# Law Enforcement Digest

**April 2002**

## HONOR ROLL

**541st Session, Basic Law Enforcement Academy – October 9, 2001 through February 22, 2002**

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Best Overall: Michael H. Melzo - Milton Police Department
Best Academic: Gregory M. Grannis - Bellevue Police Department
Best Firearms: Timothy G. Owens - Seattle Police Department
Tac Officer: Deputy Patrick McCurdy - King County Sheriff's Office

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## CJTC INTERNET HOME PAGE HAS MOVED

The Criminal Justice Training Commission internet home pages has been moved to [http://www.cjtc.state.wa.us].

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## UNITED STATES SUPREME COURT

### TERRY "TOTALITY OF CIRCUMSTANCES" REASONABLE SUSPICION TEST CLARIFIED AS COURT CRITICIZES 9TH CIRCUIT'S "DIVIDE-AND-CONQUER" APPROACH TO FACTS

U.S. v. Arvizu, 122 S.Ct. 744 (2002)

Facts and Proceedings below: (Excerpted from lead opinion by U.S. Supreme Court)

> On an afternoon in January 1998, Agent Clinton Stoddard was working at a border patrol checkpoint along U.S. Highway 191 approximately 30 miles north of Douglas, Arizona. Douglas has a population of about 13,000 and is situated on the United States-Mexico border in the southeastern part of the State. Only two highways lead north from Douglas. Highway 191 leads north to Interstate 10, which passes through Tucson and Phoenix. State Highway 80 heads northeast through less populated areas toward New Mexico, skirting south and east of the portion of the Coronado National Forest that lies approximately 20 miles northeast of Douglas. *[Court's footnote: Coronado National Forest consists of 12 widely scattered sections of land covering 1,780,000 acres in southeastern Arizona and southwestern New Mexico. The section of the forest near Douglas includes the Chiricahua, Dragoon, and Peloncillo Mountain Ranges.]*
>
> The checkpoint is located at the intersection of 191 and Rucker Canyon Road, an

unpaved east-west road that connects 191 and the Coronado National Forest. When the checkpoint is operational, border patrol agents stop the traffic on 191 as part of a coordinated effort to stem the flow of illegal immigration and smuggling across the international border. Agents use roving patrols to apprehend smugglers trying to circumvent the checkpoint by taking the back roads, including those roads through the sparsely populated area between Douglas and the national forest. Magnetic sensors, or "intrusion devices," facilitate agents' efforts in patrolling these areas. Directionally sensitive, the sensors signal the passage of traffic that would be consistent with smuggling activities.

Sensors are located along the only other northbound road from Douglas besides Highways 191 and 80: Leslie Canyon Road. Leslie Canyon Road runs roughly parallel to 191, about halfway between 191 and the border of the Coronado National Forest, and ends when it intersects Rucker Canyon Road. It is unpaved beyond the 10-mile stretch leading out of Douglas and is very rarely traveled except for use by local ranchers and forest service personnel. Smugglers commonly try to avoid the 191 checkpoint by heading west on Rucker Canyon Road from Leslie Canyon Road and thence to Kuykendall Cutoff Road, a primitive dirt road that leads north approximately 12 miles east of 191. From there, they can gain access to Tucson and Phoenix.

Around 2:15 p.m., Stoddard received a report via Douglas radio that a Leslie Canyon Road sensor had triggered. This was significant to Stoddard for two reasons. First, it suggested to him that a vehicle might be trying to circumvent the checkpoint. Second, the timing coincided with the point when agents begin heading back to the checkpoint for a shift change, which leaves the area unpatrolled. Stoddard knew that alien smugglers did extensive scouting and seemed to be most active when agents were en route back to the checkpoint. Another border patrol agent told Stoddard that the same sensor had gone off several weeks before and that he had apprehended a minivan using the same route and witnessed the occupants throwing bundles of marijuana out the door.

Stoddard drove eastbound on Rucker Canyon Road to investigate. As he did so, he received another radio report of sensor activity. It indicated that the vehicle that had triggered the first sensor was heading westbound on Rucker Canyon Road. He continued east, passing Kuykendall Cutoff Road. He saw the dust trail of an approaching vehicle about a half mile away. Stoddard had not seen any other vehicles and, based on the timing, believed that this was the one that had tripped the sensors. He pulled off to the side of the road at a slight slant so he could get a good look at the oncoming vehicle as it passed by.

It was a minivan, a type of automobile that Stoddard knew smugglers used. As it approached, it slowed dramatically, from about 50-55 to 25-30 miles per hour. He saw five occupants inside. An adult man was driving, an adult woman sat in the front passenger seat, and three children were in the back. The driver appeared stiff and his posture very rigid. He did not look at Stoddard and seemed to be trying to pretend that Stoddard was not there. Stoddard thought this suspicious because in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave. Stoddard noticed that the knees of the two children sitting in the very back seat were unusually high, as if their feet were propped up on some cargo on the floor.

At that point, Stoddard decided to get a closer look, so he began to follow the

vehicle as it continued westbound on Rucker Canyon Road toward Kuykendall Cutoff Road. Shortly thereafter, all of the children, though still facing forward, put their hands up at the same time and began to wave at Stoddard in an abnormal pattern. It looked to Stoddard as if the children were being instructed. Their odd waving continued on and off for about four to five minutes.

Several hundred feet before the Kuykendall Cutoff Road intersection, the driver signaled that he would turn. At one point, the driver turned the signal off, but just as he approached the intersection he put it back on and abruptly turned north onto Kuykendall. The turn was significant to Stoddard because it was made at the last place that would have allowed the minivan to avoid the checkpoint. Also, Kuykendall, though passable by a sedan or van, is rougher than either Rucker Canyon or Leslie Canyon roads, and the normal traffic is four-wheel-drive vehicles. Stoddard did not recognize the minivan as part of the local traffic agents encounter on patrol, and he did not think it likely that the minivan was going to or coming from a picnic outing. He was not aware of any picnic grounds on Turkey Creek, which could be reached by following Kuykendall Cutoff all the way up. He knew of picnic grounds and a Boy Scout camp east of the intersection of Rucker Canyon and Leslie Canyon roads, but the minivan had turned west at that intersection. And he had never seen anyone picnicking or sightseeing near where the first sensor went off.

Stoddard radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling. After receiving the information, Stoddard decided to make a vehicle stop. He approached the driver and learned that his name was Ralph Arvizu. Stoddard asked if Arvizu would mind if he looked inside and searched the vehicle. Arvizu agreed, and Stoddard discovered marijuana in a black duffel bag under the feet of the two children in the back seat. Another bag containing marijuana was behind the rear seat. In all, the van contained 128.85 pounds of marijuana, worth an estimated $ 99,080.

Arvizu was charged with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) (1994 ed.). He moved to suppress the marijuana, arguing among other things that Stoddard did not have reasonable suspicion to stop the vehicle as required by the Fourth Amendment. After holding a hearing where Stoddard and Arvizu testified, the District Court for the District of Arizona ruled otherwise. It pointed to a number of the facts described above and noted particularly that any recreational areas north of Rucker Canyon would have been accessible from Douglas via 191 and another paved road, making it unnecessary to take a 40-to-50-mile trip on dirt roads.

The Court of Appeals for the Ninth Circuit reversed. In its view, fact-specific weighing of circumstances or other multifactor tests introduced "a troubling degree of uncertainty and unpredictability" into the Fourth Amendment analysis. It therefore "attempted . . . to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involving" Arvizu. After characterizing the District Court's analysis as relying on a list of 10 factors, the Court of Appeals proceeded to examine each in turn. It held that 7 of the factors, including Arvizu's slowing down, his failure to acknowledge Stoddard, the raised position of the children's knees, and their odd waving carried little or no weight in the reasonable-suspicion calculus. The remaining factors -- the road's use by smugglers, the temporal proximity between Arvizu's trip and the agents' shift change, and the

use of minivans by smugglers -- were not enough to render the stop permissible.

[Arvizu's name substituted for references to "respondent"]

ISSUE AND RULING: Do the totality of the facts, considered in light of the investigating officer's experience and training, establish reasonable suspicion to believe Arvizu was transporting illegal drugs? (ANSWER: Yes, rules a unanimous Supreme Court)

Result: Reversal of Ninth Circuit Court of Appeals suppression ruling; remand of case, presumably for sentencing on Arvizu's guilty plea.

ANALYSIS: (Excerpted from U.S. Supreme Court opinion)

> The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. Terry v. Ohio. Because the "balance between the public interest and the individual's right to personal security," tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "'may be afoot.'"
>
> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." Although an officer's reliance on a mere "'hunch'" is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.
>
> Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. But we have deliberately avoided reducing it to "'a neat set of legal rules.' " In U.S. v. Sokolow, 490 U.S. 1 (1989), for example, we rejected a holding by the [Ninth Circuit] Court of Appeals that distinguished between evidence of ongoing criminal behavior and probabilistic evidence because it "created unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment."
>
> We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to "no weight." Terry, however, precludes this sort of divide-and-conquer analysis. The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation."
>
> The [Ninth Circuit's] view that it was necessary to "clearly delimit" an officer's consideration of certain factors to reduce "troubling . . . uncertainty," also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field. Even if in many instances the

factual "mosaic" analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another, "two decisions when viewed together may usefully add to the body of law on the subject."

But the [Ninth Circuit's] approach . . . seriously undercuts the "totality of the circumstances" principle which governs the existence…of "reasonable suspicion." Take, for example, the [Ninth Circuit's] positions that Arvizu's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no 'special circumstances' rendering 'innocent avoidance . . . improbable.'" We think it quite reasonable that a driver's slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.

In another instance, the [Ninth Circuit] chose to dismiss entirely the children's waving on grounds that odd conduct by children was all too common to be probative in a particular case. See 232 F.3d at 1249 ("If every odd act engaged in by one's children . . . could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes"). Yet this case did not involve simply any odd act by children. At the suppression hearing, Stoddard testified about the children's waving several times, and the record suggests that he physically demonstrated it as well. The District Court Judge, who saw and heard Stoddard, then characterized the waving as "methodical," "mechanical," "abnormal," and "certainly . . . a fact that is odd and would lead a reasonable officer to wonder why they are doing this." Though the issue of this case does not turn on the children's idiosyncratic actions, the Court of Appeals should not have casually rejected this factor in light of the District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom.

[W]e hold that Stoddard had reasonable suspicion to believe that Arvizu was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that Arvizu had set out from Douglas along a little-traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that Arvizu intended to pass through the area at a time when officers would be leaving their back roads patrols to change shifts. The likelihood that Arvizu and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally, for the reasons we have given, Stoddard's assessment of Arvizu's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

> Arvizu argues that we must rule in his favor because the facts suggested a family in a minivan on a holiday outing. A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. Undoubtedly, each of these factors alone is susceptible to innocent explanation, and some factors are more probative than others. Taken together, we believe they sufficed to form a particularized and objective basis for Stoddard's stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.

[Some text, citations and footnote omitted; Arvizu's name inserted]

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## NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

**ALTHOUGH UNATTACHED GARAGE NOT COVERED BY SEARCH WARRANT OFFICERS WERE EXECUTING AT HOUSE, EXIGENT CIRCUMSTANCES JUSTIFIED THEIR WARRANTLESS ENTRY OF THE GARAGE; OFFICERS DID NOT "CREATE" EXIGENCY**

U.S. v. Ojeda, 276 F.3d 486 (9th Cir. 2002)

Facts: (Excerpted from Court of Appeals opinion)

> The police believed that methamphetamine production was occurring at defendant Steven Peter Ojeda's residential property. The police obtained a search warrant describing the area to be searched as the premises located and described as 2417 Merritt Ave., San Pablo, Contra Costa County, CA, further described as a single story, single family residence, with blue wood exterior, white trim, and a composition roof. The numbers 2417 are attached to the mailbox in front of the residence.
>
> It was held by the district court and conceded by the government that this warrant did not include the garage immediately behind and about five feet from the residential structure. That is the place where this search took place.
>
> When the police were in that area in the course of executing the search of the residence, defendant Ojeda emerged from the garage. The garage door immediately slammed shut and was locked from the inside. The officers smelled the odor of chemicals used to manufacture methamphetamine, which the officers knew to be combustible. The officers then entered the garage and discovered the methamphetamine laboratory.

Proceedings below: The trial court ruled that the officers improperly created the exigent circumstances that they claimed justified the warrantless entry of the garage. Accordingly, the trial court suppressed the evidence seized from the garage.

ISSUE AND RULING: Did exigent circumstances justify the warrantless entry of the garage that was not attached to the house and not addressed in the search warrant? (ANSWER: Yes)

Result: Reversal of suppression ruling by U.S. District Court for the Northern District of California; case remanded for trial of Steven Peter Ojeda.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Exigent circumstances justify a warrantless entry, search, or seizure when police officers, acting on probable cause and in good faith, reasonably believe from the

totality of the circumstances that (a) evidence or contraband will imminently be destroyed or (b) the nature of the crime or character of the suspect(s) pose a risk of danger to the arresting officers or third persons. The government bears the burden of showing specific and articulable facts to justify the finding of exigent circumstances.

The district court found these facts demonstrated exigent circumstances that would normally justify an immediate warrantless search of the garage:

> After the officers arrived on the scene, they saw Ojeda exit the rear building and heard the door being locked behind Ojeda from inside. The officers could smell a strong odor, associated with the manufacture of methamphetamine, coming from that unit. Thus, the officers had reason to believe that there were additional suspects inside the rear building and that methamphetamine manufacturing was occurring there. In addition, they had reason to believe that the suspects might try to escape or to destroy evidence, such as the glass laboratory equipment or the finished product.

The district court then decided, however, that the exception was not applicable because it thought that the exigency was created by the police. Exigent circumstances created by improper conduct by the police may not be used to justify a warrantless search. United States v. Driver, 776 F.2d 807 (9th Cir. 1985). The district court held:

> However, as Agent Hudson testified, the exigent circumstances in this case were created by the combination of the operation of the methamphetamine laboratory and the suspects' knowledge that the officers were on the property, the latter circumstance being what might have caused the suspects to attempt to destroy evidence. The exigency was created by the fact that the officers appeared on the scene with a search warrant for the house, alerting the suspects, but without a warrant to search the rear building, the very place that the laboratory was suspected to be located. The officers did not neglect to obtain a warrant for the rear building in bad faith, but the exigency caused by their unreasonable failure to obtain a warrant for the correct location cannot reasonably be used to excuse a warrantless search of that location.

The district court erred when it found that the police created the exigent circumstances. We can find no case support for that analysis. This Court has consistently held that the created exigencies doctrine is applicable only in limited circumstances. United States v. VonWillie, 59 F.3d 922, 926 (9th Cir. 1995) (stating that "this is not a case where the government purposely tried to circumvent the requirements of [18 U.S.C.] § 3109 (citations omitted). Because the sort of intentionally evasive behavior found in other cases was absent in this case, the rule does not require us to invalidate the entry.").

The police were at a place where they had every right to be with the warrant in hand. While the search warrant for the "premises" did not specifically include the space between the house and the garage, the warrant gave the police the legal right to be on the "premises" and thus the legal right to be in the area. The

> garage was only five feet away from the main residence so in order to execute the search warrant the police had to be near the garage.
>
> The district court specifically found there was no bad faith in the officers' actions. The officers did not neglect to obtain a warrant for the rear building in bad faith. The record clearly indicates that the omission of the garage from the warrant was inadvertent and not intentional. The record does not indicate other evidence of bad faith or deliberate misconduct on the part of the police.
>
> Thus, the district court erred in finding that the police created the exigent circumstances by their presence in the area or by their failure to obtain a warrant for the rear building. The police were justified in entering the methamphetamine laboratory under the exigent circumstances exception to the warrant requirement. Therefore, the order to suppress evidence is due to be reversed.
>
> Basing our decision on exigent circumstances, it is unnecessary for us to consider the government's alternative argument that the officers properly entered the garage to conduct a protective sweep while they searched the main residence.

[Citations omitted]

**LED EDITORIAL COMMENTS:**

**1) Details, details: Of course, it goes without saying that, in their initial search warrant application, officers should always describe and seek authorization to search all garages and outbuildings which their probable cause covers.**

**2) Improperly creating exigencies: A generic example of a circumstance where a court would likely hold that officers improperly "created" exigent circumstances is as follows: Detectives develop probable cause to believe that three housemates committed the "French judge masks" bank robbery one month previously. A few days later, without an arrest warrant or a search warrant (and without presently existing exigent circumstances), the officers set up surveillance on the suspects' residence. During the early evening hours, while the lights are still on in the house, one of the suspects emerges from the front door onto the porch. The officers immediately run to arrest him as he heads down the front steps. As the officers grab him on the steps, the suspect yells, "it's the cops." We think that most courts would hold that these circumstances do not justify forced entry because the officers created the exigency.**

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

**(1) COUNTY SHERIFF'S OFFICE HAD NO JURISDICTION TO EXECUTE SEARCH WARRANT FOR TRIBAL GOVERNMENT RECORDS RELATING TO TRIBAL EMPLOYEE** -- In Bishop Paiute Tribe v. County of Inyo, 275 F.3d 893 (9th Cir. 2002), the Ninth Circuit of the U.S. Court of Appeals holds that a county sheriff's office conducting an investigation into possible welfare fraud involving individual members of the tribe was barred by Indian tribal sovereignty from executing a warrant to search tribal government records located on the reservation. The tribe's interest in protecting its right to self-government, through enforcement of tribal policies to promote tribal interests such as accuracy in tribal records, confidentiality of members' personal information, and a trusting relationship with tribal members, outweighed the county's interest in investigating potential welfare fraud, which could be accomplished through less intrusive means.

The Bishop Paiute Tribe Court notes that the sheriff's office would have had authority to execute a warrant to search the property of an individual tribal member, as opposed to this warrant which unlawfully authorized a search of tribal government records.

Result: Reversal of order by U.S. District Court for Eastern District of California dismissing tribe's lawsuit against County of Inyo (California) county sheriff, and county district attorney; remanded for civil trial.

Status: The County of Inyo is seeking a rehearing and reconsideration of the Bishop Paiute Tribe decision in the Ninth Circuit. The County points to the U.S. Supreme Court decision in Nevada v. Hicks, 533 U.S. 353 (2001) as support for the County's position that the Ninth Circuit 3-judge panel erred in its Bishop Paiute Tribe decision.

**(2) SGT. McCARTHY'S VICTORY IN COUNTERSUIT IS UPHELD BY UNPUBLISHED NINTH CIRCUIT DECISION** -- In Cross v. City of Port Orchard (and others), (2001 WL 1609759) the Ninth Circuit of the U.S. Court of Appeals affirms by unpublished opinion a federal district court decision (also unpublished) that was summarized in the September 2002 **LED** at page 21.

In a federal court civil suit arising out of a residential entry to make a warrantless arrest in a hot pursuit situation – Cross v. City of Port Orchard (and others) (United States District Court # C00-5012RJB) - the district court has granted a total of $5,191.05 damages, attorney fees and costs to Port Orchard Sgt. Dennis McCarthy in Sgt. McCarthy's counter-claim for being falsely named in the lawsuit. Judge Bryan's June 1, 2000 order granting damages, attorney fees and costs to Sgt. McCarthy described in part the basis for the counter-claim:

> Apparently, the plaintiff erroneously named Sergeant McCarthy as a defendant in the rush to file the lawsuit to beat the statute of limitations. Sergeant McCarthy was not involved in any way in the events giving rise to this lawsuit, but his deposition was taken to ascertain this fact. When the error was verified, the plaintiff amended his complaint, deleting Sergeant McCarthy and naming [another officer]. Sergeant McCarthy argues that he was forced to defend his reputation because the local newspaper reported the allegations in the lawsuit, naming Sergeant McCarthy as a defendant. Further, Sergeant McCarthy argues that he has suffered significant stress and embarrassment.

Plaintiff Cross responded to the counter-claim by asserting only that he corrected the error as soon as possible, and that he then wrote Sgt. McCarthy a letter of apology. This was not enough to escape sanctions, Judge Bryan ruled, granting judgment to Sgt. McCarthy as follows:

> The authority presented by the defendant supports his motion. 42 U.S.C. § 1988 provides for attorney fees to the prevailing defendant; RCW 4.24.350 provides for a counterclaim and up to $1000 as liquidated damages for a law enforcement officer named as a defendant in an unfounded lawsuit; RCW 4.84.185 provides for payment of reasonable expenses, including attorney fees, after an award of dismissal of an unfounded lawsuit against a law enforcement officer. Fed. R. Civ. P. 11 and 28 U.S.C. provide for sanctions against a party or his counsel for the filing of an unfounded lawsuit.
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> …
>
> Defendant McCarthy's motion for summary judgment should be granted. Based on the federal and state law cited above, Defendant McCarthy is entitled to judgment as follows: Attorneys' fees: $4,176.00; Costs: $15.05; Liquidated damages: $1000.00. Total: $5,191.05.

Judge Bryan's award to Sgt. McCarthy has now been affirmed by the Ninth Circuit. Additional costs were awarded Sgt. McCarthy by the Court of Appeals. Sgt. McCarthy was represented by Kim Zak of the Shires law firm in Port Orchard.

Result: Affirmance of U.S. District Court decision for Port Orchard Officer Dennis McCarthy against plaintiff Jerry Cross, granting damages and costs for plaintiff's pursuit of a frivolous action. While Cross's appeal was pending in the Ninth Circuit, the District granted summary judgment to all of the other defendants on all remaining issues.

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## WASHINGTON STATE SUPREME COURT

### "911" OPERATOR'S STATEMENTS RAISE FACT-QUESTION; CIVIL SUIT MUST GO TO TRIAL ON "SPECIAL RELATIONSHIP" EXCEPTION TO "PUBLIC DUTY DOCTRINE"

Bratton v. Welp, County of Spokane, ___ Wn.2d ___, 39 P.3d 959 (2002)

Facts and Proceedings below: (Excerpted from Supreme Court opinion)

> Norma Bratton caught her mother's neighbor, Peter Welp, stealing a battery from her mother's car on December 24, 1996. Mr. Welp began arguing with Ms. Bratton's family, so she called 911 to report a neighborhood disturbance. The 911 operator did not send police to investigate. Later that evening, Ms. Bratton saw Mr. Welp replacing the battery in her mother's car with a smaller battery. The two got into a heated argument and Mr. Welp threatened to shoot Ms. Bratton. She again called 911. The police arrived, and questioned the parties, but no arrest was made.
>
> On January 4, 1997, Mr. Welp threatened to ram his car into Ms. Bratton's sister's car, which was parked in front of their mother's house. The sister called Ms. Bratton, who was at the hospital with their dying mother. Ms. Bratton immediately went to her mother's house. Tempers flared and Mr. Welp punched Ms. Bratton's sister in the face and again threatened to shoot Ms. Bratton. She called 911. The operator told Ms. Bratton that the police were on their way and that "if she or her family was threatened again that the police would be sent." The police arrived, and Mr. Welp retreated into his house. But again, apparently no arrest was made, although the city police assured Ms. Bratton that Mr. Welp would be arrested the next time he caused a disturbance. Ms. Bratton's mother died that night.
>
> On January 11, 1997, the family was conducting an estate sale, when Mr. Welp appeared and threatened to shoot Ms. Bratton's brother, Jerry Brown. Mr. Brown called 911. He told the operator that Mr. Welp was drunk and disrupting the sale. The operator told him to call "Crime Check" and they would investigate. Mr. Brown called "Crime Check" and the same operator answered. He told her again that Mr. Welp had threatened him and then went back into his house. The operator told Mr. Brown that if Mr. Welp came out of his house again to call 911. Shortly after that, Ms. Bratton arrived and Mr. Welp came out of his house. The two argued. Mr. Brown immediately called 911 for a third time that day, 20 minutes after his first call. As he was talking to the operator, Mr. Welp shot Ms. Bratton in the chest three times. The operator heard the shots and dispatched police, who arrived within minutes.
>
> Fortunately, Ms. Bratton survived. But while tending to his recovering wife at the hospital, Steve Bratton regurgitated in his sleep and was found dead in the hospital waiting room. After Mr. Welp was charged and convicted of the shooting, Ms. Bratton, Mr. Brown, Mr. Bratton's estate, and the Brattons' son sued Mr. Welp, the City of Spokane, and Spokane County, alleging negligence

arising from the shooting. The family claimed the City and County were liable because each made express assurances of assistance and failed to provide timely assistance.

The County moved for summary judgment, asserting that the family was unable to prove the County had made an express assurance of assistance to Ms. Bratton. The trial court granted summary judgment to the County. The family moved for reconsideration and offered the affidavit of the 911 operator. [The 911 operator stated] that on January 4 the family had been assured by 911 operators that police would be dispatched if the family again complained about Mr. Welp. She also averred that she should have immediately dispatched police after Mr. Brown's first call on January 11. The trial court reversed its earlier summary judgment order, finding on reconsideration that a material question of fact remained regarding whether the County had made an express assurance of assistance.

The County sought discretionary review of the trial court's order on reconsideration. The Court of Appeals granted review and reversed, finding there were no material questions of fact and that the County enjoyed immunity under the public duty doctrine. [See Jan 02 **LED**:15 for summary of the Court of Appeals decision.]

ISSUE AND RULING: Is there a material question of fact concerning whether the County made an express assurance that Ms. Bratton and her family justifiably relied upon (thus exposing the County to a civil liability under the "special relationship" exception to the "public duty doctrine"?) (ANSWER: Yes, rules a unanimous Washington Supreme Court)

Result: Reversal of Court of Appeals decision that had granted summary judgment to the County; case remanded to Spokane County Superior Court for trial.

ANALYSIS: (Excerpted from Supreme Court opinion)

The first hurdle in any negligence action is establishing a duty. Under the public duty doctrine, recovery from a municipal corporation is possible only when the plaintiff can show that the duty breached was owed to her individually, rather than to the public in general. The special relationship exception to the public duty doctrine describes one situation in which a duty is said to be owed to a specific individual. To establish this exception, the plaintiff must show that there is some form of privity [privity means relationship - **LED Ed.**] between the plaintiff and the public entity that differentiates the plaintiff from the general public, that the public entity made an express assurance to the plaintiff, and that the plaintiff justifiably relied on the assurance. Privity should be construed broadly, and, in cases based on failure by the police to timely respond to requests for assistance, it refers to the relationship between the public entity and a reasonably foreseeable plaintiff.

Construing the facts most favorably to Ms. Bratton, the 911 operator's affidavit creates a material question of fact of whether the County made an express assurance to the family that it would send police if Mr. Welp threatened them. According to the 911 operator, Ms. Bratton was told on January 4 that the next time Mr. Welp threatened her or her family the police would be sent. Yet, when Mr. Brown first called on January 11 to report that Mr. Welp was disrupting the estate sale, the County did not dispatch police. The 911 operator who answered that call averred that she knew of the past confrontations with Mr. Welp and should have sent police immediately instead of telling Mr. Brown to call "Crime

Check". And when Mr. Brown called "Crime Check" and told the same operator that Mr. Welp had threatened to shoot him, the operator told him to call back if Mr. Welp came out of his house again.

The Court of Appeals reasoned that because Ms. Bratton did not personally call 911 on January 11 and did not know her brother had called, the County made no assurance to her that she could rely on police intervention in the shooting. We disagree with this reasoning. A fact-finder could conclude that Ms. Bratton justifiably relied on the statements made that police would be dispatched. The plaintiffs argue that Mr. Welp had already threatened her and her family; she was plainly a foreseeable plaintiff.

In sum, there is a material question of fact concerning whether the County made an express assurance that Ms. Bratton and her family could justifiably rely upon. Accordingly, we reverse the Court of Appeals and remand to the trial court for further proceedings.

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## BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

**(1) WARRANT TO ARREST FELON RELEASED PENDING APPEAL MAY BE BASED ON LESS THAN PROBABLE CAUSE** -- In State v. Fisher, ___ Wn.2d ___, 35 P.3d 366 (2001), the Washington Supreme Court holds that a superior court needs only reasonable suspicion, not probable cause, to justify issuing a warrant to arrest a convicted felon for violating the terms of release pending appeal. However, the Fisher Court rules that the facts of the case before the Court do not meet the reasonable suspicion standard, and therefore the arrest warrant in this case was invalid. **LED EDITORIAL NOTE: Due to space limitations, we will not detail the facts of Fisher in this LED entry.**

Result: Reversal of Court of Appeals decision **(see April 2001 LED:14)** that had affirmed a Walla Walla County Superior Court conviction of Carey Virginia Fisher for possession of methamphetamines, marijuana and drug paraphernalia (Fisher's conviction is reversed because evidence seized incident to her unlawful arrest must be suppressed).

**(2) EXPERT TESTIMONY THAT DEFENDANT WAS IN "CRASH PHASE" OF METH INTOXICATION AT TIME OF ACCIDENT SUFFICIENT TO SUPPORT CONVICTION FOR VEHICULAR ASSAULT** -- In State v. McNeal, ___ Wn.2d ___, 37 P.3d 280 (2002), the Washington Supreme Court rules that blood test evidence and expert testimony that defendant was in the "crash phase" of methamphetamine intoxication at time of a car accident was sufficient to support a jury's "vehicular assault" verdict. The McNeal Court (in analyzing an "inconsistent verdicts" issue not otherwise addressed in this **LED** entry) explains as follows its view that the expert testimony, coupled with blood test evidence, was sufficient to support the vehicular assault verdict:

> [T]he jury was presented with significant evidence to support its determination that McNeal operated his motor vehicle while under the influence of drugs. [T]here was evidence that McNeal's blood contained a concentration of .31 milligrams of methamphetamine per liter. Washington State toxicologist, Dr. Barry Logan, testified about the effects that a person would experience with such a concentration of methamphetamine in his or her blood. He indicated in that regard that among the symptoms of methamphetamine intoxication are fatigue, lethargy, and subdued behavior. He also testified that these symptoms are associated with the so-called "crash phase" of methamphetamine intoxication and can impair one's ability to drive. *[Court's footnote: Dr. Logan*

*described two stages of methamphetamine intoxication, the "stimulant phase" and the "crash phase." The stimulant phase, he explained, is the initial high immediately following the administration of the drug and is often accompanied by a person staying "awake, [or] alert for a day or more." Logan characterized the crash phase as the result of "sleep debt" during which time a person falls in and out of a "restless, prolonged sleep." Logan indicated that a person can have the same methamphetamine blood concentrations in each phase, yet experience different symptoms. Logan also indicated that each set of symptoms can impair the ability to drive a car. Stimulant phase symptoms include being "excited, stimulated, [and] experiencing rapid flight of ideas." Crash phase symptoms include being "fatigued . . . sleepy . . . [and subject to] effectively just pass[ing] out."*

Logan discussed an extensive study that he had made regarding accidents caused by drivers under the influence of methamphetamine. His study found that 85 percent of such accidents were caused by drivers who experienced "crash phase" symptoms and left their lane of travel.

The State produced testimony indicating that McNeal displayed these symptoms of methamphetamine intoxication. For example, three witnesses testified that McNeal appeared fatigued or lethargic at the time of the accident. Notably, a state trooper testified that McNeal's demeanor was "lethargic . . . not real excited" and that he was "more subdued" than normal especially considering he broke his arm in the automobile accident. Similarly, when asked about the signs McNeal displayed indicating that he was under the influence of a controlled substance, a trooper testified that McNeal did not "have much of a reaction" at the time of the accident "considering the injuries he sustained." Likewise, an attending nurse testified that McNeal "seemed lethargic" when she was drawing his blood at the hospital. Moreover, we believe that the act of driving into oncoming traffic with a .31 methamphetamine blood concentration is indicative of impairment. This is consistent with Logan's testimony that 85 percent of methamphetamine related accidents were caused by an impaired driver crossing the centerline. In sum, when this evidence is viewed in the light most favorable to the State, we conclude that it is sufficient to support the implied finding of the jury that McNeal was under the influence of methamphetamine as well as its verdict that he was guilty of vehicular assault.

Result: Affirmance of Lewis County Superior Court convictions of John K. McNeal for vehicular homicide, vehicular assault, and possession of methamphetamine with the intent to deliver.

**(3) NO DOUBLE JEOPARDY PROBLEM IN PROSECUTING TULALIP TRIBAL MEMBER (PREVIOUSLY CONVICTED IN TRIBAL COURT) IN COWLITZ COUNTY FOR ILLEGALLY HUNTING THERE** -- In State v. Moses, 37 P.3d 1216 (2002), the Washington Supreme Court unanimously rules that Indian tribes are not “another state or country” within the meaning of the double jeopardy statute, RCW 10.43.040. Therefore, the double jeopardy statute does not bar Cowlitz County from prosecuting a defendant who had previously been convicted in tribal court on similar charges based on the same incident.

Result: Affirmance (though on different grounds) of Court of Appeals decision which had affirmed the Cowlitz County Superior Court convictions of Anthony Moses, Sr. on several counts of illegal hunting activity.

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**FENCED BACKYARD HELD TO BE PART OF "BUILDING" UNDER FIRST-DEGREE BURGLARY STATUTE; CONFLICTING 1986 DECISION DISAPPROVED**

State v. Wentz, ___ Wn. App. ___, 38 P.3d 393 (Div. III, 2002)

Facts: (Excerpted from Court of Appeals opinion)

> [Defendant] Wentz drove to Spokane in a stolen car armed with a stolen gun and ammunition with the intent to kill Ms. McFadden and Mr. Wheeler. The State produced evidence of a hand-drawn map that led to Mr. Wheeler's home in Spokane. Mr. Wentz drove to Mr. Wheeler's residence and parked his car a block away while he walked around the neighborhood half a dozen times, familiarizing himself with the area. While waiting for darkness he composed a journal type note that spoke of his refusal to allow Ms. McFadden to love anyone other than him. Once it was dark outside he climbed over a locked six-foot tall fence that surrounded Mr. Wheeler's home. While armed with the weapon and ammunition he attempted to enter the residence to lie in wait for the return of Ms. McFadden and Mr. Wheeler but set off a security alarm, which apparently dissuaded him from entering the home. Ultimately, Mr. Wentz decided to hide in [a] boat, which was located in Mr. Wheeler's back yard, to wait for Ms. McFadden and Mr. Wheeler to return. Once he was apprehended by officers, Mr. Wentz waived his constitutional rights and during an interview admitted to the officers that he intended to kill Ms. McFadden and Mr. Wheeler. The trial court properly found Mr. Wentz guilty of two counts of attempted second degree murder.

Proceedings: (Excerpted from Court of Appeals opinion)

> Mr. Wentz was charged with five felony counts: (1) first degree burglary; (2) second degree possession of stolen property; (3) possession of a stolen firearm; (4) attempted second degree murder of Ms. McFadden; and (5) attempted second degree murder of Mr. Wheeler. Mr. Wentz waived his right to a jury trial. Most of the underlying facts leading to his arrest were not at issue during the trial but his purpose in driving to Spokane and his mental capacity during the planning stages of the burglary and attempted murders were disputed. The State argued the attempted murders were planned in a thoughtful, strategic manner. The defense argued Mr. Wentz's actions were the result of a combination of long-term mental illness, sleep deprivation, and substance abuse.
>
> Mr. Wentz was found guilty of all charges at the conclusion of a bench trial.

ISSUE AND RULING: For purposes of the first degree burglary statute, is a fenced, fully-enclosed backyard part of the building to which it is attached? (ANSWER: Yes)

Result: Affirmance of Gerald Lee Wentz's convictions for first degree burglary, second degree possession of stolen property, possession of a stolen firearm, and attempted second degree murder of Ms. McFadden and Mr. Wheeler.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The [trial] court's decision is supported by the statute, yet conflicts with a prior, Division Three decision, State v. Flieger, 45 Wn. App. 667 (1986). The Flieger court, on facts quite similar to those at hand, determined that an enclosed residential yard surrounded by a tall wooden fence with locked gates did not constitute a "building" pursuant to the definition set forth in the statute. It determined the language following the words "any other structure" modified all the statutory definitions of "building" and not just the word "structure." We now

disapprove the Flieger court's reasoning on this subject.

> The Flieger interpretation violates the last antecedent rule, a maxim of statutory construction. The last antecedent rule states "unless a contrary intention appears in the statute, qualifying words and phrases refer to the last antecedent." A corollary to that rule is "the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one."
>
> The portion of the definition of building at issue provides, "in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, *or any other structure used for lodging of persons or for carrying on business therein* . . . ." RCW 9A.04.110(5) (emphasis added). The noun being modified is "structure." The term "used for lodging of persons or for carrying on business therein," which modifies the antecedent, "any other structure," is not set off by a comma. Accordingly, it applies only to the preceding term. Finding no contrary intent in the statute and applying the aforementioned rules of statutory construction leads us to conclude the trial court's interpretation of the statute, while not following legal precedent, was correct.

[Some citations omitted]

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## BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

**(1) WRONGFUL INTENT HELD TO BE AN ELEMENT OF BIGAMY** -- In State v. Seek, ___ Wn. App. ___, 37 P.3d 339 (Div. I, 2002), the Court of Appeals rules that the bigamy statute, RCW 9A.64.010, is not a strict liability statute, but instead has an element of wrongful intent. Accordingly, the Seek Court rules, the trial court erred in rejecting bigamy defendant Seek's proposed jury instruction requiring that the State prove beyond a reasonable doubt that, at the time of his second marriage, defendant did not reasonably believe he was legally eligible to marry.

Result: Reversal of King County Superior Court conviction of Donald LeRoy Seek for bigamy; remand of case to the Supreme Court for possible re-trial.

**(2) IN LICENSE REVOCATION PROCEEDING, DOL MAY HOLD THAT RADAR-BASED TRAFFIC STOP WAS LAWFUL DESPITE LACK OF FOUNDATIONAL EVIDENCE REGARDING RELIABILITY OF RADAR** -- In Clement v. DOL, 109 Wn. App. 371 (Div. I, 2001), the Court of Appeals rejects a motorist's argument that, because DOL was not presented with foundational evidence as to the reliability of the radar device that led to his traffic stop, DOL could not revoke his license for driving while intoxicated.

A WSP trooper operating a radar unit on I-5 reported to another WSP trooper that Clement was registered 82 m.p.h. as it was approaching. The second trooper then observed the front end of Clement's car dip, as if the driver had just hit the brakes. The first trooper reported the car as now doing 77 m.p.h.

The second trooper pulled Clement's car over and immediately observed unmistakable signs that Clement was under the influence of alcohol. Ultimately, the second trooper arrested Clement for DUI. Clement refused a breath test, and DOL subsequently held hearings and revoked Clement's license to drive based on the second trooper's report.

Clement appealed to superior court, where the focus of his case was the lawfulness of the in initial stop for speeding. Both the lawfulness of the stop and the lawfulness of arrest for DUI were at issue in the DOL proceedings. Clement argued that without foundational evidence of the reliability

of the first trooper's radar device, that stop could not be shown to be justified. The superior court judge agreed, and DOL appealed.

The Court of Appeals has now reversed the superior court decision, holding in Clement that such foundational evidence is not required. That is because the question before DOL and the court was lawfulness of the stop, not adjudication of the speeding ticket. Based on the "fellow officer" rule, the second trooper could rely on the radar-unit trooper's report of the radar reading to make a lawful stop. In addition, the trooper who made the stop had observed the evidence of sudden braking. Therefore, there was no need to present evidence of the reliability of the radar in the DOL proceeding, the Clement Court holds.

Result: Reversal of King County Superior Court decision that reversed a DOL order revoking the driver's license of Jerome Clement (thus, the end result is that Clement's license is revoked).

**LED EDITORIAL COMMENT: The Clement Court asserts that probable cause is the standard for justification of a traffic stop for suspected traffic infraction. However, the case law authority that the Court cites for this proposition is not on point; that case law addresses when an officer may issue a citation, not when an officer may make a stop to investigate a possible traffic infraction. In the majority opinion in the "pretext stop" case of State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05, Justice Sanders asserted that the standard to justify a stop for a suspected traffic infraction is "reasonable suspicion." In her dissent in Ladson, Justice Madsen argued in vain that the standard for a traffic infraction stop is probable cause; as with the misplaced authority cited by the Clement Court, Justice Madsen addressed only statutory authority relating to when an officer may issue a citation, not when an officer may make a stop to investigate a possible traffic infraction.**

**Our research indicates that courts in most other jurisdictions that have addressed this question have held that the same constitutional standard -- i.e., reasonable suspicion, not probable cause -- justifies an investigatory stop for either a traffic infraction or a crime. It usually does not make a difference in result which standard is applied, as virtually all traffic stops are in fact supported by probable cause. However, we would hope that prosecutors and other government attorneys will not concede this issue (and that DOL hearing officers will get this right as well).**

**(3) DOL ADMINISTRATIVE HEARING JUDGE'S EARLIER DETERMINATION IN ADMINISTRATIVE PROCEEDING THAT OFFICER LACKED JUSTIFICATION FOR TRAFFIC STOP DOES NOT PRECLUDE REVISITING THAT QUESTION IN SUPERIOR COURT CRIMINAL PROCEEDING** -- In State v. Vasquez, 109 Wn. App. 310 (Div. III, 2001), the Court of Appeals holds that a DOL hearing officer's determination in an administrative license suspension proceeding that an officer did not have probable cause to justify a traffic stop does not bar a court from revisiting the same issue in a later criminal trial for possession of cocaine and DUI. A police officer paced defendant driving 38 mph in a 25 mph zone. When the officer pulled defendant over, the officer observed obvious signs of intoxication, as well as a partially consumed six-pack of beer. Defendant admitted he had been drinking. A PBT test at the scene registered .141. During a search of defendant incident to his arrest for DUI, the officer found cocaine on defendant's person.

DOL instituted administrative license suspension based on the DUI arrest, and the prosecutor filed criminal charges of DUI and cocaine possession. At an administrative hearing (where the evidence consisted only of a few documents and some telephonic testimony), a DOL hearing officer held that the officer did not have sufficient objective justification to stop defendant for speeding, and therefore there was no basis for license suspension. **[LED EDITORIAL NOTE: The Court of Appeals does not explain how the DOL hearing officer reached this determination as to lack of justification for the stop.]**

Based on this administrative decision, defendant moved in the criminal matter in superior court to dismiss the charges. He argued that the doctrine of "collateral estoppel" (also known as "issue preclusion") barred relitigation of this issue which, he claimed, had already been resolved by final judgment in litigation between him and representatives of the State of Washington.

The Vasquez Court notes that the collateral estoppel test has four parts: 1) the issue that was decided in the prior adjudication is identical with the one presented in the second action; 2) the prior adjudication ended in a final judgment on the merits; 3) the party against whom the plea is asserted was a party or in privity with the party ["privity" refers to a relationship -- **LED Ed.**] to the prior adjudication; and 4) application of the doctrine will not work an injustice or be against public policy. The Vasquez Court concludes that the case before it meets the first three parts of the test, but not the fourth.

Public policy reasons given by the Vasquez Court for not giving the DOL ruling preclusive effect in the criminal case are: 1) the purposes of administrative license suspension proceedings and criminal proceedings are different; 2) the administrative proceeding (where less is at stake) is much more streamlined than a criminal proceeding; 3) if the administrative proceeding were to be given preclusive effect in criminal cases, substantial additional resources would be required at the administrative level; and 4) the criminal justice system should be allowed to operate independently to determine what constitutes a crime and what procedural safeguards are needed in that arena. For these reasons, the Vasquez Court rules that the trial court appropriately reconsidered the question of whether the officer's traffic stop was justified. The Vasquez Court also rules that, in light of the officer's testimony about pacing the defendant's car at 38 mph in the 25 mph zone, the stop was in fact justified.

Result: Affirmance of Grant County Superior Court conviction of Ramiro C. Vasquez for possession of cocaine and DUI.

**LED EDITORIAL NOTES: 1) Collateral estoppel question in other contexts: The Vasquez Court points out that Washington courts also refuse to apply collateral estoppel in criminal proceedings based on prior determinations in parole hearings, child dependency proceedings, and civil public assistance overpayment proceedings. However, the opposite "collateral estoppel" ruling generally will be made where the sequence of criminal and DOL administrative proceedings is reversed. Thus, in Thompson v. DOL, 138 Wn.2d 783 (1999), Nov 99 LED:05, the Washington Supreme Court held that a final criminal court decision that implied consent warnings were faulty was binding in a later DOL administrative license suspension proceeding.**

**2) Standard for justifying a traffic stop: The Vasquez court states that a traffic infraction stop must be supported by "probable cause." But the authority cited by the Vasquez Court does not support this statement. We believe the proof standard for justifying a traffic stop is the same as for any investigative seizure, i.e., reasonable suspicion. See our LED Editorial comment above following the Clement entry.**

**(4) PROSECUTOR ERRED BY ASKING OFFICER TO TESTIFY AS TO WHAT ATTORNEY-INVOKING DEFENDANT HAD SAID WHEN MIRANDIZED** -- In State v. Curtis, 37 P.3d 1274 (Div. III, 2002), the Court of Appeals rules that reversible error was committed in a jury trial where the prosecutor's question to an officer in effect asked the officer to comment on the fact that, when the officer had earlier tried to interrogate the defendant, the defendant had invoked his right to an attorney. The Court of Appeals sets forth the prosecutor-officer Q & A that occurred during the State's case-in-chief:

A. I read him his Miranda, his constitutional rights.

Q. Was anything said at that time?

A. He refused to speak to me at the time, and wanted an attorney present.

The Curtis Court says that the prosecutor's eliciting of this testimony from the officer in the State's case-in-chief in effect penalized defendant for having previously asserted his Fifth Amendment rights. The prosecutor did not elicit the officer's testimony for impeachment purposes, nor was it admitted for any other proper purpose, the Court continues. The Curtis Court also holds that the admission of the testimony prejudiced defendant's case before the jury. Accordingly, the Court rules that the case must be retried.

Result: Reversal of Grant County Superior Court conviction of Bobby Ray Curtis for third degree assault; case remanded for re-trial.

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## ORDER FORMS FOR SELECTED RCW PROVISIONS

Order forms for 2001 selected RCW provisions of interest to law enforcement are available on the Criminal Justice Training Commission website on the "Professional Development" page. The direct link to the order form is [http://www.wa.gov/cjt/forms/rcwform.txt].

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## INTERNET ACCESS TO COURT RULES & DECISIONS, TO RCW'S, AND TO WAC RULES

The Washington Office of the Administrator for the Courts maintains a web site 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. 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/rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct]. This web site contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990.

Easy 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 January 2002, is at [http://slc.leg.wa.gov/]. Information about bills filed in 2002 Washington Legislature is at the same address -- look under "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 WAC amendments is at [http://slc.leg.wa.gov/wsr/register.htm]. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The address for the Criminal Justice Training Commission's Internet Home Page is [http://www.cjtc.state.wa.us], while the address for the Attorney General's Office web site is [http://www/wa/ago].

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The Law Enforcement Digest is co-edited by Senior Counsel John Wasberg and Assistant Attorney General Shannon Inglis, both of the Washington Attorney General's Office. Questions and comments regarding the content of the **LED** should be directed to Mr. Wasberg at (206) 464-6039; Fax (206) 587-4290; E Mail [johnw1@atg.wa.gov]. Questions regarding the distribution list or delivery of the **LED** should be directed to Darlene Tangedahl of the Criminal Justice Training Commission (CJTC) at (206) 835-7337; Fax (206) 439-3752; E mail [dtangedahl@cjtc.state.wa.us]. **LED** editorial commentary and analysis of statutes and court decisions express the thinking of the writers 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. **LED**'s from January 1992 forward are available via a link on the Commission's Internet Home Page at: [http://www.cjtc.state.wa.us].