Law Enforcement Digest

OCTOBER 2013

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

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NOTE REGARDING DEPARTMENT OF JUSTICE GUIDANCE ON IMPLEMENTATION OF INITIATIVE 502: On August 29, 2013, the United States Department of Justice issued a memorandum to all United States Attorneys relating to Guidance Regarding Marijuana Enforcement. If readers have not already read the memorandum, it can be found on the Criminal Justice Training Commission website, under Publications and Resources/ I-502 Marijuana Legalization. The CJTC has compiled a number of resources relating to I-502 in this location. In short the memorandum instructs United States Attorneys to focus their resources on eight marijuana enforcement priorities. Those priorities do not include enforcement of federal drug laws, as to marijuana, in states that have legalized marijuana if those states adopt sufficient regulations and provide sufficient enforcement to satisfy the federal priorities, and if the activity involving marijuana is in compliance with state law and regulations.

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NINTH CIRCUIT UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT LAWSUIT: ISSUES OF MATERIAL FACT REGARDING WHETHER MAN WHO WAS FATALLY SHOT ON HIS PATIO POSED AN IMMEDIATE THREAT TO OFFICERS PRECLUDE SUMMARY JUDGMENT ON EXCESSIVE FORCE CLAIM

George v. Morris, ___ F.3d ___, 2013 WL 3889157 (9th Cir., July 30, 2013)

Facts and Proceedings Below: (Excerpted from majority opinion)

The Court describes the facts and trial court proceedings, in part, as follows:

> At half past five, on the morning of March 6, 2009, Carol George awoke. Her husband Donald needed food. Donald had a terminal case of brain cancer and, as a result of his chemotherapy, ate frequently to manage headaches. His wife brought him a snack and then, not having slept well, returned to bed. Shortly after, George took the keys to the couple's truck from the night stand and went downstairs. Concerned for his well-being, Carol followed him. She witnessed him retrieve his pistol from the truck and load it with ammunition.
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> Carol called 911. . . . On the audio recording in evidence, she can be heard exclaiming "No!" and "My husband has a gun!" The highway patrol dispatcher could only determine that she lived somewhere in Santa Barbara. Her husband wanted her to hang up, so she did. The dispatcher then contacted a Santa Barbara County 911 operator who called Carol back and obtained her complete address.

Deputies were dispatched to the residence for a domestic disturbance involving a firearm. Santa Barbara Sheriff's Deputies Jarrett Morris and Jeremy Rogers responded first. Carol met them at the front door. She asked them to be quiet and not to scare her husband, while also advising that he was on the patio with his gun.

The deputies decided to established a perimeter around the house. . . .

The district court concluded there was a dispute as to which officer made contact with Donald first. Morris said that Schmidt had—announcing "I see the suspect" on the radio—while Schmidt claimed that it was Morris who initially saw Donald. According to an uncontroverted police-dispatch log, at 8:08 a.m., Donald opened the door to the balcony. Once he appeared in view of the deputies, Schmidt identified himself as law enforcement and instructed Donald to show him his hands. Hearing yelling, Rogers left his post out front and headed into the backyard.

Four minutes later, dispatch was told that Donald had a firearm in his left hand. Morris testified to seeing Donald "carrying [a] silver colored pistol in his left hand, while holding" what he described "as a walker or a buggy." Rogers stated that when George came into view, he was holding a gun with the barrel pointing down. Carol does not dispute that Donald exited onto the balcony with his walker and holding his firearm. However, the district court concluded that Carol's evidence, which included an expert witness's report, called into question whether Donald ever manipulated the gun, or pointed it directly at deputies.

Soon after the deputies broadcast that Donald had a firearm, the dispatch log records "shots fired." Donald fell to the ground, and Rogers continued to shoot. Together the three deputies fired approximately nine shots. They then ran to assist him, applied first aid, and called an ambulance. Donald died two hours later at the hospital following surgery and admission to the intensive care unit.

Carol sued a year later under 42 U.S.C. § 1983 asserting two constitutional claims. Against Morris, Schmidt, and Rogers she claimed a violation of her late husband's right to be free from excessive force under the Fourth Amendment, as incorporated. In a claim chiefly implicating Deputy Harry Hudley, Carol asserted that her own Fourth Amendment right against unreasonable seizure was violated when Hudley kept her from the crime scene in the shooting's aftermath and when she was briefly stopped from visiting Donald in the hospital. The deputies and their supervisors moved for summary judgment invoking qualified immunity, mainly arguing that neither Donald's nor Carol's constitutional rights had been violated.

After an evidentiary hearing, the district court concluded that based on the admissible evidence, "whether Mr. George presented a threat to the safety of the deputies is a material fact that is genuinely in dispute." This meant a constitutional violation could be proven and the court denied qualified immunity on that basis. Concluding that the deputies had not argued for its application, the court did not address the second prong of qualified immunity—the clearly established inquiry. That asks whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Lacey v. Maricopa County, 693 F.3d 896, 915 (9th Cir. 2012) (en banc). As to Carol's seizure claim,

> the district court decided there was no constitutional violation and, in the alternative, that "the right at issue was not clearly established." It therefore granted summary judgment to Hudley and the other deputies.

[Footnotes and citations omitted]

ISSUE AND RULING: Are there genuine issues of material fact regarding whether the decedent posed an immediate threat to the safety of officers, thus precluding summary judgment on the excessive force claim? (ANSWER BY NINTH CIRCUIT: Yes, rules a 2-1 majority)

Result: Affirmance of United States District Court (Central District California) order denying summary judgment on excessive force claim [and remanding unreasonable seizure claim for appeal after conclusion of proceedings].

ANALYSIS: (Excerpted from majority opinion)

> As to whether the deputies violated the Fourth Amendment, two Supreme Court decisions chart the general terrain. Graham v. Connor, 490 U.S. 386 (1989), defines the excessive force inquiry, while Tennessee v. Garner, 471 U.S. 1 (1985), offers some guidance tailored to the application of deadly force.
>
> "Graham sets out a non-exhaustive list of factors for evaluating [on-the-scene] reasonability: (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, and (3) whether the suspect actively resisted arrest or attempted to escape." Maxwell v. County of San Diego, 697 F.3d 941, 951 (9th Cir. 2012) **Jan 13 LED:06; April 13 LED:03**. In Garner, the Supreme Court considered (1) the immediacy of the threat, (2) whether force was necessary to safeguard officers or the public, and (3) whether officers administered a warning, assuming it was practicable. See Scott v. Harris, 550 U.S. 372, 381–82 (2007). Yet, "there are no per se rules in the Fourth Amendment excessive force context." Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir., 2011)(en banc) **Jan 12 LED:02**.
>
> The district court applied the Graham factors and found that the first and third unmistakably weighed in Carol's favor. "It is undisputed that Mr. George had not committed a crime, and that he was not actively resisting arrest or attempting to evade arrest by flight." The deputies do not challenge these conclusions on appeal. They correctly observe, however, that the "'most important' factor under Graham is whether the suspect posed an 'immediate threat to the safety of the officers or others.'" Bryan v. MacPherson, 630 F.3d 805, 826 (9th Cir. 2010) **[LED EDITORIAL NOTE: A prior opinion in Bryan, not materially revised by the opinion cited here, was digested in the September 2010 LED beginning at page 7.]**. As to this third key factor, while the deputies certainly aver feeling threatened before they shot George, such a statement "is not enough; there must be objective factors to justify such a concern." Id. When an individual points his gun "in the officers' direction," the Constitution undoubtedly entitles the officer to respond with deadly force. Long v. City & County fo Honolulu, 511 F.3d 901, 906 (9th Cir. 2007). In Scott, we likewise recognized that officers firing their weapons at a defendant who "held a 'long gun' and pointed it at them" had not been constitutionally excessive.

> Taking the facts as we must regard them [viewing the summary judgment factual allegations in the best light for the plaintiffs], that specific circumstance is not present in this case. In Glenn v. Washington County, 673 F.3d 864, 873-78 (9th Cir. 2011) **April 12 LED:11**, we found that in a 911 scenario without flight or an alleged crime, the officers' decision to shoot an individual holding a pocket knife, "which he did not brandish at anyone," violated the Constitution. Reviewing Long and Scott, we explained that the fact that the "suspect was armed with a deadly weapon" does not render the officers' response per se reasonable under the Fourth Amendment. Id. at 872–73; see also Harris v. Roderick, 126 F.3d 1189, 1204 (9th Cir. 1997) ("Law enforcement officials may not kill suspects who do not pose an immediate threat to their safety or to the safety of others simply because they are armed.").
>
> This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat. On this interlocutory appeal, though, we can neither credit the deputies' testimony that Donald turned and pointed his gun at them, nor assume that he took other actions that would have been objectively threatening. Given that version of events, a reasonable fact-finder could conclude that the deputies' use of force was constitutionally excessive. Contrary to the dissent's charge, we are clear-eyed about the potentially volatile and dangerous situation these deputies confronted. Yet, we cannot say they assuredly stayed within constitutional bounds without knowing "[w]hat happened at the rear of the George residence during the [four minutes between when] Mr. George walked out into the open on his patio and the fatal shot." Dissent at 40. That is, indeed, "the core issue in this case."
>
> The deputies argue that the reasonableness of their actions is enhanced because they were told to expect a domestic disturbance. Sitting en banc, this court recently identified this circumstance as a "'specific factor [ ]' relevant to the totality of the[ ] circumstances." Mattos, 661 F.3d at 450. Domestic violence situations are "particularly dangerous" because "more officers are killed or injured on domestic violence calls than on any other type of call." At the same time, we explained in Mattos that the legitimate escalation of an officer's "concern[ ] about his or her safety" is less salient "when the domestic dispute is seemingly over by the time the officers begin their investigation." Years before that we had held—in another en banc decision—that a husband's criminal abuse of his spouse "provide[d] little, if any, basis for the officers' use of physical force" because when law enforcement "arrived [the husband] was standing on his porch alone and separated from his wife." Smith v. City of Hemet, 394 F.3d 689, 703 (9th Cir. 2005) (en banc). That distinguishing feature from Smith and Mattos is present here. Carol was unscathed and not in jeopardy when deputies arrived. Donald was not in the vicinity; instead he was said to be on the couple's rear patio.
>
> Today's holding should be unsurprising. If the deputies indeed shot the sixty-four-year-old decedent without objective provocation while he used his walker, with his gun trained on the ground, then a reasonable jury could determine that they violated the Fourth Amendment.

[Footnotes omitted; some citations modified]

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) REVIEW BY EN BANC PANEL ORDERED IN CASE WHERE VOLUNTARINESS OF A CONFESSION BY A MILDLY MENTALLY CHALLENGED SUSPECT IS AT ISSUE – On August 14, 2013, the Ninth Circuit vacated the opinion in United States v. Preston, 706 F.3d 1106 (9th Cir., Feb. 5, 2013) **May 13 LED:14** (confession of mildly mentally challenged suspect ruled not involuntary). The case will now be reviewed by an en banc (11-judge) panel, and a new opinion will be issued.

(2) WHERE PRIOR AFFIDAVIT AND SEARCH WARRANT FOR OTHER RESIDENCES ARE REFERENCED BUT NOT ATTACHED OR INCORPORATED IN A SUBSEQUENT APPLICATION FOR A WARRANT TO SEARCH ANOTHER RESIDENCE FOR EVIDENCE, THE AFFIDAVIT IN THE PRIOR APPLICATION AND THE ISSUANCE OF THE PRIOR WARRANT CANNOT BE USED TO SUPPORT THE SUBSEQUENT APPLICATION; ALSO, OFFICER'S EXPERIENCE-AND-TRAINING-BASED CONCLUSIONS NEED FOUNDATION – In United States v. Underwood, ___F.3d ___, 2013 WL 3988675 (9th Cir., Aug. 6, 2013), a three-judge Ninth Circuit panel rules that an application for a warrant to search a residence for evidence related to dealing in ecstasy failed to establish probable cause.

The DEA and local southern California police agencies, working jointly, suspected a drug trafficking organization of distributing hundreds of thousands of pills of ecstasy per week. Federal court search warrants supported by a 102-page affidavit were obtained for a number of residences. During one of the searches, officers learned from Underwood's mother that suspect Underwood was living at a residence not included in the federal court warrant authorizations. Officers went to that address and made a lawful arrest of Underwood at his home. In plain view, they saw and lawfully seized a clear zip-lock bag containing a personal use amount of marijuana. **[LED EDITORIAL NOTE: The lawfulness of the warrantless arrest and seizure of Underwood and the baggie were not at issue in this case.]**

Underwood refused consent to search his residence, so officers secured the scene and applied in state court for a warrant to search for, among other things: records of drug transactions, bank account records, supplier lists, phones, drugs such as ecstasy, drug paraphernalia, currency over $500, personal records such as bills, photographs and videos involving drugs, and firearms.

The affidavit in the warrant application to the state court noted that the federal court had issued warrants to search other residences, but the state court affidavit did not incorporate or attach the 102-page federal court affidavit, nor did it include much of the information in that other affidavit. The state court affidavit set forth a series of unsupported conclusory allegations but only two facts: Underwood's delivery of two undescribed crates to the suspected leader of the ecstasy ring three months before the state court warrant application, and a description of the observation of the personal-use amount of marijuana in Underwood's home. The search of Underwood's residence under the state court warrant resulted in the seizure of thirty-three kilograms of cocaine, $417,000 in cash, 104 ecstasy pills, packaging material, a money counter, and a "pay/owe" sheet.

In a federal district court case against Underwood, the district court suppressed, for lack of probable cause in the affidavit, the evidence seized under the state court warrant. The Ninth Circuit agrees.

The Ninth Circuit opinion appears to suggest that if the 102-page affidavit for the federal court search warrants had been attached and incorporated in the application for the state court search warrant, then probable cause would have been established for Underwood's residence. But a mere reference to a prior warrant application, whether the prior warrant was granted or not, is of no help in establishing probable cause in a subsequent application for a warrant to search a different residence. And the mere fact that a small baggie of marijuana was found in Underwood's home at the time of his arrest did not establish probable cause for a warrant to search for the drug-dealing items listed in the warrant application.

The Ninth Circuit opinion also discusses the state court affidavit's discussion of the officer-affiant's conclusions based on his experience and training. Such conclusions are of no help in establishing probable cause unless a sufficient foundation is established in the affidavit. No such foundation was established here, the Ninth Circuit explains:

> [T]he affidavit contained [an officer's] beliefs about drug traffickers' general habits based on [the officer's] experience and training, including that drug traffickers often keep records from drug transactions at their residences. . . . Here, the affidavit not only fails to define "drug trafficker" but it also provides no facts to support the conclusion that Underwood is in the business of buying and selling ecstasy. Moreover, the affidavit does not even assert that Underwood is a drug trafficker. Instead, the affidavit describes Underwood as a "courier." As District Judge Stephen Wilson explained, the two terms have different meanings: while a trafficker is someone who is in the business of buying and selling items, a courier is "one who merely delivers items (in this context, contraband) but does not typically trade, buy, or sell the items being delivered." Thus, Kaiser's conclusions about drug traffickers . . . are foundationless as to Underwood. Hence, they cannot be used to support a finding of fair probability that drug trafficking evidence would be found at Underwood's home.

Result: Affirmance of suppression order of U.S. District Court (Central District of California).

(3) VOLUNTARY STATEMENT ABOUT FEAR OF REPRISAL THAT CUSTODIAL SUSPECT MADE IN INTERROGATION THAT OFFICERS IMPROPERLY CONTINUED AFTER HE HAD INVOKED HIS RIGHT TO SILENCE IS HELD ADMISSIBLE TO IMPEACH HIS TRIAL TESTIMONY THAT HE WAS AN UNKNOWING COURIER OF ILLEGAL DRUGS – In United States v. Gomez, ___F.3d ___, 2013 WL 3988705 (9th Cir., Aug. 6, 2013), a three-judge Ninth Circuit panel rules 2-1 that, while the government was barred in its case in chief from using a suspect's statement to detectives – after he had invoked his right to silence – about his fear of retaliation against his family if he talked to police, the statement was admissible to impeach his testimony at trial that he had unknowingly transported the illegal drugs that police had found in his possession.

In a border search, U.S. agents discovered several kilograms of methamphetamine hidden in the gas tank of Cesar Gomez's car. In a custodial interrogation, Gomez responded to Miranda warnings by saying "I can't talk." The agents pressed him as to why he couldn't talk, and after some back and forth he said: "I can't say anything because my family . . . will get killed." At that point the interrogation stopped.

The U.S. district court ruled that Gomez's initial statement, "I can't talk," was a clear invocation of his right to silence. Therefore, the further questioning as to what that meant and why he could not talk violated his Miranda rights. The government was barred in its case in chief from informing the jury of Gomez's statement that the reason he could not talk was that his family

would get killed. **[LED EDITORIAL NOTE: The federal government did not challenge this ruling on appeal.]**

At trial, Gomez took the witness stand and testified that he had been an unwitting drug courier. He claimed that someone else must have hidden the illegal drugs in his gas tank without his knowledge. The trial court then allowed the federal prosecutor to put on impeachment evidence about defendant's post-invocation statement stating his fear of retaliation if he talked.

The majority opinion for the Ninth Circuit approves the impeachment use of the statement. While a defendant's refusal to talk to interrogators cannot generally be used to impeach him, a different rule applies to voluntary inconsistent statements from the defendant. The majority opinion explains:

> There are two important limitations on the government's ability to impeach a defendant with prior inconsistent statements taken in violation of Miranda. First, the statement must have been voluntary. . . . Here, Defendant does not dispute, and we easily conclude, that his statement was voluntary. Defendant said: "I'm just going to say something. Okay?" When Agent Fuentes started to speak, Defendant interrupted: "Listen, listen, listen, listen, listen [unintelligible] . . . I can't say anything because my family . . . my family will get killed. Okay?"
>
> The second relevant limitation is that, in order to be admissible, the statement must be "arguably" inconsistent with the defendant's testimony at trial. Again, Defendant does not dispute, and we conclude, that his statement that he feared for his family's safety was arguably inconsistent with his trial testimony that he lacked knowledge of the drugs. The prosecution asked the jury to draw the inference that Defendant's family in Mexico faced danger only if, in fact, he had knowledge of the drugs when he left Mexico, and that, accordingly, his denial of knowledge was not credible.
>
> We also stress that the prosecution sought to impeach Defendant not for his failure to talk to Agent Fuentes but for his stated reason for declining to talk. It would be a very different case had the prosecution argued that Defendant's silence itself undermined his credibility or had Agent Fuentes testified that Defendant said only, "I can't talk." Those hypothetical situations would fall clearly within the scope of [the rule against using silence to impeach a defendant]. Because the impeachment evidence here concerned Defendant's statement, however, [the] rule does not apply. . . .

[Footnotes and case citations omitted]

Result: Affirmance of U.S. District Court (Southern California) conviction of importation of methamphetamine.

(4) CIVIL RIGHTS ACT LAWSUIT: CASE MUST GO TO JURY TRIAL ON WHETHER: (1) TERRY SEIZURE VIOLATED NINTH CIRCUIT RULING IN GRIGG LIMITING SEIZURES FOR COMPLETED MISDEMEANORS; (2) OFFICER'S PULLING OF TASER IN CONTACTING SUSPECT WAS JUSTIFIED; AND (3) ARREST OF CURSING SUSPECT WAS LAWFUL – In Johnson v. Bay Area Rapid Transit District, ___F.3d ___, 2013 WL 3888840 (9th Cir., July 30, 2013), a three-judge Ninth Circuit panel rules, among some other rulings that are not addressed in this LED entry, that a Civil Rights Act case must go to jury trial on three issues arising out of police response to a report that there had been a late night/early morning New Year's Day fight

among black males on a train a few minutes earlier. Because the issues all involve the police claims of qualified immunity from suit, all of the allegations in the record were viewed by the appellate court in the best light for the plaintiffs who were suing the police.

1) Terry seizure for completed misdemeanor may not have been justified under U.S. v. Grigg

The police had received a citizen's cell phone 911 report that the caller had seen a group of black males fighting on a Bay Area Rapid Transit (BART) train. The caller had seen no weapons in observing the melee. Police directed the operator to stop the train at a station in Oakland, California. When police arrived, they saw a group of black males acting peacefully on a platform near the train. One of the officers pulled his Taser before contacting the suspects. He later testified in pre-trial proceedings that his purpose in doing so was "to intimidate" the suspects. The officers, another of whom also unholstered his Taser at the outset of the contact, aggressively and profanely ordered the suspects to stop and sit.

The Ninth Circuit panel rules that a jury could find from the allegations that this Terry seizure was not justified under the rule announced by the Ninth Circuit in United States v. Grigg, 498 F.3d 1070 (9th Cir. 2007) **April 08 LED:06** because the crime involved was a previously completed misdemeanor, and, under the alleged facts of this case, viewed in the best light for plaintiffs, no exception applied under the Ninth Circuit's Grigg rule restricting Terry stops for completed-misdemeanors. The panel explains:

> In determining whether the Fourth Amendment permits an officer to detain a suspected misdemeanant, Grigg requires us to "consider the nature of the misdemeanor offense in question, with particular attention to the potential for ongoing or repeated danger (e.g., drunken and/or reckless driving), and any risk of escalation (e.g., disorderly conduct, assault, domestic violence)." Id. at 1081; see also United States v. Hensley, 469 U.S. 221, 228 (1985) ("[T]he exigent circumstances which require a police officer to step in before a crime is committed or completed are not necessarily as pressing long afterwards. Public safety may be less threatened by a suspect in a past crime who now appears to be going about his lawful business . . . ."). Here, [the first officer] came upon a group of black men who were doing nothing but talking when he arrived. There is an insufficient basis to conclude, from anything [the officer] witnessed, that there was a likelihood for "ongoing or repeated danger," or "escalation." [The officer] nevertheless pulled a weapon (his Taser) on the young men, admittedly for the purpose of "intimidation," and using profanity, ordered them to be seated.
>
> Would our hypothetical reasonable officer, given the law we articulated in Grigg and his task of avoiding constitutional violations, have behaved as [the officer] did? We think not. Whether or not [the officer] articulated facts sufficient to support his suspicion of Reyes, the Brysons, and Greer, we conclude that given the questionable nature of [his] authority to detain the group for a misdemeanor that abated before his arrival, the district court properly denied [the officer] qualified immunity—at this stage of the proceedings and on the record before it—from their claim of unlawful detention.

[Some case citations omitted]

2) Officer's pulling of Taser at the outset of the contact may not have been justified

On the plaintiffs' claim regarding the pulling of the Taser, the key part of the panel's analysis is as follows:

> Courts "examine the 'totality of the circumstances' in deciding 'whether an investigative detention has ripened into an arrest,'" focusing "on the perspective of the person seized, rather than the subjective beliefs of the law enforcement officers." . . . . "The question is thus whether a reasonable innocent person in [the same] circumstances would not have felt free to leave after brief questioning." . . . . While this standard suggests that "[u]nder ordinary circumstances, drawing weapons and using handcuffs are not part of a Terry stop," . . . . , we have recognized some circumstances in which it is appropriate for an officer to use a level of force that would ordinarily bring to mind arrest, i.e. : (1) "where the suspect is uncooperative or takes action at the scene that raises a reasonable possibility of danger or flight;" (2) "where the police have information that the suspect is currently armed;" (3) "where the stop closely follows a violent crime;" and (4) "where the police have information that a crime that may involve violence is about to occur." Washington v. Lambert, 98 F.3d 1181, 1189 (9th Cir. 1996) . . . .
> . . . . [The officer] contends that "from the perspective of a reasonable officer on the scene," brandishing a Taser was appropriate: [he] was outnumbered, responding to a violent crime, had no way of knowing whether the men were armed (he knew only that no weapons were *used* in the fight), and was surrounded by intoxicated BART patrons. Moreover, [he] argues, the stop lasted only a few minutes, and when he attempted to make the stop, Grant and Greer fled on to the train. And at no time did [he] strike or handcuff Reyes or the Brysons.
> . . . .
>
> Despite [the officer's] argument about the conditions on the platform when he arrived, [the officer] testified he pulled his Taser on the young men for the purpose of "intimidation," and not because he feared for his safety or the safety of anyone else on the platform. A desire to cow suspects into compliance is not one of the previously enumerated reasons for which we countenance the use of weapons during an investigatory stop. Moreover, [the officer] testified that he drew his Taser before he "made contact" with the group, belying an argument that he did so to prevent Reyes or the Brysons, or anyone else, from taking flight—a flight which would have been futile, since the train on to which they might have fled could not leave the Fruitvale Station until BART released it. And not knowing whether a suspect is armed is not the same as having reason to believe the suspect is actually armed.
>
> We are therefore left with the question whether it was reasonable, on the facts with which he was presented, for [the officer] to use, or threaten to use, any weapon at all in conducting an investigatory stop—or whether [the officer] effectively arrested Reyes and the Brysons. That question must be resolved by a jury. . . .

[Footnotes and some case citations omitted; emphasis in original]

3) Arrest for cursing at officers may not have been justified in light of Free Speech protection

On one plaintiff's claim that he was unlawfully arrested for cursing at the officers, the key part of the panel's analysis is as follows:

> [The officer] argues that he is otherwise entitled to qualified immunity from Jack Bryson's unlawful arrest claim, because he had probable cause to arrest Bryson independently of [another officer's] order. See Rosenbaum v. Washoe Cnty., 663 F.3d 1071, 1076 (9th Cir. 2011) (noting that an officer is immune to a claim of unlawful arrest if he had probable cause for the arrest, i.e., it was not actually unlawful, or if "it is reasonably arguable that there was probable cause for arrest"). Specifically, [the officer] posits, he had probable cause to arrest Jack Bryson for violating California Penal Code § 148, which penalizes interference with a law enforcement officer in the performance of his duties, because [he] "personally observed Bryson creat[ing] a disturbance, incit[ing] the crowd, and disregard[ing] [the officer's] instructions during a tense, escalating event on the platform to which [the officer] had been called for backup."
>
> Bryson's alleged creation of a disturbance consisted of his cursing the officers, but "[e]ven though the police may dislike being the object of abusive language," section 148 does not allow them "to use the awesome power which they possess to punish individuals for conduct that is not only lawful, but which is protected by the First Amendment." In re Muhammed C., 95 Cal. App. 4th 1325, 1330-31 (2002); see also Duran v. City of Douglas, 904 F.2d 1372, 1377 (9th Cir. 1990) (opining that "making obscene gestures" and "yelling profanities in Spanish," while "boorish, crass and, initially at least, unjustified," is "not illegal"); cf. Swartz v. Insogna, 704 F.3d 105, 109-11 (2d Cir. 2013) (observing, among other things, that police officers cannot arrest someone for the "disorderly conduct" of giving the officers the finger). If Bryson was exhorting people to commit violence against the officers, it would be arguable that [the officer] had probable cause to arrest him. See generally Brandenberg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (observing that states may criminalize speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). But what Bryson may have said to the crowd is at least a disputed question of fact—the record reflects only what Bryson said to the officers—and thus, ... must be left to a jury. . . .

Result: Affirmance in part and reversal in part of ruling of U.S. District Court (Northern District of California); remand for trial.

(5) SPANISH-LANGUAGE MIRANDA WARNINGS THAT USED AN INCORRECT TRANSLATION OF "FREE" FAILED TO "REASONABLY CONVEY" THE MIRANDA RIGHT TO AN ATTORNEY WITHOUT COST – In United States v. Botello-Rosales, ___ F.3d ___, 2013 WL 3497636 (9th Cir., July 15, 2013), a three-judge Ninth Circuit panel rules that the use of the Spanish word "libre" for "free" in Spanish language Miranda warnings was an incorrect translation that was unreasonably misleading, and that this defect was not cured by the fact that the suspect was also given an adequate English-language Miranda warning.

The detective gave the following Miranda warnings to the defendant in Spanish:

> You have the right to remain silence.
>
> Anything you say can be used against you in the law.

> You have the right to talk to a lawyer and to have him present with you during the interview.
>
> If you don't have the money to pay for a lawyer, you have the right. One, who is free, could be given to you.

[Emphasis added]

The Court concludes that the use of the word "libre" for "free" failed to reasonably convey the government's obligation to appoint an attorney for an indigent suspect. The Court reasons:

> As the district court concluded, this warning failed to reasonably convey the government's obligation to appoint an attorney for an indigent suspect who wishes to consult one. See [Florida v. Powell, ___ U.S. ___, 130 S.Ct. 1195, 1204 (2010) **April 10 LED:06**]; [Miranda v. Arizona, 384 U.S. 436, 473 (1966)]; United States v. Perez-Lopez, 348 F.3d 839, 848 (9th Cir. 2003) **July 04 LED:05**.
>
> The detective used the Spanish word "libre" to mean "free," or without cost. After hearing testimony from lay and expert witnesses, the district court concluded that this usage of "libre" to mean "without cost" was not a correct translation. "Libre" instead translates to "free" as in being available or at liberty to do something. Additionally, the phrasing of the warning—that a lawyer who is free could be appointed—suggests that the right to appointed counsel is contingent on the approval of a request or on the lawyer's availability, rather than the government's absolute obligation. . . . While no "talismanic incantation" is required, . . . such an affirmatively misleading advisory does not satisfy Miranda's strictures. . . .
>
> That officers had previously administered correct Miranda warnings in English to Botello does not cure the constitutional infirmity. Even if Botello understood the English-language warnings, there is no indication in the record that the government clarified which set of warnings was correct. . . . Absent such a clarification, Botello cannot be charged with "sufficient legal or constitutional expertise to understand what are his . . . rights under the Constitution." . . . .
>
> Because the warnings administered to Botello did not reasonably convey his right to appointed counsel as required by Miranda, his subsequent statements may not be admitted as evidence against him. . . . We therefore reverse the district court's denial of Botello's motion to suppress.

[Footnotes and some citations omitted]

Result: Reversal of United States District Court (Oregon) order denying the suppression motion of Jeronimo Botello-Rosales; remand for further proceedings.

LED EDITORIAL COMMENT: Law enforcement agencies may wish to review their Spanish language Miranda warnings in light of this case.

(6) UNDER PARTICULAR CIRCUMSTANCES OF CASE, RE-ADVISING ARRESTEE OF HER MIRANDA RIGHTS AFTER SHE INVOKED HER ATTORNEY RIGHT, PLUS PROCESSING HER IN THE PRESENCE OF 77 MARIJUANA BRICKS AND PHOTOGRAPHING HER WITH THOSE BRICKS, DID NOT CONSTITUTE RE-INITIATION OF INTERROGATION IN VIOLATION OF MIRANDA – In United States v. Morgan, ___ F.3d ___, 2013 WL 3491418 (9th

Cir. July 15, 2013), the same three-judge Ninth Circuit panel issued an amended opinion that did not change the result or materially change the analysis in United States v. Morgan, 717 F.3d 719 (9th Cir., June 3, 2013) **July LED 13:04.**

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WASHINGTON STATE SUPREME COURT

ISSUANCE AND EXECUTION OF SEARCH WARRANT ON TRIBAL TRUST LAND DID NOT INFRINGE ON TRIBAL SOVEREIGNTY WHERE STATE HAD JURISDICTION OVER THEFT OCCURRING ON FEE LAND WITHIN THE BORDERS OF INDIAN RESERVATION, AND WHERE NO FEDERAL STATUTE OR TRIBAL PROCEDURAL RESTRICTION APPLIES

State v. Clark, ___ Wn.2d ___, 2013 WL 3864298 (July 25, 2013)

Facts and Proceedings Below: (Excerpted from the Supreme Court opinion)

> On October 13, 2009, a break-in occurred at a facility owned by the Cascade and Columbia River Railroad (CCRR). The facility sits on fee land within both the city of Omak and the Colville Indian Reservation.
>
> An Omak detective later arrested Clark, an enrolled member of the Colville Tribes, at his home for a different crime. Clark resided on tribal trust land also located within both the city of Omak and the Colville Indian Reservation. Based on information gathered at the scene of this arrest, the detective sought a search warrant for Clark's residence to look for evidence related to the CCRR break-in. Though attempting to search tribal trust land, the detective sought the warrant from the Okanogan County District Court (OCDC) instead of the Colville Tribal Court or the United States District Court for the Eastern District of Washington. The OCDC issued the search warrant and police seized evidence related to the break-in. The State charged Clark ith burglary in the second degree, theft in the first degree, and malicious mischief in the third degree.
>
> Clark moved to suppress the seized evidence, arguing that the Colville Tribal Court had jurisdiction over his property, not the OCDC, rendering the warrant and search invalid. The trial court denied this motion.
>
> [A jury convicted Clark and the Court of Appeals affirmed].

[Footnote omitted]

ISSUE AND RULING: Does the State's jurisdiction over crimes committed on fee land within an Indian reservation allow it to issue and execute a valid state search warrant for tribal trust property where no federal statute or tribal law restricts the State's action? (ANSWER BY SUPREME COURT: Yes rules a unanimous court)

Result: Affirmance of decision by Court of Appeals (see **September 2012 LED:22**) affirming Okanogan County Superior Court conviction of Michael Allen Clark of First Degree Theft.

ANALYSIS: (Excerpted from the Supreme Court opinion)

Under RCW 37.12.010, the State has jurisdiction over crimes committed on fee lands within the borders of a reservation or on trust or allotment lands outside a reservation's borders. The State lacks jurisdiction over crimes committed on trust or allotment land within reservation borders. RCW 37.12.010. The CCRR theft occurred on fee land within the reservation's borders; consequently, RCW 37.12.010 provides the State with jurisdiction over Clark's crime.

While RCW 37.12.010 provides the State with criminal jurisdiction over the CCRR break-in, it does not explicitly authorize the State to issue and execute a search warrant for tribal trust land pursuant to this jurisdiction. See id. (no explicit provision allowing state courts to issue search warrants for tribal lands to investigate crimes for which the State has jurisdiction); State v. Matthews, 133 Idaho 300, 986 P.2d 323, 335 (1999) (reasoning that a similar, limited assumption of jurisdiction under PL–280 did not provide Idaho with the explicit statutory power to authorize searches of Indian country for crimes over which it had criminal jurisdiction).

However, the absence of explicit statutory authorization does not mean that the OCDC lacked the authority to issue a search warrant for trust property or that the Omak police lacked the authority to execute this warrant. The State may exert its authority on reservation lands, even without statutory authorization, subject to certain limitations. First, Congress' plenary power over tribal affairs allows it to preempt the application of state law to tribal members or tribal lands. Second, tribal sovereignty may also prevent the exertion of state authority in Indian country. Because of this sovereignty, states may exert their authority over reservation lands only where doing so does not undermine tribal self-governance by "infring[ing] 'on the right of reservation Indians to make their own laws and be ruled by them.'"

. . .

[CONCLUSION]

The State did not infringe the Colville Tribes' sovereignty by issuing and executing a state warrant on Clark's residence on tribal trust land within the borders of the Colville Indian Reservation because the Colville Tribes had not exercised their sovereignty to regulate the State's ability to execute its process at the time of the search. Because neither tribal sovereignty nor federal preemption inhibited the State's ability to issue and serve the warrant, the State could validly search Clark's property. The trial court properly denied Clark's motion to suppress the evidence gathered through the search. We therefore affirm Clark's conviction for theft in the first degree.

[Footnotes and most citations omitted]

LED EDITORIAL COMMENT: The Court adopts the reasoning of the United States Supreme Court in Nevada v. Hicks, 533 U.S. 353, 362 (2001).

The following guidance comes from staff for the Washington Association of Prosecuting Attorneys (WAPA):

1. State search warrants for evidence located within the reservation on trust property for off reservation offenses may be served the same way as they are served anywhere else in the state.

2. State search warrants for evidence located within the reservation on trust property for an on reservation offense committed by a non-Indian may be served the same way as they are served anywhere else in the state.

3. State search warrants for evidence located within the reservation on trust property for an on reservation offense committed by an Indian are valid, but officers may be required to comply with tribal procedures governing the execution of state court process. Tribal procedures may not require state officers to obtain a tribal court search warrant. Tribal procedures may not "meaningfully frustrate[] the State's ability to punish those who break the law." Tribal procedures that require state officers to notify tribal police officers prior to or contemporaneously with the service of the warrant should be valid.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

MERE POSSESSION IS INSUFFICIENT EVIDENCE THAT DEFENDANT POSSESSED FAKE SOCIAL SECURITY CARD AND FAKE PERMANENT RESIDENT CARD WITH INTENT TO INJURE OR DEFRAUD, AND THUS INSUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF FORGERY – In State v. Vasquez, ___ Wn.2d ___, 2013 WL 3864265 (July 25, 2013), the Washington State Supreme Court holds that the State presented insufficient evidence that the defendant possessed forged social security and permanent resident cards with intent to injure and defraud. The decision reverses the decision of the Court of Appeals reported at 166 Wn. App. 50 (Div. III, Jan. 24, 2012) **Aug 12 LED:22**.

The defendant was detained by a grocery store security guard for suspected shoplifting [using lotion while in the store and putting the bottle back]. The guard patted the defendant down to check for weapons and to locate identification. He located a social security card and a permanent resident card in the defendant's wallet. The defendant said he obtained the social security card and permanent resident card from a friend in California for $50 each and admitted that they were fakes.

The forgery statute provides in part:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

[Emphasis added]

RCW 9A.60.020(1). A "forged instrument" is "a written instrument which has been falsely made, completed, or altered," RCW 9A.60.010(6), and a "written instrument" is "(a) Any paper, document, or other instrument containing written or printed matter or its equivalent; . . . ." RCW 9A.60.010(7).

The Supreme Court concludes that the state failed to produce sufficient evidence that the defendant possessed the forged cards with "intent to injure or defraud." It stresses that mere

possession alone is insufficient (although the court agrees with amicus curiae Washington Association of Prosecuting Attorneys (WAPA) that the state is not required to show "use.") The Court summarizes its conclusion as follows:

> The Court of Appeals' holding assumes that the only reason a person possesses forged documents is because he or she intends to injure or defraud someone. But by requiring proof of intent to injure or defraud, the legislature has determined that mere possession of forged documents is not enough to sustain a forgery conviction. Rather, as courts both in- and outside Washington have held, the State must prove intent to injure or defraud beyond a reasonable doubt. The evidence that the State presented to demonstrate intent to injure or defraud was not sufficient because it either was patently equivocal or based on rank speculation. Thus, even when viewing the evidence in this case in the light most favorable to the State, we conclude that no rational juror could have found an intent to injure or defraud beyond a reasonable doubt. Accordingly, we reverse the Court of Appeals and remand with instructions to vacate Vasquez's convictions for forgery.

Result: Reversal of Yakima County Superior Court conviction of Vianney Vasquez of two counts of forgery.

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WASHINGTON STATE COURT OF APPEALS

THERE IS NO BLANKET REQUIREMENT THAT THE PROSECUTION INTRODUCE A STATEMENT OF UNCERTAINTY FOR EACH BREATH ALCOHOL CONCENTRATION (BAC) TEST IN DRIVING UNDER THE INFLUENCE CASES

State v. King County Distrct Court, West Division, ___ Wn. App. ___, 2013 WL 3895245 (Div. I, July 29, 2013)

[LED EDITORIAL NOTE: This case arises out of a King County-wide suppression order originally issued in January 2008.]

Facts and Proceedings Below: (excerpted from the Court of Appeals opinion)

> Brent Ballow and Leslie Fausto were arrested separately in King County for driving under the influence of intoxicating liquor (DUI), in violation of RCW 46.61.502 and RCW 46.61.506. During their arrests, they each consented to a breath alcohol concentration (BrAC) test. Both defendants subsequently moved to suppress their BrAC test results under a countywide suppression order issued in State v. Ahmach, No. C00627921 (King County Dist. Court Jan. 30, 2008).
>
> In Ahmach, a panel of three King County District Court judges entered a countywide suppression order on all BrAC test results, because the Washington State Patrol's Toxicology Laboratory Division (WTLD) was unable to produce reliable test results. Since Ahmach, the WTLD addressed testing irregularities and obtained breath test accreditation from the American Society of Crime Laboratory Directors Laboratory Accreditation Board. As a result, the State requested a hearing . . . for the Ahmach panel to reconsider its decision. The State's motion was granted.

The cases were consolidated for a hearing before the same panel of judges who decided Ahmach. [The defendants] asked the panel to decide whether the State must present a corresponding statement of uncertainty to admit BrAC test results at trial. The panel held a five day hearing in August 2010. It heard testimony from four experts: Washington State Toxicologist Dr. Fiona Couper, WTLD Quality Assurance Program Manager Jason Sklerov, former head of the Washington State Patrol breath test program Rod Gullberg, and University of Washington professor Dr. Ashley Emory.

In a September 20, 2010, ruling, the district court lifted the Ahmach suppression order. The court issued a separate order holding that breath test results must be presented by the State at trial with an accompanying uncertainty statement, presented as a confidence interval. The court also wrote that its order put "the State on notice that every discovery packet supplied to defendants must contain the confidence interval for any breath-alcohol measurement the State intends to offer into evidence in that case." It explained that the breath test results are inadmissible if the State fails to present the uncertainty measurement in pretrial discovery or at trial.

. . . [T]he State sought and obtained a writ of review before the King County Superior Court. The State argued that the district court's decision improperly created a new foundational requirement for all King County DUI cases that was not mandated by statute, administrative rule, protocol, or the rules of evidence. The superior court reversed the district court's conclusion of law that uncertainty statements must be offered by the State as a judicially imposed minimum requirement in addition to the statutory requirements of RCW 46.61.506. The superior court concluded that trial courts may not use ER 702 to impose a new foundational requirement. But, it further explained that trial courts retain their gatekeeping functions under ER 403 and 702, so they may decide to exclude otherwise admissible breath test results in individual cases. The superior court acknowledged that science evolves and evidence that once met the [standard under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923)] may still be challenged if the science is no longer accepted in the relevant scientific community. However, it explained, the fact that uncertainty analysis now exists does not debunk the science of breath testing and the DataMaster machine.

The superior court also reversed the district court's holding that uncertainty calculations must be provided by the State in discovery. The court explained that a party's discovery obligation does not require that the party provide documents, but rather "'discoverable materials shall be made available for inspection and copying.'" (Quoting CrRLJ 4.7(a)(2)). Uncertainty calculations are readily available from the WTLD. In fact, the WTLD performed uncertainty calculations over 600 times in 2010, mostly at the request of defense attorneys.

The criminal defendants (petitioners) filed a motion for discretionary review that this court granted.

[Footnotes omitted]

ISSUE AND RULING: As a blanket rule, is a breath alcohol concentration test result admissible in a criminal prosecution only if the prosecution also introduces a statement of uncertainty for the test? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of King County Superior Court order reversing county-wide suppression order in DUI cases.
Status: The defendants have filed a petition for review by the Washington State Supreme Court.

ANALYSIS: (excerpted from the Court of Appeals opinion)

> Breath test admissibility begins with relevance under ER 401 and ER 402, neither of which are in dispute here. Next, as scientific evidence, breath test results must pass the Frye test. State v. Baity, 140 Wn.2d 1, 10 (2000). Under Frye, a court must determine whether an expert's opinion is based on a theory generally accepted in the relevant scientific community. Under RCW 46.61.506(4)(a), breath tests are deemed admissible if the State produces prima facie evidence of eight statutory factors regarding the accuracy of the test. The Washington Supreme Court recognizes that the DataMaster produces scientifically accurate, reliable test results when the eight criteria of RCW 46.61.506(4)(a) are met, satisfying the Frye test. State v. Ford, 110 Wn.2d 827, 833 (1988); see also State v. Straka, 116 Wn.2d 859, 870 (1991). Once the statutory foundational requirements are met, RCW 46.61.506(4)(c) specifies that all other challenges to the reliability or accuracy of the test "shall not preclude the admissibility of the test," but instead "may be considered by the trier of fact in determining what weight to give the test result." The Washington Supreme Court upheld the constitutionality of these foundational requirements in [City of Fircrest v. Jensen, 158 Wn.2d 384, 399 (2006)]. Not surprisingly, the petitioners do not contend that the statutory foundational requirements are not met. Nor is there an assertion that the BrAC tests fail the Frye test.
>
> Evidence that is admissible under Frye must still pass the two-part test under ER 702:(1) whether the witness is qualified as an expert and (2) whether the expert testimony is helpful to the trier of fact. Evidence is helpful if it concerns matters beyond the common knowledge of a layperson and does not mislead the jury. Courts generally interpret possible helpfulness to the trier of fact broadly and favor admissibility in doubtful cases. Essentially, the trial court acts as a gatekeeper and can exclude otherwise admissible evidence if it fails to meet ER 702 standards.
>
> The district court's order included nine pages of findings related to instrument bias, uncertainty calculations, and the WTLD's breath alcohol testing program. The findings are not challenged. For context, however, some of those findings are worth noting here. Every measurement is "uncertain," in that no instrument is infinitely precise or accurate. The concept of measurement uncertainty is similar to the concept of margin of error and expresses the idea that a true value of a measurement can never be known. Even the best instruments yield only an estimate of the true value. Uncertainty indicates a range in which the true value of a measurement is likely to occur. Though there are many methods of estimating uncertainty, the WTLD uses a confidence interval system developed by Gullberg. As an example, a confidence interval calculation for the statutory threshold of 0.15 under RCW 46.61.5055 might look like this: mean BrAC result: 0.1505 (the average of the two required breath test readings); confidence interval: 0.1387–0.1608, with a 99 percent confidence level that the true value lies somewhere in that range. A probability can then be calculated that the true

value of the test falls below the statutory threshold, in this example, between 0.1387–0.1499.

The district court concluded that measurement uncertainty is generally accepted within the scientific community. The State does not dispute that measurement uncertainty is recognized in all sciences and uncertainty measurements may be helpful to the trier of fact in some circumstances. Nor does the State challenge the district court's finding that testing laboratories should estimate measurement uncertainty whenever possible. As such, WTLD now performs confidence interval calculations on every breath testing machine it maintains and makes all such results available to the public.

However, the district court concluded that without this confidence interval, a breath alcohol measurement is incomplete and therefore inherently misleading and unhelpful to the trier of fact in every case. This conclusion is fatally flawed. To properly reach this result, the district court would have needed to conclude that BrAC results without confidence intervals are not generally accepted within the relevant scientific community. However, BrAC results without confidence intervals are generally accepted in the forensic toxicology community. In fact, measurement uncertainty reporting is almost nonexistent in the context of these cases. Indeed, the WTLD is unique in that regard. Neither Couper nor Gullberg knew of another breath test program in the country that offers a measurement of uncertainty. Sklerov likewise testified that there is little consensus in the forensic toxicology community on how to even calculate or report uncertainty measurements. At the time of the 2010 hearing, only two scientific publications discussed calculating uncertainty for breath tests-both of which were written by Gullberg. The district court's findings reflect this testimony.

In essence, the district court implicitly concluded the BrAC test results without the accompanying confidence interval failed the Frye test in every case. But, when the court excludes evidence under ER 702, it must exercise that discretion on the facts of a particular case. Without a confidence interval, test results obtained in conformance with the WTLD and statutory quality assurance procedures remain the best estimate of the measurement's true value.

. . .

Moreover, it is well supported in case law that if a scientific test is generally accepted by the relevant scientific community, lack of certainty goes to weight rather than admissibility. Similarly, unless errors rates are so serious as to be unhelpful to the trier of fact, error rates go to weight, not admissibility. In State v. Keller, the court applied this principal to Breathalyzer tests. 36 Wn. App. 110, 113 (1983). In that case, the defendant argued there was insufficient evidence to support his DUI conviction, because the Breathalyzer machine had an inherent margin of error of .01 percent. Id. at 111-13. The court rejected this argument, holding that the margin of error went to the weight of the Breathalyzer evidence rather than admissibility. Id. at 113-14. .

Nothing in RCW 46.61.506 prevents the trial court from exercising its discretion under ER 702 to exclude an unreliable, inaccurate, or erroneous BrAC test result on a case-by-case basis. However, by adopting a blanket exclusion, the district court implicitly imposed a new foundational requirement for BrAC tests admissibility, beyond that required by Frye or RCW 46.61.506(4). This was error.

> The burden is on defendants, not the State, to present uncertainty evidence challenging BrAC test results. We hold that the superior court properly reversed the district court's decision.

[Footnotes and some citations omitted]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) JUVENILE COURT HAS AUTHORITY TO ISSUE A DOMESTIC VIOLENCE NO CONTACT ORDER FOR THE STATUTORY MAXIMUM TIME PERIOD, EVEN IF THE RESULT IS THAT THE NO CONTACT ORDER WILL REMAIN IN EFFECT BEYOND THE JUVENILE'S EIGHTEENTH BIRTHDAY – In State v. W.S., ___ Wn. App. ___, 2013 WL 4432220 (Div. I, August 19, 2013), the Court of Appeals holds that a juvenile court has authority to issue domestic violence no contact order for ten year maximum for the crime of assault in the second degree, even though the no contact order will remain in effect past the juvenile's eighteenth birthday.

Result: Affirmance of Spokane County Superior Court DVNCO for the statutory maximum for the crime of DV assault in the second degree.

(2) IN CIVIL SUIT PITTING PRIVATE PARTIES, DANGEROUS DOG ORDINANCE IS INTERPRETED BY 2-1 MAJORITY TO ALSO MAKE COUNTY SUBJECT TO LIABILITY BASED ON "FAILURE TO ENFORCE" EXCEPTION TO "PUBLIC DUTY DOCTRINE" – In Gorman v. Pierce County, ___ Wn. App. ___, 2013 WL 4103314 (Div. II, Aug. 13, 2013), the Court of Appeals addresses a number of issues in a civil suit of neighbor against neighbor and others that arose from a dog-mauling of a woman in her home. The decision includes a ruling by a 2-1 majority that Pierce County is not entitled to dismissal of the claim against the county based on the public duty doctrine.

Two dogs (a pit bull owned by a neighbor and one of the pit-bull's mixed-breed offspring) entered Ms. Gorman's house through an open door and mauled her, causing serious injuries. Invoking a statute imposing strict liability against dog owners for dog-bite injuries, Ms. Gorman sued the private dog owners. She also sued Pierce County, claiming that the County had been negligent in the way it had responded to past complaints about the dogs. Pierce County relied on the public duty doctrine in seeking dismissal of the claims against it. But the trial court ruled that the failure-to-enforce exception to the public duty doctrine applied. A jury found all defendants, including the county, liable and also found that Ms. Gorman's actions of leaving the doors to her home open contributed to her injuries.

Pierce County appealed, arguing, among other things, that the failure-to-enforce exception to the public duty doctrine does not apply because its county ordinance does not mandate enforcement of the dangerous dog ordinance. In key part, the analysis in the Court of Appeals opinion is as follows:

> Under the failure to enforce exception [to the public duty doctrine that generally bars a negligence suit against the government], a government's obligation to the general public becomes a legal duty owed to the plaintiff when (1) government agents who are responsible for enforcing statutory requirements actually know of a statutory violation, (2) the government agents have a statutory duty to take corrective action but fail to do so, and (3) the plaintiff is within the class the

statute intended to protect. . . . The plaintiff has the burden to establish each element of the failure to enforce exception, and. the court must construe the exception narrowly. Contesting only the second element, Pierce County argues that it had no statutory duty to take corrective action. Gorman contends that former PCC 6.07.010(A) created a duty to classify potentially dangerous dogs. We agree with Gorman.

An ordinance creates a statutory duty to take corrective action if it mandates a specific action when the ordinance is violated. . . . Gorman argues that former PCC 6.07.010(A) creates a statutory duty because the word "shall" expresses a mandatory directive.

. . .

Here, former PCC 6.07.010(A) provided:

> The County or the County's designee shall classify potentially dangerous dogs. The County or the County's designee may find and declare an animal potentially dangerous if an animal care and control officer has probable cause to believe that the animal falls within the definitions [of "potentially dangerous dog" set forth in [PCC] 6.02.010[T]. The finding must be based upon:
>
> 1. The written complaint of a citizen who is willing to testify that the animal has acted in a manner which causes it to fall within the definition of [PCC] 6.02.010[T]; or
>
> 2. Dog bite reports filed with the County or the County's designee; or
>
> 3. Actions of the dog witnessed by any animal control officer or law enforcement officer; or
>
> 4. Other substantial evidence.

(Emphasis added.)

Where a statute uses both "shall" and "may" we presume that the clause using "shall" is mandatory and the clause using "may" is permissive. . . . Here, the ordinance mandated some actions ("shall") and made others discretionary ("may"). For instance, after inquiry, Pierce County had discretion to classify a dog as potentially dangerous. Former PCC 6.07.010(A) ("The County . . . may find and declare an animal potentially dangerous . . . .") (emphasis added). But, if the county received reports of a potentially dangerous dog, it had a duty to apply the classification process to that dog. Former PCC 6.07.010(A) ("The County . . . shall classify potentially dangerous dogs.") (emphasis added). The legislature's use of "shall" was a clear directive to apply the classification process to dogs that were likely potentially dangerous. Although the county had discretion to classify or not classify any particular dog as potentially dangerous, it had a duty to at least apply the classification process to any apparently valid report of a dangerous dog. The county had a duty to act.

[Case citations and footnotes omitted]

Judge Penoyar authored the majority opinion, which is signed by Judge VanDeren. Judge Worswick dissented, arguing that the Pierce County ordinance should be interpreted as not creating a duty to act under the circumstances of this case.

Result: Affirmance of Pierce County Superior Court judgment on jury verdict finding all defendants civilly liable to some degree and also finding that Gorman's actions contributed to her injuries.

LED EDITORIAL COMMENT: Politics aside, it would appear that an ordinance of the sort involved here could be amended to make clear that there is no duty for civil liability purposes.

(3) COURT REJECTS VAGUENESS AND OVERBREADTH CONSTITUTIONAL CHALLENGES TO FELONY STALKING STATUTE – In State v. Bradford, ___ Wn. App. ___, 2013 WL 4056281 (Div. I, Aug. 12, 2013), the Court of Appeals rejects the defendant's First Amendment challenges to the felony stalking statute.

The defendant was convicted of stalking his ex-girlfriend. He challenged the constitutionality of the felony stalking statute on vagueness and overbreadth grounds. The Court rejects both.

The Court rejects the defendant's allegation that the felony stalking statute is overbroad because it proscribes constitutionally protected speech. The Court's analysis is as follows:

> The challenged provision of the stalking statute, RCW 9A.46.110(1)(a), provides, in relevant part:
>
> > (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
> >
> > (a) He or she intentionally and repeatedly harasses or repeatedly follows another person.
>
> Pursuant to RCW 9A.46.110(6)(c), "'[h]arasses' means unlawful harassment as defined in RCW 10.14.020," which, in turn, provides:
>
> > (1) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication, but does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of "course of conduct."
> >
> > (2) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of

> conduct would cause a reasonable parent to fear for the well-being of their child.
>
> RCW 10.14.020 (emphasis added).
> . . .
>
> . . . [T]he stalking statute's proscriptions do not intrude upon constitutionally protected activities because the plain language of the definition of the term "course of conduct" explicitly excludes from its scope such activities. The text of RCW 10.14.020(1) expressly declares that "'[c]ourse of conduct' . . . does not include constitutionally protected free speech. Constitutionally protected activity is not included within the meaning of 'course of conduct.'" Thus, the stalking statute explicitly does not criminalize actions—"a course of conduct"—that are constitutionally protected.
>
> In defining the term, "harasses," the stalking statute incorporates the definition of "course of conduct" set forth in RCW 10.14.020(1). That language specifically excepts from its reach constitutionally protected free speech activity. Therefore, Bradford's facial overbreadth challenge to the stalking statute fails.

The Court likewise rejects the defendant's vagueness challenge, characterizing it as "nonsensical."

Result: Affirmance of King County Superior Court conviction of Jonathan Wells Bradford of felony stalking.

(4) PUBLIC RECORDS ACT LAWSUIT: INMATE PREVAILS IN PRA LAWSUIT AGAINST THE DEPARTMENT OF LICENSING – In Gronquist v. Department of Licensing, ___ Wn. App. ___ (Div. II, July 30, 2013), the Court of Appeals rules in favor of the requestor holding "(1) [The Department of Licensing] failed to respond to Gronquist's request within the statutory time frame, (2) none of the redacted information was exempt under the statutes cited by Licensing at the time Gronquist made his PRA request, [and] (3) Licensing failed to provide timely and adequate explanations for the redactions, ..."

Result: Reversal of Thurston County Superior Court order granting summary judgment to the Department of Licensing.

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

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

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

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

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

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