Wn. App. ___, 2012 WL 4055338 (Div. I, Sept. 17, 2012), the Court of Appeals rules that where the primary purpose of a radiologist's finding of a nasal fracture on a computerized tomography scan ("CT scan") was to inform the treating physician of the nature of a patient's injuries in order for the physician to determine appropriate treatment, the radiologist's report was not "testimonial" for purposes of the U.S. Constitution's Sixth Amendment confrontation clause, as interpreted in Crawford v. Washington, 541 U.S. 36 (2004) **Sept 06 LED:03** (and as Crawford has been interpreted in many decisions by the U.S. Supreme Court and lower courts in Washington and elsewhere in the U.S.).

The Court of Appeals concludes that because the Sixth Amendment confrontation clause is not implicated by these facts, the State was not required to call the radiologist to testify about his report so that he would be available for cross examination by the defense. The Court of Appeals also rules in Clark that – where the radiologist's finding was made in the regular course of business and the radiology scan was ordered simply to rule out other injuries that might require additional treatment – the radiologist's finding confirming the treating physician's diagnosis of a nasal fracture was properly admitted under Washington statutory and Court Rule evidentiary standards (1) for business records and (2) for statements made for purposes of medical diagnosis and treatment.

Result: Affirmance of King County Superior Court conviction of Tyson Monte Clark for second degree assault.

(2) CLERK'S MINUTE ENTRY SHOWING SERVICE OF NO CONTACT ORDER IS NONTESTIMONIAL AND DOES NOT VIOLATE THE CONFRONTATION CLAUSE – In State v. Hubbard, 169 Wn. App. 182 (Div. II, June 29, 2012), the Court of Appeals holds that a minute entry from a prior sentencing, indicating that the defendant was served in open court with a no contact order, is not testimonial and thus its introduction into evidence in a subsequent criminal trial does not violate the defendant's rights under the Confrontation Clause.

The Court explains in part as follows:

> The Washington Supreme Court recently observed that "certain statements 'by their nature [are] not testimonial—for example, business records or statements in furtherance of a conspiracy.'" State v. Jasper, 174 Wn.2d 96, 109 (2012) **June 12 LED:18** (alteration in original) (quoting Crawford v. Washington, 541 U.S. 36, 56 (2004) **May 04 LED:20**. Certified records that are not prepared for use in a criminal proceeding also are not testimonial. Jasper, 174 Wn.2d at 112; see also State v. Mares, 160 Wn. App. 558, 564 (2011) (public records are generally admissible absent confrontation because, having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial, they are not testimonial).
>
> The Jasper court distinguished between nontestimonial, self-authenticating certified records and testimonial clerk certifications attesting to the nonexistence of a public record. Jasper, 174 Wn.2d at 113 (quoting Melendez–Diaz v. Massachusetts, 557 U.S. 305 (2009) **Sept 09 LED:03**). A clerk's certification attesting to the nonexistence of a public record is a declaration describing the result of a public records search conducted in contemplation of litigation. See Jasper, 174 Wn.2d at 113. By contrast, a certified public record such as a clerk's minute entry simply memorializes facts as they occurred in court, without reference to future litigation. See Mares, 160 Wn. App. at 564 (records custodian may authenticate or provide a copy of an otherwise admissible record but may not create a record for the sole purpose of providing evidence against a defendant); State v. Benefiel, 131 Wn. App. 651, 656 (prior judgment and sentence was not testimonial; it was not a statement made for purpose of establishing some fact and did not constitute statement the declarant believed would be used by State at later trial), review denied, 158 Wn.2d 1009, 143 P.3d 829 (2006).
>
> . . .

> Here, it is undisputed that Exhibit 1 is a certified copy of a court record containing facts relating to Hubbard's sentencing under a prior cause number. Exhibit 1 is not testimonial because it was not prepared for use in a criminal proceeding, and it is admissible under the hearsay exception for self-authenticating public records. Accordingly, we hold that the trial court did not violate Hubbard's confrontation rights under the Sixth Amendment in admitting Exhibit 1 and affirm.

Result: Affirmance of Kitsap County Superior Court conviction of Jeffrey Garett Hubbard for felony violation of no contact order.

(3) THIRD DEGREE RAPE DEFENDANT LOSES ARGUMENT THAT THE JURY MUST CONSIDER "LACK OF CONSENT" FROM THE SUBJECTIVE VIEW OF THE DEFENDANT – In State v. Higgins, 168 Wn. App. 845 (Div. III, June 19, 2012; as corrected June 21, 2012), the Court of Appeals rejects defendant's argument that the jury should have been instructed that in a prosecution for third degree rape, "lack of consent" under RCW 9A.44.060(1)(a) must be looked at from the subjective point of view of the particular defendant in the case. In part, the Court of Appeals explains its rejection of defendant's argument in the following passage:

> Our focus, and certainly the jury's focus, is more properly on the victim's words and actions rather than Mr. Higgins's subjective assessment of what is being communicated. State v. Walden, 67 Wn. App. 891, 895 n.2, 841 P.2d 81 (1992). Mr.Higgins's proposed analytical approach would, in our judgment, turn the apparent legislative concern here on its head:
>
> > For policy reasons it makes sense that the Legislature would focus on the issue of the victim's consent, or rather lack thereof, rather than the perpetrator's subjective assessment of the situation. To do otherwise would lead to the ludicrous result that a perpetrator could be exonerated simply by arguing that he did not know the victim's expressed lack of consent was genuine or that he did not intend to have nonconsensual sexual intercourse with the victim.
>
> State v. Elmore, 54 Wn. App. 54, 57 n.5, 771 P.2d 1192 (1989).

Result: Affirmance of Grant County Superior Court conviction of Ryan R. Higgins for rape in the third degree.

(4) DEFENDANT "USED" VEHICLE IN THE COMMISSION OF A FELONY, TAKING OR RIDING IN A MOTOR VEHICLE WITHOUT THE OWNER'S PERMISSION, WHEN HE UNLOCKED THE VEHICLE AND DROVE AWAY – In State v. Dupuis, 168 Wn. App. 672 (Div. II, June 12, 2012), the Court of Appeals holds that the defendant "used" a vehicle to accomplish taking or riding in a motor vehicle without the owner's permission, requiring revocation of hs driver's license, when he used the touchpad to unlock the vehicle, and he drove away.

RCW 46.20.285 provides: "The department shall revoke the license of any driver for the period of one calendar year . . . upon receiving a record of the driver's conviction of any of the following offenses, . . . (4) Any felony in the commission of which a motor vehicle is used."

The defendant Dupuis was ordered by a court, following a guardianship proceeding, to transfer ownership of the car he had been driving to the protected person's guardian. "Dupuis gave two keys to the guardian's attorney and left the courtroom. When family members went outside and

tried to use the keys, they did not work. Dupuis then went to the vehicle, used the touch pad to unlock it, and drove away. . . . "

The defendant entered an Alford plea to second degree taking or riding in a motor vehicle without the owner's permission.

The defendant asserts that he did not "use" the vehicle in the commission of the crime and thus, his license should not have been suspended. The Court of Appeals disagrees. It explains:

> RCW 46.20.285 does not define "use," but we have cited the plain and ordinary meaning of the word in finding that, in order for RCW 46.20.285(4) to apply, a vehicle must have been employed in accomplishing the crime. State v. Batten, 95 Wn. App. 127, 129–30 (1999), aff'd, 140 Wn.2d 362 (2000) **July 00 LED:04**. The relevant test is whether the felony had some reasonable relationship to the operation of a motor vehicle, or whether use of a motor vehicle contributed in some reasonable degree to the commission of the felony. State v. B.E.K., 141 Wn. App. 742, 746 (2007) **April 08 LED:24**.

The Court concludes that although it is possible to commit taking a motor vehicle without the owner's permission without actually using the vehicle, in this case the defendant used the vehicle when he drove it from the courthouse.

Result: Affirmance of Grays Harbor County Superior Court order that Allen K. Dupuis' abstract of driving record be forwarded to the DOL after his conviction for taking or riding in a motor vehicle without the owner's permission.

****

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

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

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

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

****

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]

****