"This is a great legal analysis". Mark Vovos, Attorney, Spokane, WA

SUPERIOR COURT, CLARK COUNTY, STATE OF WASHINGTON

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| State of Washington,<br>Plaintiff,<br>v.<br>J C,<br>Defendant. | No.<br><br><br>Mr. C's Motion to Dismiss |

Organization of Motion

This Motion first offers a discussion of CA v. Byers which addressed a hit and run statute from California in 1971. Issues include its impact on the right to avoid self-incrimination and whether this Court must follow CA v. Byers.

Mr. C's motion to dismiss is next, which reviews RCW 46.52.020 and its negative effect on the 5th Amendment and Art. 1, sec. 9, Washington constitution.

Mr. C suggests that this Court should use strict scrutiny in its examination of 46.52.020, considering the fractured result of the Byers Plurality and Byers' failure to consider the pervasive impact of police deception on the public's right to avoid self-incrimination.

This Motion moves the Court to Dismiss the charge of Hit and Run Injury because RCW 46.52.020 is unconstitutional as written and applied.



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## CA v. Byers

CA v. Byers, 402 U.S. 424 (1971) a plurality opinion, attempted to resolve an issue similar to Mr. Crane's situation. St. v. Engstrom, a rubber stamped opinion on the minor issue relevant to this matter within Engstrom, 79 Wn.2d 469 (1971) soon followed.

43 years late, Mr. C suggests it is time for a new look at the hit and run statute in Washington state.

The most important factor today is that law enforcement is judicially allowed to be deceptive in its contact with suspects.

The Byers Court holding, as included in St. v. Engstrom included comments about a California hit and run statute that was "essentially regulatory and noncriminal, since there is a strong public policy for disclosure, since the burden of disclosure is upon the public at large rather than a 'highly selective group inherently suspect of criminal activities,' and since the possibility of incrimination is not substantial, the statute does not violate the privilege against self-incrimination. The Supreme Court further held that compliance with the 'hit and run' statute does not provide the state with such evidence of a testimonial or communicative nature within the meaning of the constitution." Engstrom at 469. Mr. C will contest each of these claims.

## I. Issue

The Right to avoid self-incrimination is thwarted by law enforcement's ability to deceive suspects.

## II. Argument

**Deception**

"The use of deception by a police officer does not necessarily affect the voluntariness of



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a consent to search." State v. McCrorey, 70 Wn. App. 103, 112 (Div. I 1993).

The judicial authorization of deception deflates the Byers' Court's holding. "Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential, the judicial scrutiny is invariably a close one." Byers at 427. Byers' was a plurality decision, not a Majority as claimed within the Engstrom decision. Byers should have considered police deception. The CA Supreme Court holding might have been upheld after such an analysis.

The Dissent in Byers found many flaws in the Plurality's reasoning, but the flaw presented today was not foreseen by the Plurality or Dissent.

Law Enforcement's judicial sanction to deceive people perceived to be suspects, e.g., a driver in an alleged hit and run event, upsets the entire structure of Byers.

**Court's Concerns**

"In all of these cases, the disclosures condemned were only those extracted from a "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes" -- not in "an essentially noncriminal and regulatory area of inquiry." *E.g., Albertson v. SACB,* 382 U.S. at 382 U. S. 79; *Marchetti v. United States,* 390 U.S. at 390 U. S. 47." Byers at 430.

The reasonable response is that as the Byers' Dissent pointed out, the Plurality's examples it presented were actually not a "highly selective group, but that they were members of the public. The Claim that "the privilege was applied only in "an area permeated with criminal statutes", is inaccurate as the CA Code was 4 volumes long and full of criminal statutes. The proposition that the CA hit and run statute was "in "an essentially noncriminal and regulatory area of inquiry", Byers at 430, is at least now wrong because as we see in Washington state, one



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cannot argue that we have "an essentially noncriminal and regulatory area of inquiry" when we are faced with police who will lie to us. It is an artificial legal proposition to say that a member of the public who involuntarily self-reports on himself, violating his right to avoid self-incrimination, is in an "essentially noncriminal and regulatory area of inquiry" when we know the police shall lie to him to further their infraction, misdemeanor and felony investigative goals.

The Byers Court's comment at p. 430 that there is a strong public policy for disclosure does not mean there is a strong public policy to ignore our fundamental right to avoid self-incrimination.

This police deception explodes the concept that RCW 46.52.020 is an "essentially noncriminal and regulatory area of inquiry".

Byers went to proclaim "Even if we were to view the statutory reporting requirement as incriminating in the traditional sense, in our view, it would be the "extravagant" extension of the privilege Justice Holmes warned against to hold that it is testimonial in the Fifth Amendment sense. Compliance with § 20002(a)(1) requires two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address. The act of stopping is no more testimonial -- indeed less so, in some respects -- than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or Page 402 U. S. 432 blood." Byers at 431-31.

Byers' dicta here is no longer rational. The concept behind "The act of stopping is no more testimonial -- indeed less so, in some respects -- than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, or to give samples of handwriting, fingerprints, or blood" no longer presents our reality. Police are allowed to deceive the person.



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Any person who merely stands in a lineup, say prescribed words, give samples of handwriting, fingerprints or blood, will provide no more than his appearance, his blood, his voice.

**Today**

The person today who presents himself to law enforcement after a motor vehicle accident will be deceived into incriminating himself, a clear violation of his rights as noted below.

"Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." Byers at 432.

While this supposed mere disclosure of name and address may once have arguably solely been an implementation of motor vehicle regulation; with police deception, it is not now.

Most importantly, "There will undoubtedly be other statutory schemes utilizing compelled self-reporting and implicating both permissible state objectives and the values of the Fifth Amendment which will render this determination more difficult to make. A determination of the status of those regulatory schemes must, of course, await a proper case."

J. Harlan, Concurring, Byers at 458. This is that case.

III. Issue

A Washington Court need not follow CA v Byers.

This Court, in addressing the concerns listed by Mr. C, need not follow the decision in Byers.

Byers is a plurality with no guiding single rationale and no clear decision. The CA statute is not identical to RCW 46.52.020.

Byers ignored the fact that police routinely deceive suspects. This is significant because it undercuts so many of Byers' rationales for its decision. To suggest that RCW 46.52.02 is



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essentially regulatory and noncriminal is foolish, when police will deceive the suspect while fashioning a noose of vehicular assault around the suspect's neck. Byers' suggestion that the "burden of disclosure is upon the public at large rather than a 'highly selective group inherently suspect of criminal activities" is artificial. The Byers Court created this so-called highly selective group out of thin air.

To suggest that the possibility of incrimination is not substantial, and the statute does not violate the privilege against self-incrimination is foolish. This Court is not required to follow this backward decision that does not squarely address today's facts, rights and law.

This Court is free to fashion its own decision, based on the law and facts.

I. 46.52.020

Mr. C is charged with RCW 46.52.020 H & R Injury mva and DWS 3. He seeks dismissal of the H & R charge. Trial is set for 8-25-14.

II. Motion

Mr. C moves the Court to Dismiss the H & R charge.

III. Issue

Must RCW 46.52.020 be reviewed under Strict Scrutiny?

IV. Argument

**Duty to Report**

RCW 46.52.020 imposes a legal duty on a citizen who may be involved in a motor vehicle accident to inform on himself in violation of Washington Const. Art. 1, Sec. 9 and the 5th


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Amendment to the U.S. Constitution. This legislatively imposed duty is in conflict with our Constitutional rights and must not survive a motion to dismiss. The pertinent portion of Washington's provision states: "No person shall be compelled in any criminal case to give evidence against himself[.]" Const. art. 1, § 9. The Fifth Amendment reads that no person "shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. 5. St. v. Moore, 79 Wn.2d 51 (1971) notes the constitutions provide the same level of protection.

Our constitutional right to avoid self-incrimination is directly adverse to this state legal duty to obey 46.52.020. Mr. C must legally obey the statute, and the statute is presumed constitutional as written. However, Mr. C and all others in this class of citizens have the right to prevent law enforcement from going beyond our fundamental rights. In the setting created by 46.52.020, Mr. C would not be in a custodial situation and Miranda warnings would not be required. There are then no protections within 46.52.020 to alert citizens that they have a constitutional right to avoid self-incrimination.

There is the legal fiction that all citizens know the law and are responsible to obey it, because to allow a suspect to claim ignorance of a law and therefore innocence is unworkable. It is a fiction because members of the public do not know our laws with any particularity. It is well known that many lawyers do not practice in more than one area of law because of the complexities in each practice area. There are no more jack of all trade attorneys.

However, 46.52.020 extends beyond this fiction. This insufficient statute functions under the "all citizens know the law and are responsible to obey it" dictum and, it also fails to alert the public that they possess a constitutional right to avoid self-incrimination. This failure dooms the statute. It is unconstitutional to legally require a person to incriminate himself in a criminal matter.

The statute violates the 5th Amendment and Art. 1, sec. 9 because it does not limit law enforcement's inquiry, and it fails to alert the public that it possesses a constitutional right in



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opposition to 46.52.020. Mr. Crane will involuntarily and unknowingly assist the police in their criminal investigation for Vehicular Assault and H & R Injury by obeying 46.52.020.

Law Enforcement, by asking defendant the initial questions in 46.52.020, will put the defendant in a position where incriminating evidence will be obtained regardless of the responses. Any responses by Mr. C automatically incriminate him within our adversarial system of justice, as links in a chain of evidence.

It is understood Law Enforcement will require self-incrimination within its use of 46.52.020 unless limited specifically by a new 46.52.020. 46.52.020 without precise and specific limits that protect a person's right to avoid self-incrimination violates the 5th Amendment and Art. 1, sec. 9.

**Strict Scrutiny**

State v. Sieyes, 168 Wn.2d 276 (2010), a Second Amendment case, provides this Court with the means to analyze the legal conflict presented by Mr. Crane.

"¶ 33 Sieyes asks us to subject RCW 9.41.040(2)(a)(iii) to strict scrutiny, which would require determining whether the statute is narrowly tailored to achieve a compelling governmental interest. [18] Although the Supreme Court has held regulations infringing on fundamental rights to strict scrutiny, (District of Columbia v.) Heller explicitly " declin[es] to establish a level of scrutiny for evaluating Second Amendment restrictions," 128 S.Ct. at 2821." St v Sieyes, 168 Wn.2d 276, 294 (2010). The germane point offered here is that a statute that infringes on a fundamental (constitutional) right is subject to strict scrutiny.

"A law will pass the most intensive level of scrutiny, "strict scrutiny," if necessary to achieve a compelling government purpose-proof the law is the least restrictive means of achieving the purpose. See, e.g., Johnson v. California, 543 U.S. 499, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

St v Sieyes, 168 Wn.2d 276, 316 (2010).



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If one assumes for this argument that protecting the injured public as a result of a motor vehicle accident is a compelling state interest, then 46.52.020 is required to be the least restrictive means to achieve its purpose.

46.52.020 does not offer the least restrictive means to achieve the purpose implied within it, which appears to be to protect the injured and to obtain the driver's identity and information. There must be a specific and limiting provision added to 46.52.020 that requires law enforcement to avoid violation of a person's right to avoid self-incrimination, and that alerts the public that police questioning involves self-incrimination.

B. 46.52.020 as implemented violates the WA and U.S. Constitutions.

In general, the statute imposes a duty on a driver to provide his identity and insurance information to law enforcement in a situation, like is presented here, when the injured party is unable to accept the information. Under (7), the driver is to contact law enforcement to give information required in (3).

In a practical setting this statutorily imposed set of duties is in direct conflict with the 5th Amendment and Art. 1, Sec. 9. See Attached.

5th Amendment: No person… "shall be compelled in any criminal case to be a witness against himself."

WA Art. 1, sec. 9: No person shall be compelled in any criminal case to give evidence against himself…

**Police Report**

In a review of the police report provided to the defense in this matter, it is apparent the police investigation not only sought the name, driver's license and insurance information of the alleged driver Mr. C and circumstances of the accident, but the police also sought



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information about the driver's possible intoxication and possible reckless driving. These two factors are bases to consider charging Vehicular Assault. At the end of the investigation, law enforcement failed to accumulate sufficient facts to support Vehicular Assault. The state settled on the H & R injury charge in its Information. Within our facts, obedience to the legal duty to give personal information is an act that gives evidence against Mr. C. It is a criminal case as the police immediately made it so.

**Main Defect**

The main defect in 46.52.020 is its obvious ability to admit self-incriminating statements that the 5th Amendment and Art. 1, sec. 9 mean to exclude.

C. Review used in Byers

The Byers Court Plurality did not use Strict Scrutiny to address its concerns in the California matter.

Chief Justice Burger, joined by Stewart, White, and Blackmun chose to balance the public need, on the one hand, and the individual claim to constitutional protections, on the other. Byers at 424. The justices looked at the income tax, communist party registration, the federal gambling tax and firearm registration cases and the justices compared the "highly selective group inherently suspect of criminal activities" and the privilege was applied only in "an area permeated with criminal statutes" -- not in "an essentially noncriminal and regulatory area of inquiry against the mere possibility of prosecution in a hit and run situation. Byers at 424.

The Plurality compared the competing interests and ignored the precedent that strict scrutiny should be used when a state regulation restricts a constitutional right, as noted in Sieyes.



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Justice Harlan simply wrote that "Considering the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the nature of the disclosures involved, I cannot say that the purposes of the Fifth Amendment warrant imposition of a use restriction as a condition on the enforcement of this statute." Byers at 458.

Mr. C's argument follows closely along with the Dissent in Byers.

Justice Black, with whom Justice Douglas and Justice Brennan join, dissenting wrote that

"Since the days of Chief Justice John Marshall this Court has been steadfastly committed to the principle that the Fifth Amendment's prohibition against compulsory self-incrimination forbids the Federal Government to compel a person to supply information which can be used as a "link in the chain of testimony" needed to prosecute him for a crime." Byers at 459.

"The plurality opinion, if agreed to by a majority of the Court, would practically wipe out the Fifth Amendment's protection against compelled self-incrimination. This protective constitutional safeguard against arbitrary government was first most clearly declared by Chief Justice Marshall in the trial of Aaron Burr in 1807. *United States v. Burr, supra.* In erasing this principle from the Constitution the plurality opinion retreats from a cherished guarantee of liberty fashioned by James Madison and the other founders of what they proudly proclaimed to be our free government. One need only read with care the past cases cited in today's opinions to understand the shrinking process to which the Court today subjects a vital safeguard of our Bill of Rights. Byers at 459.

"The plurality opinion, *ante* at 402 U. S. 431, appears to suggest that those previous cases



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are not controlling because respondent Byers would not have subjected himself to a "substantial risk of self-incrimination" by stopping after the accident and providing his name and address as required by California law." Byers at 460.

The plurality opinion also seeks to distinguish this case from our previous decisions on the ground that § 20002(a)(1) requires disclosure in an area not "permeated with criminal statutes" and because it is not aimed at a "highly selective group inherently suspect of criminal activities." *Ante* at 402 U. S. 430. Of course, these suggestions ignore the fact that *this particular respondent* would have run a serious risk of self-incrimination by complying with the disclosure statute. Furthermore, it is hardly accurate to suggest that the activity of driving an automobile in California is not "an area permeated with criminal statutes." *Ibid.* And it is unhelpful to say the statute is not aimed at an "inherently suspect" group because it applies to "all persons who drive automobiles in California." *Ibid.* The compelled disclosure is required of all persons who drive automobiles in California *who are involved in accidents causing property damage.* [Footnote 3/2] If this group is not "suspect" of illegal activities, it is difficult to find such a group." Byers at 460.

"This suggestion can hardly be taken seriously. A California driver involved in an accident causing property damage is in fact, very likely to have violated one of the hundreds of state criminal statutes regulating automobiles which constitute most of two volumes of the California Code. [Footnote 3/1] More important, the particular facts of this case demonstrate that Byers would have subjected himself to a "substantial risk of self-incrimination," *ante* at 402 U. S. 431, had he given his name and address at the scene of the accident. He has now been charged not only with failing to give his name, but also with passing without maintaining a safe distance

as prohibited by California Vehicle Code § 21750 (Supp. 1971). It is stipulated that the allegedly improper passing caused the accident from which Byers left without stating his name and address. In a prosecution under § 21750, the State will be required to prove that Byers was the driver who passed without maintaining a safe distance. Thus, if Byers had stopped and provided his name and address as the driver involved in the accident, the State could have used that information to P 461 establish an essential element of the crime under § 21750. It seems absolutely **fanciful to suggest** (bold added) that he would not have faced a "substantial risk of self-incrimination," *ante* at 402 U. S. 431, by complying with the disclosure statute.

The plurality opinion also seeks to distinguish this case from our previous decisions on the ground that § 20002(a)(1) requires disclosure in an area not "permeated with criminal statutes" and because it is not aimed at a "highly selective group inherently suspect of criminal activities." *Ante* at 402 U. S. 430. Of course, these suggestions ignore the fact that *this particular respondent* would have run a serious risk of self-incrimination by complying with the disclosure statute. Furthermore, it is hardly accurate to suggest that the activity of driving an automobile in California is not "an area permeated with criminal statutes." *Ibid.* And it is unhelpful to say the statute is not aimed at an "inherently suspect" group because it applies to "all persons who drive automobiles in California." *Ibid.* The compelled disclosure is required of all persons who drive automobiles in California *who are involved in accidents causing property damage.* [Footnote 3/2] If this group is not "suspect" of illegal activities, it is difficult to find such a group. Byers at 462.

"I also find unacceptable the alternative holding that the California statute is valid because the disclosures it requires are not "testimonial" (whatever that term may mean). *Ante* at

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402 U. S. 431. Even assuming that the Fifth Amendment prohibits the State only from compelling a man to produce "testimonial" evidence against himself, the California requirement here is still unconstitutional. What evidence can possibly be more "testimonial" than a man's own statement that he is a person who has just been involved in an automobile accident inflicting property P 463 damage?" Byers at 463.

The main complaint by Mr. C as mirrored in the Byers Dissent is the failure to follow the prohibition against self-incrimination. The Byers Plurality wipes out the content of our 5th amend. as created by our founding fathers.

**Foolish Notion**

In reality the claim in the Plurality that one does not subject himself to a substantial risk of self-incrimination by providing his name and address is a foolish notion. Justice Black could not take the Plurality seriously. The statutes that are violated in a hit and run incident are traffic infraction violations and felonies such as Vehicular Assault and Hit and Run Injury. RCW 46.52.020's requirements would provide essential elements of the charges. One knows that assuming the responsibility to drive a car and getting into an accident involves potential property and injury damages.

Finally, as Justice Black notes, what can be more testimonial that a man's own statements in which he incriminates himself after becoming involved in property damage or injury to another?

Mr. C argues that strict scrutiny is appropriate because 46.52.020 is a state regulation infringing on a fundamental right. "Sieyes asks us to subject RCW 9.41.040(2)(a)(iii) to strict scrutiny, which would require determining whether the statute is narrowly tailored



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to achieve a compelling governmental interest. [18] Although the Supreme Court has **held regulations infringing on fundamental rights to strict scrutiny**…" (bold added).

St v Sieyes, 168 Wn.2d 276, 316 (2010).

Strict scrutiny is the appropriate level of review because the state statute infringes on the fundamental right to avoid self-incrimination.

(inserted 2-18-15: consider adding st v Hirshfelder, 170 Wn.2d 536, 550 (2010) I have not yet read it). (consider city of Redmond v. Moore, 151 wn.2d 664, 669, 2004, quote: to show stat is unconst. on its face, def must show no set of circum. Exist in which the stat as written can be const applied) I am unsure if I showed this here) (Note – in Moore, 669: to show stat is uncon as applied to future applic of the stat in a similar context.)

D. The Byers Court's Plurality

The Plurality in Byers means that there is no Majority agreement on the reasons for the Court's result. This opens up for review whether these is any single authoritative rule of law in Byers. Comparing the content of the comments of the Dissent with the Plurality, there is no single authoritative rule of law. The result is that it is impossible to avoid a collection of arbitrary rules within Byers.

One example of Byers' arbitrary rules is "The plurality seems to believe that membership in such a suspect group is somehow an indispensable foundation for any Fifth Amendment claim. *See ante* at 402 U. S. 429-431. Of course, this is not so, unless the plurality is now prepared to assume that *McCarthy v. Arndstein,* 266 U. S. 34 (1924), *Counselman v. Hitchcock,*142 U. S. 547 (1892), *Garrity v. New Jersey,* 385 U. S. 493 (1967), and *Spevack v. Klein,* 385 U. S. 511 (1967), were based, respectively, upon the unarticulated premises that bankrupts, businessmen, policemen, and lawyers are all "group[s] inherently suspect of criminal activities." Instead, in the words of the California Supreme Court,

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"in each case, the crime-directed character of the registration requirement was . . . important only insofar as it supported the claims of the specific petitioners that they faced 'substantial hazards of self-incrimination' justifying invocation of the privilege. Byers at 469.

This collection of arbitrary rules given to us by the Plurality leaves later courts with questions of clarity about how they must arrive at the result in Byers. Mr. Crane argues that strict scrutiny is appropriate because Byers is not clear on which level of review was used by each Justice, and the Justices' lack of uniformity made the matter vague and unworkable, especially now with the present element of police deception.

This use of strict scrutiny leaves present courts with the discretion and independence to create workable decisions while considering the result in Byers. This is advantageous to this present Court because there are 43 years of history since Byers with which to make a reasoned decision to support our constitutional rights. See Plurality and Precedence…, Washington Univ. L.R., Vol. 85, Issue 6 (2008) J.A. Bloom.

**Not a Binding Precedent.**

"Footnote 22. Texas v. Brown, 460 U.S. 730, 737 (1983) (plurality opinion) (holding that while one particular plurality opinion was "not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue").

The Supreme Court's most famous ruling about the precedential value of plurality opinions came in Marks v. United States, 430 U.S. 188 (1977). In Marks, the Court ruled that some portions of plurality opinions could be treated as binding.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by


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those Members who concurred in the judgments on the narrowest grounds." Id. at 193. However, both the Supreme Court as well as other courts and commentators have balked at treating the Marks approach as the default rule for interpreting pluralities. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 325 (2003) ("[The Marks] test is more easily stated than applied . . . ." (quoting Nichols v. United States, 511 U.S. 738, 745–46 (1994))); Hochschild, supra note 1, at 280– 81.

While Marks and Brown alone might not prove the middle ground of authority suggested above, these cases are evidence that the Court takes these decisions seriously and wants other courts to do the same."

Plurality and Precedence, at 1373.

There is a great deal of difference between this Court using Byers as a point of reference and binding precedent. The conclusion of the scholarly treatise listed above comes down on using Byers as a point of reference and nothing more.

E. It is understood that law enforcement is permitted to deceive suspects, and in certain cases, actively lie to them.

Appellate case quotes from St. v. McCrorey and others follow.

"The use of deception by a police officer does not necessarily affect the voluntariness of a consent to search."

State v. McCrorey, 70 Wn. App. 103, 112 (Div. I 1993).

And…

"We find the Ninth Circuit's approach in United States v. Bosse, 898 F.2d 113 (9th Cir.1990) persuasive. A government agent who gains entry by misrepresenting the scope or purpose of the investigation raises special policy considerations. It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Bosse, 898 F.2d at 115 (citing SEC v. ESM Government Securities,



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Inc., 645 F.2d 310, 316 (5th Cir.1981)). Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. Bosse, 898 F.2d at 115. See also United States v. Briley, 726 F.2d 1301 (8th Cir.1984) (similarly drawing a distinction between undercover ruse entries and cases where officers falsely state 70 Wn.App. 114 the purpose of entry). [10] We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given."

St v McCrorey, 70 Wn. App. 103, 113-114 (1993).

However, the court continued "We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given." Id at 114.

"The court held that "[W]e recognize the necessity for some undercover police activity and that in the detection of many types of crime, the government is entitled to use decoys and to conceal the identity of its agents." United States v. Wright, 641 F.2d 602, 604 (8th Cir.1981)."

St. v. Hashman, 46 Wn. App. 211, 216 (1986).

"Law enforcement conduct does not violate due process unless it is "so shocking as to violate fundamental fairness." State v. Smith, 93 Wash.2d 329, 351, 610 P.2d 869 (1980). See also United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); State v. Emerson, 10 Wash.App. 235, 517 P.2d 245 (1973). The mere fact of deceit will not defeat a prosecution, "for there are circumstances when the use of deceit is the only practicable law enforcement technique available." Russell, 411 U.S. at 436, 93 S.Ct. at 1645. It appears that the broad "fundamental fairness" guaranty is not transgressed absent



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"coercion, violence or brutality to the person." See Irvine v. California, 347 U.S. 128, 132-33, 74 S.Ct. 381, 382-83, 98 L.Ed. 561 (1954) (distinguishing Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952)). See also United States v. Kelly, 707 F.2d 1460 (D.C.Cir.1983), and cases cited therein. "The requisite level of outrageousness ... is not established merely upon a showing of obnoxious behavior or even flagrant misconduct on the part of the police ..." Kelly, at 1476."

St. v. Myers, 102 Wn.2d 548, 551 (1984).

"Washington courts have been more specific. In State v. Huckaby, 15 Wash.App. 280, 549 P.2d 35 (1976), the court stated:

The use of deception to gain entry to a premises, as long as no force is involved, has long been considered proper police practice, and in such cases law enforcement officers need not announce their identity, authority, and purpose under the "knock and announce" rule. Huckaby, at 285, 549 P.2d 35. Thus, "the ruse will be permitted but only if successful." Ellis, 21 Wash.App. at 125, 584 P.2d 428. See also State v. Hartnell, 15 Wash.App. 410, 550 P.2d 63 (1976)."

St. v. Myers, 102 Wn.2d 548, 554 (1984).

It is clear here that our courts to some degree authorize police deception. This is to be distinguished from the foolish notion that police deception may disrupt our fundamental rights.

**Knowledge**

However, within the dark concept of police deceptions, there is a light. "The basic principle of a ruse entry is also supported by expectation of privacy analysis, which holds that what a person **knowingly exposes** (bold added) to the public, even in one's home, is



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not the subject of Fourth Amendment protection. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)."

St. v. Nederland, 51 Wn. App. 304, 309 (1988).

In St. v. C, RCW 46.52.020's duty extends far beyond what a person knowingly exposes to the public. Any person in Mr. C's position is forced to obey a legal duty, one that he is not knowingly exposing to the public.

"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See Lewis v. United States, 385 U.S. 206, 210 [, 87 S.Ct. 424, 17 L.Ed.2d 312 (1966) ] ... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected....(Citation omitted.) Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967)." There is no reasonable expectation of privacy in a home where illegal business is openly conducted and, therefore, it is not entitled to Fourth Amendment protection."

St. v. Hastings, 119 Wn.2d 229, 253 (1992).

Mr. C's point here is that he is expected to legally obey 46.52.020, notwithstanding his 5th Amend. right to avoid self-incrimination. Hastings makes clear the distinction between what a person willingly makes open to the public, as opposed to what he is ordered to do in violation of his 5th amend. right to avoid self-incrimination.

St. v. McCrorey and the other cases illustrate the police power to deceive, and the Court's duty to narrowly limit that power under strict scrutiny when it conflicts with our constitutional rights. As stated above, "Members of the public should be able to safely rely on the representations of government agents acting in their official capacity." Mr. C and the public are not required to avoid self-incrimination as 46.52.020 demands.



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F. Driver must contact Police per 46.52.020(7).

This statute sets up the driver for involuntary relinquishment of his constitutional rights against self-incrimination, in a situation where there is no policeman on the scene and the injured party is not able to accept the driver's information. The statute requires a driver to involuntarily go to a police station to provide the information. RCW 46.52.020(7).

**Seamless Web**

We know that police routinely deceive suspects and they are trained to do so. We know that law enforcement in state v. Crane investigated the motor vehicle accident for Vehicular Assault and H & R Injury offenses.

We know that we have an adversarial justice system, pitting the police against the suspect. Requiring a driver to submit himself to the police interrogation in this situation is a violation of his constitutional rights against self-incrimination. To believe less is to accept that a policeman would forego his training and its adversarial nature, and placidly note whatever a suspect offers. It is more likely the Sun will rise in the west.

Since the Sun rises in the east, and police always seek incriminating information, 46.52.020 as written and implemented violates our constitutional rights against self-incrimination.

Further, no particular statute exists in a vacuum. The Court must consider the facts, our constitutional rights and our laws which are intended to be a seamless web. These factors require more than 46.52.020 offers. The reviewing Court should consider all of the facts, rights and law, not just 46.52.020 by itself.

Conclusion

Mr. C, based on the facts and law asks the Court to dismiss the H & R Injury charge.



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Respectfully submitted,

Dated this 14th day of August, 2014

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