Law Enforcement Digest

NOVEMBER 2013

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

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HONOR ROLL

692nd Basic Law Enforcement Academy – May 9, 2013 through September 17, 2013

President:	Dustin M. Soptich, Yakima PD
Best Overall:	Timothy C. Lewis, King County SO
Best Academic:	Jacob D. Spitzer, Spokane County SO
Best Firearms:	Matthew R. Nicholas, King County SO
Patrol Partner Award:	Randy T. Watts, Spokane County SO
Tac Officer:	Corporal Brian Dixon, WSP

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NOTE: Revised DUI Arrest Report forms: The DUI Arrest Report forms have been revised in light of recent amendments to the DUI laws. There is now a new DUI Arrest Report 3000-110-196 and a new English/Spanish DUI Arrest Report 3000-110-197, revised 9/13. Effective at 0000 on September 28, 2013, only the 9/13 revision of the form may be used. All other versions of the forms may no longer be used and must be destroyed or recycled. The revised forms were distributed to all breath test instrument locations. The forms can also be found on the WSP internet site http://www.wsp.wa.gov/breathtest/btpindex.php. If you have any questions about obtaining copies of the form please contact your local WSP Breath Test Technician.

NOTE: "Survey of Washington Search and Seizure Law: 2013 Update": Washington State Supreme Court Justices Charles Johnson and Debra Stephens recently published this article in the Seattle University Law Review. The 276 page article can be found on the internet using any major search engine. While officers may not want to rely on this article for legal advice, it does provide useful guidance including the view of two sitting state supreme court justices.

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NINTH CIRCUIT UNITED STATES COURT OF APPEALS

FAILURE OF PROSECUTION TO DISCLOSE UNREDACTED TRAINING AND PERMORMANCE RECORDS OF NARCOTICS DETECTION CANINE CONSTITUTES DISCOVERY VIOLATION; PROBABLE CAUSE FOR SEARCH NOT NEGATED SOLELY BY CANINE'S FAILURE TO FULLY COMPLETE HIS INDICATION

United States v. Thomas, ___ F.3d ___, 2013 WL 4017239 (9th Cir., Aug. 8, 2013)

Facts: (Excerpted from Ninth Circuit opinion)

> In the early afternoon on February 28, 2010, Jonathan Thomas approached a highway checkpoint in southern Arizona manned by the United States Border Patrol. He was driving a silver pick-up truck with a large black toolbox attached to the bed. Border Patrol Agent Christopher LeBlanc had a partner that day: "Beny–A," his drug-detection dog, who was trained in the detection of concealed humans and controlled substances. LeBlanc was stationed about fifteen feet in front of a "primary inspection" area. As Thomas's truck passed, Beny–A started to demonstrate what LeBlanc described as "alert behavior." The dog's tail and ears went up, his posture and breathing pattern changed, and he started "air-scenting."
>
> Based on those responses, agents directed Thomas to secondary inspection where he and his three young children exited the truck. Starting at the tailgate, LeBlanc walked Beny–A counterclockwise around the truck. As they encountered areas of interest, LeBlanc signaled Beny–A to go there. The dog was "in odor" throughout, meaning he was very animated and excited. Near the gas tank on the passenger side the dog exhibited more alert behavior. Beny–A is trained to perform what is known in the trade as an "indication" when he discovers contraband: he "rock[s] back into a sit."
>
> When the team came upon the toolbox, LeBlanc cast his hand low-to-high. In response, Beny–A jumped up and placed his paws on the vehicle and pressed his nose against Thomas's toolbox. LeBlanc testified that the dog then tried to sit, but that he did not allow him to complete that trained indication. Next, LeBlanc returned Beny–A to his kennel, obtained Thomas's keys, and searched the locked toolbox. Inside was a blanket and, underneath, bundles of marijuana weighing about 150 pounds. Thomas was arrested, advised of his Miranda rights, and transported to the Tucson Border Patrol station. During interviews with the Border Patrol, Thomas said he had knowingly transported the marijuana but under duress.

[Footnote omitted]

Proceedings below:

Thomas was indicted for violating federal drug laws. Before trial Thomas filed a motion to suppress evidence of the marijuana obtained at the checkpoint. Thomas pursued two arguments. He claimed that the search of the toolbox had violated the Fourth Amendment because the drug dog's failure to indicate meant probable cause had not been established. And during the suppression hearing, Thomas also objected to receiving heavily redacted training- and performance-evaluation records on Beny-A and his handler. After deciding that these limited disclosures satisfied the government's discovery obligation under federal court rules, the district judge ruled that the government had met its burden of establishing probable cause. Thomas's motion to suppress was denied. Thomas was convicted and sentenced.

ISSUES AND RULINGS: 1) Did the prosecution violate discovery rules by failing to disclose unredacted training and performance records? (ANSWER BY NINTH CIRCUIT: Yes)

2) Did border patrol agents lack probable cause to search the vehicle for the sole reason that the narcotics detection canine did not complete his full indication? (ANSWER BY NINTH CIRCUIT: No, failure of the canine to complete the indication does not necessarily negate probable cause)

Result: Reversal of United States District Court (Arizona) conviction of Jonathan Michael Thomas of conspiracy to possess with intent to distribute marijuana; case remanded for re-trial.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

Redacted Training Records

> With respect to reliability, Thomas claims it was improper for the government to have supplied heavily redacted records concerning Beny–A and LeBlanc's training and experience in narcotics detection.
>
> Such records show that LeBlanc and Beny–A had attended yearly certification programs from the Border Patrol and were up-to-date at the time of the search. Biweekly logs, called green sheets, were also produced. The team's performance during eight-hour-controlled evaluations was scored on a scale of one to six—the higher the score, the worse the performance. At least one record analyzed at the suppression hearing revealed marginal performance in "search skills." The team received a 3.50. Had it been one-tenth of a point higher it would have been "a failing score." The redactions obscure comments on nearly every page of the records. As to what is beneath the blacked-out paragraphs, the defendant, district judge, this court, and even the Border Patrol's custodian of records are entirely in the dark.
>
> In United States v. Cedano–Arellano, 332 F.3d 568 (9th Cir. 2003), we held that when a defendant requests dog-history discovery to pursue a motion to suppress, Federal [Rules of Criminal Procedure compel] the government to disclose the "handler's log," as well as "training records and score sheets, certification records, and training standards and manuals" pertaining to the dog. These materials were held to be "crucial to [the defendant's] ability to assess the dog's reliability, a very important issue in his defense, and to conduct an effective cross-examination of the dog's handler" at the suppression hearing. These disclosures are "mandatory" when the government seeks to rely on a dog alert as

the evidentiary basis for its search. See United States v. Cortez–Rocha, 394 F.3d 1115, 1118 n. 1 (9th Cir. 2005).

A unanimous Supreme Court echoed this in another recent dog-sniff case. See Florida v. Harris, ___ U.S. ___, 133 S. Ct. 1050, 1057 (2013) **May 13 LED:07**. Harris explained that a defendant must be afforded the opportunity to challenge "evidence of a dog's reliability, whether by cross-examining the testifying officer or by introducing his own fact or expert witnesses." "The defendant, for example, may contest the adequacy of a certification or training program, perhaps asserting that its standards are too lax or its methods faulty. So too, the defendant may examine how the dog (or handler) performed in the assessments made in those settings."

In flat contravention of the principle at the heart of Harris and Cedano–Arellano, Thomas's counsel was hamstrung by the fact that the certification records had been so redacted. The K9 Coordinator for the Border Patrol conceded during the suppression hearing that the redactions contained, in part, information about "the training methodology and the techniques used to train the K9s and evaluate the K9s." He also said that if the redactions were lifted, he would expect to see critiques of the team's competence as well as discussions about areas for improvement.

. . .

Probable Cause

Because it is squarely presented for our review and it will arise again upon remand, we also take up Thomas's claim that whether or not the disclosure was adequate, Beny–A's behavior could not give rise to probable cause. His contention is that even assuming Beny–A and LeBlanc were a reliable duo, because the dog never completed his trained indication—the sitting discussed earlier—his behavior was an insufficient basis for searching the toolbox. Thomas says that the "alert" behavior described by Agent LeBlanc (both at his pre-primary post and during the secondary inspection) consists of "untrained" responses that a dog might exhibit at any time, which fall short of probable cause as a matter of law.

Faced with a similar argument, our sister circuit declined to adopt a rule "which would require the dog to give a final indication before probable cause is established." United States v. Parada, 577 F.3d 1275, 1281–82 (10th Cir. 2009); see also id. at 1275 (upholding as sufficient, the dog's "rapid deep breathing, body stiffening, and upbreaking from the search pattern . . . around a vehicle"). Its rationale was on the mark: probable cause is measured in reasonable expectations, not certainties; see also United States v. Cervantes, 703 F.3d 1135, 1139 (9th Cir. 2012) ("An officer will have probable cause to search if there is a fair probability that contraband or evidence of a crime will be found in a particular place, based on the totality of the circumstances." (internal quotation marks omitted)). Evidence from a trained and reliable handler about alert behavior he recognized in his dog can be the basis for probable cause. Whether a particular dog displays enough signaling behavior will depend on the facts and circumstances of each case.

> The Supreme Court's Harris decision confirms the correctness of this view. ("We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."). In rejecting Florida's evidentiary checklist for a drug dog's reliability, the Court explained that "[a] gap as to any one matter . . . should not sink the State's case," because that is "the antithesis of a totality-of-the-circumstances analysis."
>
> Thomas's alternative basis for invalidating the search therefore fails.

[Footnotes and some citations omitted]

LED EDITORIAL NOTE: The defendant also argued, as his primary argument, that directing Beny-A to "jump[ ] up and put his paws and nose on the toolbox in the truckbed, and stay[ ] like that, refusing to move" constituted a search under the Fourth Amendment. He based this argument on the trespass theory of search (to be distinguished from the intrusion-on-reasonable-privacy-expectation theory of search) recognized by the U.S. Supreme Court in U.S. v. Jones, ___ U.S. ___, 132 S. Ct. 945 (2012) March 12 LED:07 and Florida v. Jardines, ___ U.S. ___, 133 S. Ct. 1409 (2013) June 13 LED:06. The Ninth Circuit does not directly reach this thorny issue, instead holding that even if it did constitute a search for the dog to physically touch the toolbox in the truckbed, it was lawful at the time and thus, evidence obtained from the search is admissible under the Fourth Amendment's good faith (faith in case law) exception to the exclusionary rule recognized in Davis v. U.S., ___ U.S. ____, 131 S. Ct. 2419 (2011) Sept 11 LED:04 (note that Washington's Supreme Court ruled in State v. Adams, 169 Wn.2d 487 (2010) Oct 10 LED:15 that there is no case-law based good faith exception to exclusion of evidence under the Washington constitution, article I, section 7.)

POLICE CANINE'S PRIOR MISIDENTIFICATIONS CONSTITUTE BRADY MATERIAL, KNOWLEDGE OF WHICH IS IMPUTED TO PROSECUTOR, AND FAILURE TO DISCLOSE PREJUDICED DEFENDANT

Aguilar v. Woodford, 725 F.3d 970 (9th Cir., July 29, 2013)

Facts and Proceedings Below: (Excerpted from Ninth Circuit opinion)

> Gilbert Aguilar was convicted of first-degree murder after a jury trial in Los Angeles County Superior Court. A young Hispanic man got out of a white Volkswagen Beetle and shot John Guerrero while Guerrero's car was stopped at a stoplight. The only question at trial was the identity of the shooter. Aguilar's defense was that another young Hispanic man, Richard Osuna, had shot Guerrero.
>
> The prosecution introduced evidence that a police dog named Reilly had alerted to a "scent pad," showing that Aguilar's scent was present on the front passenger seat of the white Volkswagen. The prosecution did not disclose to the defense that Reilly had a history of making mistaken scent identifications, even though it had stipulated to Reilly's mistaken identifications in a different trial several months earlier. Following the stipulation, that court had excluded evidence of Reilly's scent identification from the earlier trial.
>
> Reilly's scent identification was the only evidence that tied Aguilar to the white Volkswagen. Putting the scent identification to one side, the evidence against

Aguilar was weak. No clear motive for Aguilar to shoot Guerrero was ever suggested at trial. No physical evidence tied Aguilar to the crime. The faces of Aguilar and Osuna are very similar, but Aguilar is older and, at the time of the shooting, was significantly taller. A number of eyewitnesses identified Aguilar as the shooter at trial. Several of those witnesses had earlier given a quite different physical description to police—one that matched Osuna in age and height rather than Aguilar. At trial, these witnesses changed their description to match Aguilar.

The evidence suggesting that Osuna was the killer was substantial. Osuna's brother was shot several days before Guerrero was shot. Two witnesses testified that Osuna jumped into a white Volkswagen Beetle to pursue Guerrero's car as it drove past. One of them testified that Osuna did so in the belief that the "fools" in the car had shot his brother. That same witness testified that Osuna told her a short time later that he had shot a "fool." Even so, Osuna was never investigated as a suspect in this case. Indeed, the prosecutor in this case expressly told the police not to pursue an investigation of Osuna.

. . .

Brady Evidence

Unbeknownst to defense counsel at the time of trial, the prosecution had stipulated in another case only a few months earlier that Reilly, the scent dog, had made mistaken identifications on two prior occasions. In People v. White, No. BA 212658 (L.A.Cty.Super.Ct. Mar. 19, 2002), the prosecution sought to introduce testimony from [Reilly's handler] about a scent identification made by Reilly implicating White. The prosecution stipulated that in November 1997 Reilly had identified two different men as the source of scent on the murder suspect's shirt, and that in a 2001 case, People v. Bruner, No. BA 216390 (L.A.Cty.Super.Ct.), Reilly had identified as the perpetrator of a crime an individual who was in prison at the time the crime was committed. After an evidentiary hearing on dog scent lineups, the White court ruled that the dog scent procedures [Reilly's handler] used with Reilly "were so flawed" that the judge would "not allow the dog scent lineup in."

After the White case concluded, the Los Angeles County Public Defender wrote a letter to the Los Angeles District Attorney, Steven Cooley, dated March 20, 2002 [in which he asserted that the facts of the White case constituted Brady material [under Brady v. Maryland, 373 U.S. 83 (1963)] and should be disclosed to defense attorneys in cases where evidence of Reilly's alerts would be presented].

By the time the prosecution introduced the dog scent evidence in Aguilar's case, Reilly no longer worked as a scent dog.

The Los Angeles District Attorney's office prosecuted Aguilar's case six months after the White case concluded. At Aguilar's trial, the prosecutor trying the case did not disclose to the defense the earlier mistaken identifications, the stipulation in the White case, or the letter to District Attorney Cooley from the County Public Defender. Aguilar's trial counsel moved to strike the dog scent evidence for foundation, but not for relevance or admissibility. Counsel has since declared that he would have objected to the evidence's admissibility had he been aware of

> Reilly's history of mistaken identifications, of the White stipulation, or of the letter to Cooley.

ISSUE AND RULING: Did the prior mistaken scent identifications by a police canine constitute Brady material? (ANSWER BY NINTH CIRCUIT: Yes)

Result: Reversal of United States District Court (Central District California) order denying Gilbert R. Aguilar's petition for habeas corpus relief from his conviction for first-degree murder.

ANALYSIS:

The elements of a Brady claim are: (1) exculpatory or impeachment evidence; (2) suppressed by the state; and (3) resulting prejudice to the defendant ("materiality"). Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

1. Exculpatory or Impeachment Evidence

The Court concludes that the evidence is exculpatory, explaining:

> There is no doubt that Reilly's history of making erroneous scent identifications is exculpatory evidence. "[I]mpeachment, as well as exculpatory, evidence falls within Brady's definition of evidence favorable to the accused." United States v. Marashi, 913 F.2d 724, 732 (9th Cir. 1990) (internal quotation marks omitted). "Any evidence that would tend to call the government's case into doubt is favorable for Brady purposes." Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013) **July 13 LED:15**. The evidence not disclosed by the prosecution showed that Reilly had a record of mistaken scent identifications. Because Reilly's identification tied Aguilar to the white Volkswagen, the undisclosed evidence is unquestionably "favorable for Brady purposes." Id.

2. Suppressed by the State

The Court finds that the prosecutor's office was aware of the information and that knowledge was imputed to the trial prosecutor who failed to disclose it to the defense. The Court goes on to point out that even if the prosecutor's office had not possessed the information, Reilly's handler did, and even if he had not the Sheriff's office did. Under any scenario, the prosecutor was imputed with the knowledge and required to disclose.

3. Prejudice to the Defendant

The Court finds that the defendant was prejudiced:

> Brady evidence is material if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Kyles v. Whitley, [514 U.S. 419, 435 (1995) **Sept 95 LED:04**]. Aguilar does not need to prove that a different result would have occurred in his case. He needs to show only that the state court unreasonably decided that there was not "a reasonable probability of a different result."
>
> If the Brady evidence had been presented to the Aguilar court, it is virtually certain that the trial judge would have ruled as did the trial judge in White by excluding the evidence of Reilly's scent identification. In at least two

contemporaneous California state court trials, defense attorneys successfully challenged the admissibility of dog scent lineups. See White, No. BA 212658; People v. Rhoney, No. 94HF0957 (Orange Cty.Super.Ct.1998) (dog scent evidence excluded because it was more prejudicial than probative). One of those cases, White, was before the same court, with the same District Attorney's office, and involved the same dog. Further, shortly after Aguila's trial, the California Court of Appeal found that "evidence of Reilly's scent identification was admitted in error" in a different criminal proceeding because it was not adequately supported by scientific evidence. People v. Mitchell, 110 Cal.App.4th 772, 790–94, 2 Cal.Rptr.3d 49 (2003); see also People v. Willis, 115 Cal.App.4th 379, 381, 9 Cal.Rptr.3d 235 (2004) (finding in a case involving a different dog that "the dog scent evidence was improperly admitted").

The court in Aguilar's case already seemed receptive to excluding the dog scent evidence, even without knowledge of the stipulation in the White case. . . .

Even if [Reilly's handler's] testimony about Reilly had been admitted into evidence, at the very least a reasonable state court would have concluded that the Brady evidence provided powerful impeachment material. . . .

A reasonable state court would have concluded that there was a reasonable probability that the jury would have reached a different verdict if Reilly's dog scent identification had not been presented to the jury, or had been impeached by the evidence of Reilly's earlier misidentifications and the White court stipulations. The gunman's identity was the only issue in Aguilar's case. Absent Reilly's dog scent testimony, there was no corroborating evidence for the shaky eyewitness identifications. There was no forensic evidence, murder weapon, or confession. The prosecution did not tie Guerrero and Aguilar to each other in any way. The only motive given for the killing was the unsubstantiated suggestion that Guerrero had trespassed into the territory of Aguilar's Puente Street gang, and this theory was suspect given that Guerrero was shot numerous times at close range while his passengers—equally trespassing—were left unharmed. The prosecution's own gang expert testified that the fact that only Guerrero was shot indicates that he was the intended target, undercutting the government's theory that this was a gang rivalry shooting. Richard Osuna, a suspect who had a motive to commit a targeted shooting, and who more closely resembled the eyewitness descriptions, had not been investigated.
. . .

In every case where a federal or California state court has found dog tracking or scent identification Brady evidence to be immaterial, the defendant was convicted on evidence stronger than, and independent from, the dog scent identification. In such cases, there was physical evidence to support the conviction, see Epperly v. Booker, 997 F.2d 1, 10 (4th Cir. 1993) (bloodstained clothes with head hair resembling Epperly's hair), a known relationship between the defendant and the victim, see Sherer v. Stewart, No. 06–1635–RSM–JPD, 2008 U.S. Dist. LEXIS 118661 at *3, *57–59 (W.D. Wash. June 20, 2008) (history of violence toward victim); Willis, 115 Cal.App.4th at 387, 9 Cal.Rptr.3d 235 (same), or other evidence corroborating guilt, see Sherer v. Sinclair, 476 Fed.Appx. 443, 443 (9th Cir. 2012) (mem.) ("[G]iven the strength of the evidence against petitioner versus the relative weakness of the dog tracking evidence, petitioner has not demonstrated a reasonable probability that disclosure of the

allegedly suppressed dog tracking report would have produced a different result."); People v. Herrera, No. B181092, 2006 WL 2773702, at *3, *9–10, 2006 Cal.App. Unpub. LEXIS 8638, at *8, *28 (Cal.Ct.App. Sept. 28, 2006) (mem.) (defendant testified and admitted he lied); Mitchell, 110 Cal.App.4th at 794, 2 Cal.Rptr.3d 49 (admission to third party of guilt); People v. Rivera, No. B166838, 2004 WL 2601335, at *1–2, *6–7, 2004 Cal.App. Unpub. LEXIS 10517, at *3–4, *20 (Cal.Ct.App. Nov. 17, 2004) (perpetrator chased and arrested minutes after attack). In each of these cases, the evidence to convict was sufficient even absent the dog scent identification because the prosecution had independently proven guilt beyond a reasonable doubt. Here, in contrast, the only evidence in addition to Reilly's scent identification was shaky eyewitness testimony.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: TRIAL ORDERED IN CASE INVOLVING TASING OF ALLEGEDLY OBSRUCTING BYSTANDER WHO DID NOT BACK UP WHEN ORDERED – In Gravelet-Blondin v. [Named Officer] and City of Snohomish, ___F.3d ___, 2013 WL 4767182 (9th Cir., Sept. 6, 2013), a three-judge Ninth Circuit panel rules 2-1 a case must go to trial for a fact-finder to determine reasonableness of a law enforcement officer's tasing of a bystander alleged by the officer to have passively obstructed a police action involving the alleged obstructer's suicidal elderly neighbor.

The Ninth Circuit panel's majority opinion describes the factual and procedural background as follows:

> In the early evening of May 4, 2008, [a sergeant] and four other officers from the Snohomish, Washington Police Department were dispatched to respond to a 911 call of a suicide in progress made by family members of an elderly suspect, Jack [Hawes]. When the officers arrived at Jack's home he was sitting in his car, which was parked in the side yard of his house, with a hose running from the exhaust pipe into one of the car's windows. The officers had been warned that Jack owned a gun and would have it with him. [A sergeant] took precautions to ensure officer safety and then asked Jack to get out of the car.
>
> After several requests Jack finally complied, turning his car off and stepping out with his hands at his sides. When Jack refused multiple commands to show his hands, [the sergeant] —concerned that Jack might gain access to a gun— instructed another officer to tase Jack in dart mode. Jack fell to the ground and, as officers attempted to restrain and handcuff him, he pulled his arms underneath him. He was then tased a second time.
>
> Donald and Kristi Gravelet-Blondin ("the Blondins"), Jack's neighbors, were watching TV at home when the police arrived at the scene. They heard noise coming from the direction of Jack's house and went outside—Donald Blondin ("Blondin") in shorts, a t-shirt, and slippers—to investigate and make sure their neighbor was all right. When they stepped into the yard between Jack's house and their own, the Blondins heard Jack moaning in pain, and Blondin saw officers holding Jack on the ground.
>
> Blondin called out, "what are you doing to Jack?" He was standing some thirty-seven feet from Jack and the officers at the time, with Jack's car positioned in

> between. [*Court's footnote*: *Blondin's calculation is based on measurements he took the day after the incident; officers on the scene took no measurements and have given varying estimates as to how far away Blondin was standing, ranging from ten to twenty-five feet*.] At least two of the officers holding Jack yelled commands at Blondin: one instructed him to "get back," while another told him to "stop." According to a bystander watching the scene unfold, Blondin took one or two steps back and then stopped. Blondin recalls that he simply stopped. [The sergeant] then ran towards Blondin pointing a taser at him and yelling at him to "get back." Blondin froze. The bystander testified that Blondin "appeared frozen with fear," and [the law enforcement defendants] have conceded that he made no threatening gestures.
>
> [The sergeant] began to warn Blondin that he would be tased if he did not leave, but fired his taser before he had finished giving that warning. [The sergeant] tased Blondin in dart mode, knocking him down and causing excruciating pain, paralysis, and loss of muscle control. Blondin, disoriented and weak, began to hyperventilate. [The sergeant] asked Blondin if he "want[ed] it again" before turning to Ms. Blondin and warning, "You're next." [The sergeant] then ordered another officer to handcuff Blondin. Paramedics called to the scene removed the taser's barbs from Blondin's body and tried to keep him from hyperventilating. Blondin was arrested and charged with obstructing a police officer, a charge that was ultimately dropped.
>
> The Blondins then initiated this action, suing the City of Snohomish ("the City") and [the sergeant] for excessive force and unlawful arrest in violation of 42 U.S.C. § 1983, and malicious prosecution in violation of Washington law, for the tasing and arrest of Blondin. Ms. Blondin also sued for outrage under state law for the harm she suffered watching her husband's tasing and being threatened with tasing herself. After considering cross-motions for summary judgment, the district court granted summary judgment to [the law enforcement defendants] on all claims.

[Footnote describing nature of taser in dart mode omitted]

In order for government actors to prevail on summary judgment in a Civil Rights case, the factual allegations must be viewed in the best light for the plaintiffs (here, the Blondins). The majority opinion first determines that, taking the evidence in the light most favorable to the Blondins, the discharge of a taser in dart mode was more than "trivial" force, which is the maximum level of force permitted for arresting a passive person for a minor offense. The majority opinion thus concludes that using the taser in dart mode was unreasonable given that, in the view of the majority judges: (1) Donald's alleged crime of obstructing was a minor offense; (2) there was no reason to believe, based on his passive behavior, demeanor, and distance from the officers, that he posed an immediate threat to anyone's safety; and (3) the officer's giving of a warning before using the taser was not meaningful because he did not give Blondin a chance, after the warning, to comply with the order to back up. The majority opinion further holds that the police officer who tased Donald is not entitled to qualified immunity because it was well known as of 2008 that a taser in dart mode constituted more than trivial force.

The majority opinion also reverses the U.S. District Court's summary judgment on plaintiffs' excessive force claim against the City and remanded the case for trial on whether a <u>former</u> agency policy, custom or practice that was in effect at the time of the incident — and had placed the taser at the lowest level of force — was the "moving force" behind the tasing. The majority

opinion further holds that a genuine issue of fact remains as to whether there was probable cause to arrest Donald for obstructing a police officer. The opinion instructs the District Court on remand to consider whether qualified immunity or agency Civil Rights liability applies to the unlawful arrest claim. Finally, the panel reverses the District Court's summary judgment on plaintiffs' common law claims for malicious prosecution and outrage.

Dissenting, Judge Jacqueline H. Nguyen argues that the majority has gone badly astray on all of the issues because the majority judges have lost sight of the specific factual context of this case, and they employed hindsight rather than viewing the scene through the eyes of a reasonable officer.

Result: Reversal of United States District Court (Western District Washington, Seattle) order granting summary judgment to all law enforcement defendants; case remanded for trial.

LED EDITORIAL NOTES: Many LED readers will want to read the full majority and dissenting opinions in the Gravelet-Blondin case. As we point out in the resources boilerplate at the end of each LED, Ninth Circuit published opinions can be accessed (by date of decision and other search methods) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov] and clicking on "Opinions."

Among the Ninth Circuit's use of force Civil Rights Act decisions discussed in the majority and dissenting opinions are: Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) (beanbag application); Headwaters Forest Defense v. County of Humboldt, 276 F.3d 1125 (9th Cir. 2002) (pepper spray); Bryan v. McPherson, 630 F.3d 805 (9th Cir. 2010) (taser); Mattos v. Agarano, 661 F.3d 433 (9th Cir. 2011) (taser); and Nelson v. City of Davis, 685 F.3d 867 (9th Cir. 2012) (pepperball projectile). LED entries on those cases, either digesting the cited opinion or an earlier opinion in the case that was not materially changed in the cited opinion, appeared in the following LEDs: Deorle (June 01 LED:05); Headwaters, Aug 00 LED:05; Bryan (Sept 10 LED:07); Mattos (Jan 12 LED:02); and Nelson (Dec 12 LED:05).

(2) CIVIL RIGHTS ACT LAWSUIT: THREATENING STATEMENTS MADE BY STUDENT ARE NOT ENTITLED TO FREE SPEECH PROTECTION – In Wynar v. Douglas County School Dist., ___ F.3d ___, 2013 WL 4566354 (9th Cir., Aug. 29, 2013), a three-judge Ninth Circuit panel holds that threatening statements made by a student do not constitute First Amendment protected speech.

The Court describes the facts and proceedings as follows:

> When the events at issue occurred, Landon was a sophomore at Douglas High School. He collected weapons and ammunition and reported owning various rifles, including a Russian semi-automatic rifle and a .22 caliber rifle.
>
> Landon communicated regularly with friends from school by exchanging instant messages through the website MySpace. . . .
>
> Among other things, Landon wrote frequently about weapons, going shooting, and World War II (often mentioning Hitler, whom he once referred to as "our hero"). His messages also expressed social insecurity, stating, for example, "[my parents] also don't like me just like everyone at school," and "its ignore landon day everyday." Some months into his sophomore year, Landon's MySpace messages became increasingly violent and disturbing. They included the

following statements, all centered around a school shooting to take place on April 20 (the date of Hitler's birth and the Columbine massacre and within days of the anniversary of the Virginia Tech massacre):

> "its pretty simple / i have a sweet gun / my neighbor is giving me 500 rounds / dhs is gay / ive watched these kinds of movies so i know how NOT to go wrong / i just cant decide who will be on my hit list / and thats totally deminted and it scares even my self"
>
> "i havent decided which 4/20 i will be doing it on / by next year, i might have a better gun to use such as an MI cabine w/ a 30 rd clip . . . or 5 clips . . . 10?"
>
> "and ill probly only kill the people i hate?who hate me / then a few random to get the record"
>
> [in response to a statement that he would "kill everyone"] "no, just the blacks / and mexicans / halfbreeds / athiests / french / gays / liberals / david"
>
> [referring to a classmate] "no im shooting her boobs off / then paul (hell take a 50rd clip) / then i reload and take out everybody else on the list / hmm paul should be last that way i can get more people before they run away . . . "
>
> "she only reads my mesages and sometimes doesnt even do that. / shes # 1 on 4/20"
>
> "ya i thought about ripping someones throat out with one. / wow these r weird thoughts . . . / then raping some chicks dead bodies to? no. maybe. idk."
>
> "that stupid kid from vtech. he didnt do shit and got a record. i bet i could get 50+ people / and not one bullet would be wasted."
>
> "i wish then i could kill more people / but i have to make due with what i got. / 1 sks & 150 rds / 1 semi-auto shot gun w/sawed off barrle / 1 pistle"

Although Landon's friends apparently joked with him at times about school violence, the tenor of these escalating comments alarmed them, and they corresponded with each other to decide what to do. . . .

[Two of his friends] went to a football coach whom they trusted and then, together with the coach, they talked to the school principal about their concerns. They told the principal that they had information about a possible school shooting. After two police deputies interviewed the boys and saw the MySpace printouts, they questioned Landon in the principal's office.

After the police took Landon into custody, school administrators met with him and asked if he wanted his parents to be present for their discussion. Landon said that he did not. They asked Landon about the MySpace messages, which he

admitted writing but claimed were a joke. After providing a signed, written statement, Landon was suspended for 10 days.

The school board charged Landon with violating Nev.Rev.Stat. § 392.4655, among other things, and convened a formal hearing. Section 392.4655(1)(a) provides that a student will be deemed a habitual discipline problem if there is written evidence that the student threatened or extorted another pupil, teacher, or school employee. Under Nev.Rev.Stat. § 392.466(3), a student who is deemed a habitual disciplinary problem must be suspended or expelled for at least a semester. At the school board hearing, Landon was represented by an attorney. He had the opportunity to call witnesses and present evidence, which he chose not to do, and to cross-examine the school's witnesses. Landon testified at the hearing. The board held that he violated § 392.4655 and expelled him for 90 days.

Landon and his father, acting as guardian, sued the school district, school administrators, and school district officials and trustees (collectively, Douglas County) for violations of Landon's constitutional rights under 42 U.S.C. § 1983, as well as for negligence and negligent infliction of emotional distress. The district court denied Landon's motion for summary judgment and granted Douglas County's motion for summary judgment. The material facts are not in dispute.

[Footnotes and citations omitted]

The Court's analysis of the First Amendment issue is, in part, as follows:

One of the difficulties with the student speech cases is an effort to divine and impose a global standard for a myriad of circumstances involving off-campus speech. A student's profanity-laced parody of a principal is hardly the same as a threat of a school shooting, and we are reluctant to try and craft a one-size fits all approach. We do not need to consider at this time whether Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 406 (1969) applies to all off-campus speech such as principal parody profiles or websites dedicated to disparaging or bullying fellow students. These cases present challenges of their own that we will no doubt confront down the road. Nor do we need to decide whether to incorporate or adopt the threshold tests from our sister circuits, as any of these tests could be easily satisfied in this circumstance. Given the subject and addressees of Landon's messages, it is hard to imagine how their nexus to the school could have been more direct; for the same reasons, it should have been reasonably foreseeable to Landon that his messages would reach campus. Indeed, the alarming nature of the messages prompted Landon's friends to do exactly what we would hope any responsible student would do: report to school authorities. Here we make explicit what was implicit in LaVine [v. Blaine School Dist., 257 F.3d 981 (9th Cir. 2001)]: when faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of Tinker.

As we wrote in LaVine: "Given the knowledge the shootings at Columbine, Thurston and Santee high schools, among others, have imparted about the potential for school violence . . . we must take care when evaluating a student's First Amendment right of free expression against school officials' need to provide a safe school environment not to overreact in favor of either." 257 F.3d at 983.

> The approach we set out strikes the appropriate balance between allowing schools to act to protect their students from credible threats of violence while recognizing and protecting freedom of expression by students.
>
> B. APPLICATION TO LANDON'S MY SPACE MESSAGES
>
> Confronted with messages that could be interpreted as a plan to attack the school, written by a student with confirmed access to weapons and brought to the school's attention by fellow students, Douglas County faced a dilemma every school dreads. As the Eleventh Circuit noted in a similar case, "[w]e can only imagine what would have happened if the school officials, after learning of [the] writing, did nothing about it" and Landon did in fact come to school with a gun. Boim v. Fulton Cnty. Sch. Dist., 494 F.3d 978, 984 (11th Cir. 2007). "School officials have a difficult task in balancing safety concerns against chilling free expression." LaVine, 257 F.3d at 992. Under the circumstances of this case, Douglas County did not violate Landon's First Amendment rights by expelling him for 90 days.
>
> Under Tinker, schools may restrict speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities" or that collides "with the rights of other students to be secure and to be let alone." 393 U.S. at 508. Such speech is "not immunized by the constitutional guarantee of freedom of speech." Id. at 513. It is an understatement that the specter of a school shooting qualifies under either prong of Tinker.

[Footnotes and some citations omitted]

Result: Affirmance of United States District Court (Nevada) summary judgment dismissal of plaintiff's lawsuit.

(3) CIVIL RIGHTS ACT LAWSUIT: PAROLEE IS ENTITLED TO DAMAGES BASED ON FIRST AMENDMENT VIOLATION FOR BEING REQUIRED, AS A CONDITION OF PAROLE, TO ATTEND A FAITH BASED DRUG TREATMENT PROGRAM THAT REQUIRED THAT HE ACKNOWLEDGE A HIGHER POWER – In Hazle v. Crofoot, ___ F.3d ___, 2013 WL 4490317 (9th Cir., Aug. 23, 2013), a three-judge Ninth Circuit panel holds that a parolee is entitled to compensatory damages after being incarcerated when his parole was revoked for refusing to participate in a faith-based drug treatment program.

The Ninth Circuit opinion summarizes the case as follows:

> In 2007, citing "uncommonly well-settled case law," we held that the First Amendment is violated when the state coerces an individual to attend a religion-based drug or alcohol treatment program. Inouye v. Kemna, 504 F.3d 705, 712, 716 (9th Cir. 2007). Plaintiff Barry Hazle is an atheist who, over his numerous objections, was forced as a condition of parole to participate in a residential drug treatment program that required him to acknowledge a higher power. When Hazle refused, he was removed from the treatment program and arrested; his parole was revoked, and he was imprisoned for an additional 100 days.
>
> Hazle subsequently filed this suit, seeking damages and injunctive relief for the deprivation of his First Amendment rights. The district judge held, consistent with

the "uncommonly well-settled case law," that the state defendants in this case were liable for the violation that Hazle alleged—a finding that the state defendants do not appeal. Nevertheless, the jury, which addressed only the issue of damages, awarded Hazle zero damages for the violation of his constitutional rights.

We hold that the district judge erred in denying Hazle's motion for a new trial based on the jury's failure to award damages, and therefore reverse. We also hold that the district judge erred in instructing the jury to determine whether liability should have been apportioned among the multiple defendants in this case and in dismissing certain other of Hazle's claims. Accordingly, we remand to the district court for, inter alia, a new trial against the state defendants on the issue of damages.

Result: Reversal of United States District Court (Eastern District California) denial of Barry A. Hazle's motion for new trial following jury's award of zero damages.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) ONCE A COMPETENCY EVALUATION IS FILED WITH THE COURT IT IS SUBJECT TO THE PRESUMPTION OF OPENNESS; REDACTION, RATHER THAN SEALING ENTIRE EVALUATION, IS NOT AN ABUSE OF DISCRETION – In State v. Chen, ___ Wn.2d ___, 2013 WL 4758248 (Sept. 5, 2013), the Washington State Supreme Court holds that "once a competency evaluation becomes a court record, it also becomes subject to the constitutional presumption of openness, which can be rebutted only when the court makes an individualized finding that the [Seattle Times Co. v. Ishikawa 97 Wn.2d 30 (1982)] factors weigh in favor of sealing." The superior court's decision to order redaction, rather than sealing entire competency evaluation, was not an abuse of discretion.

The Court's analysis is in part as follows:

> A person found incompetent cannot be tried, convicted, or sentenced. If reason exists to doubt the defendant's competency, the court must order a competency examination and report. These competency evaluations are authorized pursuant to chapter 10.77 RCW, which, according to the parties, also specifies that these evaluations should be disclosed only to certain entities. This provision states:
>
> > Except [for certain situations not relevant here], all records and reports made pursuant to this chapter, shall be made available only upon request, to the committed person, to his or her attorney, to his or her personal physician, to the supervising community corrections officer, to the prosecuting attorney, to the court, to the protection and advocacy agency, or other expert or professional persons who, upon proper showing, demonstrates a need for access to such records.
>
> RCW 10.77.210(1).
>
> Chen argues that this limitation on disclosure should create a presumption that competency evaluations, even once they become court records, remain private. However, as the State correctly responds, such a presumption of privacy

> arguably conflicts with our state constitutional requirement that all court records be presumptively open to public view. We have generally recognized that the presumption of openness can be overcome only if the Ishikawa factors, which balance these privacy concerns, weigh in favor of sealing. Even if sealing is appropriate, the court should attempt to use redaction rather than wholesale sealing of the entire document.

[Footnotes and some citations omitted]

Concurrence: Justice Gordon McCloud files a concurring opinion.

Result: Affirmance of King County Superior Court order denying Louis Chao Chen's motion to seal his entire competency evaluation in his prosecution for first degree murder.

(2) PROSECUTOR MAY CONSIDER STRENGTH OF EVIDENCE, ALONG WITH FACTS AND CIRCUMSTANCES OF CRIME, WHEN DETERMINING WHETHER TO SEEK THE DEATH PENALTY – In State v. McEnroe; State v. Anderson, ___ Wn.2d ___, 2013 WL 4759268 (Sept. 5, 2013) the Washington State Supreme Court unanimously holds that the King County prosecutor did not violate chapter 10.95 RCW (death penalty statute) by considering the strength of the evidence against the defendants when making the determination of whether to seek the death penalty.

The Court summarizes its opinion as follows:

> RCW 10.95.040(1) directs the prosecutor to "file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." The prosecutor in this case complied with the statute in question by considering mitigating circumstances and determining that there was reason to believe that the mitigating circumstances were not sufficient to merit leniency. That the prosecutor also considered the strength of its case in making this determination is of no consequence. We therefore reverse the trial court and remand with instructions to reinstate the notices of special sentencing proceeding so that the cases against McEnroe and Anderson may proceed to trial.

Result: Reversal of King County Superior Court order striking notices of special death penalty sentencing in the prosecutions of Joseph T. McEnroe and Michele Kristen Anderson for six counts of aggravated first degree murder (for the 2007 murder of Anderson's family in Carnation). Cases remanded for trial and determination of death penalty.

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WASHINGTON STATE COURT OF APPEALS

EVIDENCE HELD SUFFICIENT (1) TO ESTABLISH "TRUE THREAT" IN EMAIL COMMUNICATIONS TO GOVERNOR AND (2) TO CONVICT DEFENDANT OF MAKING THREATS AGAINST THE GOVERNOR AND HER FAMILY

State v. Locke, ___ Wn. App. ___, 2013 WL 3999814 (Div. II, Aug. 6, 2013)

Facts and Proceedings below: (Excerpted from majority opinion)

In the early morning of January 25, 2011, Locke sent two e-mail messages to the Governor through a section of the Governor's web site entitled "Contact Governor Gregoire." The web page required the sender's first and last name, e-mail address, physical address, city, state, and zip code as contact information.

In his first e-mail, sent at 6:09 AM, Locke identified himself as "Robb Locke" and provided a phone number; an e-mail address, "robblocke2004 @yahoo.com"; a zip code, 98334; and a state, Washington. For his address, Locke entered "1313 Mockingbird Lane," an address used in the television comedy "The Munsters." For his city, he entered "Gregoiremustdie." His message stated,

> I hope you have the opportunity to see one of your family members raped and murdered by a sexual predator. Thank you for putting this state in the toilet. Do us a favor and pull the lever to send us down before you leave Olympia.

At 6:11 AM, Locke used the web page to send a second e-mail, providing the same contact information. His second message stated, "You f---ing CUNT!! You should be burned at the stake like any heretic."

Finally, at 6:13 am, Locke accessed another section of the Governor's web site titled, "Invite Governor Gregoire to an Event." Through a form on this web page, Locke requested an event, again identifying himself as "Robb Locke," noted that he lived in Washington state, and identified his organization as "Gregoire Must DIe [sic]." He requested that the event be held at the Governor's mansion and stated the event's subject would be "Gregoire's public execution." He wrote that the Governor's role during the event-would be "Honoree," the event would last 15 minutes, the media would be invited, and the audience's size would be greater than 150.

Barbara Winkler, the Governor's executive scheduler, discovered Locke's event request when she arrived at work the morning of January 25. The request alarmed her, and she considered it as serious because it occurred shortly after a recent shooting of an elected official in Arizona. *[Court's Footnote: The Arizona shooting referred to by multiple witnesses in this case was the shooting of United States Representative Gabrielle Giffords. On January 8, 2011, a gunman shot Representative Giffords and 18 other people during a public meeting held in a supermarket parking lot in Arizona.]* She forwarded the event request to a member of the Executive Protection Unit (EPU) of the Washington State Patrol [WSP].

After speaking with Winkler, Rebecca Larsen, the Governor's executive receptionist, searched the computer system for the name Locke provided in the event request and discovered the two earlier e-mails from him. Because Larsen was "alarm[ed]" by the e-mails, she printed them and gave them to the EPU.

[A WSP Sergeant] of the EPU reviewed the e-mails and event request. After considering their content and the Arizona shootings, he interpreted them as "a serious threat to do harm to the governor." [The sergeant] reviewed the communications with [a WSP Detective], who dialed the telephone number provided with the e-mail. A male voice answered, and [the detective] asked if he was speaking with Locke. Locke answered yes, and [the detective] identified

himself and said he wanted to discuss the e-mails. Locke replied, "Yeah," and either hung up or lost cellular service. When [the detective] called back, the call went to voice mail.

[The detective and a trooper] went to an address believed to be Locke's residence and saw someone matching Locke's description walking down the street. [The trooper] contacted the individual. Locke identified himself and replied, "Yeah, I know why you're here . . . . I figured you guys would be contacting me." [The detective] then identified himself and said he had spoken with Locke on the telephone earlier that morning. Locke replied, "[Y]eah, I want you to know . . . I didn't hang up on you, I have poor cell service." [The detective] then transported Locke to a state patrol office.

At the office, Locke acknowledged that he sent the e-mails and an event request from a computer in his residence. He stated that he did this because, while Governor Gregoire was the attorney general, he had filed a complaint with that office about an employer depriving him of his last two paychecks, and the attorney general's office failed to follow up. In October 2010, Locke became unable to work because of a back condition, and the Department of Social and Health Services twice reduced benefits he was receiving. When Locke awoke the morning of January 25, 2011, he was angry over those circumstances and having to walk three miles to physical therapy while in pain. He described his communications to the Governor as "giv[ing] her a piece of [his] mind," but he did not recall making any direct threats to her safety and had no intention of carrying out any threats. He "profusely apologize[d] for [his] temper" and said that "it was . . . the worst judgment" to have sent the communications, but he "needed the outlet at the moment . . . [a]nd, it was there."

The State charged Locke with one count of threats against the Governor or her family. A jury convicted him as charged. The trial court sentenced him to 12 months confinement and ordered a mental health evaluation. . . .

ISSUE AND RULING: Did the State present sufficient evidence that the defendant made a "true threat" against the Governor? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority)

Result: Affirmance of Pierce County Superior Court conviction of Robert Locke of making threats against the Governor and her family.

ANALYSIS: (Excerpted from majority opinion)

Locke was convicted under RCW 9A.36.090(1), which provides:

> Whoever knowingly and willfully deposits for conveyance in the mail or for a delivery from any post office or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the governor of the state or his or her immediate family . . . or knowingly and willfully otherwise makes any such threat against the governor . . . shall be guilty of a class C felony.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the

freedom of speech." Virginia v. Black, 538 U.S. 343, 358 (2003) **Aug 03 LED:04**. The First Amendment, though, does not extend to speech held to be unprotected, one category of which comprises "true threats." State v. Allen, 176 Wn.2d 611, 626, (2013).

A true threat is "a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Allen, 176 Wn.2d at 626 (internal quotation marks omitted) (quoting State v. Kilburn, 151 Wn.2d 36, 43 (2004) **Oct 04 LED:05**). To avoid violating the First Amendment, our Supreme Court has held that it will "interpret statutes criminalizing threatening language as proscribing only unprotected true threats." Allen, 176 Wn.2d at 626. Consequently, we construe RCW 9A.36.090(1) as prohibiting only true threats.

A true threat is a serious threat, not one said in jest, idle talk, or political argument. Kilburn, 151 Wn.2d at 43 (citing United States v. Howell, 719 F.2d 1258, 1260 (5th Cir. 1984)). Stated another way, communications that "bear the wording of threats but which are in fact merely jokes, idle talk, or hyperbole" are not true threats. State v. Schaler, 169 Wn.2d 274, 283 (2010) **May 11 LED:10**. The nature of a threat "depends on all the facts and circumstances, and it is not proper to limit the inquiry to a literal translation of the words spoken." State v. C.G., 150 Wn.2d 604, 611 (2003). Statements may "connote something they do not literally say . . . . " Planned Parenthood of Columbia/Willamette, Inc. v. A.L.C.A., 290 F.3d 1058, 1085 (9th Cir. 2002). Consistently with this recognition, our court has held that "whether a statement is a true threat or a joke is determined in light of the entire context" and that a person can indirectly threaten to harm or kill another. See Kilburn, 151 Wn.2d at 46, 48. Further, "[t]he speaker of a 'true threat' need not actually intend to carry it out. It is enough that a reasonable speaker would foresee that the threat would be considered serious." Schaler, 169 Wn.2d at 283 (citation omitted).
. . .

With these principles in mind, we turn to whether any of Locke's communications constituted a true threat. Locke's first e-mail identified his city as "Gregoiremustdie" and stated his desire for the Governor to witness a family member "raped and murdered by a sexual predator." The e-mail also stated that the Governor had "put this state in the toilet" and requested that she "pull the lever to send us down before you leave Olympia."

Although identifying his city as "Gregoiremustdie" is surely menacing, the force of the message itself is the desire that the Governor see a family member raped or murdered, coupled with the opinion that the Governor had put the state "in the toilet." Although crude and upsetting, this is more in the nature of hyperbolic political speech, predicting threatening personal consequences from the state's policies. Under the standards above, this does not rise to the level of a true threat, as recently defined in Allen.

Locke's second e-mail, sent only two minutes later, intensified in its violent tone and content. In this e-mail, Locke again identified his city as "Gregoiremustdie"; addressed the Governor with an emphatic, gender-specific epithet; and expressed his opinion that she should be "burned at the stake like any heretic."

Unlike the first e-mail, this expresses more than the desire that the Governor's policies will lead to horrible consequences to her family. Rather, its message, expressed twice, is that the Governor should be killed.

Its passive phrasing, though, blunts the implication that Locke is threatening to do this himself. As the dissent points out, Locke's message is that someone should kill the Governor, not that he intends to. The dissent argues also that since burning heretics at the stake is a historically political act, the second e-mail is removed from the realm of a true threat in the same way the first e-mail was protected by its political content. There is a conceptual gulf, though, between the first e-mail's hope that the Governor's family would suffer harm from the Governor's policies and the message of the second e-mail that the Governor should be killed in a horrible way once reserved for religious and political dissenters. The ancient political or religious pedigree of burning at the stake in no way transforms its menace into legitimate political speech today.

Even so, under Allen, the passive and impersonal phrasing of this sort of statement would at best reach only the margins of a true threat; viewed in isolation, we cannot deem it unprotected speech. However, it and the event request discussed below, considered together, do cross into the territory of a true threat.

Locke's event request, sent only two minutes after the second e-mail, further escalated the violent tone and content of his communications. Locke sent the request through a section of the Governor's web site entitled "Invite Governor Gregoire to an Event." He identified his organization as "Gregoire Must DIe [sic]," requested that the event be held at the Governor's mansion, and stated the subject of the event would be "Gregoire's public execution," at which she would be the "Honoree."

We must consider these facts in light of Locke's own admission that he was aware of Representative Giffords's shooting 17 days earlier. In such a context, a reasonable speaker would foresee that the Governor would take seriously an invitation to her own public execution from "Gregoire Must DIe [sic]," especially in light of the rapid progression of Locke's communications from expressing his displeasure with her to his blunt desire for her death. Although Locke did not directly state that he himself would kill her, a direct threat is not required for his communications to constitute a true threat.

The menace of the communication was further heightened by its specificity. Locke requested a 15–minute event at the Governor's mansion, with media present, with an audience of over 150, at which the Governor would be the honoree, and at which she would be publicly executed. These details throw the threat into higher relief and translate it from the realm of the abstract to that of the practical. They plainly suggest an attempt to plan an execution, even though Locke may have intended nothing.

Further, Locke had no preexisting relationship or communications with the Governor from which he might have an expectation that she would not take his statements seriously. In fact, all the witnesses from the Governor's office testified that they took Locke's communications as serious threats. Finally, Locke himself seemed to acknowledge that he knew his threats would be taken

seriously; he admitted that he knew why the state patrol contacted him, that he expected them to do so, and that he exercised "the worst judgment" in sending the communications.

The dissent asserts that the outlandishness of the event request means that no reasonable person would take it seriously. The threat, though, lay not in the possibility that the request would actually be granted or that a fire would be kindled beneath a stake. It lay, rather, in the escalation of the communications from passive abstraction to a more detailed plan for the Governor's murder, coupled with the repeated admonition that "Gregoire must die." The dissent asserts also that the short time between the e-mails shows a continuous statement, not an escalation of threats. To the contrary, the evidence shows a rapid-fire e-mail sequence of increasing specificity and menace. If anything, the short intervals between the e-mails suggest a troubling explosiveness lying behind them. That message would be taken seriously by a reasonable person.

The dissent asserts also that Locke's messages do not disclose any serious plan to harm the Governor. Underlying planning, however, is not an essential element of a true threat. In Schaler, underlying planning was simply evidence of circumstances that fell into the true threat category. Further, Schaler itself held that the speaker of a true threat need not actually intend to carry it out. Under both Schaler's rationale and its result, Locke's statements crossed well into the precincts of unprotected speech.

Finally, the contrast between the circumstances of the threat in Kilburn and Locke's communications highlight the more serious nature of Locke's actions. On its face, the eighth grader's statement to a classmate that he was "going to bring a gun to school tomorrow and shoot everyone and start with you" is chilling and serious. Kilburn, 151 Wn.2d at 39. The Court pointed out, though, that the speaker and the classmate had been talking about books they were reading and Kilburn's book involved the military and guns; that Kilburn had known the classmate for two years and had always been friendly to her; that he joked around with other students, including this classmate; and that he had been laughing when he made the statement. Kilburn, 151 Wn.2d at 52–53. These circumstances led our Supreme Court to deem this not a true threat. Nothing approaching these circumstances is present here.

The dissent also asserts that Locke's e-mails are protected by the First Amendment because they are political speech. In support, the dissent cites the Supreme Court's recognition "'of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide[ ]open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Watts v. United States, 394 U.S. 705, 708 (1969) (quoting N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964)).

As set out above, we recognize that the terms of the first e-mail are of an arguably political nature, and we, too, deem it to be protected speech. Locke's own statements, however, make clear that his motivation for sending the e-mails as a whole had nothing to do with public or political matters. He was upset at Governor Gregoire because, when she was attorney general, that office failed to follow up on a private complaint he had made. He was upset more generally because his state benefits had been reduced, and he was angry at having to

> walk to physical therapy while in pain. Locke's threats, consequently, were an expression of undiluted ire over a private grievance with the state, of which Gregoire was then Governor. The sentiments expressed in the second and third e-mails conveyed no view or position on public issues or policies. To suggest a "profound national commitment" to the protection of such threatening outbursts risks trivializing our critical commitment to uninhibited speech on public issues, even if it crosses into the vehement and caustic. The second and third e-mails were not political speech.
>
> Finally, the dissent notes that United States v. Lincoln, 403 F.3d 703, 704–05 (9th Cir. 2005), held that a true threat was not conveyed by a letter an inmate attempted to send to the President stating, in part: "You Will Die too George W Bush real Soon They Promissed [sic] That you would." If Locke had confined himself to the passive, indirect hopes that the Governor or her family would be harmed, found in the first two e-mails, Lincoln might be dispositive. Locke continued, though, with the increasingly specific and detailed threats described above. These escalating steps forfeited any protection of his threatening speech under Lincoln's rationale.
>
> We agree wholly with the dissent that the guarantee of free speech has its most important application to those with whom we disagree. There are limits, though, to its protection, and here those limits were crossed. Whether the event request is viewed alone or together with the second e-mail, a reasonable person would foresee that it would be interpreted as a serious expression of intention to harm or to kill another person. Thus, sufficient evidence supports the finding that Locke made a true threat.

[Some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) RCW 69.53.010(1)'S BAR TO USING PREMISES FOR CERTAIN DRUG PURPOSES HELD NOT APPLICABLE WHERE TENANT MERELY USED ROOM TO SELL DRUGS – In State v. Davis, ___Wn. App. ___, 2013 WL 4746819 (Div. II, Sept. 4, 2013), the Court of Appeals holds that RCW 69.53.010(1)'s prohibition against using certain types of premises in specified illegal drug activity does not apply where a tenant sold drugs from her residence, and where there is no evidence that the tenant made the room available to other people to use, store, or sell illegal drugs.

RCW 69.53.010(1) provides:

> It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW, legend drug under chapter 69.41 RCW, or imitation controlled substance under chapter 69.52 RCW.

In key part, the statutory analysis by the Court of Appeals is as follows:

> [O]ur de novo review of the statute establishes that it is inapplicable to the facts of this case. At trial, the State had to establish that Davis knowingly provided a space under her management or control as "an owner, lessee, agent, employee, or mortgagee," to others for storing, manufacturing, selling, or delivering drugs. RCW 69.53.010(1). Although the evidence clearly establishes that Davis worked at the Chieftain and sold drugs from the living quarters on the premises provided as part of her compensation, the record does not establish that Davis managed or controlled any portion of the motel other than the room she herself earned as wages from her position as a maid or that she knowingly made her room available for other people to use, store, or sell drugs.
>
> Very few Washington cases have addressed the "drug house" statute, but all those that have involve situations where someone who manages or controls a building knowingly allows someone else to use the building to sell, manufacture, or store drugs. State v. Sigman, 118 Wn.2d 442, 444 (1992) LED (1992) **May 92 LED:05**; State v. Bryant, 78 Wn. App. 805, 807 (1995) (homeowner knowingly allowed a tenant to grow marijuana in the home); State v. Roberts, 80 Wn. App. 342, 356 n. 14 (1996) **May 96 LED:16** (Roberts was not charged with violating either of Washington's 'crack house' statutes. . . . A landlord violates RCW 69.53.010(1) by knowingly acquiescing in such activity by a tenant or subtenant.").
>
> The plain language of RCW 69.53.010(1) is clear. The legislature intended to punish those managing or controlling property who allowed renters, lessees, etc., to manufacture, sell, store, or deliver drugs from the property with their knowledge. Here, nothing established that Davis acted as a landlord or, herself, allowed others to deal drugs from a space of which she maintained control. Accordingly, we vacate Davis's conviction for violation of RCW 69.53.010(1) and remand to the trial court for resentencing.

[Some citations revised; footnotes omitted]

Result: Reversal of Kitsap County Superior Court conviction of Tawana Lea Davis for violation of RCW 69.53.010; in an unpublished portion of the Court of Appeals opinion, the Court rejects arguments by the defendant challenging her additional convictions on three counts of unlawful delivery of a methamphetamine with school zone sentencing enhancements.

(2) EVIDENCE OF PREMEDITATION HELD SUFFICIENT TO SUPPORT FIRST DEGREE MURDER CONVICTION IN DEATH OF SPOUSE, AND, UNDER A TRANSFERRED INTENT THEORY, EVIDENCE ALSO HELD TO SUPPORT SECOND DEGREE ASSAULT CONVICTION FOR INJURY TO DAUGHTER WHO HAD TRIED TO BLOCK FATAL ATTACK – In State v. Aguilar, ___Wn. App. ___, 2013 WL 4426275 (Div. III, Aug. 20, 2013), the Court of Appeals rejects defendant's arguments that the evidence in his case is insufficient to support (1) the premeditation element of his first degree murder conviction for killing his wife, or (2) the intent element of his second degree assault conviction for causing injuries to his daughter when she tried to intervene in the fatal assault.

Premeditation

Premeditation distinguishes first and second degree murder where intentional killing is involved. Under Washington case law, premeditation involves a deliberate formation of and reflection upon the intent to take a human life and includes the mental process of thinking beforehand,

deliberation, reflection, and weighing or reasoning for a period of time, however short. Relevant factors include motive, procurement of a weapon, stealth, and method of killing. In key part, the Aguilar Court's analysis of the premeditation issue is as follows:

> The evidence establishes that Mr. Cortes had a motive to kill his wife—her possible involvement with another man. Mr. Cortes said during a police interview that he was suspicious about Ms. Arroyo Alejandre's telephone conversation with another man, and Dr. Kim testified that the daughter said the attack occurred because her father thought her mother had been cheating on him.
>
> Also, Mr. Cortes had time to reflect on his actions before killing Ms. Arroyo Alexandre. He began the attack on his wife by hitting her. Then, similar to [State v. Ortiz, 119 Wn.2d 294 (1992) **Sept 92 LED:06**] Mr. Cortes instituted his plan to kill his wife by leaving the living room to procure a weapon, a knife, from the kitchen. He returned to the living room with the knife and stopped her from leaving. Mr. Cortes continued the attack on his wife with the knife, stabbing her multiple times. The evidence indicates his use of stealth, as Mr. Cortes stabbed his wife even though his 13-year-old daughter attempted to block the attack by standing between Mr. Cortes and his wife.
>
> Last, Mr. Cortes's lengthy and excessive attack provides evidence of premeditation. Mr. Cortes inflicted five deep wounds and other defensive wounds, indicating a violent, prolonged struggle. Three of the wounds punctured Ms. Arroyo Alejandre's lung, a vital organ. He intended to stab her in the throat, although he claims that he did not expect the stabbing to kill her. After the attack, Mr. Cortes had the presence of mind to leave his home where the attack took place and to ask for help in hiding from law enforcement.

Transferred intent

The variation of second degree assault charged in this case required that the State prove that Mr. Cortes intentionally inflicted the injuries to his daughter when she tried to intervene. The Aguilar Court concludes that the doctrine of transferred intent supports the intent element of the second degree assault charge.

Under the doctrine of transferred intent, once the intent to inflict harm on one victim is established as to a particular attack, the intent element transfers to any other victim who is actually injured in the same attack. The State is not required to prove that the person actually injured is the person the defendant intended to injure. The Court explains:

> [T]he jury was permitted to conclude that Mr. Cortes's intent to assault Ms. Arroyo Alejandre transferred to his daughter. Evidence of such intent was presented at trial. According to [the Officer], Mr. Cortes admitted that he intended to injure Ms. Arroyo Alejandre with a knife. Mr. Cortes injured his daughter as she tried to block the assault. Therefore, based on the doctrine of transferred intent, there is sufficient evidence to support the conviction for second degree assault.

Result: Affirmance of Chelan County Superior Court conviction of Sebastian Cortes Aguilar for first degree murder of his wife and second degree assault of his daughter.

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NEXT MONTH

The December 2013 LED will include an entry on the pro-State 5-4 decision by the Washington Supreme court in State v. Byrd, ___ Wn.2d ___, 2013 WL 5570220 (Oct. 10, 2013). The Byrd decision reverses a decision of the Washington Court of Appeals that was reported in the **October 2011 LED**. The Supreme Court's majority opinion holds that, incident to a custodial arrest, officers have automatic authority to make a warrantless search of a purse or other item or container that is in the actual possession of the arrestee at the time or immediately prior to the point of arrest. This means that officers may search, incident to arrest, any purses, bags, other containers, and any clothing or other items (though of course not strip searching) that are in the arrestee's actual and exclusive possession at or immediately prior to the point of arrest. The search may be done even after the arrestee has been secured in a police vehicle, so long as the search is conducted reasonably contemporaneously to the arrest.

The Byrd majority opinion carefully points out, however, that this search incident to arrest authority under the Washington constitution does not extend to items that are only within reaching distance of the arrestee or are otherwise arguably only in the constructive possession of the arrestee. Also, the ruling by the Supreme Court in State v. Byrd does not change the Court's severe restriction under the Washington constitution on searches of vehicles incident to arrest.

One of the five justices in the Byrd majority writes a concurring opinion indicating that there may not have been probable cause to support the arrest of defendant Byrd. On remand, the defendant apparently is legally entitled to ask the trial court to look at the probable cause issue.

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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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