LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

August 2016

TABLE OF CONTENTS FOR AUGUST 2016 LEGAL UPDATE

NINTH CIRCUIT, UNITED STATES COURT OF APPEALS……2

CIVIL RIGHTS ACT CIVIL LIABILITY: TWO-PLUS MILLION DOLLAR VERDICT AGAINST JAIL OFFICERS AND AGENCY UPHELD; NO QUALIFIED IMMUNITY FOR OFFICERS WHO JURY FOUND HAD VIOLATED THE DUE PROCESS RIGHT OF A PRETRIAL DETAINEE IN A SOBERING CELL TO BE FREE FROM VIOLENCE AT THE HANDS OF A KNOWN VIOLENT PERSON PLACED WITH HIM; ALSO, AGENCY LIABILITY STANDARD OF MONELL HELD TO BE MET BASED ON INADEQUATE SCHEME FOR AUDIO SURVEILLANCE AND VISUAL CELL CHECKS
Castro v. County of Los Angeles, ___ F.3d ___ , 2016 WL 4268955 (9th Cir., August 15, 2016)……..2

MIRANDA/SEIBERT: HABEAS RULING IS THAT DELIBERATE AND UNCURED 2-STEP INTERROGATION VIOLATED SEIBERT'S RULING AGAINST (STEP 1) PURPOSEFULLY QUESTIONING CUSTODIAL SUSPECT WITHOUT WARNINGS, AND (STEP 2) MIRANDIZING FOR MORE QUESTIONING AFTER THE CAT IS OUT OF THE BAG
Reyes v. Lewis, ___F.3d ___ , 2016 WL ____ (9th Cir., August 17, 2016)……6

CIVIL RIGHTS ACT CIVIL LIABILITY: EXCLUSIONARY RULE DOES NOT APPLY TO SECTION 1983 CIVIL RIGHTS LAWSUIT, SO OFFICER'S UNLAWFUL ENTRY INTO CURTILAGE TO KNOCK ON BACK DOOR LOCATED WITHIN HOME'S CONNECTED CARPORT DOES NOT IMPACT GOVERNMENT ARGUMENT THAT OFFICER MADE A SUBSEQUENT LAWFUL ARREST BASED ON SMELL OF MARIJUANA HE DETECTED WHEN A VISITOR INSIDE OPENED THE DOOR
Lingo v. City of Salem, __ F.3d __ , 2016 WL 3525209 (9th Cir., June 27, 2016 decision amended by decision dated August 8, 2016)…….....7

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT……..9

LAKEWOOD ORDINANCE PROHIBITING "BEGGING IN RESTRICTIVE AREAS," INCLUDING AT FREEWAY ON AND OFF RAMPS AND AT INTERSECTIONS OF MAJOR ARTERIALS, HELD IN SPLIT VOTING TO VIOLATE FREE SPEECH

PROTECTION ON GROUNDS THAT ORDINANCE IS A CONTENT-BASED RESTRICTION ON SPEECH IN PUBLIC FORUMS
City of Lakewood v. Willis, ___ Wn.2d___ , 2016 WL ___ (July 21, 2016)……..…9

WASHINGTON STATE COURT OF APPEALS……...10

CIVIL LIABILITY FOR NEGLIGENCE: "FAILURE TO ENFORCE" EXCEPTION TO PUBLIC DUTY DOCTRINE IS NOT SUPPORTED BY LAW ENFORCEMENT AGENCY'S FAILURE TO ENFORCE AN AGENCY POLICY THAT IS NOT REQUIRED BY STATUTE OR ORDINANCE
Oliver v. Cook, ___ Wn. App. ___, 2016 WL __ (Div. II, June 14, 2016)…….10

MIRANDA INVOCATION HOLDINGS: (1) SUSPECT'S CONFUSING REFERENCES TO HAVING OR NOT HAVING AN ATTORNEY HELD AMBIGUOUS AND HENCE NOT INVOCATIONS OF RIGHT TO AN ATTORNEY; AND (2) WASHINGTON CONSTITUTION DOES NOT PROVIDE GREATER PROTECTION THAN U.S. CONSTITUTION REGARDING INVOCATION OF RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION
State v. Horton, ___ Wn. App. ___, 2016 WL __ (Div. II, July 26, 2016)…….12

SIXTH AMENDMENT RIGHT TO TRIAL BY JURY: DETECTIVE'S TESTIMONY DESCRIBING HIS INTERROGATION OF DEFENDANT IN WHICH HE CONFRONTED DEFENDANT WITH THE IMPLAUSIBILITY OF HIS STORY AND TOLD DEFENDANT THAT HIS STORY "DIDN'T MAKE SENSE" DID NOT CONSTITUTE IMPERMISSIBLE OPINION ON THE GUILT OF THE DEFENDANT
State v. Smiley, ___ Wn. App. ___, 2016 WL ___ (Div. I, July 25, 2016)……14

SUFFICIENCY OF EVIDENCE OF CRIMINAL TRESPASS: NO "IMPLIED LICENSE" BY HOMEOWNER FOR PERSONS TO "DINGDONG DITCH" BY (1) RINGING FRONT DOORBELL OF HOME, (2) SHOUTING RACIST COMMENT, AND (3) RUNNING AWAY; THEREFORE, DEFENDANT IS GUILTY OF TRESPASS AS ACCOMPLICE WHEN FRIENDS DID AS HE HAD SOLICITED
State v. C.B., ___ Wn. App. ___ , 2016 WL 4484366 (Div. III, August 23, 2016)……16

FUTURE LEGAL UPDATE ENTRY……19

****

NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABIILITY: TWO-PLUS MILLION DOLLAR VERDICT AGAINST JAIL OFFICERS AND AGENCY UPHELD; NO QUALIFIED IMMUNITY FOR OFFICERS WHO JURY FOUND HAD VIOLATED THE DUE PROCESS RIGHT OF A PRETRIAL DETAINEE IN A SOBERING CELL TO BE FREE FROM VIOLENCE AT THE HANDS OF A KNOWN VIOLENT PERSON PLACED WITH HIM; ALSO, AGENCY LIABILITY STANDARD OF MONELL HELD TO BE MET BASED ON INADEQUATE SCHEME FOR AUDIO SURVEILLANCE AND VISUAL CELL CHECKS

Castro v. County of Los Angeles, ___F.3d ___ , 2016 WL 4268955 (9th Cir., August 15, 2016)

Facts and Proceedings below: (Excerpted from majority opinion)

> Late in the evening of October 2, 2009, two LASD deputies arrested Castro for public drunkenness, a misdemeanor under California Penal Code section 647(f). Castro, the officers reported, was staggering, bumping into pedestrians, and speaking unintelligibly. The officers arrested Castro for his own safety and transported him to the West Hollywood police station. They placed him in the station's "sobering cell," a fully walled chamber that was stripped of objects with hard edges on which an inmate could hurt himself; the cell contained only a toilet and some mattress pads.
>
> Several hours later, authorities arrested Gonzalez on a felony charge after he shattered a glass door with his fist at a nightclub. LASD deputies described Gonzalez as acting "bizarre" at the time of his arrest. The intake form characterized Gonzalez as "combative." The authorities placed him in the sobering cell with Castro.
>
> The West Hollywood station manual defines a "sobering cell" as a "cell with a padded floor and standard toilet with a padded partition on one side for support. It must allow for maximum visual supervision of prisoners by staff." The sobering cells are to be used to house inmates who are a threat to their own safety or to others' safety. The station manual provides that non-compliant sobering cells "should not be utilized."
>
> California's Building Code, adopted through legislative action by the Los Angeles County Board of Supervisors as County law, also includes standards that govern sobering cells. L.A. Cty. Code tit. 26, ch. 1, § 100 (2007). In 2009, the building code required maximum visual supervision of all inmates by staff and provided that inmates requiring more than minimum security must be housed in cells with an inmate or sound-activated audio-monitoring system. Cal. Bldg. Code tit. 24, §§ 1231.2.4, 1231.2.22 (2007). The sobering cell at the West Hollywood police station met neither of those requirements, yet it was used routinely.
>
> Shortly after Gonzalez entered the cell, Castro approached the door and pounded on the window in the door, attempting to attract an officer's attention. No one responded.
>
> Christopher Solomon, the station's supervising officer, had assigned an unpaid community volunteer to monitor the cell. The volunteer walked by the cell about 20 minutes after Castro had sought help. He noticed that Castro appeared to be asleep and that Gonzalez was "inappropriately" touching Castro's thigh, in violation of jail policy. The volunteer did not enter the cell to investigate. Instead, he reported the contact to Solomon. Six minutes later, Solomon arrived at the sobering cell and saw Gonzalez making a violent stomping motion. He opened the door, discovered Gonzalez stomping on Castro's head, and found Castro lying unconscious in a pool of blood. Solomon separated Gonzalez from Castro and called for medical assistance.

> When the paramedics arrived, Castro was unconscious, in respiratory distress, and blue. He was hospitalized for almost a month, after which he was transferred to a long-term care facility, where he remained for four years. He suffers from severe memory loss and other cognitive difficulties.
>
> Castro filed a complaint against the County of Los Angeles and the LASD (the "entity defendants"), as well as Solomon and Solomon's supervisor, David Valentine (the "individual defendants"). He sought to recover actual damages, future damages, punitive damages, and compensation for pain and suffering. Castro claimed that both the entity defendants and the individual defendants violated his constitutional rights by housing him in the sobering cell with Gonzalez and by failing to maintain appropriate supervision of the cell.
>
> The case proceeded to trial. After Castro presented his case, Defendants moved for judgment as a matter of law on three grounds: (1) insufficient evidence that the design of a jail cell constitutes a policy, practice, or custom by the County that resulted in a constitutional violation; (2) insufficient evidence that a reasonable officer would have known that housing Castro and Gonzalez together was a violation of Castro's constitutional rights; and (3) insufficient evidence for the jury to award punitive damages. The district court denied the motion. The jury returned a verdict for Castro on all counts and awarded him more than $2 million in damages. Defendants then filed a renewed motion for judgment as a matter of law. The district court denied the renewed motion without issuing a written opinion.
>
> Defendants timely appealed. A three-judge panel affirmed the judgment of the district court as to the individual defendants but reversed as to the entity defendants. Castro v. County of Los Angeles, 797 F.3d 654 (9th Cir. 2015). A majority of active non-recused [Ninth Circuit] judges voted to rehear the case en banc [i.e., with an 11-judge panel].

[Footnote and one citation omitted]

ISSUES AND RULINGS: (1) Did any individual correctional officers violate the constitutional Due Process right of Mr. Castro as a pre-trial detainee to be free in the jail system from violence at the hands of a known violent person when a highly combative inmate was placed with Mr. Castro in a "sobering cell" cell that had no audio or video surveillance and only occasional monitoring? (ANSWER BY NINTH CIRCUIT MAJORITY: Yes, substantial evidence supports the jury's findings that the defendant jail officers understood that placing plaintiff in a cell with a combative inmate – where the jail cell had no audio or video surveillance and only occasional monitoring – could lead to serious violence against plaintiff.)

(2) Are the individual officers entitled to qualified immunity on the rationale that the case law was not clearly established on the constitutional standard at the time of their actions and inactions? (ANSWER BY NINTH CIRCUIT MAJORITY: No, the officers are not entitled to qualified immunity; the law was clearly established)

(3) There is substantial evidence (A) that a cause of plaintiff's injury was use of a sobering cell that lacked adequate audio surveillance to detain more than one belligerent drunk person while checking the cell visually only every half hour, and (B) that the County knew that its cell design might lead to a constitutional violation among its inhabitants. For purposes of the standard for

agency responsibility under the Civil Rights Act as interpreted in Monell v. Department of Social Services, 436 U.S. 658 (1978), and is there substantial evidence to support the jury's verdict that the County of Los Angeles thus had notice that agency customs or policies posed a substantial risk of serious harm to persons detained in the sobering cell, and that the County deliberately indifferent to that risk? (ANSWER BY NINTH CIRCUIT MAJORITY: Yes)

Result: Affirmance of judgment of U.S. District Court for Central District of California on jury verdict (1) against individual corrections officers under the Civil Rights Act, and (2) against the County of Los Angeles under the Civil Rights Act as employer under Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

ANALYSIS:

MAJORITY OPINION:

The following is a summary of parts of the majority opinion in the case (signed by eight judges) prepared by staff of the Ninth Circuit (the summary is no part of the opinion of the Court):

> The en banc court [the majority opinion] affirmed the district court's judgment, entered following a jury trial, in an action brought under 42 U.S.C. § 1983 by a pretrial detainee alleging that his due process right to be protected from harm at the hands of other inmates was violated when he was severely beaten and injured in his cell by another inmate.
>
> 1. Individual liability of correctional officers
>
> The en banc court first held that the individual sheriff deputies were not entitled to qualified immunity from suit because plaintiff had a clearly established right to be free from violence from other inmates, and substantial evidence supported the jury's findings that the defendants understood that placing plaintiff in a cell with a combative inmate, when the cell had no audio or video surveillance and only occasional monitoring, could lead to serious violence against plaintiff.
>
> Applying Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015), the en banc court concluded that the evidence supported the jury's findings that the officers knew of the substantial risk of serious harm to plaintiff, which necessarily implied that the jury found that a reasonable officer would have appreciated the risk. The en banc court further concluded that there was sufficient evidence to support the jury's findings that the officers caused plaintiff's injuries by failing to take reasonable measures to address the risk.
>
> 2. Agency liability under Monell v. Dep't of Social Services, 436 U.S. 658 (1978)
>
> The en banc court held that the County of Los Angeles and the Los Angeles Sheriff's Department had notice that their customs or policies posed a substantial risk of serious harm to persons detained in the West Hollywood sobering cell and were deliberately indifferent to that risk. The court held that the custom or policy to use a sobering cell that lacked adequate audio surveillance to detain more than one belligerent drunk person while checking the cell visually only every half hour caused plaintiff's injury. Additionally, substantial evidence supported the

jury's finding that the County knew that its cell design might lead to a constitutional violation among its inhabitants.

[Subheadings added]

DISSENTING OPINIONS

The following is a summary of the dissenting opinions in the case prepared by staff of the Ninth Circuit (the summary is no part of the opinions of the dissenting judges or of the majority):

> Dissenting in part, Judge Callahan, joined by Judges Bea and Ikuta, agreed that the judgment against the individual defendants should be affirmed, but she dissented from the affirmance of the judgment against the entity defendants [under Monell] on the grounds that the record in this case showed that the County of Los Angeles did not have a policy or custom that reflected deliberate indifference and caused plaintiff's injuries.
>
> Dissenting, Judge Ikuta, joined by Judges Callahan and Bea, stated that the en banc court misinterpreted Kingsley v. Hendrickson and made a mess of the Supreme Court's framework for determining when pretrial detainees have suffered punishment in violation of their Fourteenth Amendment due process rights.

LEGAL UPDATE NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING C.B. DECISION: The Castro decision is digested in the AGO/CJTC's August 2016 LED at pages 1-3.

MIRANDA/SEIBERT: HABEAS CORPUS RULING IS THAT DELIBERATE AND UNCURED 2-STEP INTERROGATION VIOLATED SEIBERT'S RULING AGAINST (STEP 1) PURPOSEFULLY QUESTIONING CUSTODIAL SUSPECT WITHOUT WARNINGS, AND (STEP 2) MIRANDIZING FOR MORE QUESTIONING AFTER THE CAT IS OUT OF THE BAG

Reyes v. Lewis, ___F.3d ___ , 2016 WL ___ (9th Cir., August 17, 2016)

The following is a summary of the majority and concurring opinions in the case prepared by staff of the Ninth Circuit (the summary is no part of the opinion of the Court):

> The panel issued an order replacing the opinion filed August 14, 2015, with an amended opinion, and rejecting an en banc call, in a case in which the panel reversed the district court's denial of a habeas corpus petition alleging that petitioner's state-court conviction rested on a confession obtained in violation of [the U.S. Supreme Court decision in] Missouri v. Seibert, 542 U.S. 600 (2004) **Sept 04 LED:04**.
>
> The panel held that Justice Kennedy's Seibert concurrence, based on a rationale narrowing the result reached by the Seibert plurality, constitutes "clearly established" Supreme Court law for the purpose of AEDPA review [i.e., habeas corpus review]. Under this concurrence, a post-Miranda-warning statement must be suppressed if interrogating officers deliberately use the two-step interrogation technique that was used in Seibert, and if effective curative measures are not

taken to ensure that the suspect genuinely understood the Miranda warnings. The two-step technique involves interrogating in successive, unwarned and warned phases.

The panel held that under the circumstances of this case where police interrogated the fifteen-year-old petitioner over the course of two days; where on the first day at a police station they conducted a two-hour unwarned interrogation; where on the second day at a sheriff's station they obtained a confession during an unwarned interrogation following an unwarned polygraph test; and where they transported the petitioner back to the police station and obtained a post-warning confession "clarifying" what he had stated at the sheriff's station, a Seibert analysis was clearly required.

The panel held that the California Court of Appeal applied a rule that was contrary to federal law as clearly established by the Supreme Court in Seibert, and thus was owed no deference, when it concluded that the petitioner's post-warning confession was admissible solely on the ground that his unwarned custodial statement was voluntary, and that his subsequent warned statement therefore was also necessarily voluntary.

The panel held that police officers deliberately employed a two-step interrogation technique, and that they did not take appropriate "curative measures," in violation of Seibert. The panel therefore held that the petitioner's post-warning confession should have been suppressed.

The panel remanded with instructions to grant the writ unless the petitioner is tried within a reasonable time, not to exceed 180 days.

Concurring, District Judge Singleton wrote that the California Court of Appeal's conclusions of law are in conformity with Seibert and Justice Kennedy's concurrence, but its findings of fact are unreasonable in context.

Result: Reversal of U.S. District Court (Central District of California) denial of writ of habeas corpus; case remanded with instructions to grant the writ unless the petitioner is tried within a reasonable time, not to exceed 180 days.

CIVIL RIGHTS ACT CIVIL LIABILITY: EXCLUSIONARY RULE DOES NOT APPLY TO SECTION 1983 CIVIL RIGHTS LAWSUIT, SO OFFICER'S UNLAWFUL ENTRY INTO CURTILAGE TO KNOCK ON BACK DOOR LOCATED WITHIN HOME'S CONNECTED CARPORT DOES NOT IMPACT GOVERNMENT ARGUMENT THAT OFFICER MADE A SUBSEQUENT LAWFUL ARREST BASED ON SMELL OF MARIJUANA HE DETECTED WHEN A VISITOR INSIDE OPENED THE DOOR

LEGAL UPDATE INTRODUCTORY EDITORIAL NOTE: The ruling in the Lingo case is summarized in a single paragraph as follows on the website of the Washington Association of Prosecuting Attorneys in the "Case Notes" by staff attorney Pam Loginsky:

> **The exclusionary rule does not apply in § 1983 cases, and therefore police officers may rely on unlawfully obtained evidence to defend themselves against a**

constitutional tort action for false arrest. Accordingly, the officers' unlawful entry into the plaintiff's curtilage did not taint the arrest that followed. The officers had probable cause to arrest the plaintiff for endangering the welfare of a minor based upon the odor of marijuana that emanated from the plaintiff's house.

Lingo v. City of Salem, ___ F.3d ___ , 2016 WL 3525209 (9th Cir., June 27, 2016 decision amended by decision dated August 8, 2016)

Facts and Proceedings below:

A Salem, Oregon, police officer investigating a dispute between two female neighbors talked to one neighbor first. Neighbor 1 told the officer that Neighbor 2, Lingo, had been verbally abusive regarding her dog. The officer informed Neighbor 1 that this did not sound criminal, but he said he would talk to Lingo. He walked to Lingo's house and saw a rear outside light on. The officer decided not to knock on the front door. He instead walked into Lingo's carport and knocked on a rear door that was located within the carport. **[LEGAL UPDATE EDITORIAL NOTE: The government defendants in this case conceded on appeal that the officer violated the Fourth Amendment in going through the carport to knock on the back door that was located within the carport. See United States v. Perea-Rey, 680 F.3d 1179 (9th Cir., May 31, 2012) September 12 LED:03, holding that area near home's side entry door located on left wall of mostly-enclosed carport was a protected private area under the Fourth Amendment; and that a federal border agent unlawfully went into that private area rather than going to front door to contact resident.]**

When the door was opened from within the house by a visitor, the officer immediately smelled what he believed to be marijuana. Lingo came to the door and told the officer that the smell was only a hemp-scented incense, but the officer did not believe her. After another officer arrived, and he too believed that he smelled marijuana odor emanating from the house. The officers arrested Lingo, who did not have authority to use medical marijuana under then-existing Oregon law. She was arrested for endangering the welfare of her young children in the house, and her children were temporarily taken from her.

She refused consent to search. A search warrant was obtained, and officers found a small amount of marijuana (1.8 grams including packaging), plus small baggies commonly used as drug packaging materials, and a small amount of Klonopin, which is a schedule IV prescription drug. was discovered in the house.

Charges of child endangerment against Lingo were filed, but the charges were dropped after she prevailed on a suppression motion based on the officer's unlawful warrantless entry of her carport to knock on her back door. Lingo then filed a Civil Rights Act lawsuit, but the federal District Court granted summary judgment to all government defendants. The District Court ruled that (1) the Exclusionary Rule does not apply in civil lawsuits and therefore the officers may establish probable cause through evidence (smelling marijuana) they gathered as a result of their illegal entry into her carport; and (2) the undisputed facts at the scene support a finding of probable cause that there was marijuana in the house, and that she was endangering her children.

ANALYSIS BY NINTH CIRCUIT PANEL:

The Ninth Circuit panel agrees with the District Court on both points. On the Exclusionary Rule issue, the panel asserts, among other things:

> [N]othing within the fruit-of-the poisonous-tree doctrine suggests that an officer must ignore facts that would give him probable cause to arrest a person merely because those facts were procured through an unlawful search. Indeed, as a general matter, probable cause determinations depend on the substance of the information known to the officer, not whether that information would be admissible in court. See Crowe v. County of San Diego, 608 F.3d 406, 432 (9th Cir. 2010) (noting that evidence establishing probable cause need not be admissible). And as the Second Circuit explained in rejecting an argument similar to Lingo's, "[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all." . . . The exclusionary rule already provides a person in Lingo's position "an enormous benefit by reason of the illegal . . . search to which [she] was subjected: [her] freedom, achieved by the suppression of evidence" at criminal trial.. . . . But the Supreme Court has made clear that this suppression remedy does not mean that the government's use of illegally obtained evidence is itself a constitutional concern. [See, e.g., Penn. Bd. of Prob. & Parole v. Scott, 524 U.S. 357 (1998)]. ("We have emphasized repeatedly that the government's use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution.").

[One citation omitted, some other citations revised for style]

Result: Affirmance of U.S. District Court (Oregon) summary judgment for all government defendants in the case.

****

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

LAKEWOOD ORDINANCE PROHIBITING "BEGGING IN RESTRICTIVE AREAS," INCLUDING AT FREEWAY ON AND OFF RAMPS AND AT INTERSECTIONS OF MAJOR ARTERIALS, HELD IN SPLIT VOTING TO VIOLATE FREE SPEECH PROTECTION, APPARENTLY ON GROUNDS THAT THE ORDINANCE IS A CONTENT-BASED RESTRICTION ON SPEECH IN PUBLIC FORUMS

In City of Lakewood v. Willis, ___ Wn.2d___ , 2016 WL ___ (July 21, 2016), the Washington Supreme Court addressed an appeal from a citation for violating a City of Lakewood ordinance prohibiting "begging in restrictive [sic] areas," including at freeway on and off ramps and at intersections of major arterials. The Supreme Court held in split voting and a confusing (at least in the mind of the Legal Update Editor) mix of opinions that the ordinance violates Free Speech protection on grounds that it is a content-based restriction on speech in public forums.

For what appears to your Editor to be an insightful discussion of Willis, see the article on the website of Washington-focused Municipal Research and Services Council (MRSC). Go to the MRSC Home page, click on Stay Informed, then click on MRSC Insight Blog, and scroll down to the July 27, 2016 blog entry by MRSC staff member, Jim Doherty. The entry is titled "Washington Supreme Court Finds Begging Ordinance Unconstitutional Under Reed v. Town of Gilbert" (Gilbert is a 2014 U.S. Supreme Court decision).

Result: Reversal of Division Two Court of Appeals decision (unpublished) that affirmed a Pierce County Superior Court decision that affirmed the Lakewood Municipal Court conviction of Robert Willis for "Begging in Restrictive Areas."

****

WASHINGTON STATE COURT OF APPEALS

CIVIL LIABILITY FOR NEGLIGENCE: "FAILURE TO ENFORCE" EXCEPTION TO PUBLIC DUTY DOCTRINE IS NOT SUPPORTED BY LAW ENFORCEMENT AGENCY'S FAILURE TO ENFORCE AN AGENCY POLICY THAT IS NOT REQUIRED BY STATUTE OR ORDINANCE

In Oliver v. Cook, ___Wn. App. ___, 2016 WL ___ (Div. II, June 14, 2016), a three-judge panel of Division Two of the Court of Appeals unanimously rules that the trial court correctly ruled that a failure of a law enforcement agency to follow its policy on dealing with danger from privately owned dogs cannot be the basis for allowing a party to sue the agency. That is because the agency policy is not required by statute or ordinance.

The public duty doctrine generally shields government entities from liability for negligence in carrying out certain obligations. The rationale for the shield is that an agency's duty to the general public does not necessarily support a claim of a civil liability duty to a particular victim. There are several exceptions to the public duty doctrine, one of which is the "failure to enforce" exception to the public duty doctrine. Under the "failure to enforce" exception, a government agency generally has a civil liability duty if (1) governmental agents responsible for enforcing statutory requirements (2) possess actual knowledge of a statutory violation and fail to take corrective action despite a statutory duty to do so and (3) the plaintiff is within the class the statute intended to protect. The Oliver Court concludes that the "failure to enforce" exception does not apply under the facts alleged by the plaintiffs in this case because no legislation imposed the duty claimed by the plaintiff.

The Oliver Court describes the factual and procedural background as follows:

> Steven Oliver operated an automobile shop that was located on Eugene Mero's property in Grays Harbor County. In exchange for using Mero's property, Oliver performed repair and maintenance work for Mero.
>
> Henry Cook was Mero's friend. Cook owned a dog named "Scrappy," an eight-year-old male pit bull mix. Mero knew Scrappy could be aggressive; Scrappy often barked at passing strangers, and Mero avoided approaching vehicles when he knew Scrappy was in them.
>
> On August 23, 2010, Cook arrived at the Mero property driving Mero's flatbed truck. Cook and Mero then left the property together in a different vehicle, leaving Scrappy inside the cab of Mero's truck with the window partially down.
>
> Soon thereafter, Oliver arrived at the Mero property. As Oliver walked past the passenger side of the flatbed truck, Scrappy lunged out of the passenger window and bit Oliver in the face, ripping off a significant portion of his nose.
>
> Prior to his attack on Oliver, Scrappy had a history of aggressive and violent behavior. In 2004, Scrappy attacked a Dachshund owned by one of Cook's

neighbors in Grays Harbor County. The attack, which occurred on the neighbor's property, tore off the Dachshund's toenail and left it with numerous puncture wounds. The Grays Harbor County Sheriff's Department investigated the attack and issued Cook a Potentially Dangerous Dog Notification.

In 2007, Scrappy was involved in another incident in Grays Harbor County that required a response from the sheriff's department. Scrappy aggressively chased a seven-year-old boy who was visiting one of Cook's neighbors. The boy was able to reach the neighbor's residence without being bitten or otherwise injured. The sheriff's department issued Cook a second Potentially Dangerous Dog Notification.

Former departmental policy 1753.3 in effect at the time of the 2004 and 2007 attacks, defined a "Dangerous Dog" as one that had been "previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans or domestic animals." In contrast, the corresponding State statute defined a dangerous dog as "any dog that . . . has been previously found to be potentially dangerous because of injury inflicted on a human, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans." RCW 16.08.070(2)(c) (emphasis added).

[The Court's footnote 3 relating to the preceding paragraph reads as follows: *"The departmental policy, which was adopted in 1993, was updated in 2008 to reflect the State legislature's 2002 amendment to RCW 16.08.070, which changed the definition of a dangerous dog. We cite the policy language in effect at the time of the 2004 and 2007 incidents."* The Court's footnote 4, also relating to the preceding paragraph, reads as follows*: "The former County departmental policy stated, "'Dangerous Dog' means any dog that according to the records of the appropriate authority: a. Has inflicted severe injury on a human being without provocation on public or private property, b. Has killed a domestic animal without provocation while off the owner's property, or c. Has been previously found to be potentially dangerous, the owner having received notice of such and the dog again aggressively bites, attacks, or endangers the safety of humans or domestic animals*."]

Oliver argued that Cook receiving a Potentially Dangerous Dog Notification after Scrappy's 2004 attack on the Dachshund, and then Scrappy later exhibiting aggressive behavior toward the seven-year-old boy in 2007, required the sheriff's department to declare Scrappy a dangerous dog under its own policies. Oliver conceded that Scrappy was not a dangerous dog under RCW 16.08.070; however, he argued the County sheriff's department nonetheless breached its "statutory duty" created by its own departmental policies to declare Scrappy dangerous.

Oliver argued that the sheriff department's failure to enforce its own more restrictive regulation triggered the failure to enforce exception to the public duty doctrine, consequently creating liability for the County. The County argued that the failure to enforce exception cannot be based upon an alleged violation of departmental policy but must be based on a duty that arises from a statute or ordinance.

> The superior court granted the County's motion for summary judgment, finding that the departmental policies Oliver cited could not support a claim under the failure to enforce exception.

As noted above, the Court of Appeals agrees with the Superior Court on the public duty doctrine issue.

Result: Affirmance of Thurston County Superior Court summary judgment order that dismissed the case against Grays Harbor County. Reversal, under analysis not addressed in this Legal Update entry, of summary judgment order that dismissed the case against the owner of the private premises.

MIRANDA INVOCATION HOLDINGS: (1) SUSPECT'S CONFUSING REFERENCES TO HAVING OR NOT HAVING AN ATTORNEY HELD AMBIGUOUS AND HENCE NOT INVOCATIONS OF RIGHT TO AN ATTORNEY; AND (2) WASHINGTON CONSTITUTION DOES NOT PROVIDE GREATER PROTECTION THAN U.S. CONSTITUTION REGARDING INVOCATION OF RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION

State v. Horton, ___Wn. App. ___, 2016 WL ___ (Div. II, July 26, 2016)

Facts and Proceedings below:

The trial court made the following findings relating to the Miranda issue in this case, as described by the Court of Appeals:

> Shortly after being advised of his Miranda rights, [Horton] made a comment, "I do have a lawyer." The investigator asked what [Horton] and he responded, "I don't have a lawyer." The investigator asked "What did you have a lawyer for?" [Horton] responded "why would I have a lawyer?" The investigator asked if the defendant was referring to a previous case and the defendant responded, "naw, naw, I didn't have no lawyer for a previous case. But I do have lawyers . . . but I'm just saying, this guy right here man [referencing the victim] . . . fuck shit man." [Horton] then proceeded to talk about the events that transpired that night. At no other point did [Horton] reference an attorney or otherwise suggest that he was invoking his right to an attorney or his right to remain silent.

The trial court concluded that Horton's statements to the investigator, which the appellate court briefing of the State and defendant make clear were made after Horton had already given a straightforward waiver of rights a short while earlier, were admissible. The trial court further concluded that the comments regarding a lawyer "were not an unequivocal request for an attorney that invoked the right to counsel," and instead, that in full context the comments were unclear, contradictory, and required clarification. This included: (1) Horton's repeated expressions of eagerness to talk to law enforcement that night, (2) his express statement to the Investigator that he knew he could "shut up" and not talk about what happened, and (3) the fact that he could not be referring to an attorney he had secured on this matter because he had not had an opportunity from the time of the shooting to retain counsel.

A jury found Horton guilty of unlawful possession of a firearm in the first degree but could not reach a verdict on the first degree murder charge. In a second trial, the second jury found

Horton committed first degree murder while armed with a firearm, and also found that a gang aggravator was proven. The trial court sentenced Horton to 481 months of confinement.

ISSUES AND RULINGS: (1) During a custodial interrogation, after waiving his Miranda rights in a straightforward way, Horton made a comment, "I do have a lawyer." The investigator asked "What did you have a lawyer for?" and Horton responded "why would I have a lawyer?" The investigator asked if the defendant was referring to a previous case and the defendant responded, "naw, naw, I didn't have no lawyer for a previous case. But I do have lawyers . . . but I'm just saying, this guy right here man, referencing the victim . . . fuck shit man." Horton then proceeded to talk about the events that transpired that night.

In context, were Horton's statements mentioning a lawyer unambiguous invocations of his Miranda right to an attorney? (ANSWER BY COURT OF APPEALS: No, rules the unanimous three-judge panel)

(2) Does the Washington constitution provide greater protection of the right to counsel during custodial interrogation such that an ambiguous reference to the right to an attorney forbids any further questioning of the suspect, at least until the interrogator clarifies the suspect's wishes? ((ANSWER BY COURT OF APPEALS: No, rules the unanimous three-judge panel, the Washington constitution provides no greater protection of this right than the federal constitution)

Result: Affirmance of Pierce County Superior Court convictions of William Charles Horton, Jr. for murder in the first degree and unlawful possession of a firearm in the first degree; also, in rulings not addressed in this Legal Update entry, the Court of Appeals affirmed his 481-month sentence.

Status: Defendant Horton has petitioned the Washington Supreme Court for discretionary review.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Horton argues that under article 1, section 9 of the Washington State Constitution, [the detective] should have inquired further into his invocation of the right to counsel after he said the word "lawyer" and that as a result, the trial court erred by admitting his statements. . . .
>
> Here, the trial court found that when Horton stated in the interview room, "I do have a lawyer," "I don't have a lawyer," "[W]hy would I have a lawyer?", and "I do have lawyers," he was neither invoking his right to counsel nor his right to remain silent. The court concluded the "unclear" and "contradictory" statements "were not an unequivocal request for an attorney."
>
> Horton does not argue that under the Fifth Amendment to the United States Constitution, his right to counsel was violated. Instead, Horton contends that article 1, section 9, of the Washington State Constitution affords greater protections than the Fifth Amendment and therefore, the trial court should have applied the standard set forth in State v. Robtoy, 98 Wn.2d 30 (1982) (holding a suspect's equivocal request for an attorney forbids further questioning), rather than that in Davis v. United States, 512 U.S. 452 (1994) (holding only an unequivocal request to speak to an attorney, after waiver of the right, mandates an end to police interrogation). He . . . asserts that Washington courts have not

> answered whether Robtoy applies under article 1, section 9, of the Washington State Constitution.
>
> . . . . However, our Supreme Court has already determined that the state constitution'' article 1, section 9, is co-extensive with the Fifth Amendment. State v. Earls, 116 Wn.2d 364 (1991) It is not broader. Earls.
>
> In Earls, our Supreme Court decided that the defendant "was repeatedly and clearly told of his right to have the assistance of an attorney. He freely, knowingly, and intelligently chose to give up that right and to confess to murder in exchange for a reduced charge." One Justice dissented, relying in part on Robtoy. The dissent concluded that law enforcement violated Earls's right to counsel because the officers did not act on an equivocal invocation of the right to counsel. This reasoning was rejected by the eight other Washington Supreme Court justices. Officers are not required to inquire further when a suspect merely uses the word ""lawyer." See Earls, 116 Wn.2d at 380-81.
>
> Horton's arguments are contrary to how Washington courts have consistently ruled, i.e., that the state constitutional protections under article 1, section 9, and the federal constitutional protections under the Fifth Amendment are the same. [The investigator] did not have a duty to inquire further into Horton's statements about lawyers. Additionally, Horton does not argue that under the Fifth Amendment, his right to counsel was violated, nor does he assign error under the Fifth Amendment, thus conceding that his right was not violated under the federal constitution. Horton's claim fails. The trial court did not err.

LEGAL UPDATE EDITORIAL COMMENT: Note that the State's Brief of Respondent in the Court of Appeals in Horton explains that in State v. Radcliffe, 164 Wn.2d 900 (2008) Dec 08 LED:18, the Washington State Supreme Court made clear that the Robtoy decision discussed in Horton is not good law. For no good reason that I can discern, the Horton Court, while citing Radcliffe for unrelated procedural points, does not note that Radcliffe expressly overruled Robtoy.

LEGAL UPDATE EDITORIAL NOTE: For general information on a wide range of Miranda issues, see pages 1-31 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors May 2015, an annually updated collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's Internet LED page.

Also accessible on the CJTC LED page is the Miranda-related article – "Initiation of Contact Rules Under the Fifth Amendment" by your Legal Update Editor.

SIXTH AMENDMENT RIGHT TO TRIAL BY JURY: DETECTIVE'S TESTIMONY DESCRIBING HIS INTERROGATION OF DEFENDANT IN WHICH HE CONFRONTED DEFENDANT WITH THE IMPLAUSIBILITY OF HIS STORY AND TOLD DEFENDANT THAT HIS STORY "DIDN'T MAKE SENSE" WAS NOT IMPERMISSIBLE OPINION ON GUILT OF DEFENDANT

In State v. Smiley, ___ Wn. App. ___, 2016 WL ___ (Div. I, July 25, 2016), a three-judge Division One panel rejects a defendant's argument under the Sixth Amendment right to a trial by

jury. The defendant argued that a detective impermissibly testified to a belief that the defendant was guilty. The panel rules that a detective's testimony merely described his interrogation method of challenging the defendant's story.

Shortly after Smiley was deployed to Afghanistan by the Army, Smiley's stepsister, then aged 14, told her parents that he had been molesting her since she was in the fourth grade. She had told her friends of her claims several years before, but she had not gone to her parents. The parents then triggered a law enforcement investigation. Smiley told a detective that the stepsister was making a false accusation because she was jealous of all of the attention that Smiley was getting over his deployment. The detective testified at trial that in questioning Smiley, the detective told Smiley that he thought the jealousy theory "didn't make sense" in light of the reports that the stepsister had made to friends a couple of years earlier.

The Court of Appeals explains as follows why it rejects Smiley's argument that the detective's testimony violated his right to trial by jury:

> A witness may not give, directly or by inference, an opinion on a defendant's guilt. To do so is to violate the defendant's constitutional right to a jury trial. When improper opinion testimony is expressed by a government official, such as a sheriff or police officer, the opinion may influence the jury and deny the defendant a fair and impartial trial. State v. Dolan, 118 Wn. App. 323, 329 (2003) **April 04 LED:20**. Testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence, is not improper opinion testimony. State v. Notaro, 161 Wn. App. 654, 662 (2011) **Sept 11 LED:21**.
>
> Notaro was a murder case. In an initial interview with a detective, the defendant said his mother was the one who shot the victim, and his role had been only to help her bury the body. In recounting the interview for the jury, the detective testified that he told the defendant the story was not believable. The detective told the defendant "to tell me the truth." The defendant confessed to being the shooter.
>
> The defendant [in Notaro] argued on appeal that the officer should not have been allowed to testify that he disbelieved the defendant's initial story. The court determined it was clear to the jury that the officer was not stating a personal opinion about the defendant's veracity. Rather, it was "an account of tactical interrogation statements designed to challenge the defendant's initial story and elicit responses that are capable of being refuted or corroborated by other evidence or accounts of the event discussed." It gave the defendant the opportunity to explain why his account of what happened made sense despite its seeming inconsistency with other evidence.
>
> The same is true here. Smiley suggested that his stepsister was making up a story to hurt him because of jealousy in connection with a recent event, his deployment overseas. [The detective] told Smiley his suggestion did not make sense in view of the disclosures his stepsister made to her friends years before. This was not an impermissible opinion regarding Smiley's veracity. Like in Notaro, [the detective's] testimony described an interrogation tactic.

[Some citations omitted; other citations revised for style]

Result: Affirmance of Pierce County Superior Court convictions of Bryce Earl Smiley for two counts of child molesting in the first degree, two counts of rape of a child in the second degree, and two counts of rape of a child in the third degree.

SUFFICIENCY OF EVIDENCE OF CRIMINAL TRESPASS: NO "IMPLIED LICENSE" BY HOMEOWNER FOR PERSONS TO "DINGDONG DITCH" BY RINGING FRONT DOORBELL OF HOME, SHOUTING RACIST COMMENT, AND RUNNING AWAY, SO DEFENDANT IS GUILTY OF TRESPASS AS ACCOMPLICE WHEN FRIENDS DID AS HE HAD SOLICITED

State v. C.B., ___ Wn. App. ___ , 2016 WL 4484366 (Div. III, August 23, 2016)

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

> On June 1, 2013, Carter B., then 14 years old, dared his friends, Parker C. and Jared W., to "dingdong ditch" the home of Melvin Harris, an African-American. "Dingdong ditch" is the boys' slang for running up to someone's front door, ringing the doorbell, and running away. When Parker and Jared were reluctant, Carter taunted the two, telling them they were "pussies" if they refused. When they finally accepted the dare, Carter walked his two friends halfway to the Harris home and pointed it out. On the way, Carter "upped the ante and urged the two boys to yell 'nigger' when they rang the doorbell."
>
> The Harris property was fenced on all sides. To reach the front porch, one had to walk up the private driveway to an opening in the fence, where a private sidewalk led to the porch. There was no mailbox within the front yard; it was located across the street. Because of prior harassment, the Harris family had installed surveillance cameras, and signs that the property was under video surveillance were posted in the window by the front door.
>
> It was early evening when, after continued hesitation, Parker and Jared finally acted on the dare. Mr. Harris and his wife were in the living room watching television at the time. One of the windows adjacent to their front door was open to circulate air on what was a warm evening. After running up the driveway and through the gate to the front yard, Parker and Jared ran on to the front porch, rang the doorbell, and Jared yelled very loudly, "You fucking nigger, go back to Africa!"
>
> The Harrises" initial reaction was shock and fear. Mr. Harris would later testify that the boys' actions "scared the hell out of him," and he dropped the glass he was holding. He immediately went outside to see who was responsible and saw three males running away.
>
> The couple's fear quickly turned to indignation. Mr. Harris decided to try to locate the boys involved. Correctly surmising where their escape route would take them, he drove to that area and saw Parker, whom he recognized as one of the culprits. Ultimately, all three boys and some of their parents arrived at the location where Mr. Harris had found Parker and they all talked about what had happened. Parker and Jared initially lied about why they had been at the home, claiming they were there to sell football tickets. When Carter's mother arrived

and encountered Mr. Harris questioning the boys, she yelled at him, "Why do you have your big black ass in my neighborhood?"

Proceedings below:

All three boys were charged with second degree criminal trespass. Carter was charged as an accomplice. Parker reached a diversion agreement, did community service, and wrote an essay and a letter of apology to Mr. Harris. Jared was denied diversion and pleaded guilty. Carter was convicted in a bench trial.

ISSUE AND RULING: The teenage defendant dared two friends to ring the front doorbell of the home of an African-American, shout a racist comment, and run away. The two friends did as defendant had solicited. Did the two friends exceed the homeowner's "implied license" allowing visitors to attempt to contact the homeowner at his front door such that the defendant is guilty of criminal trespass as an accomplice to the acts of his friends? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Yakima County Juvenile/Superior Court conviction of criminal trespass in the second degree.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Under RCW 9A.52.080(1), "[a] person is guilty of criminal trespass in the second degree if he or she knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree." "A person 'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5) (emphasis added).
>
> We begin by noting that the significance Carter attaches to the absence of "No Trespassing" signs at the Harris home is misplaced. Posting is required to exclude persons from only "unimproved and apparently unused land." RCW 9A.52.010(5). [Court's footnote: *RCW 9A.52.010(5) provides in part that "[a] person who enters or remains upon* unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, *does so with license and privilege unless notice against trespass is personally communicated to him or her . . . or unless notice is given by posting in a conspicuous manner." (Emphasis added.)*]
>
> The principal issue at trial was whether Jared and Parker enjoyed a license to enter the Harris property. Among licenses that can prevent an entry from constituting trespass are implied licenses. One implied license recognized by common law is a homeowner's implied license to third parties to approach his or her front door for a customary purpose. Florida v. Jardines, 133 S.Ct. 1409, 1415 (2013) **June 13 LED:06**. Jardines is a Fourth Amendment search and seizure case, but its outcome depended on the common law issue present here: When does an implied license exist to enter a person's residential property?
>
> In Jardines, officers entered into Joelis Jardines's yard with a drug-sniffing dog and, after it alerted at Mr. Jardines's front door, they applied for and obtained a search warrant for his home. Whether the search warrant was valid turned on

whether the officers' entry into the yard was "an unlicensed physical intrusion" or, instead, Mr. Jardines "had given his leave (even implicitly)" for the officers to do what they had done. Justice Scalia summarized the applicable common law:

> . . . We have accordingly recognized that "the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds." . . . . This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant *may approach a home and knock, precisely because that is "*no more than any private citizen might do*."* . . . .
>
> But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do that. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to-well, call the police. The scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose.

. . . .

In the premises liability context, this court [the Washington Court of Appeals] has held that a homeowner's implied license to third parties can arise from "local custom." [This court has] held that a Jehovah's Witness who approached a home for purposes of religious solicitation was a licensee rather than a trespasser, relying on cases from other jurisdictions holding that "strangers approaching a private residence may reasonably interpret the presence of a doorbell or a pathway leading to the door as tacit consent to approach the residence and attempt to contact its occupants."

. . . .

Here, the juvenile court concluded that neither habits of the country nor local custom resulted in the Harrises' impliedly opening their private sidewalk and front porch to third parties for the purpose of dingdong ditching and shouting racist comments through open windows. The conclusion is not only reasonable, it appears inescapable. Carter did not offer evidence that Jared's and Parker's conduct is customary and expected in Yakima County, and therefore implicitly invited by Yakima County homeowners. He does not cite a case from any jurisdiction suggesting that conduct as objectionable as the conduct he solicited

> and encouraged falls within the scope of a homeowner's common law implied license to third parties. . .
>
> Instead, Carter argues that because the court attached importance to the racial slur shouted during the trespass, it "essentially created a new crime by adding a speech element." He then identifies three reasons why this new crime cannot be a crime or was not proved: Carter had no notice of the crime; the racial epithet did not constitute a "true" threat or "fighting words" for First Amendment purposes; and there is insufficient evidence the epithet was shouted while Jared was on the Harrises' property.
>
> The court did not create a new crime. The "habits of the country/local custom" limitation on a homeowner's implied license is well settled. The racist comment shouted by Jared was relevant to that limitation. There being no "new crime, " notice is not an issue.
>
> For the same reason-that the racist comment was merely evidence relevant to limitations on the implied license **–** the First Amendment is a nonissue." . . . Carter was found guilty not because of what Jared said, but because the conduct that Carter solicited and encouraged took place on the Harrises' front porch, where Jared and Parker had no lawful right to be.

[Some citations omitted; other citations revised for style]

LEGAL UPDATE NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING C.B. DECISION: The C,B. decision is digested in the AGO/CJTC's August 2016 LED at pages 3-4.

****

FUTURE LEGAL UPDATE ENTRY

In the September 2016 Legal Update or a later 2016 Legal Update, I will digest:

State v. Cruz, ___ Wn. App. ___ , 2016 WL ___ (Div. II, July 26, 2016), a Washington Court of Appeals decision holding that an officer's protective search of a fish-snagging arrestee's vehicle for firearms that the officer knew to be in the vehicle was not justified under Terry or under the exigent circumstances exception; the Court held that the circumstances of the contact with the suspect at the recreational fishing parking area did not justify the officer's perception of danger (Status Note: At the point in mid-September of finalization of the August 2016 Legal Update, a motion for reconsideration was pending at the Court of Appeals in Cruz; I am waiting for the Court of Appeals decision on the motion to reconsider before digesting that Court's decision in Cruz in the Legal Update).

****

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement will be placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal

Updates are issued, the current and three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

****

INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND 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 "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, 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) Law Enforcement Digest (LED) is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

****