Law Enforcement Digest

JANUARY 2013

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

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HONOR ROLL

683rd Basic Law Enforcement Academy – June 12 through October 17, 2012

President:	Gary K. Koon – Bainbridge Island Police Department
Best Overall:	Brian D. Lewellen – Skagit County Sheriff's Office
Best Academic:	Kim L. Ellithorpe – Pierce County Sheriff's Office
Best Firearms:	Gary K. Koon – Bainbridge Island Police Department
Patrol Partner Award:	Richard E. Tison – Algona Police Department
Tac Officer:	Officer Steve Grossfeld – Seattle Police Department

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ANNOUNCEMENT: THE FOLLOWING ARTICLE BY JOHN WASBERG HAS BEEN UPDATED AS OF OCTOBER 25, 2012 AND IS AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS":

Eyewitness Identification Procedures: Legal and Practical Aspects

This and two other articles/outlines on the CJTC Internet LED page by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year.

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ANNOUNCEMENT: THE 2012 EDITION OF THE WASHINGTON "PROSECUTORS' DOMESTIC VIOLENCE HANDBOOK," INCLUDING A "POLICE INVESTIGATION" APPENDIX, IS NOW AVAILABLE ON THE WEBSITE FOR THE WASHINGTON ASSOCIATION OF PROSECUTING ATTORNEYS

The "Prosecutors' Domestic Violence Handbook," prepared by the Washington Association of Prosecuting Attorneys (WAPA) and the King County Prosecuting Attorney's Domestic Violence Unit is now available on the WAPA website. Included in the handbook at pages 93-99 is a "Police Investigation" appendix providing information relating to law enforcement investigation and enforcement relating to domestic violence. Authors of this manual include Carrie Hobbs, Pam Loginsky, and David Martin. It can be found at www.waprosecutors.org/pubs.html.

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INITIATIVE MEASURE 502: RELATING TO MARIJUANA
Effective date: December 6, 2012

This initiative legalizes the possession of marijuana under Washington law, in specified limited amounts, by persons 21 years of age and over. It also provides for the regulation and taxation of marijuana, and amends impaired driving laws. The initiative does not amend Washington's existing medical marijuana laws. Chapter 69.51A RCW.

The text of the initiative can be found on the Internet at http://sos.wa.gov/_assets/elections/initiatives/i502.pdf. The initiative creates some new RCW

sections as well as amending some current RCW sections. Codification of new RCW sections by the Washington Code Reviser likely will not occur before mid-January, 2013. One of the as-yet-uncodified sections is section 21, which, as further explained below, bars certain conduct relating to opening a package of marijuana or consuming marijuana in view of the general public. According to the Administrative Office of the Courts, violations of section 21 should be cited as "13C3S21" (which translates to laws of 2013, chapter 3, section 21) until the section is codified.

Section 2 amends the Uniformed Controlled Substances Act (VUCSA) definitions section, RCW 69.50.101, to add several new defined terms and to revise several other terms. Included is a revision to the definition of "marijuana" (recodified from subsection (q) to subsection (s)) to explain that marijuana includes all parts of the plant Cannabis, whether growing or not, "with a THC concentration of greater than 0.3 percent on a dry weight basis." The underlined language is the new language in the definition. Also included are a definition of "THC" in new subsection (ii) and a definition of "useable marijuana" in new subsection (kk) of RCW 69.50.101. Section 3 of the initiative adds a definition of "THC concentration" in a new traffic code section in chapter 46.04 RCW.

The initiative provides for the licensing and regulation of marijuana producers, processors, and retailers by the Washington State Liquor Control Board (WSLCB). The WSLCB has until December 1, 2013 to promulgate regulations, and production, processing and retailing of marijuana and marijuana products will not be lawful until the WSLCB promulgates those regulations. **[LED EDITORIAL NOTE: On December 5, 2012, the WSLCB filed a CR-101 (pre-proposal filing) to enter into the initial stage of rule-making on the "marijuana producer" license only. According to the tentative schedule, the WSLCB will file draft rules in March 2013, adopt final rules in April, and the rules will take effect in May.]**

The initiative's sections 20(3) and 15(3), read together, legalize under Washington law the delivery, distribution, and sale on the premises of a retail outlet to persons 21 and over, as well as possession by persons 21 and over, of "any combination of":

- One ounce (28.3 grams) useable marijuana,
- Sixteen ounces of marijuana-infused product in solid form, or
- Seventy-two ounces of marijuana-infused product in liquid form

The initiative also legalizes the production, manufacture, processing, packaging, delivery, distribution, sale or possession in compliance with the initiative. **[LED EDITORIAL NOTE: As noted above, the WSLCB has until December 1, 2013 to promulgate regulations. Until the regulations are adopted there will be no legal way under Washington law to manufacture or deliver marijuana (other than for medicinal purposes in compliance with the medical marijuana provisions of Chapter 69.51A RCW). Once adopted, the manufacture and distribution of marijuana will continue to be a crime with the same classification and punishment as previously if not done in compliance with WSLCB regulations. The LED will report on the WSLCB regulations when they go into effect.]**

Possession or use by those under 21 remains a misdemeanor if the amount is 40 grams or less and a felony if the amount is greater than 40 grams.

For persons 21 years of age or older, possession of marijuana in amounts greater than authorized by the initiative is:

- Between 28.3 and 40 grams – misdemeanor
- Greater than 40 grams – class C felony

Public use or consumption constitutes a new class 3 civil infraction under chapter 7.80 RCW – "It is unlawful to open a package containing marijuana, useable marijuana, or a marijuana-infused product, or consume marijuana, useable marijuana, or a marijuana-infused product, in view of the general public." Section 21. **[LED EDITORIAL NOTE: Washington law still prohibits smoking, whether tobacco or marijuana or another smokable substance, in a public place or place of employment. See RCW 70.160.030.]** The fine for violating Section 21 appears to be $103. See RCW 7.80.120(1)(c) and RCW 3.62.090. As noted above, violations of section 21 should be cited as "13C3S21" until the section is codified. The initiative does not define any of Section 21's terms, including the terms: "open a package," "consume," or "in view of the general public."

Note as to the infraction under Section 21, that the Washington Supreme Court held in Seattle v. Duncan, 146 Wn.2d 166 (2002) **June 02 LED:19**, that article I, section 7 of the Washington constitution does not give officers authority to make seizures of suspected civil non-traffic infraction violators based on reasonable suspicion (even though the Washington constitution does give officers such Terry stop power for traffic violations). Under Duncan, officers must have probable cause that a violation of a civil non-traffic infraction occurred in order to make the temporary seizure necessary to write a citation.

Also, under RCW 7.80.050(2), not amended by the initiative, officers may not issue a citation for violation of a civil non-traffic infraction statute such as Section 21 unless the infraction occurs in an officer's presence, i.e., is perceived by the officer's senses. And, under RCW 7.80.060, likewise not amended by the initiative, detention for a civil non-traffic infraction cannot extend beyond the time needed to write a citation. Finally, it appears that, under State v. Rife, 133 Wn.2d 140 (1997) **Oct 97 LED:03,** because no statute authorizes officers to extend the detention for a civil non-traffic infraction beyond the time needed to write a citation, officers may not hold a person after they have completed writing a citation solely for the purpose of waiting for return information on a warrant check (note that Rife was legislatively overruled by amendment to RCW 46.61.021 relating to traffic stops, see **Nov 1997 LED** at page 3, but no similar legislation authorizes warrant checks during stops for non-traffic civil infractions).

Section 22 amends RCW 69.50.412 (use of drug paraphernalia) to legalize the use of drug paraphernalia with marijuana. Section 23 amends RCW 69.50.4121 (selling drug paraphernalia) to legalize the sale of drug paraphernalia for use with marijuana.

Section 25 amends the drug forfeiture provisions of RCW 69.50.505 to exempt from forfeiture property used solely to facilitate marijuana related activities that are conducted consistent with the initiative.

The initiative amends RCW 46.20.308 (and other statutes) to add a reference to THC concentration in the blood to the implied consent laws**. [LED EDITORIAL NOTE: Revised Implied Consent Warnings have been developed and are available at the WSP Internet page http://www.wsp.wa.gov/breathtest/btpindex.php#dui.]**

Sections 33 and 35 amend the DUI and physical control laws to add a per se level for "THC concentration of 5.00 or higher as shown by analysis of the person's blood" within two hours of driving and creates an affirmative defense for consuming marijuana after driving but before administration of the blood draw. See RCW 46.61.502 and .504 (as amended). **[LED EDITORIAL NOTE: Existing DUI laws criminalize driving while under the influence of drugs. The initiative creates a new per se prong for marijuana. This prong will not be able to be charged until blood tests results are returned. Accordingly, officers should continue**

to rely on existing training in investigating and enforcing suspected driving while under the influence of marijuana cases.]

Section 34 amends RCW 46.61.503 to create a new zero-tolerance crime for a person under 21 who drives or is in physical control of a vehicle with a THC concentration above 0.00 but less than 5.00. See RCW 46.61.503(1)(b)(ii) (as amended). **[LED EDITORIAL NOTE: RCW 46.61.503 is not included in RCW 10.31.100's exceptions to the in-presence requirement for misdemeanor and gross misdemeanor arrests, so this zero-tolerance offense by a person under 21 must occur in the presence of the officer. Additionally, RCW 46.61.503 is not included in the mandatory 12 hour impounds under of Hailey's law.]**

LED EDITORIAL COMMENT: Initiative 502 amends Washington state law only and does not impact federal law. (The Untied States Attorney's Office for the Western District of Washington issued a statement on Initiative 502 on December 5, 2012. http://www.justice.gov/usao/waw/press/2012/December/Statement.html.) **Additionally, the initiative does not require employers to modify existing policies relating to marijuana use.**

The initiative is lengthy and complex, and its parameters will likely be fleshed out over time. This LED entry does not attempt to address every detail of the new law. Rather, we attempt to point out the major changes most relevant to our law enforcement readers. We may revisit the initiative in the future as the collective wisdom of police legal advisors and prosecutors comes up with more specific guidance for the law enforcement community. As always, we urge law enforcement officers to consult their agency legal advisors for assistance in interpreting this new initiative.

Additionally, the Criminal Justice Training Commission has compiled a number of documents relating the initiative on its website under "Publications and Resources" at: https://fortress.wa.gov/cjtc/www/index.php?option=com_content&view=article&id=253&Itemid=71. In addition to documents referred to above in this entry, the website also includes a memorandum on Initiative 502 and Canine Alerts, prepared by Pamela Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys (WAPA), a training document (I-502 Guidance for Law Officers) prepared by the Washington State Patrol (WSP) training division, and many other useful documents.

The WSP and WAPA will also be holding trainings on Marijuana DUI: Enforcement and Prosecution throughout the state. Registration is available on the Washington State Traffic Safety Resource Program website: www.duienforcers.camp7.org.

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BRIEF NOTES FROM THE NINTH CIRCUIT UNITED STATES COURT OF APPEALS

(1) NINTH CIRCUIT ORDERS REHEARING EN BANC IN DAHLIA V. RODRIQUEZ – On December 11, 2012, the Ninth Circuit Court ordered rehearing en banc (by the full court) in Dahlia v. Rodriguez, 699 F.3d 1094 (9th Cir., Aug. 7, 2012) **Nov 12 LED:08** (Disclosure by police officer of allegedly abusive interrogation tactics was made in the course of his official duties and thus not protected by the First Amendment free speech clause; lawsuit based on retaliation for officer's reporting must be dismissed). The panel opinion may no longer be cited.

(2) CIVIL RIGHTS ACT LAWSUIT: COURT HOLDS (1) DELAY TRANSPORTING BLEEDING VICTIM FROM CRIME SCENE VIOLATED DUE PROCESS; (2) DETAINING

WITNESSES FOR FOUR HOURS WAS UNLAWFUL SEIZURE; (3) FORCE AGAINST WITNESS WAS EXCESSIVE; (4) SUPERVISORS PRESENT BUT NOT TAKING CHARGE NONETHELESS MAY BE LIABLE; (5) INDIAN TRIBE PARAMEDICS DO NOT GET SOVEREIGN IMMUNITY – In Maxwell v. County of San Diego, 697 F.3d 941 (9th Cir., Sept. 13, 2012), a Ninth Circuit panel rules 2-1 in a Civil Rights Act lawsuit that a family is entitled to a trial on their claims against law enforcement officers for the officers' actions in responding to a domestic shooting involving a fellow officer.

Taking the plaintiffs' allegations as true (as courts must do in Civil Rights Act lawsuit when the government claims qualified immunity), the majority opinion concludes that a jury could conclude that the officers: (1) exhibited "deliberate indifference" and thus violated the federal constitutional due process rights of a gunshot victim (a woman shot in the jaw by her San Diego Deputy Sheriff husband) by contributing to her death through unreasonable delay before they transported her from the scene of the crime in order to obtain emergency medical treatment; and (2) violated the Fourth Amendment rights of certain non-suspect relatives of the shooting victim by (a) separating and detaining them for four hours at the crime scene (while officers were obtaining a search warrant) under the apparent law enforcement rationale that those family members were witnesses who needed to be separated and detained by law enforcement until they could be questioned (even though the family members were not suspects, and even though the shooter had confessed and voluntarily submitted to custody as soon as officers arrived at the scene); and (b) using excessive force by pepper spraying, baton-striking, and handcuffing one of those relatives solely because he was disobeying an order not to try to rejoin his family.

The majority opinion also holds that the family may go to trial on their claims against a captain and lieutenant who were at the perimeter of the crime scene but did not take charge. The majority opinion concludes on this issue that a jury could lawfully determine liability on the theory that the captain and lieutenant were in a position to observe their subordinate officers' ongoing violations of the family members' Fourth Amendment rights, and that the supervisors unreasonably failed to act to prevent or stop those violations.

On the victim-transport issue, the majority opinion concludes that a jury could determine that the victim was in urgent need of transport to get life-saving care, but that despite their knowledge of this urgency, the officers unreasonably delayed her transport to a hospital for as much as 12 minutes in the hope that the officers could first get a statement from her. The dissent argues on this issue that the evidence is (1) that the delay in transport was no more than a few minutes and (2) that the delay was otherwise reasonable in light of what the officers knew of the victim's medical condition during the period of delay.

On the witness-separation-and-detention issue, the majority opinion opines that the Fourth Amendment requires some sort of emergency or exigency to justify forcibly holding non-suspect witnesses for questioning, particularly for the extended period of several hours involved in this case, and that no emergency existed under the allegations of the plaintiffs.

On the excessive force issue, the majority opinion asserts that the use of any force under the alleged circumstances of mere disobedience of an order not to try to rejoin one's family was not justified.

Finally, as to all of the above issues, the majority opinion denies qualified immunity to the officers because, at the time of the conduct, case law clearly established the respective applicable Fourth Amendment standards as to their alleged acts and omissions.

The dissenting opinion disagrees with the majority's assessment of both the factual allegations and the case law that relate to the family's lawsuit against the law enforcement officers.

The majority opinion also concludes that paramedics from an Indian tribe at the crime scene may be held liable in their individual capacities even though the tribes employing them are entitled to civil liability protection under tribal sovereign immunity. The otherwise dissenting judge agrees with the majority on this issue. **[LED EDITORIAL NOTE: This LED entry does not further address this Indian Law ruling by the Ninth Circuit panel, other than to note that the ruling appears, from our very limited Internet research, to be controversial.]**

Result: Affirmance of U.S. District Court (Southern District of California) ruling denying qualified immunity to certain named San Diego County Sheriff's Deputies on the Maxwells' Civil Rights Act claims for due process and Fourth Amendment violations; reversal of District Court's grant of tribal paramedics' dismissal motion that was based on tribal sovereign immunity; case remanded for further proceedings.

(3) CIVIL RIGHTS ACT LAWSUIT: 2-1 RULING FAVORS OFFICERS WHO REPEATEDLY TASED COMBATIVE MAN WHO WAS PERFORMING VIOLENT EXORCISM ON HIS 3-YEAR-OLD GRANDDAUGHTER, AND WHO HAD HER IN A CHOKEHOLD – In Marquez v. City of Phoenix, 693 F.3d 1167 (9th Cir., Sept. 11, 2012, amended Oct. 4, 2012), a 2-1 majority of a Ninth Circuit panel upholds a District Court ruling that officers did not violate the Fourth Amendment with their repeated Tasing of a combative man who officers found in a small, cramped, blood-spattered bedroom attempting to perform an exorcism on his 3-year-old granddaughter. The encounter occurred just after the man had beaten his 19-year-old daughter, who was also present in the room. The man died of cardiac arrest shortly after the Tasing.

The officers had responded to a call from a woman about the actions of her 48-year-old son. The woman said her son was attempting an exorcism on his 3-year-old granddaughter. The officers had to force their way through a barricaded door into a small, cramped bedroom from which the officers had heard a small child's screams of pain. There they saw the man on a bed with the now-silent-and-motionless child in a chokehold. In a corner of the room was the man's nude, 19-year-old daughter. She was screaming and her face showed signs of a recent beating. Blood was smeared on the walls and furniture in the small, cramped room.

To try to disable the man in order wrest the 3-year-old child from him, an officer first warned him of impending use of the Taser. When the warning had no effect, the officer Tased him with the device in dart mode. The darts appeared to have no effect. The officers switched the Taser to "drive stun mode." Over the next three minutes, the officers made repeated attempts to Tase the man, but making contact was not easy in the chaotic circumstances. The officers believed that most of the charges were either going into the air or into each other as they passed the Taser back and forth to each other in these efforts. Also, the device seemed to have no effect on the man, who violently kicked at the officers, striking one in the groin and thighs.

The officers eventually freed the child from the man. The officers made a few more applications and attempted applications of the Taser against the man. They finally wrestled the man into submission. After that, the officers made two applications of the Taser in drive-stun mode to subdue the 19-year-old daughter, who had attacked one of the officers near the end of the officers' struggle with her father (the Ninth Circuit decision did not address the lawfulness of this application of the Taser).

It took a couple minutes to bring the daughter under control. At that point the officers found that the man had a weak pulse. He then went into cardiac arrest and died despite timely and reasonable efforts to save his life. A coroner's autopsy report concluded that he suffered from heart disease, with the cause of death listed as "excited delirium." The coroner made no mention of the Taser as a contributing factor. The coroner found seven sets of Taser burns on his chest and two Taser probes embedded in his lower left chest. Evidence established that the officers had pulled the Taser's trigger 22 times, but the evidence did not establish the length of time that the Taser had been in contact with the man's body during any of the times the Taser actually touched him.

The majority opinion rules on the Fourth Amendment excessive force claim of the family that the officers used "significant" but reasonable force against the man. The force was reasonable, the majority rules, because, until brought under total control, the man posed an immediate threat to the officers as well as the 3-year-old child and the 19-year-old daughter.

The majority opinion also rejects the "wrongful death" claim by the family under Arizona state law. The opinion declines to determine whether the use of the Taser constituted deadly force under Arizona law, though suggesting that it was not deadly force. The majority opinion states that even if one assumes the application to be deadly force, it was justified under the totality of the circumstances. The opinion explains its reasoning on this point as follows:

> No reasonable jury could find that Marquez was unlikely to endanger human life or inflict serious bodily injury if not subdued: at first, he would not release his granddaughter from a choke-hold, then he struggled viciously in close quarters against the officers attempting to restrain him, and his daughter, who had also been the victim of his attacks, remained in the room throughout.

The panel's majority opinion also rejects the family's claim against the manufacturer of the Taser, determining that the manufacturer provided sufficient warning on the use of its product.

The dissenting opinion agrees with the majority's ruling in favor of the Taser manufacturer, but argues that the Court: (1) instead of ruling that the officers' conduct was reasonable under the Fourth Amendment, should have granted the officers only qualified immunity under the rationale that at the time of the conduct, case law did not clearly establish the Fourth Amendment standard; and (2) should have sent the Arizona-law issue of wrongful death to a jury.

Result: Affirmance of U.S. District Court (Arizona) decision granting summary judgment to the officers and the manufacturer of the Taser.

LED EDITORIAL NOTE: We briefly noted above that the dissent would have granted the officers qualified immunity, instead of ruling, as the majority did, that their actions were reasonable under the Fourth Amendment. For an excellent article on the current state of case law on qualified immunity, see the September 2012 issue of the FBI Law Enforcement Bulletin, which is accessible on the Internet.

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WASHINGTON STATE SUPREME COURT

COMMON LAW CIVIL LIABILITY: TO PROVE "SPECIAL RELATIONSHIP" BETWEEN CRIME VICTIM AND GOVERNMENT AS EXCEPTION TO "PUBLIC DUTY DOCTRINE," 911 OPERATOR'S STATEMENTS TO CALLER NEED NOT BE SHOWN BY VICTIM/PLAINTIFF TO HAVE BEEN FALSE OR INACCURATE

Munich v. Skagit Emergency Communications Center (and others), ___ Wn.2d ___, 288 P.3d 328 (Nov. 1, 2012)

Facts and Proceedings below:

William Munich called Skagit 911 from a rural Skagit County area to report that his neighbor was shooting at him from the neighbor's property. The 911 operator immediately dispatched a deputy sheriff to the scene, and she told Munich that she had done so. The operator coded the call as a Priority 2 "weapons call" and not a Priority 1 "emergency call." For that reason, the responding deputy sheriff did not activate his emergency lights, and he travelled only slightly above the speed limit.

About 7 minutes after the first call, Munich again called 911. Munich told the operator that the neighbor had entered his garage with a rifle, that Munich was trying to run away, and that the neighbor had shot at him multiple times. At this point, the operator informed the responding deputy of these facts, and the deputy then activated his emergency lights and siren, and he also increased his speed. The call ended with Munich being shot. The deputy arrived to find Munich's dead body approximately two minutes after the neighbor had fatally shot Munich.

Munich's estate sued Skagit County, the Skagit County Sheriff's Office, and Skagit Emergency Communications Center for wrongful death, alleging the County negligently responded to the incident. The Estate presented (1) expert testimony opining that Munich's initial call should have been coded as Priority 1, and (2) additional evidence suggesting that if the responding deputy had been dispatched as Priority 1, the responding deputy would have arrived at the scene before Munich was fatally shot.

The trial court denied the summary judgment dismissal motion of the County, which argued that the County had no duty to Munich under the "special relationship" exception to the Public Duty Doctrine. The County appealed. The Court of Appeals affirmed. See Munich v. Skagit Emergency Communications Center (and others), 161 Wn. App. 116 (Div. I, 2011) **July 11 LED:22**). Now, the Supreme Court has affirmed the trial court and Court of Appeals decisions.

ISSUE AND RULING: In a negligence-based lawsuit that is centered on (1) a 911 operator's assurance of law enforcement response and (2) the subsequent law enforcement response, must the suing party show that the assurance was false or inaccurate in order to establish a "special relationship" for purposes of the "Public Duty Doctrine?" (ANSWER: No, rules an 8-1 majority; the Supreme Court thus affirms the result and essentially agrees with the analysis of Division One of the Court of Appeals in the case.

Result: Affirmance of Court of Appeals decision that affirmed the Skagit County Superior Court decision denying the County's motion to dismiss the lawsuit.

ANALYSIS:

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). There are four exceptions to the public duty doctrine. In short, these exceptions are: (1) failure to enforce, (2) legislative intent, (3) special relationship, and (4) rescue doctrine. 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. This case involves the "special relationship" exception to the public duty doctrine.

As noted above, the Supreme Court's lead opinion holds that, when a 911 operator assures a caller that help is on the way, as in this case, the call by itself establishes a special relationship between the caller and the government agency that administers the 911 operation. The Supreme Court thus holds that truth or falsity of the 911 operator's statements is not determinative on "special relationship" or the government's liability, because the government actor may be negligent in fulfilling that assurance.

The lead opinion notes that a special relationship does not automatically result in liability. Plaintiffs seeking to recover in "special duty" cases involving 911 calls and law enforcement responses must still establish breach of the special duty, proximate cause, and damages, just as they would in suing a private defendant. If the government acted reasonably under the circumstances, no liability will incur. Generally, reasonableness will be a question for the fact-finder at trial.

Eight justices concur in the lead opinion. Justice Chambers authors a concurring opinion that attempts to explain or reframe the public duty doctrine (four justices who also concurred in the lead opinion concur in the Chambers opinion).

Justice James Johnson dissents, arguing, among other things, that the only safe response for a 911 operator who is (1) responding to a 911 call and (2) seeking to avoid creating a special relationship with the caller under the public duty doctrine would be for the operator to (1) carefully and narrowly acknowledge receipt of the call, and (2) not say anything more, or at least not say anything about the dispatching of officers. Justice Johnson is making a rhetorical point, of course, and is not suggesting that 911 operators take this approach.

LED EDITORIAL COMMENT: It is still important for civil liability purposes that 911 operators and others taking calls for services strive both to be accurate and to not over-promise in describing the ongoing, pending or expected law enforcement response to the call.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) CHILD-RAPE DEFENDANT HAS BURDEN OF PROVING HER DEFENSE THAT SHE WAS ASLEEP WHILE THE CHILD ENGAGED IN INTERCOURSE WITH HER – In State v. Deer, ___Wn.2d ___, 287 P.3d 539 (Oct. 25, 2012), the Washington Supreme Court votes 7-2 to reject a child rape defendant's argument that the State is required to prove beyond a reasonable doubt that she was awake during the sexual intercourse acts at issue in the case. Instead, the majority holds, the defendant's theory is an affirmative defense, so she has the burden of proving her I-was-sleeping defense under a preponderance of evidence proof standard.

The Court of Appeals (in a 2010 decision not previously addressed in the LED) agreed with the defendant's argument that the State was required to prove that the defendant's alleged acts of engagement in sexual intercourse with the child were "volitional," and thus that the State must disprove, under the beyond a reasonable doubt standard, her claim that she was asleep at the time of the acts. See State v. Deer, 158 Wn. App. 854 (2010).

Among the past Washington appellate court decisions discussed in the Supreme Court's majority and dissenting opinions in Deer are: State v. Bradshaw, 152 Wn.2d 528 (2004) **Jan 05 LED:08** (holding that the defendant charged with possession of a controlled substance has the burden, under a preponderance of the evidence standard, of proving a claim of unwitting possession); and State v. Eaton, 168 Wn.2d 476 (2010) **May 10 LED:24** (holding that RCW 9.94A.533(5)'s possessing-drugs-in-jail sentencing enhancement does not apply to an arrestee's possession of methamphetamine that was discovered in a jail booking search, because the defendant did not volitionally bring the drugs into the jail).

Result: Reversal of Court of Appeals ruling on the affirmative defense issue; case remanded to King County Superior Court for re-trial of Lindy Deer on three counts of rape of a child in the third degree (Ms. Deer must be retried because of a trial charging error not addressed in the Supreme Court opinion or in this LED entry).

(2) COURT ACCEPTS STATE'S CONCESSION THAT, UNDER FACTS THAT AROSE IN 2007, STATE V. SNAPP CONTROLS ON VEHICLE SEARCH INCIDENT TO ARREST ISSUE – In State v. Louthan, ___Wn.2d ___, 287 P.3d 8 (Oct. 25, 2012), the Washington Supreme Court unanimously accepts the State's concession that a 2007 search of the defendant's vehicle incident to his arrest violated the Washington constitution's article I, section 7, as interpreted in State v. Snapp, 174 Wn.2d 177 (2012) **May 12 LED:25**.

The Supreme Court includes a footnote stating that its decision to reverse on the exclusive narrow basis of Snapp should not be read as approving any part of the Court of Appeals opinion in this case, i.e., State v. Louthan, 158 Wn. App. 732 (Div. II, 2010) **Jan 11 LED:08**. **[LED EDITORIAL COMMENT: We think that the footnote does not suggest that the Supreme Court disapproves of any part of the Court of Appeals opinion other than the ruling on vehicle search incident to arrest.]**

Result: Reversal of Court of Appeals decision; vacation of Grays Harbor County Superior Court conviction of Darrin L. Louthan for possession of methamphetamine; and remand of case for order of dismissal with prejudice.

(3) PUBLIC RECORDS ACT: NEITHER A SEX OFFENDER SENTENCING ALTERNATIVE EVALUATION NOR A RELATED VICTIM IMPACT STATEMENT QUALIFIES UNDER THE PRA EXEMPTION FOR INVESTIGATIVE RECORDS – In Koenig v. Thurston County, ___Wn.2d ___, 287 P.3d 528 (Sept. 27, 2012), the Washington Supreme Court rules 6-3 in favor of a public records requestor and against Thurston County.

Both David Koenig and Thurston County had sought review of a decision by the Court of Appeals holding that a special sex offender sentencing alternative (SSOSA) evaluation may be disclosed under the Public Records Act (PRA), chapter 42.56 RCW, but that a victim impact statement may not be disclosed. The Court of Appeals had held that both the SSOSA evaluation and victim impact statement are investigative records within the meaning of the exemption at RCW 42.56.240(1). The Court of Appeals then determined the victim impact statement was exempt under the essential-to-effective-law-enforcement prong of the

investigative records exemption of the PRA, but concluded the SSOSA evaluation was not exempt.

The Supreme Court majority opinion holds that, because neither the SSOSA evaluation nor the victim impact statement is part of an investigation into criminal activity or claims of malfeasance, neither type of record qualifies as an investigative record within the meaning of RCW 42.56.240(1). The majority opinion is authored by Chief Justice Barbara Madsen, who is joined by Justices Charles Johnson, Susan Owens, Mary Fairhurst, Debra Stephens, and Gerry Alexander (Justice Alexander is retired but is acting in a pro tem capacity in this case). In the concluding section of the majority opinion, the opinion summarizes the majority's reasoning as follows:

> When applying the investigatory records exemption, a court must find that an investigative entity is compiling and using the relevant record to perform an investigative function. RCW 42.56.240(1). It is not enough that a prosecutor consider a document or even that the document may be useful in making a sentencing recommendation to the court. A victim impact statement is primarily a communication between a victim and a judge and the SSOSA evaluation principally provides a basis for the court to impose sentencing alternatives. Const. art. I, § 35; RCW 7.69.030; RCW 9.94A.670(3)-(5). Neither of these records is part of an investigation into criminal activity or an allegation of malfeasance.
>
> Because the PRA requires that exemptions be narrowly construed, we decline to protect documents that are created to aid a court in its sentencing decision. We reverse the Court of Appeals decision that the victim impact statement is an investigative record and affirm its decision that a SSOSA evaluation is not.

Result: Reversal in part and affirmance in part of Court of Appeals decision (not reported in the LED) that reversed in part and affirmed in part a Thurston County Superior Court decision holding that both the SSOSA evaluation and the victim impact statement were exempt from disclosure under RCW 42.56.240(1).

(4) MEDIA-DUBBED "SOUTH HILL RAPIST" LOSES CHALLENGE TO HIS COMMITMENT AS A SEXUALLY VIOLENT PREDATOR – In In re the Detention of Kevin Coe, 175 Wn.2d 482 (Sept. 27, 2012), the Washington Supreme Court rejects the arguments of Kevin Coe (a serial rapist referred to in some media accounts as Spokane's "South Hill Rapist"), who, after he had served 25 years in prison for one count of first degree rape, was determined in a civil commitment jury trial to be a sexually violent predator (SVP) under RCW 71.09.060.

The State's psychological expert (Dr. Amy Phenix) opined that Mr. Coe suffers from a mental abnormality or personality disorder making him likely to engage in acts of sexual violence if not confined. Mr. Coe contended on appeal that the trial court erred in admitting: (1) testimony by Dr. Robert Keppel about a ritualistic crime signature linking 17 unadjudicated rapes to the rape of which Mr. Coe was convicted; (2) testimony by Tamara Matheny, an analyst with the Homicide Investigation Tracking System (HITS) of the Washington Attorney General's Office, that established a modus operandi crime signature linking together those same 18 rapes; (3) evidence of the 17 unadjudicated rapes, including testimony by some of the victims; and (4) testimony by the psychological expert that relied on the unadjudicated offenses.

The Supreme Court's lead opinion rejects most of Coe's challenges, including his argument that the facts underlying Dr. Keppel's ritualistic crime signature testimony were insufficiently unique

to prove identity, and that admission of the unadjudicated rapes therefore violated Evidence Rule 404(b) (restricting admission of "other crimes" evidence). The lead opinion in Coe concludes that the trial court did not abuse its discretion, under the particular facts of this case, either in admitting Dr. Keppel's ritualistic signature analysis or allowing Dr. Phenix to rely on and discuss the ritualistic and HITS modus operandi signatures.

The lead opinion does agree with Coe that the trial court erred under the hearsay evidence rules in admitting analyst Matheny's testimony about the HITS database and the modus operandi signature it identified. That evidence was admitted for the substantive purpose of showing the identity of the perpetrator. In light of the fact that the HITS database contains hearsay, and no hearsay exception applies, the HITS database should not have been admitted as substantive evidence, the majority opinion concludes. The HITS database evidence was, however, lawfully admissible under Evidence Rules ER 703 and 705, for the limited purpose of explaining the bases of Dr. Phenix's opinions, just as it was in State v. Russell, 125 Wn.2d 24, 66-67 (1994). In an opinion concurring in the result but not all of the analysis in the lead opinion, Justice Chambers is joined by Justice Wiggins in arguing, in a few respects, for a narrower view than the lead opinion as to admissibility of the evidence. Like the majority opinion, however, the Chambers concurrence concludes that the contended error in admitting evidence was harmless error because overwhelming "untainted evidence" in the record supports the jury's verdict.

Result: Affirmance of the result of the Court of Appeals decision (reported in the **May 2011 LED** at page 20) that affirmed the Spokane County Superior Court judgment on jury verdict committing Kevin Coe, a/k/a Fredrick Harlan Coe, as a sexually violent predator.

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WASHINGTON STATE COURT OF APPEALS

HELD: (1) TERRY SEIZURE OF WITNESS/SUSPECT WAS REASONABLE; (2) ARREST WAS LAWFUL UNDER RCW 10.31.100 BECAUSE OFFICER HAD PROBABLE CAUSE AS TO HARM TO PERSON AND/OR TAKING OF PERSONAL PROPERTY; (3) BUT STRIP SEARCH AT JAIL VIOLATED CHAPTER 10.79 RCW BECAUSE SUSPECT'S MERE NERVOUSNESS DID NOT JUSTIFY IT, AND THERE WAS NO SUPERVISOR APPROVAL

State v. Barron, ___Wn. App. ___, 285 P.3d 231 (Div. III, Sept. 18, 2012)

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

> [A law enforcement officer] responded to a report of an assault with a knife on September 6, 2010. He arrived at the scene and found Gabriela Barron and three others standing in the front yard of a house. Ms. Barron was crying hysterically and her knee was bleeding. She told [the officer] that Melinda Garcia had chased her out of Ms. Garcia's nearby house at knife point following a dispute over the supposed theft of $100 and that she injured her knee in the process.
>
> [The officer] asked Ms. Barron if she would sit in the back seat of his patrol car while he and another officer investigated. He explained that she was not under arrest at that time. Ms. Barron got in the back of the patrol car. [The officer] took her purse and placed it in the secured front seat area of the car. Ms. Barron remained locked in the back of the patrol car for about 20 minutes.

[The officer] spoke with Ms. Garcia and her roommate, Katie Everham. The two women confirmed that there had been a physical altercation inside Ms. Garcia's house over the missing money and that Ms. Barron was eventually chased out of the house. Ms. Garcia and Ms. Everham both denied the use of a knife. The investigating officers did not locate a knife or the money alleged to be stolen.

[The officer] returned to his patrol car and arrested Ms. Barron for disorderly conduct. He then searched Ms. Barron's purse, the purse he had placed in the front seat, and found two glass pipes with apparent drug residue and some unused baggies. [The officer] took Ms. Barron to the [police station] to be booked.

Once at the station, [the arresting officer] instructed [a dispatch officer] to conduct a strip search of Ms. Barron for concealed narcotics. [The arresting officer] was concerned by the number of unused baggies found in Ms. Barron's purse and the fact that she was acting nervous and answering questions quickly. [The officers] did not seek a warrant or permission from a supervisor before they started to search Ms. Barron.

[The dispatch officer] took Ms. Barron to a changing room and explained the strip search procedure to her. She clarified that she would not "go hands on unless need be." Ms. Barron began crying and stated that she wanted to come clean and had something concealed. [The dispatch officer] told Ms. Barron to start removing her clothes. Ms. Barron took off her pants and then repeatedly asked to use the restroom while grabbing her genitalia. [The dispatch officer] told her she could do so after she was changed but that the toilet would be inspected prior to flushing. Ms. Barron then pulled her underwear down and removed an envelope from her vagina. The envelope contained a $20 bill and pieces of aluminum foil containing six-tenths of a gram of methamphetamine.

Ms. Barron moved to suppress the various pieces of evidence on four separate grounds: (1) the initial detention in the back of the patrol car lacked any reasonable suspicion or lawful basis, (2) the arrest for disorderly conduct violated the officer presence rule which requires that a warrantless arrest occur in the presence of an officer, (3) the search of the purse fell outside of the search incident to arrest exception because it occurred after Ms. Barron was secured and there were no exigent circumstances, and (4) the strip search violated Washington law because it was conducted without a warrant or authorization from a supervisor.

The court ruled that Ms. Barron voluntarily entered the patrol car and that exigent circumstances surrounding the knife incident supported the officer's request. The court also ruled that the arrest for disorderly conduct outside of the officer's presence fell within the physical threat of harm exception to the officer presence rule. The court then ruled that the officer unlawfully searched Ms. Barron's purse and suppressed that drug evidence. However, the trial court justified the strip search based on [the arresting officer's] concern that Ms. Barron acted nervous following her arrest for disorderly conduct and the court refused to suppress the evidence discovered in that search.

> The court found Ms. Barron guilty of possession of a controlled substance with intent to deliver following a stipulated trial. She appeals. The State does not appeal the court's suppression of the drug evidence discovered in her purse.

[Emphasis added]

ISSUES AND RULINGS: 1) Was the officer justified in the initial seizure of Ms. Barron even though it was not clear at the time of seizure whether she was a suspect or a mere witness? (ANSWER BY COURT OF APPEALS: Yes, while the seizure of a mere witness is not justified unless there are exigent circumstances to justify it, the seizure here was lawful under the totality of the circumstances where the officer had reasonable suspicion that Ms. Barron was at least a central witness to a possible knife fight, and she was a possible suspect in the knife fight);

2) Did the subsequent arrest of Ms. Barron violate the misdemeanor-presence rule of RCW 10.31.100? (ANSWER BY COURT OF APPEALS: No, because, although the officer characterized the crime of arrest as disorderly conduct, at the time of arrest the officer had probable cause to believe that Ms. Barron had committed a crime involving harm to a person or the taking of personal property);

3) In light of the twin facts (a) that the trial court suppressed drugs that had been found in a search of the arrestee's purse, and (b) that the suppression ruling regarding the purse search was not challenged by the State on appeal, did the warrantless strip search at the jail violate chapter 10.79 RCW both (a) because the strip search was conducted without reasonable suspicion of factors addressed in that statute (mere nervousness does not qualify as reasonable suspicion), and (b) because the strip search was conducted without approval from a supervisor? (ANSWER BY COURT OF APPEALS: Yes, the strip search violated the statute for both reasons).

Result: Reversal of Yakima County Superior Court conviction of Gabriella Yaserth Barron for possession of a controlled substance with intent to deliver.

ANALYSIS: (Excerpted from Court of Appeals opinion)

1. The initial detention was an exigent circumstances seizure of a witness

> A citizen is seized when her freedom of movement is restrained and she would not believe that she is free to leave or decline an officer's request to do something. The test is objective. [The arresting officer] arrived at the scene of a reported assault with a knife. He spoke with Ms. Barron; she was crying hysterically and her knee was bleeding. [The officer] then requested that Ms. Barron sit in the back of his patrol car while he investigated further. She complied and relinquished her purse. The officer put the purse in the front seat and locked Ms. Barron in the back seat of the patrol car. Objectively, these actions restrained Ms. Barron's freedom of movement; she was not free to leave. This is a warrantless seizure.
>
> An investigative stop/detention is an exception to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. State v. Glover, 116 Wn.2d 509 (1991) (citing Terry v. Ohio, 392 U.S. 1 (1968)). An investigative detention occurs when the police briefly seize a person for questioning based on specific and articulable, objective facts that give rise to a reasonable suspicion that the person has been or is about to be involved in a

crime. State v. Dorey, 145 Wn. App. 423 (Div. III, 2008) **Aug 08 LED:08** (quoting Terry, 392 U.S. at 21).

Here, the trial court concluded that exigent circumstances supported the detention because [the officer] did not know if Ms. Barron was a victim, witness, or perpetrator. Ms. Barron argues that [the officer] had no information implicating her as the perpetrator following his initial investigation and, accordingly, had no authority to detain her. The State responds that Ms. Barron's claim that she was a victim to or witness of an assault involving a knife amounted to exigent circumstances.

Police may not stop potential witnesses to the same extent as suspects of a crime. See Dorey, 145 Wn. App. at 426. In Dorey, we considered whether police may stop and detain a potential witness when investigating a disturbance complaint where no exigent circumstances existed. There, the responding officer asked a man at a nearby car wash for identification and information regarding the complaint. After the man left, the officer checked for outstanding warrants and found some. The officer went after the man and found him minutes later getting out of his car and tossing a fanny pack into the bushes. The man was arrested on the warrants and charged with possession of the methamphetamine found in the fanny pack. We concluded that the arrest was unlawful because the officer had no particular articulable suspicion of involvement in criminal activity.

We quoted State v. Carney, 142 Wn App. 17 (Div. II, 2008) **Feb 08 LED:17** for the proposition that "'[t]here is no authority—either statutory or otherwise—permitting an officer to seize a witness without a warrant, absent exigent circumstances or officer safety.'" Exigent circumstances necessary for detaining a witness exist when: (1) a serious crime recently occurred, (2) the officer reasonably believes that the witness's information will materially assist in the investigation, and (3) the detention is reasonably necessary for identification or investigation purposes. Dorey, 145 Wn.App. at 426 (quoting American Law Institute, A Model Code of Pre-Arraignment Procedure § 110.0(1)(b) (1975)).

Here there were the necessary exigent circumstances. [The officer] was summoned to investigate a disturbance that was anything but innocuous—an alleged assault with a deadly weapon. [The officer] found Ms. Barron in the front yard of a neighbor's house, hysterical and wounded. She admitted that she had a fight involving a knife over an alleged theft. At that point, [the officer] did not know if she was a victim or a perpetrator but he knew she was a witness. And [the officer] reasonably believed that Ms. Barron's information would materially assist in his investigation. The brief detention in the back of the patrol car was lawful and the court correctly refused to suppress the evidence on that ground.

2. The arrest was supported by PC and did not violate chapter 10.31.100

. . .

Probable cause requires a showing that "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 a belief that an offense has been committed." The determination rests on "the totality of facts and circumstances within the officer's knowledge at the time of the arrest."

Ms. Barron argues that [the officer] did not have probable cause to arrest because he did not witness the fight or even see her run outside the house. Police must personally witness the crime in order to make a warrantless arrest for most misdemeanor and gross misdemeanor offenses. RCW 10.31.100. But felony offenses and misdemeanors involving physical harm to a person or the unlawful taking of property have no such requirement. RCW 10.31.100(1). [the officer] arrived at the scene and saw Ms. Barron and three others standing in the front yard of a neighbor's house. Ms. Barron was crying hysterically and her knee was bleeding. She informed [the officer] that Melinda Garcia had assaulted her with a knife over the alleged theft of $100. Ms. Garcia corroborated much of the story. These undisputed facts create more than a suspicion that Ms. Barron and Ms. Garcia fought and that $100 was stolen. Based on the totality of the circumstances, [the officer] had probable cause to believe either crime had been committed. He decided, however, to charge both women with disorderly conduct for their actions inside and outside of the house.

Ms. Barron argues that the fight between her and Ms. Garcia could not be disorderly conduct under either the Sunnyside Municipal Code or state statute because it occurred inside a house, not in a public place. Sunnyside Municipal Code 9.60.010(A)(1), (2) defines disorderly conduct as when a person "[f]ights, quarrels or encourages others to fight in any public place" or if a person "[b]y noisy, riotous or tumultuous conduct, disturbs the peace . . . of the City." RCW 9A.84.030(a), (b) defines disorderly conduct as when a person "[u]ses abusive language and . . . intentionally creates a risk of assault; [or] intentionally disrupts any lawful assembly or meeting or persons without lawful authority."

Both women admitted to [the officer] that the fight started inside the house, and that Ms. Barron was chased outside and injured her knee. Ms. Barron's behavior amounted to conduct that disturbed the peace. The arrest was lawful and the court appropriately refused to suppress on that ground.

3. The strip search violated chapter 10.79 RCW

. . .

RCW 10.79.130 authorizes a warrantless strip search. RCW 10.79.130(1)(a) authorizes a strip search without a warrant if there is a reasonable suspicion that a strip search is necessary to discover weapons or drugs concealed on a person in custody that constitute a threat to the security of the facility. A reasonable suspicion has been described as a substantial possibility that criminal conduct has occurred or is about to occur. State v. Harris, 66 Wn. App. 636 (1992) **Jan 93 LED:13**.

RCW 10.79.130 provides in part:

> (1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:
>
> (a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched,

> that constitutes a threat to the security of a holding, detention, or local correctional facility[.]
>
> (2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:
>
> (a) A violent offence as defined in RCW 9.94A.030 or any successor statute;
>
> (b)An offense involving escape, burglary, or the use of a deadly weapon; or
>
> (c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

Division One of this court addressed the reasonable suspicion exception to a warrantless strip search in State v. Audley, 77 Wn. App. 897 (1995) **Sept 95 LED:11**. In Audley, the defendant was arrested for possession of a controlled substance with intent to deliver, and the officer saw him reaching down the front of his pants to retrieve suspected cocaine. The officer testified that the crotch area was a common place to hide drugs. Division One held that a reasonable suspicion was clearly present based on the crime for which the defendant was arrested and his conduct prior to arrest.

But the facts here are distinguishable. Ms. Barron was arrested for disorderly conduct—not an offense that could support a reasonable suspicion on its own. And the court ruled that the search of Ms. Barron's purse that followed her arrest was improper because it was held by [the arresting officer] in a separate location prior to arrest. The court suppressed that drug evidence. **[LED EDITORIAL NOTE: In the Court of Appeals, the State did not challenge that ruling, and of course that trial court ruling affected the Court of Appeals analysis of the strip search issue in the case.]** The court nonetheless concluded that [the officer] had reasonable suspicion to order the jailhouse strip search based on Ms. Barron's nervousness . . . .
. . . .

So the drug evidence from the purse had been suppressed and the arrest was for a nonviolent crime. [The arresting officer] could then only have relied on Ms. Barron's nervousness to support the strip search. That alone did not provide a substantial possibility that she was concealing drugs. We assume that many, if not most, people will react with a level of nervousness when they are arrested.

The State contends that Ms. Barron's actions in the changing room prior to the search provided the reasonable suspicion necessary for the full strip search. . . .

Ms. Barron was taken to a private room, threatened with a possible "hands on" strip search, and then broke down emotionally [and produced the concealed drugs]. This retroactive reasonable suspicion is not what the law contemplates. RCW 10.79.130. Ms. Barron's nervousness standing alone is not sufficient to support this strip search.

Ms. Barron also contends that the strip search was unlawful because police did not obtain prior approval from a supervisor as required by RCW 10.79.140(2).

RCW 10.79.140 provides in part:

> (1) A person to whom this section is made applicable by RCW 10.79.120 who has not been arrested for an offense within one of the categories specified in RCW 10.79.130(2) may nevertheless be strip searched, but only upon an individualized determination of reasonable suspicion or probable cause as provided in this section.
>
> (2) With the exception of those situations in which reasonable suspicion is deemed to be presented under RCW 10.79.130(2), no strip search may be conducted without the specific prior written approval of the jail unit supervisor on duty.

(Emphasis added.)

Ms. Barron was neither arrested for the crimes set out in RCW 10.79.130(2) nor did her nervousness support a reasonable suspicion. Police must then have obtained written approval from the jail supervisor before ordering the warrantless strip search here. While at least one court has held that suppression is not the appropriate remedy for violation of the writing requirement of RCW 10.79.140(2), that same court found a reasonable suspicion supported the search. See Harris, 66 Wn. App. at 644. We do not have that here. The evidence discovered during the unlawful search should have been suppressed.

[Some citations omitted; substitute subheadings inserted in place of Court's originals]

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BRIEF NOTES FROM THE WASHINGTON STATE COURT OF APPEALS

(1) "FORCIBLE COMPULSION" ELEMENT OF INDECENT LIBERTIES SUPPORTED BY EVIDENCE OF THREAT THAT WAS IMPLIED BY PAST FORCIBLE ABUSES OF CHILD – In State v. Gower, ___Wn. App. ___, 288 P.3d 665 (Div. II, Nov. 20, 2012), the Court of Appeals rejects defendant's argument, among others, that there is insufficient evidence in the trial court record to support the "forcible compulsion" element of his indecent liberties conviction.

The essential elements of indecent liberties by forcible compulsion are that the defendant (1) knowingly causes another person (2) who is not his or her spouse (3) to have sexual contact with him or her or another (4) by forcible compulsion. RCW 9A.44.100(1)(a). "'Forcible compulsion' means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped." RCW 9A.44.010(6) (Emphasis added).

At trial, the alleged victim, the teenage stepdaughter of Gower, testified that over a period of several years she had suffered regular spankings by Gower as purported punishment for a variety of actions. He would make her get naked and then spank her with a coat-hanger or other object. In the summer of 2007, Gower again sought to punish the girl, now 17 years old.

He offered her a choice: she could ride with him in his truck on a trip to Astoria, or again be beaten with an object of Gower's choosing. The girl opted for the truck ride. Once in the truck, Gower ordered her to get naked from the waist down and to comply with the would-be "punishments" of several specified types of sexual contact. She complied.

This evidence and trial court findings support the trial court's determination that Gower's past and present conduct involved both express and implied threats, and that he therefore committed indecent liberties by forcible compulsion. The Court of Appeals explains in part as follows:

> Gower's threat to spank SEH if she did not ride with him in the truck constituted an express threat that placed SEH "in fear of . . . physical injury to herself." RCW 9A.44.010(6). Gower used this threat to coerce SEH into his truck, where she was isolated and helpless to resist his sexual advances. Based on Gower's past sexual touching of her, SEH had reason to expect similar sexual advances when alone with Gower in the truck. Moreover, Gower's long history of spanking SEH as punishment had an overtly sexual tone: Gower would order SEH to remove her clothing before a spanking; and, Gower was a member of the local sadomasochism community in which spanking has a sexual component. Based on these past experiences, SEH knew that if she disobeyed him by resisting, she would face punishment. Consequently, Gower's threat when forcing SEH into the truck included an implied threat that, once in the truck, he would meet any resistance to his sexual advances with physical punishment.

Result: Affirmance of Pierce County Superior Court convictions of Daniel Joel Gower for two counts of indecent liberties and one count of second degree incest.

(2) DEFENDANT LOSES CHALLENGE TO EYEWITNESS IDENTIFICATION TESTIMONY, BOTH BECAUSE DETECTIVE ACTED REASONABLY AND BECAUSE POLICE WERE NOT RESPONSIBLE FOR VIEWING BY WITNESS OF DEFENDANT IN MEDIA REPORTS – In State v. Sanchez, ___ Wn. App. ___, 288 P.3d 351 (Div. III, Oct. 30, 2012), the Court of Appeals rejects the challenge by double-murder defendant Sanchez to admissibility of eyewitness testimony in his case. **[LED EDITORIAL NOTE: The analysis and description of the record by the Court of Appeals is not as comprehensive and precise as we would like; we have made our best effort to draw reasonable inferences in both regards in this LED entry.]**

Due process protection under the U.S. Constitution requires that a conviction be set aside if an eyewitness identification at trial follows a pre-trial identification procedure conducted by the government that was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification at trial. Courts use a two-step review process.

If the identification procedure by law enforcement is determined in Step One to have been unnecessarily suggestive, then the testimony of the eyewitness in court will be admissible only if, in Step Two, the government can overcome the suggestiveness determination by establishing that the identification is nonetheless reliable. Key factors considered in the Step Two determination of whether the pre-trial suggestiveness tainted the identification trial testimony of the eyewitness such as to make the ID testimony unreliable are as follows: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at the time of the crime; (3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the identification procedure; and (5) the lapse of time between the crime and the identification procedure.

Where the government is not responsible for the suggestiveness of circumstances surrounding an identification, constitutional Due Process protections do not preclude submission of the identification evidence to the jury. In the latter circumstance, it is solely up to the jury to determine what weight to give the identification. See Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716 (Jan. 11, 2012) **March 2012 LED:02**. In Perry, the U.S. Supreme Court held that where officers did not purposely stage what inadvertently turned out to be a "showup" identification of the suspect, constitutional due process protections against suggestive ID procedures were not triggered.

In the Sanchez case, the Court of Appeals does not get past Step One, concluding: (1) that the detective who conducted identification procedures with a victim did not engage in unnecessarily suggestive actions within the meaning of the Due Process case law; and (2) that any impact on the victim of viewing media reports about the crime were not the responsibility of the government, and therefore under Perry could not be the basis for a Due Process challenge to the identification testimony.

During two days immediately after the occurrence of two murders and other assaults in a drugs-and-money rip-off, a detective conducted two photo array procedures to determine if one of the surviving victims could identify Sanchez as one of the perpetrators. Inadvertently, the detective included Sanchez in each of the two arrays. The victim did not identify Sanchez either time. A few days later, the victim met again with the detective. She told him that she had since seen booking photo pictures of Sanchez in media reports on the case, and that she was now able to identify Sanchez as one of the perpetrators.

Prior to his trial, Sanchez moved to suppress the eyewitness ID testimony from the victim. The trial judge ruled that the testimony was admissible, and that the defendant could, of course, cross examine the victim at trial (at trial she explained that immediately after the assault she was confused because she was traumatized and medicated, and that she became less confused and more able to identify the attackers after a little time passed).

The trial judge permitted the defendant to call an expert witness to explain to the jury the fallibility of eyewitness identifications. The defendant's expert on eyewitness identification apparently testified that the following law enforcement safeguards for reliable eyewitness identification were not perfectly followed with the victim: (1) give an admonition to the witness preceding the showing of every photo array; (2) record the entire identification session for purposes of future forensic examination; (3) use a double-blind procedure, meaning that the administrator of the procedure is not privy to facts of the case, in order to ensure that he or she does not inadvertently convey information to the witness by word or reaction; (4) avoid repetition of showing of any given suspect's image to any given witness, because repetition can create source confusion and a possible belief by the witness that the suspect is familiar from the crime scene (rather than from repeated showings); and (5) warn a witness to a newsworthy crime not to watch the news, a step the expert characterized as "recommended procedure" and "wise."

The Sanchez Court does not disagree with the defense expert's guidelines for conducting eyewitness identifications. But the Court concludes that, to the extent that the detective's actions did not meet all the guidelines presented by the expert, such assumed failings do not make the detective's actions in conducting the photo arrays suggestive. As for the appearance of Sanchez in two photo arrays, the Court opines that this alone does not make a procedure suggestive. The Court opines similarly as to the failure to use a double-blind procedure where there is no evidence that the detective did anything suggestive in the showing of photos.

As for the failure to admonish the victim not to view media reports about the crime, the Court relies on Perry v. New Hampshire in concluding that such failure to warn against media exposure does not make law enforcement responsible for the effect of media reports on the eyewitness.

Result: Affirmance of Yakima County Superior Court convictions of Jose Luis Sanchez, Jr. for two counts of aggravated first degree murder, plus other crimes.

LED EDITORIAL NOTE: For more information on the law relating to identifications, see the article "Eyewitness Identification Procedures: Legal and Practical Aspects," by John R. Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) available on the CJTC's Internet LED page under "Special Topics."

(3) UNDER APPROPRIATE CIRCUMSTANCES, GANG-RELATED EVIDENCE MAY BE INTRODUCED TO ESTABLISH MOTIVE, INTENT, PLAN OR PREPARATION; 2-1 MAJORITY HOLDS THAT PRESENT CASE PRESENTS SUCH CIRCUMSTANCES – In State v. Embry, Morgan and Parker, ___ Wn. App. __, 287 P.3d 648 (Div. II, Oct. 30, 2012), the Court of Appeals explains that under appropriate circumstances evidence regarding gang status of a defendant and aspects of gang behavior may be introduced if relevant to establishing motive, intent, plan or preparation. Courts are cautious, however, in admitting such gang-related evidence, because such evidence generally is by its nature highly prejudicial to defendants. Assessments of relevance and prejudice are highly fact-intensive, so the precedential value of past appellate court decisions can be limited.

Two of the three judges in this case conclude that the gang-related evidence had probative value and that the prejudicial aspect of the evidence did not require the trial judge, in the exercise of discretion, to exclude the evidence. The gang evidence was presented to show that two members from one gang plotted with a member from an "allied" gang to aid the latter person in his retaliation against a man with whom he had previously fought. Judge Armstrong dissents, arguing that the gang-related evidence should not have been admitted into evidence because it was general and speculative, as well as, as it often is, highly prejudicial.

Result: Affirmance of Pierce County Superior Court convictions of Randall Marquise Embry, Bryant Deshean Morgan, and Andre Terrell Parker for attempted first degree murder, with firearm sentencing enhancements; also, affirmance of Embry's conviction for conspiracy to commit first degree murder; reversal (under sufficiency-of-evidence analysis not addressed in this LED entry), of the convictions of Parker and Morgan for first degree unlawful firearm possession.

(4) EVIDENCE AS TO NATURE OF AND MOTIVE FOR ASSAULT HELD SUFFICIENT TO SUPPORT PREMEDITATION ELEMENT OF MURDER CONVICTION – In State v. Thompson, 169 Wn. App. 436 (Div. I, July 16, 2012), in three separate trials for three separate notorious violent crimes committed in 2004 in King County, Curtis Shane Thompson was convicted of first degree premeditated murder for one of the crime, and of numerous other charges. As to the murder conviction, Thompson argued that the record contains insufficient evidence to support the premeditation element. The Court of Appeals rejects this argument under the following analysis:

> Premeditated intent "must involve more than a moment in point of time" (RCW 9A.32.020(1)) and involves "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." State v. Finch, 137 Wn.2d 792, 831 (1999) **Aug 99 LED:17** (internal

quotation marks omitted) (quoting State v. Pirtle, 127 Wn.2d 628, 644 (1995). Premeditation is "the deliberate formation of and reflection upon the intent to take a human life." State v. Hoffman, 116 Wn.2d 51, 82 (1991).

A wide range of proven facts will support an inference of premeditation, including "where multiple wounds were inflicted with a knife or other weapon, there were signs of a struggle, the victim was at some point struck from behind, and there was evidence that sexual assault or robbery was an underlying motive." State v. Gregory, 158 Wn.2d 759, 817 (2006) **Feb 07 LED:05**.

There is evidence of every one of those facts in this case. The evidence shows a prolonged and violent struggle. Deborah's room was in disarray. She had defensive wounds on her arms, bruises and scratches on her face, significant bruising under her scalp, and petechiae in her eyes and a linear abrasion on her neck indicating she had been strangled. The fatal injuries were stab wounds to the front of her chest, her side, and the back of her neck, most likely made by a flat-head screwdriver, which was later found in a box with other tools in her closet. Her body was naked and there was evidence of sexual activity consistent with assault, which suggests a motive for the murder and further supports an inference of premeditation. The evidence was sufficient to prove Thompson murdered Deborah with premeditated intent.

[Citations revised stylistically and moved from footnotes into body]

Result: Affirmance of King County Superior Court convictions of Curtis Shane Thompson for three separate attacks on a number of victims: (1) for first degree premeditated murder for one of his attacks (the Court also upholds the jury's alternative verdict of felony murder), and (2) of numerous other charges relating to the other two violent attacks committed by Thompson.

(5) JUVENILE COURT'S DISCLOSURE OF SPECIAL SEX OFFENDER DISPOSITION ALTERNATIVE (SSODA) EVALUATION TO LOCAL LAW ENFORCEMENT AGENCIES WAS MANDATED BY STATUTE; COURT ALSO OPINES THAT EVALUATION WOULD BE EXEMPT FROM PUBLIC DISCLSURE – In State v. Sanchez, 169 Wn. App. 405 (Div. I, July 9, 2012), the Court of Appeals holds that a juvenile court's disclosure of the defendant's sex offender disposition alternative (SSODA) evaluation to the sheriff's office was mandated by statute. The Court also opines that the evaluation would be exempt from public disclosure.

Pursuant to a juvenile disposition, Josh Sanchez was permitted to remain in the community on the basis of a juvenile sexual behavior and risk assessment SSODA (special sex offender disposition alternative) evaluation.

The juvenile court transmitted the evaluation to the sheriff's office to enable it to establish a sex offender risk assessment under RCW 4.24.550(6). That section provides:

Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (b) assign risk level classifications to all offenders about whom information will be disseminated; and (c) make a good faith effort to notify the public and residents within a reasonable period of time after the offender registers with the agency. The juvenile court shall provide local

> law enforcement officials with all relevant information on offenders allowed to remain in the community in a timely manner.

[Emphasis added]

The defendant filed a motion seeking to prohibit the juvenile court from transmitting the SSODA evaluation to the sheriff's office. The court denied the motion and the defendant appealed. The Court of Appeals rejects the defendant's arguments, concluding that disclosure to the sheriff's office is required by statute.

In rejecting the defendant's argument that if the SSODA evaluation is disclosed to the sheriff it will be subject to public disclosure, the Court explains that the evaluation would be exempt from disclosure under RCW 13.50.050. The Court explains:

> Sanchez next argues that since the information is transmitted to the sheriff that information is at risk of being released under the Public Records Act (PRA), chapter 42.56 RCW. But RCW 13.50.050 provides that all records other than an official juvenile court file are confidential and may be released only in certain circumstances, such as to the sheriff's office. *[Court's Footnote: RCW 13.50.050 provides in part: (1) This section governs records relating to the commission of juvenile offenses . . . (2) The official juvenile court file . . . shall be open to public inspection, unless sealed . . . (3) All records other than the official juvenile court file are confidential and may be released only as provided in this section, RCW 13.50.010, 13.40.215, and 4.24.550.]* RCW 42.56.070 provides for the protection of records from disclosure, where specifically exempt from disclosure by other statutes, such as RCW 13.50.050. Indeed, in his reply brief, Sanchez agrees with King County's assessment that its polices would prohibit re-disclosure of the evaluation under the public policy and rights to privacy contained within the PRA under RCW 42.56.070.

Result: Affirmance of King County Superior Court order denying Josh A. Sanchez's motion to bar release of SSODA to King County Sheriff's Office.

LED EDITORIAL COMMENT: Although the Court of Appeals rejection of the defendant's Public Records Act (PRA) argument contains language that may be helpful to law enforcement public records officers and their legal advisors, we want to remind readers that this case was not a PRA case. Note also that the Court of Appeals relies on chapter 13.50 RCW (relating to juvenile records). In Koenig v. Thurston County, discussed above, the Supreme Court applied (and rejected) the investigative records exemption of the PRA.

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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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