Law Enforcement Digest

JANUARY 2012

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

****

HONOR ROLL

676th Basic Law Enforcement Academy – July 12, 2011 through November 18, 2011

President:	Benjamin J. Mortensen, Longview PD
Best Overall:	Brian W. Hall, Tacoma PD
Best Academic:	Brynn R. Johnson, Kirkland PD
Best Firearms:	Benjamin J. Mortensen, Longview PD
Patrol Partner Award:	Benjamin J. Mortensen, Longview PD
Tac Officer:	Officer Tony Nowacki, Des Moines PD

****

JANUARY 2012 LED TABLE OF CONTENTS

****

NINTH CIRCUIT U.S. COURT OF APPEALS

MAJORITY OF SPLIT EN BANC (10-JUDGE) PANEL HOLDS IN TWO CASES THAT TASER USE BY OFFICERS WAS NOT REASONABLE, BUT THAT THE OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY IN BOTH CASES

Mattos v. [named law enforcement officers] and Maui County; Brooks v. City of Seattle [and named law enforcement officers], ___ F.3d ___, 2011 WL 4908374 (9th Cir. Oct. 17, 2011)

LED INTRODUCTORY EDITORIAL NOTES AND COMMENTS: The decision by a 10-judge Ninth Circuit panel digested below revises in part two 3-judge panel decisions that were previously digested in the LED. The 3-judge panel decision in Mattos was digested in the March 2010 LED beginning at page 5. The 3-judge panel decision in Brooks was digested in the June 2010 LED beginning at page 10.

Most of our LED readers know that generally where, as in these two cases, the government is seeking dismissal of a Civil Rights Action on summary judgment (thus avoiding trial on the facts), both the trial court and the appellate courts are required to assume resolution of all conflicts in the allegations of the parties in plaintiffs' favor. So here the U.S. District Court and the Ninth Circuit Court of Appeals are required to assume to be accurate all of the allegations by Ms. Brooks and by Mr. and Ms. Mattos (for instance, in the Mattos case, the Ninth Circuit decision assumes that Ms. Mattos is correct in her assertion that the officer did not warn her before tasing her even though – as Hawaii newspaper accounts about this decision indicate – the officer contends otherwise). The trial and appellate courts are then required to address whether the officers are entitled to judgment as a matter of law on those assumed facts.

The Ninth Circuit inquiry in these two cases addresses two questions of law related to the plaintiffs' allegations, both of which questions of law must be answered "yes" in order for the plaintiffs to avoid dismissal of their lawsuit on "qualified immunity" grounds: (1) Was there a violation of a constitutional right by the officers in their applications of tasers? and, if so, then (2) Was the right at issue "clearly established" under the case law at the time of the incident such that it would have been clear beyond debate to any reasonable officer that his or her conduct was unlawful in that situation? In both of these cases, the majority opinion for the 10-judge panel concludes that the officers' actions with their tasers constituted constitutional violations under the Fourth Amendment's prohibition on application of excessive force (question 1 is thus answered "yes"), but that the officers and their agencies are entitled to "qualified immunity" in each of the two cases because the plaintiffs' rights were not "clearly established" at the time of the incidents (question 2 is answered "no").

Officers and agencies beware, however. If relatively similar facts were to arise in future cases, the Ninth Circuit would deem the law to be "clearly established" based on the majority opinion digested below, and therefore qualified immunity would not be available to officers.

Our final comment is that we find it difficult to draw clear principles regarding law enforcement taser usage (or regarding use of force generally) in light of the fact-specific discussion in the majority opinion's "analysis." It is not easy to determine what was critical to the Brooks-Mattos majority's censure of the particular taser usage in the two consolidated cases beyond concerns about the (1) low-level nature of the crimes at issue and (2) apparent lack of danger to the officers posed by the resisting/obstructing violators. Officers are urged to consult their own legal advisors for legal advice on the implications of the Brooks-Mattos decision.

Allegations by Ms. Brooks: (Excerpted from Ninth Circuit majority opinion)

> On the morning of November 23, 2004, Plaintiff-Appellee Malaika Brooks was driving her 11-year-old son to school in Seattle, Washington. Brooks was 33 years old and seven months pregnant at the time. The street on which Brooks

was driving had a 35-mile-per-hour posted speed limit until the school zone began, at which point the speed limit became 20 miles per hour. When Brooks entered the school zone, she was driving 32 miles per hour. Once in the school zone, a Seattle police officer parked on the street measured Brooks's speed with a radar gun, found that she was driving faster than 20 miles per hour, and motioned for her to pull over.

Once Brooks pulled over, Seattle Police Officer [A] approached her car. [He] asked Brooks how fast she was driving and then asked her for her driver's license. Brooks gave [him] her license and then told her son to get out of the car and walk to school, which was across the street from where [Officer A] had pulled her car over. [Officer A] left, returning five minutes later to give Brooks her driver's license back and inform her that he was going to cite her for a speeding violation. Brooks insisted that she had not been speeding and that she would not sign the citation. At this, [Officer A] left again.

Soon after, [Officer B] approached Brooks in her car and asked her if she was going to sign the speeding citation. Brooks again refused to sign the citation but said that she would accept it without signing it. [Officer B] told Brooks that signing the citation would not constitute an admission of guilt; her signature would simply confirm that she received the citation. Brooks told [Officer B] that he was lying, the two exchanged heated words, and [Officer A] said that if Brooks did not sign the citation he would call his sergeant and she would go to jail. **[LED EDITORIAL NOTE: In 2004, under the relevant Washington state statutes and under the relevant constitutional provisions, generally, a person could lawfully be arrested for refusing to sign a traffic citation. In 2006, the Washington legislature amended the relevant statutes to remove the requirement that the recipient of a notice of infraction sign the notice. See Chapter 270 (HB 1650), Laws of 2006 May 06 LED:17].**

A few minutes later, [the sergeant] arrived at the scene and he, too, asked Brooks if she would sign the citation. When Brooks said no, [the sergeant] told [the two officers] to "book her." [Officer A] told Brooks to get out of the car, telling her that she was "going to jail" and failing to reply when Brooks asked why. Brooks refused to get out of the car. At this point, [Officer A] pulled out a taser and asked Brooks if she knew what it was. Brooks indicated that she did not know what the taser was and told the officers, "I have to go to the bathroom, I am pregnant, I'm less than 60 days from having my baby." [Officer B] then asked how pregnant Brooks was. Brooks's car was still running at this point.

After learning that Brooks was pregnant, [Officer B] continued to display the taser and talked to [Officer A] about how to proceed. One of them asked "well, where do you want to do it?" Brooks heard the other respond "well, don't do it in her stomach; do it in her thigh." During this interchange, [Officer B] was standing next to Brooks's driver's side window, [Officer A] was standing to [Officer B's] left, and [the sergeant] was standing behind them both.

After [Officers A and B] discussed where to tase Brooks, [Officer A] opened the driver's side door and twisted Brooks's arm up behind her back. Brooks stiffened her body and clutched the steering wheel to frustrate the officers' efforts to remove her from the car. While [Officer A] held her arm, [Officer B] cycled his taser, showing Brooks what it did. At some point after [Officer A] grabbed Brooks's arm but before [Officer B] applied the taser to Brooks, [Officer A] was

able to remove the keys from Brooks's car ignition; the keys dropped to the floor of the car.

Twenty-seven seconds after [Officer B] cycled his taser, with [Officer A] still holding her arm behind her back, [Officer B] applied the taser to Brooks' left thigh in drive-stun mode. Brooks began to cry and started honking her car horn. Thirty-six seconds later, [Officer B] applied the taser to Brooks's left arm. Six seconds later, [Officer B] applied the taser to Brooks's neck as she continued to cry out and honk her car horn. After this third tase, Brooks fell over in her car and the officers dragged her out, laying her face down on the street and handcuffing her hands behind her back.

The officers took Brooks to the police precinct station where fire department paramedics examined her. The same day, Brooks was examined at the Harborview Medical Center by a doctor who confirmed her pregnancy and expressed some concern about Brooks's rapid heartbeat. After this examination, Brooks was taken to the King County Jail.

On December 6, 2004, the City of Seattle filed a misdemeanor criminal complaint against Brooks, charging her with refusal to sign an acknowledgment of a traffic citation, in violation of Seattle Municipal Code 11.59.090, and resisting arrest, in violation of Seattle Municipal Code 12A.16.050. Brooks was tried by a jury beginning on May 4, 2005, and after a two-day trial the jury convicted her of failing to sign the speeding ticket. The jury could not reach a verdict on the resisting arrest charge, and it was dismissed.

Brooks gave birth to her daughter in January 2005. The district court was presented with evidence that Brooks's daughter was born healthy, and Brooks's counsel confirmed at oral argument before this court that her daughter remains healthy now. Brooks herself has not experienced any lasting injuries from the tasing, though she does carry several permanent burn scars from the incident.

Allegations by Mr. and Mrs. Mattos: (Excerpted from Ninth Circuit majority opinion)

On August 23, 2006, Jayzel Mattos and her husband Troy had a domestic dispute. Around 11 p.m., Jayzel asked C.M., her 14-year-old daughter, to call the police, which C.M. did. Several minutes later, Maui Police Officers [A, B, and C] arrived at the Mattoses' residence. As the officers approached the residence, they saw Troy sitting on the top of the stairs outside the front door with a couple of open beer bottles lying nearby. Troy is six feet three inches tall, approximately 200 pounds, and he smelled of alcohol when the officers arrived. [Officer D] arrived by himself soon after.

[Officer C] approached Troy first and informed him about the 911 call. Troy told [Officer C] that he and Jayzel had an argument, but he stated that nothing physical had occurred. As [Officer C] continued to question Troy, Troy became agitated and rude. [Officer C] asked Troy if he could speak to Jayzel to ensure that she was okay. When Troy went inside to get Jayzel, [Officer A] stepped inside the residence behind him. Troy returned with Jayzel and became angry when he saw [Officer A] inside his residence. Jayzel was initially behind Troy, but she ended up in front of him on her way to the front door to speak with the officers. Troy yelled at [Officer A] to get out of the residence because he had no right to be inside. [Officer A] asked Jayzel if he could speak to her outside.

> Jayzel agreed to go outside, but before she could comply with [Officer A's] request, [Officer D] entered the residence and stood in the middle of the living room. When [Officer D] announced that Troy was under arrest, Jayzel was already standing in front of Troy. She did not immediately move out of the way. As [Officer D] moved in to arrest Troy, he pushed up against Jayzel's chest, at which point she "extended [her] arm to stop [her] breasts from being smashed against [Officer D's] body." [He] then asked Jayzel, "Are you touching an officer?" At the same time, Jayzel was speaking to [Officer A], asking why Troy was being arrested, attempting to defuse the situation by saying that everyone should calm down and go outside, and expressing concern that the commotion not disturb her sleeping children who were in the residence.
>
> Then, without warning, [Officer D] shot his taser at Jayzel in dart-mode. Jayzel "felt an incredible burning and painful feeling locking all of [her] joints [and] muscles and [she] f[e]ll hard on the floor." [Officers A and B] handcuffed Troy. Troy and Jayzel were taken into custody; Troy was charged with harassment, in violation of Hawaii Revised Statutes § 711-1106, and resisting arrest, in violation of Hawaii Revised Statutes § 710-1026, and Jayzel was charged with harassment and obstructing government operations, in violation of Hawaii Revised Statutes § 710-1010. All charges were ultimately dropped.

Procedural background in Brooks: (Excerpted from Ninth Circuit majority opinion)

> Brooks sued [the officers and the sergeant], Seattle Police Department Chief Gil Kerlikowske, and the City of Seattle for excessive force in violation of the Fourth Amendment; Kerlikowske and the City of Seattle for negligence; and [the officers and the sergeant] for assault and battery. The case [came to the Ninth Circuit of the U.S. Court of Appeals] on interlocutory appeal from the district court's summary judgment ruling that the defendant [officers and sergeant] are not entitled to qualified immunity. The district court denied the defendants' motion as to Brooks's § 1983 excessive force claim against the officers, concluding that with all the evidence construed in Brooks's favor, she alleged a Fourth Amendment excessive force claim and that the officers were not entitled to qualified immunity. The district court also denied the defendants' motion as to Brooks's state law assault and battery claims against the officers, concluding that these claims presented questions for a jury and that the officers were not entitled to state qualified immunity on these claims. The district court granted the defendants' summary judgment motion as to Brooks's § 1983 and negligence claims against Chief Kerlikowske and the City of Seattle. Thereafter, the officers [and sergeant] filed this interlocutory appeal. The only issue raised on appeal by the officers is whether the district court erred when it rejected their claim for federal qualified immunity and state qualified immunity.

Procedural background in Mattos: (Excerpted from Ninth Circuit majority opinion)

> The Mattoses sued the officers and others for violations of their Fourth, Fifth, and Fourteenth Amendment rights based on the officers' warrantless entry into their home, their arrests, and the officers' use of the taser on Jayzel. The district court granted summary judgment to the defendants on all of the Mattoses' claims except their Fourth Amendment excessive force claim for the tasing. The district court concluded that there were material questions of fact critical to deciding whether the tasing was constitutionally reasonable, which precluded a pretrial

> ruling on the issue of qualified immunity. Thereafter, the officers filed this interlocutory appeal challenging the denial of their claims to qualified immunity.

ISSUES AND RULINGS IN BROOKS AND MATTOS: 1) Under the use-of-force principles announced by the Ninth Circuit in Bryan v. McPherson, 630 F.3d 805 (9th Cir. 2010) and announced by the U.S. Supreme Court in Graham v. Connor, 490 U.S. 386 (1989), were the officers reasonable in their applications of tasers in these cases? (ANSWER: No, rules a 6-4 majority, the use of tasers in both cases was unreasonable); **[LED EDITORIAL NOTE: The three-judge panel in Bryan v. McPherson twice revised its opinion in that case involving taser use, but the excessive force analysis did not materially change in any of the versions of the opinion; we fully digested the facts and analysis of the original opinion (see February 2010 LED, pages 2-5, and we briefly noted the first revised opinion (see the September 2010 LED at page 7), but we did not digest the final version of the opinion that is dated November 30, 2010 and is reported at 630 F.3d 805.]**

2) Was the law "clearly established" at the time of the incidents at issue? (ANSWER: No, rules a less split majority, the law was not clearly established at the time of these incidents, and therefore the officers are entitled to qualified immunity)

Result in Brooks: Reversal of U.S. District Court (Western District Washington, Seattle) order denying summary judgment to the officers on Brooks' Civil Rights Act civil lawsuit; Affirmance of District Court order denying summary judgment to the officers on Brooks' state law claims for assault and battery; case remanded for possible trial on the latter state law claims.

Result in Mattos: Reversal of U.S. District Court (Hawaii) denial of summary judgment to Maui police officers on the Mattos' Civil Rights Act civil lawsuit.

Status of Brooks and Mattos cases: Time remains for the parties to seek discretionary review in the United States Supreme Court.

ANALYSIS:

INTRODUCTORY LED EDITORIAL NOTE REGARDING THE ANALYSIS: This LED entry will not summarize or excerpt from the Court's analysis of the question of whether the law on excessive force relating to use of tasers was "clearly established" at the time of these incidents. What is more important for Washington law enforcement officers is that they be aware that the law will be deemed by the Ninth Circuit for future purposes to be clearly established under factual circumstances that are close to those present in these cases.

Also note that the majority opinion explains in footnote 9 that "[b]ecause we conclude that a reasonable jury could find that the officers used excessive force in tasing Brooks, we affirm the district court's conclusion that the officers are not entitled to Washington state qualified immunity for Brooks's assault and battery claims."

Excessive force analysis regarding Brooks case: (Excerpted from majority opinion)

> We begin by considering the nature and quality of the force used against Brooks: a taser in drive-stun mode. We have previously described the force involved when a taser is deployed in dart-mode. See Bryan v. McPherson, 630 F.3d 805 (9th Cir. 2010). In Bryan, we explained that in dart-mode the taser uses compressed nitrogen to propel a pair of "probes"—aluminum darts tipped with stainless steel barbs connected to the [taser] by insulated wires— toward the target at a rate of over 160 feet per second. Upon striking a person, the [taser] delivers a 1200 volt, low ampere electrical charge . . . . The electrical impulse

instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless." When a taser is used in drive-stun mode, the operator removes the dart cartridge and pushes two electrode contacts located on the front of the taser directly against the victim. In this mode, the taser delivers an electric shock to the victim, but it does not cause an override of the victim's central nervous system as it does in dart-mode. Each of the three times that [Officer B] tased Brooks in drive-stun mode, the shock was "extremely painful." In Bryan, we held that tasers used in dart-mode "constitute an intermediate, significant level of force."

Here, the record is not sufficient for us to determine what level of force is used when a taser is deployed in drive-stun mode. We follow the Supreme Court's guidance . . . . however, and need not decide this issue in order to assess the reasonableness of the tasing. Instead, we proceed to determine whether [Officer B's] use of the taser against Brooks in this case was reasonable, keeping in mind the magnitude of the electric shock at issue and the extreme pain that Brooks experienced.

In evaluating the reasonableness of [Officer B's] action, we consider the governmental interests at stake and begin with (1) how severe the crime at issue was, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight.

According to the facts as alleged by Brooks, the officers pulled her over for speeding and then detained and took her into custody because she refused to sign a traffic citation. She refused to sign the citation after she gave [Officer A] her driver's license and he spent five minutes in his squad car with the license, presumably checking the status of her license. We appreciate the danger associated with speeding, and we do not minimize the particular importance of observing school zone speed limits. We also recognize the importance of having people sign their traffic citations when required to do so by state law. However, we have no difficulty deciding that failing to sign a traffic citation and driving 32 miles per hour in a 20-mile-per-hour zone are not serious offenses. Indeed, our case law demonstrates that far more serious offenses than Brooks's do not constitute severe crimes in a Graham analysis. See Davis v. City of Las Vegas, 478 F.3d 1048, 1055 (9th Cir. 2007) (noting that trespassing and obstructing a police officer were not severe crimes); City of Hemet, 394 F.3d at 702 (concluding that suspect was not "particularly dangerous" and his offense was not "especially egregious" where his wife had "called 911 to report that her husband 'was hitting her and/or was physical with her,' [and] that he had grabbed her breast very hard").

We next consider whether Brooks "posed an immediate threat to the safety of the officers or others." When the encounter began, Brooks was compliant: she pulled over when signaled to do so, gave her driver's license to [Officer A] when asked, and waited in her car while [he] checked her information. When [Officer A] returned and informed Brooks that he was going to cite her for the speeding violation, she became upset and proceeded to become increasingly agitated and uncooperative as the incident evolved. At no time did Brooks verbally threaten the officers. She gave no indication of being armed and, behind the wheel of her car, she was not physically threatening. At most, the officers may have found her uncooperative and her agitated behavior to be potentially threatening while Brooks's keys remained in the ignition of her car. In theory, she could have

attempted to drive away rapidly and recklessly, threatening the safety of bystanders or the officers. But at some point after [Officer A] grabbed Brooks's arm and before [Officer B] applied the taser to her, [Officer A] removed the keys from Brooks's car ignition and the keys dropped to the car's floor. Thus, at the time [Officer B] applied the taser to Brooks, she no longer posed even a potential threat to the officers' or others' safety, much less an "immediate threat." We reiterate that this is the "'most important single element'" of the governmental interests at stake.

The third governmental interest factor in the Graham test is whether Brooks was "actively resisting arrest or attempting to evade arrest by flight, and any other exigent circumstances that existed at the time of the arrest." Brooks refused to get out of her car when requested to do so and later stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. In other words, she resisted arrest. We observe, however, that Brooks's resistance did not involve any violent actions towards the officers. In addition, Brooks did not attempt to flee, and there were no other exigent circumstances at the time. The facts reflect that the officers proceeded deliberately and thoughtfully, taking an aside in the midst of the incident to discuss where they should tase Brooks after they found out she was pregnant. There is no allegation that an exigent circumstance requiring the attention of one of the three officers existed somewhere else, so that the encounter with Brooks had to be resolved as quickly as possible. Still, Brooks engaged in some resistance to arrest.

Finally, we must examine the totality of the circumstances and consider "'whatever specific factors may be appropriate in a particular case, whether or not listed in Graham.'" Bryan. We note that Brooks bears some responsibility for the escalation of this incident, which influences the totality of these circumstances. There are, however, two other specific factors in this case that we find overwhelmingly salient. First, Brooks told [Officer B], before he tased her, that she was pregnant and less than 60 days from her due date. And as explained above, [Officers A and B] paused after they learned she was pregnant and discussed where they should tase Brooks in light of this information. The record unambiguously reflects that the officers knew about and considered Brooks's pregnancy before tasing her.

The second overwhelmingly salient factor here is that [Officer B] tased Brooks three times over the course of less than one minute. Twenty-seven seconds after [Officer B] cycled his taser as a warning, he applied the taser to Brooks. Thirty-six seconds later, he tased Brooks for the second time. Six seconds after that, [Officer B] tased Brooks for the third time. Each time, Brooks cried out in pain. Three tasings in such rapid succession provided no time for Brooks to recover from the extreme pain she experienced, gather herself, and reconsider her refusal to comply.

In sum, Brooks's alleged offenses were minor. She did not pose an immediate threat to the safety of the officers or others. She actively resisted arrest insofar as she refused to get out of her car when instructed to do so and stiffened her body and clutched her steering wheel to frustrate the officers' efforts to remove her from her car. Brooks did not evade arrest by flight, and no other exigent circumstances existed at the time. She was seven months pregnant, which the officers knew, and they tased her three times within less than one minute, inflicting extreme pain on Brooks.

A reasonable fact-finder could conclude, taking the evidence in the light most favorable to Brooks, that the officers' use of force was unreasonable and therefore constitutionally excessive.

Excessive force analysis regarding Mattos case: (Excerpted from majority opinion)

Determining whether the force used against Jayzel Mattos was constitutionally excessive, we begin again by considering the nature and quality of the force used. Here, the taser was employed in dart-mode, which we have held "constitute[s] an intermediate, significant level of force." Bryan. The taser's aluminum darts penetrated Jayzel's skin and delivered the intended dart-mode response: [t]he electrical impulse instantly overrides the victim's central nervous system, paralyzing the muscles throughout the body, rendering the target limp and helpless. Jayzel "felt an incredible burning and painful feeling locking all of [her] joints [and] muscles and [she] f[e]ll hard on the floor." It is against this backdrop that we consider the governmental interests at stake and the ultimate reasonableness of the officers' action.

Considering the first governmental interest factor, the severity of the crime at issue, we are mindful that we must construe the facts in the light most favorable to Jayzel at this stage. When Jayzel appeared in the hallway, [Officer A] asked to speak to Jayzel outside; she agreed, but before she could comply, [Officer D] entered the residence. When [Officer D] announced that Troy was under arrest, Jayzel was already standing in front of Troy. She did not immediately move out of the way. As [Officer D] moved in to arrest Troy, he pushed up against Jayzel's chest, at which point she "extended [her] arm to stop [her] breasts from being smashed against [Officer D's] body." [Officer D] then asked Jayzel, "Are you touching an officer?" At the same time, Jayzel was speaking to [Officer A], asking why Troy was being arrested, attempting to defuse the situation by saying that everyone should calm down and go outside, and expressing concern that the commotion might disturb her sleeping children who were in the residence. Taking the evidence in the light most favorable to Jayzel, and resolving all conflicts in her favor, the most that can be said about her actions is that, while standing between Troy and [Officer D], she attempted to prevent [Officer D] from pressing up against her breasts. While this may have momentarily deterred [Officer D's] immediate access to Troy, it did not rise to the level of obstruction. Thus, under Graham, the severity of the crime, if any, was minimal.

The next, and most important, Graham factor is whether "the suspect posed an immediate threat to the safety of the officers or others." Here, Jayzel was the "suspect" against whom force was used, so we consider whether she posed an immediate threat to the officers' safety. The officers came to the residence in response to a 911 call made at Jayzel's request during a domestic dispute with Troy. Once the officers arrived and saw Jayzel, there were no objective reasons to believe that she was armed, she did not verbally threaten the officers, and her only physical contact with [Officer D] resulted from her defensively raising her hands to prevent him from pressing his body against hers after he came into contact with her. Jayzel's main contribution to the scene consisted of repeatedly entreating the officers and her husband to calm down and go outside so that her sleeping children would not be awakened. Jayzel posed no threat to the officers.

The third enumerated governmental interest factor is whether Jayzel was actively resisting arrest or attempting to evade arrest by flight. According to Jayzel's rendition of the facts, the most that can be said is that she minimally resisted

Troy's arrest. She was standing between [Officer D] and Troy before [Officer D] moved in to arrest Troy, and her physical contact with [Officer D] was defensive, intended to protect her own body from contact with [Officer D]. That being said, when [Officer D] stated that Troy was under arrest, Jayzel did not immediately move out of the way to facilitate the arrest. For the purposes of this Graham factor, however, we draw a distinction between a failure to facilitate an arrest and active resistance to arrest. Moreover, the crux of this Graham factor is compliance with the officers' requests, or refusal to comply. Here, Jayzel was attempting to comply with [Officer A's] request to speak with her outside when she got physically caught in the middle between [Officer D] and Troy. Accordingly, this factor weighs in Jayzel's favor.

Finally, it is important in this case that we consider the additional "'specific factors'" relevant to the totality of these circumstances. Bryan. While Jayzel herself did not pose any threat to the officers' safety, we must also consider the danger that the overall situation posed to the officers' safety and what effect that has on the reasonableness of the officers' actions. As we have recounted, the officers came to the Mattoses' residence in response to a 911 domestic dispute call. When they arrived they encountered Troy, who was sitting by himself outside the residence, hostile, seemingly intoxicated, six feet three inches tall and approximately 200 pounds. We have observed that "[t]he volatility of situations involving domestic violence" makes them particularly dangerous. United States v. Martinez, 406 F.3d 1160, 1164 (9th Cir. 2005). "When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Indeed, more officers are killed or injured on domestic violence calls than on any other type of call." We have also "recognized that the exigencies of domestic abuse cases present dangers that, in an appropriate case, may override considerations of privacy." United States v. Black, 482 F.3d 1035, 1040 (9th Cir. 2007) (internal quotation marks omitted) **[LED EDITORIAL NOTE: We digested an earlier version of the Black decision (reported at 466 F.3d 1143) in the December 2006 LED beginning at page 13; we did not digest the amended majority and dissenting opinions that were issued in 2007, but we note here that the majority and dissenting opinions in Black did not materially change the analysis that we reported in the December 2006 LED.]**

We take very seriously the danger that domestic disputes pose to law enforcement officers, and we have no trouble concluding that a reasonable officer arriving at the Mattoses' residence reasonably could be concerned about his or her safety. In light of such concerns, we have recognized that "the exigencies of domestic abuse cases present dangers that . . . may override considerations of privacy" where the alleged Fourth Amendment violation was a warrantless entry into a residence for the purpose of intervening in a domestic dispute, protecting the potential victim, and gaining control over a volatile situation that could endanger the officers. Here, though, the alleged Fourth Amendment violation is the excessive use of force against the potential non-threatening victim of the domestic dispute whom the officers ostensibly came to protect. Our previous reasoning for providing some Fourth Amendment leeway to officers who must enter a residence without a warrant in response to domestic disputes does not logically extend to officers who use an intermediate level of force on the non-threatening victim of a domestic dispute whom they have come to protect—especially when the domestic dispute is seemingly over by the time the officers begin their investigation.

> In drawing this distinction, we are guided by the Supreme Court's reasoning in Scott v. Harris, 550 U.S. 372 (2007). There, the Court observed that in weighing the Graham governmental interests in a situation where someone is likely to get hurt—either a fleeing suspect or innocent bystanders—it is "appropriate in this process to take into account . . . relative culpability." Given the procedural posture at this stage of the proceedings, we cannot say that Jayzel was culpable in this situation. We understand that Jayzel was unintentionally in the way when [Officer D] attempted to gain control over a potentially dangerous situation by arresting Troy, and we appreciate that "police officers are often forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation." At the same time, we are unable to identify any reasonableness in the conclusion—whether made in a split-second or after careful deliberation—that tasing the innocent wife of a large, drunk, angry man when there is no threat that either spouse has a weapon, is a prudent way to defuse a potentially, but not yet, dangerous situation. We stress that this unreasonableness is compounded by the officers' knowledge that there were children present in the home at the time.
>
> Finally, the fact that [Officer D] gave no warning to Jayzel before tasing her pushes this use of force far beyond the pale. We have previously concluded that an officer's failure to warn, when it is plausible to do so, weighs in favor of finding a constitutional violation.
>
> To summarize, [Officer D] used the intermediate force of a taser in dart-mode on Jayzel after he and the other officers arrived to ensure her safety. Her offense was minimal at most. She posed no threat to the officers. She minimally resisted Troy's arrest while attempting to protect her own body and to comply with [Officer A's] request that she speak to him outside, and she begged everyone not to wake her sleeping children. She bears minimal culpability for the escalation of the situation. The officers were faced with a potentially dangerous domestic dispute situation in which they reasonably felt that Troy could physically harm them if he chose to, but there was no indication that Troy intended to harm the officers or that he was armed. When [Officer D] encountered slight difficulty in arresting Troy because Jayzel was between the two men, [Officer D] tased her without warning. Considering the totality of these circumstances, we fail to see any reasonableness in the use of a taser in dart-mode against Jayzel. When all the material factual disputes are resolved in Jayzel's favor and the evidence is viewed in the light most favorable to her, we conclude that she has alleged a Fourth Amendment violation. That is, a reasonable fact finder could conclude that the officers' use of force against Jayzel, as alleged, was constitutionally excessive in violation of the Fourth Amendment.

[Footnotes and some citations and parentheticals omitted]

Dissenting views: One other Ninth Circuit judge joins in an opinion authored by Chief Judge Kozinski that argues vigorously that the officers acted reasonably and did not use excessive force in either case. For Kozinski, Ms. Brooks and Ms. Mattos breached a covenant of cooperation for members of the public by defiantly and actively refusing to comply with police orders. When people do that in circumstances like those present in these cases, police must bring the situation under control, Kozinski argues. Police have a number of tools at their disposal, all of which can have injurious consequences. The "traditional tools" such as batons can be problematic, and "the taser is a safe alternative." The taser is certainly to be preferred in

some circumstances to "pepper-spray," says Kozinski, "which [in the case of Brooks] would be absorbed into her bloodstream and go straight to the fetus."

Kozinski closes his dissent by inviting U.S. Supreme Court review of the two cases, saying: "One can only hope the Supreme Court will take a more enlightened view."

Two other judges join in the Kozinski dissent's view that the Seattle PD officers did not use excessive force in the Brooks case, but they assert that in the Mattos case the jury should have been asked to resolve some factual questions in relation to the qualified immunity issue.

SEARCH WARRANT AFFIDAVIT BY EXPERIENCED DETECTIVE (1) ASSERTING DISCOVERY OF PHOTO ON COMPUTER OF NUDE 15- TO 17-YEAR-OLD FEMALE WITH "NUDE-TEENS" WEBSITE LABEL, AND (2) DESCRIBING SOME ADDITIONAL PURPORTEDLY CORROBORATING FACTS HELD BY 2-1 MAJORITY TO ESTABLISH PROBABLE CAUSE TO SEARCH COMPUTERS FOR CHILD PORNOGRAPHY

U.S. v. Krupa, 658 F.3d 1174 (9th Cir. Sept. 30, 2011)

Facts and Proceedings below:

Edwards Air Force Base military police officers went to an on-base residence to check on the welfare of the children (boy, 5 and girl, 10) of a divorced Air Force sergeant. The officers had received a report from the children's mother that the sergeant had failed to return them to her in accordance with a shared custody order. Defendant Krupa, a civilian who was at the sergeant's residence, showed officers a note from the sergeant. Krupa explained to the officers that the sergeant was overseas and not due to return for another nine days, and that Krupa was taking care of the children as directed by the sergeant.

The military police found the residence to be very messy. They also observed in plain sight 13 computer towers plus two laptops. Feeling the presence of so many computers to be unusual, the officers asked Krupa if they could take and search the computers that were all under his control. Krupa agreed. Four days later, a trained specialist in computers and digital evidence, Investigator Reynolds, began a search of the computers. He found on one of them the photograph of a nude 15- to 17-year-old female with a website label of "www.nude-teens.com."

Five days later, before Reynolds could finish his search, he was hospitalized with chest pains. The following day, Krupa revoked his consent to search the computers. Investigator Reynolds then obtained a search warrant for the computers. The supporting affidavit for the search warrant began with a description of Investigator Reynolds' experience and training, including his experience in investigating child pornography. The affidavit then described the facts of the investigation noted above. The description of the photograph, in its entirety, was as follows: "This photograph appeared to be of a nude 15 to 17 year old female with a website label of www.nude-teens.com." The photograph was not attached to the affidavit. **[LED EDITORIAL NOTE: The officer's affidavit is set forth in full as an appendix to the Court of Appeals decision in this case.]**

Under authority of the warrant, Investigator Reynolds continued his search and found some adult pornography, along with 22 images of child pornography. Krupa was interrogated and made some admissions to FBI investigators. Krupa was charged in federal district court with possession of child pornography, 18 U.S.C. § 2252(a)(4). The district court denied Krupa's motion to suppress the results of the search of the computers. Krupa pleaded guilty, but he reserved his right to appeal the denial of his motion to suppress the evidence seized under the search warrant.

ISSUE AND RULING: Did the search warrant affidavit establish probable cause to search Krupa's computers for child pornography where the affidavit asserted discovery by the detective

of what he concluded based on his observation, experience, and training was a photo of a nude 15- to 17-year-old female with a "nude-teens" website label, and where the affidavit also asserted the following additional purportedly corroborating facts: (1) a messy home, (2) a lone adult male civilian living in a military base residence taking care of a 5-year-old boy and a 10-year-old girl unrelated to him based only on an informal request from the children's absent father, and (3) a total of 13 computer towers and two laptop computers under the control of that adult male? (ANSWER: Yes, rules a 2-1 majority) **[LED EDITORIAL NOTE: The Krupa majority and dissenting opinions also briefly address the Fourth Amendment issue of whether the evidence should be saved from exclusion on grounds that the officer-affiant had a good faith belief that the affidavit established probable cause to search the computers. Because this good faith exception to exclusion of evidence does not apply under the Washington constitution, we have chosen not to address the good faith issue in this LED entry.]**

Result: Affirmance of conviction by U.S. federal district court (Eastern District of California) of Peter John Krupa for possession of child pornography.

ANALYSIS BY MAJORITY JUDGES:

Krupa's argument focused on the explanation in the Ninth Circuit decision of U.S. v. Battershell, 457 F.3d 1048 (9th Cir. 2006) **Oct 06 LED:08** that an affidavit's assertion that a single photograph of a nude teen or pre-teen girl was discovered on a computer, without something more about suspicious posing of the girl or some other suspicious facts relating to the suspected crime of child pornography, is generally insufficient by itself to establish probable cause for a search warrant to search the computer for child pornography. The majority judges in the Krupa case conclude, however, as did the Court in Battershell, that there were additional suspicious facts that the magistrate properly took into consideration in finding probable cause to search.

The fact that the nude photo of the minor teenage girl on one of Krupa's computers had a website label of "www.nude-teens.com" was "strong supporting evidence," the majority opinion concludes. The majority opinion, as one of its rationales for rejecting Krupa's challenge, concludes that this website-label evidence established probable cause to search the computers for child pornography when added to the following evidence - - the unusual circumstance of a civilian with no apparent ties to the Air Force (1) being in possession and control of 15 computers, (2) living in military housing that was in "complete disarray," and (3) acting as the lone caretaker for two young children not his own while the children's father was out of the country.

DISSENTING OPINION:

The dissent argues that the mere discovery of a photograph of a nude female appearing to be a 15- to 17-year-old with a website label of "www.nude-teens.com" is not itself child pornography and does not provide any support for a search for child pornography. The affidavit did not provide any information that would suggest that the photograph showed the female posed in a lascivious manner (i.e., a manner likely intended to incite lustful desires), as opposed to being artfully or otherwise benignly posed. The dissent argues further that none of the additional information in the affidavit (regarding the messy residence and the informal child-care arrangement involving a non-military person living in military housing) provided any logical support for the proposition that there would be child pornography on the computers. Also, in light of the absence of other support in the affidavit, the dissent argues, the officer-affiant's assertion regarding his training and experience is a bare superfluous conclusion that does not support a probable cause determination regarding child pornography.

LED EDITORIAL COMMENTS:

The majority opinion in Krupa states that the probable cause question on the facts of this case is "close." The dissenting opinion asserts that the question is not close, and that 0 + 0 + 0 (the dissent's assessment of the affidavit) = 0. The dissent's argument is relatively strong. We would not be completely surprised if the Ninth Circuit were to grant further review in the Krupa case. Officers working in this subject area may not want to rely on Krupa majority opinion. Additional child-pornography-specific facts may be required to establish probable cause in these circumstances. If discovered photographs depict a lascivious pose, that should be stated in the affidavit. Also, the Ninth Circuit's Battershell decision (discussed in Krupa) stated that it is preferable that photographs be attached to affidavits to aid the courts in assessing whether probable cause exists; officers should at least consider the pros and cons of whether to attach such photographs.

The Battershell decision discussed in Krupa was one of two significant 2006 Ninth Circuit opinions addressing computer search warrant probable cause issues in child pornography investigations. The other 2006 decision was U.S. v. Hill, 459 F.3d 966 (9th Cir. 2006), also discussed in Krupa. Hill was not separately digested in the LED, though Hill was discussed in our comments on the Battershell decision in the October 2006 LED. In Hill, like Battershell, a case involving a child pornography investigation, the Ninth Circuit addressed in considerable detail what kind of description will be particular enough to satisfy Fourth Amendment probable cause standards for a child pornography search warrant when an officer-affiant is describing the "lasciviousness" of a suspected child porn photo or photos. Included in this discussion in Hill is the following:

> **Child pornography is a particularly repulsive crime, but not all images of nude children are pornographic. For example, "a family snapshot of a nude child bathing presumably would not" be criminal. Moreover, the law recognizes that some images of nudity may merit First Amendment protection because they serve artistic or other purposes, and possessing those images cannot be criminal. Thus, the more precise question we must answer is whether the officer's affidavit established probable cause that the images on the defendant's computer were - - as described - - lascivious. In answering that question, it is important to remember that in issuing the search warrant, the magistrate had to make a practical, commonsense decision, based on the totality of the circumstances presented to him in the affidavit, that there was a "fair probability" that the images were lascivious.**
>
> **Various courts have attempted to articulate a test for determining lasciviousness. Many have relied upon a six-factor test originated in United States v. Dost [a federal district court decision]: (1) whether the focal point of the visual depiction is on the child's genitalia or pubic area; (2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity; (3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; (6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.**
>
> **The district court [in Hill], analyzing each of these six factors, found Dost to be "not particularly helpful" in determining whether a given image is lascivious - - generally or as applied to the images here. Instead, the**

[district court in Hill] fashioned a new test that would create a presumption of lasciviousness, and therefore probable cause, "[i]f an image of a minor displays the minor's naked genital area . . . [,] unless there are strong indicators that [the image] is *not* lascivious." Although we appreciate the district court's careful analysis and critique of Dost, we do not think it necessary to adopt a new test or to deny the utility of Dost in the context of this case.

The Dost factors can be a starting point for judges to use in determining whether a particular image is likely "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." But the factors are neither exclusive nor conclusive. Dost itself acknowledged that it did not seek to offer "a comprehensive definition of . . . lasciviousness," because a determination of lasciviousness "ha[s] to be made based on the overall content of the visual depiction." The factors are merely "general principles as guides for analysis." For instance, we have already recognized that, in some instances, the factors may be "over generous" to defendants.

Ultimately, probable cause is a fluid and nontechnical conception not readily susceptible to multifactor tests or rebuttable presumptions. The magistrate, relying on Dost as a guidepost or on some other test for lasciviousness, need only make a "practical, common-sense decision" that the description presented in the affidavit demonstrates a "fair probability" that the images are lascivious.

Based on our independent review of the affidavit describing the two images, we are satisfied that the state judge's finding of probable cause was well within his discretion. There was a fair probability that the images were "so presented by the photographer as to arouse or satisfy the sexual cravings of a voyeur." The affidavit described in some detail the images of three partially nude children, who were provocatively and unnaturally dressed in light of the photographs' settings. The girls' clothing was opened so as to reveal their breasts and pubic areas, with the girls appearing in sexually suggestive poses. Moreover the descriptions themselves did not raise doubts that the images served some purpose other than [lasciviousness] . . . .

[Citations and parentheticals and footnotes omitted]

Officers and attorneys working in this subject area will want to review Krupa and the other opinions discussed here in their entirety. As we note at the end of each month's LED in our information about Internet access to certain information, Ninth Circuit opinions can be located on a chronologically-arranged set-up at [http://www.ca9.uscourts.gov/] (click on "opinions") if one knows the date of the opinion and the name of the case. The Battershell decision was issued on August 10, 2006 (see Oct 06 LED:08). The Hill decision was issued on August 11, 2006.

CIVIL RIGHTS ACT LAWSUIT: SPLIT 3-JUDGE PANEL HOLDS THAT CASE MUST GO TO TRIAL ON THE QUESTION OF WHETHER DETECTIVES GOT SEARCH AND ARREST WARRANTS FOR CHILD PORNOGRAPHY USING AFFIDAVIT THAT DELIBERATELY OR RECKLESSLY CONTAINED MATERIAL OMIISSIONS AND FALSE STATEMENTS

LED INTRODUCTORY EDITORIAL COMMENT: The majority opinion in Chism is troubling in light of the apparent ease with which the majority judges conclude that a substantial showing was made by plaintiffs for their contention that the detectives were deceptive in

an affidavit for a search warrant. It appears to us from our reading of the majority and dissenting opinions in the Chism case that any errors by the affiant detective and her supervisor in creating a search warrant affidavit were inadvertent and immaterial to the probable cause question. But while we take considerable issue with the analysis in the majority opinion in this case, we recognize that there are some lessons to be learned from this case. With help from some other sources, we attempt to provide our thoughts on those lessons learned in our LED editorial comments that follow this LED entry.

Chism v. Washington State, 655 F.3d 1106 (9th Cir. August 25, 2011, Amended Nov. 7, 2011)

Facts and Proceedings below: (Excerpted from majority opinion)

> On July 3, 2007, Washington's Missing and Exploited Children Task Force (MECTF) received a tip from the National Center for Missing and Exploited Children (NCMEC). The tip advised MECTF that roughly one week earlier, the web-hosting company Yahoo! had archived images of child pornography that were contained on the website http://foelonipwin-cmezixecvom.us/ (the "foel website"). The tip listed Yahoo! user account qek9pj8z9ec@yahoo.com (the "first user account") as the "suspect." The tip stated that Internet Protocol (IP) address 68.113.11.49 was used to open the first user account on May 11, 2007. The tip did not provide the time or date that the child pornographic images were uploaded to the foel website, nor did it provide the IP address from which the child pornographic images were uploaded. [Detective A] was assigned to investigate this tip.
>
> On July 17, 2007, MECTF received another tip from NCMEC. Similar to the first tip, the July 17 tip indicated that two weeks earlier, Yahoo! archived images of child pornography that were contained on the website http://qemtudawyownufiseip.com (the "qem website"). The tip listed Yahoo! user account qaagwcyI9ab@yahoo.com (the "second user account") as the "suspect." The tip stated that IP address 67.160.71.115 was used to open the second user account on June 19, 2007. The tip did not provide the time or date that the child pornographic images were uploaded, nor did it provide the IP address from which the child pornographic images were uploaded. [Detective B] was assigned to investigate this tip.
>
> The detectives began their investigations by obtaining warrants to search Yahoo! records associated with the first and second user accounts. In agreement with the first NCMEC tip, the Yahoo! records indicated that the foel website was created on May 11, 2007. The information for the first user account listed the name "Mr. Nicole Chism" with birthday May 20, 1966. The information indicated that "Mr. Nicole Chism" lived in Chile and used zip code "ucc16." The Yahoo! records also showed that the first user logged in to the account on June 18, 2007 from IP address 69.147.83.181, a different IP address than the one used to create the foel website. The billing information associated with the first user account listed Nicole Chism's name and contained the Chisms' correct residential address, phone number, and credit card number, which ended in 6907. Finally, the Yahoo! records showed that two months of "domain service" for the foel website had been paid with the Chisms' credit card. The Chisms' credit card statements confirm that they were twice charged a monthly fee for domain service for the foel website.
>
> The information that Yahoo! provided about the second user account was similar in character. In agreement with the second NCMEC tip, the Yahoo! records indicated that the qem website was created on June 19, 2007. The information

for the second user account listed the name "Mr. Nicole Cism" with a birthday of March 11, 1977; indicated that "Mr. Nicole Chism" was from Bolivia; and used zip code "nf897." The Yahoo! records also showed that the second user logged in twice since opening the account. On July 3, 2007, the second user logged in twice: once from IP address 69.147.83.181 (the IP address from which the first user logged in on June 18, 2007), and once from a different IP address. Yahoo! did not provide any billing information for the second user account, but the Chisms' credit card statements showed that Yahoo! charged them one hosting fee for the qem website on June 22, 2007.

[The detectives] also independently obtained warrants to trace the IP addresses used to create the two user accounts and websites. [Detective B] learned that the IP address used to open the first user account and to create the foel website was traced to Cheryl Corn of Walla Walla, Washington. The IP address used to open the second user account and to create the qem website was traced to Vitina Pleasant of Federal Way, Washington. It appears that neither [Detective B or A] traced IP address 69.147.83.181—the IP address from which the first user logged in on June 18, 2007 and the second user logged in on July 3, 2007.

A few months later, [Detective A's] assignment was transferred to [Detective C]. After reviewing the information from Yahoo!, [Detective B] noticed that both user accounts used the name "Mr. Nicole Chism" and both websites had at some point been accessed from the IP address 69.147.83.181. [Detectives B and C] concluded that the tips might be connected, and [Detective B] took over the investigation of both tips. [Detective B] decided to investigate the Chism lead, largely because Nicole's name was common to both tips.

[Detective B] first determined that the Chisms' 6907 card was a Bank of America Visa credit card. [Detective B] contacted Bank of America in September 2007 and learned from a Bank of America employee that the Chisms had reported a lost credit card in 2006. The 6907 card was a replacement for the lost card. The Bank of America employee, however, informed [Detective B] that no fraudulent activity had been reported on the 6907 card. [Detective B] eventually obtained credit card statements for the 6907 card and confirmed that the Chisms had paid two charges for the foel website and one charge for the qem website. On the basis of this information, [Detective B] concluded that there was probable cause to believe that Todd Chism had committed a crime.

In January 2008, [Detective B] submitted a search warrant application and affidavit to a magistrate judge and obtained a warrant to search the Chisms' home in Nine Mile Falls, Washington, and Todd Chism's workplace in Spokane, Washington. [Detective D, supervisor of Detective B] reviewed the affidavit and agreed that probable cause existed. On the same day, [a county deputy prosecuting attorney] obtained a warrant to arrest Todd for "[s]ending, bringing into the state depictions of minor engaged in sexually explicit conduct and [p]ossession of depictions of [m]inor engaged in sexually explicit conduct." The warrants were executed five days later. [State] officers arrested, detained, and interrogated Todd; they scoured the Chisms' home; and they seized the Chisms' computers. No child pornography was found, and criminal charges were never filed against Todd.

The Chisms sued . . . under 42 U.S.C. § 1983, alleging violations of their constitutional rights. Both the Chisms and the officers moved for summary judgment on the issue of qualified immunity, and the district court granted the

> officers' motion and denied the Chisms' motion. The district court then declined to exercise supplemental jurisdiction over the Chisms' state law claims, pursuant to 28 U.S.C. § 1367(c)(3), and dismissed them. The Chisms appeal the district court's grant of summary judgment.

[Footnotes omitted]

ISSUE AND RULING: Giving the Chisms the benefit of the doubt, as required by the proof requirements of law under the Civil Rights Act where summary judgment has been granted to the government, did the Chisms make, in their submittal at the trial court, a substantial showing of deliberate falsehood or reckless disregard for the truth by the detective-affiant and her supervisor in the search warrant affidavit, and did the Chism's establish that, but for the alleged dishonesty, the searches based on Detective B's affidavit would not have occurred? (ANSWER BY NINTH CIRCUIT: Yes, the Chisms may proceed with their lawsuit rules a 2-1 majority)

Result: U.S. District Court (Eastern District of Washington) summary judgment dismissal order reversed; case remanded to the District Court for trial in which a factfinder will determine whether there was deliberate falsehood or reckless disregard for the truth by the detective-affiant and her supervisor in the search warrant affidavit, and that, but for the alleged dishonesty, the searches based on the detective's affidavit would not have occurred (and whether an arrest based in part on the detective's affidavit would not have occurred).

ANALYSIS:

The majority opinion explains as follows why the two majority judges concluded that Detective B's affidavit contained two false statements and was flawed by four improper omissions:

> The first false statement contained in [Detective B's] affidavit was [her] assertion that, "[b]ased on the information received from NCMEC about the images downloaded by Todd M. Chism, it is likely to believe he was using internet service at his residence and/or his business office." [The detective's] allusion to "images downloaded by Todd M. Chism" is inaccurate. When [the detective] drafted the affidavit, she possessed no information that Todd had ever accessed any child pornographic images, let alone the particular images that were uploaded to the qem and foel websites. Nor did [the detective] have any evidence that the images were ever downloaded by anyone. As far as [the detective] knew, the only evidence linking Todd to the websites was the fact that the credit card he shared with [his wife] was used to pay the hosting fees for the sites. Thus, [the detective's] assertion that Todd downloaded images of child pornography was not a truthful representation of the evidence she had gathered.
>
> The second false statement contained in [Detective B's] affidavit was her assertion that the Chisms' credit card was "used to purchase the images of child pornography from the website." This statement was false because the Chisms' credit card was not used to buy images of child pornography. Rather, the Chisms' card was used to pay hosting fees for the sites to which illegal images were uploaded at some unknown time, date, and location. [The detective's] statement that the Chisms' card purchased child pornographic images was therefore patently false.
>
> [Detective B's] affidavit also contained several serious omissions. First, [she] omitted her discovery that the IP addresses that were used to open the offending Yahoo! user accounts and websites were traced to people other than the Chisms. Second, [the detective] omitted the fact that a third IP address—69.147.83.18—was used to log in to both the first and second user accounts on

> June 18, 2007, and that this IP address was never traced. Third, [the detective] omitted the fact that [Chism's wife] shared the 6907 credit card account with Todd, even though [her] name—not Todd's—was associated with the two user accounts. Fourth, [the detective] did not report that the user accounts contained nonsensical identifying information.

The majority opinion next explains as follows why the two majority judges concluded that the Detective B's affidavit's false statements and omissions were made with intentional or reckless disregard for the truth:

> As a first element of their judicial deception claim, the Chisms must demonstrate that [Detective B and her supervisor] acted deliberately or with reckless disregard for the truth in preparing the affidavit. Because the Chisms appeal from a grant of summary judgment, they need only make a "substantial showing" of the officers' deliberate or reckless false statements and omissions. . . . If the Chisms make such a substantial showing, then "the question of intent or recklessness is a factual determination" that must be made by the trier of fact. Viewing the evidence in the light most favorable to the Chisms, we conclude that the Chisms have made a substantial showing that the officers' deception was intentional or reckless. The most commonsense evidence that the officers acted with at least a reckless disregard for the truth is that the omissions and false statements contained in the affidavit were all facts that were within [the detective-affiant's] personal knowledge. For example, [the detective's] false reference to "images downloaded by Todd Chism" was a statement that [the detective] knew to be false when she drafted her affidavit.
>
> The declaration [the detective] filed in the district court similarly demonstrates that she knew that the IP addresses used to register the user accounts and websites were traced to other people, and that she knew that the identifying information for the Yahoo! accounts was nonsensical. The fact that the affidavit did not report important factual information that was within the officers' knowledge at the time [the detective] prepared her affidavit would allow a reasonable factfinder to conclude that the officers acted with at least a reckless disregard for the truth.
>
> A reasonable factfinder could also find that the officers acted recklessly or intentionally because the false statements and omissions contained in the affidavit all bolster the case for probable cause, which suggests that the mistakes were not the product of mere negligence. It is conspicuous that, cumulatively, the omissions purged the affidavit of any reference to the possibility that someone other than Todd Chism was responsible for the offending websites. Corn and Pleasant were the people to whom the offending IP addresses were traced, yet this information was omitted from the affidavit. Nicole Chism's credit card information was used to pay the hosting fees, yet the fact that Nicole was an authorized user of the credit card was omitted from the affidavit. All of the information in each Yahoo! profile was nonsensical, yet this information was omitted from the affidavit. In short, the net effect of [Detective B's] omissions was to obscure the prospect that someone other than Todd Chism might have registered the websites and uploaded images of child pornography. We have no difficulty deciding that a reasonable factfinder, viewing the evidence in the light most favorable to the Chisms, could conclude that [the detective's] omissions reflected an affiant "reporting less than the total story . . . [to] manipulate the inferences a magistrate will draw." Accordingly, we hold that the Chisms made a substantial showing of the officers' reckless or intentional disregard for the truth.

[Case citations omitted]

The majority judges also conclude in analysis not described or excerpted in this LED entry that the Chisms made a substantial showing that the false statements and omissions were material, on the rationale that, but for the alleged dishonesty and omissions, the search warrant would not have issued, and the searches based on the detective's affidavit would not have occurred.

The majority judges further conclude in analysis not described or excerpted in this LED entry that the Chisms made a sufficient showing to go to trial in their challenge to Mr. Chism's arrest that was based in part on Detective B's affidavit.

Finally, the majority judges also conclude that Detective B and her supervisor are not entitled to qualified immunity because the Chisms' right to not be searched and arrested as a result of "judicial deception" in the affidavit was clearly established at the time [Detective B] prepared and submitted her affidavit. This appears to be a blanket ruling that qualified immunity can never be granted where a Civil Rights plaintiff makes a showing of such "judicial deception."

Dissent: The dissenting judge argues (1) that although the two alleged false statements may have been technically erroneous, the statements do not support a claim that any error was made with a deliberate or reckless disregard for the truth, and (2) that in any event any error was immaterial because the affidavit established probable cause with the statements corrected. Similarly, the dissenting opinion argues that the alleged omissions were either not material omissions or were not inappropriate omissions, or both.

LED EDITORIAL COMMENTS: 1. Allegedly false or recklessly inaccurate statements in affidavits. On the "false statements" aspect of this case, it reminds us a bit of the quarter-century-old decision in State v. Stephens, 37 Wn. App. 76 (Div. III, 1984), though that case did not involve Chism's modern-day complex technology, as well as sometimes confusing semantics (for instance here, usage of the terms "downloading" vs. "uploading") of the world of computers and Internet financial transactions and activity.

In Stephens, two officers staked out a recently discovered rural marijuana patch that was dry and in need of watering. They recognized a suspect who lived close by leave his property and approach the area on a motorcycle. From the officers' cover, they heard the motorcycle noise come closer and then stop. After about an hour, they heard the noise of a motorcycle starting up and then going away toward the residence. From their cover, they had not been able to see the patch or the suspect during the hour, but when they emerged from hiding, they saw that the previously dry ground in the marijuana patch was now wet.

In the affidavit for a search warrant of Stephens' nearby residence and property authored by one of the officers, the officer stated that that he had "observed" the suspect water the marijuana plants. In a 2-1 decision, the Stephens Court ruled that the officer's "false" statement that he had "observed" the suspect water the plants, instead of stating the facts from which the officer drew that rational inference, impermissibly tainted the affidavit with falsity (or in the alternative was too conclusory).

While we feel that the dissenting judge in Stephens had a good argument that the majority judges were being overly technical on the falsity question, as well as too demanding of precision in the drafting of the search warrant affidavit, there is a lesson to be learned from Stephens – and from the Chism case as well. In describing the facts of the investigation in an affidavit, it is always best to describe the raw facts in as much straightforward detail as practicable, rather than stating unexplained inferences and conclusions. It is best to leave the drawing of such inferences and conclusions to a later portion of the affidavit in which the officer-affiant states such based on (1) his or her

"training and experience" and (2) the raw facts described previously in the affidavit. Ultimately, the drawing of such inferences and conclusions are for the judiciary based on the facts set forth in the affidavit.

2. Omissions from affidavits. One of the most difficult things to assess in drafting search warrant affidavits is what seemingly immaterial facts can be omitted from an affidavit. For instance, if a citizen information source in his early forties has some criminal history from his late teens and early twenties and nothing since, should that be included in the affidavit? What may seem to be immaterial to a law enforcement officer applying his or her own common sense may not seem immaterial to a reviewing judge applying his or her own version of common sense. The best rule on this point is that when in doubt, the officer-affiant should include the information, or at least – if there is not a general practice to have affidavits and search warrants reviewed by a deputy prosecutor – run the omissions question by a deputy prosecutor.

3. Final Notes. It appears that some of the Court's concerns may also stem from computer related terminology. Whether our perception is correct or not, officers should strive to be as accurate as possible in their use of computer related terminology.

Additionally, we strongly suggest that officers verify IP addresses before seeking a search warrant.

****

BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) DEPUTIES WHO WERE SUSPENDED WITHOUT PAY UPON BEING CHARGED WITH FELONIES MUST BE AFFORDED POST-SUSPENSION HEARINGS IN ADDITION TO LIMITED PRE-SUSPENSION PROCEDURES – In Association for Los Angeles Deputy Sheriffs v. County of Los Angeles, 648 F.3d 986 (9th Cir. August 12, 2011), a split Ninth Circuit panel holds 2-1 that sheriff's deputies who were suspended without pay upon being charged with felonies were entitled to post-suspension hearings in addition to the limited procedure they received prior to the suspension. The court explains:

> "[E]mployees who occupy positions of great public trust and high public visibility, such as police officers," can be temporarily suspended without any pre-suspension due process if felony charges are filed against them. Gilbert v. Homar, 520 U.S. 924, 932–34 (1997); see also FDIC v. Mallen, 486 U.S. 230 (1988) (upholding suspension of indicted bank official without pre-suspension hearing). The felony charge "serve[s] to assure that the state employer's decision to suspend the employee is not 'baseless or unwarranted,' in that an independent third party has determined that there is probable cause to believe the employee committed a serious crime."
>
> However, the constitutionality of a suspension without any pre-suspension procedural due process depends on the availability of a post-suspension hearing. See Gilbert, 520 U.S. at 930 ("[W]here a State must act quickly, or where it would be impractical to provide predeprivation process, post-deprivation process satisfies the requirements of the Due Process Clause."); Mallen, 486 U.S. at 240 (holding that "in limited cases demanding prompt action," the government may be justified in "postponing the opportunity to be heard until after the initial deprivation."); see also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, at 547 n. 12 (1985)("[T]he existence of post-termination procedures is relevant to the necessary scope of pretermination procedures.").

Result: Reversal (in part) of United States District Court (Central District California) order dismissing lawsuit.

(2) NINTH CIRCUIT WITHDRAWS AND SUPERSEDES PRIOR OPINION IN STARR V. BACA (CIVIL RIGHTS ACT LAWSUIT BY INMATE AGAINST LOS ANGELES COUNTY SHERIFF) WITH NO SUBSTANTIVE CHANGE – In Starr v. Baca, 652 F.3d 1202 (9th Cir. July 25, 2011), the Ninth Circuit Court of Appeals withdraws and supersedes its previous opinion in this case, Starr v. Baca, 633 F.3d 1191 (9th Cir. Feb. 11, 2011) **May 11 LED:08** with a revised opinion. There does not appear to be any substantive change in either the majority or dissenting opinions in the revised opinion where the Ninth Circuit holds in a 2-1 decision that a jail inmate in a beating case is entitled to trial based on a claim of individual supervisory liability of the Los Angeles County Sheriff under an Eight Amendment deliberate indifference theory. A motion for rehearing en banc was denied in Starr v. Baca, ___ F.3d ___, 2011 WL 4582500 (9th Cir. Oct. 5, 2011).

(3) DETECTIVES' TESTIMONY REGARDING OUT OF COURT STATEMENTS MADE BY NON-TESTIFYING WITNESS CONSTITUTES CONFRONTATION CLAUSE VIOLATION – In Ocampo v. Vail, 649 F.3d 1098 (9th Cir. June 9, 2011), the Ninth Circuit Court of Appeals holds that where a witness' statement to police was testimonial, was admitted against the defendant at trial, and no admissibility exceptions applied, it does not matter that the police summarized the statement rather than providing a verbatim account. See Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**.

Result: Reversal of United States District Court (Western District of Washington) dismissal of prisoner Santana Ocampo's petition for writ of habeas corpus. Remand for evidentiary hearing.

****

BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) REVIEW GRANTED IN BYRD CASE – COURT TO ADDRESS SEARCH-INCIDENT-TO-ARREST RULING THAT EXTENDED GANT TO SEARCHES OF PERSONAL EFFECTS – In State v. Byrd, 162 Wn. App. 612 (Div. III, July 19, 2011), reported in the October 2011 LED beginning at page 21, the Court of Appeals, Division Three, overruled another recent Division Three decision and extended the Arizona v. Gant search-incident rule for motor vehicle searches to searches of the person incident to arrest. The Court of Appeals suppressed evidence seized from the search of a purse that was carried by arrestee Ms. Byrd at the time of her arrest. The purse was searched at the scene only after Ms. Byrd had been handcuffed and secured in the back of a patrol car. On November 21, 2011, the Washington Supreme Court granted discretionary review in Byrd (Supreme Court docket number 86399-7). It is expected that oral argument in Byrd will be heard in the spring of 2012.

(2) COUNTY JAILS MUST PROVIDE OPPORTUNITIES FOR INMATES AWAITING SENTENCING TO EARN GOOD TIME CREDIT – In In re Talley, ___ Wn.2d ___, 260 P.3d 868 (September 15, 2011) the Washington State Supreme Court holds that former RCW 9.92.151 requires a county jail to provide opportunities for an inmate who is yet to be sentenced to earn credit toward early release (i.e., "good time").

Result: Remand to Skamania County Superior Court with instruction to grant Teddy Glen Talley earned early release credit at the statutory maximum rate of 15 percent.

(3) SUPREME COURT MAJORITY OPINION REVERSES COURT OF APPEALS DECISION AND CONVICTION, BUT, FOR PROCEDURAL REASONS, DECLINES TO ADDRESS MERITS OF PARTIES' ARGUMENTS ABOUT EXCLUSIONARY RULE ATTENUATION

DOCTRINE – In State v. Ibarra-Cisneros, ___ Wn.2d ___, 2011 WL 4992328 (October 20, 2011), a majority of the Washington Supreme Court rules for the defendant and agrees to reverse a Court of Appeals decision, basing the reversal on the absence of arguments by the State on certain issues at certain key junctures in the case.

The Court of Appeals had ruled in a consolidated case involving two defendants that: (1) a non-consenting, warrantless search of the residence of one of the defendants (Ibarra-Raya) was unlawful under the State's exigent circumstances theory; (2) but, under an exclusionary rule "attenuation" theory that the Court of Appeals raised on its own (i.e., with no briefing from the State), this unlawfulness in police conduct did not taint the arrest of Ibarra-Cisneros at another location; and (3) the evidence established constructive possession of cocaine by Ibarra-Cisneros. See State v. Ibarra-Raya, 145 Wn. App. 516 (Div. III, 2008) **Sept 08 LED:13** (the September 2008 LED entry addressed all three holdings by the Court of Appeals).

The State did not petition the Supreme Court for review of the first holding relating to the exigent circumstances issue, so that issue and co-defendant Ibarra-Raya were not before the Supreme Court. The Supreme Court majority opinion concludes that, because the State had not raised the exclusionary rule attenuation theory in the Court of Appeals or at Superior Court, the Court of Appeals should not have addressed that issue. Accordingly, the Supreme Court majority opinion reverses the cocaine possession conviction of Ibarra-Cisneros.

Justice Stephens is author of the majority opinion, which is signed by five other justices. Justice Alexander authors a concurring opinion not joined by any other justice; he argues that the Supreme Court should have addressed the exclusionary rule attenuation issue and should have held under the Fourth Amendment that the evidence must be excluded.

Justice Madsen authors a dissenting opinion not joined by any other justice; she argues that the Supreme Court should have affirmed the Court of Appeals decision by holding that no privacy interest of Ibarra-Cisneros was violated, and that the evidence established that he was in constructive possession of the cocaine. Justice James Johnson authors a dissenting opinion likewise not joined by any other justice; he argues, among other things, that: (1) the Supreme Court should have held that the exclusionary rule attenuation doctrine of the Washington and federal constitutions are the same; and (2) based on that doctrine, the evidence should not have been excluded.

Result: Reversal of Court of Appeals decision that affirmed the Walla Walla County Superior Court conviction of Gilberto Ibarra-Cisneros for unlawful possession of cocaine.

****

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WHERE DEFENDANT'S TRIAL BEGINS AFTER NEW CONTROLLING CONSTITUTIONAL INTERPRETATION, DEFENDANT DOES NOT MEET ROBINSON TEST AND ORDINARY PRINCIPLES OF ISSUE PRESERVATION APPLY – In State v. Lee, 162 Wn. App. 852 (Div. II, July 26, 2011), the defendant raised the issue of the legality of the search of his vehicle incident to arrest under Arizona v. Gant, 556 U.S. 332 (2009) **Jun 09 LED:13** for the first time on appeal. The Court of Appeals rejects the challenge, explaining that the Washington State Supreme Court announced a new rule in State v. Robinson, 171 Wn.2d 292 (2011) **July 11 LED:19**, that provided:

> [P]rinciples of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

The Court of Appeals distinguishes the defendant's case from Robinson pointing out that defendant Lee's trial began approximately five months after the United States Supreme Court decision in Gant and accordingly he fails the fourth prong of the Robinson test. Thus ordinary principles of issue preservation apply and because the defendant did not raise the issue at trial he is precluded from raising it on appeal.

Result: Affirmance of Pierce County Superior Court convictions of Darnell Montae Lee for possession of methadone with intent to deliver, possession of cocaine, driving with a suspended license, forgery, and two counts of bail jumping.

LED EDITORIAL COMMENT: Robinson involved consolidated appeals where the defendants raised the issue of the legality of the searches of their vehicles under Gant for the first time on appeal. In Robinson the defendants' trials were completed prior to the Gant decision and they met all four prongs of the new test announced in Robinson. In Lee, the defendant's trial did not begin until after the Gant decision. The Court of Appeals has recently reversed a number of convictions based on the application of the Robinson test and a subsequent finding that vehicle searches were illegal under Gant.

(2) MERE CONTACT BETWEEN MALE AND FEMALE SEX ORGANS DOES NOT CONSTITUTE "PENETRATION" UNDER "SEXUAL INTERCOURSE" DEFINITION – In State v. Weaville, 162 Wn. App. 801 (Div. I, July 25, 2011), the defendant was charged with rape in the second degree under RCW 9A.44.050(1)(b). One element of the crime is that the defendant engage in "sexual intercourse" with another person. "Sexual intercourse" is defined in RCW 9A.44.010(5) as having "its ordinary meaning and occurs upon any penetration, however slight, . . . "

The Court of Appeals holds that "Mere contact between the sex organs of the male and female does not constitute penetration. . . . In other words, touching can occur without penetration. Not all contact meets the statutory definition of 'sexual intercourse.'" (Citations omitted.)

Result: Reversal of Clark County Superior Court conviction of Scott Ellwood Weaville for second-degree rape; affirmance of convictions for attempted second-degree rape, and delivery of a controlled substance [not addressed in this LED entry].

(3) POSSESSION OF STOLEN PROPERTY IS A CONTINUING OFFENSE AND STATUTE OF LIMITATIONS RUNS FROM THE DATE THE DEFENDANT LAST POSSESSED THE PROPERTY; DEFENDANT "USED" VEHICLE IN COMMISSION OF FELONY FOR PURPOSES OF DEPARTMENT OF LICENSING SUSPENSION STATUTE – In State v. Contreras, 162 Wn. App. 540 (Div. III, July 7, 2011), the Court of Appeals holds that possession of a stolen vehicle under RCW 9A.56.068 is a continuing offense, thus the three year statute of limitations begins to run from the date the defendant last possessed the vehicle, not from the date he first possessed the vehicle.

The Contreras Court also holds that the defendant's possession and use of the vehicle, including attempting to license the vehicle, constitute "use" of a vehicle under RCW 46.20.285(4), which requires the Department of Licensing to revoke the license of a driver for conviction of "any felony in the commission of which a motor vehicle is used." In this case the felony was possession of the stolen vehicle, which is a class B felony.

Result: Affirmance of Yakima County Superior Court conviction of Fransico Javier Contreras for possession of a stolen vehicle.

****

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

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

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

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

****

The Law Enforcement Digest is edited by Assistant Attorney General Shannon Inglis of the Washington Attorney General's Office. Questions and comments regarding the content of the LED should be directed to AAG Inglis at Shannon.Inglis@atg.wa.gov. Retired AAG John Wasberg provides assistance to AAG Inglis on the LED. LED editorial commentary and analysis of statutes and court decisions express the thinking of the editor and do not necessarily reflect the views of the Office of the Attorney General or the CJTC. The LED is published as a research source only. The LED does not purport to furnish legal advice. LEDs from January 1992 forward are available via a link on the CJTC Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]

****