LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

September 2016

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

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A.K.H. v. City of Tustin (California), ___ F.3d ___, 2016 WL 4932330 (9th Cir., Sept. 16, 2016)

Facts and Proceedings below: (Excerpted from three-judge Ninth Circuit panel's opinion)

> On December 17, 2011, at approximately 3:00 p.m., Hilda Ramirez called 911. She reported that her ex-boyfriend, Benny Herrera, had "jacked [her] phone." Ramirez stated that she was not hurt, that she did not need paramedics, and that her children were "fine." Initially, Ramirez told the 911 police dispatcher that Herrera stole her phone by "just grabb[ing] it from [her] hand." A short time later, Ramirez modified her story and said that, while the two were arguing about her phone, Herrera "did end up hitting [her] in the head."
>
> Ramirez told the police dispatcher that Herrera had not used a weapon to take her phone, that Herrera did not carry any weapons, and that Herrera had never been violent with her before. Ramirez told the dispatcher that Herrera was "walking down El Camino Real . . . towards Red Hill." She explained that because he did not have a car and had no friends in the area, Herrera was probably trying to a catch a bus back to his home.
>
> The dispatcher sent out a general call to Tustin police officers. The dispatcher initially reported:
>
> [A] DV [domestic violence] just occurred . . . The RP [reporting party] states her ex-boyfriend, Benny Herrera, male Hispanic, 31 years, 5'8", thin build, bald head, black hooded sweatshirt was inside her apartment, took her cell phone, he left. He is now walking on ECR [El Camino Real] towards Red Hill.
>
> The dispatcher repeated Ramirez's report, saying that Herrera was heading down El Camino Real "to catch the bus" because he had "no access to a vehicle and no friends in the area." After Ramirez modified her story, the dispatcher updated the officers, explaining that "originally the RP claimed that there was no physical violence, now she's claiming that the male subject hit her in the head." The dispatcher reported that Herrera "is not known to carry weapons." She also reported that Herrera was "shown in-house to be a member of the Southside Gang" and that there was possibly a $35,000 traffic warrant out for Herrera's arrest. The dispatcher reported, further, that Herrera was on "parole for 11350," a reference to a state drug possession crime. *See* Cal. Health & Safety Code § 11350.
>
> Driving a large police SUV, Officer Brian Miali was the first to spot Herrera. As Ramirez had reported, Herrera was walking down El Camino Real. A video taken by Miali's dashboard camera shows Herrera walking on the right shoulder of the road in the same direction as traffic. On Herrera's immediate right was a high wall, preventing him from escaping to the right. As he came up to Herrera,

Miali turned on the red lights of his SUV. Herrera put his right hand in his sweatshirt pocket and started alternately to skip, walk, and run backwards facing Miali. As Herrera did so, he moved away from the right shoulder toward the middle of the road. Miali drew his gun and opened his driver's side door while driving forward slowly. Herrera kept ahead of Miali's SUV, sometimes at distances of less than ten or fifteen feet. Using the loudspeaker of his SUV, Miali told Herrera three times to "get down." Herrera did not comply. He stayed on his feet and continued to move down the road at about the same speed as Miali's SUV.

Officer Villarreal was driving on El Camino Real behind Officer Miali. A civilian sedan was directly behind Miali, separating Miali from Villarreal's vehicle. Villarreal testified in his deposition that he did not hear Miali tell Herrera to "get down." The civilian car moved onto the shoulder to the right, and Villarreal moved left into the opposite lane. He drove his patrol car up beside Herrera, and slightly forward of Miali's SUV, in order to "box" Herrera in and cut off his avenue of escape. Villarreal held his gun in his hand. His front passenger window was open. The video taken by Miali's dashboard camera shows that Herrera was already moving to the left, toward Villarreal's patrol car, as Villareal pulled up beside Herrera. Villareal immediately shouted, "Get your hand out of your pocket." Herrera removed his right hand from his sweatshirt pocket in an arcing motion over his head. Just as Herrera's hand came out of his pocket, Villarreal fired two shots in rapid succession. Villarreal did not give any warning that he would shoot, and Officer Miali later stated that he was not expecting the shots. Both officers admitted that they never saw anything in either of Herrera's hands.

Officer Villarreal testified in his deposition that he shot Herrera because he "believe[ed] that he had a weapon and he was going to use that weapon on [him]." Villarreal testified that Herrera's right hand was "concealed" in his sweatshirt pocket." Miali testified in his deposition that "there was something in there that appeared to be heavy." Villarreal testified that Herrera "charged [him] or shortened the distance or closed the distance at [his] passenger window very quickly." Villarreal said that probably "three to five seconds" passed between when he commanded Herrera to remove his hands from his pocket and when he shot. The recording from Villarreal's dashboard camera, however, shows that the command and the shots were almost simultaneous, separated by less than a second. The total elapsed time from when Miali first encountered Herrera to when Villarreal shot him was less than a minute.

It is undisputed that Herrera was unarmed. Ramirez had reported to the police dispatcher that Herrera did not carry weapons. The dispatcher had reported to the officers that Herrera "is not known to carry weapons." The only "heavy" object in Herrera's sweatshirt pocket was a cell phone. Relatives of Herrera ("Plaintiffs") filed suit under 42 U.S.C. § 1983 against Officer Villarreal and the City of Tustin alleging, [among other allegations], that Villarreal used excessive force against Herrera. Villarreal moved for summary judgment based on qualified immunity. The district court denied the motion.

ISSUE AND RULING: Viewing the factual allegations in the best light for the civil plaintiffs in this case, the key facts are as follows:

A dispatcher had broadcast that a DV victim had claimed that the male subject, Benny Herrera, had hit her in the head. The dispatcher reported that Herrera "is not known to carry weapons," that records showed him to be a member of the Southside Gang, that there was possibly a $35,000 traffic warrant out for his arrest, and that he was on parole for a state drug possession crime. Officer Villarreal was in his patrol car when he saw Herrera walking on the right shoulder of the street. Herrera walked toward the middle of the roadway, moving in the direction of traffic as the officer drove alongside Herrera with his passenger window open. Several times, a fellow officer in a separate vehicle ordered Herrera by loudspeaker to get down, but Herrera did not comply. Herrera's left hand was free and visible; his right hand appeared to be in his sweatshirt pocket. Neither Officer Villarreal nor any other officer warned Herrera that deadly force would be applied if Herrera did not comply with orders.

Officer Villarreal commanded Herrera to take his right hand out of his pocket. Less than a second later, just as Herrera's hand came out of his pocket, the officer shot Herrera twice, killing him. Herrera turned out to have been unarmed. Officer Villarreal does not claim that he saw, or thought he saw, a weapon in Herrera's hand.

Under these assumed facts, did the officer use excessive force, and, if so, did the officer violate a clearly established right of Herrera, such that the officer is not entitled to qualified immunity? (ANSWER BY NINTH CIRCUIT PANEL: Yes to both questions, and therefore the officer is not entitled to qualified immunity)

Result: Affirmance of order of U.S. District Court (Central District of California) denying qualified immunity to Officer Villarreal; case remanded for trial.

ANALYSIS: (Excerpted from three-judge Ninth Circuit panel's opinion)

> To determine whether Officer Villarreal is entitled to summary judgment based on qualified immunity, we ask two questions. First, viewing the facts in the light most favorable to the plaintiffs, did Villarreal use excessive force in violation of the Fourth Amendment? Bryan v. MacPherson, 630 F.3d 805, 823 (9th Cir. 2010). Second, if Villarreal used excessive force, did he violate a clearly established right? We address each question in turn.
>
> A. Excessive Force
>
> We analyze excessive force claims under the Fourth Amendment. Graham v. Connor, 490 U.S. 386, 388 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985). "The question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Graham. To determine the reasonableness of an officer's actions, we "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." Garner. We evaluate "the totality of the circumstances," paying careful attention to factors such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." The "most important" of these factors is "whether the suspect posed an 'immediate threat to the safety of the officers or others.'" Mattos v. Agarano, 661 F.3d 433, 441 (9th Cir. 2011) (en banc) **Jan 12 LED:02**. Deadly force is permissible only "if the suspect threatens the officer

with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm." Garner.

The "nature and quality of the intrusion" by Officer Villarreal on Herrera's Fourth Amendment interests was extreme. "The intrusiveness of a seizure by means of deadly force is unmatched." The use of deadly force implicates the highest level of Fourth Amendment interests both because the suspect has a "fundamental interest in his own life" and because such force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment."

The government's interests were insufficient to justify the use of deadly force. First, the "crime at issue," was a domestic dispute that had ended before the police became involved. We recognize that some domestic disputes can pose a serious danger to police officers and others, but we have held that domestic disputes do not necessarily justify the use of even intermediate let alone deadly force. For example, we denied qualified immunity in [Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005) **June 05 LED:04**] to officers who used pepper spray and a dog to subdue and arrest a suspect, even though the suspect was reported to have "hit[]" or become "physical" with his wife. The use of force is especially difficult to justify when "the domestic dispute is seemingly over by the time the officers begin their investigation." George v. Morris, 736 F.3d 829, 839 (9th Cir. 2013) **Oct 13 LED:03** (denying qualified immunity in an excessive force case partly because the victim of the domestic disturbance "was unscathed and not in jeopardy when deputies arrived"); Smith, 394 F.3d at 702–03 (denying qualified immunity partly because, by the time the officers arrived, the suspect "was standing on his porch alone and separated from his wife"). Here, when the officers came upon Herrera, he had left Ramirez's apartment and was walking down a road at some distance from the apartment.

Second, Herrera did not "pose[] an immediate threat to the safety of the officers or others." Graham v. Connor. It is clear that the domestic altercation was over, and that Herrera posed no current threat to the safety of Ramirez. She had told the police dispatcher that Herrera had taken her phone, had hit her on the head, and had left on foot to catch a bus. It is also clear in retrospect that Herrera posed no threat to the safety of the officers, as he in fact had no weapon; but the relevant question for purposes of qualified immunity is whether Officer Villarreal could reasonably have believed that Herrera posed such a threat. Viewing the evidence in the light most favorable to Plaintiffs, we conclude that he could not.

When Officer Miali first arrived on the scene, Herrera was walking on the right-hand shoulder of the road. The officers had little, if any, reason to believe that Herrera was armed. Ramirez had told the police dispatcher that Herrera was not carrying any weapons, and the dispatcher had told the officers that Herrera was "not known to carry weapons." When Miali started following Herrera in his SUV, Herrera put his right hand in the pocket of his sweatshirt. He then alternated among skipping, walking, and running, mostly facing backward toward Miali, without displaying a weapon. Villarreal admitted that he never saw a weapon.

We recognize that the dispatcher had told the officers that Herrera was a member of the "Southside Gang," may possibly have had a $35,000 traffic warrant, and was on parole for a drug possession conviction. Further, the officers had been told that Herrera had stolen Ramirez's cell phone and hit her on the head, and had had prior run-ins with law enforcement, including at least one conviction. But the traffic warrant and drug possession conviction were relatively minor crimes, neither of which entailed violence or gun possession, and the dispatcher's information included a statement that Herrera was not known to be armed.

Third, even if Herrera was "actively resisting" or "attempting to evade" an investigatory stop, and even if we equate for present purposes an arrest and an investigatory stop, this factor only slightly favors the government. Graham v. Connor, 490 U.S. at 396; *see also* Chew v. Gates, 27 F.3d 1432, 1442 (9th Cir. 1994). Herrera did not stop as soon as he saw the red lights on Officer Miali's SUV, and he did not comply with the officer's commands to "get down." Herrera, however, never attempted to cross the road and flee, and he continued to move at about the same speed as Officer Miali, while facing him much of the time. Nor did Villareal actually hear Miali tell Herrera to "get down." Viewing the evidence in the light most favorable to Herrera, this factor does not weigh heavily in the government's favor in determining whether the amount of force used was justified. . . .

Finally, and perhaps most important, Officer Villarreal escalated to deadly force very quickly. Villarreal commanded Herrera to take his hand out of his pocket immediately upon driving up beside him. Villarreal then shot Herrera just as he was taking his hand out of his pocket. Less than a second elapsed between Villarreal commanding Herrera to take his hand from his pocket and Villarreal shooting him. Villarreal neither warned Herrera that he was going to shoot him, nor waited to see if there was anything in Herrera's hand. In total, less than a minute had elapsed between when Miali first came upon Herrera and when Villarreal shot him.

Roger Clark, a twenty-seven year veteran of the Los Angeles Police Department, submitted an expert witness declaration. Clark concluded that the "use of deadly force by Officer Villarreal against Mr. Herrera was excessive and unreasonable." The reasons supporting his conclusion included that "[t]here was no serious crime reported"; "[t]here was no indication that a weapon was involved"; "[t]he dispatch information to the officers was that the suspect was not known to carry weapons"; "Mr. Herrera was only being detained, not arrested"; "Mr. Herrera complied with Officer Villarreal's command to take his hand out of his pocket"; "[w]hen Mr. Herrera took his hand out of his pocket upon request, there was nothing in his hand"; "Officer Villarreal conceded that he never saw a gun or anything that looked like a gun in Mr. Herrera's hand"; "Officer Villarreal gave no warning that he was going to shoot"; "Mr. Herrera never verbally threatened the officers"; and "Officer Villarreal had other reasonable options."

Based on the totality of circumstances, and balancing the interests of the two sides, . . ., we conclude, viewing the evidence in the light most favorable to the plaintiffs, that the intrusion on Herrera's interests substantially outweighed any

interest in using deadly force. We therefore conclude, so viewing the evidence, that Officer Villarreal's fatal shooting of Herrera violated the Fourth Amendment.

B. Clearly Established Right

Although we conclude Officer Villarreal's actions violated the Fourth Amendment, we may affirm the district court's denial of qualified immunity only if "the right which was violated was clearly established at the time of the violation." . . . . To determine whether Officer Villarreal violated clearly established law, we look to "cases relevant to the situation [Villarreal] confronted," Brosseau v. Haugen, 543 U.S. 194, 200 (2004) **Feb 05 LED:06** (quotation marks omitted), mindful that there need not be a case "directly on point." Gravelet-Blondin v. Shelton, 728 F.3d 1086, 1093 (9th Cir. 2013) **Nov 13 LED:10** (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011)). Viewing the evidence in the light most favorable to the plaintiffs, we conclude that Villarreal violated clearly established Fourth Amendment law when he shot and killed Herrera.

The Supreme Court's decision in Garner is instructive. Neither the crime at issue in Garner nor the crime in this case involved the use of serious or deadly force. In Garner, the police suspected Garner of committing burglary; here, the officers had been told that Herrera reportedly hit his ex-girlfriend on the head and stole her cell phone. Garner fled from police even though an officer told him to "halt"; Herrera did not comply with Miali's commands to "get down" (although Officer Villarreal had not heard the commands). Most important, viewing the facts in the light most favorable to Plaintiffs, Officer Villarreal in this case had no more reason to suspect that Herrera was armed than did the officer in Garner. The officer in Garner stated that the suspect "appeared to be unarmed" but that he "could not be certain that was the case." The Court explained, "Restated in Fourth Amendment terms, this means [the officer] had no articulable basis to think Garner was armed." The same is true here. The dispatcher expressly told the officers that Herrera was "not known to carry weapons." Villarreal never saw a gun. He could provide no basis for his belief that Herrera was armed except to say that Herrera had one hand "concealed."

Conclusion

It has long been clear that "[a] police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." Garner. Viewing the evidence in the light most favorable to the plaintiffs, that is precisely what Officer Villarreal did here. We affirm the district court's denial of qualified immunity and remand for further proceedings consistent with this opinion.

[Emphasis added; some citations omitted, others revised for style]

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING A.K.H. DECISION: The A.K.H. decision is digested in the AGO/CJTC's September 2016 LED at pages 2-3.

FOUR KEY RULINGS UNDER FOURTH AMENDMENT: (1) 911 PHONE CALL PLUS OFFICERS' OBSERVATIONS PROVIDED REASONABLE SUSPICION FOR TERRY SEIZURE FOR TRESPASS OR DUI; (2) ARREST FOR OBSTRUCTING FOR RUNNING FROM ATTEMPTED TERRY SEIZURE HELD LAWFUL; (3) WARRANTLESS SEARCH OF PERSON INCIDENT TO ARREST FOR OBSTRUCTING HELD LAWFUL; (4) WARRANTLESS SEARCH OF CAR BASED ON PROBABLE CAUSE TO BELIEVE DRUGS OR EVIDENCE OF DRUG DEALING WERE IN CAR HELD LAWFUL (NOTE THAT THIS FINAL RULING WOULD NOT PASS MUSTER UNDER THE WASHINGTON CONSTITUTION)

United States v. Williams, ___ F.3d ___, 2016 WL 5030343 (9th Cir., September 20, 2016)

Facts and Proceedings below: (Excerpted from three-judge Ninth Circuit panel's opinion)

> At 4:40 a.m., a person who identified himself as Tony Jones telephoned a Las Vegas police hotline to report an adult, black male sleeping inside a grey Ford Five Hundred car. Jones reported that the man was "known to sell drugs in the area," did not live in the adjacent apartment complex, and Jones expressed that he "just wanted the person moved out of the area." Jones provided the operator with his phone number and address.
>
> The Las Vegas Metropolitan Police Department (Metro) dispatched two officers on duty in the reported area, Alvin Hubbard and Thomas Keller. Hubbard and Keller were on patrol in a marked Metro patrol car, with Hubbard driving. When Hubbard and Keller arrived at the apartment complex the caller had identified, they saw a grey Ford Five Hundred car in the parking lot. The Ford had temporary license plates, preventing the officers from securing an initial vehicle check.
>
> The Ford was flanked by a car on either side and a parking curb in front. Hubbard stopped the patrol car behind the grey Ford, blocking its exit. The officers turned on their overhead lights, "take-down" lights, and spotlights, shining them into the Ford's windows. After the officers turned on their lights, a black male, later identified as defendant Tony Williams, sat up in the driver's seat inside the Ford. Williams looked to his left and right, then started his car. Williams momentarily placed the car in reverse and then quickly shifted the car back into park.
>
> By the time Williams started the car, both officers were approaching the Ford on foot. Hubbard approached the car on the driver's side, while Keller approached on the passenger's side with his handgun drawn. Hubbard yelled at Williams through the Ford's closed windows to turn off the engine and exit the vehicle.
>
> Williams complied and got out of the car. Hubbard continued walking towards Williams, until he was within three to four feet of him. Williams, without saying a word, ran. He ran toward the front of the Ford and around the other cars in the parking lot.
>
> Keller ran after Williams on foot, and Hubbard joined the pursuit in the patrol car. The pursuit lasted approximately one minute. Two or three buildings away from the parking lot, Williams fell and did not get up. He remained on the ground where he had fallen with his hands out. Keller approached with his gun drawn

> and stood over Williams. Hubbard arrived shortly after in the patrol car, observed Williams prone on the ground, performed a protective sweep of his backside, and handcuffed him.
>
> Hubbard then did a pat down of Williams's backside. Hubbard then helped Williams from the ground and brought him to the front of the patrol vehicle. At that point, Hubbard did a pat down of Williams's front. He proceeded to reach into all of Williams's pants' pockets. In the right front pocket, Hubbard found a plastic bag containing crack cocaine. In the left front pocket, Hubbard found $1,165.00.
>
> Hubbard placed Williams in the back of the patrol car and drove back to the parking lot where the Ford was still parked. With Williams handcuffed in the back of the patrol car, Hubbard began searching the Ford. Hubbard discovered that the Ford was not registered to Williams but rather to a company named Rodo. The officers never telephoned the company, nor made a call to Metro dispatch to have the vehicle towed or impounded.
>
> As Hubbard searched the car, he found pots, pans, food, and utensils. In the back seat, he found a purse; when he unzipped it, he found a gun inside. Hubbard placed the purse on the hood of the patrol car and contacted his sergeant, who called for a detective from the firearms unit.
>
> . . . . [After the government charged him with federal crimes,] Williams moved to suppress the evidence of the crack cocaine and handgun found during the search of Williams and the Ford. The district court granted the motions.

ISSUES AND RULINGS UNDER THE FOURTH AMENDMENT: (1) Did the 911 call plus the officers' observations provide reasonable suspicion to seize Williams for a possible trespass or DUI? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

(2) Did the police have probable cause to arrest the defendant for obstructing when the defendant ran from the officers while they were lawfully attempting to seize him in a Terry stop? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

(3) Were the officers authorized to make a warrantless search of the person of the defendant incident to his arrest for obstructing? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

(4) Were the officers authorized under the Fourth Amendment's probable cause car search doctrine make a warrantless search of Williams's car where they had found illegal drugs and evidence of drug-dealing in a search incident to arrest of his person? (ANSWER BY NINTH CIRCUIT PANEL: Yes)

LEGAL UPDATE EDITORIAL NOTE: While the Fourth Amendment rulings on the other three issues in this case are consistent with the interpretation by Washington state courts of the Washington constitution, the ruling on the fourth issue would run afoul of the rulings of the Washington Supreme Court that have rejected the probable cause car search doctrine under the Washington constitution, article I, section 7, and have required actual exigent circumstances generally to justify a warrantless, non-consenting car search. See State v. Ringer, 100 Wn.2d 686 (1983); State v. Tibbles, 169 Wn.2d 364 (2010) Sept 10 LED:09.

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

ANALYSIS:. (Excerpted from three-judge Ninth Circuit panel's opinion)

(1) 911 call plus observations provided reasonable suspicion to stop Williams for possible trespass or DUI

> The government first argues that the district court erred in concluding that the officers lacked reasonable suspicion to conduct an investigatory stop. The Fourth Amendment permits brief investigative stops when a law enforcement officer has reasonable suspicion that the person stopped is engaged in criminal activity. Navarette v. California, 134 S.Ct. 1683, 1687 (2014) **June 14 LED:03**. Reasonable suspicion requires more than a mere "hunch" of wrongdoing, but the degree of proof needed is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less demanding than that for probable cause." . . . Whether reasonable suspicion exists depends upon the totality of the circumstances surrounding the stop, including "both the content of information possessed by police and its degree of reliability." Alabama v. White, 496 U.S. 325, 330 (1990); see also Navarette, 134 S. Ct. at 1687.
>
> In assessing the role of telephone tips in investigative stops, the Supreme Court and our court have focused on whether the tips have "sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop." White, 496 U.S. at 327; United States v. Edwards, 761 F.3d 977, 983 (9th Cir. 2014) **Oct 14 LED:10**. In White, an anonymous tipster telephoned police to report that the defendant would be leaving a particular apartment at a particular time in a particular vehicle, and that the defendant would be heading towards a specific motel in possession of cocaine. The police went to the identified apartment, saw a vehicle matching the description, and pursued the vehicle as it made its way to the specified motel. Officers stopped the vehicle just short of the motel and discovered marijuana and cocaine inside. The Court held that the anonymous tip "exhibited sufficient indicia of reliability to justify the investigatory stop" because the anonymous tipster predicted the defendant's future behavior and the officers corroborated the tip through independent police work.
>
> The Supreme Court further clarified the factors used in assessing the reliability of tips in Navarette. There, an unidentified 911 caller reported that a truck ran her off the road. A police officer responded to the 911 broadcast, located the truck, and pulled it over. Officers smelled marijuana when they approached the truck and a subsequent search uncovered 30 pounds of marijuana. The Court held that the 911 call had sufficient indicia of reliability to provide the officers with reasonable suspicion that the truck ran the caller off the roadway, reasoning that (1) the tip indicated that the caller had eyewitness knowledge of the incident, "lend[ing] significant support to the tip's reliability," (2) police corroborated the tip by verifying the truck's location near where the caller stated the incident occurred; (3) the caller used the 911 system, which identifies and traces callers, thus increasing the tip's veracity by "provid[ing] some safeguards against making false reports with immunity;" and (4) the caller reported a specific and potentially ongoing crime.

Applying the principles articulated in White and Navarette, we hold that officers Hubbard and Keller had reasonable suspicion to stop Williams based on the information they possessed and the tip's reliability. First, the tipster, Tony Jones, telephoned a police hotline and provided his name, address, and phone number. Second, the officers verified the information Jones relayed through independent observation. Jones provided officers with Williams's location and the make of Williams's car. When the officers arrived at the specified parking lot, they found the reported grey Ford Five Hundred with a man inside. Third, Jones provided specific criminal allegations. Jones reported that Williams was sleeping in a car in an adjacent apartment complex, even though Williams did not live there. Jones also reported that Williams was known to sell drugs in the area.

Fourth, the officers' suspicion was increased when they witnessed Williams's behavior upon arriving at the parking lot. When the officers shone the light on Williams's car, he popped up in the driver's seat and immediately looked left and right. Williams then proceeded to place the car in reverse. The officers testified that this conduct was consistent with someone who intended to flee the scene. Lastly, the incident occurred in a high-crime area around 5:00 a.m. See Illinois v. Wardlow, 528 U.S. 119, 124 (2000) **March 00 LED:02** (Although "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime," police can consider the "relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation"). The officers testified that they were aware of gang activities in the area, and often responded to domestic violence and "party calls" there.

Williams's reliance on Florida v. J.L., 529 U.S. 266 (2000) **May 00 LED:07**, is unpersuasive. In J.L., an anonymous caller told police "that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun." Police went to the bus stop, frisked a young black male in plaid, and seized a gun from his pocket. The Court held that the police lacked reasonable suspicion to stop the suspect, reasoning that the call "provided no predictive information," leaving the "police without means to test the informant's knowledge or credibility." The tip also failed to allege more than "[a]n accurate description of a subject's readily observable location and appearance," and did not show how the tipster had knowledge of the alleged "concealed criminal activity."

By contrast, the tip in this case not only provided an accurate description of the suspect, but it also alleged ongoing, observable criminal activity—trespass. Jones identified Williams's location, car, and appearance and also stated that Williams was sleeping in a car in an adjacent apartment building's lot, even though Williams did not live there. Unlike the concealed criminal activity alleged in J.L., Jones provided predictive information concerning Williams's activity, which the officers were able to immediately verify when they arrived.

Even if there were a question as to whether the tip, on its own, provided the officers with the requisite reasonable suspicion to detain Williams, the tip was certainly sufficient to justify further investigation. After receiving the information provided by the tipster, the officers would have been delinquent had they not

driven over to the parking lot to investigate the situation. The officers testified at the evidentiary hearing that the reported conduct, if confirmed, would be indicative of a potential DUI, as well as loitering or trespassing. When they arrived, the officers faced a potentially dangerous situation. They encountered a possible drug dealer, sitting in a car with temporary license plates, in a dark and deserted parking lot, in a high-crime area, during the early hours of the morning. Accordingly, the officers acted reasonably when they blocked in the driver with their police car, turned on their police lights, and one of the officers drew his gun. These actions led to Williams's subsequent suspicious conduct, which included placing his car in reverse, ignoring the officers' questions, and ultimately darting away on foot.

Based on the totality of the circumstances surrounding the stop, the officers had reasonable suspicion to briefly detain Williams, and the district court erred in concluding otherwise.

(2) Running from attempted Terry stop justified probable cause arrest for obstructing

The government contends that the officers had probable cause to arrest Williams because he obstructed the officers in their attempt to enforce Nevada Revised Statute (N.R.S.) § 171.123. Section 171.123 dictates that police officers may detain a suspect whom the officers have reasonable suspicion has committed, is committing, or is about to commit a crime, in order to obtain that individual's identity. [Court's footnote: *N.R.S. § 171.123(1) and (3) provide: "Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime. . . . The officer may detain the person pursuant to this section only to ascertain the person's identity and the suspicious circumstances surrounding the person's presence . . . ."*]

When the suspect fails to identify himself after officers have detained him under reasonable suspicion, the suspect violates N.R.S. § 199.280 (Nevada's obstruction statute), which makes it unlawful for a person to "willfully resist[], delay[] or obstruct[] a public officer in discharging or attempting to discharge any legal duty of his or her office."

As explained above, the officers had reasonable suspicion to conduct an investigatory stop: a caller reported that Williams was sleeping in his car outside of an apartment building that Williams did not live in; the caller reported that he knew Williams to be a drug dealer; Williams acted as if he intended to flee when officers approached him; and the conduct occurred in a high-crime area early in the morning. Accordingly, the officers had reasonable suspicion to stop Williams and, pursuant to section 171.123, could approach Williams to ascertain his identity. Instead of speaking with the officers, Williams immediately ran, preventing the officers from discharging their duty under section 171.123 and, accordingly, violating Nevada's obstruction statute.

In holding that the officers lacked probable cause to arrest Williams, the district court concluded that simply fleeing from an officer, while it establishes reasonable suspicion, does not establish probable cause that the individual violated Nevada's obstruction statute. See United States v. Smith, 633 F.3d 889,

893 (9th Cir. 2011) ("[A] person's 'headlong,' 'unprovoked' flight upon seeing a police officer, when it occurs in a high-crime neighborhood, is sufficient to establish reasonable suspicion that the person is involved in criminal activity.") (quoting Illinois v. Wardlow, 528 U.S. 119, 124–25 (2000) **March 00 LED:02**). The district court, however, ignored the interplay circumstances surrounding the person's presence . . . ." between section 171.123 and Nevada's obstruction statute.

The officers did not have probable cause to arrest Williams on the basis of the obstruction statute alone; rather, the officers had probable cause to effectuate an arrest because Williams obstructed officers in their efforts to enforce section 171.123.

(3) Officers lawfully searched the person of Williams incident to his arrest for obstructing

. . . . Because the officers lawfully arrested Williams, the government contends that the officers conducted a valid search incident to arrest when they searched Williams's pockets and found crack cocaine. The Supreme Court and our court have already held that a search incident to a lawful arrest is not limited to simple pat-down of the suspect and can "involve a relatively extensive exploration" of the areas within the arrestee's immediate control. United States v. Robinson, 414 U.S. 218, 227 (1973) . . . Those areas include the arrestee's person and the inside pockets of the arrestee's clothing. Here, the officers had probable cause to arrest Williams and performed a valid search incident to arrest of Williams's person—which lawfully extended to the insides of Williams's pockets—after apprehending Williams for obstruction.

(4) Williams's car was lawfully searched without a warrant based on PC to search it [Washington constitution would not allow a warrantless search based solely on PC]

Lastly, the government contends that the officers lawfully searched Williams's vehicle because they had probable cause to believe the Ford contained contraband or evidence of drug dealing. Officers may conduct a warrantless search of an automobile, including containers within it, when they have probable cause to believe that the vehicle contains contraband or evidence of criminal activity.

[Some citations omitted, others revised for style; footnote omitted; subheadings added]

LEGAL UPDATE EDITORIAL NOTES REGARDING WASHINGTON STATE CASE LAW: The closing paragraphs of the Williams panel's opinion discuss the panel's view that: (1) after the officers' search of Williams's person, officers had probable cause to believe that the car contained drugs or evidence of drug dealing; and (2) a warrantless search of the car was accordingly permitted under the Fourth Amendment Carroll doctrine (aka the probable cause car search doctrine) that allows a warrantless search of a vehicle based on probable cause to search it despite the lack of actual exigent circumstances. As noted above, the Washington Supreme Court has held that the Washington constitution does not permit a warrantless search of a vehicle based on PC absent actual exigent circumstances. See State v. Ringer, 100 Wn.2d 686 (1983) (mobility of motor vehicle alone does not provide "exigent circumstances" justifying a warrantless search based on

probable cause to search the vehicle); State v. Tibbles, 169 Wn.2d 364 (2010) Sept 10 LED:09 (same ruling).

On the other hand, the rulings by the Williams panel on the first three issues are consistent with case law from Washington courts interpreting article I, section 7.

Also note that a Washington appellate court decision held that fleeing from a lawful Terry stop is "obstructing" under Washington law. See State v. Hudson, 56 Wn. App. 490 (1990).

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING WILLIAMS DECISION: The Williams decision is digested in the AGO/CJTC's September 2016 LED at pages 3-4.

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WASHINGTON STATE SUPREME COURT

SEIZING COMPANION OF ARRESTEE: BECAUSE OFFICERS HAD AN "OBJECTIVE RATIONALE PREDICATED ON SAFETY CONCERNS" TO SEIZE A COMPANION TO SECURE THE SCENE OF AN ARREST, ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION ALLOWED FOR THE SEIZURE OF THE COMPANION EVEN THOUGH THE OFFICERS DID NOT HAVE REASONABLE SUSPICION OF THE COMPANION UNDER THE STANDARD OF TERRY V. OHIO

State v. Flores, ___ Wn.2d ___, 2016 WL 4940036 (September 15, 2016)

LEGAL UPDATE INTRODUCTORY NOTES REGARDING WAPA STAFF ATTORNEY PAM LOGINSKY'S CASE NOTE ON FLORES:

Pam Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys (WAPA), included the following quotes from the Flores majority opinion in a "case note" on the WAPA website:

- **"When executing an arrest, officers may seize non-arrested companions to control the scene of the arrest if they can articulate an objective rationale predicated specifically on safety concerns for the officers, the arrestee, his or her companions, or other citizens."**

- **"Factors that warrant an officer seizing companions include (but are not limited to) the arrest, the number of officers, the number of people present at the scene of the arrest, the time of day, the behavior of those present at the scene, the location of the arrest, the presence or suspected presence of a weapon, officer knowledge of the arrestee or the companions, and potentially affected citizens . . . . This is not an exhaustive list, and no one factor by itself justifies an officer's seizure of non-arrested companions. When determining whether there is an objective rationale, the court should look at all the circumstances present at the scene of the arrest. . . ."**

- **"[Officers] may control the movements of non-arrested companions only to control the scene of the arrest. To further engage in an investigatory interaction such as a pat down, officers must meet the individualized Terry standard of**

"reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime."

<u>LEGAL UPDATE EDITOR'S ADDITIONAL PRELIMINARY NOTE</u>: Paragraph 1 of the majority opinion in the <u>Flores</u> case summarizes the Court's ruling as follows:

> **This case requires us to decide under what circumstances officers making a lawful arrest may seize a companion of the arrestee in the absence of reasonable suspicion to independently justify a <u>Terry</u> stop of the companion. We hold that where officers have an objective rationale predicated on safety concerns to seize a companion to secure the scene of the arrest, article I, section 7 of the Washington State Constitution allows for the seizure, so long as it remains reasonable in scope and duration. Based on this holding, we reverse the Court of Appeals and hold that evidence of the gun taken from Cody Flores [voluntarily surrendered by Mr. Flores during his brief seizure should not have been suppressed.**

<u>Facts and Proceedings below</u>: (Excerpted from Washington Supreme Court majority opinion)

> On November 2, 2013, the Moses Lake Police Department dispatched all available patrol officers to an address in Moses Lake. An anonymous source had reported that Giovanni Powell was at that address and had pointed a gun at someone's head. [Officer A] was first to arrive at the scene. [Officer A] was familiar with Powell, had seen pictures of him holding firearms, knew he was in a gang, and knew he was a material witness to a Spokane homicide. While en route, dispatch informed [Officer A] (and other officers who were following him) that "Powell had a warrant out for his arrest in the Spillman police information system. This warrant was later confirmed after Powell was stopped."
>
> [Officer A] testified that he is familiar with Powell, has "seen pictures of him holding firearms or friends of his holding firearms," and had "knowledge that [Powell is] in a gang called the Base Block." [Officer A] stated he "believe[d] that [Powell] was a material witness" to a shooting incident in Spokane. There is sufficient evidence to support a finding that [Officer A] was familiar with Powell and knew that Powell was in pictures holding firearms, was associated with gang members, and was a material witness to a homicide in Spokane. . . .
>
> [Officer A] arrived at the reported address less than five minutes from the time of the call, around 4:40 p.m. He observed Powell, whom he recognized, and another person (later identified as Flores) walking down the street together. [Officer A] did not recognize Flores and did not have an individualized, articulable reason to suspect Flores of criminal activity. Officers testified they were concerned that Flores posed a threat to their safety because of "his association and close proximity to Powell within a few minutes of a report of Powell pointing a gun at someone's head."
>
> [Officer A] "parked across the street from Powell and Flores, got out of his car, drew his side arm, held it pointed at the ground, and ordered . . . Powell to stop." Both Flores and Powell stopped. [Officer A] ordered Powell and Flores to drop to their knees with their hands up, a position of disadvantage. Powell and Flores were talking, so "[Officer A] ordered Powell to move away from Flores." Powell

> complied, moving about six feet away. [Officer A] then "ordered Powell to walk backwards towards him with his hands up."
>
> As this was occurring, other officers arrived, including [Officer B]. In total, there were approximately five officers on the scene. All had their guns drawn and held at the "low ready" position. "While [Officer A] was securing Powell, [Officer B] ordered Flores to walk backwards towards him with his hands up." "As he was walking backwards towards [Officer B], Flores told [Officer B] he had a gun. This statement was not in response to a question from [Officer B]." [Officer B] told Flores to keep walking backward and they would deal with the gun in a minute. Once Flores got to [Officer B], [Officer B] asked where the gun was. Flores responded that it was in his pants. [Officer B] removed and secured the gun. The State charged Flores with first degree unlawful possession of a firearm.
>
> Flores brought a CrR 3.6 motion to suppress all evidence of the gun, arguing that [Officer B's] command to walk backward constituted a second seizure that was not predicated on articulable suspicion that Flores was involved in criminal activity. [A Grant County Superior Court judge] granted the motion to suppress "the gun found on . . . Flores and his statements pertaining to it" . . . . Another Grant County Superior Court judge then dismissed the charges without prejudice. The State appealed, and Division Three of the Court of Appeals affirmed. State v. Flores, 188 Wn. App. 305 (2015) **July 15 LED:08**

[Footnotes and citations to record omitted]

ISSUES AND RULINGS: (1) Where officers do not have individualized reasonable suspicion of criminal activity to seize a companion at the scene of an arrest, but the officers do have an objective rationale based on safety concerns to seize the companion to secure the arrest scene, does article I, section 7 of the Washington State Constitution allow for seizure of the companion, so long as the seizure remains reasonable in scope and duration? (ANSWER BY WASHINGTON SUPREME COURT: Yes, rules a 7-2 majority, the Washington constitution supports the "objective rationale" standard for seizing companions both in the context of arresting persons out of vehicles and in the context of arresting persons where no vehicle is involved; the dissenting opinion argues that, except where a person is arrested out of a vehicle, seizure of a companion is not justified unless officers have reasonable suspicion of criminal activity by the companion under Terry v. Ohio.)

(2) Under the record in this case, did the officers have an objective rationale predicated on safety concerns to seize defendant Flores as the companion of an arrestee, and was the seizure of defendant Flores reasonable in scope and duration? (ANSWER BY WASHINGTON SUPREME COURT: Yes, rules the majority, the factual record supports the conclusion that the officers had an objective rationale for the seizure predicated on safety concerns; the dissenting opinion does not address whether the facts meet the standard of "an objective rationale predicated on safety concerns")

Result: Reversal of the decision of Division Three of the Court of Appeals that affirmed the Grant County Superior Court suppression ruling; case remanded for prosecution of Cody Ray Flores for unlawful possession of a firearm in the first degree.

ANALYSIS: (Excerpted from Supreme Court majority opinion)

The primary question in this case is whether it is always a violation of article I, section 7 of the Washington State Constitution for an officer to seize the non-arrested companion of an arrestee to secure the scene of an arrest. . . .

Under our state constitution, an individual is seized "when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he . . . is free to leave or decline a request due to an officer's use of force or display of authority." State v. Rankin, 151 Wn.2d 689, 695 (2004) **Aug 04 LED:07**. "'This determination is made by objectively looking at the actions of the law enforcement officer." There is no doubt here that Flores was seized, and indeed, the State concedes that he was seized when [Officer A] stopped him and Powell and ordered them into a position of disadvantage. Flores challenges his seizure as an unlawful Terry stop. Flores asserts that the seizure should be analyzed in two parts: the initial seizure when [Officer A] first ordered Flores into a position of disadvantage, and a second seizure when [Officer B] ordered Flores to move back toward him.

Although Flores does not concede that [Officer A's] initial detention of him was permissible, he contends that even if the initial seizure by [Officer A] was justified by the need to secure the scene of Powell's arrest, that justification evaporated the moment that Powell, having complied with officer's directives that he get down on his knees, continued to follow [Officer A's] orders . . . . At this point in time, the scene was secured, Powell was safely under control, and there was no need to further intrude on Flores' liberty by ordering him to walk backwards to the sound of [Officer B's] voice." Flores insists that the second seizure was investigatory and an unlawful Terry stop because the State failed to show it was reasonable and necessary. Finally, Flores argues that this court should hold that vehicle stop cases involving the rights of passengers do not control cases where the companion and arrestee are pedestrians.

The State counters that Terry is inapplicable because officers did not seize Flores for investigative purposes. Rather, the State argues that under State v. Parker, 139 Wn.2d 486 (1999) **Dec 99 LED:13** (plurality opinion), and State v. Mendez, 137 Wn.2d 208 (1998) **March 99 LED:04**], [Officers A and B] acted within their authority to control the scene of an arrest when they directed Flores's movements. The State contends that the circumstances here are not materially different from when the driver of a car has been arrested and the police may order the passenger in or out of the car to secure the scene of the arrest. Under Mendez, the court should review the officer's actions for an "'objective rationale'" for seizing the companion of an arrestee. Under Parker, the fact of an arrest meets this test. Here, the State asserts the officers had an objective rationale. Furthermore, the court should apply a deferential standard when reviewing officers' actions that are taken in the interest of safety.

The American Civil Liberties Union of Washington (ACLU) filed an amicus brief arguing that while the Court of Appeals was correct in suppressing the evidence, it did not go far enough. The ACLU argues that under article I, section 7, there was no justification to seize Flores in the first place because the State "failed to provide an individualized objective rationale based on safety concerns." The ACLU also argues Mendez and Parker should not apply to pedestrian cases.

Our precedent favors the State's argument. The risks that companions pose to police attempting to arrest an individual are similar whether the companion and arrestee are in a car or on a sidewalk. The officer safety rationale that underlies our reasoning in Mendez and Parker applies with equal force whenever officers make an arrest. We therefore adopt the objective rationale test for when an officer may seize companions to control the scene of an arrest. When that test is met, it is not a violation of article I, section 7 for an officer to seize a non-arrested companion of an arrestee. The objective rationale test was met under the facts of this case. We therefore reverse the Court of Appeals and hold that the evidence of the gun should not have been suppressed.

I. Officers May Order a Non-arrested Companion of an Arrestee to a Position Necessary to Secure the Scene of the Arrest

The court's decisions in Mendez and Parker provide a useful framework for analyzing this case. In Mendez, the court addressed the scope of police officers' authority over passengers in an automobile when the officers have probable cause to detain the driver for a traffic infraction. In that case, two police officers stopped a car that ran a stop sign. As soon as the vehicle stopped, Mendez, a passenger who had been in the front seat, got out and began walking away. Approaching the vehicle, one of the officers told him to get back into the vehicle, but Mendez turned, fumbled with his shirt, and continued walking away. He then ran and was chased on foot by one I officers. Mendez was arrested for obstructing a public servant, and in the search incident to arrest, the officers found a marijuana pipe. Mendez moved to suppress the evidence of the marijuana pipe.

This court examined the question under article I, section 7, explaining that we must balance the privacy interests that Washingtonians held in the past and have a right to hold in the future "against concerns for officer safety during traffic stops." "Plainly, in any traffic stop, concerns about officer safety and control of the situation are entirely relevant."

The court concluded, "Washington's constitutional policy of greater protection to the privacy of individuals in automobiles than the Fourth Amendment provides must carry the day." Although the court found that with regard to drivers, officers have authority to "take whatever steps [are] necessary to control the scene, including ordering the driver" in or out of the vehicle, it declined to adopt a categorical rule with regard to passengers.. It explained,

> A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the police. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens, for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy article I, section 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy. But to the extent such an objective rationale exists, the intrusion on the passenger is de minimis in light of the larger need to protect officers and to prevent the scene of a traffic stop from descending into a

chaotic and dangerous situation for the officer, the vehicle occupants, and nearby citizens.

To meet this objective rationale standard, an officer need not meet the standard required for a Terry stop. "Terry must be met if the purpose of the officer's interaction with the passenger is investigatory. For purposes of controlling the scene of the traffic stop and to preserve safety there, we apply the standard of an objective rationale." The court provided a list of nonexclusive factors that may warrant an officer controlling the movement of a passenger. These factors include "the number of officers, the number of vehicle occupants, the behavior of the occupants, the time of day, the location of the stop, traffic at the scene, affected citizens, or officer knowledge I occupants." Emphasizing the flexibility of this analysis, the court concluded that "[t]he inquiry into the presence or absence of an objective rationale requires consideration of the circumstances present at the scene of the traffic stop."

Under the facts in Mendez, the officers did not satisfy the objective rationale test. One of the officers testified that "he had no suspicions Mendez had engaged or was about to engage in criminal conduct." "Neither officer testified that Mendez's actions in reaching inside his clothing aroused any suspicion. Besides, Mendez did not reach inside his clothing until *after* he had been seized by [the officer's] command to return to the car." "Obviously, once an individual is "seized," no subsequent events or circumstances can retroactively justify the "seizure." The officers were unable to clearly articulate a reason to order Mendez to stay in the car. Mendez "was already walking away when he was told to stop," the stop took place in broad daylight, there were no specific safety concerns at the scene, the officers "'had control of the situation as the driver remained where he was directed," and he had not omitted any crime. Thus, there was no objective rationale that the officers could articulate to justify Mendez's seizure. Although the officers were unable to meet the objective rationale test, the court was clear that the situation could have been different "'had Mendez remained standing by the passenger side door, had he behaved in any way the police viewed as threatening or potentially dangerous, or had the scene at the traffic stop required him to stay in the vehicle."

The same year the court decided Mendez, it also decided Parker.. . . In Parker, the court considered "whether the personal belongings of non-arrested vehicle passengers are subject to search incident to the arrest of the driver." In a plurality decision, the court held that "the arrest of one or more vehicle occupants does not, without more, provide the 'authority of law' under article I, section 7 of our state constitution to search other, non-arrested vehicle passengers, including personal belongings clearly associated with such non-arrested individuals." . . . .

Both the lead and one of the concurring opinions in Parker recognized "that under certain circumstances non-arrested individuals may pose a threat to officer safety in an arrest situation." [Talmadge concurring] To protect officer safety and individuals' article I, section 7 rights, the court "engage[s] in a delicate balancing of interests, weighing safety and evidentiary concerns against the basic notion that the people of this state enjoy a measure of privacy that is, and will forever be, unassailable." "As against the privacy interests of a non-arrested individual, the balance has already been struck." Although companions may

pose a danger to law enforcement, officers may not engage in a full search of a non-arrested companion; instead, any search of the companion "is limited to ensure officer safety only and must be supported by objective suspicions that the person searched may be armed or dangerous." The lead opinion concluded, however, that, whether or not articulable suspicion exists sufficient to justify a pat down for weapons, the circumstance of an arrest falls squarely within the rule of Mendez. Thus, a vehicle stop and arrest in and of itself provides officers an objective basis to ensure their safety by "controlling the scene," including ordering passengers in or out of the vehicle as necessary. A concurrence stated that the risks non-arrested passengers may pose to law enforcement "can be addressed under Mendez or pursuant to Terry." [Talmadge concurring].

The situations presented in Mende*z* and Parker are analogous to the facts of this case. Flores argues that automobile cases are unique because we have developed a line of vehicle-specific jurisprudence. One of the primary justifications is the mobility of vehicles. . . . However, the court in Mendez and Parker was not concerned with the mobility of the vehicle, but with the threat that companions in the vehicle – those who are close in proximity to the subject of the stop – pose to officers. In Mendez, we described our test as "predicated specifically on safety concerns," and in Parker we noted that "the search incident to arrest exception functions primarily to achieve [officer safety]." Because the analysis in Mendez and Parker centered on safety concerns rather than the location of the stop, it should not be restricted to traffic stops, but is equally applicable in cases like this one where an arrestee is accompanied by companions at the time of the arrest.

This conclusion is common sense, as the potential danger at an arrest scene does not turn on whether people are sitting together in a car or walking side by side on a sidewalk. Companions in either circumstance could, for example, be concealing a weapon that could be used against the arresting officer. . . .

In both situations, when an officer is attempting to execute an arrest warrant, those close to the subject pose a potential safety risk. . . .

There is no sensible basis to compartmentalize Mendez and Parker as "vehicle" cases and to create a separate line of "pedestrian" cases. As explained, the fact that the seizures in Mendez and Parker occurred in the vehicle context was not central to the analysis. To determine which standard we use to evaluate the legality of a seizure, we do not focus on the seizure's location; rather, we focus on its purpose. . . . Where the stop is for investigative purposes, we require officers to meet the Terry standard of individualized, reasonable, articulable suspicion. . . . However, when a stop is conducted to effectuate an arrest, we require a valid arrest warrant or probable cause. . . . [**LEGAL UPDATE EDITORIAL COMMENT: This sentence is awkward. A stop that precedes an arrest requires only reasonable suspicion. An arrest that follows a stop requires a warrant or probable cause.]** Yet another standard exists when an officer engages in a purported social contact. In those situations, we determine if the contact was in fact a seizure – rather than merely a social contact – based on whether a reasonable person would believe he was not free to leave. State v. Young, 135 Wn.2d 498, 513-14 (1998) **Aug 98 LED:02** (holding shining a spotlight on an individual "did not amount to such a show of authority a

reasonable person would have believed he or she was not free to leave" and thus was not a seizure). As these cases demonstrate, the standard we use to evaluate the legality of a seizure is determined by the purpose of the seizure. We therefore reject Flores's argument that we should ignore the objective rationale test established in Mendez and Parker because those were "vehicle" cases.

Because the situations contemplated in Mendez and Parker are analogous to the one presented here, we follow the analysis developed in those cases. However, we reject the State's argument that Parker established a per se rule that the fact of an arrest is sufficient to satisfy Mendez's objective rationale test. The statement in the lead opinion that arguably supports this proposition was not joined by either of the concurring justices and, thus, is not binding law. Furthermore, this court has characterized that statement as supplying but one factor officers may consider as part of the objective rationale test, without suggesting that an arrest by itself satisfies the officers' burden. [Citing cases] . . . We therefore consider an arrest to be a factor officers may take into account when assessing whether they have an objective rationale
for seizing companions to control the scene.

[Court's footnote 5: *Were we to agree with the State, we would, in effect, be adopting a variation of the "automatic companion rule." Under the automatic companion rule, "[a11 companions of the arrestee within the immediate vicinity, capable of accomplishing a harmful assault on the officer, are constitutionally subjected to the cursory "pat-down" reasonably necessary to give assurance that they are unarmed." United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971). Under this rule, an officer may conduct a frisk for weapons of an arrestee's companions without individualized, articulable suspicion of criminal activity or dangerousness. [Citing and discussing cases] We reject the automatic companion rule as inconsistent with our precedent and with the rule we announce today. . . . Contrary to the dissent's characterization, our holding does not create any new "exception" to the Fourth Amendment or article I, section 7.*]

We hold that when executing an arrest, officers may selze non-arrested companions to control the scene of the arrest if they can articulate an objective rationale predicated specifically on safety concerns for the officers, the arrestee, his or her companions, or other citizens. Factors that warrant an officer seizing companions include (but are not limited to) the arrest, the number of officers, the number of people present at the scene of the arrest, the time of day, the behavior of those present at the scene, the location of the arrest, the presence or suspected presence of a weapon, officer knowledge of the arrestee or the companions, and potentially affected citizens. See Mendez. This is not an exhaustive list, and no one factor by itself justifies an officer's seizure of non-arrested companions. When determining whether there is an objective rationale, the court should look at all the circumstances present at the scene of the arrest.

[Court's footnote 6: *In Terry, the United States Supreme Court considered statistics showing the danger police officers face. It considered similar statistics [in other cases] [citing cases and statistics]. . . .While we consider police deaths and injuries, we are also cognizant of the fact that police practices may be biased*

against a particular community and that "no shortage of seemingly routine stops ... end[] in physical harm or even death." . . . As noted, courts must carefully consider the circumstances of each case.]

As this court discussed in Mendez, the objective rationale test is different from Terry's reasonable suspicion of criminal activity requirement. Officers' authority to intrude into an individual's privacy is likewise limited in scope and duration; they may control the movements of non-arrested companions only to control the scene of the arrest. To further engage in an investigatory interaction such as a pat down, officers must meet the individualized Terry standard of "reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." . . . Similarly, to engage in a protective pat down, officers must be able to point to particular facts that provide "reasonable grounds to believe the person is armed and dangerous." . . . This, again, is a different, more individualized standard than the objective rationale test. Finally, officers may not create an exigency that would then give them reason to search or seize the companion. Cf. Terry, 392 U.S. at 32 (Harlan, J., concurring) ("Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence."). **[LEGAL UPDATE EDITORIAL COMMENT: This statement in Justice Harlan's concurrence in Terry is both (1) a rhetorical overstatement by Justice Harlan, and (2) a statement taken out of context by the author of the Flores majority opinion, Justice Stephens. I believe that all that Justice Harlan meant to say in the full passage in his concurrence is that officers generally do not have a free-floating authority to frisk those who the officers have reason to believe are armed and dangerous, but who the officers have no authority to seize.]**

Requiring officers to articulate an objective rationale for seizing non-arrested individuals to control the scene of an arrest strikes the proper balance between safety considerations and individual privacy rights under article I, section 7. First, an officer's seizure of non-arrested companions is limited to controlling the movement of those companions only insofar as is justified to control the scene of the arrest and ensure safety. . . . Any intrusion into the companions' privacy is therefore "de minimis in light of the larger need to protect officers and to prevent the scene . . . from descending into a chaotic and dangerous situation for the officer, . . . nearby citizens," and those present at the scene of the arrest. Mendez. Second, requiring officers to point to specific concerns at an arrest scene ensures that no person sacrifices constitutional privacy rights because of "mere proximity to others independently suspected of criminal activity." . . . . Requiring an objective rationale allows the court to determine whether the detention was merely harassing or arbitrary. . . .

II. Applying the Objective Rationale Analysis, the Seizure of Flores Was Justified and the Evidence of the Gun Should Not Be Suppressed

Applying the objective rationale test, we find that [Officer A] justifiably seized Flores to secure the scene of Powell's arrest, and that [Officer B's actions were a justified continuation of that initial seizure. We reject Flores's contention, embraced by the Court of Appeals, that the seizure must be analyzed as two

events: an initial seizure by [Officer A], and then a Terry stop beginning when [Officer A] called Flores back. Although a permissible contact can ripen into an impermissible seizure, . . . we do not find that to be the case here. There was but one seizure, and both [officers'] actions were justified by the ongoing need to control the scene of Powell's arrest.

Although an anonymous tip standing alone may not be sufficient to support a Terry stop (a determination we need not make), officers do not need to ignore information that implicates their safety when there is a lawful basis to arrest an individual. . . . [Officers A and B] could, therefore, consider the fact that there may have been a gun present when assessing what they needed to do to control the scene of Powell's arrest. Although dispatch did not indicate whether Powell was alone (the tip appears to have mentioned only Powell), when [Officer A] arrived at the scene, Powell and Flores were walking down the street together in close proximity. [Officer A] arrived at the scene less than five minutes after dispatch received the tip. He was the only officer on the scene at that point. [Officer A] recognized Powell. [Officer A] had seen pictures of Powell or his friends holding firearms, and had information that he was at the scene of a fight in which one of his best friends was shot and killed. The stop occurred after 4:30 p.m. in November. When [Officer A] ordered Powell to stop, both he and Flores halted, and they remained together. Based on these facts, [Officer A] had an objective rationale to seize Flores to secure the scene of Powell's arrest.

[Officer B], who received the same dispatch information as [Officer A], arrived on the scene after Flores was put in a position of disadvantage away from Powell. When [Officer B] arrived, [Officer A] was calling Powell back toward him. [Officer A's] focus was on Powell. There is no evidence that Powell was already secured when [Officer B] focused on Flores and told him to begin walking toward [Officer B]. . . . [Officer B] testified that he told Flores to walk back because he did not know what [Officer A] had observed when he got there, and because he was concerned there was a firearm. Although [Officer A] also stated, "[I]t appeared to me [Flores] was involved in [the firearm incident] somehow," this statement alone does not turn his legitimate control of Flores's movements to secure the scene of the arrest into an investigatory stop.

While Flores was walking back toward [Officer B], he volunteered that he had agun. This admission was not made in response to any questioning or prompting by [Officer B]. Once Flores volunteered that he had a gun, had reasonable suspicion to further detain Flores and seize the gun. See, e.g., State v. King, 89 Wn. App. 612 (1998) **April 98 LED:07** (officer conducting a consensual search of a house could temporarily seize individual and gun for officer safety).

[Officers A and B] had an objective rationale predicated on safety concerns that justified temporarily seizing Flores to control the scene of Powell's arrest. Because Flores was not unlawfully seized, we reverse the Court of Appeals and hold that evidence of the gun should not have been suppressed.

[Some citations omitted; others revised for style; some footnotes omitted]

DISSENTING OPINION

Justice Gordon McCloud writes a dissent that is signed by Chief Justice Madsen. The dissent argues that, under both the Washington constitution's article I, section 7 and under the federal constitution's Fourth Amendment, the seizure of Flores in this case should have been treated as a standard Terry stop, lawfulness of the seizure should have been tested under a reasonable suspicion standard, and that in this case the facts do not add up to reasonable suspicion under Terry v. Ohio. The dissent does not discuss whether the majority is correct that, if one assumes the majority is correct that the standard for the seizure is the lower on of "objective rationale predicated on safety concerns," the facts meet that standard.

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING FLORES DECISION: The Flores decision is digested in the AGO/CJTC's September 2016 LED at pages 4-6.

CIVIL LIABILITY FOR COMMON LAW NEGLIGENCE OF JAIL: 5-4 MAJORITY REJECTS LAWSUIT THAT ALLEGED NEGLIGENCE BY COUNTY CORRECTIONS UNDER A PURPORTED "TAKE-CHARGE" RELATIONSHIP IN FAILING TO ADEQUATELY EVALUATE AND TREAT PSYCHOTIC SCHIZOPHRENIC WHO COMMITTED MASS MURDER; NO CIVIL LIABILITY DUTY TO MONITOR OR CONTROL INMATE AFTER HIS RELEASE FROM CUSTODY

In Binschus v. State of Washington, Skagit County (and others), ___Wn.2d ___, 2016 WL 5344251 (September 22, 2016), the Washington Supreme Court rules 5-4 that public jail operations may not be held liable – on the rationale that the jails operations should have better evaluated and treated an inmate **–** for violent crimes committed by the inmate after the inmate is released from jail.

Isaac Zamora killed six people, including a Skagit County Deputy Sheriff, and injured others in a shooting rampage on September 2, 2008. He had recently been released from the Skagit County Jail, and, shortly before that, the Okanogan County jail, where, as to each jail, he had been incarcerated for non-violent crimes. He suffers from schizophrenia. He was experiencing a psychotic episode when he attacked his victims. Multiple people and estates sued the two counties and other government entities. The Snohomish County Superior Court granted summary judgment to the counties, Division One of the Court of Appeals reversed, and now by 5-4 vote, the Washington Supreme Court has reinstated the Superior Court's summary judgment ruling.

Division One of the Court of Appeals had concluded that there were material issues of fact as to whether the County established a "take charge" relationship with Zamora that imposed a common law (i.e,. case-law-based, not statute-based) duty to third party victims of Zamora. A "take charge" relationship forms under the common law when the alleged tortfeasor (i.e., wrong-doer) takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled. The party who takes charge is under a duty to exercise reasonable care to control the third person to prevent him from causing bodily harm to others. The Court of Appeals noted allegations in the record that might convince a fact-finder at trial that Skagit County knew or should have known of Zamora's risk to the public. Binschus v. State, 186 Wn. App. 77 (Div. I, February 23, 2015) **March 15 LED:03**

The first paragraph of the Supreme Court Majority Opinion in Binschus summarizes the majority's holding as follows:

> In 1992, we held that the State could be held liable for crimes committed by parolees if those crimes resulted from the State's negligence in supervising the parolees. Taggart v. State, 118 Wn.2d 195 (1992). Today, plaintiffs ask us to extend *Taggart* and hold that a county jail can be held liable for crimes committed by a former inmate. However, the crimes in this case occurred well after the inmate left that jail-long after the county had the duty (or ability) to supervise the former inmate. Plaintiffs contend that the jail could have prevented the inmate from committing crimes after he was released, but a jail's duty to supervise and control inmates during incarceration does not include a general duty to somehow prevent inmates from committing crimes after they are lawfully released from incarceration.

A later passage in the Majority Opinion explains that: "a jail's duty in a take charge relationship is limited to controlling violent inmates during incarceration, not preventing all foreseeable future crimes."

The Majority Opinion is authored by Justice Owens and is signed by Chief Justice Madsen and Justices Fairhurst, Wiggins and Gordon McCloud. The Dissenting Opinion is authored by Justice Yu and is signed by Justices Johnson, Stephens and González.

Friend-of-the-court briefs were filed on both sides in the case. The ACLU sided with the government in this case, arguing that:

> The plaintiffs' position that a county jail must "take charge" of inmates scheduled for release who are not subject to civil involuntary commitment creates too great a risk of a regimen of preventive detention and compelled medication. Such a proposal cannot be reconciled with basic rights guaranteed by the state and federal constitutions.

Result: Reversal of Court of Appeals decision and affirmance of Snohomish County Superior Court order granting summary judgment to Snohomish County and Skagit County in the case; remanded to Superior Court for trial.

LEGAL UPDATE EDITORIAL NOTE REGARDING THE LAW ENFORCMENT DIGEST ENTRY ADDRESSING THIS DECISION: The Binschus decision is addressed in the September 2016 LED at page 6.

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WASHINGTON STATE COURT OF APPEALS

VEHICLE FRISK JUSTIFICATION: OFFICER'S PROTECTIVE SEARCH OF ARRESTEE'S VEHICLE FOR FIREARMS THAT OFFICER KNEW TO BE IN VEHICLE HELD NOT JUSTIFIED UNDER TERRY OR UNDER EXIGENT CIRCUMSTANCES EXCEPTION BECAUSE THE CIRCUMSTANCES AT THE RECREATIONAL FISHING PARKING AREA DID NOT JUSTIFY THE OFFICER'S PERCEPTION OF DANGER

State v. Cruz, ___ Wn. App. ___, 2016 WL 5342412 (Div. III, Sept. 22, 2016) (revised opinion)

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

> Late one August morning in 2012, [a] Washington Department of Fish and Wildlife officer was alone on patrol . . . . From his vantage point on a cliff above the river, [the officer] was able to watch the activities of fishermen below. According to [the officer], there was no cellular service and only a "sketchy" radio signal at a parking lot where most of the fishermen would leave their vehicles or down on the river itself.
>
> Eric Cruz and a male companion were fishing on the river that morning and caught [the officer's] eye. After about a half hour, [the officer] saw Mr. Cruz illegally snag a Chinook salmon and pull it from the river. The offense was a gross misdemeanor. [The officer] got into his car and drove down to the parking area to make contact with Mr. Cruz.
>
> [The officer] found Mr. Cruz by himself, standing near the open door of his truck. He was filling out his catch record card. After a brief interaction, [the officer] arrested Mr. Cruz for illegal snagging and placed him in handcuffs. Mr. Cruz was cooperative. [The officer] performed a search incident to arrest of Mr. Cruz's person. While doing so, he asked Mr. Cruz if he had any firearms on him. Mr. Cruz volunteered that he had firearms in his truck. There was no discussion of what type of firearms were in the truck or whether they were loaded.
>
> [The officer] placed Mr. Cruz in his patrol vehicle. As he did so, Mr. Cruz's companion appeared, curious about what was happening. Mr. Cruz's companion was told to stay away from the truck, to which he complied. At no point did [the officer] observe Mr. Cruz's companion do anything illegal or engage in any suspicious or obstructive conduct.
>
> With Mr. Cruz secure in the police vehicle and his companion 15-20 feet away, [the officer] entered Mr. Cruz's truck and removed three firearms. According to [the officer], he wanted to secure the firearms for the duration of his contact with Mr. Cruz, as he intended to release Mr. Cruz with only a citation. After placing the firearms in his patrol vehicle, [the officer] ran Mr. Cruz's name through dispatch. [The officer] learned Mr. Cruz had a prior felony conviction and was ineligible to possess firearms. [The officer] then retained the firearms as evidence.
>
> The State charged Mr. Cruz with three counts of unlawful possession of a firearm in the second degree. The superior court granted Mr. Cruz's motion to suppress evidence of the firearms and dismissed the charges against Mr. Cruz without prejudice.

[Footnote explaining the meaning of "snagging" omitted]

<u>ISSUES AND RULINGS</u>: (1) An officer working alone arrested Mr. Cruz for illegal snagging of a fish, a gross misdemeanor. The arrest took place at a parking area near the river where Mr. Cruz and his companion had been fishing. Mr. Cruz admitted to the officer that he had firearms in his truck. Mr. Cruz and his companion were cooperative and compliant, and they did not act evasively or present any antagonism to the officer. The presence of firearms in the truck did not seem unusual given the circumstances. Under these circumstances, was a search of the truck to find and secure the firearms justified as a protective search under <u>Terry v. Ohio</u>? (<u>ANSWER BY COURT OF APPEALS</u>: No, rules a unanimous 3-judge panel)

(2) Under the circumstances outlined for Issue 1, was a search of the truck to find and secure the firearms justified under the exigent circumstances exception to the warrant requirement of the Washington and federal constitutions? (ANSWER BY COURT OF APPEALS: No, rules a unanimous 3-judge panel)

Result: Affirmance of Okanogan County Superior Court order suppressing the seized firearms and dismissing the charges of unlawful possession of firearms against Eric Daniel Cruz.

ANALYSIS: (Excerpted from Court of Appeals opinion)

Terry Search

> A frisk [under Terry v. Ohio, 392 U.S. 1 (1968)] extends to a car if there is a reasonable suspicion that the suspect is dangerous and may gain access to a weapon in the vehicle. . . . . Both components must be present. Neither the plain wording of Terry nor our case law permit reducing the standard to a disjunctive test. If either the suspect cannot access a weapon or there is no suspicion of dangerousness, a warrantless vehicle search violates Terry.
>
> [Court's footnote: *See State v. Russell, 180 Wn.2d 860, 868, 330 P.3d 151 (2014)* ***Sept 14 LED:07*** *("stop was justified because [the officer] could point to specific and articulable facts that supported a belief that [defendant] could be armed and dangerous") (emphasis added);* State v. Collins*, 121 Wn.2d 168 (1993) (protective frisk of driver was lawful as the officer had a reasonable suspicion the driver was armed and dangerous where there was a reliable informant tip the driver had a gun, the stop occurred early in the morning, and the officer previously arrested the driver for a felony);* State v. Horrace*, 144 Wn.2d 386 (2001)* ***Oct 01 LED:05*** *(frisk of vehicle passenger supported by specific and articulable facts giving rise to an objectively reasonable belief that passenger could be armed and dangerous where trooper saw driver lean in passenger's direction, passenger was in close proximity to driver's movements, passenger was wearing a bulky jacket in which driver could have concealed a weapon, and the stop occurred in a relatively isolated spot in the middle of night);* State v. Kennedy*, 107 Wn.2d 1 (1986) (where driver made suspicious furtive movements and passenger remained in the car, officer's Terry search of car justified); State v. Larson, 88 Wn. App. 849 (1997)* ***Feb 98 LED:05*** *(driver's furtive movements combined with the officer's knowledge he would have to let driver back into his car justified Terry frisk of car).*]
>
> [The officer's] search fails under Terry because, despite possible access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous. The right to bear arms is constitutionally protected. Standing alone, the mere fact an individual possesses firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle Terry frisk is not warranted based simply on the presence of firearms.
>
> There was no indication here of dangerousness. At the time of the search, Mr. Cruz and his companion had just spent the morning fishing. The fact that there were firearms present in this recreational setting was neither surprising nor

alarming. Mr. Cruz's law violation did not create any specific safety concerns. He was not under investigation for a crime of violence or other felonious conduct. He was in the process of being cited for a misdemeanor fishing violation. Nothing about these general circumstances suggested a risk to officer or public safety.

The individual circumstances of Mr. Cruz and his companion were likewise benign. Neither man had engaged in any suspicious conduct or made any concerning or furtive movements. Both fully complied with [the officer's] instructions. When asked by the State how he felt at the time of the search, [the officer] agreed he "didn't feel that [Mr. Cruz] was a danger." These circumstances support the superior court's finding the search was improper.

[Court's footnote: *Although Officer McCormick's subjective impressions are not dispositive, they are relevant to the court's objective assessment of how a reasonable officer would assess the situation. See Ornelas v. United States, 517 U.S. 690, 699 (1996) (in making determinations of reasonable suspicion and probable cause, "due weight" should be given to inferences drawn by "local law enforcement officers").*]

The authorities cited by the State are inapposite. Both State v. Kennedy, 107 Wn.2d 1 (1986), and State v. Larson, 88 Wn. App. 849 (1997) **Feb 98 LED:05**, involved vehicle occupants who had made suspicious, furtive movements. Such movements typically provide strong justification for a protective search. . . . State v. Chang, 147 Wn. App. 490 (2008) **Jan 09 LED:03** involved an individual known to possess a concealed handgun while parked in the lot of a bank as his companion committed a crime inside. This was not an innocuous circumstance. In the context of an ongoing felony investigation, the presence of firearms justifies protective action under Terry.

As recognized in the authorities cited by the State, once a firearm is present, not much more is needed to justify a frisk. Had Mr. Cruz or his companion been noncompliant, had they appeared evasive or antagonistic, or had the presence of firearms seemed unusual given the circumstances or time of day, the balance likely would have tipped to favor a protective search. . . . But under the facts found by the superior court, Mr. Cruz and his companion were completely cooperative. They posed no more threat than the average sportsmen. To allow a search in this case would mean anyone transporting firearms in a vehicle for sporting purposes would be vulnerable to a law enforcement search. That level of intrusion is incompatible with our constitutional principles.

Exigent Circumstances

The State also attempts to justify [the officer's] search under the exigent circumstances exception to the warrant requirement. This exception applies where obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence. . . . Exigent circumstances involve a true emergency. . . . Danger to an arresting officer is a potentially exigent circumstance. . . .

The State fails to establish exigent circumstances for the same reasons it cannot

establish dangerousness under Terry. Exigent circumstances are ones presenting a true potential for an emergency or destruction of evidence. No such circumstances were present here. . . . The hypothetical concern that Mr. Cruz or his companion could have posed a threat if they were dangerous applies to every individual contacted by law enforcement. We agree with the superior court that such generalized concerns are insufficient to permit intruding on an individual's constitutionally protected private space.

Conclusion

Once [the officer] learned about the presence of firearms, it was appropriate for him to proceed with caution. But this did not justify a warrantless search. Other less intrusive options were available. [The officer] could have asked Mr. Cruz for consent to retrieve and secure the firearms. Alternatively, he may have been able to access Mr. Cruz's keys and lock the vehicle during the citation process. Had [the officer] believed Mr. Cruz's companion was too close to the truck, he could have instructed him to stand further away and keep his hands visible. If, during any of these interactions, [the officer] developed a suspicion that Mr. Cruz and his companion were being evasive or non-compliant, then he would have had grounds to go further and conduct a protective search.

Our country's freedoms undoubtedly make police work more difficult. Over the years, courts have accommodated law enforcement's safety and investigative needs by crafting several exceptions to the constitution's warrant requirement. However, none of these exceptions extends to generalized safety concerns applicable to interactions with large sectors of the public. Because [the officer's] safety concerns were too general, the order of suppression must be affirmed.

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

LEGAL UPDATE EDITORIAL NOTE REGARDING THE LAW ENFORCMENT DIGEST ENTRY ADDRESSING THIS DECISION: The Cruz decision is addressed in the September 2016 LED at pages 7-9.

RETAIL THEFT WITH SPECIAL CIRCUMSTANCES: ARRANGEMENT OF MAGNETS ON KEY THAT WAS USED TO UNLOCK WAL-MART SECURITY DEVICES CONSTITUTED "AN ARTICLE, IMPLEMENT OR DEVICE DESIGNED TO OVERCOME SECURITY SYSTEMS" WITHIN THE MEANING OF RCW 9A.56.360(1)(B)

State v. Wade, ___ Wn. App. ___ , 2016 WL ___ (Div. III, September 27, 2016

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

Wade was arrested after a customer assisted store security in stopping Wade's flight from a Spokane Valley Wal-Mart store. An investigation uncovered nine empty security devices in the men's room garbage can after Mr. Wade had entered the room. Nine plastic-wrapped video games were discovered in Mr. Wade's backpack, along with charging cords, a bolt cutter, a pry bar, and a screwdriver. In his right pocket, police discovered 35 powerful small magnets, a thin key, and a tumbler key. His left pocket contained a knife and box cutters.

> The magnets were arranged in three columns along the key, a configuration that allowed a person to open the magnetic lock on the security cases used to protect the video games by sliding the magnet group along the top of the case. The prosecutor filed a felony charge of third degree retail theft with special circumstances, alleging the crime was committed with an "item, article, implement, or device designed to overcome security systems." The matter ultimately proceeded to jury trial.
>
> The magnets, keys, and one of the security devices recovered from the restroom were admitted into evidence. Trial testimony established that a device containing a magnet was used by store employees to open the security cases that held the video games. At the conclusion of the State's case, the defense moved to dismiss the charge, arguing that magnets were a common item and not specifically manufactured to defeat security devices. After taking a recess to review case law, the court concluded that the configuration of the magnets on the key could be considered a device and that the matter was appropriately a question for the jury. . . .
>
> The parties respectively argued the matter to the jury on the basis that the arrangement of magnets was or was not a device designed to overcome a security system. The jury convicted Mr. Wade as charged.

ISSUE AND RULING: Did the arrangement of magnets on the key the defendant used to unlock Wal-Mart security devices constitute "an article, implement or device designed to overcome security systems" within the meaning of RCW 9A.56.360(1)(b)? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Spokane County Superior Court conviction of Casey Wade for felony third degree retail theft with the special circumstances that the crime was committed with an "item, article, implement, or device designed to overcome security systems."

ANALYSIS: (Excerpted from Court of Appeals opinion)

> As charged in this case, the prosecutor had to establish the defendant committed third degree theft while in possession of an item, article, implement, or device designed to overcome security systems including, but not limited to, lined bags or tag removers. RCW 9A.56.360(1)(b), (4). The only question presented by this appeal is whether the magnet group constituted an "article, implement, or device." The statute does not further define this phrase, but that language was at issue in State v. Larson, 184 Wn.2d 843 (2015) **Dec 15 LED:02**. Larson was released after trial in this case and both parties rely on it in their briefing to this court.
>
> [In Larson], the defendant had used wire cutters to remove a security tag from a pair of shoes at a store in Bellingham. . . . Resolving a split between Division One and Division Two [of the Washington Court of Appeals], the court determined that an ordinary item did not constitute a "device designed to overcome security systems." . . . .Noting that the word "designed" was not synonymous with "used," the court focused on the common usage of the object. The statute targeted items that were specifically created to overcome security devices such as tag

removers and lined bags. It did not apply to ordinary tools of general usage. The conviction was reversed. The court reiterated its holding:

> We hold that "designed to overcome security systems" for the purposes of retail theft with "extenuating" circumstances under RCW 9A.56.360(1)(b) is limited to those items, articles, implements, or devices created – whether by the defendant or manufacturer – with the specialized purpose of overcoming security systems. Ordinary tools, such as pliers or the wire cutters used by Larson, do not fall within the scope of RCW 9A.56.360(1)(b).

Likening his situation to that in Larson, Mr. Wade argues that magnets are a common device that are not manufactured specifically to overcome security systems. While we agree with that general observation, Mr. Wade was not prosecuted for possessing a single magnet strong enough on its own to open the security box. Instead, he possessed 35 magnets, arranged in three columns roughly the length of the metal in the security box, and joined to a key, making it easy to use the magnets in concert to slide open the security box. The jury was permitted to infer that the defendant assembled the magnets in this grouping in order to defeat a security system.

LEGAL UPDATE EDITORIAL NOTE REGARDING THE LAW ENFORCMENT DIGEST ENTRY ADDRESSING THIS DECISION: The Wade decision is addressed in the September 2016 LED at page 7-9.

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BRIEF NOTE FROM THE WASHINGTON STATE COURT OF APPEALS

COMPLEX QUESTION OF WHAT CONSTITUTES A "PREMISES" UNDER CHAPTER 9A.52 RCW EXPLORED; COURT OF APPEALS HOLDS THAT A VEHICLE IS A "PREMISES" SUCH THAT THE SECOND DEGREE CRIMINAL TRESPASS STATUTE APPLIES TO VEHICLE – In State v. Joseph, ___ Wn. App. ___ , 2016 WL ___ (Div. III, September 1, 2016), a panel of Division Three of the Court of Appeals rules that a vehicle is a "premises" within the meaning of the trespass statutes in chapter 9A.52 RCW. Therefore, it was not error for the trial court to instruct a jury that the defendant could be found guilty of second degree criminal trespass as a lesser included offense of second degree vehicle prowling. The Joseph Court's opinion engages in an extended discussion of the complex case law that has addressed the meaning of "premises" and "building" in the trespass and burglary provisions of chapter 9A.52 RCW.

Result: Affirmance of Kittitas County Superior Court conviction of Anthony A. Joseph for second degree criminal trespass (Mr. Joseph was also convicted of third degree criminal assault, but he did not appeal from that conviction).

LEGAL UPDATE EDITORIAL NOTE REGARDING THE LAW ENFORCMENT DIGEST ENTRY ADDRESSING THIS DECISION: The Joseph decision is addressed in the September 2016 LED at page 7.

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NOTICE: 9TH CIRCUIT TO REHEAR DOG BITE CIVIL RIGHTS ACT LAWSUIT IN LOWRY V. CITY OF SAN DIEGO

Update on Lowry v. City of San Diego, 818 F.3d 840 (9th Cir., April 1, 2016) (addressed in the April Legal Update for Washington Law Enforcement and in the April 2016 LED). By order dated September 16, 2016, the Ninth Circuit issued the following order that requires review by an 11-judge Ninth Circuit panel in Lowry:

> Upon the vote of a majority of non-recused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35-3. The three-judge panel opinion shall not be cited as precedent by or to any court of the Ninth Circuit.

In the three-judge panel's April 1, 2016 decision in Lowry, the panel addressed a Civil Rights Act lawsuit involving an office worker who got drunk, accidentally set off burglar alarm after hours, and then fell asleep so soundly in her office that she did not hear a K-9 officer's warnings. A 2-1 majority concluded in the April 1, 2016 decision that a reasonable jury could find the police agency liable based in part on agency's use of "bite and hold" police dogs. Now, an 11-judge panel will reconsider the case and issue a new opinion.

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NOTICE: NEW FEDERAL REGULATIONS ON DRONES ARE NOW IN EFFECT

On August 29, 2016, new Federal Aviation Administration (FAA) drone regulations went into effect governing operation of certain "small unmanned aircraft systems" (sUAS) operated for commercial purposes ("sUAS" is what the FAA calls drones weighing less than 55 pounds). 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 September 8, 2016 blog entry by MRSC staff legal consultant, Robert Sepler. The entry is titled "New Federal Rules Governing Commercial Drones."

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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.

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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].

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