



Law Enforcement

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

“CARROLL DOCTRINE,” “PC CAR SEARCH” DECISION OF HIGH COURT HOLDS THAT POLICE CAN SEARCH ALL PERSONAL EFFECTS IN CAR, WHETHER THEY BELONG TO SUSPECT OR NONSUSPECTS; RULING MAY NOT DIRECTLY IMPACT WASHINGTON STATE LAW ENFORCEMENT—In Wyoming v. Houghton, 1999 WL 181177, a 6-3 majority of the U.S. Supreme Court made a Fourth Amendment ruling on April 5, 1999 that, where police are making a warrantless search of a car based on probable cause (PC) to believe the car contains evidence or contraband (i.e., they are searching under the “Carroll Doctrine”), police may search all personal effects they come across in the car, whether those items belong to a suspect or to nonsuspects. [LED Editor’s Note: *The Washington State Supreme Court abandoned the “Carroll Doctrine” in an “independent grounds” reading of the Washington constitution, article 1, section 7, in State v. Ringer, 100 Wn.2d 686 (1983). For that reason, we question in our “comment” below whether the U.S. Supreme Court’s Houghton decision will directly impact the practices of state and local law enforcement officers in the State of Washington.*]

The Houghton case began when a Wyoming Highway Patrol officer stopped David Young for speeding. The officer saw a hypodermic syringe in Young’s pocket and then directed Young to step out of the car. Young admitted he used the syringe to shoot up illegal drugs. Backup officers then directed Young’s two passengers to get out of the car. In the ensuing search of the car, the officer found drug paraphernalia and liquid methamphetamine in a purse that one of the passengers, Sandra Houghton, had chosen to leave on the back seat when she got out of the car. As an officer had picked up the purse, she claimed ownership of it. When the officer found illegal drugs in a pouch in the purse, she denied knowledge of the pouch or drugs. Houghton was charged with and convicted of possession of the illegal drugs.

The Wyoming Supreme Court overturned her conviction, ruling that the permissible scope of a Carroll Doctrine/PC car search does not extend to the personal effects of persons in the car for whom there is no individualized suspicion of involvement in the criminal activity under investigation, except where the original suspect had the opportunity to hide contraband within the personal effects. Now, the U.S. Supreme Court has reversed the Wyoming Supreme Court, upheld the search, and reinstated the conviction.

The majority opinion of the U.S. Supreme Court, authored by Justice Scalia, explains the majority opinion is supported: a) by well-established precedent in 70 years of car search cases under the Fourth Amendment, and b) by more recent Supreme Court case law which allows officers to exercise full discretion in ordering passengers, as well as drivers, out of stopped vehicles. [LED Editor’s Note: **Compare the “independent grounds” ruling of the Washington Supreme Court in State v. Mendez, 137 Wn.2d 208 (1999) March 99 LED:04 (limiting officer discretion as to nonviator passengers).**] In addition, the majority opinion finds the privacy interests of passengers in their personal effects to be outweighed by the law enforcement interests, particularly the need for a rule that is clear and relatively simple for police and the courts to administer. Justice Scalia explains:

To require that the investigating officer have positive reason to believe that the passenger and driver were engaged in a common enterprise, or positive reason to believe that the driver had time and occasion to conceal the item in the passenger’s belongings, surreptitiously or with friendly permission, is to impose requirements so seldom met that a “passenger’s property” rule would

dramatically reduce the ability to find and seize contraband and evidence of crime. Of course these requirements would not attach (under the Wyoming Supreme Court's rule) until the police officer knows or has reason to now that the container belongs to a passenger. But once a "passenger's property" exception to car searches became widely known, one would expect passenger-confederates to claim everything as their own. And one would anticipate a bog of litigation – in the form of both civil lawsuits and motions to suppress in criminal trials – involving such questions as whether the officer should have believed a passenger's claim of ownership, whether he should have inferred ownership from various objective factors, whether he had probable cause to believe that the passenger was a confederate, or to believe that the driver might have introduced the contraband into the package with or without the passenger's knowledge. When balancing the competing interests, our determinations of "reasonableness" under the Fourth Amendment must take account of these practical realities. We think they militate in favor of the needs of law enforcement, and against a personal-privacy interest that is ordinarily weak.

Result: Reversal of Wyoming Supreme Court suppression decision; reinstatement of conviction for illegal drug possession.

LED EDITOR'S COMMENT: As we noted above in the italicized last sentence of paragraph one of this LED entry, the Houghton decision may have no direct impact on state and local officers in Washington. Since the 1983 "independent grounds" decision of our State Supreme Court in Ringer, the Carroll Doctrine has not applied to state court review of car searches by Washington officers. Accordingly, Washington officers seeking to justify a warrantless top-to-bottom, full car search based on PC to believe the car contains contraband or evidence have been required to point to exigent circumstances other than the mere mobility of the vehicle. We believe that the only published Washington Supreme Court decision upholding a PC car search (as opposed to a car search "incident to" an arrest) since Ringer was State v. Patterson, 112 Wn.2d 731 (1989) Sept. 89 LED:15. In Patterson, a majority of the Washington Supreme Court reinforced Ringer's abolition of the Carroll Doctrine under the Washington constitution. However, all members of the Court agreed that a warrantless car search of a burglary suspect's car was justified on an exigent circumstances rationale where the search occurred just a few minutes after the burglary, as the police followed a warm trail to the suspected getaway car parked outside the suspect's residence.

While there is no Carroll Doctrine under the Washington constitution, Washington officers retain relatively broad authority to search a vehicle incident to custodial arrest of an occupant of the vehicle. See State v. Stroud, 106 Wn.2d 144 (1986) Aug. 86 LED:01 and the many cases citing Stroud's "search incident" rule, which is on "independent grounds" reading of article 1, section 7 of the Washington constitution. The Stroud rule authorizes police, incident to the custodial arrest of a vehicle occupant, to search and secure the arrestee, remove all other occupants from the vehicle, and to make a relatively contemporaneous search of: (a) the passenger area of the vehicle (but not the trunk or engine compartment), and (b) any unlocked containers and personal effects located in that area.

Currently pending before the Washington Supreme Court are three cases posing subtly different categorical fact patterns for decision under the Stroud rule. The three cases were consolidated on appeal and were argued to the State Supreme Court in the fall of 1998. In one of the cases, State v. Hunnel, 89 Wn. App. 638 (Div. II, 1998) March 98 LED:08, Division Two upheld a search under the following circumstances: After arresting the driver of a car on a warrant, the officer ordered a passenger out of the car so that the officer could conduct a search of the passenger area incident to the arrest. When the passenger started to get out of the car with her purse in hand, the officer ordered her to leave the purse in the vehicle. The officer then searched the purse as part of a lawful warrantless vehicle search incident to arrest of the driver. In a second pending case, State v. Parker, 88 Wn. App. 273 (1997) Jan. 98 LED:12, Division Three of the Court of Appeals upheld a search under similar circumstances, except that in Parker the passenger left the purse in the car without being directed to do so. Presenting similar facts to Parker is a third pending case, State v. Jines, which was decided for the State by the Court of Appeals in an unpublished opinion.

It is debatable whether the U.S. Supreme Court's decision in Houghton will have any impact on the Washington Supreme Court's analysis in Hunnel, Parker and Jines. We may be guilty of over-compartmentalized thinking, but we feel that "Carroll Doctrine" decisions do not provide much help on "search incident" cases. The counterpoint to such thinking is that both set of rules are of a "bright line" nature, and the same reason - ease of understanding and administration - supports viewing each rule's fact scenario as coming within the bright line authority to search. Based on personal assessment of the current State Supreme Court, our optimistic conclusory guesses are: 1) that the State Supreme Court will find Houghton's analysis to be of only limited help in resolving these three "search incident" cases, and 2) that the State Court will reverse Hunnel and affirm Parker and Jines.

WASHINGTON STATE COURT OF APPEALS

NO JUSTIFICATION FOR FRISK OF NON-OCCUPANT-WOULD-BE-VISITOR WHO ARRIVED AT A MOTEL ROOM AS A SEARCH WARRANT WAS BEING EXECUTED THERE

State v. Lennon, ___ Wn. App. ___ (Div. III, 1999) 1999 WL 30503 (Opinion issued 01/26/99; ordered published 03/23/99)

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

On June 7, 1996, police executed a search warrant for narcotics at a Motel 6 in Moses Lake. Throughout the nearly three-hour search, people called the room, paged occupant Rick Garza or came to the door – all apparently seeking cocaine. At one point Mr. Lennon knocked at the door and asked if Rick was home. [A detective who was] an old acquaintance of Mr. Lennon asked him to come in. Mr. Lennon entered with a beer in his hand. The officers took the beer away from him and immediately patted him down. [The detective] felt a long cylindrical object in Mr. Lennon's right rear pocket, removed it and discovered it was a pipe containing residue. The left rear pocket was found to contain a tablespoon with burn marks and residue. Lab tests revealed that the residue on both objects was cocaine.

The detective also removed from the left pocket a small container filled with a white powder that was later determined to be baking soda (used to “cut” narcotics or to manufacture crack cocaine). All these items were seized as drug paraphernalia and Mr. Lennon was arrested for possession of cocaine.

Before trial, Mr. Lennon moved for exclusion of the drug paraphernalia as the fruit of an illegal search. Based on the officers’ testimony that they usually find a weapon at the residence when they execute a search warrant, the trial court concluded that the search was for officer safety and ordered the evidence admitted at trial. Mr. Lennon – a car mechanic – testified at trial that he was fixing Mr. Garza’s car and discovered the drug paraphernalia in it. He claimed he was returning the items to Mr. Garza when police searched him. The jury found him guilty of possession of cocaine and bail jumping (based on an earlier failure to appear).

ISSUE AND RULING: Did the officers have a reasonable safety concern justifying a frisk of defendant Lennon after he arrived at the scene of the search warrant execution? (**ANSWER:** No) **Result:** Reversal of Grant County Superior Court conviction for possession of cocaine.

ANALYSIS: (Excerpted from Court of Appeals opinion)

A Terry stop-and-frisk is justified when 1) the initial stop is legitimate; 2) there is a reasonable safety concern justifying a protective frisk for weapons; and 3) the scope of the frisk is limited to the protective purposes. State v. Collins, 121 Wn.2d 168 (1993) [**July 93 LED:07**]. In the case before us, Mr. Lennon challenges only the second element of the Terry test, contending the officers had no reasonable basis for believing he was armed and dangerous. (Court’s footnote: *We note that while executing a search warrant, police are justified in stopping anyone arriving at the scene so as to determine whether that person may interfere with the search and what business that person has on the scene.*)

A protective frisk is justified only when the officer can point to “specific and articulable facts” that create an objective, reasonable belief that the suspect is armed and dangerous. Generally courts are reluctant to second-guess the judgment of officers in the field and will uphold the validity of most frisks that arise from a “founded suspicion” that is neither arbitrary nor harassing. Collins, 121 Wn.2d at 173. The suspicion must be founded, however, on facts specific to the individual suspect. “Generalized suspicion” is insufficient to justify a frisk, even when the person is present at the location where the police are authorized by warrant to search. State v. Galbert, 70 Wn. App. 721 (1993) **March 94 LED:17** citing Ybarra v. Illinois, 444 U.S. 85 (1979). Further, a person’s mere proximity to a suspect independently suspected of criminal activity will not strip away Fourth Amendment protections. State v. Braodnax, 98 Wn. 2d 289 (1982).

Here the trial court made no finding that the officers felt threatened by any gesture or word from Mr. Lennon. As in Galbert, the officers testified that they commonly found weapons on the premises searched for narcotics. Not only is this fact irrelevant to the question of Mr. Lennon’s dangerousness, but it is irrelevant to the dangerousness of any person who happens to arrive at the site of an authorized search after the search has begun. The Galbert court ignored the police officers’ generalized suspicion and noted other factors indicating Mr. Galbert was not

armed or dangerous, including the facts that he did not ignore the officers or flee and did not wear clothing that could have facilitated concealing a weapon.

Similar facts face us here. According to the police testimony, Mr. Lennon arrived at the room with a can of beer in his hand, asked for Rick and accepted the invitation to enter from a known officer. Nothing in the record indicates he appeared nervous, tried to flee or made furtive gestures. The state's argument on appeal that the officers probably knew Mr. Lennon had been convicted of a felony (felonious taking of a vehicle) is specious. No officer testified to that knowledge or claimed the decision to frisk was based on such knowledge. In short, there are simply no facts to support an individualized suspicion that Mr. Lennon was armed or presently dangerous. Consequently, the frisk was unconstitutional and the trial court erred in admitting the evidence discovered.

[Some citations omitted]

LED EDITOR'S COMMENT: This was a relatively easy case for the Court of Appeals to decide. Case law here and elsewhere is relatively strong against police asserting authority to automatically frisk persons like Lennon: (a) who arrive at a premises where police are executing a search warrant, and (b) have no close connection to the premises being searched. Safety first, of course – there is no constitutional requirement that police be “dead right.” But officers in a suppression hearing seeking to justify a frisk of a would-be-visitor who comes to the door while the search is going on will -- under case law in most jurisdictions in the nation -- need to articulate objective facts demonstrating reasonable concerns that the particular non-occupant visitor being frisked could have posed a safety risk.

On the other hand, courts are split relatively evenly nationally as to whether officers have automatic authority, under the federal constitution's Fourth Amendment, to frisk non-occupants of premises when such persons are already present when police arrive to search the premises under search warrants. See Professor LaFare's "Search & Seizure" treatise (3rd Ed.) at section 4.9; and see also, Angela Overgaard, "People, Places, and Fourth Amendment Protection: The Application Of Ybarra v. Illinois To Searches of People Present During The Execution Of Search Warrants On Private Premises," 25 Loyola University of Chicago Law Journal 243 (Winter 1994) (the latter article collects many of the cases on both sides of this issue, though, as with almost all writings from academia, its author's suggestions for interpreting current law and for future development of the law come down against the police point of view). *Unfortunately for Washington law enforcement officers, the Washington State Supreme Court is one of the several state courts which have concluded that the Fourth Amendment bars automatic frisking of non-occupants who are present when police arrive to execute search warrants for controlled substances.*

The leading U.S. Supreme Court decision is Ybarra v. Illinois, 444 U.S. 85 (1979). In Ybarra, the high court ruled 6-3 that, under the Fourth Amendment, police executing a search warrant at a tavern needed to provide individualized objective indicators of dangerousness to justify frisking a tavern patron who was “merely present” in the premises when police arrived to execute a search warrant. The warrant in Ybarra authorized a search of the tavern and of its named bartender for controlled substances.

In State v. Broadnax, 98 Wn.2d 289 (1982), in a 5-3 ruling, the Washington Supreme Court ruled that Ybarra mandated an identical rule as to an adult male: (a) who was present inside the premises when police arrived to execute a heroin search warrant, but (b) who was not known to be an occupant of the premises at the time that officers performed a frisk for weapons. The officer who performed the frisk in Broadnax did not articulate any individualized justification for the frisk (which yielded a “plain feel” seizure of heroin), and the State Supreme Court majority therefore suppressed the evidence.

The U.S. Supreme Court has not revisited Ybarra since the 1979 decision to advise how that decision might apply to frisking persons during the execution of a search warrant at a non-commercial or non-public place, nor how that decision might apply to occupants of premises being searched. And neither the Washington Supreme Court nor the Washington intermediate appellate courts have ever addressed whether the Broadnax “individualized suspicion” rule applies to frisking occupants during warrant execution. We hope that prosecutors will press arguments that occupants of premises being searched for illegal drugs under a warrant are subject to automatic search, even under Broadnax’s arguably overbroad reading of Ybarra.

We restate for emphasis our assumption that officers will take what they believe to be reasonable safety precautions. However, when executing warrants, when writing reports about frisks which occur in that setting, and when preparing for suppression hearings relating to frisking persons at warrant executions, an officer should be aware that he or she will be questioned as what prior intelligence (e.g., subject known to carry weapons, subject known to be a convicted felon, etc.) or what contemporaneous observations (e.g., furtive gestures, extreme nervousness or hostility, bulky clothing, etc.) triggered the officer’s concern that the particular person frisked might be armed.

BRINGING DRUG-SNIFFING DOG TO ASSIST IN “SEARCH INCIDENT” AT A CAR HELD LAWFUL; ALSO, REMOVING ASHTRAY AFTER DOG ALERT OK’D AS PART OF SEARCH

State v. Boursaw, ___ Wn. App. ___ (Div. I, 1999) 1999 WL 106928 (Opinion issued 03/01/99; ordered published 03/16/99)

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

On August 29, 1997, Mountlake Terrace Police Officer Brian Oswalt stopped Appellant Grant Boursaw for a traffic infraction and arrested him for driving with a suspended license. After handcuffing Boursaw and placing him in the back of the patrol car, Oswalt conducted a search of the passenger compartment of Boursaw's automobile. In the unlocked glove box, Oswalt found plastic ziplock bags and several needles. Assuming these items to be narcotics paraphernalia, Oswalt called for a K-9 unit. Officer Kelly Miller-Carman and her dog Justice arrived at the scene within ten minutes. Justice did not give a positive response during a search of the exterior of the vehicle. When Miller-Carman placed Justice inside the vehicle, he gave a positive response to an area under the center of the dashboard directly beneath the ashtray. Miller-Carman removed the ashtray and discovered a plastic bag containing a substance that tested positive for methamphetamine.

The trial court denied Boursaw's motion to suppress the methamphetamine. The

court stated that "[a]n ashtray in a vehicle is designed to be removed and replaced without difficulty or damage, so I don't think removal of an ashtray would constitute dismantling of the vehicle." The court found that the search of the vehicle was reasonable because it did not exceed the scope or duration of a search incident to Boursaw's arrest.

The methamphetamine was introduced at trial, and Boursaw was convicted of one count of possession of methamphetamine with intent to manufacture or deliver. Boursaw appeals the denial of his motion to suppress.

ISSUE AND RULING: 1) Was the 10-minute delay between the arresting officer's discovery of drug paraphernalia and the arrival of K-9 unit unreasonable such as to disqualify the search as one conducted "incident to arrest?" (**ANSWER:** No, the delay was reasonable); 2) Did the officer exceed the permissible scope of a search incident to arrest in removing the vehicle's ash tray to search behind it? (**ANSWER:** No) **Result:** Affirmance of Snohomish County Superior Court conviction of possession of methamphetamine with intent to manufacture or deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1) Ten-minute delay

The United States Supreme Court held that a police officer may make a contemporaneous search of the passenger compartment of an automobile incident to the lawful custodial arrest of an occupant of the automobile. See New York v. Belton, 453 U.S. 454 (1981). The Belton court defined for automobiles the principal established in Chimel v. California, 395 U.S. 752 (1969), that the scope of a search incident to arrest extended to the area within the immediate control of an arrestee, which is defined as the area into which the arrestee might reach to grab a weapon or item of evidence.

The Washington Supreme Court addressed a search of the passenger compartment of an automobile incident to arrest of an occupant in State v. Stroud, 106 Wash.2d 144 (1986). The Stroud court held that "[d]uring the arrest process, including the time immediately subsequent to the suspect's being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence."

"At some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest." [State v. Smith, 119 Wn.2d 675 (1992) **Nov 92 LED:04**] (citing United States v. Chadwick, 433 U.S. (1977) (finding that a search of a footlocker conducted "more than an hour" after agents gained control of the locker and long after the arrestees were in custody was not a reasonable search incident to arrest); United States v. Vasey, 834 F.2d 782 (9th Cir.1987) (finding that a search of an automobile conducted 30-45 minutes after the arrestee was arrested, handcuffed, and placed in the patrol car failed to meet the contemporaneous requirement of Belton and was therefore not a reasonable search incident to arrest)]. In Smith, a 17-minute delay was reasonable where the delay was not caused by "unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene" and the officer's activities during the delay were all

incident to the arrest.

Relying on Smith, this court found that a 15-20 minute delay was not per se unreasonable. See State v. Parker, 88 Wn. App. 273, 1081 (1997), review granted, 134 Wn.2d 1024, 958 P.2d 315 (1998) [**Jan 98 LED:12**]. The court added that "it was incumbent upon [the arrestee] to offer some evidence supporting her argument the delay was caused by activities unrelated to the arrest."

There are limits on the duration of a warrantless search of an automobile incident to arrest. Such a warrantless search is impermissible once the arrestee has been removed from the scene. See State v. Boyce, 52 Wn. App. 274 (1988) [**Nov 88 LED:02**]. The Boyce court reasoned that there was no justification for such a search, stating: *We reiterate that the right to search incident to an arrest is an exception to the warrant requirement and as such must be jealously and carefully drawn, and must be confined to situations involving special circumstances. In light of Stroud and our state constitution, we hold that once Boyce was removed from the scene, there simply were no special circumstances present that justified a warrantless vehicle search as there was no possibility that Boyce could destroy evidence or grab a weapon.*

In the present case, Boursaw was still at the scene when the search was performed. Boursaw argues that Oswald's initial search incident to arrest to look for weapons and destructible evidence secured the scene; thus, the K-9 search was a search for additional evidence -- an activity not related to the arrest process -- and was not a proper search incident to arrest. Oswald's initial search of the car, Boursaw contends, removed the risk of destruction of evidence and the danger to the safety of the officers and the public. Boursaw reasons that with these dangers gone, justifications for a search incident to arrest were removed, and the officers were required to seek a warrant for the second, independent search by Justice and Miller-Carman. The State argues that adopting Boursaw's reasoning would preclude officers from requesting assistance to perform a valid search incident to arrest. The State contends that "many instances arise where officers need assistance to perform their duties safely and properly."

The State's reasoning is persuasive. We will not preclude police officers from requesting assistance to secure the scene and perform searches incident to arrest. A single officer arresting several intoxicated and unruly individuals must be allowed to request assistance to search the arrestees and a vehicle which they occupied. But this assistance is required to secure the scene. Boursaw argues that Oswald had already secured the scene when the dog search and the search behind the ashtray were performed. This case turns, therefore, on what constitutes activities related to "the securing of the suspect and the scene," and at what point is the scene sufficiently secured. Considering that Stroud explicitly allows a search of an automobile incident to arrest after the suspect is handcuffed and in the patrol car, one may conclude that the scene is not secured simply by an officer's exercise of control over the arrestee. Moreover, if we follow Boursaw's argument that the scene was secured in this case when Oswald performed the initial search, we might preclude a second officer from immediately searching, as an added precaution, the same area already searched by her fellow officer. We find that because the delay was only ten minutes and

Boursaw was at the scene, the dog search and the search behind the ashtray were not beyond the duration of a search incident to arrest. The dog search and the search behind the ashtray may be viewed not as a second independent search but as a continuation of Oswald's search. Our holding is limited to the facts of this case, and delays caused by a request for assistance might be unreasonable under differing circumstances.

2) Searching behind the ashtray

The scope of a valid search incident to arrest extends to those objects in the control of the arrestee at the time of arrest. See Smith (determining that a fanny pack in the control of the suspect immediately prior to the arrest but in control of the officer for 17 minutes before the search was within the scope of a search incident to arrest). "An object is ... within the control of an arrestee for the purposes of a search incident to an arrest as long as the object was within the arrestee's reach immediately prior to, or at the moment of, the arrest."

Stroud explicitly allows the search of the passenger compartment of an automobile incident to the arrest of an occupant. The Washington Supreme Court noted the rule suggested by Professor LaFave for automobiles: "a passenger compartment includes 'all space reachable without exiting the vehicle, without regard to the likelihood in the particular case that such a reaching was possible.'" [State v. Johnson, 125 Wn.2d 431 (1996) **March 96 LED:06**]

In Johnson, the Court found that the search of the sleeper compartment of a tractor-trailer that was accessible from the cab by an open portal was within the scope of a search incident to arrest. But a search of the engine compartment of an automobile exceeds the scope of a search incident to arrest because the engine area "is not accessible without exiting the vehicle" and not "within the arrestee's immediate control." State v. Mitzlaff, 80 Wn. App. 184 (1995) [**March 96 LED:11**]. In the present case, the area immediately behind the ashtray is within the reach of the occupants of the automobile. A driver or passenger may pull out the ashtray and reach into the area behind it without exiting the vehicle. We find that Miller-Carman's search of the area behind the ashtray did not exceed the scope of a search incident to Boursaw's arrest.

[Footnote and some citations omitted]

COURT VALIDATES ARREST OF COLVILLE TRIBAL MEMBER WHERE CITY OF OMAK OFFICERS CHASED HIM ONTO RESERVATION TRUST LAND – BUT PART OF COURT'S ANALYSIS OF EXTRATERRITORIAL ARREST AUTHORITY MAY BE OFF THE MARK

State v. Waters, ___ Wn. App. ___ (Div. III, 1999) (971 P.2d 538)

Facts: (Excerpted from Court of Appeals opinion)

The Okanogan River divides the city of Omak. The Colville Indian Reservation includes East Omak. Law enforcement in East Omak is provided primarily by the City of Omak. Mr. Waters is an enrolled member of the Colville Confederated Tribes. Frank Rogers is an Omak City Police Sergeant, a commissioned County

Deputy Sheriff, and a commissioned Colville Tribal Law Enforcement Officer. Omak Police Officer Pete Shove is also a commissioned tribal officer.

On February 20, 1997, at around midnight, Sergeant Rogers and Officer Shove were on patrol in a marked police car. In West Omak, they saw Mr. Waters' car stopped at the stoplight. When the light changed, he revved his car engine loudly, squealed its tires, and crossed the centerline toward the police. These are civil traffic infractions. The officers turned around and followed the car across the river into East Omak. They activated their emergency lights. Mr. Waters refused to stop. He raced through a residential area in East Omak, exceeding the speed limit and running stop signs. The police activated their siren.

With Sergeant Rogers and Officer Shove in pursuit, after an hour-long, high-speed chase on state highways, Mr. Waters' car turned off Highway 155 and entered Upper HUD, a tribal reservation trust property housing project in Nespelem. Sergeant Rogers, assisted by Tribal Officer Bob Merriman and Officer Shove, arrested Mr. Waters for felony eluding, driving while license suspended, driving while under the influence, and resisting arrest.

Proceedings: Waters was charged in Okanogan County Superior Court with felony eluding, DWLS, DUI, and resisting arrest. Prior to trial, Waters moved to dismiss, arguing that the City of Omak officers did not have authority to arrest him on the reservation. The then-sitting judge denied that motion.

Later, shortly before trial, that judge attempted to assign the case to a visiting judge, but Waters filed an affidavit of prejudice against the newly-assigned judge. The newly assigned judge denied the affidavit of prejudice. After a non-jury trial the judge found Waters guilty on all charges.

ISSUE AND RULING ADDRESSED IN THIS LED ENTRY: 1) Assuming for the sake of argument that the arresting officers did not have authority to arrest tribal member Waters on reservation land, did the superior court have subject matter jurisdiction to try him? (ANSWER: Yes); 2) Did the City of Omak officers have authority to pursue Waters onto reservation land, arrest him and take him off the reservation land to jail? (ANSWER: Yes). Result: Reversal of Okanogan County Superior Court convictions of Thomas Lawrence Waters, Jr. for felony eluding, DWLD, DUI, and resisting arrest; the reversal was on grounds that Waters' affidavit of prejudice against the visiting judge should have been granted (that issue will not be addressed in this LED entry); case remanded for re-trial.

COURT'S ANALYSIS AND COMMENTARY BY LED EDITOR:

LED EDITOR'S INTRODUCTORY NOTE: Defendant raised several jurisdictional issues which have not previously been addressed by the Washington courts. We agree with the Court of Appeals that Waters was wrong on each of his jurisdictional arguments. However, we are not convinced that the Court of Appeals correctly analyzed all subparts of those issues. We will not attempt a thorough critique in this LED entry of the Court of Appeals analysis, part of which we believe is wrong and part of which we find confusing. Instead, we will just briefly address the jurisdictional issues unsuccessfully raised by defendant Waters, mixing our commentary into our discussion of the Court's analysis.

1. Assuming for the sake of argument that Waters was unlawfully arrested on the reservation and/or unlawfully extradited from the reservation, would this preclude trying him in a Washington court? No. What is known as the “Ker-Frisbie” doctrine in case law nationally establishes that an illegal arrest or unlawful extradition does not require dismissal of charges. The Ker-Frisbie issue has not arisen previously in Washington in relation to extradition of Indians from in-state reservations, but other state courts have found the doctrine to apply in this context. The Court of Appeals does not have to decide whether the “Ker-Frisbie” doctrine applies to allegedly illegal extradition from Indian reservations, because it finds the arrest and “extradition” to be lawful, per the analysis described in part below.

2. Were the pursuing officers in lawful fresh pursuit? The Court of Appeals discussion of “fresh pursuit” authority seems disjointed and confusing, including a suggestion at one point that what triggers “fresh pursuit” authority is a felony committed in the home jurisdiction. Of course, intrastate fresh pursuit authority under Washington law is much broader, as RCW 10.93.120 provides:

1. Any peace officer who has authority under Washington law to make an arrest may proceed in fresh pursuit of a person a) who is reasonably believed to have committed a violation of traffic or criminal laws, or b) for whom such officer holds a warrant of arrest, and such peace officer shall have the authority to arrest and to hold such person in custody anywhere in the state.
2. The term “fresh pursuit,” as used in this chapter, includes, without limitation, fresh pursuit as defined by the common law. Fresh pursuit does not necessarily imply immediate pursuit, but pursuit without unreasonable delay.

Clearly, the City of Omak officers were well within this authority as they pursued Waters out of the City of Omak.

3. Did the City of Omak officers have valid tribal commissions authorizing them to act on the reservation? Yes, the tribe had issued commissions to the officers authorizing them to make an arrest on the reservation.

4. Did the tribal commissions given to the City of Omak officers act as “consents” to exercise of authority on the reservation under Washington’s Mutual Aid Peace Officer Powers Act, RCW 10.93.070(1)? Yes, says the Court of Appeals. This makes no sense, says your LED editor. Your editor’s view is that the “consent to authority” provision of the Mutual Aid Peace Officer Powers Act does not apply to tribal agencies. (See Suarez v. Newquist, 70 Wn. App. 827 (Div. III, 1993). Nothing in the Court of Appeals brief discussion of the “consent” question in Waters suggests that there is any legal support for the suggestion that chapter 10.93’s consent-to-authority provisions apply to tribal agencies. Tribes can commission state and local officers to enforce tribal laws; they cannot “consent” to exercise of authority pursuant to chapter 10.93 RCW [or so your LED editor believes].

5. Did the Colville tribe have extradition procedures with which the arresting officers failed to comply? No, says the Court of Appeals. There is very limited legal authority from other states supporting the view that, if a tribe has an extradition procedure, the state and local police should defer to it. Here, however, the Colville extradition “procedure” appeared to allow for state and local police to go onto the reservation, either in hot pursuit or on a “cold” intrusion to execute an arrest warrant, and to take the arrestee off the reservation to jail (the Court of Appeals notes that

the Colville Tribe does not have its own jail and therefore routinely uses the Omak jail). Hence, the Court of Appeals holds, there was no violation of tribal extradition procedures.

BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) WARRANTLESS NIGHTTIME CHECK OF GARAGE NEAR SIDE-YARD DRIVEWAY HELD BY COURT OF APPEALS TO HAVE IMPERMISSIBLY INVADED CURTILAGE AND THUS TO HAVE VIOLATED DEFENDANT’S RIGHTS UNDER THE FOURTH AMENDMENT; BUT STATE SUPREME COURT THEN PUTS RULING ON HOLD – In State v. Ross, 91 Wn. App. 814 (Div. II, 1998), the Court of Appeals ruled on August 7, 1998 that officers violated defendant’s privacy rights under the Fourth Amendment when the officers went into Ross’s side driveway and checked out the exterior of a garage abutting the driveway. **However, on February 3, 1999, the State Supreme Court vacated the decision and remanded the case to the Court of Appeals with the following directions for reconsideration of its decision:**

[Reconsider]...in light of State v. Rose, 128 Wn.2d 388-401, 909 P.2d 280 (1996) [March 96 LED:02] (generally, no search occurs under “open view” doctrine when law enforcement officer simply observes or detects something from a lawful vantage point; an officer with legitimate business may enter impliedly open access routs to a house; the discovery of evidence need not be inadvertent, and is not unconstitutional solely because the officer is looking for evidence of a crime) and State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) [June 94 LED:04] (unchallenged findings of fact are verities on appeal).

The facts and trial court proceedings in the Ross case were described by the Court of Appeals as follows: After dark, officers went to the neighborhood where Ross’s home was located. Based on an anonymous informant’s report, the officers suspected Ross of growing marijuana. The officers wore plain clothes, and they drove an unmarked car. They parked the car on a street to the west of Ross’s house near a U-shaped driveway. The driveway led to a side access to the house. The front door of the house was on the south side of the house. The front door could be accessed by parking on a street to the south of the house and approaching the house from that vantage point, or it could be accessed by parking in the U-shaped side driveway and then entering an unlocked side gate and walking along a sidewalk around to the front door.

The officers walked around to the bottom of the “U” of the side driveway. At that point, the officers were standing next to a garage which was located just to the west of Ross’s house. One of the officers could smell growing marijuana, while the other was unable to smell marijuana, but noticed mold and mildew. The officers then withdrew from the property via the driveway without further intruding onto the property. Later that same evening, the officers came back to the house and retraced their steps. This time both officers were able to smell growing marijuana.

The officers again withdrew from the property via the U-shaped side driveway. The officers then obtained a warrant based primarily on their observations from the driveway. The warrant was executed, and officers found growing marijuana in both the garage and house, plus other evidence of a grow operation.

Ross was charged under the UCSA for growing marijuana. He moved to suppress the evidence prior to trial, arguing that the officers had violated his privacy rights by approaching his garage at nighttime via the route they used. Ross argued that the officers should have approached his premises via a “front yard” sidewalk at the southeast corner of his property, rather than from the side driveway. However, the trial court found that “the deputies used the most apparently normal, most direct access route to the house.” Thus, the trial court denied the motion, and Ross was convicted.

Ross then appealed to the Court of Appeals. The Court of Appeals reversed the Pierce County Superior Court suppression ruling, declaring, among other things, that the officers were not on a “normal access route” “impliedly open to the public” when they made their plainclothes, night-time walk along the U-shaped side driveway. We won’t go into the details of the Court of Appeals analysis in this **LED** entry. We believe that the Court of Appeals committed error by rejecting the trial court’s factual finding that the officers were in fact on a normal access route impliedly open to the public when they approached Ross’s garage. Appellate courts are required under Washington case law to adhere to trial court findings of fact which are either unchallenged or are supported by substantial evidence. In the Ross case, the trial court findings were unchallenged and were supported by substantial evidence, so it appears that the Court of Appeals erred in making its own finding on whether the officers were on a normal access route impliedly open to the public.

The prosecutor petitioned the State Supreme Court for review, and, as is stated in the sentence in bold above in the first paragraph of this **LED** entry, the Supreme Court remanded the case to the Court of Appeals for reconsideration in light of State v. Rose and State v. Hill. **LED EDITOR’S NOTE: The remand order by the Supreme Court appears to leave the Court of Appeals little choice but to reverse itself.]**

Result of Court of Appeals decision: Reversal of Pierce County Superior Court conviction for manufacturing a controlled substance. Status: The State Supreme Court remanded the case to the Court of Appeals for further review.

LED EDITOR’S COMMENT: From our review of property diagrams and the prosecutor’s briefing in the Ross case, we believe that the original Court of Appeals opinion is wrong. However, **OFFICERS BEWARE.** Washington courts sometimes take a dim view (so to speak) of police snooping around a residence where that snooping occurs in the dark of night rather than during the day. The case law in Washington and elsewhere is unsettled as to whether time of day should make a difference. Just be aware for now that, in light of the unsettled nature of the appellate case law, if you have a close question as to the right of public access to a certain part of the suspect’s property, you have a better chance of successfully claiming no privacy violation if your warrantless approach to the property occurs in the daytime.

(2) STRIP SEARCH OF YOUNG DRUG DEALER AT SCENE OF ARREST HELD UNLAWFUL – In State v. Rulan Clewis, ___ Wn. App. ___ (Div. I, 1999) [970 P.2d 821], the Court of Appeals holds unlawful a strip search of a young drug dealer at the scene of his arrest. The Court describes the facts and trial court proceedings as follows:

Rulan called an apartment while several officers, armed with a warrant, were searching it. He engaged in a conversation with one of the officers and agreed to sell the officer \$60 worth of cocaine. He went to the apartment and knocked on

the door. Officers arrested him as he opened the door. They placed him on the ground and checked his mouth for drugs. Then, they took him to the apartment's bathroom and told him to take off all his clothes. When Rulan was naked, the officers had him bend over and cough so that they could check his buttocks for drugs. The officers found cocaine in one of Rulan's shoes. [Court's Footnote: As the State conceded during oral argument for this appeal, it is unclear from the record whether the officers looked into Rulan's shoes before Rulan removed all of his other clothing, or afterward. It is only clear that the cocaine was discovered "during the course of this strip search[.]"]

Rulan petitioned the trial court to suppress the cocaine evidence because it resulted from an illegal search. The trial court found that Rulan had been strip searched, but that "the search was reasonable under the circumstances and under the statute and carried out in a reasonable manner." The court did not suppress the evidence.

Analyzing this case under the Washington Constitution, article 1, section 7, the Court of Appeals finds none of the exceptions to the search warrant requirement to be applicable. The Court holds that search of the person may be conducted incident to arrest but not a strip search with the intensity of that conducted on the young Rulan Clewis. [Theoretically irrelevant facts: birth date:02/12/80; date of search: sometime in 1997.] Furthermore, there were no exigent circumstances which would justify the warrantless search. And while the drugs were found in one of defendant's shoes, an area presumably within the permissible scope of an on-scene search incident to arrest, there is no way to separate the unlawful strip search from the shoe search under these facts, the Court of Appeals holds.

Moreover, while Washington statutory provisions in chapter 10.79 RCW permit strip searches in some circumstances (including arrests of drug dealers), the statute applies only to searches at detention facilities. A warrantless strip search at the scene of an arrest is generally not permitted, the Rulan C. Court holds.

Finally, the Court of Appeals rejects the State's argument for application of an "inevitable discovery" exception. The Court holds that the State waived the argument by not making the argument at the trial court level.

Result: Reversal of King County Superior Court conviction of Rulan Clewis for possession of cocaine with intent to deliver. Status: The King County Prosecuting Attorney has moved the Court of Appeals to make this opinion unpublished and therefore non-precedential; the motion was still pending at LED deadline.

LED EDITOR'S COMMENTS:

1) **Lawfulness of strip search in "search incident to arrest"**. The Court of Appeals ruling is grounded in the heightened privacy protection of the Washington Constitution, article 1, section 7, so Fourth Amendment case law is of limited value in evaluating the Exclusionary Rule aspect of this case (note, however, that the Fourth Amendment lurks as a source of civil liability under the federal Civil Rights laws). Nonetheless, concerned that Division One might be setting a rule at odds with case law in other jurisdictions elsewhere, we attempted some research of Fourth Amendment case law regarding strip

searching of arrestees at the scene of the arrest. There appears to be very little case law on point, but our “gut” tells us that the strip search in this case went too far.

Case law in this state and in other jurisdictions generally permits a very thorough “search incident” of the arrestee’s clothing and of the personal effects that are on his or her person or in the “lunge area.” However, we can’t find any cases permitting body-cavity-inspection-type strip searches at the scene of arrest.

On a generalized reasonableness analysis, we think that the officers lawfully could have thoroughly frisked Rulan Clewis through his outer clothing, including his crotch and buttocks areas. At that point, if they had detected something that was consistent with a weapon, we believe they could have proceeded, on an exigent circumstances basis, to pull down his underwear to retrieve the weapon before transporting him to the jail or stationhouse.

If, instead, their frisking had detected something consistent with illegal drugs, they could have directed him to retrieve the suspected contraband himself. If he had refused such a directive, their choices would have been: (A) to obtain a telephonic warrant authorizing a strip search at the scene; or (B) to allow him to put his pants back on, and to then take him to the jail, where state law permits a strip search of persons booked into holding, detention or correctional facilities for offenses involving possession of drugs or controlled substances. See RCW 10.79.130(2)(c).

The Division One Court of Appeals panel in Clewis cites, but does not discuss, the Division Three Washington Court of Appeals decision in State v. Colin, 61 Wn. App. 111 (Div. III, 1991) Oct. 91 LED:14. In Colin, Division Three upheld a strip search conducted at a residence where officers were executing a search warrant for cocaine. The person strip searched in Colin was identified in a search warrant as a person to be searched. Division Three declined to establish a “bright line” rule for strip searching in this circumstance, employing instead a generalized reasonableness test.

The Colin Court thus stated that the lawfulness of such a search depends on a number of factors including, but not limited to: (1) whether the drugs could be readily concealed in a manner that they could not otherwise be found; (2) whether the search was conducted without bodily touching; (3) whether the search involved only persons of the same sex as the person searched; and (4) whether the search was conducted in privacy such that only those conducting the search could observe it. Division Three upheld the strip search conducted in that case, as the evidence on all of the listed factors was favorable to the government’s case.

While the evidence relating to the nature of the item of item sought and the manner of searching was similar in the two cases, Colin is readily distinguished from Rulan C. Because the subject of the search in Rulan C. was not a person named in a search warrant, the ruling in Colin does not support the search of arrestee Rulan C., the Court of Appeals holds in Clewis.

2. Issue of inevitable discovery exception to Exclusionary Rule. Appellate courts have broad discretion to reject an argument not raised in the trial court proceedings. Generally, however, where a new theory is supported by the record, and where such new

theory merely provides an alternative justification for upholding the trial court decision, the appellate courts permit the party to raise it. In Rulan C., the prosecutor had a very strong argument under the “inevitable discovery” exception to the Exclusionary Rule. However, the Court of Appeals rejects the argument on grounds that it was not made at the trial court level.

It was certain that Rulan C. would have been arrested for a drug crime, and, as such, would have been subjected to a strip search at the jail. Thus, it seems inevitable that the illegal drugs in his shoes would have been found at that point, a point toward which he was inexorably proceeding from the moment he walked in the door of the house. We suspect that the Division One panel’s sensibilities were deeply offended by the cheek-spreading strip search conducted on Rulan C., and perhaps by the youth of the arrestee (though the legal analysis portion of the opinion does not discuss the fact of his age). These factors probably help explain why the Division One panel was not willing to consider the prosecutor’s strong alternative theory of” inevitable discovery.”

WHEN FOREIGN NATIONALS ARE SUBJECTED TO CUSTODIAL ARREST IN THE U.S., THE ARRESTEES SHOULD BE ADVISED OF THE RIGHT TO SEEK ASSISTANCE FROM THEIR CONSULATES; WHERE THE FOREIGN COUNTRY IS A “MANDATORY NOTIFICATION COUNTRY,” THE CONSULATE MUST BE NOTIFIED OF THE FACT OF THE ARREST DESPITE THE ARRESTEE’S WISHES

1. Introduction

For over 25 years, the United States has been a party to a multinational treaty known as the Vienna Convention on Consular Relations. The treaty regulates the functions of consulates in at least 144 nations. Article 36 of the Vienna Convention requires that foreign nationals subjected to custodial arrest by police of another country be advised by the arresting police that the arrestees may, in their discretion, obtain assistance from their consulate located in the country of arrest. Additional treaty obligations between the U.S. and certain countries mandate notification of consular representatives regardless of the wishes of the arrestee.

A “foreign national” in the U.S. is anyone—whether tourist, visitor, migrant worker with a temporary work permit, alien resident, illegal alien, asylum-seeker, or person-in-transit—who has (a) not renounced citizenship in his or her country of origin or (b) become a naturalized immigrant in the United States.

The treaty requirements discussed in this LED entry have been in place for many years, but most state and local police throughout the U.S. have not been made aware of the requirements. In recent years, some criminal defense attorneys, particularly those involved in death penalty litigation, have argued for reversal of convictions based on police failure to comply with the treaty requirements discussed here. To date, a generally successful prosecution response to such arguments is that the treaties establish rights in the foreign governments and their consuls, not in the foreign nationals. Thus, the argument goes, no rights of the defendants have been violated, and therefore the defendants have no remedy for the violations. There is increasing concern among government attorneys that this argument may not continue to hold its ground in the face of increasing litigation of the issue. In addition, because U.S. citizens abroad are protected by the same treaties, there is growing concern that continuing non-compliance with the treaties will have other negative consequences politically and legally.

Earlier this year, Pam Loginsky, who acts as both a deputy prosecuting attorney in Kitsap County and as a staff attorney to the Washington Association of Prosecuting Attorneys (WAPA), authored a manual on "Consular Notification." This month's LED entry is an attempt to: (A) summarize key information in Ms. Loginsky's WAPA manual and U.S. State Department's explanatory materials; and (B) provide directions to the Training Commission's Internet Home Page link to the U.S. Department of State's Home Page information on "Consular Notification."

2. When consular notification is at the option of the foreign national

When U.S. police (whether federal, state or local) make a custodial arrest (this does not include a Terry seizure or traffic stop, but it does include a situation where a person is placed under guard in a hospital) of foreign nationals, the police are required, as are the police of other countries when they arrest U.S. nationals, to advise the foreign nationals of the right to consular assistance. [See page 20 of this LED for the wording of the advisement relating to consular notification at the option of the arrestee. The U.S. State Department Home Page on the Internet contains several foreign language translations of the advisements. See Part 4 of this LED entry below for help in accessing the Home Page.] If the arrestee states that he or she wishes to consult with consular representatives, the arresting agency is required to accommodate that request.

Ordinarily, if the arrestee has not already volunteered the information, the officer would inquire, *after arrival at the station house but before any station house interrogation*, as to the arrestee's possible foreign national status; this could be done at the same time that the officer gives the person the Miranda warnings, or, if no interrogation is to be attempted, at or prior to booking. (But "better late than never," the State Department advises.) The giving of Miranda warnings and the giving of the advisement about consul notification achieve completely different purposes. Thus, the giving of one does not in any way substitute for the giving of the other.

Officers are not required to ask every arrestee as to his or her possible foreign national status, but officers should ask where there are indicators such as significant difficulty with the English language. Generally, if an arrestee claims to be a U.S. citizen, officers can rely on that claim. And if the arrestee refuses to answer the question, the officer need investigate no further, but should note the response. A passport or other travel document will be considered sufficient absent some conflicting information.

Advising of the right to consular notification and the actual making of the notification of the consulate are considered to be the primary responsibility of the police agency which makes the custodial arrest. Notification of the consul is best made by filling out the form fax sheet created by the U.S. Department of State. A model fax form, fax phone numbers and locations of consul offices in the U.S. can be found by going to the Training Commission's Internet Home Page which has a link to "Consular Notification" information provided by the U.S. Department of State. See part 4 of this LED entry below for the Home Page addresses.

The police themselves should make the initial communication, rather than merely giving the arrestee access to a phone. Police should inform the arrestee that the communication has been made and should keep a written record showing that the foreign national was advised, noting his or her response to the advisement and pertinent facts regarding response by the consul, if any.

While some consulates may choose not to provide any assistance to a foreign national, assistance from consul representatives to their foreign nationals may take the form of legal advice and assistance (though they may not act as legal counsel in court), translation,

notification of family members, transferring documentation from one country to another, and observing court hearings. Foreign consul representatives may address a court on matters of release to the same extent that a family member might do so. Foreign consular officers or representatives are entitled to visit with and communicate with the foreign national subject to reasonable jail and prison regulations (visits and other communications generally should be afforded similar privacy to the arrestee's communications with defense attorneys). Police may require that those who claim to be foreign consular representatives present an official identification card which is subject to verification through the State Department on phone numbers available on the State Department Internet Home Page.

3. When consular notification is mandatory

In addition to the Vienna Convention, additional agreements between the U.S. and over 50 nations require that, regardless of the wishes of the arrestee, the police in the arresting country notify the consular representatives of the arrest. See Part 5 below for (a) the wording of the police advisement relating to mandatory consular notification, and (b) a list of all of the "mandatory notification countries." Where an arrestee is seeking asylum in the U.S., the police agency should not reveal that fact in its mandatory notification to the foreign consul.

4. State Department Internet Home Page

As noted above, the Criminal Justice Training Commission Internet Home Page at <http://www.wa.gov/cjt> contains a "Consular Notification" link in two places – "Link To Other Law Enforcement Sites" and "Download Law Enforcement Digest Files" to the U.S. State Department Internet Home Page. Also, the State Department Internet Home Page may be directly accessed at <http://www.state.gov> (click on the "Index," then click on "C," and then click on "Consular Notification and Access"). The State Department Home Page is very user-friendly and contains the information discussed and referenced in this LED entry, plus more.

5. Miscellaneous Additional Items of Import

Suggested Statements to Arrested or Detained Foreign Nationals

Statement 1:

When Consular Notification Is at the Foreign National's Option

As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?

Statement 2:

When Consular Notification Is Mandatory

Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.

Steps To Follow When a Foreign National Is Arrested or Detained¹

1. Determine the foreign national's country. Normally, this is the country on whose passport or other travel document the foreign national travels.

2. If the foreign national's country is not on the mandatory notification countries:
 - i) Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. (Statement 1, above)
 - ii) If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay.
3. If the foreign national's country is on the list of mandatory notification countries:
 - i) Notify that country's nearest consular officials. without delay, of the arrest/detention.
 - ii) Tell the foreign national that you are making this notification. (Statement 2, above)
4. Keep a written record of the provision of notification and actions taken.

¹ These steps should be followed for all foreign nationals, regardless of their immigration status.

**Consular Notification and Access:
Instructions for Arrests and Detentions of Foreign Nationals**

For more detailed instructions and legal material, see *Consular Notification and Access*, Department of State publication number 10518, released January 1998. The complete publication is available at http://www.state.gov/www/about_state/ca_prelim.html. Questions may also be addressed to:

Assistant Legal Adviser for Consular Affairs
L/CA, Room 5527A
U.S. Department of State
Washington, DC 20520
telephone 202-647-4415
fax 202-736-7559

Urgent after-hours inquiries may be directed to: 202-647-1512
(State Department Operations Center)

Mandatory Notification Countries

Antigua and Barbuda	Gambia, The	Mauritius	Slovakia
Armenia	Georgia	Moldova	Tajikistan
Azerbaijan	Ghana	Mongolia	Tanzania
Bahamas, The	Grenada	Nigeria	Tonga
Barbados	Guyana	Philippines	Trinidad and Tobago
Belarus	Hong Kong	Poland ²	Turkmenistan
Belize	Hungary	Romania	Tuvalu
Brunei	Jamaica	Russia	U.S.S.R. ³
Bulgaria	Kazakhstan	Saint Kitts and Nevis	Ukraine
China ¹	Kiribati	Saint Lucia	United Kingdom
Costa Rica	Kuwait	Saint Vincent/Grenadines	Uzbekistan
Cyprus	Kyrgyzstan	Seychelles Dominica	Zambia
Czech Republic	Malaysia	Sierra Leone	Zimbabwe
Fiji	Malta	Singapore	

¹ Does not include Republic of China (Taiwan) passport holders.

² Mandatory for nonpermanent residents only.

³ Passports may still be in use.

NEXT MONTH

In 21 years of editing the LED, we should have learned that nothing makes a month pass more quickly than promising for the following month an article which we have not yet begun. We have now started writing the article we promised to Officer Phil Wall and our LED readership regarding police authority over non-serious violators who are unable to reasonably identify themselves. We are finding the case law here and elsewhere to be quite limited, and the statutory scheme to be incomplete, but we expect to have an article ready in time for the June 99 LED.

In addition, the June 99 LED will include an entry on Hudson v. City of Wenatchee, ___ Wn. App. ___ (Div. III, 1999), an April 6, 1999 decision by Division Three of the Washington Court of Appeals upholding the summary judgment dismissal of a lawsuit brought by a locksmith service against the City of Wenatchee – the Hudson Court rules in favor of an informal and unwritten policy of the Wenatchee Police Department allowing its police officers to open locked vehicle doors in non-emergency situations.

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