

LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

March 2016

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WASHINGTON LAW ENFORCEMENT MEDAL OF HONOR & PEACE OFFICERS MEMORIAL CEREMONY SET FOR FRIDAY, MAY 6, 2016 IN OLYMPIA AT NOON

In 1994, the Washington Legislature passed chapter 41.72 RCW, establishing the Law Enforcement Medal of Honor. The medal honors those law enforcement officers who have been killed in the line of duty or who have distinguished themselves by exceptional meritorious conduct. This year’s Medal of Honor ceremony for Washington will take place Friday, May 6, 2016, starting at 12:00 noon at the Law Enforcement Memorial site in Olympia on the Capitol Campus. Arrival at 11:00 am is recommended. The site is adjacent to the Supreme Court Temple of Justice.

This ceremony is a very special time, not only to honor those officers who have been killed in the line of duty and those who have distinguished themselves by exceptional meritorious conduct, but also to recognize all officers who continue, at great risk and peril, to protect those they serve. This ceremony is open to all who wish to attend. A reception will follow the ceremony.

WASHINGTON 2016 LEGISLATIVE UPDATE FROM WASPC

The publicly accessible pages of the website of the Washington Association of Sheriffs and Police Chiefs contains an update of legislation of interest to law enforcement that was adopted by the 2016 Washington Legislature during the regular session. Unless otherwise noted in the legislation, bills become effective on June 9, 2016. To access the WASPC update, go to WASPC's Home Page, click on "Programs, Projects and Services," then click on "Legislation" and scroll down to 2016 Legislative Agenda and click on "End of 2016 Regular Session Report."

In addition, on the Home Page of the website of the Washington Association of Prosecuting Attorneys under "What's New" there will soon be an update of legislation of interest to prosecutors and law enforcement adopted by the 2016 Washington Legislature. The WAPA update contains links to the legislation.

Among the adopted bills of interest are:

E2SHB/Chapter 164, creating a new chapter in Title 9A RCW and establishing the crimes of Spoofing, Electronic Data Interference, Electronic Data Theft, Electronic Data Tampering (in the first and second degrees);

SHB 2765/Chapter 185, amending RCW 79A.05.160 and adopting a new section in chapter 79A.05 to expand and clarify the police powers and authority of Park Rangers;

SHB 2900/Chapter 199, amending RCW 9.94.041 to add to the list of items that constitute contraband in prisons and jails "alcohol, marijuana, or other intoxicant, or a cell phone or any other form of an electronic communication device"

SB 5605/Chapter 113 amending RCW 10.31.100 to:

raise the age for mandatory Domestic Violence arrest from age 16 to age 18; and

require custodial arrest of a 16- or 17-year-old if officer has PC of assault against a family or household member within the preceding four hours and the assailant's parent or guardian requests the arrest; and

require that juvenile detention facilities accept for booking juveniles under age 18 arrested for assaulting a family or household member.

SB 6459/Chapter 234 adds a new section to chapter 9.94A RCW addressing peace officers assisting DOC and reading as follows:

(1) Any peace officer has the authority to assist [DOC] with the supervisions of offenders;

(2) If a peace officer has reasonable cause to believe an offender is in violation of the terms of supervision, the peace officer may conduct a search as provided under RCW 9.94A.631, of the offender's person, automobile, or other personal property to search for evidence of the violation. A peace officer may assist a community corrections officer with a search of the offender's residence if requested to do so by the community corrections officer.

(3) Nothing in this section prevents a peace officer from arresting an offender for any new crime found as a result of the offender's arrest or search authorized by this section.

(4) Upon substantiation of a violation of the offender's conditions of community supervision, utilizing existing methods and systems, the peace officer should notify the [DOC] of the violation.

(5) For the purposes of this section, "peace officer" refers to a limited or general authority Washington peace officer as defined in RCW 10.93.020.

SSB 6463/Chapter 11 responds to the appellate court decisions in State v. Homan by amending the Luring statute, RCW 9A.40.090, by striking the affirmative defense and by adding an intent element requiring that State prove beyond a reasonable doubt that the perpetrator acted: (1) with the intent to harm the health, safety or welfare of the minor or person with a developmental disability, or (2) with the intent to facilitate the commission of any crime.

BRIEF NOTE FROM THE UNITED STATES SUPREME COURT

STUN GUNS/TASERS HELD PROTECTED BY SECOND AMENDMENT – In Caetano v. Massachusetts, ___ S.Ct. ___, 2016 WL 1078932 (March 21, 2016), the United States Supreme Court rules unanimously in summarily reversing a Massachusetts Supreme Court decision that had held: (1) that stun guns/Tasers are not protected by the Second Amendment, and (2) therefore that a Second Amendment challenge could not be made to a Massachusetts law prohibiting private possession stun guns..

The Supreme Court's summary per curiam (unsigned) opinion reads in relevant part as follows;

The Court has held that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding," District of Columbia v. Heller, 554 U.S. 570, 582 (2008), and that this "Second Amendment right is fully applicable to the States," McDonald v. Chicago, 561 U.S. 742, 750 (2010). In this case, the Supreme Judicial Court of Massachusetts upheld a Massachusetts law prohibiting the possession of stun guns after examining "whether a stun gun is the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment."

The [Massachusetts] court offered three explanations to support its holding that the Second Amendment does not extend to stun guns. First, the court explained that stun guns are not protected because they "were not in common use at the time of the Second Amendment's enactment." This is inconsistent with Heller's

clear statement that the Second Amendment “extends . . . to . . . arms . . . that were not in existence at the time of the founding.”

The [Massachusetts] court next asked whether stun guns are “dangerous per se at common law and unusual,” in an attempt to apply one “important limitation on the right to keep and carry arms,” Heller (referring to “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’”). In so doing, the court concluded that stun guns are “unusual” because they are “a thoroughly modern invention.” By equating “unusual” with “in common use at the time of the Second Amendment’s enactment,” the court’s second explanation is the same as the first; it is inconsistent with Heller for the same reason.

Finally, the [Massachusetts] court used “a contemporary lens” and found “nothing in the record to suggest that [stun guns] are readily adaptable to use in the military.” But Heller rejected the proposition “that only those weapons useful in warfare are protected.”

For these three reasons, the explanation the Massachusetts court offered for upholding the law contradicts this Court’s precedent. Consequently, the petition for a writ of certiorari and the motion for leave to proceed in forma pauperis are granted. The judgment of the Supreme Judicial Court of Massachusetts is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

[Some citations omitted; other citations revised for style]

Justice Thomas writes a concurring opinion joined by Justice Alito. The concurrence primarily expands on points made in the majority opinion.

Result: Reversal of Massachusetts Supreme Court decision; case remanded for the Massachusetts courts for further proceedings.

NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT CIVIL LIABILITY: IN SEARCH FOR PAROLEE-AT-LARGE, NO QUALIFIED IMMUNITY FOR NON-EXIGENT, FORCED, WARRANTLESS ENTRY OF LAWFULLY OCCUPIED SHACK LOCATED WITHIN SEMI-ENCLOSED CURTILAGE OF THIRD PARTY’S HOME; WARRANTLESS ENTRY OF SHACK LED TO OFFICERS’ SHOOTING OF OCCUPANTS, SUPPORTING – UNDER PROVOCATION DOCTRINE – PLAINTIFFS’ CLAIMS AGAINST OFFICERS FOR THE SHOOTING; COURT DECLARES THAT SHACK HAD PRIVACY PROTECTION, AND COURT RULES AGAINST OFFICERS ON EXIGENT CIRCUMSTANCES, PROTECTIVE SWEEP, CONSENT AND KNOCK-AND-ANNOUNCE ISSUES

QUALIFIED IMMUNITY IS GRANTED ON KNOCK-AND-ANNOUNCE ISSUE, BUT GOING FORWARD, OFFICERS MUST KNOCK AND ANNOUNCE IF THEY REASONABLY SHOULD KNOW THAT AN AREA WITHIN THE CURTILAGE IS A SEPARATE RESIDENCE

SUMMARY OF RULING: We quote here from the summary by the venerable organization, Americans For Effective Law Enforcement:

Two deputies, during a warrantless raid on a house, shot a homeless couple living in a shack in the backyard, including a man holding a BB gun. A federal appeals court upheld a determination that the entry into the shack constituted a search under the Fourth Amendment. The shack was in the curtilage adjacent to the home. The entry violated the Fourth Amendment as the deputies could not show consent, exigent circumstances, or a lawful protective sweep. The deputies' entry into the shack also violated the knock and announce rule, but the law on that subject in these circumstances was not clearly established in 2010, so the deputies were entitled to qualified immunity on that claim, with an award of nominal damages on that claim overturned. Going forward, the court stated, officers must knock and announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house. While the shooting was not found to be excessive force, an award of damages was upheld under the provocation doctrine. When "an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." The appeals court upheld an award of \$4 million for the shooting and \$1 in nominal damages for the unlawful search.

Facts and Proceedings below: (Excerpted from Ninth Circuit opinion)

In October 2010, Deputies Christopher Conley and Jennifer Pederson were part of a team of twelve police officers that responded to a call from a fellow officer who believed he had spotted a wanted parolee named Ronnie O'Dell entering a grocery store. O'Dell had been classified as armed and dangerous by a local police team, although that classification was "standard" for all parolees-at-large without regard to individual circumstances. **[LEGAL UPDATE EDITORIAL NOTE: Apparently, the "parolee-at-large" label, merely meant that O'Dell was the subject of a Corrections warrant for his arrest.]** Before that day, "Conley and Pederson did not have any information regarding Mr. O'Dell." Conley testified that at the time of the search he knew nothing about O'Dell's "criminal past" and that he didn't recall being given information that O'Dell was armed and dangerous, and Pederson testified that the only information she was given about O'Dell was that he was a parolee-at-large. The officers searched the grocery store for O'Dell but did not find him. The officers then met behind the store to debrief.

During this debriefing, another deputy, Claudia Rissling, received a tip from a confidential informant that a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes. The officers "developed a plan" in which some officers would proceed to the Hughes house, but because "the officers believed that there was a possibility that Mr. O'Dell already had left the Hughes residence," others would proceed to a different house on the same street. Conley and Pederson were "assigned to clear the rear of the Hughes property for the officers' safety . . . and cover the back door of the Hughes residence for containment." The officers were told that "a male

named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez).” Pederson heard that announcement, but Conley testified that he did not recall it. [Court’s footnote: *Mr. Mendez was a high school friend of Hughes, and Hughes allowed him to construct and live in a shack in her backyard. The Mendezes had been living there for about ten months.*]

Conley and Pederson arrived at the Hughes residence along with three other officers. The officers did not have a search warrant to enter Hughes’s property. Conley and Pederson were directed “to proceed to the back of the Hughes residence through the south gate.” Once in the backyard, the deputies encountered three storage sheds and opened each of them, finding nothing.

During this time, other officers (led by Sergeant Gregory Minster) banged on the security screen outside Hughes’s front door and asked Hughes to open the door. Speaking through the door, Hughes asked the officers whether they had a warrant, and she refused to open the door after being told they did not. Minster then heard someone running inside the residence, who he assumed was O’Dell. The officers retrieved a pick and ram to bust open Hughes’s door, at which point Hughes opened the front door. Hughes was pushed to the ground, handcuffed, and placed in the backseat of a patrol car. The officers did not find anyone in the house.

Pederson then met up with Minster and told him, “I’m going [to] go ahead and clear the backyard,” and Minster approved. Conley and Pederson then proceeded through the backyard toward a 7’ x 7’ x 7’ shack made of wood and plywood. The shack was surrounded by an air conditioning unit, electric cord, water hose, clothes locker (which may have been open), clothes, and other belongings. The deputies did not knock and announce their presence at the shack, and Conley “did not feel threatened.” Approaching the shack from the side, Conley opened the wooden door and pulled back a blue blanket used as a curtain to insulate the shack. The deputies then saw the silhouette of an adult male holding what appeared to be a rifle pointed at them. Conley yelled “Gun!” and both deputies fired fifteen shots in total. Other nearby officers ran back toward the shots, and one officer shot and killed a dog.

The tragedy is that in fact, Mendez was holding only a BB gun that he kept by his bed to shoot rats that entered the shack; as the door was opening, he was in the process of moving the BB gun so he could sit up in bed. The district court found that the BB gun was pointed at the deputies, although the witnesses’ testimony on that point was conflicting and the court recognized that Mendez may not have intended the gun to point that direction while he was getting up. Both Mendezes were injured by the shooting. Mr. Mendez required amputation of his right leg below the knee, and Ms. Mendez was shot in the back.

The Mendezes sued Conley and Pederson under 42 U.S.C. § 1983, alleging a violation of their Fourth Amendment rights. After a bench trial, the district court held that the deputies’ warrantless entry into the shack was a Fourth Amendment search and was not justified by exigent circumstances or another exception to the warrant requirement. The district court also held that the deputies violated the Fourth Amendment knock-and-announce rule. The court concluded that given Conley’s reasonably mistaken fear upon seeing Mendez’s BB gun, the

deputies did not use excessive force when shooting the Mendezes, . . . but the deputies were liable for the shooting under our circuit's provocation rule . . . The court also held that its conclusions in each respect were supported by clearly established law and that the officers were not entitled to qualified immunity. The Mendezes were awarded roughly \$4 million in damages for the shooting, nominal damages of \$1 each for the unreasonable search and the knock-and-announce violation, and attorneys' fees. . . .

[Several footnotes omitted]

FOURTH AMENDMENT ISSUES AND RULINGS: (1) Was the dilapidated shack a separate residence or at least a building that was within the curtilage of the nearby house such that the officers needed either a search warrant or an exception to the search warrant requirement in order to enter the shack? (ANSWER BY NINTH CIRCUIT PANEL: Yes, and the case law was clear on this issue such that they are not entitled to qualified immunity on this issue)

(2) Does the fact that the officers were searching for parolee-at-large O'Dell provide exigent circumstances under a hot pursuit or other theory such that the officers were justified in forcing entry into the shack without a warrant or consent? (ANSWER BY NINTH CIRCUIT PANEL: No, they were not in hot pursuit of O'Dell and there were no other exigent circumstances, and they are not entitled to qualified immunity of this issue)

(3) Was the forced warrantless entry of the shack justified as a protective sweep? (ANSWER BY NINTH CIRCUIT PANEL: No, no exigent circumstances that would justify a protective sweep were present, and the officers are not entitled to qualified immunity on this issue)

(4) Assuming for the sake of argument that the officers believed that they had consent to enter the shack, was that belief reasonable? (ANSWER BY NINTH CIRCUIT PANEL: No, there is no evidence that the officers believed that they had consent, and there is no evidence that would have reasonably supported such a belief; the officers are not entitled to qualified immunity on this issue)

(5) Where the officers knew or should have known that the shack in the curtilage was serving as a separate residence, were the officers required to knock and announce their presence and purpose before entering the shack? (ANSWER BY NINTH CIRCUIT PANEL: Yes; however, they are entitled to qualified immunity on this single issue, because the law was not well-established at the time of the shooting; but for purposes of litigation in future cases this case makes the law well-established on this issue)

(6) Although the shooting was not excessive force because the officers shot in reasonable self-defense against a man pointing what looked like a long gun, are the officers liable for the shooting injuries under the "provocation doctrine" or alternatively under proximate cause principles? (ANSWER BY NINTH CIRCUIT PANEL: Yes, they are liable under either the provocation doctrine or under proximate cause principles because their unlawful warrantless entry of the shack was a cause of the shooting)

(7) Where one of the officers did not enter the shack, can she be held liable for the unlawful entry of the shack and what resulted from that entry? (ANSWER BY NINTH CIRCUIT PANEL: Yes, because she was an integral participant in the police action)

Result: Affirmance of all aspects of judgment of U.S. District Court (Central District of California) against the deputies, except that the Ninth Circuit panel reverses, based on qualified immunity, the District Court's award of \$1 nominal damages for the knock-and-announce violation.

ANALYSIS OF FOURTH AMENDMENT ISSUES:

(1) Privacy protection for the shack because it was within curtilage of the house: In support of its conclusion that the dilapidated shack was within the curtilage of the nearby house such that the officers needed either a search warrant or an exception to the search warrant requirement in order to enter the shack, the Ninth Circuit panel explains in key part as follows:

The deputies contend that not every reasonable officer would have assumed that this "dilapidated" shack was a dwelling. This assertion is irrelevant, as it erroneously assumes that the Fourth Amendment applies only to residences. See United States v. Dunn, 480 U.S. 294, 307–08 (“[T]he general rule is that the curtilage includes all outbuildings used in connection with a residence, such as garages, sheds, and barns connected with and in close vicinity of the residence.”)

In this case, the trial court found that the shack was thirty feet from the house; it “was not within the fence that enclosed the grassy backyard area “but” was located in the dirt-surface area that was part of the rear of the Hughes property” and could not be observed, let alone entered, “without passing through the south gate and entering the rear of the Hughes property.” These facts support a finding that the shack was in the curtilage. Therefore, it was clearly established . under [controlling precedents] that the deputies undertook a search within the meaning of the Fourth Amendment by entering the rear of Hughes’s property through a gate and by further opening the door to the shack in the curtilage behind the house. The deputies’ citations to cases involving “abandoned property” are inapposite because even if the shack was “dilapidated,” the officers knew that Hughes lived in the house, and the shack was very clearly in the curtilage of the house.

(2) No exigency for warrantless shack entry: In support of its conclusion that the fact that the officers were searching for parolee-at-large O’Dell did not provide exigent circumstances under a hot pursuit or other theory did not justify forced entry into the shack, the Ninth Circuit panel explains in key part as follows:

As the Supreme Court held in Steagald v. United States, 451 U.S. 204 (1981), exigent circumstances to enter a home [of a third party] do not exist merely because the police know the location of a fugitive, even if they possess an arrest warrant for that person. . . .

. . . .

Although the deputies do not use the phrase “hot pursuit,” their exigency argument seems to be premised on that doctrine. The hot pursuit exception typically encompasses situations in which police officers begin an arrest in a public place but the suspect then escapes to a private place. . . .

As a preliminary matter, a police officer spotting O'Dell, a wanted parole-violator, outside of a grocery store does not appear to qualify as pursuit from "the scene of a crime" But even assuming the hot pursuit doctrine applies, Welsh v. Wisconsin, U.S. () explains why the deputies here are not entitled to qualified immunity. . . . [In Welsh, the U.S. Supreme Court] held that the entry was not valid under the hot pursuit doctrine because "there was no immediate or continuous pursuit of the petitioner from the scene of a crime."

. . . .

Welsh and [a Ninth Circuit precedent specified in the Opinion] squarely govern this case and clearly establish that the hot pursuit doctrine does not justify the deputies' search of the shack. Officer Zeko spotted a person he thought was O'Dell outside the grocery store, but that was the last time any policeman saw him before the search took place, which the record suggests was about one hour later. While the deputies received additional information about O'Dell's possible location from the confidential informant, the location identified was outside Hughes' home, not in the house or the shack behind it. And the officers still did not enter the shack until at least fifteen minutes after learning that O'Dell was outside Hughes' home. Moreover, the officers were far from sure that O'Dell was still (or had ever been) inside Hughes's house, let alone in the shack As in Welsh, "there was no immediate or continuous pursuit of the [suspect] from the scene of a crime." Welsh applies when the police enter the backyard of a third-party to look for a suspect, even when the suspect has evaded prior attempts at arrest (as O'Dell apparently had). . . .

The deputies also try to justify the warrantless entry based on a threat to the officers' safety, urging that O'Dell had been categorized as armed and dangerous. But exigent circumstances do not exist just because the police are dealing with a fugitive, even if he is wanted on serious federal drug charges. . . . Moreover, Conley testified that he was not aware of O'Dell's categorization and did not have any information about O'Dell. Conley explained that his gun was drawn during the search because he "intermittently" used the light on his gun to "see what was inside of the sheds." A search cannot be considered reasonable based on facts that "were unknown to the officer at the time of the intrusion." And even if we assume that Pederson knew about the characterization, the district court found that "the deputies lacked any credible information that the suspect, O'Dell, was in Plaintiffs' shack," which explains why Conley "did not feel threatened" before entering the shed.

. . . . We agree with the district court that these facts support a conclusion based on the objective "totality of the circumstances" that the deputies "failed to demonstrate 'specific and articulable facts'" of an exigency.

(3) No "protective sweep" justification for shack entry: In support of its conclusion that the warrantless forced shack entry was not justified as a protective sweep, the Ninth Circuit panel explains in key part as follows:

To justify a protective sweep, police must identify "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." [Maryland v. Buie, 494 U.S. 325

(1990)]. The deputies are incorrect when arguing that even if “there were no exigent circumstances to permit a search of the shed, a reasonable officer could have believed it was proper to search the shed as [part of a] protective sweep.” As we have explained, “the protective sweep and exigent circumstances inquiries are related.” . . . For the same reasons that exigent circumstances did not justify entry into the shack [see above], the deputies did not have the requisite suspicion of danger to justify a protective sweep.

(4) No support for consent theory as justification for the warrantless shack entry: In support for its conclusion that there is no basis in the record for a contention that the officers reasonably believed that they had consent to enter the shack, the Ninth Circuit panel explains in key part as follows:

[T]he deputies argue that they could have reasonably assumed that Hughes had consented to a search of the shack. The district court assumed for the sake of analysis that Hughes had authority to consent to a search of the shack, but it reasoned that even if Hughes had allowed the officers to enter her home after officers brought a pick and ram from their patrol car and set the pick against the door, any “consent” was “coerced and consequently invalid.” The deputies argue that because they spoke to another officer (Sergeant Minster) in the Hughes residence before searching the shack, “the defendants would assume the officers were lawfully in the main residence,” and they “could reasonably believe the sergeant obtained consent for the search” of the shack.

We are not persuaded by this argument. Given the deputies’ position that they lawfully entered the backyard pursuant to an exigent circumstance, it is unclear why the deputies would have thought that the other officers had gained consent to search the house rather than having relied on exigent circumstances as well. And the deputies point to no facts in the record suggesting that they knew Hughes had consented to a search of the shack. The district court correctly determined that the deputies could not have reasonably believed that their search of the shack was consensual.

(5) Violation of knock and announce rule: In support for its conclusion that, because the officers knew or should have known that the shack was serving as a separate residence, the officers violated the knock-and-announce requirement by not knocking and announcing their presence and purpose before entering the shack (though granting qualified immunity in this case), the Ninth Circuit panel explains in key part as follows:

The Fourth Amendment knock-and-announce rule requires officers to announce their presence before they enter a home. . . . Police may be exempt from the requirement, however, when “circumstances present[] a threat of physical violence.” Richards v. Wisconsin, 520 U.S. 385, 391 (1997). The district court determined here that because the shack was a separate residence, a fact that the officers knew or should have known, the officers were required to announce their presence at the shack, and that no exception applied for the same reasons that there was no exigency to enter for officer safety.

For the reasons stated above, the district court correctly concluded that no exigency exception applied. . . . Here, the deputies . . . rely on a stereotypical characterization of all parolees-at-large as a threat without pointing to any

specific facts known about O'Dell. We conclude that the knock-and-announce exigency exception does not apply.

The officers did, however, announce their presence at Hughes' front door, and we disagree with the district court that existing case law squarely governs the question whether the deputies needed to announce their presence again before entering the shack in the curtilage. We have stated that "officers are not required to announce at [e]very place of entry," . . . and we are not aware of case law clearly establishing that officers must re-announce their presence at a shack in the curtilage, even if it was obvious that it was being used as a residence.

. . . .

In the absence of clearly established law that squarely governs the situation here, qualified immunity is appropriate on the knock-and-announce claim. We reverse and remand for the district court to vacate the award of nominal damages on this claim.

. . . .

To clearly establish the law going forward, . . . we hold that the deputies violated the Fourth Amendment when they failed to knock at the shack. We do not retreat from the general principle that "officers are not required to announce at [e]very place of entry" within a residence. . . . But we agree with the district court that the deputies here should have been aware that the shack in the backyard was being used as a separate residence. The deputies were told that a couple was living behind the house, and the shack itself was surrounded by an air conditioning unit, electric cord, water hose, and clothes locker. And parallel to the district court's reasoning that a knock should be required for a separate residence just as a warrant is, . . . we hold that officers must knock and re-announce their presence when they know or should reasonably know that an area within the curtilage of a home is a separate residence from the main house.

This rule is supported by the purposes of the knock-and-announce rule, which is designed to protect our privacy and safety within our homes. . . . Indeed, here an announcement that police were entering the shack would almost certainly have ensured that Mendez was not holding his BB gun when the officers opened the door. Had this procedure been followed, the Mendezes would not have been shot.

(6) Liability for officers under "provocation" and/or proximate cause theories despite absence of "excessive force": In support for its conclusion that the officers are liable for the results of the shooting even though they shot in reasonable self-defense, the Ninth Circuit panel explains in key part as follows:

"[W]here an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be held liable for his otherwise defensive use of deadly force." . . .

. . . [The deputies] claim that because Mr. Mendez did not intend to threaten the officers with his gun, he was not responding to the deputies' actions and they did

not "provoke" him. We reject this argument. Our case law does not indicate that liability may attach only if the plaintiff acts violently; we simply require that the deputies' unconstitutional conduct "created a situation which led to the shooting and required the officers to use force that might have otherwise been reasonable."

Finally, even without relying on our circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause.

[T]he situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable. The deputies are therefore liable for the shooting as a foreseeable consequence of their unconstitutional entry even though the shooting itself was not unconstitutionally excessive force under the Fourth Amendment.

(7) Integral participant liability: In support of its conclusion that, where one of the officers did not enter the shack, she is nonetheless liable because she was an integral participant in the results of unlawful entry of the shack, the Ninth Circuit panel explains in key part as follows:

Lastly, Pederson argues that she cannot be held liable because she did not search the shack. Pederson testified, however, that after clearing the sheds on the south side of the property, she told Sergeant Minster that she was "going to check the rest of the yard," including the shack. Minster testified similarly. Pederson also approached the shack with her weapon drawn alongside Conley. It is inconsequential that only Conley opened the door and pulled the blanket back from the doorframe while Pederson stood by - under our case law, Pederson was an "integral participant" in the unlawful search because she was "aware of the decision" to search the shack, she "did not object to it," and she "stood armed behind [Conley] while he" opened the shack door.

[Some excerpts' citations omitted, others revised for style; footnotes omitted; emphasis added]

LEGAL UPDATE EDITORIAL NOTE:

The May 2016 Monthly Law Journal of the Americans for Effective Law Enforcement made the following comment regarding the "Provocation Doctrine" discussed in Mendez:

Application of the "Provocation Doctrine" to Electronic Control Weapons (ECWs)?

So far, the Ninth Circuit has developed and applied the "Provocation Doctrine" in relation to the use of deadly force. A caution is required, however. The reasoning would seem to potentially apply also to lesser uses of force, such as the use of Electronic Control Weapons (ECWs) including Tasers. If a Fourth Amendment violation, such as an unlawful warrantless search into a dwelling, imposes liability on officers for damages arising from the subsequent use therein of even justified deadly force, on the rationale that the occasion to use that force would not have arisen in the absence of the initial illegal entry, there could also be liability for lesser uses of force in those circumstances, even if also not deemed

excessive. Such lesser uses of force following an arguably unlawful entry, including ECW use, will occur more frequently than the use of deadly force.

LEGAL UPDATE EDITORIAL NOTE REGARDING MARCH 2016 LED ENTRY ON THIS DECISION: The Mendez decision is addressed in the AGO/CJTC's March 2016 Law Enforcement Digest at pages 1-3.

FLORIDA V. JARDINES RULE THAT IN SOME CIRCUMSTANCES, MERELY GOING TO A SUSPECT'S FRONT DOOR CAN BE AN UNLAWFUL SEARCH: EVIDENCE THAT RESULTED FROM SUSPECTED KIDNAPPER'S REACTION TO OFFICERS' 4 A.M. KNOCK AT FRONT DOOR HELD INADMISSIBLE; GOING TO DOOR AT THAT HOUR WITH INTENT TO MAKE WARRANTLESS ARREST HELD TO BE "SEARCH" AND TO BE NOT JUSTIFIED UNDER FOURTH AMENDMENT DOCTRINES FOR KNOCK-AND-TALK OR EXIGENT CIRCUMSTANCES OR PROTECTIVE SWEEP

United States v. Lundin, ___ F.3d ___, 2016 WL 1104851 (9th Cir., March 22, 2016)

INTRODUCTORY EDITORIAL COMMENT: The Lundin opinion digested below probably goes a little overboard in its discussion of how Florida v. Jardines, 133 S.Ct. 1409 (2013) June 13 LED:06 impacts inappropriate officer purpose when an officer goes to a person's front door to make contact during hours of the day when a person would reasonably expect visitors. See my Editorial Comment that follows the excerpted analysis in Lundin. Something to consider, however, is that under the particular facts of this case, the officers had all of the ingredients needed to obtain a search warrant for Lundin's house before attempting to contact him at his front door at 4 a.m. with the acknowledged intent to arrest him. When in any doubt, if probable cause for a search warrant exists and there is no actual exigency, getting a search warrant is the preferred approach for arresting a person out of his or her home.

Facts and Proceedings below:

Officers in a California city had probable cause to believe that some time after 8 p.m. the evening before, Lundin had committed kidnapping at gunpoint, plus several other crimes. Officers went to Lundin's house at 4 a.m. the following morning with the intent to arrest him. When they arrived, officers saw that his truck was parked in the driveway and that lights were on in the house. Without identifying themselves, the officers knocked loudly, waited thirty seconds for a response, and then knocked loudly again.

After the second knock, the officers loud crashing noises coming from the back of the house. The officers ran around to the back of the house, identified themselves and ordered Lundin to surrender. He did and they arrested him and put him in the back of a patrol car in handcuffs. Officers searched the area and in open view on the backyard patio, they saw and seized a plastic bag containing two firearms. Officers subsequently obtained a search warrant and found more evidence on the premises.

Lundin was charged in federal court with, among other things, unlawful possession of the firearms that the officers had seized while the firearms were in open view. He successfully moved to suppress the firearms, and the government appealed.

ISSUES AND RULINGS: (1) In order to lawfully go to Lundin's front door at 4 a.m. and knock with the intent of arresting him, were the officers required under the Fourth Amendment to have (1) an arrest warrant or (2) a search warrant or (3) factual justification under an exception to the warrant requirement other than what is sometimes referred to as the knock-and-talk exception to the warrant requirement? (ANSWER BY NINTH CIRCUIT PANEL: Yes, rules the 3-judge Ninth Circuit panel, both the unreasonable hour of 4 a.m. and the officers' purpose of making an arrest put their presence at Lundin's front door outside the scope of his general implied consent for visitors to contact him at his front door)

(2) Is there any support in the record for justifying the officers' actions under the exigent circumstances to the warrant requirement? (ANSWER BY NINTH CIRCUIT PANEL: No, because the only facts supporting an exigency argument relate to the crashing noises in the back of the house, and the crashing noise were the result of the officers' unlawful 4 a.m. knock on Lundin's front door)

(3) Is there any support in the record for justifying the officers' actions as a protective sweep? (ANSWER BY NINTH CIRCUIT PANEL: No)

Result: Affirmance of suppression ruling of U.S. District Court (Northern District of California) in prosecution of Eric Eugene Lundin (aka Whitey) on multiple counts for violation of federal laws against kidnapping, drug-dealing and unlawfully possessing weapons.

ANALYSIS: (Excerpted from Ninth Circuit opinion)

The government contends that the officers were permitted to knock on Lundin's door under the so-called "knock and talk" exception to the warrant requirement, which permits law enforcement officers to "encroach upon the curtilage of a home for the purpose of asking questions of the occupants." . . . The "knock and talk" exception resembles to some degree the exception for consensual searches. The relevant "consent" in a "knock and talk" case is implied from the custom of treating the "knocker on the front door" as an invitation (*i.e.*, license) to approach the home and knock. [Florida v. Jardines, 133 S.Ct. 1409 (2013) **June 13 LED:06**]. The scope of the exception is coterminous with this implicit license. Stated otherwise, to qualify for the exception, the government must demonstrate that the officers conformed to "the habits of the country," . . . by doing "no more than any private citizen might do," Jardines. In the typical case, if the police do not have a warrant they may "approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." Jardines. For two reasons, we agree with the district court that the officers exceeded the scope of the customary license to approach a home and knock.

First, unexpected visitors are customarily expected to knock on the front door of a home only during normal waking hours. This does not mean that the "knock and talk" exception never applies when officers knock on the door of a home in the early morning. In some circumstances, an early morning visit may be "consistent with an attempt to initiate consensual contact with the occupants of the home." . . . For example, officers may have reason to believe that the resident in question generally expects strangers on his porch early in the morning – perhaps he sells fresh croissants out of his home. Or the officers may have a reason for knocking that a resident would ordinarily regard as important enough

to warrant an early morning disturbance – perhaps a fox has gotten into the resident’s henhouse. Here, however, the officers knocked on Lundin’s door around 4:00 a.m. without evidence that Lundin generally accepted visitors at that hour, and without a reason for knocking that a resident would ordinarily accept as sufficiently weighty to justify the disturbance. Indeed, the officers here acted for a purpose that virtually no resident would willingly accept.

Second, the scope of a license is often limited to a specific purpose, and the customary license to approach a home and knock is generally limited to the “purpose of asking questions of the occupants,” Officers who knock on the door of a home for other purposes generally exceed the scope of the customary license and therefore do not qualify for the “knock and talk” exception.

"Reasonableness" under the Fourth Amendment "is predominantly an objective inquiry."However, the Supreme Court has recognized several "limited exception[s]" to this general rule, where "actual motivations" matter. . . . [Here, the Court notes case law on the "special needs" and "administrative-inspection" exceptions to the search warrant requirement.]

Before Jardines, it was not clear whether the proper application of the “knock and talk” exception is an entirely objective inquiry, or whether, as in special-needs-search and administrative-inspection cases, the actual motivation of the officers matters. The Court answered the question in Jardines, explaining that the scope of the license to approach a home and knock is limited not only to a particular area but also to a “specific purpose.” Jardines. That is, the application of the “knock and talk” exception ultimately “depends upon whether the officers ha[ve] an implied license to enter the [curtilage], which in turn depends upon the *purpose* for which they enter[.]” Jardines. After Jardines, it is clear that, like the special-needs and administrative-inspection exceptions, the “knock and talk” exception depends at least in part on an officer's subjective intent.

The "knock and talk" exception to the warrant requirement does not apply when officers encroach upon the curtilage of a home with the intent to arrest the occupant. Just as “the background social norms that invite a visitor to the front door do not invite him there to conduct a search,” those norms also do not invite a visitor there to arrest the occupant. We do not hold that an officer may never conduct a “knock and talk” when he or she has probable cause to arrest a resident but does not have an arrest warrant. An officer does not violate the Fourth Amendment by approaching a home at a reasonable hour and knocking on the front door with the intent merely to ask the resident questions, even if the officer has probable cause to arrest the resident.

In this case, however, Deputy Aponte had asked dispatch to broadcast a request that Lundin be arrested. The officers who arrived at Lundin’s home were responding to that request. Rather than obtain a warrant or wait for a time of day when strangers might ordinarily visit, the officers approached Lundin’s door at about 4:00 a.m. without a warrant, immediately after they arrived at his home. Based on this evidence, the district court found, as a matter of fact, that the officers’ purpose in knocking on Lundin’s door was to find and arrest him, and we see no reason to disturb that finding. Thus, the officers violated Lundin’s Fourth Amendment right to be free from unlawful searches when they stood on his porch

and knocked on his front door. And since this unconstitutional conduct caused the allegedly exigent circumstance – the crashing noises in the backyard – that circumstance cannot justify the search resulting in the seizure of the two handguns.

....

The protective sweep doctrine authorizes “quick and limited” warrantless inspections “of those spaces where a person may be found” when “there are articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene.”In this case, the officers had no “reasonable, articulable suspicion” that anyone other than Lundin was present at his residence. Maryland v. Buie, 494 U.S. 325 (1990). Thus, the only plausible threat to the safety of those on the scene was Lundin himself. By the time the officers conducted the sweep of Lundin’s home, however, he had already been handcuffed and placed in a police vehicle. Thus, the officers lacked a reasonable ground for believing that there was a danger that would have justified the sweep of Lundin’s home.

[Some citations omitted; some other citations revised for style]

LEGAL UPDATE EDITORIAL COMMENTS: In the 2012 Fifth Edition of his Search and Seizure treatise, subsection 2.3 (c), Professor LaFave, the leading academic commentator on the Fourth Amendment, had the following to say about the lack of clarity or guidance in the “improper purpose”/“forbidden purpose” discussion in the U.S. Supreme Court’s majority opinion in Jardines: “[The Jardines majority opinion] states the forbidden purpose in various ways, including so narrowly as to render the opinion virtually nonsensical and so broadly as to reach virtually all police on-curtilage activity.” The Ninth Circuit took the broad approach in suggesting that officers going to a person’s front door in midday with the intent to make an arrest would be in violation of Jardines. I doubt that the U.S. Supreme Court meant to impose such a restriction.

But Jardines can be so read, so officers should proceed with caution. If officers can say with honesty that they had not yet decided whether to make an arrest when they made a warrantless daytime contact at the front door, and that they wanted to weigh their options while talking to the subject, the contact should not be held to violate Jardines even under the Lundin Court’s broad reading of Jardines.

But beware of the legal risks of making contact at the front door when there is no arrest warrant or search warrant, and there are no exigent circumstances. Under State v. Holeman, 103 Wn.2d 426 (1985), officers may not reach through the plane of the threshold to arrest a resident who opens the door in response to a police knock in non-exigent circumstances. For a probable cause arrest to be lawful in this circumstance, Holeman holds that the resident must consent to police entry or must voluntarily step across the threshold. If the resident slams the door in the face of officers, the only recourse is to seek a warrant.

There is even some legal risk for Washington officers making a late-night/early morning arrest contact without a search warrant at the home of the subject of an arrest warrant. That is because about a decade ago in an independent grounds reading of the

Washington constitution, our Washington Supreme Court injected some doubt regarding lawfulness of forced entry of a person's home to arrest on an arrest warrant under some circumstances. In State v. Hatchie, 166 Wn.2d 398 (2007) Oct 07 LED:07, the Washington Supreme Court upheld a forced entry of the residence of the subject of a misdemeanor arrest warrant to arrest him. While the Court held the entry and arrest to be lawful in that case, the Court asserted that such forced entries will be assessed on a case by case basis to determine if (1) the entry was reasonable as to time and manner of entry, and (2) the entry was not pretextual. Discussion in subsequent Washington appellate court decisions indicates that entry to arrest on a felony arrest warrant likewise will be assessed under these two limitations.

On the other hand, there is no limitation on nighttime entry to execute a search warrant under the Washington constitution, federal constitution, or Washington statutes or court rules.

LEGAL UPDATE EDITORIAL NOTE REGARDING MARCH 2016 LED ENTRY ON THIS DECISION: The Lundin decision is addressed in the AGO/CJTC's March 2016 Law Enforcement Digest at pages 3-5.

BRIEF NOTE FROM THE NINTH CIRCUIT, U.S. COURT OF APPEALS

() **NO FOURTH AMENDMENT VIOLATION IN FALSELY TELLING DRUG SUSPECT THAT HE WAS STOPPED FOR TRAFFIC INFRACTION WHERE STOP FOR DRUGS WAS JUSTIFIED** – In United States v. Magallon-Lopez, ___ F.3d ___, 2016 WL 1254033 (9th Cir., March 31, 2016), a 3-judge Ninth Circuit panel is unanimous in rejecting a novel Fourth Amendment argument by the defendant in a drug case.

A wiretap led officers to stop a car that they had reasonable suspicion to believe was shipping methamphetamine. The officers made an “investigatory stop,” though they had not observed any traffic violation. An officer lied and told the driver the reason for the stop was failure to signal properly. Officers’ observations and questioning of the suspects led to a K-9 search, which led to a search warrant, the execution of which yielded two pounds of methamphetamine and federal. The driver, Magallon-Lopez, moved to suppress: his motion was denied and he was convicted of federal crimes for drug trafficking.

Unable to contest the existence of reasonable suspicion under the wiretap that he was transporting drugs, Magallon–Lopez challenged the legality of the stop on a different theory. He contended that the stop violated the Fourth Amendment because the officer who pulled him over deliberately lied when stating the reason for the stop, and the reason the officer gave was not itself supported by reasonable suspicion. **The Ninth Circuit’s lead opinion rejects that argument under the following analysis:**

That the officer lied about seeing Magallon–Lopez make an illegal lane change does not call into question the legality of the stop. The [Fourth Amendment] standard for determining whether probable cause or reasonable suspicion exists is an objective one; it does not turn either on the subjective thought processes of the officer or on whether the officer is truthful about the reason for the stop. If, for example, the facts provide probable cause or reasonable suspicion to justify a traffic stop, the stop is lawful even if the officer made the stop only because he wished to investigate a more serious offense.

[Whren v. United States, 517 U.S. 806 (1996)]. Likewise, if the facts support probable cause to arrest for one offense, the arrest is lawful even if the officer invoked, as the basis for the arrest, a different offense as to which probable cause was lacking. [Devenpeck v. Alford, 543 U.S. 146 (2004)]. The same principle – that the objective facts are controlling in this context, not what the officer said or was thinking – applies here. So long as the facts known to the officer establish reasonable suspicion to justify an investigatory stop, the stop is lawful even if the officer falsely cites as the basis for the stop a ground that is not supported by reasonable suspicion.”

Result: Affirmance of U.S. District Court (Montana) convictions of Hector Magallon-Lopez for drug trafficking.

LEGAL UPDATE EDITORIAL COMMENT: This scenario would present a “pretext” issue under the Washington constitution that the Fourth Amendment case law does not consider. But the Washington courts would rule for the State on the pretext issue.

In State v. Ladson, 138 Wn.2d 343 (1999) Sept 99 LED:05, the Washington Supreme Court held that traffic stops for observed minor infractions are not lawful if the stops are pretextual, and the reason for the stop is to investigate a more serious offense. But in State v. Quezadas-Gomez, 165 Wn. App. 593 (Div. II, Dec. 20, 2011), review denied, 173 Wn.2d 1034 (April 24, 2012) June 12 LED:23, the Washington Court of Appeals held that there is no pretext problem where officers make a traffic stop of an individual to determine the person’s name or other information where officers already possess probable cause to arrest the person for selling drugs, though they choose tactically to not yet make the arrest.

Note also that one of the Ninth Circuit judges writes a concurring opinion in which he suggests that a defendant may want to argue that police lying in this situation violates the Due Process clause of the 14th Amendment. But that seems to be a very weak argument in light of the other police deceptions that Due Process case law allows.

Of course, as the U.S. Supreme Court noted in the Devenpeck case, as a general rule, it is “good police practice” idea to be honest in telling a person why he or she has been stopped.

BRIEF NOTE FROM THE WASHINGTON STATE SUPREME COURT

SIXTH AMENDMENT CONFRONTATION CLAUSE: DEFENDANT’S RIGHT TO CONFRONT A WITNESS WAS NOT VIOLATED WHEN HIS CO-DEFENDANT’S NON-TESTIMONIAL HEARSAY STATEMENTS TO AN ACQUAINTANCE WERE ADMITTED IN A JOINT TRIAL – In State v. Wilcoxon, ___ Wn.2d ___, 2016 WL ___ (March 31, 2016), the Washington Supreme Court rules 5-4 that admitting into evidence the hearsay statements of Wilcoxon’s non-testifying co-defendant did not violate Wilcoxon’s Sixth Amendment right, even though Wilcoxon had no opportunity to cross examine the co-defendant declarant.

The lead opinion for the majority summarizes the ruling as follows:

The United States Constitution affords criminal defendants the right to confront witnesses presented against them, usually by means of cross-examination at

trial. . . . This confrontation right is often implicated when statements made outside of court are later presented at trial by someone other than the original speaker because the defendant cannot cross-examine the original speaker about the statements. However, the United States Supreme Court has held that not all out-of-court statements give rise to the protections of the confrontation right because not all speakers are acting as a “witness” against the accused as described in the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 51 (2004). As the Court explained, only those who “bear testimony” against the accused are “witnesses” within the meaning of the Sixth Amendment. . . . That United States Supreme Court precedent is controlling in this case. Today, petitioner Troy Wilcoxon asks us to find that his confrontation right was violated when his codefendant's out-of-court statement was admitted at trial and Wilcoxon did not have the opportunity to cross-examine his codefendant. However, since the out-of-court statements were not testimonial [they were casual statements to an acquaintance in a private conversation that no government agent was involved in or had any role in prompting], they are not subject to the confrontation right. Consequently, we find that Wilcoxon's confrontation right was not violated and affirm his conviction.

[Some citations omitted; bracketed language added by Legal Update editor]

Result: Affirmance of Asotin County Superior Court convictions of Troy J. Wilcoxon for first degree theft, second degree burglary and second degree conspiracy to commit burglary.

WASHINGTON STATE COURT OF APPEALS

SUFFICIENCY OF EVIDENCE OF STALKING: EVIDENCE IN FELONY STALKING PROSECUTION ESTABLISHES THAT DEFENDANT BOTH “REPEATEDLY FOLLOWED” AND “REPEATEDLY HARASSED” THE VICTIM

State v. Whittaker, ___ Wn. App. ___, 2016 WL ___ (Div. I, Feb. 1, 2016)

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

Sayward Spalding is a hair dresser living in Duvall, Washington. She met Whittaker in April 2012 and they became friends. That friendship evolved into a sexual relationship.

Spalding ended their sexual relationship after a few months. Thereafter, Whittaker repeatedly contacted her by text, phone, e-mail, and in person.

Spalding was not immediately afraid of Whittaker but later became afraid of him. In August 2013, Whittaker arrived at her house late at night intoxicated and yelled and banged on her door. The next month, Whittaker went to Spalding’s work, breached the window, and approached her at her car, where he grabbed her arm and stated that he wanted to talk to her. Due to his escalating aggressive behavior, Spalding obtained a court order against him.

Whittaker's behavior changed Spalding's life. She installed a security system in her home, became "reclusive," and "ended almost every relationship" she had because she felt she was putting the people she was with in danger. She also believed it was possible that Whittaker could harm her and was afraid that he would harm her husband.

Whittaker was convicted of violating the order Spalding obtained and was incarcerated during the latter part of 2013.

Also during the latter part of 2013, Spalding opened a new hair salon. She later obtained another court order when she learned of Whittaker's upcoming release in December 2013. Spalding then went into "hiding" by staying home or with a friend where Whittaker was unlikely to find her. She also left Duvall for a few days, staying at a hotel and with her father rather than at her home. Upon returning to Duvall, she mostly refrained from going out publicly until January 3, when she returned to work at her salon.

After his release from jail on December 18, 2013, Whittaker called Spalding. He stated that he had seen and liked her new salon. Spalding also received text messages that she believed were from Whittaker.

Spalding and another hairdresser, Heather Jordan, worked at Spalding's new salon. Spalding informed Jordan of the court order obtained near the time of Whittaker's release from jail. Together, they planned what to do if Whittaker appeared at the new salon.

On January 3, 2014, Spalding and Jordan were working at the new salon. Whittaker appeared at the building where the salon is located. [On two occasions on that day, separated by several minutes, Whittaker stopped and looked into Spalding's salon window or door.] Following their plan, Jordan alerted Spalding of Whittaker's presence and called 911 to report his presence, which was contrary to the terms of the court order.

The State charged Whittaker with one count of felony stalking and one count of domestic violence felony violation of a court order. The jury found Whittaker guilty on both counts, as charged. The trial court entered its judgment and sentence on the jury verdict.

[Emphasis added]

ISSUES AND RULINGS: In August 2013, Whittaker arrived at Spalding's house late at night intoxicated and yelled and banged on her door. Whittaker later went to Spalding's work, breached the window, and approached her at her car, where he grabbed her arm and stated that he wanted to talk to her. Spalding installed a security system in her home, became "reclusive," and "ended almost every relationship" she had because she felt she was putting the people she was with in danger. Additionally, after learning that Whittaker was being released, Spalding went into "hiding," left Duvall for a few days, and mostly refrained from going out publicly until she returned to work. Spalding also devised a plan with a worker at the new salon to call the police if Whittaker appeared. When he did appear, a report to the police by 911 followed.

On two occasions on the same day in early January 2014, separated by several minutes, Whittaker stopped and looked into Spalding's salon window or door. A co-worker called the police.

Is there sufficient evidence that Whittaker both "repeatedly followed" and "repeatedly harassed" the victim? (ANSWER BY COURT OF APPEALS: Yes, rules a unanimous 3-judge panel, there is sufficient evidence on both harassment elements to support the defendant's conviction)

Result: Affirmance of King County Superior Court conviction of Derek John Whittaker for felony stalking; Whittaker's conviction of a count of felony violation of a court order is set aside based on analysis of "merger" of counts in the jury verdict not addressed in this Legal Update entry.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Under RCW 9A.46.110(1), the charged crime, a person commits stalking if:

(a) He . . . intentionally and repeatedly harasses or repeatedly follows another person; and (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and (c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

This statute "provides alternative means of committing the crime of stalking: [either] intentionally and repeatedly harassing or repeatedly following another person."

Under RCW 9A.46.110(5)(b)(ii), stalking is elevated from a gross misdemeanor to a felony if it violates any order protecting the person being stalked.

Here, the question is whether sufficient evidence supports each alternative means of Whittaker's conviction: intentionally and "repeatedly harassing]" or "repeatedly follow[ing]" Spalding. We address, in turn, each of these means.

Repeatedly Follows

Whittaker first argues there is insufficient evidence that he repeatedly followed Spalding. We disagree.

RCW 9A.46.110(6)(b), defines "following" as:

deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment,

business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person.

“Repeatedly” is defined as “two or more separate occasions.” The statute does not define “separate occasions.” But State v. Kintz, 169 Wn.2d 537 (2010) **Oct 10 LED:13** is instructive.

In that case, Clarence Kintz was convicted of stalking two women. Kintz first contacted one woman while he was in a parked van. He then drove past her six times, driving out of her sight after each contact. Kintz similarly drove past the second woman several times.

Kintz argued there was insufficient evidence of the “repeated” element of following or harassment. Specifically, he claimed the evidence did not show that his contacts with the women constituted “separate occasions” for purposes of the statute. The Supreme Court concluded that a “separate occasion” is “a distinct, individual, non-continuous occurrence or incident.” Thus, “a stalking conviction requires evidence of two or more distinct, individual, non-continuous occurrences of following or harassment, and no minimum amount of time must elapse between the occurrences, provided they are somehow separable.”

The court also determined that it is a jury question “whether such instances of following and harassment, divided by such breaks, [are] ‘separate’ within the meaning of the stalking statute.” The court stated:

it is repetition, not duration, that the legislature has made the sine qua non of stalking

This is perfectly sensible because the repetition of contacts alerts the victim (and the trier of fact) to the stalker’s criminal intent, i.e., that he is purposefully targeting the victim, as opposed to coming into contact with her by chance.

Based on this analysis, the court held Kintz was properly found guilty of stalking the women because he followed them on two or more separate occasions.

Here, there is sufficient evidence that Whittaker followed Spalding on two or more separate occasions when he appeared at her salon while she was working there on January 3, 2014. It is undisputed that this date was within the charging period. It is also undisputed that the court order protecting Spalding was in effect on that date.

The trial testimony shows that, on that date, three witnesses saw Whittaker in the building where Spalding was working. Jordan testified that she saw Whittaker stop at the salon window and door and briefly look inside. Another witness later saw Whittaker in the building bathroom located at the end of a hallway.

Minutes later, Jordan and another witness saw Whittaker stop and look through the salon door again before leaving the building. A jury could reasonably have found that this was the second of two occasions of

Whittaker violating the court order on that date. Thus, these two occasions were “distinct” and “non-continuous occurrences.”

On both occasions, separated by minutes, Whittaker was within 500 feet of Spalding. His presence, while Spalding was also in the building, violated the terms of the court order protecting Spalding. Accordingly, the stalking violation was elevated to a felony.

Under Kintz, the two occasions, separated by several minutes, where Whittaker stopped and looked into Spalding’s salon window or door, constituted sufficient evidence that he repeatedly followed her. Accordingly, sufficient evidence supports the verdict that Whittaker repeatedly followed Spalding.

Repeatedly Harasses

Whittaker next argues there is insufficient evidence that he repeatedly harassed Spalding. We disagree.

Under RCW 10.14.020(2):

“Unlawful harassment” means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner. . . .

“It is the combination of separate acts – none of which is necessarily criminal in its own right – that must be “seriously alarm[ing], annoy[ing], harassing], or detrimental” to the victim in order for the perpetrator to have committed the criminal offense of stalking.”

In Kintz, the Supreme Court also determined whether sufficient evidence supported a finding of harassment. Part of that determination was that the women suffered “substantial emotional distress” in accordance with the statute. In that case, one woman was frightened and angry during the encounters, and the other woman was nervous, uncomfortable, frustrated, scared, and even hid.

The court stated “that Kintz’s repeated contacts engendered progressively greater fear on the [women] because, with each encounter, it became more apparent that the contacts were not accidental and innocent, but intentional and malevolent.” The court also determined that Kintz’s course of conduct directed at the women “seriously alarmed” them and were “such as would cause a reasonable person to suffer substantial emotional distress, and actually caused substantial emotional distress.” The court also found Kintz’s conduct to be “threatening” and “not just abnormal.”

Here, there was sufficient evidence for the jury to find that Whittaker’s conduct “would cause a reasonable person to suffer substantial emotional distress.”

For example, in August 2013, Whittaker arrived at Spalding's house late at night intoxicated and yelled and banged on her door. Whittaker later went to Spalding's work, breached the window, and approached her at her car, where he grabbed her arm and stated that he wanted to talk to her.

There was also substantial evidence for the jury to find that Whittaker engaged in a course of conduct against her that "seriously alarm[ed], annoy[ed], and harass[ed]" Spalding, and actually caused her substantial emotional distress in accordance with the statute.

This evidence includes the fact that Spalding installed a security system in her home, became "reclusive," and "ended almost every relationship" she had because she felt she was putting the people she was with in danger. Additionally, after learning that Whittaker was being released, Spalding went into "hiding," left Duvall for a few days, and mostly refrained from going out publicly until she returned to work. Spalding also devised a plan with Jordan at the new salon to call the police if Whittaker appeared. When he did appear, a report to the police by 911 followed.

Thus, sufficient evidence supports finding that Whittaker repeatedly harassed Spalding.

Whittaker properly concedes that the record establishes that he contacted Spalding several times by text messages and at least once by phone prior to January 3 and during the charging period. This satisfies the "repeatedly" element of felony stalking.

Nevertheless, he argues that Spalding was not in fear, as required by the statute, because she did not see him at her salon. He also cites [State v. Askham, 120 Wn. App. 872 (Div. III, 2004) June 04 LED:18] to argue that Spalding did not suffer actual and substantial emotional distress, as required by the statute, because she did not feel threatened, embarrassed, or irritated like the victim in that case. He selectively points to Spalding's testimony where she stated she was "numb" to his text messages and phone calls and "was not shocked" by his appearance at the salon on January 3. This argument is unpersuasive.

Because "we view the 'evidence in the light most favorable to the prosecution,'" we conclude there was sufficient evidence to support the jury determination that Spalding feared that Whittaker intended to injure her and that she suffered actual and substantial emotional distress in accordance with the stalking statute. The jury could reasonably infer that Spalding feared that Whittaker intended to injure her during the charging period because she installed a security system in her home, obtained another court order after learning that Whittaker was being released, and went into "hiding." Spalding also left Duvall for a few days, mostly refrained from going out publicly until she returned to work, and devised a plan with Jordan to call the police if Whittaker appeared at the new salon. This evidence also supports the jury determination that Whittaker's conduct actually caused Spalding substantial emotional distress.

[Most footnotes and citations omitted; two case citations revised for style; emphasis added]

BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

SUFFICIENCY OF EVIDENCE OF ROBBERY: RESTAURANT ABSCONDER’S PULLING OF KNIFE ON SERVER WHO WAS SEEKING PAYMENT FOR MEAL JUST CONSUMED WAS ROBBERY – In State v. Thomas, ___ Wn. App. ___, 2016 WL 1039228 (Div. II, December 22, 2015 decision ordered published on March 15, 2016), Division Two of the Court of Appeals rules that the evidence is sufficient to support defendant’s conviction of robbery.

A restaurant server had a confrontation with a customer outside the restaurant and requested that defendant pay for his meal. Instead and in response, the customer, defendant Thomas, threatened the server with a knife and then ran away. The Court of Appeals rules that consuming the meal converted the personal property to the defendant’s own use, and the knife was displayed in his efforts to overcome the server’s resistance to the defendant’s taking of a meal for which defendant did not intend to pay. The Court of Appeals explains that under Washington’s “transactional” analysis of robbery, the taking of property is ongoing until the assailant has effected an escape. The definition of robbery thus includes, as happened here, violence during flight immediately following the taking.

Result: Affirmance of Clark County Superior Court conviction of Adam P. Thomas of first degree robbery with a deadly weapon sentence enhancement.

LEGAL UPDATE EDITORIAL NOTE REGARDING MARCH 2016 LED ENTRY ON THIS DECISION: The Thomas decision is addressed in the AGO/CJTC’s March 2016 Law Enforcement Digest at pages 5-6.

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, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the U.S. Court of Appeals, and from the U.S. 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>].
