Law Enforcement Digest

MAY 2011

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

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LAW ENFORCEMENT DIGEST CO-EDITOR, JOHN WASBERG, IS RETIRING; CURRENT CO-EDITOR, SHANNON INGLIS, WILL CONTINUE AS THE LED EDITOR

Effective May 1, 2011, Assistant Attorney General, John Wasberg, is retiring from the Attorney General's Office after 35+ years as an Assistant Attorney General and 32+ years as the Law Enforcement Digest's editor (from 1978 through 1999) and co-editor (from January 2000 through this LED issue). Assistant Attorney General, Shannon Inglis, who has been co-editor of the LED since January of 2000, will be the editor of the LED. Mr. Wasberg will continue to provide some volunteer assistance to AAG Inglis on the LED.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

SIXTH AMENDMENT CONFRONTATION: 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 – In Michigan v. Bryant, 131 Ct. 1143 (2011), the U.S. Supreme Court rules 6-2 that statements that a dying shooting victim gave in serial questioning by several police officers while the victim was dying in a gas station parking lot (where he had driven after being shot) were, under an objective look at the totality of the circumstances, admissible under the U.S. Constitution's Sixth Amendment confrontation clause even though the declarant was dead and therefore not available for cross examination at the time of trial. The majority opinion concludes that the statements from the victim in this ongoing-emergency situation – which statements, among other things, addressed his condition and identified the shooter and location of the shooting – were not "testimonial" out-of-court statements under the Sixth Amendment right-to-confrontation tests of Crawford v. Washington, 124 S. Ct. 1354 (2004) **May 04 LED:20** and Davis v. Washington, 126 S. Ct. 2266 (2006) **Sept 06 LED:03**.

The Crawford-Davis test has been interpreted by lower courts as focusing primarily on four admissibility factors to determine if law enforcement officer questioning of a witness or victim is primarily to deal with an ongoing emergency, or instead if the statements of the witness or victim generally are to be deemed inadmissible "testimonial," out-of-court statements. Those four factors are: (1) whether the speaker is speaking of events as they are actually occurring or instead describing past events; (2) whether a reasonable listener would recognize that the speaker is facing an ongoing emergency; (3) whether the questions and answers show that the

statements were necessary to resolve a present, on-going emergency, or instead to learn what had happened in the past; and (4) whether the interrogation efforts are formal or informal.

The Bryant majority opinion concludes that the mortally wounded man's identification and description of the shooter and the location of the shooting were not testimonial statements because they had a "primary purpose," as did the police questioning, to enable police assistance to meet an on-going emergency. The majority opinion clarifies that to make the "primary purpose" determination, the Court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs, and must consider the parties' (both victim and police) statements and actions. The statements and actions of both the declarant and interrogators provide objective evidence of the interrogation's primary purpose, the majority opinion explains. The existence of an "ongoing emergency" at the time of the encounter is among the most important circumstances informing the interrogation's "primary purpose." An assessment of whether an emergency threatening the police and public is ongoing must consider the threat to the victim, to the first responders and to the general public, the majority opinion concludes. Informality, here police questioning of a dying victim in a gas station parking lot to learn his condition and the circumstances of the shooting (as opposed to more formal questioning in a different setting), is also an important factor in determining whether the statements are "testimonial."

Justice Scalia writes a stinging solo dissent. He indicates that it is absurd for the majority opinion to conclude that the primary purpose of the police questioning in this case was to: (1) deal with an ongoing emergency and to protect the police and general public, and not (2) merely investigate a recently committed crime. Justice Scalia urges, as he has in past decisions regarding the confrontation clause, that the Court instead adopt a very simple and broadly exclusionary view of the Sixth Amendment confrontation clause.

Justice Ginsburg writes a much shorter and more temperate dissent. She does state, however, that she agrees with the general principles asserted by Justice Scalia.

Result: Reversal and vacation of Michigan Supreme Court decision that reversed the conviction of Richard Perry Bryant of second-degree murder and being a felon in possession of a firearm; case remanded to the Michigan courts to determine if the statements of the dying victim are admissible under Michigan's hearsay rules.

LED EDITORIAL NOTE: LED entries on appellate court decisions interpreting the Sixth Amendment confrontation right in the past five years are: State v. Price, 158 Wn.2d 630 (2006) Jan 07 LED:07 (where a pivotal issue was whether a child victim's hearsay statements were admissible, questions that the deputy prosecutor asked of the child victim on direct examination in this child molestation case, and the child's answers, were sufficient testimony to satisfy the confrontation clause requirement that defendant have opportunity to cross examine witness, even though child claimed no recollection of crime in her testimony at trial); State v. Ohlson, 162 Wn.2d (2007) Feb 08 LED:05) (statements by assault victim to police moments after assault during ongoing emergency were not testimonial); Giles v. California, 128 S. Ct. 2678 (2008) Sept 08 LED:02 (forfeiture-by-wrongdoing doctrine held to violate defendant's right of confrontation unless there is proof of the defendant's motive to make the missing witness unavailable, thus apparently impliedly overruling State v. Mason, 160 Wn.2d 910 (2007) Oct 07 LED:10); Melendez-Diaz v. Massachussetts, 129 S. Ct. 2527 (2009) Sept 09 LED:02 (defendant's right to confront in a drug trafficking case was violated when a lab analyst's certificate of analysis of alleged cocaine was admitted into evidence without giving the defendant the opportunity to cross examine the analyst); State v. Koslowski, 166 Wn.2d 409 (2009) Sept 09 LED:12 (statements to police by robbery victim held inadmissible because there was no "ongoing emergency" at the time of the police questioning, and

instead the primary purpose of police questioning was investigation to put together a case); State v. Pugh, 167 Wn.2d 825 (2009) April 10 LED:15 (see Comment 2 below).

LED EDITORIAL COMMENTS: (1) Dying declaration hearsay rule not addressed in Bryant constitutional analysis: The Bryant majority opinion and Justice Ginsburg's dissent both note that the prosecutor did not put on evidence in the trial court sufficient to meet the dying declaration hearsay rule for criminal cases. In Washington, and we presume in Michigan, the dying declaration exception requires proof in a homicide case that, at the time of uttering the statement, the declarant (1) believed that his or her death was imminent and (2) was addressing the cause or circumstances of the declarant's impending death – see Washington's ER 804(b)(2)). Accordingly, there was no basis for the U.S. Supreme Court in this case to address an issue that the Court's 2004 decision in Crawford left open. That unresolved question is whether the pre-constitutional dying declaration rule inherited from the English roots of the U.S. judicial system is not subject to confrontation clause restrictions.

(2) Washington independent constitutional confrontation rights: In State v. Pugh, 167 Wn.2d 825 (2009) April 10 LED:15, in addition to addressing the U.S. Constitutional Sixth Amendment confrontation right issue, the Washington Supreme Court addressed article I, section 22 of the Washington constitution, which like the Sixth Amendment protects a criminal defendant's right to confront witnesses. Pugh declared that the Washington constitutional protection of confrontation rights is in some circumstances greater than the federal constitution's protection, and hence that the Washington constitution is more restrictive on admission of hearsay in criminal prosecutions.

In analysis of the State constitutional protection of the right to confrontation, the Pugh Court ruled that an E-911 tape reporting a domestic violence attack was admissible, but only because the victim's statements fell within what is known as the res gestae doctrine as it existed at the time of adoption of the Washington constitution. The res gestae doctrine requires, per Beck v. Dye, 200 Wash. 1 (1939), that the statement or declaration: (1) relates to the main event and explains, elucidates, or in some way characterizes that event; (2) is a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) is a statement of fact, and not the mere expression of an opinion; (4) is a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) is made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation (though it need not be made exactly contemporaneous with the event); and (6) is made by one who either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

The statements on the E-911 tape in Pugh met this test for admissibility, the Pugh majority held. Our guess is that the circumstances of the Bryant case would be held by the Washington Supreme Court to meet the Pugh test for confrontation rights under article I, section 22 of the Washington constitution.

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BRIEF NOTES FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

(1) DEADLY FORCE CASE MUST GO TO JURY ON A NEGLIGENCE THEORY WHERE, AMONG OTHER THINGS, NO OFFICER GAVE WARNING BEFORE FATAL SHOOTING – In Hayes v. County of San Diego, ___F.3d ___, 2011 WL 982472 (decision filed March 22, 2011), a 3-judge Ninth Circuit panel rules 2-1 that the facts alleged by a surviving beneficiary support

sending a case for jury trial on a theory (among others asserted by the plaintiff family members of the deceased) of negligent use of deadly force by law enforcement officers under Fourth Amendment standards. The dissent argues that as a matter of law there was no negligence in the fatal shooting by the officers, and therefore the case should not go to a jury.

The Hayes majority opinion is troubling in its apparent lack of recognition of the danger posed to the law enforcement officers who fired the fatal shots. The officers were on a domestic dispute call, and, after entering the dimly lit home and making their way with aid of a flashlight, they were suddenly confronted by a slowly advancing, unknown, reportedly suicidal man, holding a knife (though arguably not holding the knife in an attack mode), 6 to 8 feet away from one of the officers.

This brief LED entry will not discuss the extensive factual allegations and lengthy legal analysis in Hayes. Officers, particularly trainers, may wish to read the case on the Ninth Circuit opinions' website [http://www.ca9.uscourts.gov/] and to consider what the officers might have done differently, starting with what intelligence the officers might have attempted to gather before entering the home. We note as to the Hayes case that one of the many facts considered to be relevant by the majority judges was the failure of the officers to give any warning (for example, "drop the knife or I'll shoot") before shooting. The Fourth Amendment requires a warning – if feasible – before using deadly force or force that may result in serious injury. The majority opinion determines that among the several fact questions the jury is to decide is whether the officers should have given a warning before shooting. On the failure-to-warn question, the majority opinion discusses the Ninth Circuit opinion in Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) **June 01 LED:05**.

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.

(2) CIVIL RIGHTS ACT LAWSUIT: OFFICERS' FORCIBLE ENTRY OF HOME OF DRIVER WHO MINUTES EARLIER HAD BEEN INVOLVED IN MINOR CAR COLLISION HELD NOT JUSTIFIED BY POSSIBILITY THAT OTHER DRIVER'S BELIEF SHE HAD SMELLED ALCOHOL WAS ACTUALLY EVIDENCE OF FIRST DRIVER BEING NEAR DIABETIC COMA – In Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2009) (decision filed July 16, 2009), a 3-judge Ninth Circuit panel concludes under the summary judgment review standard that accepting as true the factual allegations of the plaintiff, Mr. Hopkins, there was no justification for officers to forcibly enter Hopkins' residence without a warrant to check on his welfare or to investigate him for DUI.

Officers responded to a call to police from a driver reporting a minor motor vehicle collision with Hopkins. They talked to the other driver in front of Hopkins' house. She told them of the minor accident, Hopkins' non-cooperation with her, the smell of what she believed to be alcohol on his breath, her belief that he was somewhat unsteady and may be intoxicated, and the fact that she had seen him go inside his house moments earlier. One officer knocked loudly and announced his presence, but there was no response. The officers then forcibly entered and ultimately found Hopkins in a bedroom. He was awake and apparently intoxicated (but not near a diabetic coma).

Hopkins was subsequently charged in a California state court with DUI and misdemeanor hit and run. All charges, however, were later dropped after the forcible house entry was held to have violated the Fourth Amendment for lack of exigent or emergency circumstances. Hopkins then sued in federal court under the federal Civil Rights Act.

Among the theories put forward in the officers' defense in the civil rights lawsuit was that at the time of entry they believed it was possible that Hopkins was possibly in or near a diabetic coma, thus necessitating an immediate check on his welfare. They had been trained that non-experts sometimes misinterpret the diabetic fruity smell on a person's breath as being alcohol. As to this theory, the Ninth Circuit panel notes that it is just too speculative (and too encouraging of forced entries of homes) to leap from a citizen's report of the odor of alcohol on a person's breath to the conclusion that the person might be on the brink of a diabetic coma and in need of immediate assistance. The Ninth Circuit also concludes that the possibility of dissipation of alcohol in Hopkins' body did not constitute exigent circumstances justifying warrantless entry of his residence; there was time to get a search warrant.

Result: Affirmance, for the most part, of U.S. District Court (Northern District of California) decision; case remanded for trial. NOTE: On remand, the U.S. District Court granted summary judgment to Hopkins on the issues described above.

LED EDITORIAL NOTES: 1. Our delayed digesting of this case: This Ninth Circuit opinion was filed in 2009. Ordinarily, we try to present decisions in the LED no later than a year after issuance of the decisions. We will continue in that endeavor.

2. Other relatively recent LED entries on issues of warrantless exigency/emergency entry to arrest DUI suspects:

State v. Hinshaw, 149 Wn. App. 747 (Div. III, 2009) July 09 LED:20 (Probable cause as to DUI, plus the scientific fact that alcohol dissipates in the body over time, held not to add up to exigent circumstances supporting reaching through doorway to arrest man suspected of being intoxicated and of having driven drunk about one hour earlier)

State v. Wolters, 133 Wn. App. 297 (Div. II, 2006) July 06 LED:17 (Exigent circumstances were present (1) where DUI suspect would not take his hands out of his pockets upon officer-attempted seizure just outside suspect's residence to investigate officer-witnessed likely DUI, and (2) where suspect then fled into his home. Under all of the circumstances, the officer was justified in making a forcible warrantless residence entry to arrest the fleeing DUI suspect)

LED EDITORIAL COMMENT STATING THE OBVIOUS: When in doubt about justification to make an unconsenting forcible entry, apply for a search warrant.

(3) CIVIL RIGHTS ACT LAWSUIT: ACTION UNDER 42 U.S.C. SECTION 1983 MAY NOT BE PURSUED IF SUIT INDIRECTLY CHALLENGES VALIDITY OF CRIMINAL CONVICTION – In Szajer v. City of Los Angeles, 632 F.3d 607 (9th Cir. 2011) (decision filed February 11, 2011), a 3-judge Ninth Circuit panel rules that under the Civil Rights Act precedent of Heck v. Humphrey, 512 U.S. 477 (1994) and Ninth Circuit decisions applying Heck v. Humphrey, the plaintiffs in this civil case are not allowed to sue for constitutional violations where the police actions under attack led to their convictions.

In the introduction to its opinion, the Ninth Circuit panel provides the following brief summary of the factual and procedural background of the case. We excerpt here from the brief summary:

> This is a civil rights action filed by Helene and Zoltan Szajer . . ., owners and operators of the "L.A. Guns" gun shop in West Hollywood, against the City of Los Angeles ("City"), the Los Angeles Police Department ("LAPD"), and a number of individual LAPD officers . . . . Following a "sting" operation wherein the Szajers purchased illegal firearms from the LAPD, officers searched the Szajers' gun shop and their personal residence, pursuant to a warrant obtained by LAPD Detective Michael Mersereau. The searches resulted in the discovery of illegal

> firearms and ammunition in both the gun shop and residence. As part of a plea agreement, the Szajers pled no contest to one count of possession of an illegal assault weapon found in their home.
>
> The Szajers then filed this civil action, alleging that the LAPD executed an illegal search at the gun shop. The Defendants filed a motion for summary judgment, which the district court granted . . . .

Result: Affirmance of U.S. District Court (Central District of California) order granting summary judgment to the Los Angeles Police Department.

(4) CIVIL RIGHTS ACT LAWSUIT: JAIL INMATE IN BEATING CASE ENTITLED TO TRIAL BASED ON CLAIM OF INDIVIDUAL SUPERVISORY LIABILITY OF LOS ANGELES COUNTY SHERIFF UNDER EIGHTH AMENDMENT ON A DELIBERATE INDIFFERENCE THEORY – In Starr v. Baca, ___F.3d ___, 2011 WL 477094 (2011) (decision filed February 11, 2011), a 3-judge Ninth Circuit panel rules 2-1 that a jail inmate's allegations regarding a vicious assault – initially, by inmates, and then followed by a stomping by a deputy sheriff acting as a corrections officer – are sufficient to take a case to a jury for individual liability against the Los Angeles County Sheriff on a theory of supervisory liability. The inmate-plaintiff's theory is that the Sheriff as the ultimate supervisor of the jail is responsible as an individual under the Eighth Amendment for unconstitutional conditions of confinement based on alleged deliberate indifference by the Sheriff.

The majority opinion summarizes as follows its rationale for concluding that the case for individual liability contains sufficient allegations of fact to go to a jury trial:

> First, Starr's complaint specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents. It specifically alleges, in addition, that Sheriff Baca was given notice, in several reports, of systematic problems in the county jails under his supervision that have resulted in these deaths and injuries. Finally, it alleges that Sheriff Baca did not take action to protect inmates under his care despite the dangers, created by the actions of his subordinates, of which he had been made aware. These allegations are neither "bald" nor "conclusory." Rather, they are sufficiently detailed to give notice to Sheriff Baca of the nature of Starr's claim against him and to give him a fair opportunity to defend against it.
>
> Second, the allegations in Starr's complaint are plausible. They may or may not ultimately be proven by evidence. But the question is not truth or even probability. [The applicable federal court rule] "does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" to support the allegations.

[Citations omitted]

The dissenting opinion indicates that the allegations appear to support a Civil Rights Act lawsuit against the Sheriff in his official capacity, which is the same as suing the Sheriff's Department on the ground of official policy or longstanding custom and policy. But the dissent argues that the claim for individual liability of the Sheriff is based on conclusory theoretical claims that do not meet the standards under Civil Rights Act case law. Establishing individual liability requires establishing specific facts – not mere conclusions and abstract theories – showing deliberate

indifference by the Sheriff in his individual capacity. Among other things, the dissent points out the following:

> When we cease to look at the Los Angeles Sheriff's Department (LASD) as an abstraction and look at the reality, we see good reasons for requiring facts before permitting lawsuits against the Sheriff himself: the agency is gigantic. The LASD is the largest Sheriff's Department in the world. It covers 3,171 square miles, 2,557,754 residents, and by contract 42 of the 88 incorporated cities in Los Angeles County. The Department employs 8,400 law enforcement officers and 7,600 civilians and is responsible for 48 courthouses and 23 substations. The Men's Central Jail alone houses a revolving population of 5,000 inmates. In addition, the Department operates the Twin Towers Correctional Facility, the Mira Loma Detention Facility, the Pitchess Detention Center, and the North County Correctional Center. Persons charged with or convicted of crimes are in over one hundred different locations. The layers of administration and management between what happens in a jail are many and they are complex. To infer that specific incidents which occur in a jail are necessarily known by the Sheriff is to engage in fallacious logic. None of this complexity absolves the Department of responsibility for respecting the constitutional rights and general well-being of its charges, but it does show how inappropriate it is to sue the Sheriff individually unless in terms of causation the Sheriff can be personally tied to the actionable behavior at issue. Just being a disappointing or even an insufficiently engaged public servant is not enough. Those issues are for the ballot box and the County Board of Supervisors, not the courts.

Result: Reversal of U.S. District Court (Central District of California) order dismissing inmate's claim of individual supervisory liability against Los Angeles County Sheriff Baca based deliberate indifference to unconstitutional conditions of confinement; case remanded for trial.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) OFFICER'S TESTIMONY THAT DEFENDANT WAS "EVASIVE" DURING INTERROGATION DID NOT VIOLATE FIFTH AMENDMENT RIGHT TO SILENCE; BUT REMARK DID VIOLATE SIXTH AMENDMENT BY INVADING PROVINCE OF JURY; THAT ERROR, HOWEVER, WAS CURED BY TIMELY TRIAL COURT JURY INSTRUCTION – State v. Hager (Timothy Edward), ___ Wn.2d ___, 2011 WL 825740 (2011), the Washington Supreme Court addresses constitutional issues involving admissibility law enforcement officer testimony that may suggest the officer's opinions about a defendant's guilt.

Such law enforcement testimony indicating an officer's opinion that a defendant is guilty may violate a criminal defendant's rights under the U.S. Constitution's Fifth Amendment right to silence or Sixth Amendment right to jury trial. In this case involving prosecution of Hager for rape of a child, the trial court denied defendant's motion for a mistrial after testimony in which a police detective described defendant's answers to law enforcement questioning prior to arrest as "evasive." This remark was in direct violation of the trial court's order prohibiting such characterization, though there is some question (though legally irrelevant) whether the officer was aware of the court order.

The Court of Appeals in Hager reversed the child rape defendant's conviction on grounds that the officer's testimony that defendant was "evasive" violated defendant's Fifth Amendment right to silence, and that this violation was not cured by the trial court's immediate curative instruction

to the jury not to consider the officer's characterization of the defendant. State v. Hager, 152 Wn. App. 134 (Div. II, 2009) **Oct 09 LED:22.**

The Washington Supreme Court holds in Hager that, because the detective's remark was not a comment on defendant's silence, but instead was a comment on something defendant said, the remark did not infringe upon defendant's Fifth Amendment right to silence/privilege against self-incrimination. Furthermore, an 8-1 majority of the Court rules that, although the comment did violate both (1) the trial court's order prohibiting such characterization and (2) defendant's Sixth Amendment right to jury trial by invading the province of the jury in expressing an opinion about defendant's credibility, any harm was cured by the trial court's prompt instruction to the jury not to consider that part of the officer's testimony. Therefore, rules the 8-1 majority, the trial court did not err by denying defendant's motion for a mistrial.

Justice Sanders dissents, arguing that there was no way to cure the violation with an instruction to the jury. He asserts the general proposition that a bell once rung cannot be un-rung. **NOTE:** Justice Sanders lost his re-election bid in November of 2011, but he is acting as a temporarily appointed Supreme Court Justice on this and a number of other cases that were pending in the Supreme Court prior to the election.

Result: Reversal of Court of Appeals decision that reversed the Pierce County Superior conviction of Timothy Edward Hager for first degree rape of a child.

LED EDITORIAL NOTE: We have not always reported on Washington appellate court decisions on the Fifth and Sixth Amendment issues relating to law enforcement officer testimony or other evidence from the State that may suggest the view that the defendant is guilty. Three of the decisions that we did report are State v. Lewis, 130 Wn.2d 700 (1996) May 97 LED:03; State v. Easter, 130 Wn.2d 228 (1996) Jan 97 LED:03; and State v. Demery, 144 Wn.2d 753 (2001) Dec 01 LED:15.

LED EDITORIAL COMMENT: We recognize that we have not provided much guidance in this LED entry. Officers and prosecutors preparing for officer testimony should, in relevant circumstances, consult regarding the Fifth and Sixth Amendment limits on law enforcement officer testimony relating to defendants' demeanor during out-of-court questioning and other law enforcement contacts.

(2) "TRUE THREAT" REQUIREMENT OF FIRST AMENDMENT FREE SPEECH PROTECTION REQUIRES SPECIAL JURY INSTRUCTION IN HARASSMENT PROSECUTION – In State v. Schaler, 169 Wn.2d 274 (2010), the majority opinion of the Washington Supreme Court holds that the jury in this prosecution for harassment, RCW 9A.46.020, should have been instructed on the First Amendment free speech standard for "true threats," and that the instructional error was not harmless. But the majority opinion also concludes over the lone dissent of Justice Sanders that the evidence of true threats in the case is sufficient for the case to be retried.

Because the First Amendment limits the criminal harassment statute to proscribing true threats, the statute must be read to reach only those instances where a reasonable person would foresee that the statement would be interpreted as a serious expression of intention to take the life of another person. This standard requires the defendant to have the mental state of negligence as to the result of the probable induced fear of the hearer. The jury in a harassment case therefore must be instructed on the concept of "true threat," which is a statement made under such circumstances that a reasonable person making the statement would foresee that the statement would be interpreted by the hearer of the statement as a serious expression of intention to inflict bodily harm upon or to take the life of another person. This is an objective test. The subjective intent of the speaker to do or not do the harm is irrelevant.

The prosecution in the Schaler case was based on defendant's statements to a crisis counselor (after his call to a crisis hotline and police transport to the crisis counselor during which defendant shared some of his thoughts with the officer as well) that he had a dispute with two of his neighbors, that for several months he had been thinking about killing those particular neighbors, that he had dreamed about it, and that he currently wanted to do it. Defendant Schaler argued on appeal that his statements were not true threats, as constitutionally required, because he was describing his mental state to a mental health specialist, and thus his words were a cry for help. He argued that a reasonable person in his position would not foresee that a listener would take his statements in this context as a serious expression of intent to kill the neighbors.

But the Supreme Court majority opinion notes that his demeanor did not suggest his words were idle talk or a joke. And the opinion recognizes that a jury could reasonably conclude from the evidence that a reasonable speaker in defendant's position would have foreseen that his statements would be interpreted as a serious expression of intention to take the lives of his neighbors. Therefore, the majority opinion concludes that defendant was lawfully prosecuted for felony harassment for his statements to the crisis counselor about his plan to kill his neighbors.

The Supreme Court concludes, however, that a true threat instruction should have been given to the jury in this case, and that the omission of such a true threat instruction was not harmless in light of the evidence that: (1) defendant never explicitly said that he would kill the neighbors, (2) his behavior at the time was erratic, (3) he was contradictory in some of his statements, and (4) his statements took place in the context of a mental health evaluation that occurred in a hospital while he received medical treatment. Thus, a jury could plausibly conclude that a reasonable speaker in defendant's position would not have foreseen that his statements would be interpreted as a serious expression of intention to take the neighbors' lives. What a reasonable person making the statements would have foreseen in these circumstances was a fact question for a properly instructed jury to resolve, the majority opinion concludes.

Justice Sanders writes a solo opinion that concurs in the majority's reversal of Schaler's conviction, but dissents from the order remanding for retrial. Justice Sanders argues that the harassment statute is in need of a drastically constricting free speech construction, that the Supreme Court should have held as a matter of law that none of Schaler's statements constituted a true threat, and therefore that there was no fact question to present to a jury. Justice James Johnson dissents from the reversal of Schaler's conviction, arguing, among other things, that the trial court's failure to give a true threat instruction was harmless error.

Result: Defendant wins his appeal; reversal of Court of Appeals decision (145 Wn. App. 628 (Div. III, 2008) **Sept 08 LED:21**) that affirmed the Okanogan County Superior Court conviction of Glen Arthur Schaler for felony harassment based on a threat to kill; case remanded for re-trial with proper jury instructions.

LED EDITORIAL NOTE: The Schaler majority opinion addressed the following LED-reported Washington Supreme Court decisions analyzing the true threat standard: State v. J.M., 144 Wn.2d 472 (2001) Dec 01 LED:15 (recently suspended middle school student's statements that he planned to shoot the school principal and other staff was a true threat and was punishable as harassment without need for proof that the defendant knew or reasonably should have known that the threat would be communicated to the proposed victim); State v. Kilburn, 151 Wn.2d 36 (2004) (Oct 04 LED:05) (middle school student's joking statement that he was going to get a gun and shoot everyone at the school was not a true threat); and State v. Johnston, 156 Wn.2d 355 (2006) March 06 LED:04 (drunken statement that defendant was "going to blow this place up" was not a true threat).

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WASHINGTON STATE COURT OF APPEALS

OFFICER DID NOT IMPROPERLY EXCEED THE SCOPE OF TRAFFIC STOP WHEN WITH JUSTIFICATION HE CHECKED ON NO-CONTACT ORDER PROTECTING PASSENGER

State v. Pettit, ___Wn. App. ___, 2011 WL 1238912 (Div. II, 2011)

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

> [A law enforcement officer] stopped Michael S. Pettit because his car had a loud exhaust, generated by a "coffee can" muffler, which RCW 46.37.390(1) and (3) prohibit. A record check disclosed that Pettit was named in a no contact order issued for the protection of a 16-year-old girl, Michelle Whitmarsh.
>
> Pettit's front seat female passenger appeared to be about 16. [Court's footnote: *There was also a woman and a young child in the rear passenger seats. The woman appeared to be in her mid-twenties.*] [The officer] returned to Pettit's car and asked the passenger for her name. She told him that she was Samantha M. Wright and that her birth date was October 21, 1989. [Court's footnote: *That would have made her almost 20 years old, because the stop occurred on April 2, 2009.*] [The officer] ran a check on that name and found no record. He did obtain more information from dispatch about Michelle Whitmarsh, who was described as having brown hair, hazel eyes, and a tattoo on her left hand. He also discovered that Whitmarsh was listed as missing and that there was a warrant for her arrest.
>
> When [the officer] returned to Pettit's car, he discovered that his young female passenger had the letter "M" tattooed on her left hand. After he confirmed that Whitmarsh's tattoo was an "M," he arrested Pettit for violation of the no contact order. He also took Whitmarsh into custody. The entire encounter took 11 minutes.
>
> Pettit moved to suppress Whitmarsh's identity. When the court denied that motion, he went to trial without a jury on stipulated facts. The trial court convicted him as charged and sentenced him to six months in jail.

ISSUE AND RULING: Did the officer improperly exceed the scope of the traffic stop in investigating the no-contact order? (ANSWER: No)

Result: Affirmance of Kitsap County Superior Court conviction of Michael S. Pettit for violation of a domestic violence no-contact order.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Pettit argues that [the officer] had no legal basis for questioning his passenger and, therefore, the trial court erred in refusing to suppress the evidence obtained from that questioning. We disagree.
>
> Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." This provision prohibits law enforcement officials from requesting identification from passengers for investigative purposes unless there is an independent basis that justifies that request. State v. Rankin, 151 Wn.2d 689 (2004) **Aug 04 LED:07**. One such independent basis is an articulable suspicion of criminal activity. Rankin; State v. Allen, 138 Wn. App. 463 (2007) **July 07 LED:21**. In