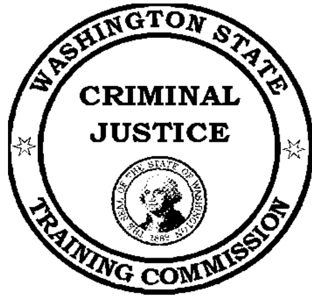

Law Enforcement

OCTOBER 2011

Digest

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

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HONOR ROLL

673rd Basic Law Enforcement Academy – March 31, 2011 through August 9, 2011

President:	Dion L. Terry, Bellingham PD
Best Overall:	Justin M. Chaput, Washington State Gambling Commission
Best Academic:	Justin M. Chaput, Washington State Gambling Commission
Best Firearms:	Justin M. Chaput, Washington State Gambling Commission
Patrol Partner Award:	Christopher M. Nielsen, Renton PD
Tac Officer:	Officer Steve Grossfeld, Seattle PD

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED AS OF JULY 25, 2011 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS":

- **Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution**
- **Article: "Initiation of Contact" Rules Under Fifth Amendment**
- **Article: Lineups, Showups and Photographic Spreads: Legal and Practical Aspects Regarding Identification Procedures & Testimony**

These articles by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year.

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BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

DISTRICT ATTORNEY'S OFFICE MAY NOT BE HELD LIABLE UNDER 42 U.S.C §1983 FOR FAILURE TO TRAIN ITS PROSECUTORS BASED ON A SINGLE BRADY VIOLATION – In Connick v. Thompson, ___ U.S. ___, 131 S. Ct. 1350 (March 29, 2011), a majority of the United States Supreme Court holds that a prosecutor's office can be held liable under 42 U.S.C. §1983 for failure to train based on a single Brady violation.

The Court summarizes the case and proceedings below as follows:

> The Orleans Parish District Attorney's Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence [a swatch of fabric stained with the suspect's blood, that test results showed was blood type B] that should have been turned over to the defense under Brady v. Maryland, 373 U.S. 83 (1963). Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson's scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson's convictions were vacated.
>
> After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages under [42 U.S.C. §1983]. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson's robbery case. The jury awarded Thompson $14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney's office may be held liable under §1983 for failure to train based on a single Brady violation. We hold that it cannot.

In order to succeed in a §1983 action based on an alleged failure to train, a plaintiff must generally establish deliberate indifference to the need to train, and that the lack of training actually caused the injury. "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train." Although the Court had in a prior case hypothesized a possible exception in which liability for failure to train could be established based on a single incident, the Connick Court concludes

that this case does not fall into the narrow range of single-incident liability. Accordingly, the Court holds that the single Brady violation in the present case is insufficient to establish liability based on failure to train.

Result: Reversal of Fifth Circuit U.S. Court of Appeals decision that had affirmed a U.S. District Court (Eastern District of Louisiana) jury verdict in favor of Thompson.

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

(1) NINTH CIRCUIT WITHDRAWS OPINION IN HAYES V. COUNTY OF SAN DIEGO AND CERTIFIES ISSUE TO CALIFORNIA STATE SUPREME COURT – In Hayes v. County of San Diego, ___ F.3d ___, 2011 WL 2315191 (9th Cir. June 14, 2011), the Ninth Circuit withdraws its prior opinion in this case, previously reported at 638 F.3d 688 (9th Cir. 2011), **May 11 LED:05**, and certifies the following issue to the California State Supreme Court: "Whether under California negligence law, sheriff's deputies owe a duty of care to a suicidal person when preparing, approaching, and performing a welfare check on him." **[LED EDITORIAL NOTE: Certification is a procedure that allows a federal court confronted with a state law issue, to certify the state law question to the highest court in the state and request that the state court determine the issue.]** In Hayes, officers responded to a domestic violence call, and, after entering the dimly lit home and making their way with aid of a flashlight, they were suddenly confronted by a slowly advancing, unknown, reportedly suicidal man, holding a knife (though arguably not holding the knife in an attack mode), 6 to 8 feet away from one of the officers. Officers shot and killed Hayes.

(2) DESPITE ICE'S LACK OF REASONABLE SUSPICION OF CRIMINAL CONDUCT BY THE PREVIOUSLY CONVICTED CHILD MOLESTER COMING BACK TO THE UNITED STATES FROM MEXICO, BORDER SEARCH DOCTRINE HELD TO JUSTIFY TAKING LAPTOP COMPUTER 170 MILES TO LAB AND SEARCHING IT OVER A TWO-DAY PERIOD FOR CHILD PORN – In United States v. Cotterman, 637 F.3d 1068 (9th Cir. March 30, 2011), a 3-judge Ninth Circuit panel rules 2-1 that the Fourth Amendment border search doctrine justifies seizure of a laptop computer by federal Immigration and Customs Enforcement (ICE) agents that began at the border and ended two days later in a government forensic laboratory, one hundred seventy miles away.

The U.S. Supreme Court has recognized in a number of decisions that the federal government possesses inherent authority to seize property at the international border without reasonable suspicion, probable cause or a warrant, in order to prevent the introduction of contraband into the country. Despite its name, a "border search" by federal officers need not take place at the actual international border. The border search doctrine sometimes applies to searches by federal officers that occur hundreds or thousands of miles from the physical border.

The Ninth Circuit majority opinion in Cotterman explains that the border search doctrine is not so limited as to require the government to equip every entry point, no matter how remote, with inspectors and sophisticated forensic equipment capable of searching whatever property that is brought into the United States. As long as property has not been officially cleared for entry and remains in the control of the federal government, a further search, within reason at least, is simply a continuation of the original border search.

While the initial seizure and preliminary search of Cotterman's computer was a valid border search, the Ninth Circuit majority opinion states that the continued detention of the computer could have become unreasonable under the Fourth Amendment if the federal agents had retained the computer beyond the time reasonably required to conduct a complete forensic

search. But in this case, the government was reasonable in detaining Cotterman's computer for forty-eight hours to search for child pornography. The duration of the seizure was reasonable, the Cotterman Court concludes, because the complexity of Cotterman's computer, specifically password-protected files, required the government to transport it to a forensic computer laboratory so an adequate search could be conducted.

Result: Reversal of U.S. District Court (Arizona) suppression order; case remanded for trial.

LED EDITORIAL COMMENT: Non-federal officers are not authorized to act under the border search doctrine unless they are specially cross-commissioned as federal officers with such authority.

(3) QUALIFIED IMMUNITY FOR ELECTED SHERIFF WHO TRANSFERRED LIEUTENANT OUT OF POLICY-MAKING POSITION FOR SUPPORTING OPPONENT DOES NOT PROTECT SHERIFF FROM CLAIM FOR ALLEGED RETALIATION AFTER TRANSFER – In Bardzik v. County of Orange, 635 F.3d 1138 (9th Cir. March 28, 2011), a 3-judge Ninth Circuit panel rules that a sheriff was entitled to qualified immunity for transferring a lieutenant from a policy making position to a non-policy making position based upon the lieutenant's support of the sheriff's opponent. The sheriff, however, is not entitled to qualified immunity for any further retaliatory action against the lieutenant once the lieutenant was transferred to the non-policy making position.

The Ninth Circuit summarizes the facts and holding as follows:

> Plaintiff Jeffrey Bardzik was a lieutenant in the Orange County Sheriff's Department under the command of Defendant Sheriff Michael Carona. Bardzik sues Carona under 42 U.S.C. §1983, alleging that Carona violated Bardzik's First Amendment right to free speech by retaliating against Bardzik for supporting Carona's opponent in the 2006 Sheriff's election. Bardzik argues that Carona retaliated against him by transferring him from the prestigious position of Reserve Division Commander to an undesirable post at Court Operations. Bardzik also argues that Carona continued punishing him even after he was transferred.
>
> Before the district court, Carona moved for summary judgment, arguing that he was permitted to retaliate against Bardzik for his political activities because Bardzik was a "policymaker" under (1980), or, at the very least, that Carona was entitled to qualified immunity for his actions. Carona argued that Bardzik was a policymaker because Bardzik was Reserve Division Commander in charge of over 600 reserve officers and because Bardzik proposed and implemented large policy changes in the Reserve Division. The district court denied Carona's motion, and Carona appeals the qualified immunity determination.
>
> We hold that Carona is entitled to qualified immunity for his actions retaliating against Bardzik while Bardzik was Reserve Division Commander because Bardzik was a policymaker in that position. Carona is not entitled to qualified immunity, however, for any further retaliatory action against Bardzik once Bardzik was transferred to Court Operations. Under clearly established law, Bardzik was not a policymaker at Court Operations. We affirm in part and reverse in part.

The Ninth Circuit explains the significance of the "policy-maker" analysis as follows:

> The First Amendment protects the rights of citizens to criticize a government official, to support a candidate opposing an elected official, or to run against an elected official. A citizen does not check these rights at the door when he accepts a government job. Ordinarily, an elected official cannot fire or retaliate against an employee for his political opinions, memberships, or activities.
>
> Nonetheless, this general rule has some limitations. In Elrod and Branti, the Supreme Court created the "policymaker exception," recognizing that an elected official must be able to appoint some high-level, personally and politically loyal officials who will help him implement the policies that the public voted for. See Branti v. Finkel, 445 U.S. 507, 517–20 (1980); Elrod v. Burns, 427 U.S. 347, 367 (1976) (plurality); Hall v. Ford, 856 F.2d 255, 263 (D.C. Cir. 1988) ("In order for the new administration to be given an opportunity to fulfill expectations, it must have available . . . significant facilitators of policy, people who have the personal and partisan loyalty, initiative, and enthusiasm that can make the difference between the acclaimed success of a government agency or program and its failure or, more typically, its lackluster performance." (emphasis added). An elected official may dismiss these same policymaking employees if they are no longer loyal, if they oppose his re-election, or simply if the official would prefer to work with someone else. "If [an official is] a policymaker, then under Branti his government employment could be terminated for purely political reasons without offending the First Amendment." Fazio v. City of S.F., 125 F.3d 1328, 1332 (9th Cir. 1997). We have recognized specifically that the rationale allowing for the patronage dismissal of a policymaker also justifies his dismissal for opposing the employer in an election. If Bardzik occupied a policymaking position, Carona is entitled to qualified immunity for demoting Bardzik in retaliation for supporting Carona's opponent in the 2006 Sheriff's election.

[Footnotes and some citations omitted]

The Court notes that it has previously rejected the argument that all sheriff's deputies, regardless of rank, are per se policymakers and that not even lieutenants are automatically policymakers. Because Bardzik is not a per se policymaker, the Court analyzes Bardzik's duties as Reserve Division Commander and in Court Operations to determine if they fit the description of a policymaker. The Court considers "some" factors that it has previously used to identify policymaking positions: "vague or broad responsibilities, relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders." Fazio, 125 F.3d at 1334 n. 5. Applying these factors to Bardzik's positions, the Court concludes that he was in a policy making position while he was Reserve Division Commander, and that he was not in a policy making position once he was transferred to Court Operations.

The Court holds that Carona is entitled to qualified immunity for his actions retaliating against Bardzik while Bardzik was Reserve Division Commander, but that he is not entitled to qualified immunity for his actions retaliating against Bardzik once Bardzik was transferred to Court Operations.

Result: Reversal of U.S. District Court (Central District of California) order denying qualified immunity to sheriff on claims that occurred while plaintiff was in policy-making position; affirming order denying qualified immunity on claims that occurred after plaintiff was transferred out of policy making position.

(4) PANEL MUDDIES WATER IN CIVIL RIGHTS ACT LAWSUIT, EQUIVOCATES ON WHETHER CLAIM BASED ON ALLEGED BRADY VIOLATION CAN BE BROUGHT WHERE THE PLAINTIFF WAS NOT CONVICTED OF A CRIME – In Smith v. Almada, 640 F.3d 931(9th Cir. March 21, 2011), in a 2-1 decision by the Ninth Circuit U.S. Court of Appeals (with special concurrence by one of the majority judges) the court withdraws its earlier opinion in this case, Smith v. Almada, 623 F.3d 1078 (9th Cir. October 19, 2010) **March 11 LED:12**, and substitutes this opinion. This opinion revises the analysis of the judges in the majority but not the result of the prior decision.

The plaintiff filed a lawsuit under 42 U.S.C. §1983 against a police sergeant based, in part, on a claim that the sergeant failed to disclose materially exculpatory evidence in the plaintiff's trial for criminal arson. Specifically, the sergeant investigating the arson failed to disclose the victim's false report of seeing the suspect standing in front of the building gloating subsequent to the fire. The revised Brady portion of the opinion reads as follows:

> Brady requires both prosecutors and police investigators to disclose exculpatory evidence to criminal defendants. See Tennison v. City & County of San Francisco, 570 F.3d 1078, 1087 (9th Cir. 2009) (allowing §1983 claim against police inspector for Brady violation) [See **Feb 09 LED:05** reporting on earlier Ninth Circuit panel decision in Tennison]. To state a claim under Brady, the plaintiff must allege that (1) the withheld evidence was favorable either because it was exculpatory or could be used to impeach, (2) the evidence was suppressed by the government, and (3) the nondisclosure prejudiced the plaintiff. Strickler v. Greene, 527 U.S. 263, 281–82 (1999). As to the prejudice prong, the Supreme Court has stated that "strictly speaking, there is never a real 'Brady violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."
>
> Here, Smith contends that Sergeant Almada should have disclosed the four previous dumpster fires that occurred on October 7, 2002, October 15, 2002, November 21, 2002, and November 25, 2002. In investigating these fires, Almada received three suspect descriptions that neither matched each other nor matched Smith. Smith also says that Almada should have disclosed Nelson's false statement that she saw Smith gloating at the crime scene. Smith argues that had Sergeant Almada disclosed this information, the jury in Smith's first trial would have acquitted him (or, at the very least, the judge in Smith's first trial would have dismissed the case immediately after the mistrial), and thus Smith would not have remained in jail for five months until his second trial.
>
> In considering Smith's Brady claim, District Court Judge Howard Matz found that "Almada is not liable under Brady because the evidence he omitted or misstated would not have materially affected the outcome of the criminal prosecution." We agree.
>
> Smith's Brady-based §1983 claim fails because he has not shown that the withheld evidence was material. First, the evidence of the suspects' descriptions in the previous dumpster fires is not material because it does nothing to undermine the strong physical evidence—i.e., the numerous pieces of mail—linking Smith to the February 2003 fire. Nor does it call into question evidence suggesting Smith's motive: Smith himself admitted that he had a dispute with Nelson less than three weeks before the fire.

Second, several differences between the February 2003 fire and the earlier fires undermine the inference that there was one dumpster arsonist or that one of the dumpster arsonists started the February 2003 fire. Although Sergeant Almada reported that one of the dumpster fires may have been started with an incendiary device in a plastic container, the similarities between the fires end there. The dumpster fires occurred in quick succession over a few weeks; the February 2003 fire occurred three months later. The dumpster fires barely damaged the building's interior; the February 2003 fire ravaged Simply Sofas. Witnesses to the dumpster fires described various suspects with very different appearances, suggesting there was no repeat offender who might have later started the February 2003 fire. And Nelson did not identify any of the dumpster fire suspects as having a grudge against her—and thus a motive to target Nelson's store itself.

More importantly, Smith does not show that any failure to disclose the earlier fires had any effect. Even without a prosecution disclosure of the earlier fires, Smith's attorney otherwise knew about the October 15, 2002 fire and sought to introduce evidence of that fire at trial. In response to Smith's offer of evidence regarding the October 15 fire, the prosecutor moved the state trial court to exclude evidence of that fire because there was no "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." The state trial court agreed and excluded the evidence. Thus, Smith's attorney knew of at least one earlier fire, and evidence of those earlier fires was likely inadmissible under California evidence law in any case. In sum, we cannot say that had Sergeant Almada disclosed evidence of the earlier dumpster fires, the outcome of Smith's first trial would have been different.

We are more troubled by Sergeant Almada's failure to disclose Nelson's false account of Smith's gloating at the crime scene. Importantly, Nelson did not testify about the gloating incident at Smith's first trial. Thus, evidence of her false account could have been used only to impeach Nelson's character for truthfulness. See Fed.R.Evid. 608(b)(1). But Nelson's testimony was not crucial at Smith's trial. Although Nelson's account of her business dispute with Smith helped establish a motive for Smith to commit the arson, Smith himself admitted the dispute to Sergeant Almada and Almada testified about his interviews with Smith. Moreover, even if the jury discredited all of Nelson's testimony, it still possessed the important and unexplained evidence linking Smith to the fire: the numerous pieces of mail from over a five-year period addressed to Smith and his wife at their residence.

Even if Sergeant Almada had disclosed Nelson's false account of Smith's gloating at the crime scene before Smith's first trial, we do not find "a reasonable probability of a different result." Banks v. Dretke, 540 U.S. 668, 699 (2004). Almada's failure to disclose the evidence does not sufficiently undermine our confidence in the outcome of Smith's trial. Strickler v. Greene, 527 U.S. 263, 289 (1999) (plaintiff must show "there is a reasonable probability that the result of the trial would have been different if the suppressed documents had been disclosed to the defense"). Hence, because the evidence that Sergeant Almada failed to disclose was not material, we hold that the district court correctly granted summary judgment for Sergeant Almada on Smith's Brady claim.

[Some citations omitted]

Result: Affirmance of order of U.S. District Court (Central District of California) dismissing claims against the sergeant.

(5) COUNTY JAILS MIGHT BE REQUIRED TO DISTRIBUTE UNSOLICITED PUBLICATION (CRIME, JUSTICE & AMERICA) TO INMATES – In Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir. January 31, 2011), a 3-judge Ninth Circuit panel holds in a 2-1 decision that issues of fact preclude dismissal of a lawsuit brought by a publisher who sought to distribute a free, unsolicited, publication to county jail inmates.

Previous Ninth Circuit opinions have struck down prison regulations prohibiting gift publications, subscription non-profit bulk mail, subscription for-profit bulk mail, and non-subscription bulk mail (which was requested by the inmate). Plaintiff Hrdlicka and his publication Crime, Justice & America (CJA), brought two lawsuits claiming that their First Amendment rights were violated by the mail policies at two county jails in California that refuse to distribute unsolicited copies of CJA to jail inmates.

The Hrdicka majority applies the four part test of Turner v. Safley, 482 U.S. 78 (1987) used to evaluate the constitutionality of prison regulations, and concludes that issues of fact preclude dismissal of the lawsuit at the summary judgment stage.

Result: Reversal of U.S. District Court (Eastern District of California) order granting summary judgment to Sheriffs of Sacramento and Butte Counties, California; cases remanded for trial.

Status: On September 1, 2011, the Ninth Circuit denied the sheriffs' motion for en banc review.

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WASHINGTON STATE SUPREME COURT

UNDER "PRIVACY PRONG" OF INVESTIGATIVE RECORDS EXEMPTION, RCW 42.56.240(1), EMPLOYEE PERSONAL INFORMATION EXEMPTION, RCW 42.56.230(2), AND THE CRIMINAL RECORDS PRIVACY ACT, CHAPTER 10.97 RCW, OFFICER'S NAME MAY BE REDACTED FROM NON-ADVERSE INTERNAL ADMINISTRATIVE INVESTIGATION AND FROM CRIMINAL INVESTIGATION WHERE CHARGES WERE NOT FILED, BUT REMAINDER OF THE INVESTIGATION RECORDS MUST BE DISCLOSED

Bainbridge Island Police Guild v. City of Puyallup, ___ Wn.2d ___, 2011 WL 3612247 (August 18, 2011)

Facts: An individual alleged that she was sexually assaulted by a Bainbridge Island police officer during a traffic stop. The Bainbridge Island Police Chief asked the Puyallup Police Department to conduct the criminal investigation, and the Mercer Island Police Department to conduct the internal administrative investigation.

The criminal investigation was forwarded to the prosecutor who declined to file charges because there was "not sufficient evidence to establish that there was any inappropriate behavior by this police officer." Likewise the internal administrative investigation recommended that the officer be "exonerated." After receiving both investigations, the chief closed the case and informed the officer that both investigations found the allegations "unsubstantiated."

Public Records Requests: (Excerpted from Supreme Court lead opinion):

In February 2008, Bainbridge Island received multiple public records requests for the MIIIR [internal administrative investigation] and the PCIR [criminal investigation], including requests from Tristan Baurick, a reporter from the *Kitsap Sun,* and Paulson, author of the *Bainbridge Notebook* blog. Paulson was permitted to view the PCIR as "non-conviction data," and Bainbridge Island informed her that the MIIIR would be produced absent an injunction.

On March 31, 2008, Puyallup notified [the officer] that Baurick had also submitted a public records request to Puyallup for the PCIR. **[<u>LED EDITORIAL NOTE</u>: Although the Court ultimately concludes that the officer's identity may be redacted, it nevertheless uses the officer's name throughout the opinion. We have chosen to omit the officer's name. This is also consistent with our practice of not naming individual officers regardless of the outcome of the case.]** Puyallup disagreed that the PCIR was nonconviction data, and informed [the officer] that it intended to produce the PCIR absent an order enjoining release. No injunction was obtained and the PCIR was produced for Baurick.

The Bainbridge Island Police Guild (BIPG) and [the officer] filed a complaint in the Kitsap County Superior Court to prevent Bainbridge Island from providing the MIIIR and the PCIR to Paulson and Baurick. Neither Mercer Island nor Puyallup was joined as a party. [The judge] reviewed the documents *in camera* and ruled that production of any portion of the reports would violate [the officer's] right to privacy. Therefore, both the PCIR and the MIIIR were withheld under the investigative report exemption of the Public Records Act (PRA), RCW 42.56.240(1). However, the court refused to enjoin the *Kitsap Sun* from publishing an article based on the PCIR produced by Puyallup for Baurick because Puyallup was not a party to the case.

On May 11, 2008, the *Kitsap Sun* published an article describing the allegations and identifying [the officer] in connection to them. Additional articles were also published in the *Bainbridge Islander* newspaper, the *Bainbridge Review* newspaper, and many Internet sources.

In June and July 2008, Koss and Koenig [the alleged victim] separately submitted public records requests to Puyallup for the PCIR. On July 18, 2008, [the officer] and BIPG moved in the Pierce County Superior Court to enjoin Puyallup from producing the PCIR. The court denied a temporary injunction and Puyallup released the report to Koss and Koenig. However, the court later ruled that the entire report was exempt from production under the personal information exemption, former RCW 42.56.230(2) (2010). The entire report was exempted, not just [the officer's] name, because the request was specific to information regarding the investigation of Koenig's allegation against [the officer], and thus any production would reveal his identity in connection with the incident. Koss and Koenig were ordered to return the report to Puyallup.

Koss and Koenig appealed the Pierce County Superior Court order directly to this court. Meanwhile, [all four requestors] submitted public records requests to Mercer Island for the MIIIR. [The officer] and BIPG moved in the King County Superior Court to enjoin production, and the injunction was again granted for the entirety of both reports. Koenig, Koss, and Paulson appealed the King County Superior Court order directly to this court. Because both appeals involve a public

records request for the same reports held by different agencies, involving the same underlying facts, the cases were consolidated for review.

ISSUES AND RULINGS: 1) Are the criminal and internal administrative investigations exempt from disclosure under the Public Records Act (PRA), specifically, RCW 42.56.230(2) (employee personal information) and RCW 42.56.240(1) (investigative records), such that the entire reports are exempt? (ANSWER BY LEAD SUPREME COURT OPINION: No, only the officer's name is exempt from disclosure)

2) Are the criminal and internal administrative investigations non-conviction criminal history record information (CHRI) under the Criminal Records Privacy Act (CRPA), chapter 10.97 RCW, such that they may not be disclosed (except for law enforcement purposes)? (ANSWER BY LEAD SUPREME COURT OPINION: No)

[LED EDITORIAL NOTE: The lead Supreme Court opinion is authored by Justice Fairhurst and joined by Justices Alexander, Chambers, and Owens.]

Result: Reversal of Pierce County Superior Court order enjoining disclosure of the entire criminal investigation and King County Superior Court order enjoining disclosure of the entire internal administrative investigation, with instructions to redact the officer's name and produce the remainder of the investigations.

ANALYSIS:

Public Records Act (PRA): (Excerpted from Supreme Court lead opinion):

Former RCW 42.56.230(2)—the personal information exemption

The trial court erroneously ruled that the personal information exemption prohibited production of the entire PCIR and MIIIR. The PRA exempts from production "[p]ersonal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy." Former RCW 42.56.230(2). To determine whether the PCIR and the MIIIR fall within this exemption, we must first decide (a) whether the reports constitute personal information, (b) whether [the officer] has a right to privacy in his identity, and (c) whether the production of [the officer's] identity in connection with the alleged and unsubstantiated sexual misconduct would violate that right to privacy. Bellevue John Does 1–11 v. Bellevue Sch. Dist. No. 405, 164 Wn.2d 199, 210 (2008) **Dec 08 LED:21**.

(a) Personal information

The PCIR and the MIIIR constitute personal information under former RCW 42.56.230(2). Although not defined in the PRA, we have defined "personal information" as "information relating to or affecting a particular individual, information associated with private concerns, or information that is not public or general." In Bellevue John Does, we held that a teacher's identity in connection with an unsubstantiated allegation of sexual misconduct is "personal information" under former RCW 42.56.230(2).

Similar to Bellevue John Does, a police officer's identity in connection with an allegation of sexual misconduct is also personal information under former RCW

42.56.230(2). Neither party asserts a reasonable basis to distinguish our case from Bellevue John Does on this issue. We hold that the PCIR and MIIIR contain personal information.

(b) Right to privacy

Appellants argue that [the officer] has no right to privacy in his identity under the PRA because his identity in connection with the unsubstantiated allegations was already released to the media without [the officer's] name. We are not persuaded that a person's right to privacy, as interpreted under the PRA, should be forever lost because of media coverage.

Personal information is exempt from production only when that production violates an employee's right to privacy. Former RCW 42.56.230(2). RCW 42.56.050 sets forth the test for determining when the right to privacy is violated, but does not explicitly identify when the right to privacy exists. In Bellevue John Does, we held that teachers have a right to privacy in their identities in connection with an unsubstantiated allegation of sexual misconduct, because the unsubstantiated allegations are matters concerning the teachers' private lives. In our case, the PCIR resulted in the allegations being found "unsubstantiated," and the MIIIR "EXONERATED" [the officer]. Under the precedent established in Bellevue John Does, [the officer] has a right to privacy in his identity in connection with Koenig's unsubstantiated allegation of sexual misconduct. Therefore, we must turn to the question of whether that right to privacy was eliminated by media coverage of the incident stemming from the initial disclosure of the PCIR by Puyallup.

Under the PRA, [the officer] maintains his right to privacy in his identity, regardless of the media coverage of this unsubstantiated allegation. An agency should look to the contents of the document, and not the knowledge of third parties when deciding if the subject of a report has a right to privacy in their identity. Even though a person's identity might be redacted from a public record, the outside knowledge of third parties will always allow some individuals to fill in the blanks. But just because some members of the public may already know the identity of the person in the report, it does not mean that an agency does not violate the person's right to privacy by confirming that knowledge through its production.

We also must note the practical effect on the agency if we were to hold that [the officer] has no right to privacy in his identity. Under such a holding, agencies will be required to engage in an analysis of not just the contents of the report but the degree and scope of media coverage regarding the incident. Exactly how much media coverage is required before we will rule that an individual's right to privacy is lost? Agencies will be placed in the position of making a fact-specific inquiry with uncertain guidelines. If the agency incorrectly finds that there has been little media coverage and exempts from disclosure the identity of the subject of the report, the agency could face significant statutory penalties. Puyallup filed a separate brief in this action requesting a bright line rule enabling government agencies to fulfill their duty under the PRA while protecting an individual's right to privacy. Denying the existence of a right to privacy on the basis of the extent of media coverage is likely to result in incorrect assessments and potentially significant costs to the agency. We hold that [the officer] has a right to privacy in

his identity, regardless of the media coverage stemming from the production of the PCIR.

(c) Violation of the right to privacy

Appellants argue that even if we hold that [the officer] has a right to privacy in his identity in connection to the unsubstantiated allegation of sexual misconduct, that right to privacy is not violated by production of the PCIR or the MIIIR with [the officer's] name redacted. "A person's 'right to privacy' . . . is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public." RCW 42.56.050.

(1) Highly offensive

Appellants argue that production of [the officer's] identity in connection with the unsubstantiated accusation of sexual misconduct is not highly offensive to a reasonable person. "[T]he offensive nature of disclosure does not vary depending on whether the allegation is substantiated or unsubstantiated," but "is implicit in the nature of an allegation of sexual misconduct." In Bellevue John Does, we held that it was highly offensive to reveal a teacher's identity in connection with an accusation of sexual misconduct. For the purposes of determining whether the production is highly offensive, there is no reason to distinguish an allegation of sexual misconduct against a police officer from an allegation of sexual misconduct against a teacher. We hold that revealing [the officer's] identity in connection with Koenig's unsubstantiated allegation of sexual misconduct is highly offensive to a reasonable person.

(2) Legitimate public concern

Appellants argue that the trial court's withholding of the entire PCIR and MIIIR unlawfully denied access to a matter of legitimate public concern: an agency's response to an allegation of sexual misconduct. In Bellevue John Does, we held that the public has no legitimate interest in finding out the identity of someone accused of an unsubstantiated allegation of sexual misconduct. Because the public records request in this case was specific to the PCIR and the MIIIR involving [the officer] and Koenig, the trial courts found that any production of the PCIR or the MIIIR in connection with this specific request would necessarily reveal [the officer's] identity in connection with the unsubstantiated allegation. However, we have recognized "when allegations of sexual misconduct are unsubstantiated, the public may have a legitimate concern in the nature of the allegation and response of the school system to the allegation."

Although lacking a legitimate interest in the name of a police officer who is the subject of an unsubstantiated allegation of sexual misconduct, the public does have a legitimate interest in how a police department responds to and investigates such an allegation against an officer. The reports in this case not only identify [the officer], they reveal the nature of the Mercer Island and Puyallup Police Departments' investigations of this allegation. Under RCW 42.56.050, the trial court erred by exempting the entire PCIR and MIIIR, rather than producing the report with only [the officer's] identity redacted.

We have previously permitted production of a similarly redacted report even though redaction of only the person's name was insufficient to protect the person's identity. See Koenig v. City of Des Moines, 158 Wn.2d 173 (2006) **Oct 06 LED:15**. In Koenig the public records exemption at issue, former RCW 42.17.31901 (1992), specifically exempted "'[i]nformation revealing the identity of child victims of sexual assault.'" However, unlike former RCW 42.56.230(2), former RCW 42.17.31901 went on to define "[i]dentifying information" as "the child victim's name, address, location, photograph, and in cases in which the child victim is a relative or stepchild of the alleged perpetrator, identification of the relationship between the child and the alleged perpetrator." In Koenig, the requestor had submitted a public records request specific to Jane Doe, a child victim of sexual assault. Just like our current case, any production of the records of the assault whatsoever would identify Jane Doe as a child victim of sexual assault, even if her name were redacted. Relying on the express language of the statute, the court held that the provision exempted only the enumerated pieces of identifying information and not the entire report. The majority noted the dissent's concern that the result would encourage "'fishing expedition[s]'" and speculation about victims' identities in filing public records requests. However, the majority held that it was bound by the unambiguous text of former RCW 42.17.31901, and ordered the records production with only the enumerated identifying information redacted.

Although former RCW 42.56.230(2) does not enumerate specific types of identifying information that must be redacted, we are placed in the same position of being unable to completely protect the identity of an individual in a public record. Under RCW 42.56.050, a person's "'right to privacy' . . . is invaded or violated only if disclosure of information about the person: (1) Would be highly offensive to a reasonable person, and (2) is not [a matter] of legitimate concern." (Emphasis added.) The PCIR and MIIIR include matters of legitimate public concern because they include information regarding police departments' investigations of an allegation of sexual misconduct. Because the nature of the investigations is a matter of legitimate public concern, disclosure of that information is not a violation of a person's right to privacy. Because it is not a violation of a person's right to privacy, it does not fall into the category of "personal information" exempt under former RCW 42.56.230(2). We recognize that appellants' request under these circumstances may result in others figuring out [the officer's] identity. However, it is unlikely that these are the only circumstances in which the previously existing knowledge of a third party, paired with the information in a public records request, reveals more than either source would reveal alone. We hold that while [the officer's] identity is exempt from production under former RCW 42.56.230(2), the remainder of the PCIR and the MIIIR is nonexempt.

. . . .

RCW 42.56.240(1)—the investigative records exemption

Although conceding that both exemptions turn on the issue of [the officer's] right to privacy, BIPG and [the officer] argue that the investigative records exemption under RCW 42.56.240(1), exempts the entire PCIR and MIIIR from production. RCW 42.56.240 provides:

The following investigative, law enforcement, and crime victim information is exempt from public inspection and copying under this chapter:

> (1) Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.

The PCIR and MIIIR are clearly investigative records compiled by law enforcement. See Cowles Publ'g Co. v. State Patrol, 109 Wn.2d 712, 729 (1988) (holding that law enforcement internal investigation records meet the first criterion of investigative records exemption); Cowles Publ'g Co. v. Spokane Police Dep't, 139 Wn.2d 472, 477–78 (1999) **Jan 00 LED:06** (investigative records exemption applies to criminal investigative records so long as the other criteria of the exemption are met). The PCIR was part of a criminal investigation of [the officer], and the MIIIR was compiled by Mercer Island Police after the Bainbridge Island police chief vested Mercer Island with the responsibility of deciding whether [the officer] should be disciplined.

The BIPG and [the officer] do not argue that the PCIR and the MIIIR are essential to effective law enforcement, but only that withholding the reports is essential for the protection of [the officer's] right to privacy. **[LED EDITORIAL NOTE: This case is decided solely based on the "privacy prong" of the investigative records exemption and not on the "essential to effective law enforcement prong."]** The analysis here is identical to the right to privacy analysis in the personal information exemption. Therefore, only [the officer's] identity is exempt under the PRA and should be redacted. Subject to those redactions, the remainder of the PCIR and the MIIIR, including the nature of the agencies' response to the allegation, are nonexempt.

. . . .

Criminal Records Privacy Act (CRPA)

The BIPG and the officer also argued that chapter 10.97 RCW (the CRPA) exempts the PCIR from production, and to the extent it contains the PCIR, the MIIIR.

The CRPA governs the dissemination of Criminal history record information (CHRI). CHRI is defined as:

> [I]nformation contained in records collected by criminal justice agencies, other than courts, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release.
>
> The term includes information contained in records maintained by or obtained from criminal justice agencies, other than courts, which records provide individual

> identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender . . .

RCW 10.97.030(1). Non-conviction data is defined as:

> [A]ll criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending. There shall be a rebuttable presumption that proceedings are no longer actively pending if more than one year has elapsed since arrest, citation, charge, or service of warrant and no disposition has been entered.

RCW 10.97.130(2).

RCW 10.97.050 governs dissemination of CHRI by criminal justice agencies. Generally, it provides that conviction data may be disseminated without restriction (RCW 10.97.050(1)) and restricts the dissemination of non-conviction data. See RCW 10.97.050(3)-(6).

RCW 10.97.080 governs inspection and challenge to the accuracy of CHRI by the subject of record. In this context, the statute provides in part:

> . . . .
>
> No person shall be allowed to retain or mechanically reproduce any nonconviction data except for the purpose of challenge or correction when the person who is the subject of the record asserts the belief in writing that the information regarding such person is inaccurate or incomplete. The provisions of chapter 42.56 RCW shall not be construed to require or authorize copying of nonconviction data for any other purpose.
>
> . . . .

In Hudgens v. City of Renton, 49 Wn. App. 842, 844–45 (1987), the Court of Appeals concluded that this language in RCW 10.97.080 prohibited the copying of a criminal investigation that did not result in a conviction, but did not prohibit a requestor from inspecting or viewing the record even where the requestor was not the subject of record.

The lead opinion in Bainbridge Island Police Guild concludes:

> The PCIR did not arise from an arrest, detention, indictment, or other formal criminal charge, and would not include any "descriptions and notations" of those events. Therefore, the PCIR does not contain any criminal history record information beyond the individual identification of [the officer] as the alleged offender.
>
> The BIPG and [the officer] cite to Hudgens as authority for the proposition that RCW 10.97.080 exempts an entire record such as the PCIR from production if it contains any criminal history record information. In Hudgens, the Court of Appeals declared, without analysis, that police investigative records relating to an arrest were exempt from retention and copying under RCW 10.97.080. We reject that interpretation, and hold that RCW 10.97.080 requires redaction of only

criminal history record information. In other words, the statute does not exempt information relating to the conduct of the police during the investigation.

Interpreting criminal history record information as not including all the contents of an investigative record is also consistent with the surrounding statutory context. "Statutes in pari materia should be harmonized so as to give force and effect to each and this rule applies with peculiar force to statutes passed at the same session of the Legislature." The first paragraph of RCW 10.97.080 explicitly draws a distinction between criminal history record information and "data contained in . . . investigative . . . files." Moreover, companion legislation enacted during the same legislative session as RCW 10.97.080 draws the same distinction:

> "Criminal history record information" includes, and shall be restricted to identifying data and information recorded as the result of an arrest or other initiation of criminal proceedings and the consequent proceedings related thereto. "Criminal history record information" shall not include intelligence, analytical, <u>or investigative reports</u> and files.

RCW 43.43.705 (emphasis added). RCW 43.43.705 establishes the Washington State Patrol as the central clearinghouse for criminal history record information in Washington. We interpret "criminal history record information" in a manner consistent with RCW 43.43.705, holding that it does not include the entire investigative report. In the context of the PCIR, RCW 10.97.080 requires nothing more than redaction of [the officer's] identity in connection with the allegation, but the PCIR's description of the police department's investigation is not criminal history record information and must be produced.

[Some citations and footnotes omitted]

<u>Concurrence/Dissent</u>: Chief Justice Madsen concurs in the lead opinion's conclusion that both the criminal and internal administrative investigations must be disclosed, but Justice Madsen would not allow the officer's name to be redacted. Justice Madsen also dissented in the <u>Bellevue John Does</u> case. Justice Madsen's opinion does not address the chapter 10.97 RCW issue. Justice Madsen is joined by Justices Charles Johnson, Stephens, and Sanders (Justice Sanders is sitting in a temporary capacity on cases on which he heard oral argument before Justice Wiggins was sworn into office on the Supreme Court on January 7, 2011).

<u>Dissent</u>: Justice Jim Johnson is the lone dissenter, arguing that both the criminal and the internal administrative investigations should be exempt from disclosure in their entirety under RCW 42.56.240(1). Justice Johnson's opinion does not address the chapter 10.97 RCW issue.

<u>LED EDITORIAL COMMENTS</u>: 1) <u>RCW 42.56.230(2) – Employee Personal Information Exemption</u> – RCW 42.56.230(2) exempts:

> **Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy.**

This exemption is typically applied to records contained in personnel files. Yet both the lead and concurring opinions suggest that this exemption would apply to a criminal

investigation and the lead opinion uses this exemption as a basis for redacting the officer's name from the criminal investigation. The lead opinion relies on Bellevue John Does 1–11 v. Bellevue School District No. 405, 164 Wn.2d 199, 210 (2008) Dec 08 LED:21, but that opinion involved an internal administrative investigation of teachers. It did not involve a criminal investigation. We disagree with the Court's apparent conclusion that the Legislature intended that this exemption apply to a criminal investigation, especially an investigation completed by another agency. It is a closer call whether this exemption would or should apply to an internal administrative investigation of a police officer. Based on anecdotal evidence, most law enforcement agencies have not cited this exemption as a basis for withholding or redacting an internal administrative investigation, but rather rely on the investigative records exemption. But now, law enforcement agencies and their legal advisors may need to take another look at this issue.

2) RCW 42.56.240(1) – Investigative Records Exemption – RCW 42.56.240(1) exempts:

> **Specific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.**

The investigative records exemption has two distinct prongs: 1) essential to effective law enforcement, and 2) protection of any person's right to privacy. In Cowles Publishing Company v. State Patrol, 109 Wn.2d 712 (1988), the Supreme Court held that officer names could be redacted from adverse internal administrative investigations under the essential to effective law enforcement prong (but not under the privacy prong). Many law enforcement agencies rely solely on the effective to essential law enforcement prong in withholding non-adverse internal administrative investigations. As noted above, the Bainbridge Island Police Guild Court specifically pointed out that none of the parties to the case argued that non-disclosure was essential to effective law enforcement. (At least they did not make this argument in the Supreme Court.) Accordingly, this case was decided on the "privacy prong," and it appears that an argument can still be made that non-adverse internal administrative investigations are still exempt in their entirety under the essential to effective law enforcement prong of RCW 42.56.240(1). However, while it seems apparent that an argument exists, it appears (at least initially) that some law enforcement agencies are choosing in light of the Bainbridge Island Police Guild decision to begin disclosing non-adverse internal administrative investigations with the officer's name redacted. This is not surprising given the substantial penalties at stake under the PRA. Agencies choosing to continue asserting the exemption may find themselves having to present a strong factual basis of why non-disclosure is essential to effective law enforcement. See for example the extensive facts presented in both Cowles v. State Patrol and Newman v. King County, 133 Wn.2d 565 (1997) Jan 98 LED:07.

Law enforcement agencies should discuss all aspects of the Bainbridge Island Police Guild decision with their agency legal advisors.

3) Chapter 10.97 RCW – Criminal Records Privacy Act (CRPA) – By way of background, there has been a longstanding debate amongst those who advise law enforcement agencies regarding whether the CRPA applies to criminal investigations. Those who believe it does not apply to criminal investigations (with whom we agree based on the

language and history of both the CRPA and RCW 43.43.705) would disclose all completed criminal investigations (with appropriate redactions) on the basis that the CRPA only applies to RAP sheet data, not criminal investigations. Those who believe the CRPA applies to criminal investigations would withhold any investigations not resulting in convictions. They rely on the Court of Appeals decision in <u>Hudgens v. City of Renton</u>, 49 Wn. App. 842 (1987) where the court held that a criminal investigation was criminal history record information (CHRI), an investigation that did not result in a conviction was non-conviction CHRI, and accordingly, pursuant to chapter 10.97 RCW, could not be copied, but could be viewed.

In <u>Bainbridge Island Police Guild</u> the Court analyzes the text of chapter 10.97 RCW and concludes that the criminal investigation "does not contain any [CHRI] beyond the individual identification of [the officer] as the alleged offender," and rejects the argument that the entire investigation must be withheld, concluding that only the CHRI – in this case the name – need be redacted. This likely ends any debate regarding whether an entire criminal investigation may be categorically withheld as non-conviction data. However, it does suggest that a criminal investigation can contain CHRI.

There are at least two ways to interpret this opinion. One interpretation is that the Court (intentionally or not) held that a name in a criminal investigation is CHRI and if the investigation does not result in a conviction it must be redacted as non-conviction CHRI. It would arguably be a "must" because chapter 10.97 RCW provides criminal penalties for unauthorized disclosure. This interpretation will require law enforcement records officers to determine whether a requested criminal investigation resulted in a conviction, and if not, redact the suspect's name (at minimum).

To the extent this is the correct interpretation of the Court's opinion, we think the Court has misread the legislative intent of the CRPA. Although RCW 10.97.030(1) does include "records [which] provide individual identification of a person together with any portion of the individual's record of involvement in the criminal justice system as an alleged or convicted offender" within the definition of CHRI, that language must be read in the context of the rest of the chapter, which applies only to RAP sheet information. The legislative history of the CRPA, particularly tracing its origins to the federal law that it was patterned after, is also consistent with the view that it only applies to RAP sheet information.

An alternative interpretation is that the Court only arrived at its conclusion because it had already concluded that the officer's name could be redacted under the PRA. The Court states that "RCW 10.97.080 requires nothing more than redaction of [the officer's] identity in connection with the allegation, but the PCIR's description of the police department's investigation is not [CHRI] and must be produced." This interpretation suggests that this part of the Court's opinion is dicta (language not necessary to support a decision) and may be disregarded.

The CRPA is an unclear statutory scheme, and as noted above its correct interpretation has long been subject to debate, prior to the <u>Bainbridge Island Police Guild</u> case. Unfortunately rather than clarifying the meaning of the CRPA, this case arguably creates greater confusion. We hope that this confusion will be eliminated, or reduced, in subsequent legislative sessions. Until then, we reiterate that law enforcement agencies should discuss all aspects of this decision with their agency legal advisors.

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BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

COLLATERAL BAR RULE PROHIBITS CHALLENGES TO VALIDITY OF ORDERS ISSUED UNDER CHAPTER 26.50 RCW; LANGUAGE IN DEFENDANT'S ORDER PROVIDED ADEQUATE NOTICE THAT VIOLATION WAS A CRIME – In City of Seattle v. May, 171 Wn.2d 847 (June 23, 2011), the Supreme Court holds in a 6-3 decision that (1) the collateral bar rule prohibits challenges to the validity of orders issued under the Domestic Violence Protection Act, chapter 26.50 RCW, and (2) the language contained in the defendant's order provided adequate notice that violation was a crime.

Defendant May was charged in Seattle Municipal Court with violating a domestic violence protection order. The order was issued by the King County Superior Court. On appeal the defendant challenged the validity of the order as well as the order's alleged failure to provide him with notice that violation would result in criminal penalties. The Court rejects these arguments.

The "collateral bar rule" prohibits a party from challenging the validity of a court order in a proceeding for violation of that order.

The Supreme Court holds that the collateral bar rule prohibits defendant May's challenge to the validity of the protection order in this case, explaining:

> Today, we clarify that, in a proceeding for violation of a court order, the trial court's gate-keeping role includes excluding orders that are void, orders that are inapplicable to the crime charged (i.e., the order either does not apply to the defendant or does not apply to the charged conduct), and orders that cannot be constitutionally applied to the charged conduct (e.g., orders that fail to give the restrained party fair warning of the relevant prohibited conduct). . . . Miller specifically stated that no-contact orders issued pursuant to chapter 10.99 RCW may not be "collaterally attacked after the alleged violations of the orders." We see no reason this should apply differently to orders issued pursuant to chapter 26.50 RCW. The collateral bar rule precludes challenges to the validity—but not the applicability—of a court order in a proceeding for violation of such an order except for challenges to the issuing court's jurisdiction to issue the type of order in question. Void orders and inapplicable orders are inadmissible in such proceedings.
>
> In the present case, the court issuing the permanent domestic violence protection order against May had jurisdiction to issue such orders, and its subject matter and personal jurisdiction are unchallenged. As such, the order was not void. The collateral bar rule therefore prohibits May's challenge to the validity of the underlying protection order. If May believes the domestic violence protection order against him is invalid, RCW 26.50.130(1) permits him to seek modification of that order by the issuing court.

[Citations and footnotes omitted]

The Court also holds that defendant May had notice that violation of the protection order would result in criminal penalties.

The protection order against May states, "Violation of the provisions of this order with actual notice of its terms is [a] criminal offense under chapter 26.50 RCW and RCW 10.31.100 and will subject a violator to arrest." May's argument is premised on the proposition that chapter 26.50 RCW does not criminalize violation of a no-contact provision of an order of protection. This premise is incorrect in light of Bunker. In State v. Bunker, 169 Wn.2d 571 (2010) **Oct 10 LED:15** this court held that former RCW 26.50.110 (2000), which was in effect at the time May violated the order of protection, criminalized all violations of no-contact and protection orders. The Seattle ordinance under which May was convicted is no broader, but is instead simply the type of "equivalent municipal ordinance" expressly contemplated by chapter 26.50 RCW. Thus, because May had notice that violation of the order of protection was a crime under chapter 26.50 RCW, May had "fair warning of the type of conduct" that was criminal. Consequently his prosecution did not violate due process.

[Some citations and footnotes omitted]

Dissent: Justice Sanders files a dissent, jointed by Justice James Johnson concurs (Justice Sanders is sitting in a temporary capacity on cases on which he heard oral argument before Justice Wiggins was sworn into office on the Supreme Court on January 7, 2011).

Justice Stephens dissents, agreeing with Justice Sanders' dissent, but writing separately because she does not "endorse the dissent's gratuitous comments about the misuse of protection orders generally."

Result: Affirmance of Court of Appeals decision reinstating a Seattle Municipal Court conviction (two counts) of Robert J. May for violation of domestic violence protection order (King County Superior Court had reversed the conviction on an appeal from the municipal court).

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WASHINGTON STATE COURT OF APPEALS

COURT OF APPEALS APPLIES ARIZONA V. GANT RULE TO SEARCH OF PURSE (ON PERSON) INCIDENT TO ARREST

State v. Byrd, 162 Wn. App. 612 (Div. III, July 19, 2011)

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

[A police officer] stopped a Honda Civic for using stolen license plates. [The officer] arrested the driver on an outstanding warrant. The driver told the officer that the car belonged to the passenger, Lisa Byrd.

[The officer] approached Ms. Byrd. She was sitting in the front passenger seat with a purse on her lap. [The officer] ordered Ms. Byrd out of the car. He removed the purse from her lap and placed it on the ground outside the car. He arrested Ms. Byrd for possession of stolen property, handcuffed her, and put her in a patrol car. He then searched Ms. Byrd's purse and found methamphetamine and glass pipes with drug residue.

Ms. Byrd was charged with possession of a controlled substance. She moved to suppress the drug evidence, arguing that the search of her purse violated Gant

> and State v. Valdez. The trial court concluded that the search incident to arrest exception did not authorize the warrantless search of Ms. Byrd's purse. It suppressed the drug evidence and dismissed the charge against Ms. Byrd. The State appeals the suppression ruling.

ISSUE AND RULING: Do the Fourth Amendment principles laid out by the United States Supreme Court in Arizona v. Gant, 556 U.S. 332 (2009) **June 09 LED:13**, restricting searches of vehicles incident to arrest, apply to the search of a purse incident arrest where the purse was in the suspect's lap just prior to arrest? (ANSWER BY COURT OF APPEALS: Yes, rules a 2-1 majority, expressly overruling its conflicting opinion in State v. Johnson, 155 Wn. App. 270, review denied, 170 Wn.2d 1006 (2010) **June 10 LED:18** but not mentioning its conflicting opinion in State v. Whitney, 156 Wn. App. 405 (2010), review denied, 170 Wn.2d 2004 (2010) **Aug 10 LED:16**)

Result: Affirmance of Yakima County Superior Court order suppressing evidence and dismissing possession of controlled substance charge against Lisa Ann Byrd.

Status: On August 18, 2011, the Yakima County Prosecutor petitioned the Washington Supreme Court for discretionary review. It usually takes the Washington Supreme Court approximately six months to determine whether to grant review.

ANALYSIS:

In Johnson, as in Byrd, the suspect exited the vehicle with purse in hand, and officers searched it after the suspect had been arrested and placed in the back of the patrol car. The Johnson court concluded that Arizona v. Gant only applied to searches of vehicles incident to arrest.

The Johnson court relied on State v. Smith, 119 Wn.2d 675 (1992) **Dec 92 LED:04** (search of fanny pack) and held that the search of the purse was proper. The Smith court relied on New York v. Belton, 453 U.S. 454 (1981). Because the well accepted interpretation of Belton was rejected by the United States Supreme Court in Gant, the Byrd court concludes that Smith, and thus Johnson, are no longer good law. The court states "In short, the test announced in Smith and applied in Johnson is based on a rejected interpretation of Belton*;* an interpretation that Gant overruled."

The Byrd court rejects any distinction between the search incident to arrest of a vehicle and the search incident to arrest of a purse, stating "A search incident to an arrest is a search incident to an arrest whether the object searched is a car or a purse." Relying on Chimel v. California, 395 U.S. 752 (1969), the court explains:

> Chimel did not involve the search of a vehicle. And it "continues to define the boundaries of the [search incident to arrest] exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy."
>
> Under Chimel*,* then, the search incident to arrest exception permits an officer to perform a warrantless search of an arrestee and the area within his or her immediate control when an arrest is made. This type of warrantless search is justified only by interests in officer safety and the preservation of evidence. But such a search is unreasonable where the interests justifying it are absent. That

is, an officer may not, without a warrant, search an object that the arrestee cannot reach at the time of the search.

Here, Ms. Byrd was secured in a patrol car when her purse was searched. She had no way to access the purse at that time. And the arresting officer was not concerned that she could access a weapon or destroy evidence. The justifications for the search incident to arrest exception, then, did not exist here. The exception did not apply. And the warrantless search of Ms. Byrd's purse violated the Fourth Amendment.

Dissent: Judge Brown dissents, asserting that Gant addresses only vehicle searches and arguing that the search of the purse in this case does not violate Gant, and is consistent with Smith and Johnson.

LED EDITORIAL COMMENT: Judge Kulik authored Division Three's unanimous 2010 Johnson opinion that the Byrd opinion overrules. As we noted above, the Byrd majority opinion does not mention Division Three's unanimous opinion in State v. Whitney, 156 Wn. App. 405 (Div. III, 2010) Aug 10 LED:16, which conflicts with Byrd and was authored by Judge Brown with Judge Kulik as a panelist (Judge Brown's dissent in in Byrd likewise does not mention the Court's 2010 opinion in Whitney).

So what is the current rule for Washington trial courts (and law enforcement officers) to follow? A published opinion by any of the three divisions of the Washington Court of Appeals is not geographically limited in its effect. Therefore, if a new Court of Appeals decision does not conflict with other decisions of (1) the Washington Court of Appeals, (2) the Washington Supreme Court, or (3) the U.S. Supreme Court, the new Washington Court of Appeals decision is a controlling precedent for trial courts throughout Washington.

However, in light of the existence of the Whitney decision that is not mentioned in Byrd, a reasonable argument can be made that there are presently conflicting Court of Appeals decisions from Division Three – Byrd vs. Whitney – in Washington. In addition, a reasonable argument can be made that the Byrd opinion misinterprets both the U.S. Supreme Court decision in Arizona v. Gant, 556 U.S. 332 (2009) June 09 LED:13 and the Washington Supreme Court decision in State v. Smith, 119 Wn.2d 675 (1992) Dec 92 LED:04 (while the Washington Supreme Court's denials of the defendants' petitions for discretionary review in both Johnson and Whitney have no precedential effect, it is nonetheless noteworthy that the Washington Supreme Court denied defendants' petitions for review in each of those cases). Accordingly, Washington trial courts may choose to not follow the Byrd majority opinion.

Our research of published court opinions from the courts of other states and from federal circuit courts of appeal (likely not exhaustive) indicates that: (1) there are only a handful of opinions from such courts addressing whether Arizona v. Gant applies outside the context of vehicle searches; and (2) courts in other jurisdictions are split on this question (we found no on-point decisions by the Ninth Circuit, U.S. Court of Appeals, unless we count the Ninth Circuit decision in U.S. v. Maddox, 614 F.3d 1046 (9th Cir. August 12, 2010) Feb 11 LED:03, in which the 3-judge panel excluded evidence relating to a search of a person incident to arrest, taking a Gant-like approach, but not citing Gant). Admittedly, there is a measure of logical support for extending the rationale of Gant outside the context of vehicle searches incident to arrest. On the other hand, not only is there logic to support the contrary argument, but also, pure logic does not always

dictate constitutional search and seizure rules. We think that those who advise law enforcement officers in Washington could lawfully support advice either for or against following the Byrd ruling.

As always, we caution that what we say in the LED is our own personal thinking and is not legal advice. We always recommend that officers consult their own legal advisors and local prosecutors regarding how to proceed in light of the appellate court decisions that we report and comment upon in the LED.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

PRISON SURVEILLANCE VIDEO RECORDINGS HELD EXEMPT FROM PUBLIC DISCLOSURE AS "ESSENTIAL TO EFFECTIVE LAW ENFORCEMENT" – In Fischer v. Department of Corrections, 160 Wn. App. 722 (Div. I, January 24, 2011) (publication ordered April 18, 2011), the Court of Appeals rejects the arguments under the Public Records Act (PRA) of a Department of Corrections (DOC) inmate who sought prison surveillance video recordings for the Program and Activities Building (PAB) at the Monroe Correctional Complex.

The investigative records exemption, RCW 42.56.240(1), exempts: "[s]pecific intelligence information . . . compiled by investigative, law enforcement, and penology agencies . . . the nondisclosure of which is essential to effective law enforcement . . . " from public disclosure. **[LED EDITORIAL NOTE: Fischer did not dispute that DOC is a law enforcement or penology agency, that the surveillance videos constitute intelligence information, or that surveillance videos are essential to DOC's ability to undertake effective law enforcement.]**

The DOC apparently allows inmates to view video monitors but does not provide copes. The inmate/PRA requestor in this case argued that because DOC allows inmates to view video monitors located in the PAB, non-disclosure of the videos could not be "essential to effective law enforcement." The Court of Appeals explains as follows why the Court rejects this argument under the record in this case:

> In opposing Fischer's PRA request, DOC relied on the declaration of [DOC employee] Richard Morgan, who stated that surveillance cameras provide intelligence information that is used for prison investigations, prison infractions, and criminal prosecutions and that the electronic surveillance systems, including fixed cameras, were "an essential element of effective control of a population that is 100% criminal in its composition and is accustomed to evading detection and exploiting the absence of authority, monitoring, and accountability." Morgan explained that because DOC does not have the resources to monitor all areas 24 hours a day, the effectiveness of the system depends on preventing inmates from learning its capabilities and limitations:
>
> > Not all surveillance cameras in DOC facilities are actively monitored by staff. Some cameras are only monitored by staff and create no recordings. Some cameras are only recorded during specific times of day and not others. Some camera stations (camera housings such as boxes and bubble housings) do not contain cameras at all. Some cameras have poor resolution or can be out of service. Some cameras have very

> narrow fields of view, while others have wide fields of view. Some are PTZ (pan, tilt, & zoom) which have powerful abilities to capture fine detail at long distances. Some are controlled by the person monitoring the camera. Some pan a wide field automatically. Some cameras are so well hidden, they are not suspected by offenders to be present. On the other hand, rumors abound among inmates that there are cameras where none exist.

According to Morgan, providing access to surveillance videos would allow inmates to determine weaknesses and exploit those weaknesses by assaulting other inmates or committing crimes and prison infractions.

Contrary to Fischer's contentions, the images on a monitor do not provide the same information as surveillance videos. As the trial court correctly recognized in rejecting Fischer's claim, real-time images do not reveal which cameras are recording, the hours of recording, the resolution and field of view of recording cameras, or staff members' ability to control specific cameras. Nor do such images reveal which cameras are not being actively monitored, the location of hidden cameras, which cameras are not working, or which camera housings are empty. Consequently, even if the real-time images on the monitor are as accessible as Fischer claims, they provide virtually no meaningful information about the specific recording capabilities of DOC's surveillance system in the PAB.

. . . .

Concealment of the full recording capabilities of those systems is critical to its effectiveness in the specific setting of a prison. An inmate's ability to view certain real-time images on a prison monitor does not reveal the capabilities or limitations of the prison surveillance systems. Under the circumstances, DOC has satisfied its burden of demonstrating that nondisclosure of that information is essential to effective law enforcement.

[Citations and footnotes omitted]

Result: Affirmance of Snohomish County Superior Court's dismissal of inmate Frederick Fischer's Public Records Act lawsuit against the DOC.

LED EDITORIAL COMMENT: Application of the investigative records exemption, RCW 42.56.240(1), to surveillance videos is fact specific. As the Fischer Court noted, "[u]nder the circumstances, DOC has satisfied its burden of demonstrating that nondisclosure of [the prison surveillance videos] is essential to effective law enforcement."

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NEXT MONTH

The November 2011 LED will include the Washington State Supreme Court decision in State v. Eriksen, ___ Wn.2d ___, 2011 WL 3849504 (September 1, 2011), where the Court reverses its decisions in two previous opinions in the same case (the defendant moved for and received reconsideration of both opinions), and holds in a 5-4 decision that where non-tribal members

commit traffic infractions on the reservation, tribal police officers do not have authority to pursue such violators outside of the reservation and stop and detain them while waiting for city, county or state law enforcement to arrive. The prior two decisions are State v. Eriksen, 166 Wn.2d 953 (2009) **Nov 2009 LED:11**; State v. Eriksen, 170 Wn.2d 209 (2010) **Dec 10 LED:16**.

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

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

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

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

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

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