



Law Enforcement

MARCH 2014

Digest

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UNITED STATES SUPREME COURT TO ADDRESS WARRANTLESS CELL PHONE SEARCHES CONDUCTED BY POLICE INCIDENT TO ARREST – On January 17, 2014, the United States Supreme Court granted review in two cases to address the issue of whether it violates the Fourth Amendment rights of the owner/possessor of a cell phone for police to conduct a warrantless search of the contents of a cell phone that they take from a suspect at the time of an arrest. One of the cases involves review of a California State Supreme Court decision. The other case involves review of a decision of the First Circuit of the United States Court of Appeals. Oral argument is expected to occur this spring, and a Supreme Court decision is expected by the end of June of this year.

ATTORNEY GENERAL OPINION 2014 NO. 2: WASHINGTON ATTORNEY GENERAL OPINES THAT INITIATIVE 502, ESTABLISHING A SYSTEM FOR LICENSING MARIJUANA PRODUCERS, PROCESSORS AND RETAILERS, DOES NOT PREEMPT LOCAL ORDINANCES – On January 16, 2014, the Washington Attorney General issued a formal attorney general opinion regarding whether I-502 preempts local ordinances. The opinion summarizes the analysis as follows:

1. Initiative 502, which establishes a licensing and regulatory system for marijuana producers, processors, and retailers, does not preempt counties, cities, and towns from banning such businesses within their jurisdictions.
2. Local ordinances that do not expressly ban state-licensed marijuana licensees from operating within the jurisdiction but make such operation impractical are valid if they properly exercise the local jurisdiction's police power.

The full content of the opinion can be found on the "AG Opinions" link on the Washington Attorney General's Office website.

NINTH CIRCUIT UNITED STATES COURT OF APPEALS

INFORMANT'S PREVIOUS CRIMES AND HIS INCENTIVE TO REDUCE HIS FUTURE CRIMINAL LIABILITY DOES NOT MAKE BUREAU OF ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (ATF)'S USE OF HIM IN STING SO OUTRAGEOUS AS TO VIOLATE THE UNIVERSAL SENSE OF JUSTICE UNDER DUE PROCESS CLAUSE

United States v. Hullaby, 736 F.3d 1260 (9th Cir., Dec. 4, 2013)

Facts: (Excerpted from Ninth Circuit opinion)

Several years before the government investigation that led to Hullaby's arrest, Cortina [who later became the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) informant who is the focus of this case] belonged to a group of criminals who perpetrated a series of home invasions. The group dressed in law enforcement uniforms when raiding homes, and used a stolen law enforcement battering ram to break down locked front doors. Carrying AK-47s, shotguns, and other weapons, they would subdue and bind any occupants present, and then abscond with their possessions. Cortina was named in a 115-count indictment, and he knew that he faced the possibility of spending the rest of his life in prison. In hope of reducing his sentence, Cortina informed on his associates. Due to his

cooperation, he was allowed to plead guilty to only one felony, and was sentenced to four years of probation and released from jail.

Less than a month after his release, Cortina began to steal merchandise from his employer. A supervisor discovered Cortina's theft and called the police, at which point Cortina fled. Fearful that his probation violation would send him to prison for an extended period, and that he could face his old associates there, he contacted the detective with whom he had worked previously and offered to disclose more information about new home invasions in the area.

After meeting with him, and over the objection of Cortina's probation officer, agents of the [ATF] registered Cortina as a confidential informant. The ATF then used Cortina in the "reverse sting" operation in Phoenix, Arizona that caught Hullaby. In this operation, undercover ATF agents, working with Cortina, met with Hullaby and others to plan and carry out a robbery of a fictional cocaine stash house. Hullaby's part in the plan was to enter the stash house, along with three others, and subdue the guards that the ATF agents said would be present.

On the appointed day, the ATF agents, Cortina, and the other conspirators met in a parking lot from which they were supposed to proceed to the stash house. As the participants prepared to leave, one of the agents gave a signal and ATF personnel arrested the conspirators.

Proceedings below: Brandon Hullaby was convicted in federal district court on drug and firearms charges.

ISSUE AND RULING: Does the combination of the informant's previous crimes and his incentive to reduce his future criminal liability make ATF's use of him in its sting operation so outrageous as to violate the universal sense of justice under the federal constitution's Due Process clause? (ANSWER BY NINTH CIRCUIT: No)

Result: Affirmance of United States District Court drug and firearms convictions of Hullaby.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

We review de novo [i.e., independently and without deference to the district court] the district court's conclusion that the government did not violate Hullaby's due process rights through outrageous conduct. United States v. Smith, 924 F.2d 889, 897 (9TH Cir. 1991). "For a due process dismissal, the [g]overnment's conduct must be so grossly shocking and so outrageous as to violate the universal sense of justice." Smith. This is "an extremely high standard." Indeed, as we have recently observed, there are "only two reported decisions in which federal appellate courts have reversed convictions under this doctrine." United States v. Black, ___ F.3d ___, 2013 WL 5734381, at *5 (9TH Cir. Oct. 23, 2013) (citing United States v. Twigg, 588 F.2d 373 (3d Cir. 1978) and Greene v. United States, 454 F.2d 783 (9th Cir. 1971)).

Here, Hullaby contends that the government's conduct was outrageous, insofar as the government collaborated with "a repeat violent home-invader [Cortina] whose motivation in spurring the government to create this fictional offense was to continue to avoid accountability for his own heinous crimes." In United States v. Simpson, 813 F.2d 1462 (9th Cir. 1987), we considered a similar argument. In

that case, a confidential informant, while working to help the police, was also engaging in prostitution and using heroin. Simpson. The confidential informant had also been arrested on “numerous” previous occasions. Simpson. The district court had dismissed the indictment, in part because the government knew about these activities and arrests and nonetheless continued to use the informant.

We held that this state of affairs did not “raise[] due process concerns, “ because “[i]t is unrealistic to expect law enforcement officers to ferret out criminals without the help of unsavory characters.” Thus, we concluded that the mere fact that a confidential informant “continued to use heroin and engage in prostitution during [an] investigation” did not “oblige the [government] to stop using her as an informant.” Simpson.

Likewise, here, the fact that Cortina had engaged in past crimes does not raise due process concerns about the government’s use of him as a confidential informant in its investigation. Nor does the nature of Cortina’s past crimes render the government’s conduct “outrageous.” Indeed, it was precisely because of his past experience as a criminal that he was useful to the ATF in its efforts to minimize the risks inherent in apprehending groups who were engaging in home invasions. We do not require the government to enlist a person with no criminal experience to help with the apprehension of a group of hardened criminals.

Similarly, it is not shocking that Cortina was cooperating out of self-interest. . . . We do not require the government to recruit solely informants who will work in a spirit of altruism for the good of mankind.

In sum, we reiterate our conclusion in Simpson that the due process clause does not give the federal judiciary a chancellor’s foot veto over law enforcement practices of which it does not approve. Rather, our Constitution leaves it to the political branches of government to decide whether to regulate law enforcement conduct which may offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically, but which is not antithetical to fundamental notions of due process.

[Some citations omitted, some citations revised for style]

CIVIL RIGHTS ACT LAWSUIT: DEADLY FORCE CASE MUST GO TO JURY WHERE, AMONG OTHER THINGS, NO OFFICER GAVE WARNING BEFORE FATAL SHOOTING

Hayes v. County of San Diego, 736 F.3d 1223 (9th Cir., Dec. 2, 2013)

Procedural history: The Ninth Circuit originally held that this deadly force case must go to jury on a negligence theory under California law where, among other things, no officer gave a warning before the fatal shooting. Hayes v. County of San Diego, 638 F.3d 688 (9th Cir., March 22, 2011) **May 11 LED:05**. The Ninth Circuit subsequently issued an order withdrawing the March 22, 2011 decision and certifying the issue to the California State Supreme Court. Hayes v. County of San Diego, 658 F.3d 867 (9th Cir., June 14, 2011) **Oct 11 LED:04**. The California Supreme Court issued a decision on August 21, 2013 and sent the case back to the Ninth Circuit. Hayes v. County of San Diego, 57 Cal. 4th 622, 160 Cal. Rptr. 3d 684, 305 P.3d 252 (Aug. 21, 2013).

Facts: (Excerpted from the Ninth Circuit majority opinion)

Deputy King arrived at Hayes's residence at 9:12 p.m. in response to a domestic disturbance call from a neighbor who had heard screaming coming from the house. Geri Neill, Hayes's girlfriend and the owner of the house, spoke with Deputy King at the front door. During a three-minute conversation, Neill advised Deputy King that she and Hayes had been arguing about his attempt that night to commit suicide by inhaling exhaust fumes from his car. She told Deputy King that there had not been a physical altercation between them, and she was instead concerned about Hayes harming himself, indicating that he had attempted to do so on prior occasions. Deputy King did not ask Neill about the manner of Hayes's prior suicide attempts and was unaware that he had previously stabbed himself with a knife. Although Neill advised Deputy King that there were no guns in the house, she made no indication that Hayes might be armed with a knife.

At 9:16 p.m., Deputy Geer arrived at the scene, and Deputy King advised her that there was a subject inside the house who was potentially suicidal. Based on the concern that Hayes might harm himself, the deputies decided to enter the house to check on Hayes's welfare, a process Deputy King described as seeing whether Hayes could "physically or mentally care" for himself. While Neill later stated that Hayes had been drinking heavily that night, Deputy King had not asked Neill whether Hayes was under the influence of drugs or alcohol. Although the deputies had been sent a notification that Hayes was intoxicated, neither deputy was aware of this information before entering the house. Additionally, the deputies had not checked whether there had been previous calls to the residence, and they were unaware that Hayes had been taken into protective custody four months earlier in connection with his suicide attempt involving a knife.

Upon entry, both deputies had their guns holstered. Deputy King was also carrying a Taser. While moving in the dimly lit house, Deputy King advanced ahead of Deputy Geer and was using his sixteen-inch flashlight, which he had been trained to use as an impact weapon.

Once in the living room, Deputy King saw Hayes in an adjacent kitchen area, approximately eight feet away from him. Because Hayes's right hand was behind his back when Deputy King first saw him, Deputy King testified that he ordered Hayes to "show me his hands." While taking one to two steps towards Deputy King, Hayes raised both his hands to approximately shoulder level, revealing a large knife pointed tip down in his right hand. Believing that Hayes represented a threat to his safety, Deputy King immediately drew his gun and fired two shots at Hayes, striking him while he stood roughly six to eight feet away. Deputy Geer simultaneously pulled her gun as well, firing two additional rounds at Hayes.

Deputy King testified that only four seconds elapsed between the time he ordered Hayes to show his hands and the time the first shot was fired. When asked why he believed Hayes was going to continue at him with the knife, Deputy King testified: "Because he wasn't stopping." Neither deputy had ordered Hayes to stop. While stating that such a command would have only taken "a split second," Deputy King testified that "I didn't believe I had any time."

Neill witnessed the shooting from behind Deputy Geer and testified that Hayes was walking towards the deputies with the knife raised at the time the shots were fired. She stated, however, that Hayes was not “charging” at the officers and had a “clueless” expression on his face at the time, which she described as “like nothing’s working upstairs.” Neill testified that just before the shooting, Hayes had said to the officers: “You want to take me to jail or you want to take me to prison, go ahead.”

ISSUE AND RULING: Viewing the evidence in the light most favorable to the plaintiff, could a jury conclude that officers’ actions were not objectively reasonable where among other factors officers did not give a warning prior to fatally shooting suicidal suspect? (**ANSWER BY NINTH CIRCUIT:** Yes, rules a 2-1 majority)

Result: Reversal in part of U.S. District Court (Southern District of California) order that granted summary judgment on all issues to the County of San Diego and its defendant officers; case remanded for trial on deadly force negligence issue.

ANALYSIS: (Excerpted from the Ninth Circuit majority opinion)

“The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Graham v. Connor, 490 U.S. 386, 396 (1989). To do so, a court must pay “careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight.” Id. We also consider, under the totality of the circumstances, the “quantum of force” used, Davis v. City of Las Vegas, 478 F.3d 1048, 1055 (9th Cir. 2007), the availability of less severe alternatives, id. at 1054, and the suspect’s mental and emotional state, see Deorle v. Rutherford, 272 F.3d 1272, 1282 (9th Cir. 2001) **June 01 LED:05.** All determinations of unreasonable force, however, “must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” Graham, 490 U.S. at 396-97.

...

In considering the first and third factors under Graham, it is undisputed that Hayes had committed no crime, and there is no evidence suggesting that Hayes was “actively resisting arrest or attempting to evade arrest.” Graham, 490 U.S. at 396. Taking the evidence in the light most favorable to Appellant, Hayes appears to have been complying with Deputy King’s order to show his hands when Hayes raised his hands and revealed the knife. His statement that the deputies could take him to jail further suggests his compliance at the time. Although Hayes was walking towards the deputies, he was not charging them, and had not been ordered to stop. He had committed no crime and had followed all orders from the deputies at the time he was shot.

The central issue is whether it was objectively reasonable under the circumstances for the deputies to believe that Hayes posed an immediate threat to their safety, warranting the immediate use of deadly force, rather than less severe alternatives—such as an order to stop, an order to drop the knife, or a

warning that deadly force would be used if Hayes came any closer to the deputies. See Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005) (en banc) (noting that the second factor under Graham is the “most important”) (quoting Chew v. Gates, 27 F.3d 1432, 1441 (9th Cir. 1994)). Based on the undisputed fact that Hayes was moving toward Deputy King with the knife raised, the district court found as a matter of law that the deputies’ use of deadly force was objectively reasonable due to the threat to the officers’ safety.

Considering all of the evidence in the light most favorable to the Appellant, we cannot agree. “[T]he mere fact that a suspect possesses a weapon does not justify deadly force.” Haugen v. Brosseau, 351 F.3d 372, 381 (9th Cir. 2003), rev’d on other grounds, 543 U.S. 194 (2004) (citing Harris v. Roderick, 126 F.3d 1189, 1202 (9th Cir. 2007) (holding, in the Ruby Ridge civil case, that the FBI’s directive to kill any armed adult male was constitutionally unreasonable even though a United States Marshal had already been shot and killed by one of the males)); Glenn [v. Washington County], 673 F.3d 864, 872 (9th Cir. 2011)] **April 12 LED:11** (suspect’s mere “possession of a knife” is “not dispositive” on immediate-threat issue); Curnow [v. Ridgecrest Police], 952 F.2d 321, 324-25 (9th Cir. 1991))(holding that deadly force was unreasonable where the suspect possessed a gun but was not pointing it at the officers and was not facing the officers when they shot). Accordingly, Hayes’s unexpected possession of the knife alone—particularly when he had committed no crime and was confronted inside his own home—was not sufficient reason for the officers to employ deadly force.

On the other hand, threatening an officer with a weapon does justify the use of deadly force. See, e.g., Smith, 394 F.3d at 704 (recognizing that “where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force”); Reynolds v. County of San Diego, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding deadly force reasonable where suspect, who was behaving erratically, swung a knife at an officer), overruled on other grounds by Acri v. Varian Assocs., Inc., 114 F.3d 999, (9th Cir. 1997). There is no clear evidence, however, that Hayes was threatening the officers with the knife here. Before they entered the house, the deputies were told that Hayes had threatened to harm himself; they were not told that he had threatened to harm others. Nor did the deputies witness Hayes acting erratically with the knife. Cf. Reynolds, 84 F.3d at 1168 (finding that it was reasonable for an officer to attempt to restrain a suspect where the suspect possessed a knife and was acting erratically because the suspect was perceived as a threat by others in the area).

Deputy King indicated that it was Hayes’s movement towards him that caused him to believe Hayes was an immediate threat. “[A] simple statement by an officer that he fears for his safety or the safety of others is not enough [however]; there must be objective factors to justify such a concern.” Deorle, 272 F.3d at 1281. Neill stated that Hayes was not charging Deputy King and described Hayes’s expression as “clueless” when walking towards the deputies. As noted, Hayes had not been told to stop, nor had he been given any indication that his actions were perceived as a threat. Further, Hayes was still six to eight feet away from Deputy King at the time he was shot. Accordingly, the present evidence does not clearly establish that Hayes was threatening the deputies with the knife.

Finally, it is significant that Hayes was given no warning before the deputies shot him. As noted by the court in Deorle:

The absence of a warning or an order to halt is also a factor that influences our decision. Shooting a person who is making a disturbance because he walks in the direction of an officer at a steady gait with a can or bottle in his hand is clearly not objectively reasonable. Certainly it is not objectively reasonable to do so when the officer neither orders the individual to stop nor to drop the can or bottle, and does not even warn him that he will be fired upon if he fails to halt. Appropriate warnings comport with actual police practice. . . . We do not hold, however, that warnings are required whenever less than deadly force is employed. Rather, we simply determine that such warnings should be given, when feasible, if the use of force may result in serious injury, and that the giving of a warning or the failure to do so is a factor to be considered in applying the Graham balancing test.

Id. at 1283-84; see also Nelson v. City of Davis, 685 F.3d 867, 882 (9th Cir. 2012) **Dec 12 LED:15**. The San Diego County Sheriff's Department Guidelines regarding use of force reflect the importance of warning a suspect before using deadly force: "In situations where any force used is capable of causing serious injury or death, there is a requirement that, whenever feasible, the deputy must first warn the suspect that force will be used if there is not compliance." While estimating that such a warning would have taken only a "split second," Deputy King testified that he did not feel he had time to issue such a warning. According to Deputy King's own testimony, however, Hayes was still at least six feet away from him at the time he was shot. It is not clear that a warning in this situation was unfeasible.

[Footnotes and some citations omitted]

The Court concludes that viewing the evidence in the light most favorable to the plaintiff, a reasonable jury could conclude that the officers' actions were not objectively reasonable.

CIVIL RIGHTS ACT LAWSUIT: OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY FROM DAMAGES UNDER MESSERSCHMIDT V. MILLENDER WHERE THEY CONSULTED WITH PROSECUTORS BEFORE PRESENTING THE WARRANTS AT ISSUE TO JUDICIAL OFFICERS

Armstrong v. Asselin, 734 F.3d 984 (9th Cir., Nov. 1, 2013)

Facts and Proceedings below: (Excerpted from the Ninth Circuit opinion)

The initial proceedings took place in state court. The parents of a fourteen-year-old boy, L.T., came to the police complaining that Armstrong, a man in his late thirties, was befriending and giving pornography to their son. The parents told Officer Asselin that Armstrong met their son online and had communicated with him through email, instant messaging, and over the phone. The boy's mother had seen that Armstrong was talking to her son over instant messaging about "drinking tequila and about giving a 'blow job' to his teacher." The parents also told Asselin that, after coming home from a movie, L.T. was carrying a copy of

Satan Burger—the book they thought was pornographic. The parents gave the book to Asselin, who, after looking over portions of it, thought the book might qualify as “indecent” under an Anchorage municipal code section prohibiting distribution of indecent material to minors.

The cover of Satan Burger has a picture of naked buttocks squatting over a dinner plate. The book describes itself as a “collage of absurd philosophies and dark surrealism . . . [f]eaturing a city overrun with peoples from other dimensions . . . a man whose flesh is dead, but his body parts are alive and running amok, an overweight messiah, the personal life of the Grim Reaper, lots of classy sex and violence, and a fast food restaurant owned by the devil himself.” The pages included in the record and provided to the magistrate judges are bizarre. As best we can tell, the part claimed to be pornographic appears to describe a nightmarish sexual encounter between a man and some sort of female alien creature who injures and kills people, or perhaps kills some other sort of man-like creature.

About a week later, another couple approached the police concerned about their own son, M.L., and his contact with Armstrong. As with L.T., M.L. met Armstrong online. M.L. was friends with L.T. and was with him when Armstrong gave Satan Burger to L.T. in the parking lot of a movie theater. Armstrong also gave M.L. a web cam, knives, a bag, and an inflatable alien doll. At one point, Armstrong told M.L. to go to a secret location to pick up some musical equipment and suggested that M.L. should take a weapon with him to the secret location. After the investigation into Armstrong began, he sent a series of messages to M.L. demanding to know why M.L. had cut off contact, adding that he would “try to defend myself and respond to whatever bullshit the cops told you, but you, your brother, and your dad won’t even let me.”

L.T. and M.L.’s fathers each called Armstrong individually and told him not to contact their families any more. After those conversations, Armstrong changed one of his online screen names to “John [L] is a pedophile” (John [L] is the father of M.L.) and continued to contact L.T. despite the parental demand that he stop. Officer Asselin obtained what are called Glass warrants to record these conversations, as required under Alaska law.

On November 21, 2005, a search warrant was issued on the basis of an affidavit describing the above facts in great detail. The warrant application also included a four-page excerpt of Satan Burger, photocopies of the cover picture, author statement, and copies of the online communication between Armstrong and the boys. The warrant commanded a search of Armstrong’s home for evidence of disseminating indecent material to minors and of stalking. Officer Asselin simultaneously obtained an arrest warrant charging Armstrong with disseminating indecent material to minors. The state district judge who approved both warrants reviewed the applications at the same time, did not request the full copy of Satan Burger, and consulted the dissemination ordinance prior to signing. The following day, after arresting Armstrong, Officer Asselin obtained search warrants for Armstrong’s car and his workplace desk, again to search for evidence of stalking and dissemination of indecent material to minors. Computers from Armstrong’s workplace and home were seized during these searches. A preliminary search of the computers revealed photographs of

identified victims “using a toilet,” a book about why men abuse children, and videos of nude young males.

The municipal charge for disseminating indecent material to minors was eventually dismissed by the municipal prosecutor on March 10, 2006. Before returning the property that had been taken during the investigation, Officer Asselin decided to look at it more thoroughly than he had. Armstrong’s hard drives contained a photograph of two naked prepubescent boys, one performing fellatio on the other. Upon discovering the photograph, the police stopped looking at the material on the drives until they got another search warrant to examine all the computer media and other sources for evidence of possession “and/or” distribution of child pornography. After getting this latest warrant, the police found at least 274 photographs of minors previously identified as having been sexually exploited. Officer Asselin then arrested Armstrong for possession of child pornography on August 1, 2007. Three subsequent search warrants were issued to search Armstrong’s Myspace account, residence, and finally his Hotmail account for possession “and/or” distribution of child pornography. The last two of these warrants were issued to Officer Vandegriff. Each of the affidavits in support of these warrants set out the facts just described.

This second criminal case against Armstrong ended after the Alaska Superior Court granted a motion to suppress all the evidence. The court concluded that the Glass warrant to record the telephone call between Armstrong and L.T.’s father was not supported by probable cause to show that Armstrong was disseminating indecent material to minors. The Anchorage ordinance defines “indecent material” as that which, “taken as a whole,” violates the indecency standards and lacks serious literary, artistic, political or scientific value. Officer Asselin gave the magistrate a little bit of the book and said in his affidavit that he had “reviewed portions of the book” and found “one particular portion of the book [that] explicitly describes a sexual encounter.” Since neither the police officer nor the issuing magistrate had read the book as a whole, the Alaska Superior Court ruled that there was no probable cause to believe Satan Burger was indecent under the ordinance, so there was no probable cause for the Glass warrant. The Superior Court expressed concern that “search warrants issued upon showings such as this would easily implicate school teachers, public librarians and well established booksellers for dissemination of indecent material to minors.” Because all the subsequent warrants were “based upon statements made during that initial [recorded telephone] conversation” between Armstrong and the boy’s father, evidence gathered under those warrants was likewise tainted and the motion to suppress all evidence was granted.

Armstrong then sued Officer Asselin, five other police officers, and the Municipality of Anchorage in federal district court for violating his constitutional rights. He represented himself. Defendants moved for summary judgment based on qualified immunity. In his affidavit supporting summary judgment, Officer Asselin said that the eleven warrants obtained were sought by two police officers (himself and Vandegriff), issued by five different judicial officials, and that, at the outset of the investigation and as it proceeded, he had conferred with three municipal prosecutors and then when it became a felony charge, three state prosecutors. None had “expressed concern regarding the validity of the investigation.”

[Footnotes omitted]

ISSUE AND RULING: Are officers entitled to qualified immunity from damages in relation to several warrants that were ultimately found to lack probable cause, where officers consulted with prosecutors regarding the warrants, and obtained judicial approval of the warrants? (**ANSWER BY NINTH CIRCUIT:** Yes)

Result: Reversal of U.S. District Court (Alaska) order denying officers' motion to dismiss.

ANALYSIS: (Excerpted from the Ninth Circuit opinion):

. . . First, all that is needed for a search or arrest warrant is probable cause, not proof, that giving the material to a minor would amount to a violation of the Anchorage ordinance. The cover (portraying a bare buttocks squatting over a dinner plate) and the few pages support a reasonable belief by a police officer that the work as a whole portrayed excretory functions or sexual conduct in a manner establishing violation of the ordinance. Even if the book were, on a full reading, not indecent, it would be too much to say that no reasonable police officer could seek a search warrant directed at the premises of the person who gave it to a minor until the police officer had read every word of the book and evaluated its literary value as a whole. A police officer may be entitled to qualified immunity even for a search and arrest based on invalid warrants if he has a "reasonable belief that the warrant was supported by probable cause." That low standard might be satisfied without reading the book in its entirety, even though the obscenity and municipal indecency standards would not be satisfied for purposes of a criminal conviction.

Second, and most important to the outcome of this case, the police officers subjected every step of their invasions of Armstrong's privacy to evaluation both by prosecutors and by neutral judicial officials before they acted. Such prior review of proposed searches and arrests supports qualified immunity, shielding police officers from liability under the line of cases reaffirmed and broadened most recently by Messerschmidt v. Millender, ___ U.S. ___, 132 S. Ct. 1253 (2012) **June 12 LED:06**.

Reversing our en banc decision, the Supreme Court held in Messerschmidt that, even assuming a search warrant should not have been issued, police officers who requested and executed it are immune from suit except in "rare" instances. Presentation to a superior officer and prosecutor, and approval by a judicial officer before the warrant is issued, "demonstrates that any error was not obvious."

The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error. The occasions on which this standard will be met may be rare, but so too are the circumstances in which it will be appropriate to impose personal liability on a lay officer in the face of judicial approval of his actions.

[Footnotes and some citations omitted]

BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) NINTH CIRCUIT REJECTS SECOND AMENDMENT CHALLENGE TO FEDERAL FIREARMS STATUTE THAT PROHIBITS THE POSSESSION OF A FIREARM BY PERSONS CONVICTED OF A DOMESTIC VIOLENCE MISDEMEANOR – In United States v. Chovan, 735 F.3d 1127 (9th Cir., Nov. 18, 2013), a three-judge panel of the Ninth Circuit rejects a defendant’s second amendment challenge to the federal firearms (lifetime) prohibition against possession of a firearm by persons convicted of domestic violence misdemeanors. See 18 U.S.C. § 922(g)(9).

Result: Affirmance of U.S. District Court (Southern District California) of Daniel Edward Chovan of possessing a firearm as person convicted of domestic violence misdemeanor.

(2) DETECTIVE’S SELF-STYLED MIRANDA WARNINGS HELD INADEQUATE, SO THE DEFENDANT’S CONFESSIONS DURING INTERROGATION AND AT TRIAL ARE HELD INADMISSIBLE AND NOT EVIDENCE FOR ANY PURPOSE – In Lujan v. Garcia, 734 F.3d 917 (9th Cir., Oct. 29, 2013), a 3-judge Ninth Circuit panel rules: (1) that a detective’s home-made Miranda warnings failed to adequately advise a custodial suspect of his right to have an attorney present at all times, i.e., both before and during his custodial interrogation; and (2) that the detective’s improper warning not only rendered inadmissible the defendant’s custodial confession (that the trial court incorrectly admitted into evidence), but the detective’s improper warning and the trial court’s erroneous admission of the custodial confession also rendered, as not supportive of his conviction, the defendant’s confession on the witness stand during his trial.

The Lujan Court states that the detective decided not to read Miranda warnings from a card. For reasons not disclosed in the Ninth Circuit’s opinion, the officer chose instead to give his own very rough warnings, apparently off the top of his head, as follows:

Your rights are you have the right to remain silent. Whatever we talk about, and you say, can be used in a court of law, against you. And if you don’t have money to hire an attorney, one’s appointed to represent you free of charge. So those are your rights.

If you have questions about the case, if you want to tell us about what happened tonight, we’ll take your statement – take your statement from beginning to end. We’ll give you an opportunity to explain your side of the story. And that’s – that’s what we’re looking for. We’re looking for the truth. So do you understand all that?

The Lujan Court acknowledges that the United States Supreme Court recently reiterated in Florida v. Powell, 559 U.S. 50 (2010) **April 10 LED:06** that Miranda warnings do not have to be letter perfect so long as they essentially convey the several rights under the Fifth Amendment that the 1966 Miranda decision sought to protect. But, not surprisingly in light of the clumsy warning that the detective gave in this case, the Lujan Court holds that the detective’s self-styled warning, set forth in full above, failed to adequately advise the defendant of his right to have an attorney present at all times, before and during his custodial interrogation.

The Court also holds that the state appellate court decision upholding the conviction, based on harmless error, violated Harrison v. United States, 392 U.S. 219 (1968). Harrison held that when a defendant’s trial testimony is induced by the erroneous admission of a confession into evidence, the trial testimony cannot be introduced in a subsequent prosecution, nor can it be

used to support the initial conviction on harmless error review. Considering in harmless error analysis the confession by the defendant on the witness stand would perpetuate the underlying constitutional error in the officer's improper procurement of the confession and would countenance the error of the trial court in not suppressing the out-of-court confession.

Result: Affirmance of portion of order of the U.S. District Court (Central District of California) that reversed the two first degree murder convictions of the defendant, Reuben Kenneth Lujan; vacation of that portion of the District Court order that concluded that reduction from first-degree murder convictions to second-degree murder convictions is an appropriate remedy based on the evidence remaining after exclusion of the confessions; remand of case with instructions to the U.S. District Court that it may offer to the California state court the option of making an independent determination as to whether the convictions can be modified under state law.

LED EDITORIAL COMMENT: We assume that officers everywhere have heard many times that the legally safest way to give Miranda warnings is to read from a Miranda card. Not reading from a card: (1) creates the risk that warnings will be incorrectly given, and, almost as important, (2) gives the defense attorney the chance to take an officer through torturous cross examination and suggest that the warnings were incorrectly given.

WASHINGTON STATE SUPREME COURT

PUBLIC RECORDS ACT LAWSUIT: ESSENTIAL TO EFFECTIVE LAW CATEGORICAL ENFORCEMENT EXEMPTION (RCW 42.56.240(1)) ENDS ONCE A CRIMINAL CASE IS INITIALLY REFERRED TO THE PROSECUTOR; NO CATEGORICAL EXEMPTION FOR INTERNAL ADMINISTRATIVE INVESTIGATIONS; WITNESSES' IDENTITIES ARE NOT EXEMPT UNDER THE FACTS OF THIS CASE; AND NONCONVICTION DATA IS EXEMPT FROM DISCLOSURE UNDER CHAPTER 10.97 RCW

Sargent v. Seattle Police Department, ___ Wn.2d ___, 2013 WL 6685191 (Dec. 19, 2013)

Facts and Proceedings below:

Sargent was involved in an altercation with an off-duty police officer on July 28, 2009. He was ultimately arrested for assault and spent the night in jail. Because Sargent was not released the case was "rush filed." On August 6, 2009, the prosecutor's office referred the case back to the police department for further investigation.

The majority opinion describes the facts relating to the public records act (PRA) request as follows:

Sargent submitted PRA requests for information related to the confrontation, hoping to mount a civil rights challenge. His first request on August 31, 2009 sought records of the incident report and the name and badge number of the [Seattle Police Department] SPD officer. Sargent supplemented his initial request on September 1 by adding a request for copies of the 911 tapes and the computer aided dispatch (CAD) log related to the incident. In letters dated September 4 and September 9, 2009, the SPD denied Sargent's PRA requests, citing the RCW 42.56.240 exemption for effective law enforcement. Sargent appealed the denial through the SPD internal process, but the SPD agreed to disclose only the name of the SPD officer.

Meanwhile, by October 23, 2009, the SPD had conducted its final witness interview and in January 2010, referred the matter to the Seattle City Attorney for charges. The city attorney declined to prosecute Sargent and the criminal investigation was closed.

On February 5, 2010, Sargent renewed his original PRA request and added a request for written and recorded communications regarding a pending internal SPD disciplinary investigation of [the officer]. On March 10, 2010, the SPD released its first production of responsive documents. This initial production included the 911 tapes and CAD log from the incident, with all witness names redacted. The SPD withheld their internal investigation file, citing the effective law enforcement exemption. Sargent contacted the SPD about his outstanding requests and the SPD produced a second batch of responsive documents on April 5. This production included written communications and additional materials in the investigation file but redacted names and identification information under the effective law enforcement exemption. Additionally, the SPD withheld Sargent's nonconviction data and continued to withhold any information related to the internal disciplinary investigation of [the officer]. On April 21, Sargent corresponded with the SPD, asking substantive questions about the documents remaining in the SPD's possession. On April 30, the SPD completed the internal investigation of [the officer].

The majority opinion describes the procedural history as follows:

Sargent filed a complaint for relief under the PRA on August 5, 2010 in King County Superior Court. At a show cause hearing, the trial court ordered production of unredacted requested information and assessed a \$30,270 penalty against the SPD. The trial court reasoned that once the case was first referred to the [prosecutor's office] the effective law enforcement exemption was no longer categorical. The court also found that the SPD acted in bad faith when it continued to withhold information after the final witness interview had been conducted. The court therefore awarded the maximum penalty of \$100 per day after this point and the minimum penalty of \$5 per day before this point when the SPD still believed in good faith that the exemption applied categorically.

The SPD appealed and the Court of Appeals reversed in substantial part. Sargent v. Seattle Police Dep't, 167 Wn. App. 1 (2011). The Court of Appeals held that the effective law enforcement exemption did not end when the case was referred to the [prosecutor's office] for filing or with the final witness interview but continued to apply categorically until the case was referred for a second time to prosecutors and the investigation was closed. The court further held that the exemption applied categorically to the internal disciplinary investigation of [the officer] and hence the SPD properly withheld those files as well. Although the nondisclosure of witness identities was not covered by the categorical exemption, the Court of Appeals thought that the SPD may have reasonably relied on case law suggesting otherwise and remanded to give the SPD an opportunity to justify its redaction. The court also held that the SPD properly withheld Sargent's nonconviction criminal history under the [Criminal Records Privacy Act, chapter 10.97 RCW] CRPA. Finally, the Court of Appeals reasoned that the trial court abused its discretion in awarding a maximum penalty where there was no showing of bad faith or gross negligence. The court remanded for a

redetermination of the witness identification issue and reconsideration of the penalty.

[Some citations omitted]

ISSUE AND RULING: Issue(s) before the court: 1) Does the essential to effective law enforcement exemption to the PRA apply to categorically exempt a criminal investigation where the prosecutor declines to file charges and returns the investigation to the law enforcement agency for follow up? (ANSWER BY WASHINGTON SUPREME COURT: No, answers a 5-4 court (Chief Justice Madsen and Justices Charles Johnson, Stephens, Gonzales and McLoud))

2) Does the essential to effective law enforcement exemption to the PRA apply to categorically exempt an open internal administrative investigation? (ANSWER BY WASHINGTON SUPREME COURT: No, answers a 5-4 court (Chief Justice Madsen and Justices Charles Johnson, Stephens, Gonzales and McLoud))

3) Did the SPD appropriately withhold non-conviction data pursuant to the Criminal Records Privacy Act, chapter 10.97 RCW? (ANSWER BY THE WASHINGTON SUPREME COURT: Yes)

Result: Affirmed in part; reversed in part; and remanded to the trial court.

ANALYSIS:

Criminal Investigations

The majority opinion analyzes Newman v. King County, 133 Wn.2d 565 (1997) and Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wn.2d 472 (1999) and concludes that open criminal investigations cease to be categorically exempt from disclosure at the time the case is forwarded to the prosecutor for a charging decision, regardless of whether the prosecutor returns the case for further investigation (and regardless of how quickly charges are filed). Although the exemption ceases to apply categorically, agencies may still assert this or other exemptions, however, they must do so as to each document within the investigation.

We simply hold that the SPD had the burden to parse the individual documents and prove to the trial court why nondisclosure was essential to effective law enforcement. See Cowles, 139 Wn.2d at 479 recognizing the propriety of in camera review of specific documents to determine whether the exemption applies).

Internal Administrative Investigations

The majority also holds that open internal administrative exemptions are never categorically exempt from disclosure. The majority's analysis is in part as follows:

Internal investigation materials are "specific investigative records" subject to the language of the effective law enforcement exemption. RCW 42.56.240(1); Cowles Publ'g Co. v. State Patrol, 109 Wn.2d 712, 728–29 (1988). This court has held that the effective law enforcement exemption applies to all investigations "designed to ferret out criminal activity or to shed light on some other allegation of malfeasance." Koenig v. Thurston County, 175 Wn.2d 837, 843 (2012) (quoting Columbian Publ'g Co. v. City of Vancouver, 36 Wn. App. 25,

31 (1983)). The internal investigation of police misconduct certainly aims to “shed light” on “malfeasance” and so the SPD investigation of [the officer] would be exempt if nondisclosure was essential to effective law enforcement.

In State Patrol, this court held that nondisclosure of internal investigation materials was essential to effective law enforcement in that case. 109 Wn2d at 729. The court reasoned that Washington’s effective law enforcement exemption has broader application than the federal equivalent and as such “protects law enforcement agencies and ‘effective law enforcement’ from destructive intrusion.” Id. at 730–32. Because “[e]ffective law enforcement requires a workable reliable procedure for accepting and investigating complaints against law enforcement officers,” the court held that the identities of witnesses and subjects of internal investigations were exempt from disclosure. Id. at 729–33.

But we have never held this exemption to apply categorically to internal investigations and we decline to do so here. Far from categorically exempting the entire investigation file, in State Patrol, this court held “in light of the circumstances of [that] case” only the names of investigation witnesses and subjects were exempt from disclosure. Id. at 729–30; see also Ames v. City of Fircrest, 71 Wn. App. 284, 295 (1993) (“The plurality holding in Cowles is case specific and does not establish a broad principle that all information in the records of any investigation characterized as an internal investigation is automatically exempt.”). Here, the SPD refused to disclose the entire internal investigation file, even though Sargent already knew that [the officer] was the subject of the investigation and was seeking more than witness names.

Witness Identities

When the SPD eventually produced relevant documents to Sargent in March 2010, it redacted all names of witnesses from those documents, citing RCW 42.56.240(2) (exempting from disclosure witnesses of a crime “if disclosure would endanger any person’s life, physical safety, or property” or if the witness requests nondisclosure). . . . The trial court held that the SPD failed to prove that witnesses’ lives, physical safety, or property were at risk or that any witness requested nondisclosure. The trial court therefore ordered the SPD to reproduce these documents in unredacted form. The Court of Appeals reversed, [and] . . . remanded to give the SPD an opportunity to argue why the effective law enforcement exemption should apply to the witness identities at issue. We reverse the Court of Appeals on this issue and reinstate the trial court’s ruling.

The PRA protects witness identities in two provisions. The effective law enforcement exemption in RCW 42.56.240(1) can prevent disclosure due to the potential chilling effect on other witnesses who may be discouraged from coming forward if they know that their identity will be disclosed. Additionally, RCW 42.56.240(2) provides separate protection by exempting witness identities where “disclosure would endanger any person’s life, physical safety, or property” or where the witness requests nondisclosure.

The burden is on the agency to establish that nondisclosure is in accordance with one of these PRA exemptions. RCW 42.56.550(1) (“The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in

part of specific information or records.”). The SPD had the burden to show that nondisclosure was essential to effective law enforcement under RCW 42.56.240(1) or that disclosure would endanger a person’s life, physical safety, or property, or that a witness had requested nondisclosure under RCW 42.56.240(2).

The majority concludes that because SPD had the burden of proving the exemption applied, but “made no actual showing that redaction of witness names was essential to effective law enforcement in this particular case” then the names must be disclosed. Remand is inappropriate the majority concludes.

Non-Conviction Data

At the time of the show cause hearing, the [Criminal Records Privacy Act, chapter 10.97 RCW] CRPA provided that “[n]o person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete.” Former RCW 10.97.080 (2010). “Nonconviction data,” furthermore, is defined as “all criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending.” RCW 10.97.030(2). The CRPA by its terms clearly prohibits reproduction of any nonconviction data unless the subject of the record is requesting a copy in order to contest the accuracy or completeness of the documents.

As the Court of Appeals explained, Sargent misinterprets our holding in Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 (2011). The Bainbridge Island court held that when a party requests a mix of data with both nonconviction and other information, the nonconviction data should be redacted and the remainder produced. 172 Wn.2d at 421–24. But Sargent requested materials, like his booking history documentation, that were composed exclusively of nonconviction data, and he did not assert in writing any inaccuracies or oversights. Therefore, the SPD properly withheld the documents in their entirety because the CRPA prohibits disclosure. Accordingly, we affirm the Court of Appeals on this issue.

[Footnotes omitted]

Dissent: Justice Jim Johnson authors a dissent joined by justices Owens, Fairhurst and Wiggins. His dissents points out the impractical nature of a rule requiring that open investigations cease to be categorically exempt at the time they are initially provided to the prosecutor regardless of whether they are returned for further investigation. Relying on Justice Talmadge’s concurrence in Cowles, Justice Johnson states:

The concurring opinion in Cowles foresaw the need for the progression in our case law that we face today:

[S]imply submitting an investigation to a prosecutor for a charging decision does not always end the investigation. The prosecuting authority, whether a city attorney’s office or a county prosecuting attorney’s office, must then decide whether there is a sufficient

basis to file criminal charges. If the prosecuting authority determines there is an insufficient factual or legal basis to file charges, the case is clearly neither solved nor closed. . . . At that point, further investigation is required and the whole purpose for the exemption discussed in Newman applies.

139 Wn.2d at 484 (Talmadge, J., concurring). Justice Talmadge's concurrence presciently warned the court that the controversy before us could one day arise. Nonetheless, the facts in Cowles were sufficiently distinct from the concerns raised by Justice Talmadge to warrant leaving the issue open for another day. That day has come, and unfortunately, the majority opinion has failed to recognize Cowles' need to protect "effective law enforcement" procedures.

As Justice Talmadge pointed out in his Cowles concurrence, "[t]he appropriate line of demarcation for determining when a case is closed or solved is the point at which the executive branch of government has essentially concluded its involvement with the case." Id. at 483–84. I emphatically agree. Any other reading of Newman and Cowles fails to account for the gap created between the two cases. Not all law enforcement practices fit neatly in one category or the other; accordingly, Newman and its progeny must be read flexibly to account for varying circumstances arising from law enforcement investigatory practices.

Furthermore, holding that the exemption must expire upon first referral to a prosecutor's office would lead to perverse and potentially devastating consequences. Under such a scenario, a criminal could be arrested and released, then submit a PRA request in order to gather information for use in destroying evidence or coercing witnesses. This certainly would not support the balance between open government and upholding the integrity of police investigations struck by the PRA and our case law.

As Justice Talmadge noted in his Cowles concurrence:

The better point at which to say the case is "closed" is when the prosecuting authority has determined to file charges, as our earlier cases indicate. At that time, the case is essentially solved or closed from the perspective of the executive branch—the law enforcement agencies and the prosecuting authorities. The case is then within the province of the judicial branch of government, and it is no longer appropriate for the statutory exemption to apply. The broad policy of public disclosure . . . must then control.

Cowles, 139 Wn.2d at 484–85.

Justice Johnson also argues that the categorical exemption should apply to open internal administrative investigations.

LED EDITORIAL COMMENT: This case creates a bright-line rule for categorical exemptions under RCW 42.56.240(1): 1) there is no categorical exemption for internal administrative investigations, and 2) the categorical exemption for criminal investigations ceases once the investigation has been referred to the prosecutor for a charging decision. As noted in the opinion, referring a case to the prosecutor does not mean a law enforcement agency must disclose every record in a criminal investigative

file, or that an agency must disclose every record in an internal administrative investigation. Rather, agencies may withhold individual records as long as non-disclosure is “essential to effective law enforcement.” To assert this exemption, the law enforcement agency must be prepared to factually articulate why non-disclosure is essential to effective law enforcement, i.e., why disclosure would compromise the investigation. In criminal investigations where the suspect has been identified and charged, courts may be skeptical of whether RCW 42.56.240(1) applies because the heart of the Newman opinion involved an unsolved homicide where a suspect had not been publicly identified.

Additionally, what is less clear, is whether an officer booking a suspect into jail and submitting a probable cause statement for the prosecutor to file charges within 48 hours will be considered akin to the “rush filing” at issue in Sargent.

As always agencies are encouraged to consult with their assigned legal advisors.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

WASHINGTON STATE SUPREME COURT ANNOUNCES TWO STEP TEST FOR DETERMINING WHETHER EXPERT WITNESS TESTIMONY IS SUBJECT TO CONFRONTATION CLAUSE: FIRST, THE PERSON MUST BE A “WITNESS” BY VIRTUE OF MAKING A STATEMENT OF FACT TO THE TRIBUNAL AND, SECOND, THE PERSON MUST BE A WITNESS “AGAINST” THE DEFENDANT BY MAKING A STATEMENT THAT TENDS TO INculpate THE ACCUSED – In State v. Lui, ___ Wn.2d ___, 315 P.3d 493 (Jan. 2, 2014), the Washington State Supreme Court, in a 5-4 opinion (Justices Wiggins, Chief Justice Madsen, and Justices Charles Johnson, Jim Johnson and Gonzalez in the majority), develops a test for determining whether expert witness testimony is subject to the confrontation clause.

The Court analyzes the six recent United States Supreme Court confrontation clause cases, concluding that there is no single clear binding rule. The cases are Crawford v. Washington, 541 U.S. 36 (2004) **May 04 LED:20**, Davis v. Washington, 547 U.S. 813 (2006), and Michigan v. Bryant, 562 U.S. ___, 131 S. Ct. 1143 (2011) (Crawford-Davis standard clarified in favor of state in case involving ongoing-emergency statements by dying shooting victim in gas station parking lot; objective look at purposes of both the victim and the questioning officers required) **May 11 LED:03**, relating to the admissibility of out of court statements by victims/witnesses where the person making the statement did not testify, and Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) (laboratory analyst must be made available for cross examination by defendant in drug case) **Sept 09 LED:02**, Bullcoming v. New Mexico, ___ U.S. ___, 131 S. Ct. 2705 (2011) (confrontation clause requires that a defendant be permitted to confront the specific analyst who certifies blood alcohol analysis report) **Sept 11 LED:02**, and Williams v. Illinois, ___ U.S. ___, 132 S. Ct. 2221 (2012) (scientist may testify as expert regarding another scientist’s report without violating the confrontation clause if the report is not being offered into evidence) **Oct 12 LED:03**, relating to the admissibility of laboratory analysis reports where the analyst who had performed the testing did not testify.

The Court’s test is as follows:

We examine the plain language of the confrontation right: an accused person has a right to confront “the witnesses against him.” Reading these words in light of the founders’ intent, the practice of other jurisdictions, and the trajectory

of Supreme Court confrontation clause jurisprudence leads us to adopt a rule that an expert comes within the scope of the confrontation clause if two conditions are satisfied: first, the person must be a “witness” by virtue of making a statement of fact to the tribunal and, second, the person must be a witness “against” the defendant by making a statement that tends to inculcate the accused.

[Footnote omitted]

The majority spends much time responding to the dissent. The majority points out:

Today’s opinion does not allow laboratory reports to be admitted into evidence and used against a defendant without effective cross-examination. Nor does it allow a laboratory supervisor to parrot the conclusions of his or her subordinates. Instead, our test allows expert witnesses to rely upon technical data prepared by others when reaching their own conclusions, without requiring each laboratory technician to take the witness stand. The test does nothing more.

Dissent: Justice Stephens authors a dissent joined by Justices Fairhurst and Owens. Justice Chambers (retired and deceased) joins in the dissent result only.

Result: Affirmance of Court of Appeals decision affirming King County Superior Court conviction of Sione P. Lui for second degree murder.

LED EDITORIAL NOTE: The Court analyzes the case under the federal confrontation clause, concluding “Neither the constitutional text, the historical treatment of the confrontation right, nor the current implications of adopting a broader confrontation right support an independent reading of article I, section 22 in this case.”

WASHINGTON STATE COURT OF APPEALS

REASONABLE SUSPICION FOUND FOR DRIVING WHILE UNDER THE INFLUENCE STOP IN EXPERIENCED OFFICER’S OBSERVATION OF WEAVING WITHIN LANE AND CROSSING FOG LINE THREE TIMES

State v. McLean, ___ Wn. App. ___, 313 P.3d 1181 (Div. II, Oct. 22, 2013)

Facts and Proceedings below: (Excerpted from Court of Appeals opinion)

Shortly after midnight on August 18, 2010, [an officer] was traveling westbound on State Route 500 in Clark County. Ahead of [the officer] was a car driven by Charles McLean; no other vehicles were present.

[The officer] had training and experience in identifying impaired drivers. Through this training and experience, he knew that (1) alcohol causes, delayed reactions that can result in a driver’s drifting through the lane of travel and (2) alcohol impairs a person’s ability to simultaneously perform multiple tasks such as maintaining the speed limit, staying within a lane, and using turn signals. [The officer] estimated that in 2010 he stopped about 400 drivers for lane travel violations and he made over 200 arrests for driving under the influence.

McLean's car caught [the officer's] attention because it was weaving from side to side within the left lane. **LED EDITORIAL NOTE: The Court of Appeals does not state whether the officer testified regarding the duration of the within-lane weaving.** Even though McLean was driving the speed limit, McLean's weaving made [the trooper] suspect that McLean might have been impaired. [The officer] followed McLean's car and saw it cross the fog line three times. [The officer] then activated his lights and initiated a traffic stop.

Once McLean pulled over, [the officer] approached and advised that he stopped McLean for driving in the left lane without passing, weaving through the lane, and discarding a lit cigarette after [the trooper] activated his emergency lights. [The officer] "immediately smelled an odor of intoxicants coming from the vehicle."

After administering field sobriety tests, [the officer] arrested McLean for driving under the influence of alcohol. McLean refused to provide a breath sample to measure his blood alcohol content. The State charged McLean with three counts: violating ignition interlock requirements, third degree driving while his license was suspended, and driving under the influence of intoxicants.

McLean filed a motion to suppress evidence obtained from the traffic stop, arguing that [the officer] did not have a reasonable suspicion that McLean was driving under the influence. The district court held a hearing and denied McLean's motion in an oral ruling. McLean then pleaded guilty to violating ignition interlock requirements and driving while his license was suspended, but he proceeded to trial on the driving under the influence charge.

...

... The jury found McLean guilty of driving under the influence and, in a special verdict, found that he refused a lawful request to test his blood or breath.

McLean appealed to the superior court, arguing [among other things] that . . . the district court erred by denying his motion to suppress because the traffic stop was pretextual The superior court agreed and remanded for dismissal with prejudice.

[Footnote omitted]

ISSUE AND RULING: In light of the officer's training and experience, did the officer have reasonable suspicion of DUI based on his observation of the suspect vehicle weaving within its lane and then going over the fog line 3 times? (**ANSWER COURT OF APPEALS:** Yes, and therefore there is no basis for the defendant's argument that the vehicle stop was pretextual in violation of the Washington constitution, article I, section 7)

Result: Reversal of Clark County Superior Court's vacation of the Clark County District Court conviction of Charles Wayne McLean for DUI; conviction reinstated.

ANALYSIS: (Excerpted from Court of Appeals opinion)

One exception [to the search warrant requirement of the Washington and federal constitutions] is an investigative stop, including a traffic stop, that is based on a police officer's reasonable suspicion of either criminal activity or a traffic infraction. . . . A reasonable suspicion exists when specific, articulable facts and

rational inferences from those facts establish a substantial possibility that criminal activity or a traffic infraction has occurred or is about to occur. State v. Snapp, 174 Wn.2d 177, 197-98 (2012) **May 12 LED:25**.

When reviewing the lawfulness of an investigative stop, we evaluate the totality of the circumstances presented to the police officer. . . . Those circumstances may include the police officer's training and experience. . . .

Here, the traffic stop was lawful because [the officer] had a reasonable suspicion that McLean was driving under the influence. [The officer] observed McLean's vehicle weave within its lane and cross onto the fog line three times. From the articulable fact of this observation, and from his training and experience identifying driving under the influence, it was rational for [the officer] to infer that there was a substantial possibility that McLean was driving under the influence. That substantial possibility establishes a reasonable suspicion permitting [the officer] to make a warrantless traffic stop. . . .

Nonetheless, McLean claims that the traffic stop was pretext to investigate him for driving under the influence. We disagree.

A traffic stop is pretextual [under the Washington constitution] if it is conducted not to enforce a violation of the traffic code but to investigate some other crime, unrelated to driving, for which reasonable suspicion and a warrant are lacking. [State v. Ladson, 138 Wn.2d 343, 349 (1999) **Sept 99 LED:05**] McLean claims (1) [the officer] had a reasonable suspicion only of McLean's driving in the left lane without passing, and (2) [the officer] lacked a reasonable suspicion of driving under the influence. But as we have explained above, [the officer] had a reasonable suspicion that McLean was driving under the influence, and he conducted this traffic stop to investigate that crime. Therefore this traffic stop was not pretextual. McLean's argument fails.

[Footnotes and some citations omitted; some citations revised for style]

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) DRIVING WHILE UNDER THE INFLUENCE STATUTE DOES NOT MANDATE CONTINUOUS VISUAL OBSERVATION OF SUSPECT DURING FIFTEEN MINUTES "OBSERVATION PERIOD"; RATHER STATE MUST PRESENT PRIMA FACIE EVIDENCE THAT SUSPECT DID NOT VOMIT, OR HAVE ANYTHING TO EAT, DRINK OR SMOKE FOR AT LEAST FIFTEEN MINUTES PRIOR TO THE ADMINISTRATION OF THE BREATH TEST, AND THAT THE SUSPECT DID NOT HAVE ANY FOREIGN SUBSTANCES IN HIS OR HER MOUTH AT THE BEGINNING OF THE FIFTEEN MINUTE OBSERVATION PERIOD – In State v. Mashek, ___ Wn. App. ___, 312 P.3d 774 (Div. II, Nov. 13, 2013), the Court of Appeals holds that the observation requirement that must be proved (along with other elements) in a driving while under the influence case, does not mean that officers must engage in an unbroken stare for 15 minutes. Rather the state must present prima facie evidence that the statutory requirements were met.

In this case, the officer was present in the same room with the suspect during the 15 minute observation period. He sat across from the suspect for the majority of the time, except for 3 minutes during which his body was positioned away from the suspect while the officer was

setting up the breath test machine. The suspect was also videotaped during the 15 minutes and the video showed that even while the officer was not looking directly at the suspect she did not vomit, have anything to eat, drink or smoke, or place any foreign substance into her mouth during the 15 minutes prior to the breath test.

The Court summarizes its holding as follows:

[W]e hold that the observation requirement imposed by RCW 46.61.506(4)(a)(ii) and (iii) does not require fixed, visual observation of the person to be tested for the entire 15-minute observation period. Rather, the observation requirement may be satisfied where the officer uses all of his senses, not just sight, to determine that the person to be tested does not vomit, eat, drink, smoke, or have any foreign substances in her mouth for 15 minutes before the test.

Result: Reversal of Grays Harbor County Superior Court order suppressing breath test results of Roberta D. Mashek in felony DUI prosecution. Case remanded for determination of whether state presented prima facie evidence that Mashek did not vomit, eat, drink, smoke, or have foreign substance in her mouth during 15 minute observation period.

(2) ARRESTING OFFICER'S TESTIMONY BASED ON A HORIZONTAL GAZE NYSTAGMUS (HGN) TEST, THAT THERE WAS "NO DOUBT" DEFENDANT WAS IMPAIRED, AMOUNTED TO AN OPINION ON GUILT – In State v. Quaale, 177 Wn. App. 603 (Div. III, Nov. 7, 2013), the Court of Appeals holds (1) that an arresting officer's testimony that based on the horizontal gaze nystagmus (HGN) test there was "no doubt" the defendant was impaired constituted an opinion on guilt, and (2) that the opinion was prejudicial under the facts of this case.

The defendant was arrested for attempting to elude a police officer. As the officer handcuffed the defendant he smelled alcohol. The officer performed a HGN test on the defendant and concluded that there was probable cause to believe he was impaired. The defendant was transported to a BAC machine but refused to provide a breath test.

The defendant was charged with attempting to elude and felony DUI. At trial:

After having [the officer] describe the extent of his experience [which included being a drug recognition expert (DRE)], explain HGN and the procedure for testing it, and tell the jury about his administration of the test to Mr. Quaale, the prosecutor asked, "In this case, based on the HGN test alone, did you form an opinion based on your training and experience as to whether or not Mr. Quaale's ability to operate a motor vehicle was impaired?" Mr. Quaale's lawyer immediately objected that the [officer] was being asked to provide an opinion on the ultimate issue determining guilt. The objection was overruled. [The officer] answered, "Absolutely. There was no doubt he was impaired."

The Court finds that this testimony was an improper opinion of guilt. It explains in part:

Washington decisions have previously addressed whether HGN testing and the other 11 steps of a DRE evaluation are scientific, and whether they meet the requirements of Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (1923) for novel scientific evidence. In [State v. Baity], 140 Wn.2d 1, 14 (2000)], the Supreme Court held that although not all components of DRE testing are scientific in nature, HGN testing is. It also concluded that HGN testing is generally accepted in relevant scientific communities as a means of indicating

the ingestion of certain drugs or alcohol. Because the conclusions to be drawn from HGN testing are indefinite as to the amount of consumption or impairment, however, the court explicitly limited the type of opinion that may be offered from HGN testing. Baity involved challenges to HGN testing for impairment from drug use rather than alcohol, but its discussion of limitations on the type of opinion that may be offered have equal application where a DUI charge is based on impairment from alcohol consumption.

The court held in Baity that even where an officer has fully evaluated a driver using all 12 steps of DRE,

an officer may not testify in a fashion that casts an aura of scientific certainty to the testimony. The officer also may not predict the specific level of drugs present in a suspect. The DRE officer, properly qualified, may express an opinion that a suspect's behavior and physical attributes are or are not consistent with the behavioral and physical signs associated with certain categories of drugs.

Id. at 17–18 (emphasis added).

The Court holds that because the officer's testimony in this case went beyond expressing that the defendant's behavior was consistent with the consumption of alcohol, and expressed "no doubt" that the defendant was impaired, the testimony violates Baity.

The Court rejects the state's argument that the case is indistinguishable from City of Seattle v. Heatley, 70 Wn. App. 573 (1993) (officer testified that the defendant was "obviously intoxicated and affected by the alcoholic drink that he'd been, he could not drive a motor vehicle in a safe manner") noting that the Heatley officer's opinion was based on a number of field sobriety tests, longer observation of that defendant, and was provided in a lay manner that allowed the jury to draw their own inferences. The testimony regarding Quaale was related only to HGN, something the Baity Court has indicated is scientific.

Result: Reversal of Spokane Superior Court conviction of Ryan Richard Quaale for felony driving while under the influence.

LED EDITORIAL COMMENT: It is important for officers to be aware of the limits of their testimony. Although officers do not have control over the questions asked of them while on the stand, they can in most cases avoid improper testimony.

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