Law Enforcement Digest

July 2006

591st Basic Law Enforcement Academy – January 19, 2006 through May 25, 2006

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Tac Officer: Corporal Dave Deffenbaugh - Bellevue Police Department

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UNITED STATES SUPREME COURT

UNDER FOURTH AMENDMENT THE TEST OF THE EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT IS PURELY OBJECTIVE; BEWARE, HOWEVER: THE TESTS FOR THE EMERGENCY AID AND COMMUNITY CARETAKING EXCEPTIONS TO THE WARRANT REQUIRMENT UNDER THE WASHINGTON CONSTITUTION MAY INCLUDE A SUBJECTIVE AND/OR PRETEXT COMPONENT

Brigham City, Utah v. Stuart, 126 S. Ct. 1943 (2006)

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

> This case arises out of a melee that occurred in a Brigham City, Utah, home in the early morning hours of July 23, 2000. At about 3 a.m., four police officers responded to a call regarding a loud party at a residence. Upon arriving at the house, they heard shouting from inside, and proceeded down the driveway to investigate. **[LED EDITORIAL NOTE: In the analysis later in the opinion, the U.S. Supreme Court explains that the officers heard voices inside the house consistent with fighting – "thumping and crashing" noises and someone yelling "get off me" – before the officers, who looked through a front window, and seeing no one in the front part of the house, went around to the back yard.]** There, they observed two juveniles drinking beer in the backyard. They entered the backyard, and saw--through a screen door and windows--an altercation taking place in the kitchen of the home. According to the testimony of one of the officers, four adults were attempting, with some difficulty, to restrain a juvenile. The juvenile eventually "broke free, swung a fist and struck one of the adults in the face." The officer testified that he observed the victim of the blow spitting blood into a nearby sink. The other adults continued to try to restrain the juvenile, pressing him up against a refrigerator with such force that the refrigerator began moving across the floor. At this point, an officer opened the screen door and announced the officers' presence. Amid the tumult, nobody noticed. The officer entered the kitchen and again cried out, and as the occupants slowly became aware that the police were on the scene, the altercation ceased.
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> The officers subsequently arrested respondents and charged them with contributing to the delinquency of a minor, disorderly conduct, and intoxication. In the trial court, respondents filed a motion to suppress all evidence obtained after the officers entered the home, arguing that the warrantless entry violated the Fourth Amendment. The court granted the motion, and the Utah Court of Appeals affirmed.
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> Before the Supreme Court of Utah, Brigham City argued that although the officers lacked a warrant, their entry was nevertheless reasonable on either of

two grounds. The court rejected both contentions and, over two dissenters, affirmed. First, the court held that the injury caused by the juvenile's punch was insufficient to trigger the so-called "emergency aid doctrine" because it did not give rise to an "objectively reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead [was] in the home." Furthermore, the court suggested that the doctrine was inapplicable because the officers had not sought to assist the injured adult, but instead had acted "exclusively in their law enforcement capacity."

The [Utah Supreme Court] also held that the entry did not fall within the exigent circumstances exception to the warrant requirement. This exception applies, the court explained, where police have probable cause and where "a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons." Under this standard, the court stated, the potential harm need not be as serious as that required to invoke the emergency aid exception. Although it found the case "a close and difficult call," the court nevertheless concluded that the officers' entry was not justified by exigent circumstances.

ISSUE AND RULING: Is the subjective motivation of the officers that underlies their decision to enter the residence relevant to determining whether their entry comes within the emergency aid circumstances exception to the Fourth Amendment search warrant requirement? (ANSWER: No, the test under the Fourth Amendment is purely objective; the test considers only what a reasonable officer would do)

Result: Reversal of Utah Supreme Court decision and remand, presumably to Utah trial court for prosecution.

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

[B]ecause the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. We have held, for example, that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, or to engage in "hot pursuit" of a fleeing [felony] suspect. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."

One exigency obviating the requirement of a warrant is the need to assist persons who are seriously injured or threatened with such injury. '"The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.' " Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury.

Respondents [the criminal defendants in the case] do not take issue with these principles, but instead advance two reasons why the officers' entry here was unreasonable. First, they argue that the officers were more interested in making arrests than quelling violence. They urge us to consider, in assessing the reasonableness of the entry, whether the officers were "indeed motivated primarily by a desire to save lives and property." The Utah Supreme Court also considered the officers' subjective motivations relevant.

Our cases have repeatedly rejected this approach. An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed *objectively,* justify [the] action." It therefore does not matter here--even if their subjective motives could be so neatly unraveled--whether the officers entered the kitchen to arrest respondents and gather evidence against them or to assist the injured and prevent further violence.

As respondents note, we have held in the context of programmatic searches conducted without individualized suspicion--such as checkpoints to combat drunk driving or drug trafficking--that "an inquiry into *programmatic* purpose" is sometimes appropriate. But this inquiry is directed at ensuring that the purpose behind the *program* is not "ultimately indistinguishable from the general interest in crime control." It has nothing to do with discerning what is in the mind of the individual officer conducting the search.

Respondents further contend that their conduct was not serious enough to justify the officers' intrusion into the home. They rely on Welsh v. Wisconsin, 466 U.S. 740 (1984), in which we held that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." This contention, too, is misplaced. Welsh involved a warrantless entry by officers to arrest a suspect for driving while intoxicated. There, the "only potential emergency" confronting the officers was the need to preserve evidence (*i.e.,* the suspect's blood-alcohol level)--an exigency that we held insufficient under the circumstances to justify entry into the suspect's home. Here, the officers were confronted with *ongoing* violence occurring *within* the home. Welsh did not address such a situation.

We think the officers' entry here was plainly reasonable under the circumstances. The officers were responding, at 3 o'clock in the morning, to complaints about a loud party. As they approached the house, they could hear from within "an altercation occurring, some kind of a fight." "It was loud and it was tumultuous." The officers heard "thumping and crashing" and people yelling "stop, stop" and "get off me." As the trial court found, "it was obvious that ... knocking on the front door" would have been futile. The noise seemed to be coming from the back of the house; after looking in the front window and seeing nothing, the officers proceeded around back to investigate further. They found two juveniles drinking beer in the backyard. From there, they could see that a fracas was taking place inside the kitchen. A juvenile, fists clenched, was being held back by several adults. As the officers watch, he breaks free and strikes one of the adults in the face, sending the adult to the sink spitting blood.

In these circumstances, the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning. Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.

> The manner of the officers' entry was also reasonable. After witnessing the punch, one of the officers opened the screen door and "yelled in police." When nobody heard him, he stepped into the kitchen and announced himself again. Only then did the tumult subside. The officer's announcement of his presence was at least equivalent to a knock on the screen door. Indeed, it was probably the only option that had even a chance of rising above the din. Under these circumstances, there was no violation of the Fourth Amendment's knock-and-announce rule. Furthermore, once the announcement was made, the officers were free to enter; it would serve no purpose to require them to stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.
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> Accordingly, we reverse the judgment of the Supreme Court of Utah, and remand the case for further proceedings not inconsistent with this opinion.

[Some citations omitted]

CONCURRING OPINION BY JUSTICE STEVENS: Justice Stevens writes a concurring opinion joined by no other justice. He suggests that this case was not categorically important enough for the U.S. Supreme Court to review, particularly where the Utah Supreme Court likely will make its holding as a state constitutional ruling after this Fourth Amendment ruling to the contrary.

LED EDITORIAL COMMENTS:

We would guess that the Washington Supreme Court would have a more difficult time ruling for the government on the facts of this case. Washington decisions addressing the emergency search exception and community caretaking rule have held that the tests contain a subjective element. It appears that these past Washington decisions assumed that this was the Fourth Amendment rule (now known to be an erroneous assumption in light of the Brigham City v. Stuart decision). It is our guess that the Washington Supreme Court would rule that article I, section 7 of the Washington constitution includes a subjective element in the "community caretaking" and "emergency search" doctrines. Highly relevant in this regard is the fact that the Washington Supreme Court has held that article I, section 7 - - unlike the Fourth Amendment - - includes a "pretext" prohibition on police stops of traffic violators for minor violations. See State v. Ladson, 139 Wn.2d 343 (1999) Sept 99 LED:05 (officers are precluded under the Washington constitution from making traffic stops where their motivation for such stops is a to investigate a more serious criminal matter). So Washington officers should be ready to explain - - in suppression hearings in cases with facts like those in the Brigham City case - - that they were in fact motivated (assuming it is so, of course) by the emergency aid need or community caretaking consideration that would objectively justify their entry.

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WASHINGTON STATE SUPREME COURT

NO CIVIL LIABILITY - - WHERE, IN RESPONDING TO A CALL REGARDING A THEN-OCCURRING HOME INVASION, 911 DISPATCHER GAVE NO ASSURANCES TO OCCUPANT UPON WHICH OCCUPANT COULD HAVE JUSTIFIABLY RELIED TO HIS DETRIMENT, THERE WAS NO ACTIONABLE DUTY OF THE GOVERNMENT

Harvey v. Snohomish County, ___ Wn.2d ___, 134 P.3d 216 (2006)

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

On November 17, 1999, at approximately 5:35 p.m., Keltz called 911 to report that a disturbed man, who had a painted face, appeared to be wearing a straight jacket, and claiming to be "serving God," was breaking into Harvey's condominium. Harvey, Keltz, and Harvey's son were all inside Harvey's home at the time of the call. The 911 operator remained on the line with Keltz and at the same time informed a SNOPAC police dispatcher of the situation. At 5:38 p.m., the dispatcher, over radio, requested that all available law enforcement respond to Harvey's residence. Between 5:38 p.m. and 5:39 p.m., two Snohomish County sheriff deputies responded to the call and informed the dispatcher they were on their way to the scene. At approximately the same time, the operator informed Harvey (who had taken the phone from Keltz) that she had notified the police about the situation. The dispatcher advised the police that the suspect was threatening to shoot Harvey, was armed with a handgun, and was stating he wanted to die. Snohomish County Deputy Bynum was sent to get the ballistics shield from the precinct.

At 5:44:28 p.m., Snohomish County Deputy Durand arrived and began to set up a couple of blocks away from Harvey's residence while he waited for backup units to arrive. Deputy Durand reported that there was no place to set up right in front of Harvey's home without crossing the path of a potentially armed suspect, so officers set up down the street from Harvey's residence. At approximately 5:45 p.m., the operator informed Harvey that there were deputies in the area preparing to respond. At 5:46:09 p.m., Snohomish County Deputy Shaw arrived at the scene. Between 5:46:02--5:48:07 p.m., Harvey, who apparently had lost sight of the suspect, asked the operator whether he should go out on the porch to look for the man or if he should lock himself in the bathroom. The operator told Harvey he should do whatever he felt was most safe to do.

At 5:48:01 p.m., the dispatcher advised police that the suspect was attempting to get in through a window on the balcony. The operator told Harvey she had informed the deputies about the suspect's attempts to enter through the window. At 5:49:43 p.m., another deputy responded to the incident and asked if he should block off the street in front of Harvey's residence. Five seconds later, deputies stated they did not have time to block off the street, ordered all power cut, and moved in on the residence. At 5:50:17 p.m., two other deputies arrived with the ballistics shield. Ten seconds later, the operator stated that gunfire had been heard and they had lost phone contact with Harvey. At approximately the same time, deputies moving in on the suspect discovered Harvey and Keltz making their way toward them. Harvey told the deputies that the suspect had been shot several times and was in his home. Four deputies entered Harvey's home and ordered the suspect not to move. However, despite the orders from the deputies and the extensive injuries to the suspect, the suspect attacked, grabbing Deputy Durand's leg in an attempt to bite him. The suspect was finally subdued and medical personnel arrived to provide treatment. Mercifully, neither Harvey, his son, nor Keltz sustained any physical injuries as a result of the incident.

Harvey sued Snohomish County, among others, for negligent infliction of emotional distress, alleging the county and the sheriff's department failed to rescue him, his son, and his neighbor. Harvey also filed civil rights claims. Defendants successfully removed the action to federal court, where the court

dismissed Harvey's civil rights claims. The federal court returned the remaining state claims to Snohomish County Superior Court, whereupon, the trial court granted defendant's motion for summary judgment.

The Court of Appeals reversed in part and remanded . . . [T]he court held that it was a question of fact best left to a jury to decide whether the 911 operator gave Harvey express assurances that he justifiably relied upon to his detriment. Harvey v. Snohomish County, 124 Wn. App. 806 (Div. I, 2004) **March 05 LED:20**.

ISSUE AND RULING: Did the 911 operator give express assurances to the caller that created a tort law duty to the caller to rescue him and that he relied on to his detriment? (ANSWER: No)

Result: Reversal of Court of Appeals decision (see **March 05 LED:20**) that reversed a Snohomish County Superior Court order granting summary judgment to Snohomish County, to the Sheriff's Office and to SNOPAC.

ANALYSIS: (Excerpted from Supreme Court lead opinion)

Historically, this court has held in cases concerning 911 calls for police assistance, that the government has no duty to a member of the public unless an express assurance of assistance is made by the government to the caller. Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07.** This court has dealt specifically with the express assurances requirement in the context of 911 calls for police assistance in three cases: Chambers-Castanes v. King County, 100 Wn.2d 275 (1983), Beal, and Bratton v. Welp, 145 Wn.2d 572 (2002) **April 02 LED:12**. In all three cases, this court found that assurances were made to the detriment of the caller when the operator told the callers police were dispatched when they had not been. *See* Chambers-Castanes (police received numerous calls about the incident, did not respond for an hour and a half, and, at one point, the operator told the caller that an officer had been dispatched but in fact was not); Beal (the caller was told by the operator to wait in her car for the police to arrive, but the police were never dispatched and the caller was shot and killed); Bratton (the operator told the caller that " 'if she or her family was threatened again that the police would be sent.' " Another call was made to report another threat, however, the operator did not send the police, and the caller was shot).

Unlike Chambers-Castanes, Beal, and Bratton, in this case, Harvey never received any assurance from the operator that was untruthful or inaccurate. Nor has Harvey shown that he relied on any assurance to his detriment. In other words, when the operator told Harvey she had notified police of the situation, she had. When the operator told Harvey the police were in the area and officers were setting up, they were.

Nevertheless, Harvey contends that he relied on the operator's assurances to his detriment when the operator asked Harvey to remain on the line on several occasions. However, Harvey never asked whether he should try to escape or remain in the condo, nor did the operator *ever* tell him that he should remain in the condo and wait for the police to arrive instead of escaping. Nor does Harvey even suggest that in the absence of the operator's request, he would have left the condo, especially knowing that there appeared to be a crazed man waiting outside. Simply put, no assurance was ever sought by Harvey and none was

> ever given by the operator. Furthermore, even if we assume the statements relied upon by the Court of Appeals created a duty, there is no showing the 911 operator ever breached that duty or that Harvey relied on those statements to his detriment.

[Some citations omitted]

CONCURRING OPINION

Justice Richard Sanders concurs in the result, but explains in his concurring opinion (not joined by any other justice) that he would arrive at that result under a different analytical process (that we do not address in this **LED** entry).

NO CIVIL LIABILITY - - "PUBLIC DUTY DOCTRINE" PRECLUDES AGENCY CIVIL LIABILITY WHERE DISPATCHER NEVER WAS ABLE TO COMMUNICATE WITH HANG-UP 911 CALLER, AND THUS NO "SPECIAL RELATIONSHIP" WAS CREATED

Cummins v. Lewis County, ___ Wn.2d ___, 133 P.3d 458 (2006)

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

> On December 15, 1997, the Lewis County emergency dispatch call center received a 911 call. The 911 dispatcher heard what she believed to be the voice of an adult male say, "1018 'E' Street, heart attack." The caller hung up the telephone before the dispatcher could obtain additional information and before she could respond.
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> On the date of this incident, Lewis County had in place an "enhanced 911 (E911) system[ ]." Unlike a regular 911 service, the E911 system automatically displays the telephone number and location from which a call is placed. In this instance, the system indicated that the " 'heart attack call' " was placed from a pay telephone in the vicinity of a grocery store on Tower Street in Centralia. That location is roughly five blocks from the "E" Street address furnished by the caller. A few minutes before the call in question, the 911 dispatcher had fielded a so-called "prank" 911 call from the same Tower Street pay telephone.
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> Immediately after receiving the "heart attack" call, the dispatcher dialed the pay telephone number and received a busy signal. Another operator placed a telephone call to the "E" Street address and received a recorded answer from an answering machine. This caused the dispatcher to treat the "heart attack" call as a "hang up," meaning she did not immediately send medical aid to either location. Instead, she dispatched a Centralia police officer to conduct an investigation.
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> In response to the directions from the dispatcher, a Centralia police officer drove to the location of the pay telephone. Upon arriving there, he stopped a young man who was in the vicinity. The boy was well-known to the Centralia Police Department due to his prior contacts with that department. When questioned, the youngster said that he had placed the 911 call. The officer then issued a warning to the boy and cleared the call with 911 as a "suspicious circumstance." The dispatcher indicated to the officer that she was surprised that a boy made the "heart attack" call given that it was a man's voice that she had heard. The officer responded that the boy tried to make his voice sound "old." After clearing

the call, the police officer proceeded to the "E" Street address. He did not, however, stop at that location or attempt to contact anyone who may have been at the home.

Several hours later, Mary A. Cummins, the plaintiff and petitioner here, returned home to the "E" Street address and found her husband, Leon V. Cummins, dead on the kitchen floor. Mrs. Cummins called 911. The E911 system identified her call as coming from 1018 "E" Street. This prompted the police officer who had earlier contacted the young man in the vicinity of the pay telephone to recontact him. The youth told the officer that he had lied about making the earlier call. The E911 system was thereafter checked and found to be functioning properly.

Mrs. Cummins brought a wrongful death action in Lewis County Superior Court against Lewis County and the City of Centralia in her own capacity as well as in a representative capacity. She alleged that her husband's death was the result of the negligence of the Lewis County 911 emergency dispatch unit as well as that of the Centralia police department which had responded to the call. The trial court granted a summary judgment dismissing Mrs. Cummins's complaint against both defendants. The court held that she failed to show that the county or the city owed Mr. Cummins a duty of care it did not owe to the public generally and that her claims were thereby barred by the public duty doctrine. Division Two of the Court of Appeals affirmed the superior court.

ISSUES AND RULINGS: 1) Under the public duty doctrine, is an actionable "special relationship" created between a member of the public and a government entity when an individual places a "911 call," identifies the nature of his medical emergency, provides a street address but not his name, and "hangs up" prior to either requesting help or receiving an oral assurance from the operator that medical aid will be dispatched? (ANSWER: No);

2) Should the Supreme Court eliminate the express assurance requirement of the special relationship inquiry under the “public duty doctrine” cases involving 911 calls and medical emergencies? (ANSWER: No, rules 5 justices; 4 other justices agree with the result reached by the other 5, but would change the rules to expand exposure to civil liability in such cases.)

Result: Affirmance of Court of Appeals decision (**Jan 05 LED:11**) that upheld the Lewis County Superior Court’s summary judgment dismissal of plaintiffs’ wrongful death lawsuit.

ANALYSIS: (Excerpted from Supreme Court lead opinion)

In negligence actions against a government entity, Washington courts follow the rule that:

> [T]o be actionable, the duty must be one owed to the injured plaintiff, and not one owed to the public in general. This basic principle of negligence law is expressed in the "public duty doctrine". Under the public duty doctrine, no liability may be imposed for a public official's negligent conduct unless it is shown that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (*i.e.,* a duty to all is a duty to no one)."

The public duty doctrine does not serve to bar a suit in negligence against a government entity. . . [T]he doctrine serves as a framework for courts to use

when determining when a governmental entity owes either a statutory or common law duty to a plaintiff suing in negligence.

There are four common law "exceptions" to the public duty doctrine. [*Court's footnote: The exceptions are (1) legislative intent, (2) failure to enforce, (3) the rescue doctrine, and (4) a special relationship. Babcock, 144 Wn.2d at 786.]* If one of these exceptions applies, the government will be held as a matter of law to owe a duty to the individual plaintiff or to a limited class of plaintiffs. At issue in this case is application of the special relationship exception.

Has Mrs. Cummins satisfied the three requirements of the special relationship exception?

The special relationship exception allows tort actions for negligent performance of public duties if the plaintiff can prove circumstances setting his or her relationship with the government apart from that of the general public. A special relationship imposing an actionable duty to perform arises between the plaintiff and a government entity when " '(1) there is a direct contact or privity between the public official and the injured plaintiff which sets the latter apart from the general public, and (2) there are express assurances given by a public official, which (3) gives rise to justifiable reliance on the part of the plaintiff.' " Beal v. City of Seattle, 134 Wn.2d 769 (1998) **Jan 99 LED:07**.

Was there privity between Mr. Cummins and Lewis County?

Mrs. Cummins asserts that privity was established at the point when Mr. Cummins telephoned 911 and was able to state both his physical location and the nature of his medical emergency to an operator. Lewis County contends that Division Two of the Court of Appeals correctly held that in order for privity to exist in this context some form of communication *between* the 911 caller and the operator must occur.

Mrs. Cummins correctly observes that a plaintiff can establish privity without having to prove the plaintiff herself communicated with the government entity. She is not correct, however, that prior case law establishes that the privity element is satisfied merely by the act of placing a call to 911. Washington case law shows the required communication between the injured party and 911 by which the plaintiff is set apart from the general public requires both a(1) telephone *conversation* and (2) an affirmative promise or agreement to provide assistance.

In each of the above cases, the plaintiff established privity by showing that the 911 dispatcher affirmatively communicated some form of "promise" that assistance would be sent. Furthermore, in each of these cases, the 911 caller established a dialogue with the government official after identifying the nature of his emergency and communicating his identity to the government official, thereby separating himself from the public at large. None of these activities have been shown here, the record revealing that Mr. Cummins hung up the telephone before a promise of assistance could be given and before an on-going dialogue could be established. Furthermore, he did not identify himself. This one-way communication was not sufficient to establish privity in the 911 context.

Was an express assurance given?

Mrs. Cummins must also show Mr. Cummins received an express assurance from a government official. Mr. Cummins must have sought an express assurance of assistance, and the government must have unequivocally given that assurance.

Mrs. Cummins does not contend that the 911 operator unequivocally gave Mr. Cummins an express promise that medical assistance would be dispatched.

To meet the express assurance requirement, Mrs. Cummins argues more generally that the nature of the E911 system provides an "inherent" government assurance that medical assistance will be forthcoming once a call is placed.

This argument fails. Even if this court were to decide that the very nature of the 911 system provides the public with an "inherent" promise of emergency aid dispatch, Mrs. Cummins cites no authority for equating an "inherent" assurance to the required express assurance. Thus, we conclude that an inherent assurance, like an implied assurance, does not provide us with a sufficient basis for finding an actionable duty under the special relationship exception. Because Mrs. Cummins fails to show the 911 operator gave Mr. Cummins an unequivocal statement that assistance would be forthcoming, we conclude as a matter of law that no express assurance was provided.

Was there justifiable reliance on the part of Mr. Cummins?

Mrs. Cummins must further demonstrate sufficient facts showing that Mr. Cummins justifiably relied on an explicit assurance given by the 911 operator. To bind the government, Mr. Cummins must have relied upon the assurance to his detriment.

Even after viewing the facts and inferences in a light most favorable to her, we are satisfied that Mrs. Cummins has not shown that Mr. Cummins justifiably relied upon an explicit promise of assistance or that he relied on an assurance to his detriment. First, as noted above, the 911 operator did not communicate an express assurance of assistance upon which Mr. Cummins could have relied. Second, even if this court were to infer that Mr. Cummins was provided an assistance promise, Mrs. Cummins does not show Mr. Cummins was induced to and did purposefully remain at his physical location awaiting help in reliance upon the dispatcher's assistance assurance. Rather, under the facts submitted, it is likely that given the severity of the heart attack Mr. Cummins was physically unable to move beyond his home and, thus, he was not induced to remain there and/or did not eschew other avenues of help as a result of the 911 call.

Mrs. Cummins seeks to satisfy the reliance requirement by generally asserting that "[a] caller seeking assistance for a medical emergency does so in reliance on the government's promise [under RCW 38.52.500] to provide a rapid response." However, this court cannot as a matter of law use a broad statement of legislative intent as the sole basis from which to find factually that a 911 caller justifiably relied upon a 911 operator's alleged promise of aid. Mrs. Cummins fails to show the necessary reliance.

ANALYSIS BY CONCURRING JUSTICES: Justice Tom Chambers writes a concurring opinion joined by Justice Richard Sanders and Charles Johnson. The concurring opinion argues for an

approach to government civil liability in 911 medical emergency call cases that is less protective of the government than is afforded under the app roach followed in the lead opinion excerpted above.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

NO CIVIL LIABILITY - - WHERE PARENTS OF CHILD KILLED BY REGISTERED SEX OFFENDER WERE NOT AWARE OF DEPUTY'S PRIOR ASSURANCE TO ANOTHER PERSON IN THE COMMUNITY THAT HE WOULD SEND OUT FLIERS REGARDING THE OFFENDER, COUNTY HAD NO ACTIONABLE DUTY TO THE CHILD OR PARENTS – In Osborn v. DOC and Mason County, ___ Wn.2d ___, 134 P.3d 197 (2006), the Washington Supreme Court reverses a Court of Appeals decision that was reported in the **October 2004 LED** beginning at page 9. The Supreme Court rules, 7-2, in favor of the Mason County Sheriff's Office in this civil liability case.

The facts and procedural background in Osborn are described in the majority opinion as follows:

> Rosenow was a registered sex offender. In 1993, he pleaded guilty to third degree rape of a woman at knifepoint, and in 1999 he pleaded guilty to second degree assault for choking unconscious a former sexual partner. When Rosenow was released from prison in June 2000 he moved to Hoodsport, Mason County. The prison preliminarily classified Rosenow a level II sex offender, but Mason County reclassified him a level III sex offender.
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> Detective [A] handled sex offender registration and community notification for the Mason County Sheriff's Department. Before Rosenow's release Shannyn Wiseman, a resident of Mason County, contacted [the detective] who said he would post fliers and otherwise notify the community of Rosenow's presence. [The detective] registered Rosenow and posted a notice identifying him as a sex offender on Mason County's website, but did not distribute fliers. Wiseman contacted [the detective] again, informing him that Rosenow had followed two minor children, reporting Rosenow's change of address, and asking whether [the detective] still intended to distribute fliers. [The detective] told her he was too busy to distribute fliers and discouraged her from doing so herself. In December 2000 Rosenow moved from Hoodsport to Shelton. But on February 24, 2001, he returned to Hoodsport where he raped and murdered Osborn.
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> Osborn's parents sued Mason County for failing to warn them of Rosenow's presence. Mason County moved for summary judgment, arguing that the sex offender statute then in effect, former RCW 4.24.550 (1998), imposed no duty to warn and conferred immunity from liability for failure to warn and moreover no duty to warn existed under the public duty doctrine. [*Court's footnote: In 2000, the "state's policy" was "to authorize the release of necessary and relevant information about sexual predators to members of the general public." Laws of 1990, ch. 3, § 116. A 2001 amendment requires county sheriffs to publish a notice in a newspaper of general circulation when a level III sex offender moves to their jurisdiction. See RCW 4.24.550(4); Laws of 2001, ch. 283, § 2*.] The trial court denied Mason County's motion for summary judgment, finding former RCW 4.24.550 imposed an implied duty to warn. The Court of Appeals granted Mason County's motion for discretionary review and affirmed the trial court's ruling on different grounds. **Oct 04 LED:09**. It found no duty to warn under former RCW

4.24.550, but held Mason County might have had a duty to warn under the rescue doctrine. Osborn v. Mason County, 122 Wn. App. 823 (2004).

Under these facts, the Supreme Court majority holds, the County could not be liable to the parents of the raped and murdered child. That is because the deputy made no assurances to the parents of the child, and the parents of the child did not rely on the detective's assurances to county resident Shannyn Wiseman that the detective would post fliers and otherwise warn the community of Rosenow's presence.

The majority opinion in Osborn holds (1) because the girl was not a foreseeable victim of the offender, the county had no tort law duty to warn under the "special relationship doctrine"; (2) because the parents of the girl did not rely on the county's assurances, the county had no duty to warn under the "rescue doctrine"; and (3) because the county owed no duty of care to the parents individually, the "public duty doctrine" did not apply.

This case might have had a different outcome if the parents of the child had claimed to have known of the detective's assurances to Shannyn Wiseman and had claimed to have relied on such assurances.

Justices Tom Chambers and Charles Johnson dissent, arguing that the detective's acts and omissions were sufficient to allow a jury to consider whether Mason County should be held civilly liable for the child's death.

Result: Reversal of Court of Appeals decision that affirmed a Grays Harbor Supreme Court decision denying summary judgment to Mason County.

****

WASHINGTON STATE COURT OF APPEALS

PAYTON RULE IS APPLIED UNDER WASHINGTON CONSTITUTION – MISDEMEANOR ARREST JUSTIFIES FORCIBLE WARRANTLESS ENTRY TO ARREST; ALSO, PROBABLE CAUSE REGARDING ARRESTEE'S CURRENT PLACE OF RESIDENCY (AT TIME OF POLICE ENTRY), NOT NECESSARILY THE ADDRESS SHOWN ON THE ARREST WARRANT, DETERMINES WHAT PLACE MAY BE ENTERED

State v. Hatchie, __ Wn. App. __, ___ P.3d ___, 2006 WL 1391225 (Div. II, 2006)

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

> On June 11, 2003, Pierce County Sheriff's Deputies were watching a Tacoma hardware store for purchases of methamphetamine precursors when they saw Schinnell buy a container of muriatic acid. The deputies followed Schinnell and observed him purchasing lithium batteries in a second store and two bottles of lye in a third store. Muriatic acid, lithium batteries, and lye are all used in methamphetamine manufacturing.
>
> The deputies continued to follow Schinnell at a distance in an unmarked car. A check with the Department of Licensing revealed that Schinnell's driver's license was suspended. It also revealed that he had an outstanding misdemeanor warrant for failing to appear for sentencing on a conviction for third degree driving while license suspended. The warrant provided for a $500 cash-only bail.
>
> The deputies decided to pull Schinnell over at this point, but they lost sight of him once he drove into a residential area. The deputies eventually saw Schinnell's truck parked in the driveway of a duplex unit. Schinnell was standing next to a fifth-wheel trailer in the driveway. Parked in the yard of the unit was a second car

registered to Schinnell. Schinnell's vehicles were registered to a different address in Hoodsport, Washington; Schinnell's misdemeanor warrant also listed that same Hoodsport address. The deputies established surveillance and called for a uniformed unit in a marked patrol car to contact Schinnell.

When the uniformed squad arrived, the deputies interviewed two people who were neighbors of the duplex unit. One neighbor stated that Schinnell lived at the unit and that he had been there earlier that day. The other neighbor, John Huntsman, told the deputies that there was a lot of traffic to the unit at all hours of the day. Huntsman said that people would often show up at his home looking for drugs and, when he turned them away, they would head to the unit.

Huntsman also stated that as many as six people lived at the unit and that he had seen Schinnell and his truck there before.

After talking with the neighbors, the deputies decided to contact Schinnell, who by that time was no longer standing in front of the duplex unit. As the deputies approached the unit, they spoke with Timothy Petticord, who was standing in the unit's yard. Petticord told the deputies that if Schinnell's truck was there, he was in the unit. Petticord also stated that he (Petticord) "stayed at the residence but generally outside the residence."

The deputies knocked intermittently on the duplex unit door for 45 minutes before Donald Robbins answered. When asked, Robbins first said that Schinnell was inside. He then stated that he had been sleeping and that he assumed Schinnell was "home" because his truck was there. The deputies announced their presence and asked Schinnell to come out. When there was no response, the deputies decided to enter the unit to serve the arrest warrant on Schinnell and to talk to him about his questionable purchases. While looking for Schinnell in the unit, the deputies saw numerous items used to manufacture methamphetamine. The deputies eventually found Schinnell hiding under a truck in the garage. They arrested him on the outstanding arrest warrant.

After Schinnell's arrest, the deputies learned that the duplex unit was being rented by Hatchie. Robbins told the deputies that Hatchie was at work.
Robbins indicated that he had been living with Hatchie for three months. Robbins also stated that Schinnell had been staying at the unit off and on for the last two months.

The deputies obtained a warrant to search Hatchie's duplex unit for evidence of possession and manufacture of methamphetamine. Based on the evidence seized from the unit, the State charged Hatchie with unlawful manufacture of a controlled substance.

Hatchie moved to suppress the evidence seized under the search warrant. Hatchie maintained that the deputies could not enter his home to arrest Schinnell on the outstanding misdemeanor warrant, and that, even if they could, the arrest warrant was invalid because it provided for a cash-only bail. Hatchie also maintained that the deputies used Schinnell's warrant as a pretext to enter his home. The trial court denied Hatchie's suppression motion.

A jury found Hatchie guilty as charged.

ISSUES AND RULINGS: 1) Under the "Payton" rule applied under article I, section 7 of the Washington constitution, does a misdemeanor arrest warrant justify a warrantless entry of a

residence where officers have probable cause to believe that the person named in the warrant: a) presently resides there; and b) is currently inside? (ANSWER: Yes)

2) In determining if a person is presently residing at a particular place, does the address shown on the arrest warrant control? (ANSWER: No, probable cause as to current residence is based on current circumstances at the time of the forcible entry to arrest)

Result: Affirmance of Pierce County Superior Court conviction of Raymond Kamiolani Hatchie for unlawful manufacture of a controlled substance (methamphetamine).

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Two constitutional interests are implicated when law enforcement enters a home to serve an arrest warrant: the arrestee's interest in being free from an unreasonable seizure, and the resident's interest in the privacy of his home. Here, the arrestee and the resident are different people with different interests at stake. The arrestee's liberty interest is protected by the requirement that the arrest warrant be issued by a neutral and detached magistrate upon a showing of probable cause. Schinnell's interest, as the arrestee, is not at issue in this appeal; we are concerned only with Hatchie's interest as a resident of the home which police entered to arrest Schinnell. If the entry to arrest Schinnell was unlawful, then Hatchie's rights were violated by the admission of evidence obtained as a result of the search warrant that was based on information obtained during that unlawful entry. If the entry was lawful, then Hatchie's rights were not violated by the admission of the evidence because it was seized pursuant to a search warrant that was based on the officer's plain view observations from inside the home made when they lawfully entered to arrest Schinnell.
>
> The Fourth Amendment prohibits unreasonable searches. Article I, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Under both constitutional provisions, lawful searches generally require search warrants. There are, however, several exceptions that "provide for those cases where the societal costs of obtaining a warrant ... outweigh the *reasons* for prior recourse to a neutral magistrate." The exceptions include consent, exigent circumstances, plain view, inventory searches, investigatory Terry stops, and searches incident to a valid arrest. In Washington, these search warrant exceptions are "jealously and carefully drawn" because article I, section 7 provides greater privacy protections than its federal counterpart. Article I, section 7 recognizes that "[i]n no area is a citizen more entitled to his privacy than in his or her home."
>
> In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court held that absent exigent circumstances, the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest." In narrowing the scope of its holding, the Court rejected the contention that "only a search warrant based on probable cause to believe the suspect is at home at a given time can adequately protect the privacy interests at stake":
>
> > It is true that an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause

> between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.

Payton's holding is limited to cases where law enforcement enters a home to arrest a person they believe to be a resident; the Court held one year later in Steagald that entry was not permissible to arrest a person believed to be a guest.

The Washington Supreme Court applied Payton in Williams, 124 Wn.2d 17 (2000) **Dec 00 LED:14** and State v. Thang, 145 Wn.2d 630 (2002) **May 02 LED:05**. In both cases, officers entered homes with the resident's consent to arrest a guest on an outstanding felony warrant. The court concluded both times that the consent was voluntary and the entry was therefore lawful. In dictum, both courts also concluded that the entry was lawful under Payton because officers could have entered the arrestee's home to effectuate the arrest and a person for whom an arrest warrant has been issued is not entitled to additional privacy protections in a host's home. In neither case did the court discuss whether the search warrant exception for arrest warrants applied under article I, section 7, or whether the exception depended on the seriousness of the crime for which the warrant was issued.

Those courts directly addressing Payton have held that its rule applies with equal force to misdemeanor warrants. [**LED Ed. Note: Court's footnote here lists numerous decisions from jurisdictions outside of Washington.]** These courts have concluded that the felony/misdemeanor distinction is irrelevant because Payton's main focus is the necessity of a magistrate's probable cause finding as a restraint on law enforcement's ability to enter a home for purposes of making an arrest. Such decisions are supported by the United States Supreme Court's later discussion of Payton in Steagald*:* "Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home."

The cases interpreting Payton delineate the protections provided by the Fourth Amendment and, as such, are of little value in addressing the broader privacy protections afforded under Washington's article I, section 7. Thus, we must determine whether Payton is good law in Washington and, if so, whether the Washington Constitution distinguishes between felony and misdemeanor warrants. Hatchie maintains that State v. Chrisman, 100 Wn.2d 814 (1984) (Chrisman II), controls this inquiry. We disagree. [Court's extensive discussion of Chrisman omitted.]

We turn now to whether the Payton rule applies under article I, section 7, and if so, whether a distinction must be made between felony and misdemeanor warrants. The protections of article I, section 7 extend to "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." Our inquiry into Payton*'s* application

requires a balancing of "societal need" with the "privacy interests provided by article I, section 7."

"[A] person's home is a highly private place" subject to rigorous constitutional protection. Absent a search warrant, any governmental entry into a home raises serious privacy concerns. But once a neutral magistrate has issued an arrest warrant, probable cause exists to believe that a citizen has violated the law of the land, and the citizen's privacy concerns are outweighed by society's interests in requiring him to answer those charges.

. . .

The privacy concerns implicated by our holding are best addressed by narrowly drawing the scope of the search warrant exception rather than creating a distinction between misdemeanor and felony arrest warrants. We emphasize that if law enforcement uses an arrest warrant as a pretext for entering the resident's home to conduct an otherwise impermissible search, the entry will be unlawful. In addition, we hold that lawful entry into a dwelling to serve an arrest warrant requires that law enforcement have probable cause to believe (1) that the person named in the arrest warrant resides in the home to be entered, and (2) the arrestee is in the home at the time of entry. Probable cause exists when the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the beliefs.

We hold that under article I, section 7, a felony or misdemeanor arrest warrant carries with it the limited authority to enter a dwelling to serve the warrant if there is probable cause to believe that the arrestee resides there and is present at the time law enforcement seeks to enter the dwelling. Applying our holding to the facts of this case, the deputies lawfully entered Hatchie's home to arrest Schinnell on the outstanding arrest warrant.

Here, the deputies had a warrant for Schinnell's arrest. Hatchie does not contend that the deputies lacked probable cause to believe that Schinnell was inside the unit at the time they entered it. Nor does Hatchie contend, as he did below, that the deputies used Schinnell's warrant as a pretext for entering the unit. Rather, Hatchie argues that the deputies lacked probable cause to believe that Schinnell resided at the unit. We disagree.

A neighbor told the deputies that Schinnell lived at the duplex unit. They had also been told by three people--a neighbor and two individuals associated with the unit--that if Schinnell's truck was at the unit, he would be inside. Robbins, who answered the door, specifically stated that Schinnell would be "home" if his truck was there. Schinnell also had two of his trucks at the residence, one parked on the lawn; the presence of multiple vehicles, parked in irregular locations, suggests that the vehicles' owner is not a mere guest in the home.

Hatchie relies on the fact that Schinnell's arrest warrant and vehicle registration listed a different address in Hoodsport, Washington. But individuals frequently change their residence without updating Department of Licensing records as they are legally required to do. And it is certainly not surprising that an individual with outstanding warrants will fail to inform the government of his current residence. Moreover, probable cause does not require absolute certainty; it requires only facts and circumstances sufficient to form a reasonable conclusion that the

person named in the warrant resides and is present in the residence to be entered. The totality of the facts known to the deputies who followed Schinnell established probable cause to believe that Schinnell resided in the duplex unit.

Hatchie lastly argues that even if home entry to serve a misdemeanor warrant is generally permissible, it was not in this case because Schinnell's warrant was invalid due to the cash-only bail provision. Hatchie is correct that under article I, section 7, Schinnell's arrest warrant authorized law enforcement to enter the duplex unit only if the warrant was valid. But Hatchie is incorrect that the bail provision invalidated Schinnell's arrest warrant.

Hatchie relies entirely on City of Yakima v. Mollett, 115 Wn. App (2003). There, Division Three ruled that the pre-trial release provisions of CrRLJ 3.2(a) do not allow a court to require a cash-only bail. Even if we assume that Mollett applies, and that the cash-only bail provision of Schinnell's warrant was invalid, the bail provision is severable from the warrant's probable cause determination and its presence does not invalidate the court's otherwise proper warrant for Schinnell's arrest. A warrant is invalid if it is not issued by a neutral and detached magistrate; is not based on probable cause; or if the court lacks authority to issue it. Such failings go to the constitutional heart of the warrant; a type of bail provision does not. Moreover, Hatchie's reliance on Mollett is misplaced. The Mollett court merely held that the bail provision was unlawful, it did not hold that Mollett's arrest made pursuant to the warrant was unlawful. We reject Hatchie's claim that Schinnell's arrest warrant was invalid due to the cash-only bail provision.

We conclude that the deputies lawfully entered Hatchie's duplex unit to serve a misdemeanor arrest warrant on Schinnell, whom they had probable cause to believe was residing there. As part of the lawful entry, the deputies saw in plain view evidence of a methamphetamine lab and subsequently obtained a valid search warrant to seize that lab. We, therefore, affirm the trial court's order denying Hatchie's motion to suppress.

[Some footnotes and citations omitted]

EXIGENT CIRCUMSTANCES – DUI SUSPECT WOULD NOT TAKE HIS HANDS OUT OF HIS POCKETS AND THEN FLED INTO HIS HOME – UNDER ALL OF THE CIRCUMSTANCES THE OFFICER WAS JUSTIFIED IN MAKING A FORCIBLE WARRANTLESS RESIDENCE ENTRY TO ARREST THE FLEEING DUI SUSPECT

State v. Wolters, ___ Wn. App. __, ___ P.3d ___, 2006 WL 1478540 (Div. II, 2006)

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

At an evidentiary hearing, [a WSP trooper] testified that while traveling westbound on Ocean Beach Highway, he observed Wolters's white Chevrolet pickup about a block ahead of him. The pickup, which was in the right westbound lane, drifted partly into the left lane, abruptly overcorrected, and moved back into the right lane, nearly striking the curb. Wolters drove five to ten miles per hour below the posted speed limit and continued to drift back and forth in his lane. [The trooper] activated his emergency lights and siren but Wolters failed to stop and continued driving erratically until he pulled into his own driveway and stopped.

> [The trooper] testified that Wolters exited his truck and walked toward the front of the truck with his hands in his pockets; a movement [the trooper] considered furtive. [The trooper] told him to "get his hands out of his pockets and stay where he was," but Wolters did not respond. Wolters then quickly ascended a small flight of stairs to the back door of his house and went through the exterior door and into what [the trooper] believed to be a laundry room. The laundry room was an enclosed room with a door inside that led to the rest of the house. Through the exterior door, [the trooper] saw Wolters attempting to enter the main part of the house. [The trooper] continued to give verbal commands, with his gun pointed at Wolters, and eventually talked Wolters out onto the deck and took him into custody.
>
> On cross-examination, [the trooper] admitted that sometimes a vehicle could be weaving on the road for reasons unrelated to alcohol. He also admitted that he never mentioned in his narrative report that safety concerns were a basis for pulling his weapon. [the trooper] said that he drew his gun once Wolters entered the exterior door because he was not sure what Wolters had inside the house. While Wolters tried to unlock the interior door, [the trooper] could see that he did not have a weapon in his hands. As Wolters attempted to unlock the interior door, [the trooper] continued to give verbal commands to Wolters to get him to cooperate and come outside. Although [the trooper] could not remember whether he actually had to "lay hands" on Wolters to remove him from the house, he physically entered the laundry room and "moved [Wolters] ... out" to the deck to effect the arrest. [The trooper] cited Wolters for driving under the influence, resisting arrest, and failure to yield to a police vehicle.
>
> Wolters moved to suppress all evidence obtained after the arrest, arguing that the arrest was unlawful because [the trooper] failed to obtain a warrant before arresting him. The State contends that exigent circumstances justified the arrest.

ISSUE AND RULING: Where the DUI suspect had refused to take his hands out of his pockets and had fled into his home, was the officer justified in entering the home to effect an arrest? (ANSWER: Yes)

Result: Affirmance of Cowlitz County Superior Court order affirming a District Court order denying suppression of evidence; case remanded for DUI trial of Jeffrey Glenn Wolters.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> The government bears the burden of showing the exigent circumstances that enable government agents to invade the sanctity of the home without a warrant. We consider 11 factors in determining whether exigent circumstances support a warrantless police entry into a home: Whether (1) a violent or other grave offense is involved; (2) the police have reason to believe the suspect is armed; (3) the police have reasonably trustworthy information that the suspect is guilty; (4) the police have strong reasons to believe the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the police enter peaceably; (7) the police are in hot pursuit; (8) the suspect is fleeing; (9) the arresting officer or the public are in danger; (10) the suspect has access to a vehicle; and (11) there is a risk that the police will lose evidence. State v. Terrovona, 105 Wn.2d 632 (1986) (citing Dorman v. United States, 435 F.2d 385, 392-93 (1970) and State v. Counts, 99 Wn.2d 54 (1983)).

Wolters concedes that [the trooper] (1) had reasonably trustworthy information that Wolters had committed several offenses, (2) had strong reason to believe that Wolters was on the premises, (3) was in hot pursuit, of (4) a fleeing suspect. Wolters contends, however, that these are insufficient to support the arrest. The State has the burden of showing that exigent circumstances compelled [the trooper] to arrest Wolters without first obtaining a warrant.

A. Suspect Reasonably Believed Armed

The State argues that [the trooper] had reason to believe Wolters was armed when he exited his vehicle with his hands in his pockets and refused to take them out. Wolters argues that any such fear became unreasonable once [the trooper] could see that Wolters was unarmed in the laundry room.

The district court expressly found that Wolters's "failure to remove [his] hands from [his] pockets heightened concerns that the defendant may be armed and dangerous." Wolters does not challenge this finding on appeal . . . Thus, we are bound by the finding that [the trooper] had heightened concerns that Wolters may have been armed.

B. Suspect Likely to Escape if not Swiftly Apprehended

The State argues that because the house had two exterior doors, one in front and one in back, and because [the trooper] was the only law enforcement on scene, nothing would have kept Wolters from escaping through another door or window. Wolters argues that [the trooper] could have maintained surveillance until a magistrate issued a warrant. Wolters also asserts that the State presented no evidence that [the trooper] was legitimately concerned that Wolters might escape.

"The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant." We measure exigency, in part, by considering whether it was feasible for the police to guard the premises while seeking a warrant. The State must show reasons why it was impractical, or unsafe, to take the time to get a warrant.

[The trooper] was the only officer at the scene. [The trooper] was also worried that Wolters may have been armed. Moreover, [the trooper] thought that Wolters may have been attempting to get a weapon from inside his house. [The trooper]'s testimony implies that he believed that it would have been unsafe or impractical to obtain a warrant.

Nonetheless, nothing in the record shows that Wolters was likely to escape if not swiftly apprehended. In State v. Griffith, 61 Wn. App. 35 (1991), the court noted that a suspect would have ample opportunity to escape where there is only one law enforcement officer because he would be unable to observe all entrances and exits to the home. But the test is whether the suspect is ***likely*** to escape, not whether the suspect has an opportunity to escape. Here, [the trooper] testified that Wolters's movements were sloppy, he was swaying back and forth, and that he had trouble even inserting the key in the lock. Although Wolters ignored [the trooper]'s repeated requests to cooperate, the State has not established that he was likely to escape if not immediately apprehended.

C. Peaceable Entry

The State argues that "[u]p to the point at which the trooper had to draw his gun to affect arrest," the trooper did not exhibit aggressive or hostile conduct. Wolters contends that [the trooper] did not make a peaceable entry since he entered the home with his gun drawn and pointed at Wolters.

In *Dorman,* the case from which the *Terrovona* court adopted the first six exigent circumstance factors, the court explained why peaceable entry was a proper consideration: "the fact that entry was not forcible aids in showing reasonableness of police attitude and conduct. The police, by identifying their mission, give the person an opportunity to surrender ... without a struggle and ... avoid the invasion of privacy involved in entry into the home." Dorman, 435 F.2d at 393. Dorman cited Miller v. United States, 357 U.S. 301 (1958), and Accarino v. United States, 179 F.2d 456 (1949), [*Court's footnote: Both cases talk extensively about forcible entry and provide significant commentary denouncing the practice of causing physical damage to a suspect's home in an attempt to effect an arrest.*] which both defined "peaceable entry," as entering without using physical force.

[The trooper] followed Wolters with his emergency equipment activated for a significant time before the two arrived at Wolters's home. Thereafter, he repeatedly commanded Wolters to comply with his orders, including that Wolters exit the laundry room. This conduct sufficiently apprised Wolters of [the trooper]'s mission. Although [the trooper] had his gun pointed at Wolters when he entered the house, he did so because he feared that Wolters may have been armed; he did not tell Wolters that he would shoot if Wolters did not exit the room. Further, there is no evidence that [the trooper] damaged any of Wolters's property when he entered the laundry room. We conclude that under the circumstances, [the trooper] peaceably entered Wolters's home to effect the arrest.

D. Destruction of Evidence

The State argues that the possibility of blood or breath-alcohol levels decreasing in the time it might take to get a warrant was an exigent circumstance justifying the warrantless arrest.

In Griffith, the defendant's erratic driving led a police officer to suspect that she was driving under the influence. The officer activated his car's emergency equipment and followed the defendant, who refused to stop, to her residence. Without first obtaining a warrant, the officer arrested the defendant after convincing her to try and find her driver's license in her car. The court found that, although not dispositive, the fact that the defendant's blood-alcohol level might have dissipated while the police obtained a warrant was an exigency justifying the warrantless arrest.

[The trooper] testified that Wolters's driving was consistent with that of a driver under the influence of intoxicants. Further, Wolters continued to drive erratically and failed to stop after [the trooper] activated his emergency equipment. [The trooper] had probable cause to arrest Wolters for driving under the influence (DUI). Thus, there was a possibility that evidence of the crime (Wolters's blood-alcohol level) would have been destroyed without an immediate arrest. *See* Griffith.

E. Grave Offense

In Griffith, the only post-Terrovona Washington case where the home arrest was based on an underlying DUI, the court declined to address whether DUI is sufficiently "grave" by itself to justify a home arrest. Because we hold that several other Terrovona factors exist, we need not address whether DUI is sufficiently grave on its own to justify a warrantless home arrest.

II. GRIFFITH AND ALTSCHULER

Wolters cites Seattle v. Altschuler, 53 Wn. App. 317 (1989), as support for his argument that [the trooper] lacked exigent circumstances to make a warrantless arrest.

In Altschuler, two police officers activated their car's emergency equipment and pursued the defendant after observing him drive through a red light. The defendant refused to stop and continued driving until he reached his home and pulled into his garage. One officer got out of the car and ran into the garage as the driver attempted to close the garage door. The officer arrested the defendant and the State charged him with resisting arrest, refusing to stop, and running a red light. The court held that while there was a "hot pursuit," the lack of other factors indicating exigent circumstances rendered the warrantless home arrest unlawful.

The State relies on Griffith. As previously mentioned, in that case, a police officer witnessed the defendant driving erratically and accordingly activated his emergency lights and followed the defendant. The defendant drove for two more blocks, pulled into her driveway, jumped out of her car, and started running towards her residence. The police officer chased the defendant and prevented her from closing the door to her house without actually entering her house. The police officer then smelled alcohol on the defendant's breath. The officer asked for identification, and when the defendant could not find any in her house, she accompanied the officer to her car to find her driver's license. After conducting field sobriety tests, the officer arrested the defendant for DUI. In upholding the trial court's denial of the defendant's motion to suppress, the court held that (1) there was a hot pursuit, (2) the defendant was a fleeing suspect, and (3) there was a need to preserve evidence.

The present case is more akin to Griffith. Wolters distinguishes Griffith by noting that in Griffith, the court emphasized that the officer never invaded the sanctity of the suspect's home. While the Griffith court twice mentioned the fact that the police officer never entered the home, the court's analysis focused on the Terrovona factors. And in this case, four Terrovona factors exist in addition to the three factors that justified the warrantless arrest in Griffith. Furthermore, Wolters's DUI is a more serious offense than the traffic infraction in Altschuler. The district court did not err in ruling that exigent circumstances justified [the trooper]'s warrantless arrest of Wolters.

[Some citations omitted]

LED EDITORIAL COMMENTS: Warrantless home entries by police are scrutinized very closely by the Washington appellate courts. Some attorneys are going to urge greater caution in this area than are others. Officers should seek guidance from their prosecutors and legal advisors.

Here are some of the comments (with minor modifications) that we made in the August 2001 LED regarding the Court of Appeals decision in State v. Bessette, 105 Wn. App. 793 (Div. III, 2001), a case in which the Court of Appeals held that an officer in hot pursuit of an MIP suspect did not have sufficient exigent circumstances to justify a warrantless home entry of a third person's residence in order to arrest the MIP suspect - -

Bessette Comment # 1: "Hot pursuit" of misdemeanants into residences: The law is not settled on this point, but officers should assume that exigency, beyond "hot pursuit," is required to justify non-consenting, warrantless entry of a residence to arrest a fleeing misdemeanant or fleeing gross misdemeanant. Thus, the arrest of a fleeing DUI suspect in State v. Griffith, 61 Wn. App. 35 (Div. III, 1991) Sept 99 LED:18 just inside the threshold of her front door was lawful, but apparently only because the officer had probable cause (not just reasonable suspicion) as to DUI before entering, and because the alcohol would be significantly dissipated if the officer waited for a search warrant or arrest warrant before entering.

Bessette Comment # 2: Warrantless "hot pursuit" of felons into residence: Division Three's Bessette opinion does not discuss the rule for felony "hot pursuit" into a residence (reasonably so, we note, as the facts there did not involve a felony). We would note, however, that in U.S. v. Santana, 427 U.S. 38 (1976), the U.S. Supreme Court held that an officer was legally justified in chasing a felon from a public location into her home, even though there was no arrest warrant or search warrant supporting that entry. We know of no case law, in this state or elsewhere, suggesting that the "bright line" of Santana does not apply in all felony "hot pursuit" situations.

Bessette Comment # 3: Stock search warrants should be considered: Washington law enforcement agencies might want to develop stock search warrants to deal with misdemeanor "hot pursuit" situations. The fact that such search warrants can be issued telephonically: a) makes this a practical option, and b) is a factor that will be considered by any court attempting to decide whether circumstances were truly exigent.

Note that if the officer in pursuit has probable cause to believe that the person being pursued has a current arrest warrant (felony or misdemeanor) and has fled into his own home, then the officer would be justified in forcing entry to arrest based on the arrest warrant. See the entry regarding the Hatchie case beginning at page 12 above in this LED.

HOME'S DETACHED GARAGE WITHOUT OVERHEAD DOOR HELD TO BE "BUILDING" UNDER BURGLARY STATUTE

State v. Johnson, __ Wn. App. __, 132 P.3d 737 (Div. II, 2006)

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

> On September 16, 2003, Simcoe saw a man she did not know walking along her driveway, towards the street and away from her garage. The man was carrying tools she recognized as hers. She normally stored the tools inside the garage; she later discovered they were no longer there. Simcoe identified Johnson as the man she saw walking away from her garage carrying her tools. Johnson did not have permission to enter the garage or take the tools.
>
> The garage was not attached to the house. The Simcoes stored tools, lawn equipment, and personal belongings in the garage. The garage was a permanent structure, built in the same wood-framed style as the house. It had a concrete floor, a roof, and four sides. The front side had an opening for a vehicle

garage door, but no door was installed. This meant that the garage was not and could not be fully enclosed. Because of the missing door, the garage was enclosed on three sides but open on the fourth like a shop or a bay.

The State charged Johnson with second degree burglary and third degree theft. Johnson unsuccessfully moved to dismiss the charges prior to trial, arguing that because the missing garage door meant that the garage could not be secured, it was not a building as that term is used in the second degree burglary statute.

The jury convicted Johnson as charged.

ISSUE AND RULING: Under the totality of the circumstances of this case, does the detached garage with missing overhead door constitute a "building" for purposes of the "burglary" statute? (ANSWER: Yes)

Result: Affirmance of Pierce County Superior Court conviction of Ronnie Keith Johnson for second degree burglary.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Second degree burglary includes an element of unlawfully entering or remaining "in a building other than a vehicle or a dwelling." RCW 9A.52.030(1). It is this unlawful entry or remaining *in a building* that creates liability for burglary above and beyond the independent crime intended within that building, commonly theft. Washington's Criminal Code defines "building":

> [I]n 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, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building.

RCW 9A.04.110(5).

We have found no Washington appellate cases interpreting this definition as it relates to door-less (or three-walled) garages, carports, shops, sheds, or the like. The Washington cases interpreting the statutory definition of building focus instead on fenced areas, when portions of a building constitute a separate building, or other counter-intuitive but specially designated buildings. But one case applied this definition to a non-fenced structure and held that the normally fully enclosed (but temporarily partly open) basement area beneath a tavern was a building under this statute. The court explained that the open basement was a structure used for carrying on business because it contained plumbing fixtures used in the main part of the business. State v. Couch, 44 Wn. App. 26 (Div. II, 1986).

The Washington statute defining building expressly includes the "ordinary meaning" of that term. RCW 9A.04.110(5). Building is ordinarily defined as

> [a] constructed edifice designed to stand more or less permanently, covering a space of land, usu. covered by a roof and more or less completely enclosed by walls, and serving as a dwelling, storehouse, factory, shelter for animals, or other useful structure--distinguished from structures not designed for

> occupancy (as fences or monuments) and from structures not intended for use in one place (as boats or trailers) even though subject to occupancy.
>
> WEBSTER'S THIRD NEW INT'L DICTIONARY 292 (1969).
>
> The State's evidence established that the Simcoes' garage is permanent and immobile, covers a space of land, is roofed, and serves as a storehouse or other useful structure. To meet the above definition, such a structure need only be "more or less completely enclosed" and we hold that a four-sided garage that is merely missing a door satisfies this requirement.
>
> The definition of building in RCW 9A.04.110(5) also includes a number of specific items and structures that are capable of being burglarized. This list of non-traditional buildings includes "any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods." RCW 9A.04.110(5).
>
> Whether or not the garage falls within the "ordinary meaning" of what is a building, it is clearly a "structure" used for the "deposit of goods." A structure is "something constructed or built." WEBSTER'S THIRD NEW INT'L DICTIONARY 2267 (1969). And "goods" are "tangible movable personal property having intrinsic value." The only testimony regarding the use of the structure in question is that the Simcoes used it to store tools, lawn equipment, and items soon to be sold at a garage sale. The Simcoes' garage, even without its door, falls within the specific legislative definition of building._
>
> The trial court properly instructed the jury in the language of the statute, including the determinative language quoted above.

[Footnotes and some citations omitted]

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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 website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions from 1939 to the present. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court-rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's website at

[http://www.supremecourtus.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since January 2000 can be accessed (by date of decision only) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address. Federal statutes can be accessed at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's current through January 2006, is at [http://www.1.leg.wa.gov/coderevisor]. Information about bills filed since 1997 in the Washington Legislature is at the same address. "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://insideago]. The address for the Criminal Justice Training Commission's home page is [https://fortress.wa.gov/cjtc/www/led/ledpage.html], while the address for the Attorney General's Office home page 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 [ledemail@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 CJTC Internet Home Page [https://fortress.wa.gov/cjtc/www/led/ledpage.html]