Law Enforcement Digest

AUGUST 2014

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

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HONOR ROLL

701st Basic Law Enforcement Academy – February 11 through June 18, 2014

President:	Jeran M. Delapp, Longview PD
Best Overall:	Ryan D. Beecroft, Seattle PD
Best Academic:	Adam J. Beck, Clark County SO
Best Firearms:	Ryan D. Beecroft, Seattle PD
Patrol Partner Award:	Donald J. Sichmeller, Lakewood PD
Tac Officer:	Officer Russ Hicks, Fife PD

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2014 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS":

- **Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution**
- **Article: "Initiation of Contact" Rules Under The Fifth Amendment**
- **Article: Eyewitness Identification Procedures: Legal and Practical Aspects**

These articles by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year.

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NOTICE REGARDING CITATION FORMS: The Uniform Infraction and Citation Committee has amended the statewide Infraction and Criminal Citation forms. The June 2014 version of the Infraction and Criminal Citation forms are now available for use, and will become mandatory effective **July 1, 2015**, at which time versions of the forms dated August 2013 or earlier will no longer be approved for use, and therefore not be acceptable for filing after June 30, 2015.

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ATTORNEY GENERAL OPINION 2014 NO. 6: WASHINGTON ATTORNEY GENERAL OPINES THAT CONVICTIONS IN FOREIGN COUNTRIES CAN BAR FIREARMS POSSESSION AND DISQUALIFY FROM OBTAINING A CONCEALED PISTOL LICENSE – On June 2, 2014, the Washington Attorney General issued a formal Attorney General Opinion regarding the effect of certain criminal convictions in foreign countries on firearms possession and CPL applications in Washington under chapter 9.41 RCW. The opinion summarizes the analysis as follows:

> 1. An individual who has been convicted in a foreign country of a crime that is comparable to a felony under Washington law is prohibited from possessing a firearm in Washington and, accordingly, is ineligible for a concealed pistol license.

2. An issuing authority is prohibited from issuing a concealed pistol license to any applicant with a foreign conviction comparable to a Washington felony.

The opinion explains to the requesting legislator that "[b]ecause your question focuses on felonies and serious offenses, we do not address the question of whether the same analysis applies to the misdemeanors enumerated in RCW 9.41.040(2)(a)(i)."

The full content of the opinion can be found accessed by going to the Attorney General's Office website, http://www.atg.wa.gov, and clicking on "AG Opinions" at the left.

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UNITED STATES SUPREME COURT

CELL PHONE SEIZED FROM PERSON DURING ARREST GENERALLY IS NOT SUBJECT TO SEARCH INCIDENT TO ARREST UNDER THE FOURTH AMENDMENT; CELL PHONES ARE ENTITLED TO GREATER PRIVACY PROTECTION THAN OTHER PERSONAL ITEMS

Riley v. California, ___U.S. ___, 2014 WL 2864483 (June 25, 2014) (consolidated with United States v. Wurie)

Facts and Proceedings in Riley case (Excerpted from United States Supreme Court's syllabus of opinion, which is a summary prepared by Court staff and is not a part of the Court's opinion)

> Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley incident to the arrest seized a cell phone from Riley's pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. Riley moved to suppress all evidence that the police had obtained from his cell phone. The trial court denied the motion, and Riley was convicted. The California Court of Appeal affirmed.

Facts and Proceedings in Wurie case

> Wurie was arrested after police observed him participate in an apparent drug sale. At the police station, the officers seized a cell phone from Wurie's person and noticed that the phone was receiving multiple calls from a source identified as "my house" on its external screen. The officers opened the phone, accessed its call log, determined the number associated with the "my house" label, and traced that number to what they suspected was Wurie's apartment. They secured a search warrant and found drugs, a firearm and ammunition, and cash in the ensuing search. Wurie was then charged with drug and firearm offenses. He moved to suppress the evidence obtained from the search of the apartment. The District Court denied the motion, and Wurie was convicted. The First Circuit [of the United States Court of Appeals] reversed the denial of the motion to suppress and vacated the relevant convictions.

ISSUE AND RULING: Under the Fourth Amendment's search incident to arrest exception to the search warrant requirement, may a law enforcement officer, contemporaneous with the arrest,

search the contents of a cell phone that is seized from the person of a suspect during arrest? (ANSWER BY SUPREME COURT: No, rules an essentially unanimous Court, cell phones are entitled to greater privacy protection than other personal property on the person and immediately associated with the person of the arrestee)

Results: Reversal of California appellate court decision and Riley's convictions for three crimes related to a shooting; case remanded for possible retrial. Affirmance of decision of First Circuit of the United States Court of Appeals that set aside Wurie's drug and firearm convictions.

ANALYSIS: (Excerpted from United States Supreme Court's syllabus of opinion, which is a summary prepared by Court staff and is not a part of the Court's opinion; the LED Editor has made a few revisions to the paragraphing of the syllabus and some revisions to the style of the syllabus case citations)

> A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement. See Kentucky v. King, 563 U.S, ___, 131 S. Ct. 1849 (2011) **Aug 11 LED:08**. The well-established exception at issue here applies when a warrantless search is conducted incident to a lawful arrest.
>
> Three related precedents govern the extent to which officers may [contemporaneously] search property found on or near an arrestee. Chimel v. California, 395 U.S. 752 (1969), requires that a search incident to arrest be limited to the area within the arrestee's immediate control, where it is justified by the interests in officer safety and in preventing evidence destruction.
>
> In United States v. Robinson, 414 U.S. 218 (1973), the Court applied the Chimel analysis to a search of a cigarette pack found on the arrestee's person. It held that the risks identified in Chimel are present in all custodial arrests, even when there is no specific concern about the loss of evidence or the threat to officers in a particular case. **[LED EDITORIAL NOTE: The lead opinion in Riley notes regarding Robinson: "A few years later, the Court clarified that this exception was limited to "personal property . . . immediately associated with the person of the arrestee." United States v. Chadwick, 433 U.S. 1 (1977) (200-pound, locked footlocker could not be searched incident to arrest) . . . .]**
>
> The trilogy concludes with Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**, which permits searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle. **[LED EDITORIAL NOTE: The Washington constitution has been interpreted as not including the Fourth Amendment's "evidence of the crime of arrest" exception for vehicle searches incident to arrest of occupants. See State v. Snapp, 174 Wn.2d 177 (2012) May 12 LED:25]**
>
> The Court declines to extend Robinson's categorical rule to searches of data stored on cell phones. Absent more precise guidance from the founding era, the Court generally determines whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." Wyoming v. Houghton, 526 U.S. 295 (1999). That balance of interests supported the search

incident to arrest exception in Robinson. But a search of digital information on a cell phone does not further the government interests identified in Chimel, and implicates substantially greater individual privacy interests than a brief physical search.

The digital data stored on cell phones does not present either Chimel risk. Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Officers may examine the phone's physical aspects to ensure that it will not be used as a weapon, but the data on the phone can endanger no one. To the extent that a search of cell phone data might warn officers of an impending danger, e.g., that the arrestee's confederates are headed to the scene, such a concern is better addressed through consideration of case-specific exceptions to the warrant requirement, such as exigent circumstances. See, e.g., Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

The United States and California raise concerns about the destruction of evidence, arguing that, even if the cell phone is physically secure, information on the cell phone remains vulnerable to remote wiping and data encryption. As an initial matter, those broad concerns are distinct from Chimel's focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. The briefing also gives little indication that either problem is prevalent or that the opportunity to perform a search incident to arrest would be an effective solution. And, at least as to remote wiping, law enforcement currently has some technologies of its own for combatting the loss of evidence.

[LED EDITORIAL NOTE: In regard to this passage in the staff's syllabus that we have underlined, the lead opinion for the Court explains, in an explanatory passage not summarized in the syllabus, as follows:

> **Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. . . . Such devices are commonly called "Faraday bags," after the English scientist Michael Faraday. They are essentially sandwich bags made of aluminum foil: cheap, lightweight, and easy to use. They may not be a complete answer to the problem . . . , but at least for now they provide a reasonable response. In fact, a number of law enforcement agencies around the country already encourage the use of Faraday bags. See, e.g., Dept. of Justice, National Institute of Justice, Electronic Crime Scene Investigation: A Guide for First Responders 14, 32 (2d ed. Apr. 2008) . . . .**
>
> **To the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If "the police are truly confronted with a 'now or never' situation," — for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely**

> **on exigent circumstances to search the phone immediately. . . . . Or, if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data. . . . . Such a preventive measure could be analyzed under the principles set forth in our decision in [Illinois v. McArthur, 531 U.S. 326 (2001) April 01 LED:02], which approved officers' reasonable steps to secure a scene to preserve evidence while they awaited a warrant.**
>
> **Finally, law enforcement's remaining concerns in a particular case might be addressed by responding in a targeted manner to urgent threats of remote wiping [as exigent circumstances], or by taking action to disable a phone's locking mechanism in order to secure the scene, see Illinois v. McArthur, 531 U.S. 326, 331-333 (2001) April 01 LED:02.]**

A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but more substantial privacy interests are at stake when digital data is involved.

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be carried on an arrestee's person. Notably, modern cell phones have an immense storage capacity. Before cell phones, a search of a person was limited by physical realities and generally constituted only a narrow intrusion on privacy. But cell phones can store millions of pages of text, thousands of pictures, or hundreds of videos. This has several interrelated privacy consequences. First, a cell phone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years. In addition, an element of pervasiveness characterizes cell phones but not physical records. A decade ago officers might have occasionally stumbled across a highly personal item such as a diary, but today many of the more than 90% of American adults who own cell phones keep on their person a digital record of nearly every aspect of their lives.

The scope of the privacy interests at stake is further complicated by the fact that the data viewed on many modern cell phones may in fact be stored on a remote server. Thus, a search may extend well beyond papers and effects in the physical proximity of an arrestee, a concern that the United States recognizes but cannot definitively foreclose.

. . .

It is true that this decision will have some impact on the ability of law enforcement to combat crime. But the Court's holding is not that the information on a cell phone is immune from search; it is that a warrant is generally required before a search. The warrant requirement is an important component of the Court's Fourth Amendment jurisprudence, and warrants may be obtained with increasing efficiency. In addition, although the search incident to arrest exception does not apply to cell phones, the continued availability of the exigent circumstances

exception may give law enforcement a justification for a warrantless search in particular cases.

Concurring opinion:

Justice Alito authors a concurring opinion asserting (1) that the search incident to arrest exception has a broader justification than is stated in the lead opinion, and (2) that federal legislation might be crafted in this subject area. Because our space is limited and because no other Justice joins Alito's concurrence, the LED is not further addressing his concurrence.

LED EDITORIAL COMMENT: Officers who are subject to interpretations of article I, section 7 of the Washington constitution and of the Washington Privacy Act, chapter 9.73 RCW, must also consider the Washington Supreme Court rulings earlier this year: (1) in State v. Hinton, 179 Wn.2d 862 (Feb. 27, 2014) May 14 LED:08, holding that it generally violates the rights of a sender of a text message under article I, section 7 of the Washington constitution for an officer to conduct a warrantless reading of an incoming text message on a cell phone that was seized from a drug dealer during his arrest, where the viewing occurred before the drug dealer had opened and viewed the incoming message; and (2) in State v. Roden, 179 Wn.2d 893 (Feb. 27, 2014) May 14 LED:13, holding that it violates chapter 9.73 RCW for an officer to conduct a warrantless reading of an incoming text message on an cell phone that was seized from a drug dealer during his arrest, where the viewing occurred before the drug dealer had opened and viewed the incoming message. Officers will want to look at our comments in the May 2014 LED regarding Hinton and Roden.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

CIVIL RIGHTS ACT LAWSUIT: SWORN COURT TESTIMONY OUTSIDE THE SCOPE OF ORDINARY JOB DUTIES IS ENTITLED TO FIRST AMENDMENT PROTECTION – In Lane v. Franks, ___ U.S. ___, 2014 WL 2765285 (June 19, 2014), the United States Supreme Court holds that court testimony that is outside of the scope of ordinary job duties is entitled to First Amendment protection.

The facts and holding (excerpted from United States Supreme Court's syllabus of opinion, which is a summary prepared by Court staff and is not a part of the Court's opinion):

> As Director of Community Intensive Training for Youth (CITY), a program for underprivileged youth operated by Central Alabama Community College (CACC), petitioner Edward Lane conducted an audit of the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not been reporting for work. Lane eventually terminated Schmitz' employment. Shortly thereafter, federal authorities indicted Schmitz on charges of mail fraud and theft concerning a program receiving federal funds. Lane testified, under subpoena, regarding the events that led to his terminating Schmitz. Schmitz was convicted and sentenced to 30 months in prison. Meanwhile, CITY was experiencing significant budget shortfalls. Respondent Franks, then CACC's president, terminated Lane along with 28 other employees in a claimed effort to address the financial difficulties. A few days later, however, Franks rescinded all but 2 of the 29 terminations—those of Lane and one other employee. Lane sued Franks in his individual and official capacities under 42

U.S.C. § 1983, alleging that Franks had violated the First Amendment by firing him in retaliation for testifying against Schmitz.
. . .

Held :

1. Lane's sworn testimony outside the scope of his ordinary job duties is entitled to First Amendment protection.

(a) . . . Under the first step of the [Pickering v. Board of Education of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568 (1968)] analysis, if the speech is made pursuant to the employee's ordinary job duties, then the employee is not speaking as a citizen for First Amendment purposes, and the inquiry ends. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) **Aug 06 LED:05**. But if the "employee spoke as a citizen on a matter of public concern," the inquiry turns to "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

(b) Lane's testimony is speech as a citizen on a matter of public concern.

(1) Sworn testimony in judicial proceedings is a quintessential example of citizen speech for the simple reason that anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth. That obligation is distinct and independent from any separate obligations a testifying public employee might have to his employer. The Eleventh Circuit read Garcetti far too broadly in holding that Lane did not speak as a citizen when he testified simply because he learned of the subject matter of that testimony in the course of his employment. Garcetti said nothing about speech that relates to public employment or concerns information learned in the course of that employment. The critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Indeed, speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.

(2) Whether speech is a matter of public concern turns on the "content, form, and context" of the speech. Connick v. Myers, 461 U.S. 138, 147–148 (1983). Here, corruption in a public program and misuse of state funds obviously involve matters of significant public concern. See Garcetti, 547 U.S., at 425. And the form and context of the speech—sworn testimony in a judicial proceeding—fortify that conclusion. See United States v. Alvarez, 567 U.S. ___, 132 S. Ct. 2537, 2546 (2012).

(c) Turning to Pickering's second step, the employer's side of the scale is entirely empty. Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor . . .

2. Franks is entitled to qualified immunity for the claims against him in his individual capacity. . . .

Result: Reversal of Eleventh Circuit United States Court of Appeals (and United States District Court (Northern District of Alabama)) orders concluding testimony was not entitled to First Amendment protection; affirmance of order granting summary judgment dismissal based on qualified immunity.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) CIVIL RIGHTS ACT LAWSUIT: ORDINANCE PROHIBITING THE USE OF A VEHICLE AS LIVING QUARTERS IS HELD UNCONSTITUTIONALLY VAGUE – In Desertrain v. City of Los Angeles, ___ F3d ___ 2014 WL 2766541 (9th Cir., June 19, 2014), homeless individuals filed a § 1983 action challenging the constitutionality of a city ordinance prohibiting the use of a vehicle "as living quarters either overnight, day-by-day, or otherwise."

A three-judge panel of the Ninth Circuit holds that the ordinance "provides inadequate notice of the unlawful conduct it proscribes, and opens the door to discriminatory enforcement against the homeless and the poor. Accordingly, the panel [holds that the ordinance] violates the Due Process Clause of the Fourteenth Amendment as an unconstitutionally vague statute."

Result: Reversal of United States District Court (Central District California) order granting summary judgment dismissal in favor of defendants.

(2) CIVIL RIGHTS ACT LAWSUIT: "RECTUM-PACKING" PLAINTIFF/ARRESTEE'S ALLEGATIONS THAT OFFICERS LIED TO DOCTOR TO GET DOCTOR TO DO A NON-CONSENTING, NON-EMERGENT WARRANTLESS EXTRACTION OF A BAGGIE OF DRUGS FROM HIS RECTUM MUST GO TO TRIAL – In George v. Edholm, ___F.3d ___, 2014 WL 2198581 (9th Cir., May 28, 2014), a three-judge panel of the Ninth Circuit holds that a case must go to jury trial on factual questions as to whether two law enforcement officers (or at least one of them) are responsible for Fourth Amendment violations based on a plaintiff-arrestee's allegations that they lied to a physician about: (1) whether the officers believed that an arrestee had swallowed narcotics just prior to arrest; and (2) whether the officers, who undisputedly had reason to believe the arrestee had secreted a baggie of narcotics in his rectum just prior to being arrested, lied to a physician in the officers' alleged assertions to the physician that the officers believed that the arrestee experienced seizure symptoms since being arrested.

On review the Ninth Circuit views the facts in the light most favorable to plaintiff (as it must in reviewing a summary judgment order). Under this standard, the Ninth Circuit panel rules that the alleged false statements of the officers to the doctor provide: (1) bases for deeming the officers' responsible for the doctor's conduct (in effect, making the doctor their agent) when the doctor incorrectly deemed the situation to require emergency extraction of the baggie that the plaintiff had packed in his rectum; and (2) bases for concluding that the officers committed a Fourth Amendment violation for their part in causing the non-consenting, warrantless forced sedation, anoscopy (i.e., insertion of a tube into the anus to inspect the area), insertion of forceps into the arrestee's rectum to retrieve the baggie, intubation through the mouth and insertion of a nasogastric tube, and forced bowel evacuation.

The Court denies qualified immunity to the officers on the rationale that reasonable officers would have known that their conduct violated Fourth Amendment case law standards. The George Court declares that Fourth Amendment case law clearly establishes that the mere possibility that a baggie of drugs that a person has secreted in his or her body can rupture does not justify the kind of bodily intrusion that occurred in this case. And, of course, if the officers

lied to the doctor to convince him that circumstances were emergent when they were not, the officers could not have reasonably believed that was lawful.

Result: Reversal of United States District Court (Central District California) grant of summary judgment to two officers of the Pomona (California) Police Department.

(3) CIVIL RIGHTS ACT CASE: LAWSUIT MUST GO TO JURY ON LAWFULNESS OF STOP OF CAR BASED ON MISTAKE BY AUTOMATIC LICENSE PLATE READER (ALPR) WITH NO ATTEMPT BY OFFICERS TO CORROBORATE THE ALPR HIT; EXCESSIVE FORCE AND DE FACTO ARREST ISSUES ALSO MUST GO TO JURY – In Green v. City and County of San Francisco, 751 F.3d 1039 (9th Cir., May 12, 2014), a three-judge panel of the Ninth Circuit holds that there are genuine issues of material fact (thus precluding summary judgment dismissal) regarding whether officers had reasonable suspicion for a traffic stop, whether officers exceeded the proper scope of a Terry stop, and whether officers used excessive force.

The lawsuit arose out of a vehicular stop performed by Sergeant Ja Han Kim of the San Francisco Police Department ("SFPD") after the SFPD's Automatic License Plate Reader ("ALPR") mistakenly identified Green's Lexus as a stolen vehicle. Without visually confirming the license plate, Sergeant Kim made a "high-risk" stop during which Green was held at gunpoint by multiple officers, handcuffed, forced to her knees, and detained for up to twenty minutes. She was released only after officers eventually ran her plate and discovered the ALPR mistake and that her vehicle was not stolen.

Result: Reversal of United States District Court (Northern District California) order granting summary judgment to city defendants.

LED EDITORIAL COMMENT: The IACP Model Policy on License Plate Recognition (LPR) requires, prior to a stop following an LPR hit, visual verification that the vehicle license plate matches the plate number run by the LPR system, and verification of the current status of the license plate through dispatch or MDT. The Green opinion notes that SFPD's patrol officers had been trained consistent with the IACP Model Policy. See also State v. Creed, ___ Wn. App. ___, 319 P.3d 80 (Div. III, Feb. 20, 2014) (petition for review pending) June 14 LED:15 (Officer's misreading of license plate, which returned as stolen, does not provide reasonable suspicion for traffic stop.) Creed did not involve the use of an LPR, however, it shows that courts are holding that the mistaken readings of license plates, which then return with a hit of some sort, do not provide reasonable suspicion.

(4) CIVIL RIGHTS ACT LAWSUIT: TWENTY-SEVEN MONTH CONFINEMENT IN INTENSIVE MANAGEMENT UNIT (IMU) WITHOUT PERIODIC MEANINGFUL REVIEW OF STATUS DEPRIVES INMATE OF DUE PROCESS; HOWEVER, PRISON OFFICIALS ARE ENTITLED TO QUALIFIED IMMUNITY IN THIS CASE – In Brown v. Oregon Dep't of Corrections, 751 F.3d 983 (9th Cir., April 29, 2014), a three-judge panel of the Ninth Circuit holds that an inmate's 27-month confinement in the intensive management unit, without periodic meaningful review of his status, deprived him of a due-process protected liberty interest, however, because the right to periodic meaningful review was not clearly established prison officials are entitled to qualified immunity.

Result: Affirmance of United States District Court (Oregon) order granting summary judgment to prison officials.

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WASHINGTON STATE SUPREME COURT

INTERROGATION SHOULD HAVE ENDED WHEN MIRANDIZED TRIPLE-MURDERER SAID "I DON'T WANT TO TALK ABOUT IT," AND OFFICER'S FOLLOWUP CONSOLING WORDS CONSTITUTED FURTHER INTERROGATION, BUT TRIAL COURT ERROR CONCLUDING OTHERWISE WAS HARMLESS IN LIGHT OF OTHER OVERWHELMING EVIDENCE

In re Personal Restraint of Dayva Cross, ___Wn.2d ___, 2014 WL 2892418 (June 26, 2014)

Facts relating to Miranda issue: (Excerpted from Supreme Court opinion)

> On the afternoon of [the day on which Cross earlier murdered his wife and two of his three step-daughters], officers arrested Cross and placed him in a patrol car. On the way to the station, Cross was advised of his constitutional rights pursuant to Miranda. Cross acknowledged that he understood his rights. At the station, [Officer A] advised Cross of his Miranda rights for a second time. After acknowledging once more that he understood his rights, Cross stated, "I don't want to talk about it." [Officer A] walked away and then returned to offer Cross a glass of water. Taking pity on Cross, [Officer A] said, "Sometimes we do things we normally wouldn't do, and we feel bad about it later." Cross did not drink the glass of water. Cross then said, "I [f---ing] had it. How can you feel good about doing something like this. I can't find a job, they want a thousand dollars in [f---ing] child support. I [f---ing] had it. And my ex-wife is [f---ing] lucky, because she was next on the list."
>
> [Officer B] was present when Cross stated he did not want to talk about it. Cross was then moved into a holding cell. [Officer B] approached Cross in the cell and asked, "Do you want to talk about it?" Cross responded with the same statement— that he had "[f---ing] had it" with the child support and that his ex-wife was next on the list. . . .

Proceedings:

The charges against Cross included three counts of aggravated murder. His counsel moved to suppress all of Cross's statements to law enforcement officers except for a tape-recorded statement to a detective in an interrogation (not described in the Supreme Court's decision) conducted after Cross made his statements (described above) that were heard by the law enforcement officers. Thus, the only Miranda issues remaining were whether Cross's statements heard by Officers A and B were admissible. The trial judge admitted all of Cross's custodial statements. The trial judge ruled that (1) Cross had not invoked his right to remain silent, (2) Officer A's comment to Cross was not interrogation, and (3) Cross validly waived his Miranda rights. Cross entered an Alford plea of guilty. Cross's custodial statements were then used as evidence in the sentencing phase in which a jury ultimately found for a sentence of death. Cross lost an appeal to the Washington Supreme Court. State v. Cross, 156 Wn.2d 580 (2006). He subsequently filed a Personal Restraint Petition to the Washington Supreme Court.

ISSUES AND RULINGS: 1) When Cross told Officer A "I don't want to talk about it," did Cross unambiguously assert his Miranda right to silence, thus triggering the Miranda requirement that officers scrupulously honor the assertion of rights? (ANSWER BY UNANIMOUS SUPREME COURT: Yes)

2) Did Officer A fail to scrupulously honor Cross's assertion of his right to silence when Officer A, just moments later, consoled Cross by saying: "Sometimes we do things we normally wouldn't do, and we feel bad about it later"? (ANSWER BY UNANIMOUS SUPREME COURT: Yes, Officer A's statement was impermissible; the statement was a form of interrogation because it was reasonably likely to elicit an incriminating response; also, Officer B likewise failed to scrupulously honor Cross's assertion of his right to silence when Officer B asked Cross if he wanted to "talk about it")

3) In light of the other overwhelming evidence, was it harmless error to admit the Miranda-violative statements? (ANSWER BY UNANIMOUS SUPREME COURT: Yes)

Result: Denial of Dayva Cross's personal restraint petition, thus leaving his death sentence in place.

ANALYSIS: (Excerpted from Supreme Court opinion)

> An Invocation of Miranda Rights Must Be Unequivocal
>
> In Miranda, the Supreme Court established a conclusive presumption that all confessions or admissions made during a custodial interrogation are compelled in violation of the Fifth Amendment's privilege against self-incrimination. This presumption is overcome only upon a showing that law enforcement officials informed the suspect of his or her right to remain silent and right to an attorney and that the suspect knowingly and intelligently waived those rights. A suspect may choose to invoke these rights at any time prior to or during questioning. [*Court's footnote: The Supreme Court has subsequently held that an invocation of the right to remain silent and an invocation of the right to counsel are treated similarly in that an unequivocal invocation of either right is sufficient to terminate an interrogation. Berghuis v. Thompkins, 560 U.S.370 (2010)* ***July 10 LED:02*** *(citing Michigan v. Mosley, 423 U.S. 96 (1975))*.]
>
> If the suspect's invocation of his right is equivocal, then officers may carry on questioning. Davis v. United States, 512 U.S. 452 (1994) **Sept 94 LED:02**. They are not required to clarify whether or not the suspect actually meant to invoke Miranda. However, if the invocation is unequivocal, the police must stop their questioning immediately. They may not resume discussion with the suspect until the suspect reinitiates further communication with the police, or [where only the right to silence and not the right to counsel has been invoked] a significant period of time has passed and officers reissue a fresh set of Miranda warnings and obtain a valid waiver. . . . see Michigan v. Mosley, 423 U.S.96 (1975).
>
> An invocation of Miranda rights is unequivocal so long as a "reasonable police officer in the circumstances" would understand it to be an assertion of the suspect's rights. Davis. This test encompasses both the plain language and the context of the suspect's purported invocation. Smith v. Illinois, 469 U.S. 91 (1984). Plain language can be, on its own, telling. For instance, a suspect invoked his Miranda rights when he clearly stated, "I would rather not talk about it." State v. Gutierrez, 50 Wn. App. 583 (1988). By contrast, merely announcing an intent not to say anything incriminating is not an invocation of the right to remain silent. State v. Walker, 129 Wn. App. 258 (2005) **Nov 05 LED:19**.

Courts must also consider the circumstances leading up to the alleged invocation. For instance, when a suspect says, "Maybe I should talk to a lawyer" and subsequently clarifies, "No, I'm not asking for a lawyer," the suspect has not invoked his Miranda rights and questioning may continue. Davis. But a court may not rely on context arising after the suspect's invocation to retroactively cast doubt on a facially clear and unequivocal invocation of Miranda rights. Smith. In Smith, the defendant was advised of his right to have counsel present and told the police, "Uh, yeah, I'd like to do that." Rather than cutting off discussion, the police finished reading Smith his Miranda rights and asked him, "Do you wish to talk to me at this time without a lawyer being present?" Smith answered, "Yeah and no, uh, I don't know what's what, really." The trial court seized on Smith's latter statement as proof that Smith's invocation of Miranda was equivocal and admitted evidence of Smith's statements to police. The Supreme Court disagreed, holding that "[w]here nothing about the request or the circumstances leading up to the request would render it ambiguous, all questioning must cease." In other words, what the accused said after invoking his Miranda rights might be relevant to waiver but it was not relevant to the invocation itself.

Cross Unequivocally Invoked His Right To Remain Silent

It was objectively unreasonable for the trial court to conclude that Cross did not invoke his right to remain silent. In response to being read his Miranda rights, Cross told [Officer A], "I don't want to talk about it." There is nothing equivocal or ambiguous about this statement. Indeed, it is difficult to imagine a clearer refusal. Any reasonable police officer, knowing that the exercise of the right to silence must be "scrupulously honored," would have understood that when Cross said he did not want to talk about "it", he meant he did not want to talk about the murders. . . .

Moreover, the circumstances leading to Cross's statement indicate that Cross unequivocally invoked his right to remain silent. Cross told officers that he did not want to talk immediately after [Officer A] read him his Miranda rights. . . .

[Law Enforcement Officer A] Did Not Scrupulously Honor Cross's Invocation of His Right To Remain Silent

Although it is a closer call, it was also objectively unreasonable for the trial court to conclude that [Officer A's] comment that "sometimes we do things we normally wouldn't do and feel bad about it later" was not interrogation. Unlike the comment in Rhode Island v. Innis, 446 U.S. 291 (1980), [the officer's] comment was redolent of the very recent and horrific murders and, thus, appeared reasonably likely to elicit an incriminating response. . . .

"Interrogation" can be express questioning, or any words or actions reasonably likely to elicit an incriminating response. Innis. The test for the latter category focuses primarily on the suspect's perceptions, rather than the officer's intent. . . . . . .

Here, while there was no express questioning, [Officer A] subjected Cross to the "functional equivalent of questioning." Unlike the comment in Innis [where an officer made a comment to a fellow officer that the Innis majority opinion deemed to be neither tailored to any vulnerability of the suspect nor particularly

"evocative"], [the officer] spoke directly to Cross. She could tell that he was upset, almost certainly because of the murders, which had just occurred that morning. The comment was evocative in that it referred to the recent killings, which were brutal and emotional and involved Cross's family. This is true even if [the officer's] intent was to express sympathy. Thus, the trial court erred in ruling that [the officer's] comment was no different than the statement made in Innis.

Indeed, the comment "sometimes we do things we normally wouldn't do" appears reasonably likely to elicit an incriminating response. The comment implies that Cross committed the murders. While there are several possible responses to [the officer's] comment, all are incriminating. See Innis ("incriminating response" is any response—inculpatory or exculpatory—that prosecution may seek to introduce at trial). For example, Cross could have remained silent, which could be evidence of his guilt; Cross could have denied committing the murders or feigned ignorance, which could have cast doubt on his character for honesty; or Cross could have done as he did and responded with what was essentially a confession. An officer's comment is designed to elicit an incriminating response when a suspect's choice of replies to that comment are all potentially incriminating.

Cross did not offer an irrelevant outburst unresponsive to [Officer A's] comment. Cross specifically responded to [the officer's] comment "sometimes we do things we normally wouldn't do and we feel bad about it later" by asking, "[H]ow can you feel good about doing something like this." Thus, although [the officer's] remark was not phrased as a question, it reasonably elicited an incriminating response.

We hold that [Officer A] failed to scrupulously honor Cross's invocation of his right to remain silent. [The officer's] statement constituted interrogation. Because Cross had previously invoked his Miranda rights, we hold that [the officer's] statement was an improper reexamination.

Cross Did Not Subsequently Waive His Miranda Rights

Cross did not waive his Miranda rights because he never initiated further discussions with the police after he stated, "I don't want to talk about it." . . . . If a defendant fails to unequivocally invoke his Miranda rights, a waiver may be inferred when a defendant freely and selectively responds to police questioning. . . . However, once an accused has unequivocally invoked his Miranda rights, waiver occurs only when the accused initiates further discussions with the police and knowingly and intelligently waives the right invoked. Smith (citing Edwards v. Arizona, 451 U.S. 477 (1981)). Here, Cross never initiated further discussions with the police after he stated, "I don't want to talk about it." Rather, [Officer A] reapproached Cross.

[Officer B] also improperly reapproached Cross while he was in his holding cell to ask, "[D]o you want to talk about it?" . . . . [The officer] heard Cross invoke his right to remain silent. Instead of waiting an appropriate amount of time and then reissuing a fresh set of Miranda warnings, [Officer B] immediately approached Cross in his holding cell and asked if Cross wanted to talk. Cf. Mosley (defendant's Miranda rights not violated because reinterrogation was by a different officer about a different crime and began two hours later, and new warnings were given). There was no reason for [the officer] to believe that Cross

had subsequently waived his right to remain silent. Accordingly, [the officer] was required to "scrupulously honor" Cross's right to remain silent and should not have persisted in questioning Cross or in asking Cross whether he would like to talk about the murders. . . . Thus, we hold that Cross did not subsequently waive his right to remain silent to [the officers] after he unequivocally stated, "I don't want to talk about it."

It Was Harmless Error To Admit Cross's Custodial Statements To The Law Enforcement Officers

However, we deny Cross's petition because it was harmless error to admit Cross's custodial statements to [Officers A and B]. Constitutional errors are harmless if the untainted evidence is so overwhelming that it necessarily leads to the same outcome. . . . Here, even excluding Cross's statements to the law enforcement officers], we hold that the error is harmless because it appears beyond a reasonable doubt that the same result would have been reached. **[LED EDITORIAL NOTE: The Court's opinion concludes its discussion of the Miranda issue with a description, omitted from this LED entry, of the overwhelming evidence that supports this holding.]**

[Some citations omitted, some other citations revised for style]

LED EDITORIAL NOTES: For a discussion of the Miranda-based initiation-of-contact rules under Edwards/Roberson for continuous custody suspects, see the article "Initiation Of Contact Rules Under The Fifth Amendment" (by John Wasberg, current through July 1, 2014) on the Criminal Justice Training Commission's Internet LED page under "Special Topics."

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

PUBLIC RECORDS ACT: PRIVACY ACT, CHAPTER 9.73 RCW, EXEMPTION FOR IN CAR VIDEOS APPLIES ONLY WHEN THERE IS PENDING LITIGATION, NOT TO CIRCUMSTANCES WHERE THERE MIGHT BE LITIGATION

Fisher Broadcasting-Seattle TV LLC dba KOMO 4 v. City of Seattle and Seattle Police Dep't, ___ Wn.2d ___, 2014 WL 2615058 (June 12, 2014)

Facts and Proceedings below: (Excerpted from the majority opinion)

On August 4, 2010, [KOMO reporter Tracy Vedder] requested "a copy of any and all Seattle police officer's log sheets that correspond to any and all in-car video/audio records which have been tagged for retention by officers. This request is for such records dating from January 1, 2005 to the present." On August 10, 2010, [Seattle Police Department] SPD's public record's officer . . . responded that no relevant records existed.

The next day, Vedder requested "a list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005 to the present. This list should include, but not be limited to, the officer's name, badge number, date, time and location when the video was tagged for retention and any other notation that accompanied the retention tag."

On August 18, SPD denied the request on the grounds that "SPD is unable to query the system in the way you have requested. We can search by individual officer name, date, and time only. We cannot generate mass retention reports due to system limitations. Thus we do not have any responsive records."

On September 1, 2010, Vedder requested "copies of any and all digital, in-car video/audio recordings from the Seattle Police Department that have been tagged for retention by anyone from January 2007 to the present. The recordings should also include, but not be limited to, corresponding identifying information such as the date, time, location, and officer(s) connected to each unique recording." SPD contacted COBAN for help with this request. COBAN told SPD that such a list could be generated by running a computer script that COBAN was willing to provide for free, but coding the program to enable mass copying of the videos "will take some real programming" and would cost at least $1,500. SPD denied Vedder's third request on October 1, 2010, telling her, "'SPD is unable to query the system to generate a retention report that would provide a list of the retained videos.' Without this capability we are unable to respond to your request. Therefore we have no documents responsive to your request." After Vedder pressed the matter, SPD's attorney told her that the privacy act prevented release of the videos that were less than three years old.

Meanwhile, in February 2011, Eric Rachner requested "a copy of the full and complete database of all Coban D[igital] V[ideo] M[anagment] S[ystem (DVMS)] activity logs in electronic form." He suggested since "Coban DVMS system's database runs on Microsoft SQL [(structured query language)] server, . . . it should be convenient to provide the logs, in electronic form, in their original Microsoft SQL Server format. The responsive records will include all rows of all columns of all tables related to the logging of video-related activity within the Coban DVMS." After working closely with Rachner, SPD began to provide the records in June. That summer, Rachner showed Vedder what he had received from SPD. According to Vedder, "I was amazed because the COBAN DVMS database provided to Mr. Rachner was exactly the sort of list of videos in electronic format that I had requested on August 11, 2010."

ISSUES AND RULINGS: 1) Is RCW 9.73.090(1)(c) an "other statute" under the Public Records Act (PRA) which precludes disclosure of in car video until final disposition of any criminal or civil litigation which arises from the recorded events? (ANSWER BY MAJORITY WASHINGTON SUPREME COURT: Yes, RCW 9.73.090(1)(c) is an "other statute", however, it only prohibits disclosure to the public if litigation is actually pending.)

2) Did SPD violate the PRA by stating that it had no responsive records when the request for a "list of any and all digital in-car video/audio recordings that have been tagged for retention by Seattle Police Officers from January 1, 2005, [including] officer's name, badge number" would have required the creation of a new record? (ANSWER BY MAJORITY OF WASHINGTON SUPREME COURT: Yes)

Result: Reversal of King County Superior Court order.

ANALYSIS:

RCW 9.73.090(1)(c) (Privacy Act) Exemption

Chapter 9.73 RCW is Washington's Privacy Act. RCW 9.73.090(1)(c) provides in part:

> The provisions of RCW 9.73.030 through 9.73.080 (which prohibit sound recording without the consent of all parties) shall not apply to police . . . in the following instances:
> . . .
>
> (c) Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles . . .
>
> No sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until final disposition of any criminal or civil litigation which arises from the event or events which were recorded.

The majority opinion concludes:

> SPD argues that this statute functions as an "other statute" exception to the PRA. We agree in part, but given the general rule that exemptions are to be interpreted narrowly, RCW 42.56.030, we find this exemption is limited to cases where the videos relate to actual, pending litigation.
>
> The legislature added RCW 9.73.090(1)(c) in 2000. Laws of 2000, ch. 195, § 2. It stated that its intent was "to provide a very limited exception to the restrictions on disclosure of intercepted communications." Laws of 2000, ch. 195, § 1. Prior to that time, RCW 9.73.090 had authorized certain law enforcement and emergency recordings and restricted their use to "valid police or court activities." Laws of 2000, ch. 195, § 2. This amendment and the statement of legislative intent strongly suggest that the legislature intended to provide greater guidance on the use of these authorized recordings. It does not suggest the legislature intended to create a broad categorical exception to the PRA. We note that neither the statute nor even the bill reports mention the PRA or its predecessor. Indeed, exempting recordings from disclosure "until final disposition of any criminal or civil litigation which arises from the event," RCW 9.73.090(1)(c), would be a strange way to protect privacy. Privacy does not evaporate when litigation ends.
>
> . . . In this case, the statute as a whole suggests the legislative goal was neither to instill categorical delay nor protect personal privacy. Instead, the statute as a whole provides a limited exception to the rules against recording and the rules requiring disclosure to protect the integrity of law enforcement investigations and court proceedings. In authorizing "[s]ound recordings that correspond to video images recorded [without all parties' consent] by video cameras mounted in law enforcement vehicles," RCW 9.73.090(1)(c), our legislature built on an exception to the privacy act that had for decades permitted recording of emergency calls and interviews of persons in custody. Laws of 1970, 1st Ex.Sess., ch. 48; Laws of 2000, ch. 195. For decades the privacy act has admonished that these "recordings shall only be used for valid police or court activities." Laws of 1970, 1st Ex.Sess., ch. 48, § 1(2)(d) (codified at RCW 9.73.090(1)(b)(iv)). Context suggests that the legislature's intent in providing that "[n]o sound or video recording made under this subsection (1)(c) may be duplicated and made available to the public by a law enforcement agency subject to this section until

> final disposition of any criminal or civil litigation which arises from the event or events which were recorded" is to give more guidance to agencies attempting to limit their use of these recordings to "valid police or court activities," RCW 9.73.090(1)(b)(iv). So long as "police or court activities" are ongoing, RCW 9.73.090(1)(c) restricts disclosure—most likely to protect those very "police or court activities" recited by the statute. Accord Sargent [v. Seattle Police Dep't], 179 Wn.2d 376, 395 (2013) **March 14 LED:14**]. Neither the statutory text nor the legislative history suggests that categorical delay was legislative purpose. . . .
>
> Creation of New Record
>
> SPD contends that Vedder was asking it to create a new record. This is clearly true to some extent; producing a document that would correlate all of the information Vedder requested would have required mining data from two distinct systems and creating a new document. This is more than the PRA requires. Citizens for Fair Share v. Dep't of Corrections, 117 Wn. App. 411, 435 (2003) (citing Smith v. Okanogan County, 100 Wn. App. 7, 13–14 (2000)). However, as SPD's later response to Rachner demonstrated, it did have the capacity to produce a partially responsive record at the time it denied her request. It should have done so.
>
> We recognize that neither the PRA itself nor our case law have clearly defined the difference between creation and production of public records, likely because this question did not arise before the widespread use of electronically stored data. Given the way public records are now stored (and, in many cases, initially generated), there will not always be a simple dichotomy between producing an existing record and creating a new one. But "public record" is broadly defined and includes "existing data compilations from which information may be obtained" "regardless of physical form or characteristics." RCW 42.56.010(4), (3). This broad definition includes electronic information in a database. Id.; see also WAC 44–14–04001. Merely because information is in a database designed for a different purpose does not exempt it from disclosure. Nor does it necessarily make the production of information a creation of a record.
> . . .

[Footnotes and some citations omitted]

Dissent: Justice Fairhurst the dissents from the majority opinion on the Privacy Act issue. She is joined by Justices Owens, Wiggins and Chief Justice Madsen.

LED EDITORIAL COMMENT: While we think the majority's reasoning on the Privacy Act issue is somewhat circular, we now have an answer from the Supreme Court on this issue. Law enforcement agencies have long debated on the proper response to requests for in car video given the PRA's mandate of broad disclosure with accompanying penalties and fees for non-disclosure, and the Privacy Act's prohibition against disclosure of in car video until final disposition of any criminal or civil litigation which arises from the recorded event and its potential of criminal penalties for violation.

Additionally, although the Court acknowledges that the PRA does not require agencies to create records, it does hold that in this case, where the agency had the capacity to produce a partially responsive record, the agency should have done so.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) SOUND TRANSIT FARE ENFORCEMENT OFFICERS ARE NOT PUBLIC SERVANTS FOR PURPOSES OF RCW 9A.76.175, MAKING FALSE OR MISLEADING STATEMENTS TO A PUBLIC SERVANT – In State v. K.L.B., ___ Wn.2d ___, 2014 WL 2895451 (June 26, 2014), a 7-2 majority of the Washington State Supreme Court holds that Sound Transit Fare Enforcement Officers (FEO) are not public servants for purposes of the statute prohibiting making a false or misleading statement to a pubic servant. The majority opinion describes as follows the facts relating to the issue of "public servant" status for the FEOs:

> [Two Sound Transit FEOs were working] on Seattle's Link light-rail train system (the Link). The position of an FEO is a limited-commission office authorized to issue citations for civil infractions on both light-rail and heavy-rail trains. **[LED EDITORIAL NOTE: Although the majority uses the term "limited commission office," to our knowledge the FEOs are not limited commission law enforcement officers within the meaning of chapter 10.93 RCW. If they were, then we assume the result of this case would be different.]** Sound Transit contracts with Securitas Security Services to provide security and fare enforcement services for the Link. The FEOs wear a uniform with patches reading "Sound Transit," "security," and "fare enforcement." They also wear a tool belt, which includes a radio, handcuffs, and a key ring but does not include a weapon.

When the two FEOs contacted the defendant and two companions for possible fare evasion, and asked them identification, all three were either unable or unwilling to provide identification. K.L.B. provided a false name to one of the FEOs. (K.L.B. provided his correct name to the King County Sheriff's Deputy who was called to assist.)

K.L.B. was charged with two counts of making a false or misleading statement to a public servant (but convicted of only one count).

RCW 9A.76.175 provides in part that: "[a] person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor." RCW 9A.04.110(23) defines "public servant" as:

> [A]ny person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function.

The majority concludes that Sound Transit FEOs are not government employees, are not officers of government, and do not perform a governmental function, and thus they are not "public servants" for purposes of the statute.

Retired Justice Jim Johnson (serving in a pro tem capacity on cases he heard while on the Court) dissents arguing because FEOs fulfill a governmental function they are officers within the meaning of the relevant statute.

Chief Justice Madsen concurs in the dissent pointing out that under the majority's analysis an engineering consultant hired to design the light-rail would be a "public servant" while the FEO

who interacts with the public and issues citations on the light-rail would not be. (Justice Madsen also editorializes on the fiscal prudence of the County's charging decision.)

Result: Reversal of King County Superior Court conviction of K.L.B. (juvenile) for making a false statement to a public servant.

LED EDITORIAL NOTE: This case impacts all RCW sections in which the term "public servant" as defined in RCW 9A.04.110 is used. The term is used in 13 sections of Title 9A RCW in addition to RCW 9A.76.175 and RCW 9A.04.110(23). The term is also used in 11 RCW sections outside of Title 9A RCW.

(2) THE WASHINGTON LAW AGAINST DISCRIMINATION (WLAD), CHAPTER 49.60 RCW, CREATES A CAUSE OF ACTION FOR FAILURE TO REASONABLY ACCOMMODATE EMPLOYEE RELIGIOUS PRACTICES – In Kumar v. Gate Gourmet, ___ Wn.2d ___, 325 P.3d 193 (May 22, 2014), employees brought a class action lawsuit against their employer, Gate Gourmet (which prepares meals for service on airplanes and trains). The lawsuit was based on the meal policy which, for security reasons, prohibits employees from bringing in their own food for lunch or leaving the premises during their lunch break, leaving only employer-provided food for the employees to eat. According to plaintiffs the "vegetarian" options were not always truly vegetarian. Plaintiffs alleged that the policy forced them to work without food or eat food that violates their religious beliefs.

Chapter 49.60 RCW, is Washington's Law Against Discrimination (WLAD). RCW 49.60.180(3) provides in relevant part that it is an "unfair practice" for an employer "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, sexual orientation, race, creed, color [or] national origin . . . . " "Creed" refers to religious belief.

The Washington State Supreme Court holds that WLAD, chapter 49.60 RCW, creates a cause of action for failure to reasonably accommodate employee religious practices.

Result: Reversal of King County Superior Court order dismissing plaintiffs' lawsuit for failure to state a claim upon which relief can be granted.

(3) WHERE DEFENDANT IS THE CAUSE OF A WITNESS'S ABSENCE AT TRIAL, HE FORFEITS HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESS AND ALSO WAIVES ANY HEARSAY OBJECTIONS – In State v. Dobbs, 180 Wn.2d 1 (March 13, 2014), the Washington State Supreme Court majority opinion explains that where a defendant is the cause of a witness's absence, the defendant forfeits the Sixth Amendment right to confront the witness and also waives any hearsay objection. The majority opinion concludes that the evidence in this case establishes that defendant was the cause of the absence of the witness.

The majority summarizes the opinion as follows:

> Under the Sixth Amendment to the United States Constitution, criminal defendants have the right to confront the witnesses against them. However, if the defendant intentionally causes the absence of a witness from trial, he or she forfeits that right. As the esteemed Justice Tom Chambers wrote, "[W]e will not allow [the defendant] to complain that he was unable to confront [the witness] when [the defendant] bears responsibility for [the witness's] unavailability." State v. Mason, 160 Wn.2d 910, 925 (2007). **Oct 07 LED:10** Without such a forfeiture rule, defendants would have "an intolerable incentive . . . to bribe, intimidate, or

> even kill witnesses against them." Giles v. California, 554 U.S. 353, 365 (2008) **Sept 08 LED:02**.
>
> In this case, Timothy John Dobbs engaged in a campaign of threats, harassment, and intimidation against his ex-girlfriend, C.R., that included a drive-by shooting at her home and warnings that she would "'get it'" for calling the police and she would "regret it" if she pressed charges against him. As C.R. reported the increasingly violent activities of Dobbs against her, she explained to the police that she was terrified that she was going to wind up dead. After Dobbs was arrested, he made yet another intimidating phone call to C.R., threatening that if she went forward and pressed charges against him, she would regret it. When C.R. failed to show up to testify at trial, the trial judge found that there was clear, cogent, and convincing evidence that Dobbs was the cause of her absence and thus had forfeited his confrontation right. We agree. While Dobbs has the right to confront witnesses against him, he forfeited his right to confront C.R. when he chose to threaten her with violence for cooperating with the legal system. "To permit the defendant to profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause." United States v. Carlson, 547 F.2d 1346, 1359 (8th Cir. 1976).

Justice Wiggins authors a dissent that is joined by Chief Justice Madsen and Justice Gordon McCloud. The dissenting opinion argues that the evidence is not sufficient to establish that the defendant was the cause of the witness absenting herself from his trial.

Result: Affirmance of Court of Appeals denial of Timothy John Dobbs' personal restraint petition, thus affirming Cowlitz County Superior Court convictions for stalking, felony harassment, intimidating a witness, drive-by shooting, unlawful possession of a firearm, and obstructing law enforcement.

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WASHINGTON STATE COURT OF APPEALS

LINK BETWEEN MURDER INVESTIGATION AND APPARENT VICTIM'S JOURNALS PROVIDED PROBABLE CAUSE TO SEARCH FOR JOURNALS, INCLUDING IN ELECTRONIC FORM; ALSO, 2010 AMENDMENT DEFEATS DEFENDANT'S ARGUMENT THAT HIS SECRET PHOTOGRAPHING DID NOT SUPPORT CHARGE FOR POSSESSION OF DEPICTIONS OF A MINOR ENGAGED IN SEXUALLY EXPLICIT CONDUCT

State v. Powell, ___ Wn. App. ___, 2014 WL 2583477 (Div. II, June 10, 2014)

Facts and Proceedings below:

Joshua Powell was married to Susan Powell, who disappeared under suspicious circumstances. The State investigated Susan's disappearance as a kidnapping and murder. Joshua was a person of interest in her disappearance. During the investigation, Joshua and his father, Steven Powell, stated that they were in possession of 2,000 pages of Susan's journal entries.

The State requested a search warrant to search Steven Powell's house and to seize physical and digital copies of Susan's journal entries. The affidavit for the search warrant explained that a detective had reviewed some journal entries recovered from Susan's place of work, and that the entries described a four-year period of intermittent marital discord, with such entries ending about a month before Susan's disappearance. The affidavit also described public statements

from Joshua and Steven Powell about their possession of 2,000 pages of journal entries by Susan, which led detectives to believe that Joshua and Steven were likely scanning and digitally storing copies of the additional journal entries. The public statements from Joshua and Steven indicated that some diary entries showed Susan's state of mind and alleged instability, and some diary entries described or referenced her previous romantic relationships.

A search warrant was issued to search the Steven Powell's residence, expressly including computers, for journal entries by Susan. When officers searched the residence, they seized a computer disk in Steven Powell's bedroom and searched the disk's contents. On the disk were photographic images of female minors bathing and using the bathroom. Some of these images zoomed in on the minors' genitalia and breasts, covered and uncovered. The images had been photographed from [Steven] Powell's bedroom, through the bathroom window of a neighboring house. Other images found in the search and stored with the images of the minors were photos of [Steven] Powell's genitals and of Powell masturbating.

[Steven] Powell was convicted of 14 counts of voyeurism, two of which were vacated on double jeopardy grounds. The trial court dismissed a charge of second degree possession of depictions of a minor engaged in sexually explicit conduct.

ISSUES AND RULINGS: (1) Is there a logical link between the murder/kidnap investigation and the missing woman's journals such as to provide probable cause to search for her journals, including in electronic form, in the Powell residence? (ANSWER BY COURT OF APPEALS: Yes)

(2) Does the statute that defines second degree possession of depictions of a minor engaged in sexually explicit conduct include depictions that were secretly recorded without the knowledge of the minor victims? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Pierce County Superior Court convictions of Steven Craig Powell for 12 counts of voyeurism; reversal of Superior Court's order dismissing a single count of second degree possession of depictions of a minor engaged in sexually explicit conduct, and remand of the case to Superior Court for reinstatement of the latter charge and for further proceedings.

ANALYSIS:

1) Probable cause nexus between criminal investigation and Susan's journals

The Court of Appeals explains as follows its rejection of Powell's probable cause theory.

> Powell argues that the affidavit failed to establish a nexus between Susan's kidnapping and murder and Susan's journals. We disagree for three reasons.
>
> First, the affidavit stated that the one journal in police custody discussed Susan's marital problems with Joshua, who was a person of interest in Susan's kidnapping; and murder. Powell and Joshua had admitted to possessing other journal entries consisting of over 2,000 pages. The police did not know the dates Susan wrote the pages of journal entries in Powell and Joshua's custody, but they knew that Powell had announced that these entries were important as to the investigation of Susan's disappearance. These facts establish a reasonable inference that Susan's journals would have provided further information as to the relationship problems between Susan and Joshua, a person of interest in Susan's kidnapping and murder.

> Second, the affidavit stated that Powell announced to the media that Susan's journals provided information as to Susan's state of mind. Information about Susan's state of mind would have provided critical evidence explaining the circumstances of Susan's disappearance, and whether those circumstances constitute kidnapping and murder.
>
> Third, Powell announced to the media that Susan's journals discussed her prior romantic relationships. Information about Susan's prior romantic relationships would have assisted the police in determining the existence of any additional persons of interest involved in Susan's kidnapping and murder.

2) Possession of depictions of minors engaged in sexually explicit conduct

The Court of Appeals explains that a 2010 amendment by chapter 227, Washington Laws of 2010 (see **June 2010 LED:06**), to RCW 9.68A.011's definition of "sexually explicit conduct" defeats Powell's argument that, because the photographs were taken without the knowledge of the minors, he cannot be convicted for possession of depictions of minors engaged in sexually explicit conduct. While an argument along those lines was held in State v. Whipple, 144 Wn. App. 654 (Div. II, 2008) **Aug 08 LED:20** and in a prior case to be correct under a prior version of the statute, the 2010 amendment of the statute expressly eliminated the argument. The current definition of "sexually explicit conduct" addressing this factual context is RCW 9.68A.011(4)(f). The relevant definition provides: "'Sexually explicit conduct'" means actual or simulated: . . . . (f) Depiction of the genitals or unclothed pubic or rectal areas of any minor, or the unclothed breast of a female minor, for the purpose of sexual stimulation of the viewer. For the purposes of this subsection (4)(f), it is not necessary that the minor know that he or she is participating in the described conduct, or any aspect of it; . . . ." (Emphasis added)

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

RENDERING CRIMINAL ASSISTANCE EVIDENCE HELD SUFFICIENT BECAUSE STATEMENTS WERE AFFIRMATIVE LIES, NOT MERE FALSE DENIALS OF KNOWLEDGE – In State v. Mollet, ___Wn. App. ___, 2014 WL 2573343 (Div. I, June 9, 2014), the Court of Appeals rules that sufficient evidence exists in the trial court record to support the conviction of defendant, Megan Mollet, for rendering criminal assistance in the first degree under RCW 9A.76.050(1) and 070(1). The support for the conviction is found in the evidence that defendant Mollet lied to law enforcement officers investigating the murder-by-shooting of a WSP Trooper (Tony Radulescu) in her claims to the officers, several hours after the shooting, that (1) she had not seen the murder suspect (Joshua Blake) on the property of her residence that evening, and (2) she herself had been elsewhere most of the evening helping a friend move. Defendant Mollet had in fact been with the murderer at the time of the murder, and she had been dropped off by him on the property shortly after the shooting.

The Court of Appeals describes as follows the relevant statute and the State's theory:

> Mollet was charged with rendering criminal assistance in the first degree under RCW 9A.76.070(1), which provides: "A person is guilty of rendering criminal assistance in the first degree if he or she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense." The term "renders criminal assistance" is defined by RCW 9A.76.050:

> . . . a person "renders criminal assistance" if, with intent to prevent, hinder, or delay the apprehension or prosecution of another person who he or she knows has committed a crime or juvenile offense or is being sought by law enforcement officials for the commission of a crime or juvenile offense or has escaped from a detention facility, he or she:
>
> (1) Harbors or conceals such person; or
> (2) Warns such person of impending discovery or apprehension; or
> (3) Provides such person with money, transportation, disguise, or other means of avoiding discovery or apprehension; or
> (4) Prevents or obstructs, by use of force, deception, or threat, anyone from performing an act that might aid in the discovery or apprehension of such person; or
> (5) Conceals, alters, or destroys any physical evidence that might aid in the discovery or apprehension of such person; or
> (6) Provides such person with a weapon.
>
> Therefore, a person renders criminal assistance if she knows that another person has committed a crime and she intends to prevent, hinder, or delay the apprehension or prosecution of that other person and undertakes one of the listed six actions. Here, Mollet was prosecuted for "conceal[ing]" Blake.

[Emphasis added]

The Mollet Court distinguishes State v. Budik, 173 Wn.2d 727 (2012) **June 12 LED:16**, in which the Washington Supreme Court ruled that where there was evidence only that a victim of a shooting knew who shot him and his companion, his claims to police that he did not know who shot him did not support a conviction for rendering criminal assistance. The Mollet Court explains that Budik involved mere false denials of knowledge, where, on the other hand, the key facts in Mollet involved affirmative misrepresentations that "conceal[ed]" the murderer, Blake.

Result: Affirmance of Kitsap County Superior Court conviction of Megan Mollet for rendering criminal assistance in the first degree (she was also convicted of making a false or misleading statement to a public servant, but her appeal did not challenge that conviction).

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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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