Law Enforcement Digest

APRIL 2014

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

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HONOR ROLL

697th Basic Law Enforcement Academy – October 22, 2013 through March 6, 2014

President:	Karsten Z. Garcia, Adams County SO
Best Overall:	Eric D. Kingery, Bellingham PD
Best Academic:	Eric D. Kingery, Bellingham PD
Best Firearms:	William S. Sorenson, Kent PD
Patrol Partner Award:	William S. Sorenson, Kent PD
Tac Officer:	Officer Jason Czebotar, Dep't of Fish & Wildlife

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

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

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

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NOTE REGARDING THE 2014 LEGISLATIVE UPDATE: In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. Beginning last year, we have included all of the legislation in a single stand-alone LED edition, similar to the Subject Matter Index. Once complete, the 2014 Legislative Update will be available on the Criminal Justice Training Commission's LED webpage.

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UNITED STATES SUPREME COURT

UNDER FOURTH AMENDMENT, AFTER DOMESTIC VIOLENCE SUSPECT WAS LAWFULLY ARRESTED AND REMOVED FROM RESIDENCE, HIS EARLIER OBJECTION TO POLICE ENTRY WAS NOT BARRIER TO POLICE SEARCH BASED ON NEW CONSENT FROM CO-RESIDENT VICTIM

Fernandez v. California, ___ U.S. ___, 2014 WL 794332 (Feb. 25, 2014)

Facts and Proceedings below: (Excerpted from the Supreme Court staff's syllabus of majority opinion; the syllabus of the opinion is not part of the opinion)

> Police officers observed a suspect in a violent robbery run into an apartment building, and heard screams coming from one of the apartments. They knocked on the apartment door, which was answered by Roxanne Rojas, who appeared to be battered and bleeding. When the officers asked her to step out of the

> apartment so that they could conduct a protective sweep, [Walter Fernandez] came to the door and objected.
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> Suspecting that he had assaulted Rojas, the officers removed [Fernandez] from the apartment and placed him under arrest. He was then identified as the perpetrator in the earlier robbery and taken to the police station. An officer later returned to the apartment and, after obtaining Rojas' oral and written consent, searched the premises, where he found several items linking [Fernandez] to the robbery.
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> The trial court denied [Fernandez's] motion to suppress that evidence, and he was convicted. The California Court of Appeal affirmed. It held that because [Fernandez] was not present when Rojas consented to the search, the exception to permissible warrantless consent searches of jointly occupied premises that arises when one of the occupants present objects to the search, Georgia v. Randolph, 547 U.S. 103 (2005) **May 06 LED:05** did not apply, and therefore, [Fernandez's] suppression motion had been properly denied.

ISSUE AND RULING: In Georgia v. Randolph, 547 U.S. 103 (2005) **May 06 LED:05**, the United States Supreme Court held under the Fourth Amendment that if two or more co-residents are present and one or more of them object to a law enforcement consent search, a subsequent search based on consent from another co-resident is not lawful against the still-present, objecting co-resident(s). Does Randolph continue indefinitely to protect an objecting co-resident when police lawfully arrest and take that co-resident from the residence, and police subsequently search under a voluntary consent obtained from another co-resident in the absence of the previously objecting co-resident? (ANSWER BY SUPREME COURT: No, rules a 6-3 majority, the objection in this case ceased to have effect once the objecting co-resident was arrested and taken away from the residence; the Fourth Amendment case law limits the Court to considering only objective factors, not subjective intent of the officers)

Result: Affirmance of decision of California appellate court, and thus affirmance of Fernandez's convictions for several crimes, including robbery and domestic violence assault.

ANALYSIS: (Excerpted from the Supreme Court staff's syllabus of majority opinion; the syllabus of the opinion is not part of the opinion)

> Randolph does not extend to this situation, where Rojas' consent was provided well after [Fernandez] had been removed from their apartment.
>
> (a) Consent searches are permissible warrantless searches, and are clearly reasonable when the consent comes from the sole occupant of the premises. When multiple occupants are involved, the rule extends to the search of the premises or effects of an absent, non-consenting occupant so long as "the consent of one who possesses common authority over [the] premises or effects" is obtained. However, when "a physically present inhabitant]" refuses to consent, that refusal "is dispositive as to him, regardless of the consent of a fellow occupant." Randolph. A controlling factor in Randolph was the objecting occupant's physical presence.
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> (b) [Fernandez] contends that, though he was not present when Rojas consented, Randolph nevertheless controls, but neither of his arguments is sound.

> (1) He first argues that his absence should not matter since it occurred only because the police had taken him away. Dictum [dictum is language in the opinion not necessary to decide the issue before the Court] in Randolph suggesting that consent by one occupant might not be sufficient if "there is evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," is best understood to refer to situations in which the removal of the potential objector is not objectively reasonable. [Fernandez] does not contest the fact that the police had reasonable grounds for his removal or the existence of probable cause for his arrest. He was thus in the same position as an occupant absent for any other reason.
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> (2) [Fernandez] also argues that the objection he made while at the threshold remained effective until he changed his mind and withdrew it. This is inconsistent with Randolph in at least two important ways. It cannot be squared with the "widely shared social expectations" or "customary social usage" upon which Randolph's holding was based. It also creates the sort of practical complications that Randolph sought to avoid by adopting a "formalistic]" rule, requiring that the scope of an objection's duration and the procedures necessary to register a continuing objection be defined.
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> (c) [Fernandez] claims that his expansive interpretation of Randolph would not hamper law enforcement because in most cases where officers have probable cause to arrest a physically present objector they also have probable cause to obtain a warrant to search the premises that the objector does not want them to enter. But he misunderstands the constitutional status of consent searches, which are permissible irrespective of the availability of a warrant. Requiring officers to obtain a warrant when a warrantless search is justified may interfere with law enforcement strategies and impose an unmerited burden on the person willing to consent to an immediate search.

[Citations omitted]

MAJORITY OPINION'S HOLDING IN REJECTING DEFENDANT'S PRETEXT ARGUMENT:

In rejecting defendant's argument that arresting him and taking him away from his residence, even though supported by probable cause, was a pretext to get consent from his girlfriend and conduct a search in his absence, the majority opinion explains that, with the exception of the inventory searches and administrative inspections, the Fourth Amendment does not look at subjective intent. The majority opinion continues with the following language:

> [O]nce it is recognized that the test is one of objective reasonableness, Fernandez's argument collapses. He does not contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with Rojas, an apparent victim of domestic violence, outside of [Fernandez's] potentially intimidating presence. In fact, he does not even contest the existence of probable cause to place him under arrest. We therefore hold that an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason.

The majority opinion also implies in its brief discussion of lower court decisions in a footnote that the Ninth Circuit's decision in United States v. Morgan, 516 F.3d 1117 (9th Cir. 2008) **April 08 LED:13** making a contrary interpretation of Randolph was wrongly decided and is overruled.

CONCURRING OPINIONS BY JUSTICE THOMAS AND BY JUSTICE SCALIA:

Justice Thomas, who joined the majority opinion authored by Justice Alito, argues in vain that Randolph was incorrectly decided and should be overturned, allowing one co-resident's consent to search to control over the objection of another present co-resident. Justice Scalia concurs in the Alito majority opinion and in the Thomas concurrence, and he adds his thoughts on what he sees as weaknesses in an argument in one of the amicus briefs on how property rights concepts might help the defendant (that property-rights argument is not addressed in the other opinions of the Court).

DISSENTING OPINION BY JUSTICE GINSBURG:

Justice Ginsburg authors a dissenting opinion joined by Justices Sotomayor and Kagan. The dissent primarily argues that officers could have applied for a search warrant in these circumstances, so there is no need to provide a broad third-party consent exception. The dissent appears to in part not be concerned about and in part not recognize the reality that in a number of circumstances consent to search will lead to evidence where officers lack probable cause for a search warrant.

LED EDITORIAL COMMENT: The big question for Washington's state and local law enforcement officers is whether this Fourth Amendment decision by the United States Supreme Court squares with article I, section 7 of the Washington constitution as the latter has been construed by the Washington Supreme Court. The Washington appellate courts have not yet issued a published opinion in a case with the factual scenario of this case, i.e., a case where a suspected DV perpetrator (or other criminal) denies consent to police entry, officers arrest him on probable cause and take him away from the residence, and later the same day officers ask the co-resident (whether victim or otherwise) for consent to search the residence.

We think that the Washington Supreme Court would probably uphold the consent search in domestic violence arrest circumstances, even over a defense argument that officers had mixed motives for the arrest. But we also think that the question is close and that any opinion upholding the search in these circumstances would be written much more narrowly than the majority opinion in Fernandez. And we once again note the obvious point that a search warrant is always the safer legal approach where probable to search can be established to conduct the same or broader search that consent would allow.

Three Washington Supreme Court decisions interpreting article I, section 7 of the Washington constitution have interpreted the Washington constitution as being more restrictive on law enforcement third-party consent searches than the Fourth Amendment. Those three decisions are: State v. Leach, 113 Wn.2d 735 (1989) (Court holds that where two business "partners" both were present and had dominion and control over business premises, officers were required to ask both for consent to search in order to get a consent that would apply against both of them; the Court holds that there is no need for a joint occupant to object in order to later challenge the earlier failure to ask him or her for consent); State v. Walker, 136 Wn.2d 767 (1998) Jan 99 LED:03 (Court holds that under the Leach rule, where both cohabitants were present at their residence and officers asked only one of them for consent to search their residence for marijuana, the subsequent search was

lawful only against the one who consented); and State v. Morse, 156 Wn.2d 1 (2005) Feb 06 LED:02 (Court holds that Leach rule was violated where leaseholder of apartment was in a bedroom, and officers sought consent to search the apartment only from a houseguest who answered their knock on the entry door; Court also holds that Washington's constitution, unlike the Fourth Amendment, does not have an "apparent authority" rule for third party consent searches).

We think that Leach, Walker and Morse do not help us determine what the Washington Supreme Court will do with the Fernandez scenario, except to the extent that they reflect, along with many other Washington Supreme Court decisions, that our Court often takes a different tack on search and seizure issues under article I, section 7 than does the United States Supreme Court in its interpretations of the Fourth Amendment. But we think that there is some guidance in the recent Washington Supreme Court decision in State v. Arreola, 176 Wn.2d 284 (2012) March 13 LED:07, holding that a "mixed motive" traffic stop is not unlawful even though the primary motive is the officer's desire to investigate a possible DUI, but the officer also consciously decides to make stop to address a minor traffic violation that he or she ordinarily enforces when no higher priority matter precludes that enforcement. We think that even though the Washington constitution, unlike the Fourth Amendment – (1) requires that officers ask all co-occupants on the premises for consent, and (2) considers subjective intent of officers in some search and seizure circumstances – permits officers to arrest on probable cause and take the arrestee away from the scene, and then ask the remaining co-habitant at the residence for consent to search. Also relevant here, and perhaps negating a pretext argument in the context of those circumstances where domestic violence assault arrest is mandatory, is the fact that RCW 10.31.100(2)(c) mandates the arrest and arguably makes the officers' subjective intent irrelevant.

But again, we think that the Washington Supreme Court, if it rules for law enforcement in the Fernandez-type circumstances, would write its rule much more narrowly than did the majority opinion in Fernandez. The Fernandez majority opinion suggested that even where officers merely detain a co-habitant on reasonable suspicion and take him or her outside or away from the threshold for questioning, consent effective against both co-habitants can be obtained solely from the other co-habitant. We think that would be contrary to the spirit, if not the direct holdings, under Leach, Walker and Morse requiring consent from all co-habitants who are present anywhere on the premises. We think that only if the objecting co-habitant is taken away from the premises under arrest would the consent by the other co-habitant be valid against the previously objecting co-habitant under article I, section 7 of the Washington constitution.

As always, we urge our law enforcement readers to consult their own legal advisors and/or local prosecutors on the issues addressed in the LED.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: NINTH CIRCUIT WILL RECONSIDER DECISION THAT HELD THAT POLICE CHIEF AND OFFICER ARE ENTITLED TO QUALIFIED IMMUNITY WHERE, PRIMARILY TO PROTECT A MISBEHAVING, DIFFICULT-TO-CONTROL 11-YEAR-OLD FROM RUNNING INTO TRAFFIC, THEY HANDCUFFED HIM AND TRANSPORTED HIM FROM SCHOOL TO A RELATIVE'S CARE – On February 3, 2014, the Ninth Circuit withdrew the three-judge panel's decision in C.B. v. City of Sonora, 730 F.3d 816 (9th Cir.,

Sept. 12, 2013) as reported in the **January 2014 LED** beginning at page 8. The February 3, 2014 order directs rehearing of the appeal by an en banc (i.e., 11-judge) panel.

(2) SPLIT COURT UPHOLDS STOP BY BORDER PATROL AGENTS, HOLDING THAT FACTS, INCLUDING THE EXPERIENCE OF THE BORDER PATROL AGENTS, ADD UP TO REASONABLE SUSPICION OF SMUGGLING OF ALIENS OR DRUGS – In United States v. Valdes-Vega, 738 F.3d 1074 (9th Cir., Dec. 24, 2013), by an 8-3 majority, an eleven judge panel of the Ninth Circuit disagrees with an earlier 3-judge panel's ruling and holds that federal Border Patrol Agents had reasonable suspicion of illegal smuggling of aliens or drugs to justify a stop of a vehicle headed north 70 miles from the U.S.-Mexican border on an interstate highway. We previously reported the 3-judge panel's 2-1 decision in United States v. Valdes-Vega, 685 F.3d 1138 (9th Cir., July 25, 2012) **Dec 12 LED:12**.

The majority opinion for the 11-judge panel relies on the U.S. Supreme Court decision in U.S. v. Arvizu, 534 U.S. 266 (2002) **April 02 LED:02**. Arvizu held that, in determining whether there is reasonable suspicion for a stop for criminal activity, courts must look at the totality of the circumstances of each case, including the experience and training of officers involved, to see whether the detaining officers had a particularized and objective basis for suspecting legal wrongdoing. The majority opinion determines that the following facts, when combined with the experience of the two Border Patrol agents, added up to reasonable suspicion of illegal smuggling of aliens or drugs:

> 1) The suspect's speeding (90 mph at times) and erratic driving pattern (at least 10 lane changes without signaling and weaving in and out of traffic) while being observed by following officers for at least five miles;
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> 2) The suspect's northerly direction of travel only 70 miles from the Mexican border on an interstate highway known for regular smuggling of drugs and illegal aliens;
>
> 3) The suspect's slowing down as he proceeded north past the northernmost federal Border Patrol checkpoint and his speeding up quickly as soon as he passed the checkpoint;
>
> 4) The vehicle's Mexican license plate only 70 miles from the Mexican border, making it more likely that the vehicle has recently come from Mexico;
>
> 5) The use of a pickup truck (an F-150), which is more common for smuggling than a sedan; and
>
> 6) The suspect's failure to make eye contact with an agent who pulled alongside him.

The dissenting opinions attempt to distinguish the facts from those in Arvizu.

Result: Affirmance of U.S. District Court (Central District of California) conviction of Rufino Ignacio Valdes-Vega for cocaine smuggling in violation of federal law.

LED EDITORIAL COMMENT: State, local and tribal officers in Washington do not, of course, enforce alien smuggling laws. But they do enforce drug laws, and, in any event, the principles of Arvizu apply to all types of criminal investigations. The totality of the circumstances, including the experience and training of the officers, must always be considered in determining whether officers have reasonable suspicion to seize a person or probable cause to arrest a person.

(3) CIVIL RIGHTS ACT FACIAL CONSTITUTIONAL CHALLENGE TO CITY ORDINANCE: SPLIT COURT DECLARES TO BE UNCONSTITUTIONAL A LOS ANGELES ORDINANCE MAKING IT A MISDEMEANOR FOR A HOTEL/MOTEL OPERATOR TO DENY POLICE RANDOM ACCESS TO GUEST REGISTER INFORMATION – In Patel v. City of Los Angeles, 738 F.3d 1058 (9th Cir., Dec. 24, 2013), an eleven-judge panel of the Ninth Circuit votes 7-4 under the Fourth Amendment to strike down that portion of a Los Angeles ordinances that makes it a misdemeanor for a hotel/motel operator to deny police random, warrantless, non-consenting access to a hotel/motel guest register.

The majority opinion concludes that under the Fourth Amendment such an ordinance must give the motel operator an opportunity to go to court to challenge such police access. The opinion states that certain traditionally closely regulated industries, such as firearms and mining, are not entitled to pre-compliance judicial review, but the hotel industry does not fit in that category of industry.

The majority opinion in Patel recognizes that the Ninth Circuit has ruled that a hotel/motel guest has no privacy protection under the Fourth Amendment from such random police access to the guest register. See United States v. Cormier, 220 F.3d 1103 (2000) **Oct 00 LED:04**. But the Patel majority opinion concludes that the operator has his or her own separate reasonable expectation of privacy in the register information. The majority opinion rejects one dissenting opinion's discussion of an "exigent circumstances" theory for access to a registry, asserting that such a theory is irrelevant to the constitutional issue presented to the Court in this particular case.

The United States Supreme Court has never addressed the issues of privacy rights of guests or operators in hotel/motel registries, though the Supreme Court precedents make it a near certainty that the Court would not extend Fourth Amendment privacy protection to a guest in registry information. More difficult to predict is what the Supreme Court would say about the rights of motel operators in this context.

Two dissenting opinions in Patel attack the majority opinion for, among other things, even considering the attack on the ordinance in a facial, as opposed to an as-applied, constitutional challenge.

Result: Los Angeles ordinance is ruled unconstitutional under facial constitutional analysis.

LED EDITORIAL COMMENTS: (1) Does it matter to the analysis that the Ninth Circuit looked at the ordinance as a nuisance-related ordinance, not as an aid to criminal investigation? The Patel majority opinion declares that it is giving the City the benefit of the doubt in looking at the ordinance as a nuisance-related ordinance as an aid to reducing prostitution and drug activity in temporary residences, rather than as an aid to criminal investigation by officers. We don't think this distinction by the Court makes a real difference in the analysis of the privacy rights of hotel/motel operators in guest registries.

(2) What about the Washington constitution's article I, section 7? No Washington court decision has ever addressed the question of whether hotel/motel operators have any privacy protection under the Washington or federal constitution.

The Washington Supreme Court has ruled that, unlike the Fourth Amendment, article I, section 7 of the Washington constitution provides some limited protection of the privacy

rights of guests in registry information. Thus, in State v. Jorden, 160 Wn.2d 121 (2007) July 07 LED:18, the Washington Supreme Court suppressed evidence where officers obtained registry information in a random check, and the information led to discovery of a criminal. And in In re Personal Restraint of Nichols, 171 Wn.2d 370 (2011) June 11 LED:21, the Court ruled that registry access did not violate a guest's rights where officers had reasonable suspicion of criminal activity in or near the room by a motel guest.

We are aware of one city ordinance in Washington (and we would guess that there are many more) that requires hotel/motel operators, with no right to pre-compliance judicial review, to give police access to a hotel/motel registry where police have reasonable suspicion as to criminal activity by a guest in or near the room. This raises the question: does the reasonable suspicion standard, as opposed to the standard-less Los Angeles ordinance, save an ordinance from attack under the Patel majority's analysis? We think that there is a solid argument that it does save such an ordinance.

Hotel/motel guests cannot assert the rights of operators in "standing" or privacy-rights analysis under either the Fourth Amendment or the Washington constitution. But to avoid civil rights challenges, cities and counties in the Ninth Circuit may be forced to forgo the leverage of hotel/motel registry laws and rely on getting voluntary consent for registry access from hotel/motel operators even where law enforcement has reasonable suspicion of criminal activity by a guest in or near a room.

As always, we urge our law enforcement readers to consult their legal advisors and/or prosecutors on issues addressed in the LED.

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WASHINGTON STATE SUPREME COURT

SUPREME COURT RELIES ON BYRD DECISION TO HOLD THAT IMMEDIATELY AFTER OFFICERS ARRESTED AND HANDCUFFED SUSPECT IN A PARKING LOT, A BRIGHT LINE, TIME-OF-ARREST RULE AUTHORIZED THE OFFICERS, INCIDENT TO ARREST, TO SEARCH BAGS THAT WERE TAKEN FROM HIS ACTUAL POSSESSION AT ARREST

State v. MacDicken, ___Wn.2d ___, 319 P.3d 31 (Feb. 27, 2014)

Facts and Proceedings below: (Excerpted from majority opinion)

> In her room at a Lynnwood hotel, Krystal Steig was robbed at gunpoint. The robber took various items, including a laptop and a cell phone, and put them in a suitcase belonging to Steig's roommate, Thomas Brinkly. As the robber was leaving, he walked past Brinkly in the hotel stairwell. Brinkly recognized his suitcase and confronted the robber, who pulled out a gun and pointed it at him. Brinkly quickly exited the stairwell. Brinkly and Steig called the police to report the robbery and later identified MacDicken from still photos taken from the hotel's video surveillance camera.
>
> The following morning, police tracked the stolen cell phone to a hotel in Edmonds. An officer saw MacDicken leaving the Edmonds hotel and recognized him as the man Steig and Brinkly had identified as the assailant. MacDicken had two bags in his possession when the officer saw him: a laptop bag, which he carried, and a rolling duffle bag, which he was pushing. Officers ordered

MacDicken to the ground and handcuffed him. As MacDicken, still handcuffed, was standing up next to a patrol car speaking with another officer, an officer moved the bags MacDicken had been carrying a car's length away and began to search them, without obtaining a warrant. Inside the laptop bag, police found a handgun, Steig's laptop, a letter addressed to Steig, and other items. After being asked, MacDicken told police he had stolen the laptop bag from Steig but denied robbing her with a gun. MacDicken claimed at a later hearing that he in fact told police that the laptop bag was his, but the trial court found that testimony not credible.

MacDicken was charged with two counts of first degree robbery (with a firearm enhancement) and one count of unlawful possession of a firearm in the first degree. He moved to suppress the evidence from the bags, arguing that the search violated his rights under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. The trial court denied MacDicken's motion. As part of that ruling, the court concluded that MacDicken did not have standing to challenge the search of the laptop bag because it was stolen but acknowledged that under the automatic standing rule, MacDicken had automatic standing to challenge the search as it related to the unlawful possession of a firearm charge. The trial court then found that the search was a valid search incident to arrest.

After a trial, the jury found MacDicken guilty on all three counts. MacDicken appealed and the Court of Appeals affirmed, reasoning that because the bags were within his reach at the time of the search, the warrantless search was valid as incident to his lawful arrest. State v. MacDicken, 171 Wn. App. 169, 176, 286 P.3d 413 (2012) **Feb 13 LED:16**.

[Footnote omitted]

ISSUE AND RULING: In State v. Byrd, 178 Wn.2d 611 (2013) **Dec 13 LED:12**, the Washington Supreme Court invoked what some refer to as a "time of arrest rule" for search incident to arrest of the person and items actually possessed. The Court held that, where Ms. Byrd had a purse in her actual possession at the time of custodial arrest (or immediately prior to that point), a warrantless search of her purse was a lawful search of her person incident to arrest even though the search of the purse did not occur until shortly after she had been handcuffed and secured in the back seat of a patrol car at the scene. The Byrd Court ruled that this is a per se or bright-line rule for search of the person incident to arrest, and that the rule applies to any item actually possessed at the time of arrest even though the arrestee is no longer a threat to obtain a weapon or destroy evidence in the item. But the Byrd Court declared that the search (1) must occur fairly close in time to the arrest, and (2) would not be justified absent exigent circumstances as to an item merely "constructively possessed" at or immediately prior to the time of arrest.

Was the search in MacDicken a search of the person incident to arrest that was governed by the Byrd time-of-arrest rule such that the search of the laptop bag taken from the arrestee's actual possession was lawful regardless of whether or not he might have accessed the bag to obtain a weapon or destroy evidence? (ANSWER BY WASHINGTON STATE SUPREME COURT: Yes, rules a 7-2 majority, the Byrd rule controls and the search was lawful under the facts of this case)

Result: Affirmance of Court of Appeals decision that affirmed a Snohomish County Superior Court conviction of Abraham MacDicken on two counts of first degree robbery while armed with a firearm and one count of first degree unlawful possession of a firearm.

ANALYSIS: (Excerpted from majority opinion)

> There are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person and a search of the area within the arrestee's immediate control. . . . Byrd, 178 Wn.2d at 616-17. This court recently examined the historical development of these two types of searches incident to arrest and the reasons why courts treat them differently. A warrantless search of the arrestee's person is considered a reasonable search as part of the arrest of the person. . . . Such a search presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation. Byrd, 178 Wn.2d at 618. In contrast, a warrantless search of the arrestee's surroundings is allowed only if the area is within an arrestee's "immediate control." Chimel v. California, 395 U.S. 752, 763 (1969), overruled in part by Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**. Such searches are justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search. Gant, 556 U.S. at 351.
>
> In this case, the parties argued over whether the search of bags that were a car's length away was justified by concerns of officer safety or preservation of evidence. But as described below, we hold that the search of the bags carried by MacDicken at the time of his arrest constituted a search of his person. Therefore, we do not analyze whether the search was a valid search of the area within MacDicken's immediate control under Chimel and Gant.
>
> Instead, we look to Byrd, *a* recent case in which this court upheld the search of an arrestee's purse that she was holding at the time that she was arrested. Byrd, 178 Wn.2d at 623-24. The court held that a valid search of an arrestee's person included the articles of an arrestee's person, such as her clothing and the purse that was in her possession at the time of arrest. Byrd at 623. Such a search extends "only to articles 'in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person.'" Byrd (quoting United States v. Rabinowitz, 339 U.S. 56, 78 (1950) (Frankfurter, J., dissenting)). The court defined articles immediately associated with the arrestee's person as "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." Byrd. The court cautioned that such a search does not include "articles within the arrestee's reach but not actually in his possession." Byrd. The court also noted that a significant delay between the arrest and the search could render the search unreasonable. Byrd at 623-24.
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> Here, the laptop bag and the rolling duffel bag were in MacDicken's actual and exclusive possession at the time of his arrest. Therefore, applying the rule from Byrd, we conclude that the bags were immediately associated with his person. Because there was no significant delay between the arrest and the search that would render the search unreasonable, we hold that the search of the bags was a part of the lawful search of MacDicken's person pursuant to his arrest. A warrant is not needed for a search of an arrestee's person, and thus this search

was a valid search incident to arrest under both the federal and state constitutions.

[Footnote omitted; some case citations omitted, other case citations revised for style]

Dissenting opinion: Justice McCloud writes a dissent that is joined by Justice Fairhurst. The dissent argues that Byrd misinterpreted the Fourth Amendment, and that the MacDicken majority likewise misinterprets the Fourth Amendment in applying Byrd's bright line, time-of-arrest rule that allows search of items taken off an arrestee regardless of whether the arrestee can access the items at the time of the search. The dissent argues for broad application of the approach of the car search decision in Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**. If the McCloud dissent is correct, then perhaps the U.S. Supreme Court will accept review of the MacDicken decision if defendant seeks it. Also, currently pending in the United States Supreme Court are two cases involving searches of cell phones incident to arrest, with oral argument to be heard on April 29, 2014 and a decision expected by June 30, 2014. It is possible that the United States Supreme Court decisions in those cases will address the Gant-based argument raised in Justice McCloud's dissent in MacDicken.

The McCloud dissent also argues that the factual record is unclear in this case as to whether the handcuffed Mr. MacDicken could have accessed the laptop bag at the time it was searched.

LED EDITORIAL COMMENTS: In the December 2013 LED entry regarding the Byrd decision, we made a number of comments regarding the meaning of, implications of, and issues raised by the Byrd decision. Nothing has changed in the case law, other than MacDicken confirming the approach of Byrd, since we made those comments. We won't repeat all of the comments here, but we will repeat the comment that we made in the December 2013 LED regarding the Ellison case pending review in the Washington Supreme Court.

The defendant's petition for review is pending in the Washington Supreme Court in State v. Ellison, 172 Wn. App. 710 (Div. II, Jan. 8, 2013) March 13 LED:17. In Ellison, the arrestee was sleeping or hiding under a blanket on a back porch when officers responded to a resident's call about a prowler/stalker. The officers pulled back the blanket to reveal him and a backpack that was sitting between his legs.

Officers placed Ellison in handcuffs as they arrested him. Officers moved the bag a short distance away and then searched it with arrestee Ellison standing in handcuffs nearby. The analysis by the Court of Appeals in Ellison assumed, as had the Court of Appeals in its analysis in MacDicken (an assumption now rejected by the Washington Supreme Court) that the State was required to prove that exigent circumstances existed. The Court of Appeals concluded in Ellison (as had the Court of Appeals in MacDicken) that exigent circumstances did exist even though Mr. Ellison was handcuffed when the search occurred. Handcuffs are not escape-proof nor are they otherwise an absolute protection from an arrestee, the Court held. The Washington Supreme Court had stayed action on the petition in Ellison pending its resolution of the MacDicken case. That status should change soon, now that MacDicken has been decided, but it remains to be seen whether the Supreme Court will grant or deny review in Ellison.

In light of the Byrd and MacDicken decisions, the first question to be answered is whether defendant Ellison would be deemed to be in "actual possession" of the backpack that was located between his legs. If so, and we think there is a strong fact-based argument that he was in actual possession of the item between his legs at the time

of arrest, then the contemporaneous search was lawful under the bright line time-of-arrest rule. If not, then the lunge question addressed by the intermediate appellate courts in MacDicken and Ellison (and avoided by the Washington Supreme Court in MacDicken) would be posed. We think that the Court of Appeals in MacDicken and Ellison correctly assessed the lunge risk question. Handcuffing without securing an arrestee in a locked patrol car does not provide absolute protection against an arrestee gaining access to a weapon or destroying evidence.

PRIVACY ACT VIOLATED BY MAN'S SECRET AUDIO RECORDING OF ONE-ON-ONE KITCHEN CONVERSATION WITH BROTHER-IN-LAW WHERE THE MAN SUSPECTED THE BROTHER-IN-LAW OF MOLESTING THE MAN'S UNDERAGE DAUGHTERS

State v. Kipp, ___Wn.2d ___, 317 P.3d 1029 (Feb. 6, 2014)

Facts and Proceedings below: (Excerpted from Supreme Court's lead opinion)

> William Kipp was accused of sexually assaulting two of his nieces [the nieces made the accusations to their father]. [Kipp] was confronted by their father, Kipp's brother-in-law, [Joseph Tan], who secretly recorded a conversation onto a cassette tape. This conversation was reported to police. The State charged Kipp, for the acts against one of his nieces, with two counts of second degree rape of a child and one count of second degree child molestation.
>
> Before trial, Kipp moved to suppress the recorded conversation under the privacy act, chapter 9.73 RCW. The trial court declined to conduct an evidentiary hearing and instead accepted the facts put forth by the parties. The trial court also listened to the recording, which was a little over 10 minutes in duration, and accepted the following undisputed facts: (1) Kipp did not know he was being recorded, (2) the taped conversation is about 10 minutes long, (3) the conversation took place in the upstairs kitchen of a private home, (4) the conversation was between Kipp and his brother-in-law [with no other person in the room], (5) the topic of conversation was the accusation that Kipp molested Joseph Tan's daughters, and (6) Kipp suggested toward the end of the conversation that they talk about it further at a later time.
>
> Based on these facts, the trial court concluded that the conversation between Kipp and his brother-in-law was not a private conversation and therefore not subject to suppression under the [Privacy Act, chapter 9.73 RCW]. The recorded conversation was admitted into evidence at trial . . . . A jury found Kipp guilty on all counts.
>
> Kipp appealed. The Court of Appeals affirmed in a split decision, holding [2-1] that sufficient evidence supported the trial court's decision that the conversation was not private. [State v. Kipp, 171 Wn. App. 14 (Div. II, 2012) **Feb 13 LED:20**]

ISSUE AND RULING: For purposes of the Privacy Act, chapter 9.73 RCW, did Kipp have both a subjective and reasonable expectation of privacy in the one-on-one kitchen conversation in which his brother-in-law accused him of sex molesting, such that the conversation was "private"? (ANSWER BY THE SUPREME COURT: Yes, rules a unanimous Court)

Result: Reversal of Court of Appeals decision that affirmed the Kitsap County Superior Court convictions of William J. Kipp, Jr. of two counts of second degree child rape and one count of second degree child molestation.

ANALYSIS:

The privacy issue in this case is exclusively statutory. Neither the Washington constitution nor the federal constitution bar single party consent recordings.

Six Washington Supreme Court decisions interpreting the Washington's Privacy Act guide the Court's analysis. The decisions are:

- Kadoranian v. Bellingham Police Dep't, 119 Wn.2d 178 (1992) **Aug 92 LED:06** (phone conversation held not private where person answered call from stranger – an officer who did not identify himself as such – and had a very brief conversation in which she provided only the inconsequential and non-incriminating information that a resident of the home was not then present);

- State v. Faford, 128 Wn.2d 476 (1996) **April 96 LED:02** (neighbor's use of scanner to eavesdrop on his marijuana-growing neighbors' cell phone conversations held to violate the Privacy Act);

- State v. Clark, 129 Wn.2d 211 (1996) **July 96 LED:07** (wired informant's conversations with drug vendors on the street and in his car held not private);

- State v. Townsend, 147 Wn.2d 666 (2002) **March 03 LED:11** (Internet ICQ communications between undercover detective and suspected child molester were private under the Privacy Act, but evidence regarding the communications was admissible under an implied consent theory);

- State v. Christensen, 153 Wn.2d 186 (2004) **Feb 05 LED:09** (secretly using a speaker-phone function on another phone held to violate Privacy Act, distinguishing case of State v. Corliss, 123 Wn.2d 656 (1994) **June 94 LED:02** that permitted tipped-phone eavesdropping); and

- Lewis v. Dep't of Licensing, 157 Wn.2d 446 (2006) **Sept 06 LED:09** (conversations with law enforcement officers on the street held not private, but the requirements of the patrol car video statute must be met in order for audio-video recordings to be admissible).

The Kipp lead opinion analyzes the "private conversations" question as follows:

> The federal government and 49 states have enacted privacy or eavesdropping statutes. Washington is 1 of only 11 states that require that all parties to a private communication consent to its recording and disclosure.
> . . .
>
> Since the [Privacy] act is implicated by the unconsented recording, the statutory analysis favors privacy unless it is shown differently. While the term "private" is not defined in the act, it is to be given its ordinary and usual meaning: "'belonging to oneself. . . SECRET . . . intended only for the persons involved <a ~ conversation> . . . holding a confidential relationship to something . . . a secret message: a private communication . . . SECRETLY: not open or in public.'"

Webster's Third New International Dictionary 1804-05 (1969), quoted in Clark, 129 Wn.2d at 224-25. A communication is private (1) when parties manifest a subjective intention that it be private and (2) where that expectation is reasonable. Townsend, 147 Wn.2d at 673.

Factors bearing on the reasonableness of the privacy expectation include the duration and subject matter of the communication, the location of the communication and the presence or potential presence of third parties, and the role of the nonconsenting party and his or her relationship to the consenting party. Ultimately, the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case controls as to whether a conversation is private. Clark, 129 Wn.2d at 224-27. The reasonable expectation standard calls for a case-by-case consideration of all the facts. State v. Faford, 128 Wn.2d 476 (1996).

Here, Kipp manifested a subjective intention that the conversation be private. We have found subjective intent that a conversation be private even though the party does not explicitly state such an intention. See, e.g., Christensen, 153 Wn.2d at 193 (concluding that the defendant subjectively intended for the phone conversation to be private by asking to speak to his girlfriend and that his girlfriend manifested such an intent by taking the phone into her bedroom and closing the door). Here, as Kipp was going into the kitchen, another family member left, thereby evidencing his subjective intent that the conversation be between only him and his brother-in-law. The State argues that Kipp's statement toward the end of the conversation shows that he did not intend that the conversation be private. Specifically, the State notes that Kipp said, "[L]ike I say, when we get a chance, just you and I - - we will go somewhere and we'll talk, try to . . . understand everything." According to the State, this demonstrates that Kipp did not believe that the conversation was private. However, this reasoning is flawed because the statement occurred at the end of the conversation and demonstrates only that he desired to continue discussing the matter privately in the future. Thus, we conclude he subjectively intended that the conversation be private.

Applying the Clark factors, we conclude Kipp's expectation of privacy was reasonable. When considering the first factor, duration and subject matter of the conversation, the parties agree that the 10-minute duration suggests the conversation was private. With regard to the subject matter of the conversation, we have held that "inconsequential, nonincriminating" conversations generally lack the expectation of privacy necessary to be protected under the act. Faford, 128 Wn.2d at 484.

In contrast, an incriminating statement of a serious subject matter is the type of conversation protected under the act. In Faford, we held that defendants' neighbor violated the privacy act by eavesdropping on cordless telephone conversations and that any evidence gained through this violation was inadmissible. Although the recorded conversations concerned illegal activity—a marijuana growing operation in the defendants' home—we held that the defendants had a reasonable expectation of privacy and that both the recordings and any information gathered from the illegal communications should have been suppressed. Faford, 128 Wn.2d at 488-89. [*Court's footnote: While the fruit of the poisonous tree doctrine generally does not apply to private searches,*

Washington's privacy act is applied broadly as to require exclusion of any "evidence exclusively and directly flowing from a privacy act violation." Faford, 128 Wn.2d at 489. Any other result would render any privacy protection illusory and meaningless. Faford, 128 Wn.2d at 489.]

Conversely in Clark, we held that 16 conversations where the defendants approached a stranger for brief, routine conversations on the street about drugs were not private. We limited our holding to those 16 conversations, noting that there are many illegal transactions that may involve private conversations. Clark, 129 Wn.2d at 231.

Here, the State contends that a person who confesses to child molestation should expect this information to be reported to the authorities, and therefore it is unreasonable to expect the conversation to remain private. While this may be true, it has little relevance to whether the recording itself is proper. As Kipp points out, accepting the State's argument would mean that a confession of child molestation or any other crime is never subject to a reasonable expectation of privacy. This is in direct opposition to what we said in Clark and Faford. Instead, the subject matter of the conversation in this case was not one that is normally intended to be public, demonstrating Kipp's reasonable expectation of privacy.

The second factor—location of the conversation and presence or potential presence of a third party—also weighs in favor of concluding that the conversation, was private because it took place while Kipp and his brother-in-law were alone in a private residence. A private home is normally afforded maximum privacy protection. . . . The undisputed facts establish that the conversation took place in the kitchen of a private residence. Although the State contends that a kitchen is a common area subject to a lesser expectation of privacy, the record shows that the men were alone and that Kipp's brother-in-law asked his son to leave the room so that they could talk. It is difficult to separate rooms in a house and label some "private" and some not. Both the trial court and Court of Appeals attempt to generalize that all kitchens are common areas with increased potential for the presence of third parties. But our determination as to whether a conversation is private requires a case-by-case analysis. Whether other persons were present is more relevant. Here, based on the location of the conversation and the absence of a third party, it was reasonable for Kipp to believe the conversation was private.

Finally' Kipp's role as the nonconsenting party and his relationship to his brother-in-law further demonstrate that Kipp had a reasonable expectation of privacy. Generally, two people in a conversation hold a reasonable belief that one of them is not recording the conversation. But, in evaluating this factor, we have found that the nonconsenting parties' willingness to impart the information to a stranger evidences that the communication is not private. Clark, 129 Wn.2d at 226-27 (citing Kadoranian, 119 Wn.2d at 190). We have also repeatedly held that conversations with police officers are not protected under the act. See Lewis, 157 Wn.2d at 460. The parties in this case are not strangers or public officials; they are family. And contrary to what the State contends, the nature of the relationship between the parties is not altered by the subject matter of the conversation. Focusing on Kipp's role as "the accused" eviscerates the privacy act's protections for any person accused of a crime. Under this rationale, the actual relationship between the parties would be irrelevant. If we accepted the

> State's argument, this factor "would always weigh against any accused person who makes an incriminating statement, yet incriminating statements are the very type of communications usually triggering the privacy act's protections." Kipp, 171 Wn. App. at 41-42 (Van Deren, J., dissenting).
>
> We conclude Kipp had both a subjective and reasonable expectation of privacy as he was speaking in private with his brother-in-law about a very sensitive matter. [*Court's footnote: While the recorded conversation violated the privacy act, the State could have solicited testimony from Kipp's brother-in-law regarding Kipp's alleged confession. Kipp's statements would not have been hearsay. ER 801(d)(2)(i) (A statement is not hearsay if the statement is offered against a party and is the party's own statement.)*.]
>
> Because the recording violated the privacy act, the trial court should have suppressed it.

[One case citation and one footnote omitted]

Justice Fairhurst writes a concurring opinion joined by Justices Wiggins and Gonzalez. The concurring opinion agrees with the lead opinion's "private conversation" analysis, but argues for a different standard of review from that applied in the lead opinion. The concurring opinion argues that, while it does not make a difference to the outcome in this case, the Court should have applied ordinary substantial evidence review to the factual determinations by the superior court, not de novo review, i.e., review without deference to the factual findings by the superior court.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) INSUFFICIENT EVIDENCE OF FIRST DEGREE KIDNAPPING WHERE DEFENDANT HELD VICTIM HOSTAGE IN HER HOME, WITHOUT HARMING HER, UNTIL HE FOUND A RIDE – In State v. Garcia, ___ Wn.2d ___, 318 P.3d 266 (Feb. 13, 2014), the Washington State Supreme Court finds that there is insufficient evidence to convict the defendant of kidnapping in the first degree under the facts of this case.

The Court describes the facts, in part, as follows:

> In the early morning of December 24, 2009, Garcia was cut off by three cars while driving near Sedro–Woolley. He heard two gunshots coming from the cars. Believing that the people in the cars were chasing him, he tried to escape. In the process, he hit a railway track, and the car became stuck. Garcia abandoned the car and a passenger on the tracks and ran. Eventually, he made it to a nearby Valero gas station. He testified that he thought the gas station would be open and that he could ask for help. However, the gas station's doors were locked. After trying to kick the doors open, Garcia picked up a cinder block and broke the glass door. Surveillance cameras showed him entering the store, turning around, and walking out, without going near the cash register or causing other property damage inside. Garcia testified that he walked out of the gas station after hearing an alarm because he had outstanding warrants and did not want to go to jail.

After leaving the gas station, he tried knocking on the door of a nearby house. The occupant would not open the door but spoke with him briefly through the door. Garcia told her that he needed help and that people were trying to kill him. When the occupant told him that she would call 911 but would not open the door, Garcia left.

He next ran to a mobile home park where Juliana Wilkins happened to be asleep on the sofa of her late father's home. Garcia saw the television on and entered the trailer through an unlocked door. It was 3:55 a.m. when Garcia tapped Wilkins on her upper thigh to wake her up. She had never seen Garcia before these events.

Garcia remained with Wilkins in the mobile home for around two hours. She testified that during that time he "was extremely agitated," on "an adrenaline rush, very jumpy and out of breath." She also testified that his "behavior was very unpredictable."

The timeline of what happened inside the mobile home is not clear. There was testimony that Garcia sat in a chair five or six feet away from where Wilkins sat on the couch and the two talked. He explained his situation to Wilkins and asked her to give him a ride. She declined. He also made numerous telephone calls, trying to find someone else to pick him up. At some point during the two hours, Garcia grabbed a knife from the kitchen. He briefly held the knife two feet away from Wilkins. Otherwise, he kept the knife in his pocket. At trial, he explained that the knife was to protect himself and Wilkins from the people Garcia believed were after him.

During their conversations, they talked about their families, and Wilkins gave him advice. She told him that she had 10 children and hoped to go home to them. She testified that she desired to keep the situation calm, while Garcia testified that he felt like Wilkins was helping him and tagging along.

At one point, Garcia decided to leave without having found a ride. Wilkins walked him to the door and gave him a necklace with religious significance. Garcia, however, returned within moments. Eventually, he was able to find a friend who agreed to pick him up. This friend talked with Wilkins on the phone to get directions. As Garcia was leaving, he offered to give Wilkins back the necklace. She declined and hugged Garcia.

Wilkins testified that she was very, very terrified during the event. She believed that she might be killed, and her fear did not decline while Garcia was in the residence.

RCW 9A.40.020 provides:

> (1) A person is guilty of kidnapping in the first degree if he or she intentionally abducts another person with intent:
> (a) To hold him or her for ransom or reward, or as a shield or hostage; or
> (b) To facilitate commission of any felony or flight thereafter; or
> (c) To inflict bodily injury on him or her; or
> (d) To inflict extreme mental distress on him, her, or a third person; or
> . . .

Garcia was charged alternatively under the first, second and fourth prongs. The Court finds insufficient evidence to convict Garcia under any of the three alternative means.

Result: Reversal of Skagit County Superior Court convictions of Phillip Barrara Garcia for first degree kidnapping and second degree burglary (not discussed in this LED entry); affirmance of conviction for first degree criminal trespass (also not discussed in this LED entry).

(2) DETECTIVE'S CONDUCT IN LISTENING TO TAPES OF SEVERAL TELEPHONE CONVERSATIONS BETWEEN A DEFENDANT AND HIS ATTORNEY WAS "UNCONSCIONABLE" GIVING RISE TO A PRESUMPTION OF PREJUDICE THAT CAN BE OVERCOME BY STATE ONLY BY PROOF BEYOND A REASONABLE DOUBT; CASE IS REMANDED FOR HEARING FOR STATE TO TRY TO MEET THAT STANDARD – In State v. Pena-Fuentes, ___ Wn.2d ___, 318 P.3d 257 (Feb. 6, 2014), the Washington Supreme Court addresses the issue of remedy for a detective's "unconscionable" conduct of violating the constitutionally protected attorney-client relationship by listening to several recorded telephone calls between a defendant and his attorney. The Court is unanimous in holding that such conduct categorically gives rise to a presumption of prejudice that can be overcome only if the State meets a "beyond a reasonable doubt" proof standard. Because the lower courts did not expressly apply that standard and did not fully consider how the defendant might have been prejudiced as to his motion for a new trial, the Supreme Court remands the case to superior court for a hearing.

After defendant Pena Fuentes had been convicted of child molesting, as grounds for a new trial, his new counsel submitted a video of a half-sister of the victim recanting that half-sister's trial testimony that was central to convicting the defendant. Concerned about the circumstances surrounding the half-sister's recantation video, the prosecutor asked the detective on the case to investigate possible witness tampering by the defendant. The prosecutor asked the detective to obtain the recordings of Pena Fuentes' phone calls from the jail. Unfortunately, the recordings provided by the jail to the detective included several calls between Pena Fuentes and his attorney. Two days after the detective obtained the recordings, the half-sister signed a declaration prepared by the prosecutor recanting her statements in her original recantation video and affirming the testimony she had given at trial.

Eleven days after receiving the recordings from the jail and nine days after the half-sister signed the declaration prepared by the prosecutor (recanting the recantation and affirming the trial testimony), the detective disclosed to the prosecutor that he had listened to recordings of calls between Pena Fuentes and his attorney. At the prosecutor's direction, the detective did not reveal the content of the attorney-client conversations to the prosecutor, and the detective withdrew from his participation in the case. A new detective was immediately assigned on the case.

Based on the original detective's unlawful conduct of listening to attorney-client confidential communications, Pena Fuentes moved to dismiss all charges with prejudice. The trial judge agreed that the police misconduct was "egregious." However, the trial judge denied the motion to dismiss, concluding that the police misconduct did not affect either the trial—which had concluded prior to the eavesdropping—or the facts relevant to the motion for a new trial. Pena Fuentes moved for discovery of all police reports and evidence gathered by the detective, arguing that he had previously requested such information but that the prosecutor had not provided it. Pena Fuentes also moved to dismiss all charges because the State withheld such evidence. The trial judge denied the motion for discovery on the rationale that he had already ruled on the underlying motion.

Pena Fuentes appealed to the Court of Appeals, which ruled 2-1 that there was no evidence that the defendant had been prejudiced by the detective's actions, either as to the trial or as to his motion for a new trial. State v. Pena Fuentes, 172 Wn. App. 755 (Div. I, 2013) **March 13 LED:15**. The Washington Supreme Court disagrees as to the motion for a new trial. The fact-based portion of the Court's analysis of the prejudice issue is as follows:

> The prosecutor argues that Pena Fuentes cannot show prejudice resulting from the eavesdropping because (1) the eavesdropping occurred after trial, so the actual trial could not have been affected, and (2) the prosecutor never had any knowledge of the content of the conversations, so the posttrial motions could not have been affected. Pena Fuentes counters that the overheard conversations included discussions regarding the post-trial motions and that since [the detective] was engaged in an investigation related to the post-trial motions at the same time that he had access to the tapes of the attorney-client conversations, his investigation may have been aided by his eavesdropping. Because the State holds all of the information regarding the eavesdropping and any results thereof, Pena Fuentes cannot make any showing of prejudice (or rebut the State's arguments regarding lack of prejudice) without discovery of information related to the eavesdropping.
>
> Under CrR 4.7(e)(1), a court may require disclosure of any relevant information that is both material and reasonable. Here, the trial court's decision rested entirely on the State's representations as to the prosecutor's knowledge of the content of the eavesdropped conversation. Notably, however, the State made no representations as to the date that [the detective] eavesdropped on the conversations or whether he continued his investigation after that date—the State only submitted evidence showing that [the detective] discontinued his participation in the investigation after he disclosed the eavesdropping to the prosecutor on January 5, 2011. The key pieces of evidence at issue in the post-trial motions were the videotape of L.P. and her later declaration to the prosecutor stating that everything in the videotape was a lie. The declaration was apparently facilitated by [the detective], and it was taken on December 28, 2010—two days after the tapes were delivered to [the detective]. But we do not know whether [the detective] listened to the tapes while actively seeking evidence related to the post-trial motions. That is where the possibility of prejudice arises because regardless of whether the prosecutor himself knew of the content of the conversations, he may have relied on evidence gathered by [the detective] as part of an investigation aided by the eavesdropping.
>
> On this record, there is no way to know whether [the detective's] investigation and actions were affected by what he may have overheard when eavesdropping. The State provides no evidence regarding [the detective's] investigation; it contends only that the information did not pass directly from [the detective] to the prosecutor. In this situation, Pena Fuentes must be allowed discovery in order to determine whether [the detective] continued to investigate after eavesdropping. Such evidence is crucial to the determination of whether Pena Fuentes was prejudiced. Because such discovery is necessary to determine prejudice, we reverse the trial judge's decision to deny discovery and remand for further proceedings.

Result: Reversal of Court of Appeals decision that affirmed the King County Superior Court conviction of Jorge Pena Fuentes for two counts of first degree child molestation; case remanded for hearing to determine if the actions of the original detective on the case were affected by what he heard in attorney-client conversations on the recordings.

LED EDITORIAL NOTE: For more reading and a discussion of Washington cases on court protection of the constitutional right to an attorney and of the attorney-client relationship, see the March 2013 LED entry on this case, and see also the February 2013 LED article (starting at page 2): "Inadvertent Recording of Attorney Telephone Calls In Violation Of Attorney-Client Privilege."

(3) SUSPENSION, AND SUBSEQUENT CONVICTION FOR DRIVING WHILE LICENSE SUSPENDED, IS APPROPRIATE WHERE DEFENDANT APPEARED AND CONTESTED NOTICE OF INFRACTION BUT FAILED TO PAY PENALTY WHEN COURT REJECTED HIS CHALLENGE; IN FAILING TO PAY FINE DEFENDANT FAILED TO COMPLY WITH TERMS OF NOTICE OF INFRACTION – In State v. Johnson, 179 Wn.2d 534 (Jan. 9, 2014), a 5-4 majority of the State Supreme Court rejects a defendant's argument that the terms of a notice of infraction do not include payment after appearing to contest the infraction and losing.

Former RCW 46.20.342 provides, in relevant part:

> (1) It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.
> . . .
>
> (c) A person who violates this section when his or her driver's license or driving privilege is, at the time of the violation, suspended or revoked solely because . . . (iv) the person has failed to respond to a notice of traffic infraction, failed to appear at a requested hearing, violated a written promise to appear in court, or has failed to comply with the terms of a notice of traffic infraction or citation, as provided in [former] RCW 46.20.289 [(2005)] . . . is guilty of driving while license suspended or revoked in the third degree, a misdemeanor.

In the present case, the defendant responded to the notice of traffic infraction, appeared in court, and contested the infraction. However, he failed to pay the fine when the court rejected his challenge. In doing so he failed to comply with the notice of infraction. Accordingly, his license suspension was appropriate.

The Court explains:

> Johnson argues that the terms of the notice of infraction required only that he respond and appear and that he had no duty to pay any fine ordered after the hearing contesting the infraction. Johnson's argument assumes that the terms of the notice of infraction were frozen in time when he initially received the citation. He is incorrect. The face of his notice of infraction allowed the infraction trial court to impose a penalty after any hearing held to contest the notice of infraction or to explain mitigating circumstances. In other words, according to the plain language on the face of the notice of infraction, a person who contests a notice of infraction may eliminate the duty to pay the fine imposed only if he or she succeeds in contesting the infraction. Johnson did not succeed, and the trial court recorded his failure on the face of the ticket in open court. Johnson was

present in court and also received notice of the change to the face of the notice of infraction by order. *See* former RCW 46.63.120 (1979).

Result: Affirmance of Lewis County District Court and Superior Court (on RALJ appeal) of Stephen Chriss Johnson for driving while license suspended in the third degree.

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) RAPE ONE LIMITATIONS PERIOD DOES NOT START TO RUN UNTIL DNA PROFILE FOR SAMPLE EXTRACTED FROM VICTIM'S CLOTHING IS MATCHED WITH DNA PROFILE OF KNOWN SUSPECT; ALSO, DUE PROCESS PROTECTIONS WERE NOT VIOLATED HERE IN NEARLY 13-YEAR DELAY IN FILING OF CHARGES OR IN NEGLIGENT DESTRUCTION OF EVIDENCE BY POLICE – In State v. McConnell, ___Wn. App. ___, 315 P.3d 586 (Div. I, Dec. 30, 2013), the Court of Appeals rejects arguments by a first degree rape defendant who claimed that his conviction should be reversed based: (1) on the statute of limitations in light of a nearly 13-year delay since the crime before charging him, or (2) on due process protections in light of the pre-charging delay and the negligent destruction of evidence by the police.

After a school teacher was raped in 1998 while working alone in a portable classroom, considerable physical evidence was collected, included DNA samples extracted from her underwear. The WSP lab determined there were two contributors, her husband and an unknown man. No DNA match was found using the WSP lab results and the then-available database. The case went cold.

Subsequently: (1) DNA testing methods at the WSP lab and elsewhere changed; (2) the available DNA database greatly expanded; (3) in December 2000, Michael William McConnell was sentenced for residential burglary for a separate crime, and a DNA sample was taken under his sentence and added to the database that was later used in this case; (4) in 2003, due to ignorance of the relevant limitations period, the original investigating police department negligently destroyed all of the evidence in its property room related to the 1998 rape; (5) in 2010, a cold case detective with the same police agency asked the WSP lab to test part of the ample sample of DNA remaining at the lab and to compare that test's result against the then-available database; (6) in 2011, a match was found to McConnell's sample that had been collected in relation to his 2000 burglary sentence; (7) later in 2011, a new sample was taken from McConnell under a search warrant, the earlier 2011 match was confirmed, and McConnell was charged; (8) in 2012, McConnell was convicted of first degree rape.

RCW 9A.04.080(1) and (3) together provide that the statute of limitations for rape in the first degree is: ten years from the date of commission of the crime; or one year from the date "on which the identity of the suspect is conclusively established by [DNA] testing . . . , whichever is later." The McConnell Court rejects defendant's argument that the statute's "date on which the identity of the suspect is conclusively established by [DNA] testing" means the date when the unique DNA profile of a rape suspect is identified, not when the State matches the unknown DNA profile to a particular person. The McConnell Court says that the defendant's argument ignores the Legislature's use of the word "conclusively" in the statute, and the argument also ignores legislative history for the relevant amendment to the statute.

On the due process, pre-accusatorial delay issue, citing State v. Oppelt, 172 Wn.2d 285 (2011) throughout the passage, the McConnell Court explains the legal standard as follows:

> The court uses a three-part test to determine whether preaccusatorial delay violates due process. First, the defendant must specifically show actual prejudice from the delay. A defendant is not required to show bad faith; "negligent delay can violate due process." However, "[w]here the State's reason for delay is mere negligence, establishing a due process violation requires greater prejudice to the defendant than cases of intentional bad faith delay." If the defendant establishes prejudice, the burden shifts to the State to show the reasons for the delay. The court then examines the entire record to weigh the reasons for the delay against the prejudice and "determine whether fundamental conceptions of justice would be violated by allowing prosecution."

[Citations to Oppelt omitted]

The Court goes on to conclude that there is no evidence of any prejudice to defendant or any violation of conceptions of justice in the pre-accusatorial delay in this case. The Court also concludes that there was no prejudice to defendant in the police agency's negligent destruction of the evidence in the police agency property room; ample DNA remained available at the WSP lab.

Result: Affirmance of Snohomish County Superior Court first degree rape conviction of Michael William McConnell.

LED EDITORIAL NOTE: In its discussion of the statute of limitations issue, the Court notes that the limitations statute has been changed several times since 1998, but that the Court is applying the current version of the statute per the following passage from State v. Hodgson, 108 Wn.2d 662, 666-67 (1987): "When the Legislature extends a criminal statute of limitation, the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective."

LED EDITORIAL COMMENT: While the appellate result (at least so far) is favorable to the State, law enforcement agencies should try to avoid facing a due process challenge in these circumstances by making a careful review of the statute of limitations before destroying evidence.

(2) CUSTODIAL SEXUAL MISCONDUCT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE – AN ORDINARY PERSON WOULD CLEARLY UNDERSTAND THAT THE STATUTE APPLIES TO A CORRECTIONS OFFICER – In State v. Clapper, 178 Wn. App. 220 (Div. II, Dec. 3, 2013), the Court of Appeals holds that an ordinary person would clearly understand that RCW 9A.44.160 applies to a corrections officer, thus the statute is not unconstitutionally vague. Therefore, the Court affirms the conviction.

RCW 9A.44.160 provides in part:

> (1) A person is guilty of custodial sexual misconduct in the first degree when the person has sexual intercourse with another person:
> (a) When:
> (i) The victim is a resident of a state, county, or city adult or juvenile correctional facility . . . and
> (ii) The perpetrator is an employee or contract personnel of a correctional agency and the perpetrator has, or the victim reasonably believes the perpetrator has, the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision.

. . .

The defendant, a state correctional officer, sexually assaulted a state prison inmate. The defendant argues that the statute is unconstitutionally vague "because an ordinary person could not determine whether the phrase 'the ability to influence the terms, conditions, length, or fact of incarceration or correctional supervision' applies to a person working as a corrections officer in a state correctional facility." The Court rejects this argument.

Result: Affirmance of Pierce County District Court conviction of Jonathan Ryan Clapper for first degree custodial sexual misconduct.

(3) MIRANDIZED SUSPECT'S REFERENCE TO ATTORNEY DURING CUSTODIAL INTERROGATION HELD TO NOT BE AN UNEQUIVOCAL INVOCATION OF HIS RIGHT TO ATTORNEY UNDER EDWARDS V. ARIZONA, SO QUESTIONING WAS OKAY TO GO ON – In State v. Herron, 177 Wn. App. 96 (Div. III, Oct. 3, 2013), the Court of Appeals rejects the defendant's Miranda-based argument that, after he waived his Miranda rights at the start of a custodial interrogation, he clearly informed his interrogators that he wanted an attorney. The Court rules that his reference to an attorney during the interrogation was not clear enough to require officers to terminate the interrogation.

The Herron Court describes the facts on the Miranda issue as follows:

> Law enforcement arrested Mr. Herron [one day after an alleged rape at knifepoint]. After advice of rights, he agreed to talk to them "Until I don't want to." During the interview, Mr. Herron denied having sexual relations with K.B. He later answered a question "No. And if I am going to get charged I probably need an attorney, I didn't do it." After again denying having sexual relations with K.B., he stated, "If it goes farther than that we need to have an attorney or something. I don't know." He later terminated the interview.

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).

The Herron Court concludes under the following analysis that the defendant's post-waiver statements referencing "an attorney" were not unequivocal assertions of his constitutional right to an attorney requiring termination of the interrogation:

> . . . . In light of Radcliffe, the appellant's argument fails. Assuming that his statements were even an assertion of the desire to have counsel before further conversation with the police, [*Court's footnote: The two noted statements appear best read as indications that an attorney might be needed in the future if the case proceeded as opposed to a desire to have counsel before the interview proceeded further.*] they were at best unclear. He told the deputy that "if I am going to get charged" and "if it goes farther" he would need an attorney. Both are

> conditional statements of future intent. To the extent they could even have been construed to address his current situation, neither statement amounts to an unequivocal assertion that he now desired counsel. Under Davis and Radcliffe, these statements were not sufficient to require the deputy to break off questioning.

[One footnotes omitted]

Result: Affirmance of Whitman County Superior Court conviction of Jerry Allen Herron for first degree rape.

LED EDITORIAL NOTE: For more reading and a flow chart on the subject addressed in Herron, see the following article with appendices by John Wasberg on the Criminal Justice Training Commission Internet LED page, updated through July 1, 2013: "Initiation of Contact Rules Under The Fifth Amendment."

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NEXT MONTH

The **May 2014 LED** will include discussion of the recent 5-4 Washington State Supreme Court decisions in State v. Hinton, ___ Wn.2d ___, 2014 WL 766680 (Feb. 27, 2014) and State v. Roden, ___ Wn.2d ___, 2014 WL 766681 (Feb. 27, 2014) involving text messages. In Hinton the Court holds that article 1, section 7 of the Washington State Constitution is violated by an officer's warrantless reading of a text message. In Roden the Court holds that the Privacy Act, chapter 9.73 RCW, is violated by an officer's warrantless opening, reading and responding to a text message.

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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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