



# Law Enforcement

APRIL 2013

# Digest

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

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**WASHINGTON LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS  
MEMORIAL CEREMONY IS SET FOR FRIDAY, MAY 3, 2013 IN OLYMPIA AT 1:00 P.M.**

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. The medal honors those law enforcement officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year’s Medal of Honor ceremony for Washington will take place Friday, May 3, 2013, starting at 1:00 PM, at the Law Enforcement Memorial site in Olympia on the Capitol Campus. The site is adjacent to the Supreme Court Temple of Justice.

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

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**NOTE REGARDING THE 2013 LEGISLATIVE UPDATE:** In prior years we have included the legislative update over the course of two or more LED editions, generally including legislation as it is passed. This year we are planning to include all of the legislation in a single LED edition, likely a stand alone edition similar to last year's 2012 Subject Matter Index. However, if the Legislature passes any bills of interest to law enforcement that have an immediate effective date we will likely mention them as close to the effective date as possible.

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### **BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS**

**(1) REHEARING GRANTED IN “DISRUPTIVE BEHAVIOR” CIVIL RIGHTS ACT LAWSUIT** – On February 25, 2013, the 3-judge Ninth Circuit panel in Acosta v. City of Costa Mesa has withdrawn its September 5, 2012 opinion that we reported in the **December 2012 LED** at pages 9-11 (“Disruptive behavior” element of overbroad ordinance on city council meeting behavior saves ordinance in free speech challenge; qualified immunity for arrest granted based on probable cause to arrest; no excessive force found). The Court's order granting rehearing does not explain what issues will be addressed on rehearing.

**(2) CIVIL RIGHTS ACT LAWSUIT: MAJORITY AND DISSENTING OPINIONS IN MAXWELL CASE REVISED SLIGHTLY BUT NOT MATERIALLY, AND COURT DENIES RECONSIDERATION IN CASE WHERE OFFICERS ARE FAULTED FOR, AMONG OTHER THINGS, DELAY IN GETTING SHOOTING VICTIM TRANSPORTED FOR MEDICAL HELP** – In Maxwell v. County of San Diego, \_\_\_ F.3d \_\_\_, 2013 WL 542756 (9<sup>th</sup> Cir., Feb. 14, 2013), the majority opinion and dissenting opinion for the judges on a three-judge Ninth Circuit panel are revised in minor respects. But neither the majority opinion nor the dissenting opinion is materially changed in the essential analysis and result from what we reported in the **January 2013 LED** at pages 6-8.

Thus, the Ninth Circuit panel maintains its 2-1 ruling that assumes the plaintiffs' allegations are true and holds: (1) delay transporting bleeding victim from crime scene violates due process; (2) detaining witnesses for four hours is unlawful seizure; (3) force against witness is excessive; (4) supervisors present but not taking charge nonetheless may be liable; and (5) Indian tribe paramedics do not get sovereign immunity in relation to suit against them individually. Qualified immunity is denied to the law enforcement officers and the individual Indian tribe paramedics. The case is remanded for trial.

The Ninth Circuit also issued orders on February 14, 2013 denying the government parties' requests for rehearing by the 3-judge panel, as well as by an 11-judge panel.

The original opinion, located at 697 F.3d 941 (9<sup>th</sup> Cir., Sept. 13, 2012) may no longer be cited.

**(3) CIVIL RIGHTS ACT LAWSUIT: PRISON OFFICIALS ENTITLED TO QUALIFIED IMMUNITY FOR SUBJECTING INMATE TO CONTRABAND WATCH** – In Chappel v. Mandeville, \_\_\_ F.3d \_\_\_, 2013 WL 364203 (9<sup>th</sup> Cir., Jan. 31, 2013), a three-judge Ninth Circuit panel holds 2-1 that prison officials are entitled to qualified immunity from damages on an inmate's Eighth Amendment claims, but does not decide whether, if proven, plaintiff's allegations would constitute an Eighth Amendment violation. The panel also unanimously rejects plaintiff's Due Process claim.

Chappel's fiancée visited him in prison. When she entered the facility she was wearing a ponytail hairpiece. The hairpiece was found in a trash can near the visiting room the next day. After searching the visiting room, prison officials found undergarments in the women's bathroom. Both tested positive for cocaine. The fiancée admitted that the hairpiece was hers.

Prison officials searched Chappel's prison cell and discovered three unlabeled bottles of what appeared to be eye drops. The liquid tested positive for methamphetamine.

Chappel was placed on contraband watch. Prison regulations permitted officials at the rank of captain or above to place a prisoner on contraband watch if the official has reasonable cause to believe that an inmate has ingested or secreted contraband.

The Ninth Circuit describes contraband watch as follows:

Contraband watch, also known as a "body cavity search," is a temporary confinement during which a prisoner is closely monitored and his bowel movements searched to determine whether he has ingested or secreted contraband in his digestive tract. Under prison procedures, the prisoner is first searched and then dressed so as to prevent him from excreting any contraband and removing it from his clothing. The prisoner is placed in two pairs of underwear, one worn normally and the other backwards, with the underwear taped at the waist and thighs. The prisoner is also placed in two jumpsuits, one worn normally and the other backwards, with the suits taped at the thighs, ankles, waist, and upper arms. The tape on both the underwear and the jump suits is not meant to touch the skin; it is used to close off any openings in the clothing. The prisoner is then placed in waist chain restraints, which are handcuffs that are separated and chained to the side of the prisoner's waist. This prevents the prisoner from being able to reach his rectum. The waist chain restraints are adjustable and can be lengthened if necessary. The prisoner is then placed in a surveillance cell where prison staff watch the prisoner at all times. The lights are kept on in the cell to allow staff to see the prisoner. To prevent the inmate from concealing contraband, the cell does not have any furniture other than a bed without a mattress. The prisoner is given a blanket, and receives three meals a day and beverages. When the prisoner needs to defecate he must notify the prison staff who will bring him a plastic, moveable toilet chair. Once he uses the chair, the staff will search the waste to determine if it contains contraband.

The Court summarizes the qualified immunity standard as follows:

Qualified immunity protects government officials from civil damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Schwenk v. Hartford, 204 F.3d 1187, 1195–96 (9<sup>th</sup> Cir. 2000) (applying qualified immunity to prison officials). Whether qualified immunity applies thus "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Messerschmidt v. Millender, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1235, 1245 (2012) **June 12 LED:06** (internal quotation marks omitted). Officials must have "fair warning" that their actions are unconstitutional. If an official "reasonably believes that his or her conduct complies with the law," qualified immunity applies.

[Citations omitted]

A. Eighth Amendment Claims

1. Continuous Lighting

The Court concludes that in April – May 2002 the law was not clearly established that lighting deprivation violated an inmate’s constitutional rights. The Court notes that the issue of lighting deprivation is fact specific and that it can serve legitimate penological interests. The Court summarizes its conclusion as follows:

Since, at the time Chappell’s contraband watch took place, no court had ruled on whether contraband watch constitutes a legitimate penological purpose that would justify continuous lighting, and Chappell was subjected to continuous lighting for only seven days and did not claim that he was deprived of sleep or intentionally kept awake, [prison officials] did not have fair notice that their actions were unconstitutional. Given our decision in [Keenan v. Hall, 83 F.3d 1083 (9<sup>th</sup> Cir. 1996)] and the decisional law in other circuits, we have some doubt that the conditions that Chappell experienced under contraband watch even amounted to Eighth Amendment violation, but we do not reach this question since, at a minimum, the law was not clearly established that the contraband watch was unconstitutional and thus Chappell’s Eighth Amendment claim can be resolved on qualified immunity grounds.

2. Mattress Deprivation

The Court also concludes that the law was not clearly established in April – May 2002 that mattress deprivation alone could amount to a constitutional violation. The Court reviews its prior cases, noting that mattress deprivation for a single night was insufficient to state a claim, that it was not clearly established whether mattress deprivation for a month was sufficient to state a claim, and that mattress deprivation for over a month combined with other harsh conditions did state a claim. The Court concludes that where Chappell was deprived of a mattress for a week, but given a bed and a blanket and where there were legitimate penological reasons for the deprivation (discovering secreted contraband), the law was not clearly established.

3. Combination of Conditions

The Court also concludes that the law was not clearly established as to Chappell’s allegations regarding the combination of conditions, explaining:

Viewing the facts in the light most favorable to Chappell, in addition to the continuous lighting and the mattress deprivation, Chappell alleged that he was taped into two pairs of underwear and jumpsuits, placed in a hot cell with no ventilation, chained to an iron bed, shackled at the ankles and waist so that he could not move his arms, and was forced to eat like a dog. The district court adopted the magistrate’s finding that these conditions had the “mutually enforcing effect of sleep deprivation that any reasonable officer would know comprised unconstitutional conditions of confinement.” We disagree.

It is true that “[s]ome conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone.” Wilson

v. Seiter, 501 U.S. 294, 304 (1991). But this only applies when the conditions “have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.” Id. Chappell has not alleged the deprivation of any such need here. He did not specifically claim that he was sleep deprived during the contraband watch, but only that he was “deteriorating mentally” and had to “attempt to sleep that way.”

Moreover, the focus of the inquiry under qualified immunity is whether the defendants had fair notice that their actions were unconstitutional. In April–May 2002, there were no cases in this jurisdiction that involved a contraband watch similar to the one that occurred here. The only factually similar case was Mendoza v. Blodgett, which involved a “feces watch” where the prisoner was placed in a “dry cell” wearing only a pair of shorts and not given a blanket. Mendoza v. Blodgett, 1990 WL 263527, at \*4–5 (E.D. Wash. Dec.21, 1990), aff’d on other grounds, 960 F.2d 1425, 1427 n. 3 (9<sup>th</sup> Cir. 1992) (noting that Mendoza did not renew his Eighth Amendment Claim). In that case, the district court held that these circumstances did not amount to an Eighth Amendment violation, noting that the purpose of these conditions was “to insure that [the prisoner was] unable to conceal or destroy any contraband passed through a bowel movement.”

Case law in other jurisdictions would not have provided any further clarity. The Seventh Circuit held similarly that placement of a prisoner into a dry cell for three days, during which he was unable to wash his hands and denied personal hygiene items, did not violate the Eighth Amendment, particularly since the prisoner had been “confined to the dry cell to serve a legitimate penological interest.” Jihad v. Wright, 124 F.3d 204, 1997 WL 471345, at \*2 (7<sup>th</sup> Cir. Aug.14, 1997) (unpublished); see also Stewart v. Wright, 101 F.3d 704, 1996 WL 665978, at \*1 (7<sup>th</sup> Cir. Nov.14, 1996) (unpublished) (holding that a three-day confinement to dry cell without toilet paper, toothbrush, toothpaste, in a “filthy roach-infested cell” did not violate the Eighth Amendment).

Although the conditions here were more severe than those in the feces watch cases, as previously explained, [prison officials] presented evidence that the contraband watch conditions were engineered with an eye to accomplishing the same penological purpose as the feces watch cases—discovering secreted contraband. Given this important penological purpose and the state of the law at the time, the contraband watch was not “such a far cry from what any reasonable prison official could have believed was legal that the defendants knew or should have known they were breaking the law.”

Because no court had held that conditions similar to those Chappell experienced were unconstitutional in the face of the important penological purpose of discovering contraband, we hold that [prison officials] are entitled to qualified immunity on Chappell’s Eighth Amendment claim.

[Footnotes and some citations omitted]

B. Due Process Claim

1. Fourteenth Amendment Liberty Interest

The Court explains:

We conclude that the Due Process Clause of the Fourteenth Amendment does not afford Chappell a liberty interest. “[L]awfully incarcerated persons retain only a narrow range of protected liberty interests.” Hewitt v. Helms, 459 U.S. 460, 467 (1983). Thus, “[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate’s treatment by prison authorities to judicial oversight.” Montanye v. Haymes, 427 U.S. 236, 242 (1976). Transfer to less amenable quarters for non-punitive reasons has been held to be “ordinarily contemplated by a prison sentence.” . . .

An investigative contraband watch is the type of condition of confinement that is ordinarily contemplated by the sentence imposed. Only the most extreme changes in the conditions of confinement have been found to directly invoke the protections of the Due Process Clause, such as involuntary commitment to a mental institution, see Vitek v. Jones, 445 U.S. 480, 493–94 (1980), or the forced administration of psychotropic drugs, Washington v. Harper, 494 U.S. 210, 221–22 (1990). Since a temporary contraband watch does not rise to this level, Chappell cannot directly claim a liberty interest under the Due Process Clause of the Fourteenth Amendment.

## 2. State Created Liberty Interest

Finally, the Court concludes that plaintiff does not have a state created liberty interest:

Sandin v. Conner, 515 U.S. 417 (1995) and its progeny made this much clear: to find a violation of a state-created liberty interest the hardship imposed on the prisoner must be “atypical and significant . . . in relation to the ordinary incidents of prison life.”

We conclude that the law did not clearly establish that the conditions that Chappell experienced constituted an “atypical and significant hardship.” At the time of Chappell’s contraband watch, we had explained that the “atypical and significant hardship” is context-dependent and requires “fact by fact consideration,” Keenan, 83 F.3d at 1089. . . .

We are not aware of any court that, as of April–May 2002, had applied the Sandin test, or similar temporary, investigatory confinement, to hold that a contraband watch was an “atypical and significant hardship” apart from the ordinary conditions of prison management. . . .

Because there was no case law holding that contraband watch, or any similar regime, is an “atypical and significant hardship,” and the “atypical and significant hardship” test is so fact-specific, [prison officials] did not have fair notice on whether the conditions that Chappell experienced violated a state-created liberty interest that would trigger due process protections. Thus, [prison officials] are also entitled to qualified immunity on Chappell’s due process claim.

Dissent: One of the three judges dissents, arguing that qualified immunity should be denied on the Eighth Amendment claims.

Result: Reversal of United States District Court (E.D. California) order; granting summary to prison officials.

**(4) CIVIL RIGHTS ACT LAWSUIT: ISSUE OF MATERIAL FACT PRECLUDES SUMMARY JUDGMENT ON EIGHTH AMENDMENT CLAIM BASED ON CORRECTIONAL OFFICERS' USE OF PEPPER SPRAY; SUMMARY JUDGMENT APPROPRIATE ON FOURTEENTH AMENDMENT EQUAL PROTECTION CLAIM BASED ON DENIAL OF RELIGIOUS VEGETARIAN BREAKFAST** – In Furnace v. Sullivan, 705 F.3d 1021 (9<sup>th</sup> Cir., Jan. 17, 2013), a three-judge Ninth Circuit panel concludes that issues of material fact preclude summary judgment on inmate's claim that correctional officers' use of pepper spray violated the Eighth Amendment. However, the Court affirms the district court's dismissal of inmate's claim that denial of vegetarian breakfast violated equal protection.

The plaintiff was incarcerated at Salinas Valley State Prison (SVSP). He practices the Shetaut Neter religion, which requires its advanced practitioners to be vegetarian. As a result plaintiff received vegetarian meals for over a year.

On the morning in question, breakfasts were delivered to plaintiff's cell block by two correctional officers who did not know that plaintiff was entitled to vegetarian meals. It was not posted on plaintiff's cell and he did not present the officers with his card indicating that he was entitled to vegetarian meals.

Prison regulations provided the following:

Inmates who take control of food/cuff ports create a serious immediate safety concern for staff and other inmates and mandates suspension of the programming of the other inmates housed in the unit. . . . It is imperative that the food/cuff port be secured in short order to enable inmates to continue to receive services.

. . .

If during routine duties, correctional officers encounter an inmate who refuses to allow staff to close and lock his food/cuff port, the officers will verbally order the inmate to relinquish control of the food port and allow staff to secure it. The officer shall issue a warning that chemical agents will be used if he does not comply.

If the inmate refuses to relinquish control of the food port, despite the warning, the officer is authorized to administer chemical agents against the inmate to secure the food port.

The Court describes the disputed facts as follows:

Accounts of what happened next diverge dramatically. We begin with Furnace's account. Furnace claims he heard Morales say something derogatory, which he contends was something to the effect of, "What's up with all these f---in' Muslims over here?" As Morales approached Furnace's cell, he held the food tray with one hand, and opened the food port with the other. Correctional staff rely on signs posted on the doors of prison cells to ascertain whether an inmate has been approved to receive a vegetarian meal. Morales claims that he did not see such a sign on Furnace's cell door. Inmates also keep a form called a "chrono"



that lists their authorization to receive a vegetarian meal. Furnace concedes that he did not show the officers his chrono, though he had it in his cell at the time of the incident.

When Morales opened the food port on Furnace's cell, Furnace requested two vegetarian meals. Morales said, "You guys ain't vegetarian," closed the food port, and stepped out of view to speak with Soto. Morales then returned to the cell, opened the food port, and told Furnace that Soto had advised him that Furnace and his cell mate were not entitled to vegetarian trays. Morales next told Furnace to either accept the trays, or he would mark both Furnace and his cell mate down as having refused them.

Furnace then attempted to ask Soto to come to the cell door. He states that he attempted to do so by squatting down and putting his fingertips on the bottom portion of the open food port to balance himself, from which position he intended to call to Soto through the food port. He did not extend his hand or arm outside the food port. Without warning, Morales sprayed Furnace with pepper spray. Furnace put his hand up to block the pepper spray, and grabbed the food port in the process. Sullivan saw that Morales was pepper spraying Furnace, came over, and also began pepper spraying him. Morales discharged his can of pepper spray at Furnace until it was empty. Furnace testified that he was pepper sprayed for "maybe a minute," and it was his perception that the officers unloaded the contents of two canisters of pepper spray on him.

Furnace was struck by pepper spray in the lower part of his face, on his chest, on his stomach, and on his groin area. The pepper spray caused his skin to blister and burn. He experienced a burning sensation for three or four days following the incident. After the incident, he also developed a rash in his groin area that he believes may have been caused by the pepper spray.

The officers' version of the events differs markedly from Furnace's. Morales claims that when he returned from conferring with Soto about whether Furnace was entitled to receive a vegetarian meal, Furnace abruptly forced the food port open and yelled, "f--- you!" Morales claims that he instructed Furnace to remove his hands from the food port, and that he told Furnace he had ten seconds to comply with his direct order. He avers that Furnace again said, "f--- you," and exhibited "an aggressive determination not to let go of the food port." Morales says that he discharged a one-second blast of pepper spray at Furnace in order to gain his compliance, and then ceased spraying because his canister was empty. Seeing Morales pepper spraying Furnace, Sullivan ran over to Furnace's cell, and began discharging pepper spray on Furnace from his own canister. Sullivan claims he discharged one blast of pepper spray on Furnace, and that Furnace eventually withdrew his hands from the food port after Sullivan sprayed him.

It is undisputed that after Morales and Sullivan stopped spraying Furnace, Furnace was allowed to decontaminate in his cell. He did not receive a vegetarian breakfast that morning.

[Footnote omitted]

Viewing the facts in the light most favorable to the plaintiff, as the Court must do at the summary judgment stage, the Court concludes that there is an issue of material fact regarding whether the officer's application of pepper spray violated the Eighth Amendment's prohibition against cruel and unusual punishment. See Hudson v. McMillian, 503 U.S. 1, 5 (1992)(the "settled rule [is] that the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.").

The Court rejects the plaintiff's equal protection claim under the facts of this case where the defendant correctional officers did not know the plaintiff or know that he was entitled to a vegetarian meal and the plaintiff did not present them with his card verifying that he was entitled to a vegetarian meal.

Result: Affirmance of United States District Court (N.D. California) order granting summary judgment and dismissing Fourteenth Amendment Equal Protection claim; reversing order granting summary judgment on Eighth Amendment claim.

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**WASHINGTON STATE SUPREME COURT**

**DUTY OF POLICE IN NEGLIGENCE CASE TO PROTECT A VICTIM FROM A CRIMINAL CANNOT BE BASED ON THE MERE FAILURE TO ACT WHERE POLICE HAVE NO SPECIAL RELATIONSHIP WITH THE VICTIM OR CRIMINAL; SEATTLE PD OFFICERS DID NOT ENGAGE IN AN AFFIRMATIVE ACT THAT WOULD CREATE DUTY BECAUSE THEY DID NOT CREATE NEW RISK BUT INSTEAD ONLY FAILED TO ELIMINATE RISK BY NOT PICKING UP SHOTGUN SHELLS LEFT ON GROUND BY AN UNKNOWN OTHER PERSON**

Robb v. City of Seattle, \_\_\_ Wn.2d \_\_\_, 295 P.3d 212 (Jan. 31, 2013)

Facts (Excerpted from Supreme Court opinion):

On June 26, 2005, Berhe shot Michael Robb using a stolen shotgun loaded with two shells. Less than two hours before the shooting, Officers [A] and [B] stopped Berhe and his companion, Raymond Valencia, on suspicion of burglary two blocks from where Berhe lived. A neighbor reported that he saw Valencia throw several shells to the ground before the officers took control of Berhe and Valencia. During the stop, the officers observed three to five shotgun shells on the ground, but they neither questioned Berhe or Valencia about the shells nor picked them up. The officers explain that this decision was based upon the lack of a connection between the shells and the reported crime that led to the stop. Elsa Robb claims it was negligent for [the officers] to fail to retrieve the shotgun shells.

After about 20 minutes of investigation, the officers released Berhe because he did not have any stolen property on him and they had no probable cause to arrest him in connection with burglary or any other crime. Berhe walked away mumbling to himself. Minutes later, according to a witness, Berhe returned to the scene, picked something up from the ground (likely the shotgun shells), and soon thereafter shot and killed Robb. Shortly before the shooting, Berhe came to the house of a neighbor in possession of some yellow shotgun shells. Shortly after 7:30 p.m. on June 26, 2005, Berhe flagged down a car driven by Michael Robb and shot him with a shotgun. After the shooting, Valencia admitted to a Seattle

detective that he and Berhe stole guns and ammunition in the course of a burglary on June 19.

Officers [B] and [A] had prior contact with Berhe. On June 19, [the officers] were dispatched to Berhe's home because his mother reported that Berhe was threatening suicide. Officer [B] described Berhe as acting strange and being unresponsive. Officer [A] noted that Berhe was "out of touch with reality most of the time."

On June 21, Bellevue police advised the Seattle Police Department Auto Theft Division that Berhe had stolen an automobile. Bellevue police also communicated that Berhe might have shotguns under his bed.

On June 22, Officer [B] was dispatched to Berhe's home, this time because of a report that Berhe had assaulted his brother's friend. In Officer [B's] presence, Berhe "spoke in normal tones then switched to deep demonic tones." Berhe claimed that he ruled the world and that all confused people need to be killed and tortured. Berhe was transported to Harborview Medical Center for an involuntary mental health assessment; however, a mental health professional released Berhe because the assault victim declined to testify at a commitment hearing.

On the morning of June 24, Berhe's father called 911 to report that his son and Valencia were fighting in the backyard and both had shotguns. Several officers from the Southwest precinct responded, but they arrived too late to find either the boys or the shotguns. Seemingly contradicting his earlier report, Berhe's father then explained that there had been only one shotgun, not two, and that only Valencia had possessed the gun. According to Berhe's father, Berhe had protected his father from Valencia, never posing any threat to anyone.

Proceedings: Elsa Robb filed a lawsuit in 2008. The City of Seattle moved for summary judgment of dismissal. The trial court denied the motion. The City appealed and the Court of Appeals affirmed the trial court decision. Robb v. City of Seattle, 159 Wn. App. 133 (2010) **Feb 11 LED:13**.

ISSUE AND RULING: For purposes of a negligence lawsuit, a party, whether private or public, has no duty to protect a person from the criminal conduct of a third person except where the party being sued: (1) has a special relationship with the victim, or (2) has a special relationship with the criminal, or (3) engages in an affirmative act that creates a recognizable high degree of risk of harm by the criminal conduct at issue. In this case where the officers did not have a special relationship with the victim or criminal, did they engage in an affirmative act when they failed to eliminate a risk by failing to pick up bullets left at the scene by another? (ANSWER BY WASHINGTON SUPREME COURT: No, the officers did not engage in an affirmative act, and therefore they did not have a duty under negligence case law to protect the victim)

Result: Reversal of decisions by the Court of Appeals and King County Superior Court denying summary judgment to the City of Seattle; case remanded for dismissal of the lawsuit.

[LED EDITORIAL NOTE: In the analysis by the Court below, the Court discusses the Restatement of Torts. Restatements of the law are treatises that are developed by law professors, judges and lawyers about the common law, i.e., court-made doctrines developed by case law. Such Restatements are not binding authority, but they are deemed to have persuasive value as generally reflecting the consensus of the American

**legal community regarding (1) the state of the common law or, (2) in some circumstances, what it should be.]**

ANALYSIS: (Excerpted from Supreme Court opinion)

As a general rule, “in the absence of a special relationship between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another.” . . . . Until now, our cases involving a duty to protect a party from the criminal conduct of a third party have fallen into one of two categories: where there is a special relationship with the victim or where there is a special relationship with the criminal. For example, we have found liability for the criminal acts of third parties in cases involving the relationship between a business and a business invitee, innkeeper and guest, state and probationer, and psychotherapist and patient.

However, we have also recognized under [section 302B of the Restatement of Torts] that a duty to third parties may arise in the limited circumstances that the actor’s own affirmative act creates a recognizable high degree of risk of harm. Specifically, Restatement section 302B provides that “[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal.” Comment e [of the Restatement] further provides:

There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor’s own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.

(Emphasis added.)

. . . .

This court has not yet found a duty to protect a third party from the criminal acts of another absent a special relationship, but the Court of Appeals has done so. Parrilla v. King County, 138 Wn. App. 427 (2007). In Parrilla, the Court of Appeals found King County owed a duty after a bus driver exited his bus with the engine running, leaving a visibly erratic man alone on board. The Court of Appeals recognized that cases involving the criminal conduct of a third party generally require a special relationship, but found the affirmative acts of the bus driver and the foreseeability and magnitude of the risk created by the driver justified imposing a duty under section 302B comment e. The Court of Appeals in this case relied heavily on Parrilla, finding it factually analogous. We agree with the city that it is not.

The relevant provision of Restatement section 302B comment e requires an affirmative act which creates or exposes another to a situation of peril. Foreseeability alone is an insufficient basis for imposing a duty. Unlike here, the

bus driver in Parrilla left his keys in the ignition of a bus, leaving the engine running and leaving a crazed individual alone on the bus. The court there found the driver's affirmative act of getting off the bus and leaving the engine running with an erratic passenger alone on board exposed motorists to a recognizable high degree of risk that a reasonable person would have foreseen, imposing on the county a duty of care to the injured motorists to guard against the man's criminal conduct.

The difference between this case and Parrilla is the distinction between an act and an omission. This distinction is explained in Restatement section 314 comment c:

The origin of the rule lay in the early common law distinction between action and inaction, or "misfeasance" and "non-feasance." In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

Thus, under section 314, an actor might still have a duty to take action for the aid or protection of the plaintiff in cases involving misfeasance (or affirmative acts), where the actor's prior conduct, whether tortious or innocent, may have created a situation of peril to the other. Liability for nonfeasance (or omissions), on the other hand, is largely confined to situations where a special relationship exists.

....

"The common law of torts has long distinguished between 'acts' and 'omissions,' refusing to impose liability for the latter, even though the line between the two is far from easy to draw." . . . . This is more properly considered a case of omission than affirmative action. Restatement section 314 comment a refers to misfeasance as circumstances where an actor exposes another to danger by creating a situation of peril. Misfeasance involves active misconduct resulting in positive injury to others. . . . Misfeasance necessarily entails the creation of a new risk of harm to the plaintiff. . . . On the other hand, through nonfeasance, the risk is merely made no worse. . . . Nonfeasance consists of "passive inaction or failure to take steps to protect others from harm." . . . .

Robb analogizes to a situation where a negligent driver fails to apply his or her brakes as a pedestrian crosses in front of the car. Robb claims this is affirmative action, not omission, because although the driver omitted to apply brakes, the conduct must be viewed holistically as the affirmative act of negligent driving. Robb would have this court view the failure to pick up the shells as part of the broader affirmative act of taking control of a dangerous situation. However, in Robb's example, the driver affirmatively created a new risk to the pedestrian by failing to stop his or her car. Similarly, in Parrilla, the bus driver affirmatively

created a new risk by disembarking from a bus, leaving keys in the ignition with the engine running and an erratic passenger onboard, providing the instrumentality and opportunity to cause harm.

The police officers in this case did not affirmatively create a new risk when they stopped Berhe and failed to pick up the nearby shells. The officers did not provide the shells, nor did they give Berhe the shotgun he used to kill Robb. The officers failed to remove a risk when they did not remove the shells. Berhe would have presented the same degree of risk had [the officers] never stopped him. Simply put, the situation of peril in this case existed before law enforcement stopped Berhe, and the danger was unchanged by the officers' actions. Because they did not make the risk any worse, their failure to pick up the shells was an omission, not an affirmative act, i.e., this is a case of nonfeasance.

Under the Court of Appeals' holding, the limits of liability under section 302B are too broad and do not reflect the theoretical underpinnings of the Restatement. That court's open-ended understanding of tort duty would require law enforcement officers to foresee and eliminate dangers everywhere they go. Although Robb insists that the rule she proposes would only lead to liability in unusual cases, in reality law enforcement could incur liability whenever it takes control of a situation where there is a recognizable high degree of risk of harm that it ultimately fails to eliminate. Yet, because of the very nature of police work, these types of situations are unavoidable and frequent. When police officers make a stop, intervene in a dispute, attempt to prevent crime, respond to a crime in progress, or respond to a crime recently committed, they must take control of a potentially dangerous situation. A high degree of risk is inherent in their work. Officers carry guns in their patrol cars and on their person and are charged with confronting unpredictable risks and dangerous instrumentalities.

Amicus Washington Association of Sheriffs and Police Chiefs fairly asks whether law enforcement officers would be responsible for vehicles, baseball bats, alcohol, tire irons, and other instrumentalities they encounter around them that are subsequently used to harm others. Amicus also reasonably wonders how officers will be expected to know when they have made an affirmative act that will subject them to liability when taking control of dangerous situations is part and parcel to their work.

The outcome of this case is dictated by the basic tort principles. In order to properly separate conduct giving rise to liability from other conduct, courts have maintained a firm line between misfeasance and nonfeasance. To label the conduct here as affirmative, danger-creating conduct would threaten this distinction, leading to an unpredictable and unprecedented expansion of section 302B liability. Because law enforcement only failed to eliminate a situation of peril, but did not increase the danger by an affirmative act [, the officers'] omission is insufficient to impose a duty under section 302B. [Court's footnote: *Because we hold that the failure to remove bullets left by others at the scene of a Terry stop is not an affirmative act within the contemplation of comment e, we do not reach the question of whether the public duty doctrine would act to bar this action.*]

[Some footnotes omitted, some citations revised or omitted]

WASHINGTON STATE COURT OF APPEALS

**IN NIGHT-TIME SHOTS-FIRED RESPONSE, REASONABLE SUSPICION SUPPORTS TERRY STOP OF SPOTLIGHTED POSSIBLE GANG MEMBER DRIVER WEARING RED IN BLUE-COLORS RIVAL GANG AREA AND DRIVING QUICKLY DOWN A RUTTED ALLEY; ALSO, JURY FINDING OF GANG-PURPOSES OF CONDUCT HELD SUPPORTED**

State v. Moreno, \_\_\_ Wn. App. \_\_\_, 294 P.3d 812 (Div. III, Feb. 12, 2013)

Facts:

1. Chronology up to the point when police used a patrol car to block the suspects' car

Between 9:49 and 9:51 p.m. on October 9, 2009, several calls to a 911 center, including one from an officer, reported that the callers had just heard gunshots in a particular neighborhood in Yakima, Washington. One citizen caller had reported seeing a person in an alley in the neighborhood at the time of the gunfire wearing a "white jacket with a black jacket." The neighborhood had a history of violent crime and was in the territory of the Sureño gang. The Sureño gang wears blue colors. A patrol car arrived in the neighborhood within a few minutes. An officer driving the patrol car saw a suspect car moving in an alley. The suspect car appeared to be moving "hurriedly," the officer later testified, in light of the officer's knowledge of the generally unpaved and rutted condition of alleys in the neighborhood.

The officer spotlighted the car and saw that the driver was wearing a red shirt, the colors of the Norteño gang, a cross-town rival of the Sureño gang. The officer blocked the suspect car with his patrol car and turned on his emergency lights.

2. Chronology after the point when police blocked the suspects' car up to the point when police placed the handcuffed suspect, Moreno, in the back seat of a patrol car

The suspect car stopped. The occupants of the suspect car put their hands in the air. Officers next preliminarily questioned the suspects while they were still in their car. The front seat passenger had a "Mongolian" haircut, which is characteristic of the cross-town Norteño gang. The driver's name was an unusual last name that, to the questioning officer's knowledge, matched the last name of a Norteño gang member.

When asked if they had heard the gunfire, the suspects responded that they had not heard any shots, and that they had been in the alley smoking marijuana (the Court of Appeals does not specify which of the three suspects said what). The officers found this response suspicious, both because the suspects' car windows were down so they should have heard the shots even if they had been in their car, and because, at the time of the police contact, there was no smell of marijuana coming from their car (nor was that odor detected in later contacts with the suspects that evening).

Shortly thereafter, Moreno was ordered out of the suspect vehicle. He was handcuffed and placed in the back seat of a patrol car. **[LED EDITORIAL NOTE: The Moreno opinion does not describe what officers did with the other suspects.]** According to the Court of Appeals opinion, an officer testified that the purpose of securing Moreno and the other two suspects was to "freeze the scene . . . so that they [would not] have time to communicate with each other and get their stories straight." **[LED EDITORIAL NOTE: The Court of Appeals opinion suggests that the testimony of the law enforcement personnel in the case did not indicate that**

either (1) safety of officers and others or (2) prevention of escape were a factor in the decision to secure Moreno in a patrol car. See our editorial comments below at the close of this LED entry.]

3. Chronology after the point when police placed Moreno in the back of the patrol car

The officers asked the driver for consent to search the suspect car. The driver consented to a search of only the passenger area, not the trunk. The passenger area contained a black coat with white lining, and no other evidence. In further questioning of the three, now-separated suspects as to how they came to be in the neighborhood, the two adults each said that they had gotten lost, while the juvenile back seat passenger said that they had come to the neighborhood to spray-paint graffiti.

As the investigation proceeded that evening, officers obtained witness descriptions roughly matching the stopped car and one of the suspects. They conducted a showup identification procedure that produced a tentative identification. Officers got an in-person report from a man who said he had been shot at from a car in the area and during the relevant period. Officers also made an eyeball determination that two houses in the neighborhood had been hit with bullets. The police applied for a warrant to search the suspect car's trunk based on the circumstances described above. The warrant was issued (the Court of Appeals opinion does not describe what the warrant said about the object of the search, but we assume the warrant application said something about firearms and ammunition as the object of the search).

In the search under the warrant, officers found a sawed-off .12 gauge shotgun, a .357 Magnum revolver, and .38 shell casings inside the trunk. Officers later applied for and received a warrant to search the trunk for clothing. The warrant was issued, and they found a black knit glove (a single black knit glove had been found earlier in the alley) and a dark sweatshirt with a white lining.

Proceedings below:

Moreno was charged with first degree assault and first degree unlawful possession of a firearm. The trial court denied his motion to suppress the evidence seized from the trunk. A jury convicted Moreno as charged. The jury also found on a sentencing issue that the crimes were committed "with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership." Moreno was given an enhanced sentence based on this jury finding.

ISSUES AND RULINGS: 1) In the officers' response to the call regarding shots fired in a high-violent-crime neighborhood, do the additional circumstances – multiple contemporaneous shots-fired calls to 911, plus a lone car moving in an unusually-hurried manner in an alley, plus the fact that the spotlighted driver of the suspect car was wearing clothing with the gang color, red, of a cross-town gang that is a rival of the local, neighborhood gang that wears blue – add up to reasonable suspicion to support the stop that was executed by blocking the suspects' car? (ANSWER BY COURT OF APPEALS: Yes; the 3-judge panel is unanimous on this issue)

2) Did the officers make an arrest, not merely a stop, when they placed the handcuffed suspect in a patrol car, not for safety purposes or to prevent escape, but in order to prevent him from conferring with other suspects? (ANSWER BY COURT OF APPEALS: The Court of Appeals is unanimous in declining to address this issue; the majority opinion explains that the defendant's briefing and argument on appeal fail to show that, even assuming that placing Moreno in a patrol car was an arrest, any material, non-cumulative evidence was obtained as a fruit of that



action; the Court concludes that no evidence obtained under the search warrant was tainted by the purportedly unlawful arrest; **see our LED editorial comments below regarding the “arrest” issue**)

3) Does substantial evidence support the jury’s finding for sentencing purposes that the crimes were committed “with intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang its reputation, influence, or membership”? (ANSWER BY COURT OF APPEALS: Yes, the expert testimony regarding gang behavior and motivation makes the required individualized showing needed to support such a jury finding; the Court of Appeals is split, 2-1, on this issue, with Judge Sweeney dissenting)

Result: Affirmance of Yakima County Superior Court convictions of Jesse Antonio Moreno for first degree assault and first degree unlawful possession of a firearm; remand for resentencing based on a domestic violence assessment and a jury fee issue not addressed in this LED entry.

#### ANALYSIS:

##### 1. Reasonable suspicion

Officers may temporarily seize suspects under the Washington and federal constitutions where they have “reasonable suspicion,” which generally means a fact-based substantial possibility that particular person has committed a specific crime or is about to do so. The standard considers the totality of circumstances, including objective, articulable observations by officers, as well as reliable reports from witnesses. The fact that an area is a high-violent-crime area is a factor that may be considered, but that fact will never be sufficient alone to establish reasonable suspicion. Also considered are the training and experience of the officers who are involved in making a stop, such as here, where the officers’ knowledge of gang behavior is part of the officers’ assessment of the circumstances.

There is no question in this case that the officers made a seizure of the suspects when an officer used his patrol car to block the suspects’ car and turned on the patrol car’s emergency lights. The Court of Appeals concludes, however, that the totality of the circumstances – high-violent-crime area, plus multiple contemporaneous shots-fired calls to 911, plus a lone car moving in an unusually-hurried manner in an alley, plus the fact that the spotlighted driver of the suspect car was wearing clothing with the gang color red of a cross-town gang that is a rival of the local, neighborhood gang that wears blue – add up to reasonable suspicion to support the stop of the suspects’ car.

##### 2. Gang-motivation evidence

A trial court can impose a sentence higher than the standard range if a jury finds that “[t]he defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.” RCW 9.94A.535(3)(aa). No Washington appellate decision has yet addressed this particular sentencing provision. But the Moreno Court draws an analogy to another sentencing provision that has been interpreted in several Washington appellate decisions, including State v. Bluehorse, 159 Wn. App. 410, 431 (2011) **May 11 LED:21**.

It is not enough under Bluehorse for the State to present only generalized gang-behavior testimony from a law enforcement expert on gang behavior. Such generalized evidence does not support the required individualized finding by a jury that a particular defendant actually had

the statutory gang-related motive for the particular shooting. The Moreno majority opinion concludes under the following evidence that there was sufficient evidence to support the jury's sentencing-enhancement finding that the defendant's actions were motivated by any of the purposes specified in the statute:

No case law addresses the criminal street gang sentencing enhancement. But several cases address whether evidence sufficiently supported a similar aggravating factor if the "defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group." RCW 9.94A.535(3)(s). Cases addressing that statute have required a nexus between the crime charged and the defendant's actual gang-related motivations. State v. Bluehorse, 159 Wn. App. 410, 431, 248 P.3d 537 (2011) **May 11 LED:21**.

Some evidence must show gang involvement actually motivated the defendant to commit a crime to support RCW 9.94A.535(3)(s)'s gang aggravating factor. State v. Yarbrough, 151 Wn. App. 669 (2009). In Yarbrough, Mr. Yarbrough yelled gang-related insults and challenges before shooting two people. The evidence showed Mr. Yarbrough's gang had a run-in with a rival gang a few days prior to the shooting and that Mr. Yarbrough believed that the victims were members of that rival gang. In State v. Monschke, 133 Wn. App. 313 (2006), Mr. Monschke and three other white supremacists beat a homeless man to death. In both cases, some evidence showed the defendants committed their crimes because of their gang membership. Testimony from police or other gang experts is insufficient, standing alone, to support the aggravating factor. Bluehorse.

Here, sufficient evidence showed Mr. Moreno had ties to the Norteños gang and Mr. Moreno acknowledged those ties. Mr. Moreno and two others identified as having Norteños ties were, without credible reason, found in Sureños territory hurriedly leaving the scene of a reported shooting. Police expert testimony sufficiently showed specific local gang facts: (1) the Norteños rivaled the Sureños and both gangs were uniquely territorial, not invading rival gang turf without specific reason, (2) Norteños sometimes came to Sureños territory to put in work, (3) putting in work was a way of maintaining or improving one's status in a gang, and (4) putting in work included committing random acts of violence or attacking rival gang members. Significantly, Mr. Caoile testified a person in the front passenger side of a blue car he identified as Mr. Moreno called out the gang name "South side LVL" to him shortly before Mr. Moreno shot at him. "LVL" refers to the Little Valley Locos subset of the Sureños.

From these facts, the State could and did argue Mr. Moreno was putting in work when shooting at Mr. Caoile either as a random act of violence, or more likely a misidentified rival gang member. The jury could, in weighing the testimony and deciding credibility from the sufficient evidence presented, infer the assault was committed to directly or indirectly cause benefit to a gang. Considering all, we conclude, the evidence shows a sufficient nexus between the crime and gang membership to prove the gang aggravator.

[Some citations revised or omitted]

**LED EDITORIAL NOTE REGARDING GANG-MOTIVATION SENTENCING ENHANCEMENT:**  
**As we suggested in our comments in the May 2011 LED regarding the Bluehorse**

decision, officers may wish to discuss with their local prosecutors the question of what particularized evidence is needed to support a finding of gang motivation for sentencing enhancement. The case law is a bit murky, we think.

**LED EDITORIAL COMMENTS REGARDING WHETHER PLACING MORENO IN A PATROL CAR IN HANDCUFFS CONSTITUTED AN ARREST:** The Court of Appeals previously issued an opinion (not digested in the LED) in this case, but the Court then granted a motion for reconsideration, withdrew its original opinion, and issued the revised opinion (and the dissent on only the sentencing issue) that we have digested here. The original, withdrawn opinion for the Court would have held that placing Moreno in a patrol car constituted an arrest (and that such arrest was not supported by probable cause to arrest). For reasons that we briefly explain above in item 2 of our “Issues” section, the revised opinion for the majority omits from the withdrawn opinion any analysis of the arrest and PC-to-arrest issues, but the majority opinion retains some references from the original opinion to the “arrest” being “unlawful.”

We question any implication in the unlawful-arrest language that remains in the Moreno opinion that, as a general proposition, initially placing a drive-by-shooting suspect in a patrol car in handcuffs automatically changes the status of a seizure from that of “Terry stop” that requires only reasonable suspicion to the status of “arrest” that requires probable cause.

We do not know the contents of the suppression hearing transcripts, and we cannot tell from the appellate court briefing (which is accessible on the Internet Washington Courts’ site) whether the State put on testimony from any law enforcement officer as to whether Moreno was told at the time he was placed in a patrol car that he was not presently under arrest, but was being temporarily detained while police investigated.

Nor do we know if there was officer testimony regarding possible concerns about officer safety and prevention of escape as reasons for placing Moreno in a patrol car in handcuffs. The Moreno opinion’s description of the facts appears to suggest that, instead, the officer testimony was that the sole purpose for placing the cuffed suspect Moreno in a patrol car was to keep the suspects apart so that the suspects could not get their stories straight.

We think that evidence about safety concerns could be plausibly presented by an officer under the circumstances of the Moreno case, where the night-time stop was of three drive-by-shooting suspects. While the suspects were initially compliant and were determined in frisks to not be armed, the suspects were nonetheless suspected of committing a violent crime. Frisks are not always perfect, and handcuffing does not always eliminate all risks. Briefly securing night-time, drive-by-shooting suspects in handcuffs in a patrol car seems to us to be a reasonable safety precaution.

Finally, as always, we remind that our editorial comments are not legal advice, and we recommend that law enforcement officers and agencies consult their own legal advisors and local prosecutors for guidance on legal issues.

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**BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS**

(1) MIRANDA-BASED INITIATION-OF-CONTACT BAR WAS NOT TRIGGERED WHERE SUSPECT IN CONTINUOUS CUSTODY ASSERTED RIGHT TO ATTORNEY UNDER

**CANADIAN LAW TO CANADIAN OFFICERS WHO WERE NOT AGENTS OF WASHINGTON OFFICERS, SO WASHINGTON OFFICERS LAWFULLY OBTAINED MIRANDA WAIVER** – In State v. Trochez-Jimenez, \_\_\_ Wn. App. \_\_\_, 294 P.3d 783 (Div. I, Feb. 12, 2013), the Court of Appeals rejects the defendant’s argument that detectives from King County Sheriff’s Office violated what is known as the initiation-of-contact rule of Miranda by initiating contact with him in a Canadian jail and seeking and obtaining a waiver of his Miranda rights.

Defendant is a Mexican national. He shot and killed a man in King County, Washington. He fled to Canada. He was arrested by a Canadian officer on suspicion of entering Canada unlawfully. The officer advised defendant of his right to an attorney under the “Canadian Charter of Rights and Freedoms.” Defendant requested an attorney. Defendant was booked into a Canadian jail.

The Canadian officer then ran defendant’s name through a crime database. He learned that defendant was a suspect in the King County homicide. The officer contacted the King County Sheriff’s Office and advised of defendant’s situation. Two King County detectives drove to Vancouver and contacted defendant at the Canadian jail after waiting for Canadian immigration investigators to finish questioning him on the immigration matter (he apparently consulted an attorney before agreeing to talk to the Canadian officers). The King County detectives Mirandized him. He waived his rights and made incriminating statements.

He was charged with first degree murder in King County Superior Court. The trial court rejected his suppression motion, ruling that detectives had not violated Miranda by initiating contact with defendant. Defendant was convicted of second-degree murder while armed with a firearm and sentenced to 294 months.

The issue in this case is whether the Miranda-based initiation-of-contact rule barred the King County detectives from seeking a Miranda waiver of rights to silence and counsel while the defendant remained in continuous custody following his assertion of the right to attorney under Canadian law to Canadian officers. The Court of Appeals notes that defendant also raised an “independent grounds” argument under the Washington constitution, but the Court asserts that the Miranda-based standards are the same under the Washington and federal constitutions.

As an initial matter, the Court notes that the State appeared to concede and the case law appears to support the proposition that “Miranda procedures [are] applicable to United States officials’ [here, the King County detectives]’ custodial interrogation of a foreign national in a foreign country in relation to a crime alleged to have been committed in the United States.” The Court also notes as follows that the Canadian officers were not acting as agents for the King County detectives: “King County detectives did not conduct, instigate, or participate in the Canadian interrogation of Trochez-Jimenez.”

Turning to the pivotal issue, the Court explains that the combined effect of the U.S. Supreme Court decisions in Edwards v. Arizona, 451 U.S. 477 (1981) **May-Aug 81 LED:04** and Arizona v. Roberson, 486 U.S. 675 (1988) **Sept 88 LED:01** is that officers subject to U.S. constitutional requirements, such as the King County detectives here, may not lawfully contact a suspect to seek a waiver of Miranda rights where the suspect (1) has asserted the Miranda right to an attorney during a custodial interrogation situation, and (2) has since remained in continuous custody. **[LED EDITORIAL NOTE: For a discussion of the Miranda-based initiation-of-contact rules for continuous custody suspects, see the article “Initiation Of Contact Rules Under The Fifth Amendment” (by John Wasberg, current through August 2, 2012) on the Criminal Justice Training Commission Internet LED page under “Special Topics.”]**

The Court of Appeals rules that the Edwards-Roberson bar to police initiation of contact was not triggered by the assertion of the Canadian right to attorney to Canadian officers. This ruling is based in part on decisions by military tribunals and by a Florida intermediate appellate court in analogous situations. The Trochez-Jimenez Court summarizes its holding as follows: “We hold that invocation of a right to counsel before foreign officials in a foreign investigation under a foreign rights document does not trigger the Fifth Amendment right to counsel.”

The Court of Appeals notes that the King County detectives were not told, before obtaining defendant’s statement, about defendant’s assertion to Canadian officers of his right to an attorney under the “Canadian Charter of Rights and Freedoms.” But this circumstance does not appear to be a factor in the analysis by the Court of Appeals.

Result: Affirmance of second-degree King County Superior Court murder conviction and sentence of Cesar E. Trochez-Jimenez.

**(2) CHECK NEXT TO “NCO” BOX ON JUDGMENT AND SENTENCE IS SUFFICIENT TO EXTEND PRETRIAL NO CONTACT ORDER UPON CONVICTION** – In State v. Luna, \_\_\_ Wn. App. \_\_\_, 292 P.3d 795 (Div. III, Jan. 17, 2013), the Court of Appeals rules defendant had sufficient notice that his pretrial no contact order was extended following his conviction.

The Court of Appeals summarizes the facts and proceedings as follows:

In State v. Schultz, our Supreme Court held that a sentencing court could continue a pretrial no-contact order and that it was not necessary to issue a new order following a conviction and sentence. State v. Schultz, 146 Wn.2d 540 (2002). Here the municipal court warned the defendant in open court that the pretrial no-contact order would remain in effect following his conviction. And the court then checked a box marked “NCO” on the judgment and sentence. The court also denied a later motion by the defendant to lift that no-contact order. The defendant violated the no-contact order but now claims that he was denied the notice required by due process of law. The superior court agreed with him and dismissed. We disagree, reverse the order of dismissal, and remand.

The Court describes the question before it as “whether the simple check next to the box on the judgment and sentence marked ‘NCO’ was sufficient to extend the pretrial no-contact order after conviction and sentencing.”

The Court ultimately agrees with the State’s argument that “the notation on the judgment and sentence when taken with the municipal court’s warnings in open court that the order was still in effect and the court’s later rejection of Mr. Luna’s efforts to have the no-contact order lifted,” satisfy any notice requirement.

Result: Reversal of Spokane County Superior Court order granting Jesse Luna’s motion to dismiss charges of violation of no contact order (case remanded for trial).

**(3) EVIDENCE THAT DEFENDANT WAS ATTEMPTING TO INDUCE WITNESS NOT TO APPEAR FOR THIRD PARTY’S TRIAL IS SUFFICIENT FOR CRIME OF WITNESS TAMPERING** – In State v. Andrews, \_\_\_ Wn. App. \_\_\_, 293 P.3d 1203 (Div. III, Jan. 8, 2013) the Court of Appeals holds that evidence is sufficient to convict the defendant of witness tampering where he made telephone calls and sent text messages to the victim, which the victim understood to mean that if she appeared for trial he would retaliate.

The Court of Appeals describes the facts as follows:

Carrie Frazier was subpoenaed as a witness in Ron Ralston's motor vehicle theft trial, but did not show up; she was scared to testify against Mr. Ralston at trial. After officers arrested Ms. Frazier on a material witness warrant, they obtained a search warrant for her cellular phone. Using a digital camera, [an officer] photographed text messages he found on Ms. Frazier's cell phone and used a digital recorder to record voice messages. The State charged Mr. Andrews with intimidating a witness or, alternatively, witness tampering. At trial, over Mr. Andrews' objection, Ms. Frazier testified to three voice messages left on her cellular phone.

On the first message, the caller, identified as "Yoshie," told Ms. Frazier, "You need to f---ing stay under the radar. Stay the f--- down and yeah just be like that girl. Now that's on, that, that is on the real because if it happens any different than yeah, you're gonna have some problems." Ms. Frazier understood the message to mean that she was to make herself unavailable to testify at trial, that Yoshie was serious, and that she might be subject to retaliation if she did show up to testify. The second message, again from Yoshie, demanded a call back from Ms. Frazier, in order to make sure "you're doing what you're supposed to do." Ms. Frazier understood that he was checking to make sure she was not going to trial. The third voice message, Yoshie instructed Ms. Frazier to let him know "where you are and what's up," and "I think it's today." Ms. Frazier understood that Yoshie was requesting that she should stay unavailable for just one more day, and the trial would be over with.

Also admitted over defense objection, were several text messages from Yoshie. The caller identification listed "Cosmo Mike" as the sender, but the text messages state they are from "Yoshie."

The court allowed the photographs of the text messages and the recordings of the voice messages under ER 1003, finding, "It's a piece of technology that would be unusable and would not be reviewable by the jury, I think, unless you're raising an issue as to the authenticity." Mr. Andrews' attorney responded that he did not "have any evidence" to support that what the officer "took off the phone" was not correct.

Ms. Frazier identified Mr. Andrews in court as the individual known to her as Yoshie. Additionally, she recognized the voice on the recordings as Yoshie's. Police confirmed Mr. Andrews was known as Yoshie. And Mr. Andrews has a tattoo of the name Yoshie on his body.

Ms. Frazier testified to a specific phone conversation between her and Mr. Andrews where he told her that she "did not need to go to court . . . and testify against Ronald." Ms. Frazier testified that the voice messages, as well as the text messages, were on her cell phone when she was arrested. According to Ms. Frazier, Mr. Andrews offered \$500 if she did not testify.

RCW 9A.72.120(1) provides that a person is guilty of tampering with a witness if he or she attempts to induce a witness . . . to: (a) Testify falsely or, . . . to withhold any testimony; or (b) Absent himself or herself from such proceedings; or (c) Withhold from a law enforcement

agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency. (Emphasis added.).

The Court rejects the defendant’s argument that nothing linked the voice messages to him, concluding the “evidence was sufficient for any rational trier of fact to find the essential elements of the charged crime were proved beyond a reasonable doubt.”

Result: Affirmance of Yakima County Superior Court conviction of Jamie Stewart Andrews for witness tampering.

**(4) CIVIL RIGHTS ACT LAWSUIT: QUALIFIED IMMUNITY FOR POLICE OFFICER WHERE THE OFFICER SHOT AND WOUNDED SUSPECT WHO HAD VIOLATED NO CONTACT ORDER, WHO WAS BELIEVED TO BE SUICIDAL, WHO IGNORED ORDERS TO STOP VEHICLE, AND WHO DROVE AT A HIGH RATE OF SPEED TOWARD OFFICER AND OTHERS, ALL OF WHOM WERE ON FOOT** – In Gallegos v. Freeman, \_\_\_ Wn. App. \_\_\_, 291 P.3d 265 (Div. I, Jan. 7, 2013), the Court of Appeals grants federal and state law qualified immunity to a police officer who shot and wounded a suspect.

The Court’s analysis is in part as follows:

Federal Qualified Immunity

The determination of a police officer’s entitlement to qualified immunity involves a two-part inquiry—we must determine “(1) whether the facts alleged, taken in the light most favorable to the complaining party, show that an [officer’s] conduct violated a constitutional right and (2) whether the right was clearly established at the time of the violation.” Feis v. King County Sheriff’s Dep’t, 165 Wn. App. 525, 539–40 (2011) **April 12 LED:24** (citing Saucier Katz, 533 U.S. 194, 201 (2001)). If the answer to either question is “no,” then qualified immunity applies to shield the officer from liability for damages. See Pearson v. Callahan, 555 U.S. 223, 236 (2009). . . .

. . .

As Gallegos correctly points out, claims of excessive force by police officers are judged pursuant to the Fourth Amendment’s “objective reasonableness” standard. Graham v. Connor, 490 U.S. 386, 388 (1989). The United States Supreme Court has explained that it is unreasonable for an officer to “seize an unarmed, nondangerous suspect by shooting him dead.” Tennessee v. Garner, 471 U.S. 1, 11 (1985). On the other hand, “[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.” Garner, 471 U.S. at 11. As the Court has explained, however, because Graham and Garner “are cast at a high level of generality,” these standards do not, except in “an obvious case,” provide the fair warning to a police officer that is necessary to defeat a claim of qualified immunity. Brosseau v. Haugen, 543 U.S. 194, 199 (2004) **Feb 05 LED:06**. Moreover, it is improper for a trial court to deny summary judgment simply because a “material issue of fact remains on the excessive force claim”—even in such circumstances, “[i]f the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate.” Saucier, 533 U.S. at 202.

. . .

In this case, it is undisputed that, prior to his decision to fire his weapon at Gallegos, [the Deputy] had heard a woman scream from the back of a darkened field. As he jogged toward the source of the scream, [the Deputy] was aware that Gallegos had violated a no-contact order by entering his wife's residence, that Gallegos had attempted to obtain a firearm from that location, and that Gallegos had armed himself with a knife. [The Deputy] had also been informed that Gallegos had taken an unknown number of unidentified pills and was potentially suicidal, that Gallegos's girlfriend, McKee, was present at the scene, and that Gallegos was extremely agitated and hostile to police intervention. It is likewise undisputed that the vehicle's tires spun as it accelerated, that both McKee and [the Deputy] believed that the vehicle travelled directly toward [the Deputy] at a "very high speed," and that Gallegos did not obey [the Deputy's] commands to stop. Finally, it is undisputed that [the Sergeant] was following immediately behind [the Deputy] and that other citizens at the edge of the field remained in the path of the oncoming vehicle at the time that [the Deputy] made the decision to fire his sidearm.

When the evidence of these additional circumstances is considered, it is clear that "[t]he present case is far from the obvious one where Graham and Garner alone offer a basis for decision." Brosseau, 543 U.S. at 199. Garner involved circumstances in which a police officer killed a "young, slight, and unarmed" burglary suspect by shooting him "in the back of the head" as he ran from the scene. 471 U.S. at 4. In Graham, an officer employed nonlethal force against a diabetic suspect during the course of an investigatory stop. 490 U.S. at 388–89. These cases, of course, have "scant applicability" to the case at hand. Rather, it must be determined whether, given the state of the law at the time of [the Deputy's] actions, it would have been clear to every reasonable officer that the use of deadly force was unlawful in the particular situation confronting [the Deputy]. al-Kidd, 131 S.Ct. at 2084; Brosseau, 543 U.S. at 198–99.

...

Here, it is undisputed that [the Deputy's] decision to employ deadly force against Gallegos was based upon his belief that Gallegos posed a threat of serious harm to both to [the Deputy] and to others. The question is whether this belief was objectively reasonable.

There is no doubt that, considering only [the Deputy's] perceptions of the circumstances by which he was surrounded, his use of deadly force was reasonable. [The Deputy] believed that Gallegos was highly agitated and potentially suicidal, that his vehicle was bearing down on [the Deputy] at a high rate of speed, and that Gallegos had failed to obey his commands to stop the vehicle. [The Deputy] explained that he was afraid that "the driver had no incentive to stop because he was suicidal, had taken an unknown quantity of some type of pills, and had been threatening to harm himself with a knife." [The Deputy] believed he had only seconds to act and that if he "did not shoot, [he] would either be killed or seriously injured" by the oncoming vehicle. He stated that he was afraid that even if the vehicle were to hit him, "it would not stop, and would continue down the path where [the Sergeant] was somewhere behind me, along with others." Under this view of the circumstances, [the Deputy] had probable cause to believe that both his own life and the lives of others were in danger, thus justifying his decision to employ deadly force against Gallegos.



...  
Because a reasonable officer in [the Deputy's] position would have perceived a threat of serious physical harm to both himself and to others there was no violation of Gallegos's constitutional right under the Fourth and Fourteenth Amendments, and, for this reason as well, the trial court did not err by determining that [the Deputy] was entitled to qualified immunity.

State Law Qualified Immunity

...  
An officer is entitled to state law qualified immunity where the officer "(1) carries out a statutory duty, (2) according to procedures dictated to him by statute and superiors, and (3) acts reasonably." McKinney v. City of Tukwila, 103 Wn. App. 391, 407 (2000) (internal quotation marks omitted) (quoting Staats v. Brown, 139 Wn.2d 757, 778 (2000)). Here, Gallegos does not dispute that [the Deputy] was carrying out a statutory duty according to procedures dictated to him by statute and his superiors. Instead, Gallegos asserts only that [the Deputy] did not act reasonably under the circumstances.

However, as discussed above, [the Deputy's] use of force against Gallegos was reasonable. See Arnold v. City of Lakewood, No. 3:10-cv-05907 RBL., 2012 WL 90472, \*7 (W. D. Wash. Jan. 11, 2012) (holding state qualified immunity applies where officer's use of force was reasonable under Fourth Amendment). Accordingly, the trial court did not err by determining that [the Deputy] was entitled to qualified immunity on Gallegos's state law claims.

[Footnotes and some citations omitted]

Result: Affirmance of Skagit County Superior Court order granting summary judgment based on qualified immunity to police officer.

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**NEXT MONTH**

The May 2013 LED will include entries on the February 19, 2013 United States Supreme Court opinions in Florida v. Harris, \_\_\_ U.S. \_\_\_, 2013 WL 598440 (Feb. 19, 2013), holding that the prosecution established the reliability of the narcotics detection canine who alerted on the defendant's vehicle, and Bailey v. United States, \_\_\_ U.S. \_\_\_, 2013 WL 598438 (Feb. 19, 2013), holding that the rule allowing officers executing a search warrant to detain the occupants is limited to the immediate vicinity of the premises to be searched.

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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 [\[http://www.courts.wa.gov/court\\_rules\]](http://www.courts.wa.gov/court_rules).

Many United States Supreme Court opinions can be accessed at [\[http://supct.law.cornell.edu/supct/index.html\]](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 [\[http://www.supremecourt.gov/opinions/opinions.html\]](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 [\[http://www.ca9.uscourts.gov/\]](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 [\[http://www.law.cornell.edu/uscode/\]](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 [\[http://www.leg.wa.gov/legislature\]](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 [\[http://access.wa.gov\]](http://access.wa.gov). The internet address for the Criminal Justice Training Commission (CJTC) LED is [\[https://fortress.wa.gov/cjtc/www/led/ledpage.html\]](https://fortress.wa.gov/cjtc/www/led/ledpage.html), while the address for the Attorney General's Office home page is [\[http://www.atg.wa.gov\]](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](mailto: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 [\[https://fortress.wa.gov/cjtc/www/led/ledpage.html\]](https://fortress.wa.gov/cjtc/www/led/ledpage.html)

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