LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: ***Thank you for your service, protection and sacrifice***

AUGUST 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: IN AN EARLIER STAGE OF THIS SAME SECTION 1983 CIVIL RIGHTS ACT CASE, THE U.S. SUPREME COURT PREVIOUSLY RULED THAT CIVIL RIGHTS ACT LIABILITY CANNOT BE ASSESSED FOR A MERE MIRANDA VIOLATION; ON REMAND, THE NINTH CIRCUIT PANEL HAS REVIVED THE PLAINTIFF'S CASE IN A 2-1 RULING THAT CONSIDERS A DIFFERENT CONSTITUTION-BASED CONFESSIONS ISSUE AND CONCLUDES THAT THE PLAINTIFF SHOULD HAVE BEEN ALLOWED TO PRESENT AN EXPERT WITNESS TO SUPPORT HIS CLAIM THAT HIS CONFESSION WAS COERCED UNDER CONSTITUTIONAL DUE PROCESS STANDARDS

In Tekoh v. Vega, ___ F.4th ___ , 2023 WL ___ (9th Cir., August 4, 2023), a Ninth Circuit panel rules, 2-1, that Plaintiff should have been allowed to present expert testimony in support of his claim that his confession in a prior criminal case was coerced. A brief summary of the August 4, 2023 Majority Opinion and Dissenting Opinion describes the Opinions as follows (note that the staff summaries are not part of the Ninth Circuit Opinions):

> On remand from the United States Supreme Court in a 42 U.S.C. § 1983 action alleging violations of plaintiff's Fifth Amendment right against compelled self-incrimination in his criminal case, the panel reversed the district court's judgment on a jury verdict in favor of defendants and remanded for a new trial on plaintiff's Fifth Amendment claim that his confession was coerced.
>
> The Supreme Court held that a violation of Miranda is not itself a violation of the Fifth Amendment, and that there was no justification for expanding Miranda to confer a right to sue under §1983. Vega v. Tekoh, 142 S. Ct. 2095 (2022). On remand, plaintiff conceded that his Miranda claim was no longer viable, but maintained that he was entitled to a new trial on his Fifth Amendment coercion claim because the district court improperly excluded the testimony of coerced confessions expert Dr. Iris Blandón-Gitlin.
>
> The [Majority Opinion holds] held that the District Court abused its discretion in excluding Dr. Blandón-Gitlin's testimony on coerced confessions because the testimony was relevant, false confessions are an issue beyond the common knowledge of the average layperson, and the circumstances surrounding plaintiff's confession went to the heart of his case.
>
> Dissenting, Judge Miller would hold that District Court did not abuse its discretion in excluding the proffered expert testimony of Dr. Blandón-Gitlin. [The Dissenting Opinion argues that] "[n]o specialized understanding was necessary for the jury to assess the evidence of the allegedly coercive interrogation, and her proffered expert testimony would have violated the principle that an expert witness is not permitted to testify specifically to a witness' credibility or to testify in such a manner as to improperly buttress a witness' credibility.

[Some paragraphing revised for readability]

In key part, the Majority Opinion for the Ninth Circuit panel asserts:

> "Our case law recognizes the importance of expert testimony when an issue appears to be within the parameters of a layperson's common sense, but in actuality, is beyond

their knowledge." . . . . . Dr. Blandón-Gitlin's testimony was relevant to Tekoh's case, as she would have opined on how the text of confessions can indicate classic symptoms of coercion, and would have explained to the jury how Deputy Vega's tactics could elicit false confessions.

She planned to testify that the apologies and excuses in Tekoh's statement demonstrate that Deputy Vega utilized minimization tactics— classic coercion— to elicit incriminating admissions. She would also explain to the jury the significance of Deputy Vega's use of a false evidence ploy when he told Tekoh there was video evidence.

A jury could benefit from Dr. BlandónGitlin's expert knowledge about the science of coercive interrogation tactics, which Deputy Vega employed here, and how they could elicit false confessions. See United States v. Halamek, 5 F.4th 1081, 1088–89 (9th Cir. 2021) (affirming admission of psychological phenomenon where it would help explain that phenomenon to the jury).

Because false confessions are an issue beyond the common knowledge of the average layperson, "jurors would have been better equipped to evaluate [Tekoh's] credibility and the confession itself had they known of the identified traits of stress-compliant confession and been able to compare them to [his] testimony." Lunbery v. Hornbeak, 605 F.3d 754, 765 (9th Cir. 2010) (Hawkins, J., concurring). Defendants-Appellees [i.e., the government defendants] only contest whether Dr. Blandón-Gitlin's testimony would be helpful to the jury — i.e., its relevance — and do not contest that her testimony is based upon sufficient data or that her conclusions are the product of reliable principles and methods. . . . .

The district court incorrectly concluded that Dr. Blandón-Gitlin's testimony would impermissibly vouch for or buttress Tekoh's credibility. Her testimony, however, was not that Tekoh was credible, but "assum[ing] the veracity" of Tekoh's claims, she concluded that Deputy Vega used these coercive tactics. Expert testimony that corroborates a witness's testimony is not a credibility assessment or improper buttressing, even if it implicitly lends support to that person's testimony. . . .

Appellees argue that Dr. Blandón-Gitlin's testimony lacked probative value because the falsity of the confession was not at issue in the case. According to the appellees and the dissent, even if the jury believed the confession was true, it was "well-equipped" to conclude that Deputy Vega's tactics — racial slurs, threats of deportation, approaching Tekoh with his hand on his gun — were unconstitutionally coercive without Dr. Blandón-Gitlin's testimony.

But despite the apparent obviousness of the coercion, at the second trial, the defendants repeatedly disputed that Vega used coercive tactics. And the expert's proposed testimony was not simply about false confessions, but the coercive questioning tactics that lead to them.

Dr. Blandón-Gitlin's testimony would help the jury better understand coerced confessions, including why just asking questions can be coercive, issues that are beyond a layperson's understanding and not necessarily obvious, even in these circumstances. See Lunbery, 605 F.3d at 763 (Hawkins, J., concurring) (stating that it is "hard to imagine anything more difficult to explain to a lay jury" than the fact that the alleged perpetrator could have confessed to a crime he did not commit).

> Because the circumstances surrounding Tekoh's confession go to the heart of his case, excluding expert testimony contextualizing his account was crucial to the outcome. Accordingly, we reverse and remand for a new trial on Tekoh's Fifth Amendment claim.

[Some paragraphing revised for readability; footnote omitted; some case citations omitted]

LEGAL UPDATE EDITOR'S COMMENT: I hope to address (after some research) in a future Legal Update some of the things that the Tekoh Majority Opinion says about certain interrogation techniques being inherently coercive. That language in the Majority Opinion appears to be a bit of an overstatement.

IN A CIVIL ACTION, NINTH CIRCUIT PANEL RULES 3-0 THAT HAWAII'S BAN ON BUTTERFLY KNIVES VIOLATES THE SECOND AMENDMENT; WASHINGTON STATE HAS A SIMILAR STATUTE, RCW 9.41.250 THAT MAY ALSO BE SUBJECT TO A SECOND AMENDMENT CHALLENGE

In Teter v. Lopez, ___ F.4th ___ , 2023 WL ___ (9th Cir., August 7, 2023), a Ninth Circuit panel rules that a Hawaii criminal statute that prohibits butterfly knives is invalid because it violates the Second Amendment right to "keep and bear arms." A brief summary of the August 7, 2023, Opinion for the unanimous panel describes the ruling as follows (note that the staff summaries are not part of the Ninth Circuit Opinions):

> Reversing the district court's summary judgment in favor of Hawaii officials and remanding, the panel held that Hawaii's ban on butterfly knives, Haw. Rev. State. § 134-53(a), violates the Second Amendment as incorporated against Hawaii through the Fourteenth Amendment.
>
> The panel determined that plaintiffs had standing to challenge § 134-53(a) because they alleged that the Second Amendment provides them with a legally protected interest to purchase butterfly knives, and but for section 134-53(a), they would do so within Hawaii. Plaintiffs further articulated a concrete plan to violate the law, and Hawaii's history of prosecution under its butterfly ban was good evidence of a credible threat of enforcement. The panel denied Hawaii's request to remand this case for further factual or historical development in light of New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022), determining that further development of the adjudicative facts was unnecessary.
>
> The panel held that possession of butterfly knives is conduct covered by the plain text of the Second Amendment. Bladed weapons facially constitute "arms" within the meaning of the Second Amendment, and contemporaneous sources confirm that at the time of the adoption of the Second Amendment, the term "arms" understood as generally extending to bladed weapons, and by necessity, butterfly knives.
>
> The Constitution therefore presumptively guarantees keeping and bearing such instruments for self-defense. The panel held that Hawaii failed to prove that section 134-53(a) was consistent with this Nation's historical tradition of regulating weapons.
>
> The majority of the historical statutes cited by Hawaii did not ban the possession of knives but rather regulated how they were carried and concerned knives that were

> distinct from butterfly knives, which are more analogous to ordinary pocketknives. Hawaii cited no analogues in which Congress, or any state legislature, imposed an outright ban on the possession of pocketknives close in time to the Second Amendment's adoption in 1791, or the Fourteenth Amendment's adoption in 1868.

[Some paragraphing revised for readability]

The Ninth Circuit panels notes as follows the key language of the Hawaii statute, which first criminalized carrying butterfly knives in 1993:

> "Whoever knowingly manufactures, sells, transfers, possesses, or transports in the State any butterfly knife, being a knife having a blade encased in a split handle that manually unfolds with hand or wrist action with the assistance of inertia, gravity or both, shall be guilty of a misdemeanor."

LEGAL UPDATE EDITOR'S NOTE:

RCW 9.41.250 contains a similar prohibition to that determined to be unconstitutional by the Ninth Circuit in Teter v. Lopez. RCW 9.41.250 reads as follows:

(1) Every person who:

(a) Manufactures, sells, or disposes of or possesses any instrument or weapon of the kind usually known as slungshot, sand club, or metal knuckles, or spring blade knife;
(b) Furtively carries with intent to conceal any dagger, dirk, pistol, or other dangerous weapon; or
(c) Uses any contrivance or device for suppressing the noise of any firearm unless the suppressor is legally registered and possessed in accordance with federal law,
is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.

(2) "Spring blade knife" means any knife, including a prototype, model, or other sample, with a blade that is automatically released by a spring mechanism or other mechanical device, or any knife having a blade which opens, or falls, or is ejected into position by the force of gravity, or by an outward, downward, or centrifugal thrust or movement. A knife that contains a spring, detent, or other mechanism designed to create a bias toward closure of the blade and that requires physical exertion applied to the blade by hand, wrist, or arm to overcome the bias toward closure to assist in opening the knife is not a spring blade knife.

[Emphasis added]

CIVIL RIGHTS ACTION SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: OFFICER IS GRANTED QUALIFIED IMMUNITY (QI) BY A 2-1 VOTE BASED ON LACK OF CLEAR PRECEDENT IN A CASE WHERE A CHANGE IN JUDGES ON THE THREE-JUDGE PANEL FLIPS THE QI HOLDING; THE PRIOR 2-1 RULING AGAINST THE OFFICER HAD BEEN THAT FACTUAL DISPUTES PRECLUDED GRANTING QI TO THE OFFICER IN THE DEADLY FORCE CASE WHERE THERE IS DISPUTE IN THE RECORD AS TO WHETHER – IN ADDITION TO SOME OTHER DISPUTED FACTS – THE SHOOTING OFFICER TOLD THE NOW-DECEASED TO "STOP" PUMMELING A STRADDLED FELLOW OFFICER, AND THE RECORD WOULD ALLOW A JURY TO CONCLUDE THAT (1) NO OFFICER WARNED THAT

DEADLY FORCE WAS ABOUT TO BE USED, AND (2) TIME WOULD HAVE ALLOWED SUCH A WARNING BEFORE SHOOTING

Smith v. Agdeppa and LAPD, ___ F.4th ___ , 2023 WL ___ (9th Cir., August 30, 2023

LEGAL UPDATE EDITOR'S INTRODUCTORY NOTE: The August 30, 2023, 2-1 ruling by the Ninth Circuit is the third ruling by a three-judge Ninth Circuit panel in the case. This is also the third time that case has been reported in the Legal Update.

In the first ruling on December 30, 2022 (reported in the December 2022 Legal Update), a 2-1 majority of the original three-judge panel in the case denied qualified immunity to a law enforcement officer who shot and killed a person who was in an altercation with officers.

The majority judges ruled in the December 30, 2022, decision asserted that there is a dispute in the factual record as to whether, in addition to other disputed facts, the shooting officer told the now-deceased person to "stop" pummeling a fellow officer who that person was straddling. Thus, the judges in the earlier majority vote concluded that the summary judgment record would allow a jury to conclude in a trial that (1) the shooting officer did not warn that deadly force was about to be used by the officer, and (2) time would have allowed such a warning before shooting. They thus concluded that the deadly force case must go to a jury for decision.

Some time after that December 30,2022, ruling, at a point when the officer's motion for reconsideration was still pending, one of the judges who had been in the majority on the December 30, 2022, ruling was replaced on the three-judge panel. Next, in a 2-1 ruling on May 20, 2023 (reported in the May 2023 Legal Update), the newly constituted three-judge panel voted 2-1 to reconsider the case.

Now, on August 30, 2023, the newest judge on the panel has joined the judge who dissented on the December 30, 2022, ruling. The change in the makeup of the panel has worked in the officer's favor, and he has been granted qualified immunity by a 2-1 vote.

A Ninth Circuit staff summary provides the following synopsis of the lengthy Majority and Dissenting Opinions issued on August 30, 2023:

> The panel reversed the district court's denial of qualified immunity to police officer Edward Agdeppa in a 42 U.S.C. § 1983 action alleging that [Officer] Agdeppa used unreasonable deadly force when he shot and killed Albert Dorsey.
>
> The panel first held that it had jurisdiction over this interlocutory appeal because, notwithstanding the factual disputes, [Officer] Agdeppa only contested the district court's legal conclusion that there was a violation of Dorsey's clearly established rights.
>
> The panel held that because [Officer] Agdeppa did not challenge the district court's determination that a reasonable juror could conclude that [Officer] Agdeppa violated Dorsey's Fourth Amendment right to be free from excessive force, this appeal turned solely on the second step of the qualified immunity analysis—whether the claimed unlawfulness of [Officer] Agdeppa's conduct was "clearly established."
>
> The panel [i.e., the Majority Opinion] held that Agdeppa's use of deadly force, including his failure to give a warning that he would be using such force, did not violate clearly established law given the specific circumstances he encountered. In evaluating whether

> Dorsey posed an immediate threat to safety that would justify the use of deadly force, the panel noted that it was undisputed that [Officer] Agdeppa and another officer repeatedly warned Dorsey to stand down; unsuccessfully tried to use non-lethal force; and engaged in a lengthy, violent struggle in a confined space with Dorsey, who dominated the officers in size and stature and who had gained control of a taser.
>
> Because none of the court's prior cases involved similar circumstances, there was no basis to conclude that [Officer] Agdeppa's use of force here was obviously constitutionally excessive. Moreover, past precedent would not have caused [Officer] Agdeppa to believe that he was required to issue a further warning in the middle of an increasingly violent altercation.
>
> Dissenting, Judge Christen stated that qualified immunity was improper because [Officer] Agdeppa's characterization of the facts conflicted with physical evidence and witness statements, so much so that a reasonable jury could reject the officers' account of the shooting. [Judge Christen argued that the Ninth Circuit] has well-established precedent that an officer must give a deadly force warning if practicable, and a reasonable jury could conclude that [Officer] Agdeppa had the opportunity to give a deadly force warning and failed to do so.

[Some paragraphing revised for readability]

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WASHINGTON STATE COURT OF APPEALS

IN CRIMINAL CASE, DIVISION ONE PANEL DENIES THE STATE'S MOTION FOR RECONSIDERATION AND ISSUES AN OPINION THAT DOES NOT MATERIALLY CHANGE THE PANEL'S JUNE 5, 2023, OPINION:

PANEL THUS STANDS BY ITS JUNE 5 RULING THAT SIXTH AMENDMENT RIGHT TO COUNSEL THAT IS TIED TO THE ATTORNEY-CLIENT PRIVILEGE WAS VIOLATED WHERE CORRECTIONAL OFFICERS, LAW ENFORCEMENT OFFICERS, AND A DEPUTY PROSECUTOR EACH VIOLATED THE DEFENDANT'S ATTORNEY-CLIENT PRIVILEGE BY LOOKING AT PAPERS THAT HAD BEEN TAKEN FROM DEFENDANT'S JAIL CELL WITHOUT HIS CONSENT AND WITHOUT COURT AUTHORIZATION

In State v. Myers, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, August 7, 2023), a three-judge Division One panel denies the State's motion for reconsideration of the panel's June 5, 2023, ruling, and the panel issues a slightly revised Opinion that again rules that the conviction of defendant for robbery in the first degree must be set aside due to governmental misconduct within the meaning of CrR 8.3(b). The case is remanded for the trial court to hold further hearings and further consider defendant's motion to dismiss the charge based on violations of his Sixth Amendment right to counsel that is grounded in attorney-client privilege.

The panel's revised Opinion does not indicate what changes were made in the June 5, 2023, Opinion, and in my limited review of the two Opinions, I did not see any material changes in holdings or descriptions of relevant facts and trial court proceedings. Therefore, this Legal Update is drawn from the summary that I provided for the June 2023 Legal Update entry on Myers.

The governmental misconduct consisted of multiple violations (by law enforcement officers, correctional officers, and a deputy prosecuting attorney) of defendant's Sixth Amendment right to counsel that is tied to the attorney-client privilege of defendant. The Myers Court rules that the trial court erred in many respects in addressing the remedy for the admitted violations of the defendant's motion to dismiss the charge.

The trial court correctly ruled that the government officers had violated defendant's Sixth Amendment right to counsel by looking at his attorney-client protected papers from his jail cell that had been taken from his jail cell without his consent and without authorization under a court order. And the trial court nominally recognized the case law rule that when a Sixth Amendment violation occurs in this way, the State can establish lack of prejudice in the case only if the State can show lack of prejudice to the defendant's Sixth Amendment attorney-client protections by meeting the high standard of "proof beyond a reasonable doubt."

But the Myers Court rules that the trial court erred by concluding *without proper thorough consideration of all relevant considerations relevant to the scrutiny of privileged information by each and every government actor*, that the defendant's Sixth Amendment rights could be protected by only suppressing the privileged papers that had been taken from his jail cell and looked at by the government actors. The Court of Appeals remands the case to the trial court for the trial judge to make the necessary and proper thorough consideration of all relevant considerations relevant to the prejudice to defendant that occurred through the scrutiny of privileged information by each and every government actor who looked at his papers in this case.

The August 7, 2023, Opinion by the Myers Court summarizes the facts and lower court proceedings of the case as follows (more detailed factual descriptions of some elements of the facts are also set out in the Opinion):

> The State charged Adam Myers with one count of robbery in the first degree based on an incident at a Wells Fargo bank in the city of Snohomish, Washington. On April 26, 2021, the day of the reported robbery, [Detective A] responded to the scene and took over as the primary investigator. [Detective A] was an employee of the Snohomish County Sheriff's Office (SCSO), but was assigned as a detective for the city of Snohomish, which contracts with Snohomish County to provide police services for the Snohomish Police Department (SPD).
>
> During her initial investigation, [Detective A] discovered that the robbery suspect had passed a handwritten note to one of the bank tellers. [Detective A] then received digital photos and surveillance footage of the suspect from the day of the incident and ultimately identified Myers as a suspect. Myers was arrested on May 2, 2021. **SPD officers later searched Myers' residence pursuant to a search warrant and located a handwritten note that appeared to be the one given to the bank teller.**
>
> On September 21, 2021, [a deputy prosecuting attorney (DPA)] handling Myers' case sent an email to Myers' trial counsel. In the email, [the DPA] explained that the investigation had resulted in the discovery of a letter written by Myers to his former landlord and, in an effort to compare the handwriting, SCSO corrections deputies had seized five documents from Myers' jail cell.
>
> According to [the DPA], [Detective A] called him and stated that she received photographs of the documents and became concerned that they contained privileged

> attorney-client communications. To determine whether they were in fact privileged, [the DPA] then directed that the documents be reviewed by an "uninvolved detective," [Deputy B from the same sheriff's office as Deputy A], who indicated that several of the five documents that were ultimately seized may have contained attorney-client communications.
>
> On September 27, 2021, Myers moved to dismiss the case under CrR 8.3(b) based on governmental misconduct. At the hearing on the motion to dismiss, the testifying witnesses included [five Snohomish County Jail Corrections deputies]. At the conclusion of the hearing, the trial court found that a state actor had infringed on Myers's Sixth Amendment right to counsel, but that the State had rebutted the presumption of prejudice by proof beyond a reasonable doubt. Accordingly, the trial court denied Myers' 8.3(b) motion and instead ordered a lesser remedy of suppression of the documents collected from Myers' jail cell. In late November 2021, Myers' case proceeded to trial and the jury found him guilty as charged.

[Some paragraphing revised for readability; emphasis added; court's footnote 1 omitted]

The Myers Opinion explains in extensive analysis the many ways in which law enforcement officers, corrections officers, and the deputy prosecuting attorney violated the defendant's Sixth Amendment right. Included in the violations was the use of an uninvolved deputy sheriff ("colloquially referred to by the prosecutor's office as a taint team") to review documents to determine if they are attorney-client protected. The Court indicates that the only legally permitted taint team is a judge asked formally for review.

The Myers Opinion indicates that remedies that should be considered by the trial court judge on remand of the Myers case include: (1) dismissal of the case if the misconduct is deemed to be too extensive and egregious; (2) disqualification of some witnesses if re-trial is to occur; (3) questioning of the lead detective to determine if her investigative focus was sharpened or changed by her learning of the contents of defendant's attorney-client protected papers.

Result: Reversal of Snohomish County Superior Court conviction of Adam B. Myers for robbery in the first degree; case remanded to the Superior Court for either dismissal of the charge or a remedy (if that is feasible) that fully recognizes the requirements of case law addressing attorney-client-privilege violations of a defendant's Sixth Amendment right to an attorney.

LEGAL UPDATE EDITOR'S NOTES: 1. Two of the precedents discussed in the Myers Opinion are:

- **State v. Irby, 3 Wn. App. 2d 247 (Div. I, April 16, 2018) Which held that defendant was entitled to a new hearing placing a heavy burden on the State to establish beyond a reasonable doubt that jail officers did not prejudice defendant's case when the officers violated the constitution by reading papers that the jail officers found in his jail cell, and that he had clearly marked for his attorney's review in his case.**

- **State v. Pena Fuentes, 179 Wn.2d 808 (Feb. 6, 2014) Which declared that a detective's conduct in listening to tapes of several telephone conversations between a defendant and his attorney was "unconscionable" and gave rise to a presumption of prejudice to defendant's case that can be overcome by the State**

only by proof beyond a reasonable doubt; the case was remanded for hearing for the State to try to meet that standard.

2. A Case Law note placed in June 2023 on the website of the Washington Association of Prosecuting Attorneys summarizes the holding in Myers as follows:

> **When a state actor may have intercepted privileged attorney-client communication, whether intentionally or inadvertently, the only appropriate party to review the communication is a neutral judicial officer. Use of a "taint-team" (a screened-off governmental actor who evaluates whether the communication(s) are privileged) is an additional violation of the attorney-client privilege. If privileged communications were intercepted, prejudice is presumed. The burden is on the State to prove, beyond a reasonable doubt, that the defendant was not prejudiced. If the defendant's privilege was infringed upon, any remedy pursuant to CrR 8.3 must be crafted to disincentivize such behavior going forward, and, if short of dismissal, must at least include vacation of the judgment.**

EVIDENCE RULE 803(a)(2) HEARSAY EXCEPTION FOR EXCITED UTTERANCES FITS THE FACTS IN THIS CRIMINAL CASE INVOLVING (1) A CONTEMPORANEOUS REPORT (2) TO A DEPUTY SHERIFF RESPONDING TO A 911 CALL (3) BY AN EYEWITNESS (4) DESCRIBING AN ASSAULT THAT HAD JUST OCCURRED

In State v. Carte, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, August 21, 2023), the Court of Appeals rejects defendant's several claims of trial court error, including his argument that the trial court improperly admitted a police officer's testimony about the victim's hearsay statement as an excited utterance under Evidence Rule (ER) 803(a)(2)..

In key part, the discussion of this issue by the Court of Appeals is as follows (subheadings for the Court's Parts A, B, and C added by Legal Update editor]:

> A. [*Trial Court Procedures In This Case*]
>
> In a pretrial motion the State moved to admit Cooper-McWade's statement to [the responding deputy] on November 30. The prosecutor stated that police officers arrived at Cooper-McWade's house about 12 minutes after C.W.'s 911 call.
>
> After kicking in the front door, they found Cooper-McWade and C.W. hiding in a closet. Cooper-McWade then made several statements to [the deputy] describing Carte's assault. Cooper-McWade told [the deputy] that Carte had become enraged after finding her on the phone with Argueta.
>
> When she refused to unlock her phone for him, Carte strangled her, dragged her around the apartment, and threatened to kill her. Carte then left and Cooper-McWade hid in a closet with C.W. until police arrived.
>
> Cooper-McWade believed that Carte was capable of killing her but "hoped that he wouldn't because she's a single mom." [The deputy] that Cooper-McWade was "afraid and crying" during the conversation.

Carte objected, arguing the record was unclear as to whether Cooper-McWade was sufficiently agitated for her statements to qualify as excited utterances. The trial court overruled Carte's objection, concluding that the statements were spontaneous:

The key . . . is spontaneity . . . there was a very short time period between the time of the [911] call and the time that the officers had the conversation with the complaining witness. This means that the witness would not have had time to fabricate or make up some kind of report. . . . [I]f the issue was one of assault, strangulation, whatever she is claiming happened, those would be startling events. The statements made to the officer would be made while the declarant was under the stress or excitement caused by . . . those events, and it would therefore not be objectionable as hearsay.

At trial, [the deputy] testified that Cooper-McWade appeared "mostly calm" when police first arrived but started crying when officers began speaking with her. [The deputy] observed that Cooper-McWade was "shaking" while talking to him, and that she was "stutter[ing]." [The deputy] recalled it being "very obvious . . . that [Cooper-McWade] was scared . . . and very upset."

Carte renewed his objection, arguing that Cooper-McWade's statements did not qualify as excited utterances. The trial court declined to revisit its pretrial ruling.

B. [*Background On Washington Case Law Applying The Excited Utterance Exception*]

While typically inadmissible, hearsay can be offered at trial when authorized by a court rule or statute. ER 802. One recognized exception is found in ER 803(a)(2), which allows courts to admit "statement[s] relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Courts reason that statements made while under the stress of an exciting event "could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Rodriquez, 187 Wn. App. 922, 939, (2015).

In a sense, excited utterances are "an event speaking through the person, as distinguished from a person merely narrating the details of an event." State v. Pugh, 167 Wn.2d 825, 837 (2009).

The party seeking to admit a statement as an excited utterance must show that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. State v. Ohlson, 162 Wn.2d 1, 8 (2007) [These are referred to by the Court of Appeals as "The Ohlson Factors."] The court may consider circumstantial evidence when assessing the statements, including "the declarant's behavior, appearance, and condition; appraisals of the declarant by others; and the circumstances under which the statement is made." [State v. Rodriquez]..

A statement is more likely to qualify as an excited utterance if the declarant is agitated, emotional, frantic, or "visibly upset." State v. Davis, 116 Wn. App. 81, 86 (2003). Yet a "state of nervousness or anxiety" by itself is insufficient. . . .

C. [*Application Of The Excited Utterance Case Law To The Facts Of This Case*}

> The first and third Ohlson factors are easily satisfied. The State's pretrial offer of proof revealed that C.W. called 911 to report that Cooper-McWade was being actively assaulted, evidence of which could be heard in the background of the recordings. This is a startling event or condition. Being beaten and strangled by another person is certainly a stressful event. It cannot be seriously disputed that Cooper-McWade's statement concerned the startling event.
>
> The second Ohlson factor is also met. Officers arrived at Cooper-McWade's house 12 minutes after C.W.'s called 911. Even after forcing entry, Cooper-McWade was contacted within about 20 minutes of the event.
>
> A 20-minute delay is well within the time frame recognized for admission of excited utterances where there is continuing stress. See, e.g., State v. Thomas, 150 Wn.2d 821, 855 (2004) (1.5 hours after murder); State v. Strauss, 119 Wn.2d 401, 416-17 (1992) (3.5 hours after rape of child).
>
> Thus, the trial court reasonably concluded that Cooper-McWade could still have been under the stress of the assault after the "very short time period." Cooper-McWade was also still hiding in the closet when the police arrived, which weighs in favor of admission. See State v. Guizzotti, 60 Wn. App. 289, 295-96 (1991) (statement admissible as excited utterance despite 7-hour delay because the victim had been hiding and "thought the defendant was looking for her").
>
> [The Deputy's] observation that Cooper-McWade was "afraid," "crying," "shaking," and "stutter[ing]" also suggested she was still affected by the assault. Carte relies on Damerow's testimony that Cooper-McWade at first seemed calm on contact. While this fact weighs against admission, alone, it does not establish an abuse of discretion.
>
> "The crucial question with regard to excited utterances is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." . . . .. Because Cooper-McWade's statement was made to the police shortly after they broke down her door to find her still hiding, and they arrived only 12 minutes after C.W. called 911, the court reasonably concluded that Cooper-McWade was still under the stress of the altercation with Carte. The trial court did not abuse its discretion.

[Some citations omitted and others revised for style; some paragraphing revised for readability]

Result: Affirmance of King County Superior Court convictions of Edward Leroy Carte Jr. for two counts of second degree assault and one count of felony harassment.

RAPE-MURDER DEFENDANT LOSES HIS CONSTITUTIONAL CHALLENGE REGARDING A WARRANTLESS CHECK BY LAW ENFORCEMENT OF A CONSUMER DNA DATABASE IN LOOKING FOR A FAMILIAL MATCH TO THE KILLER'S DNA FROM A 1986 RAPE-MURDER

In State v. Hartman, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, August 22, 2023) rejects a rape-murder defendant's constitutional challenge to DNA-match evidence that derived from law

enforcement's warrantless access to a consumer DNA database and using to a familial DNA match solve a rape-murder that he had committed thirty years earlier.

The Hartman Court summarizes its lengthy Opinion in a long set of introductory paragraphs reading as follows:

> In 1986, MW, a 12-year-old girl, was raped and murdered in a Tacoma park. The killer left semen on MW's body, but his DNA did not match that of any suspects or anyone in police databases for the next 30 years.
>
> In 2018, police enlisted Parabon Nanolabs, a DNA technology company, to analyze the killer's DNA and to upload it into GEDmatch, a consumer DNA database, looking for partial familial matches that would help identify the killer. Police did not secure a warrant to analyze the abandoned DNA or to compare it with DNA in the GEDmatch database.
>
> Parabon learned that several of the killer's cousins had DNA in the GEDmatch database. Parabon used information from the database and public records to construct family trees. Parabon then directed police to try to obtain a DNA sample from Gary Charles Hartman. Police obtained a discarded napkin containing Hartman's DNA, and it matched the DNA from semen on MW's body. The State charged Hartman with first degree felony murder.
>
> Before trial, Hartman moved to suppress the DNA evidence, arguing that Parabon's comparison of the DNA sample from the crime scene to the GEDmatch database was unconstitutional. He also asserted that the DNA later collected from the napkin directly linking him to the murder was inadmissible as fruit of the poisonous tree. Hartman did not argue below that he had any privacy interest in DNA left at the crime scene, nor did he challenge the collection and testing of DNA from the discarded napkin.
>
> The trial court ruled that Hartman did not have standing to challenge the comparison of the DNA from the crime scene to DNA in the GEDmatch database because he did not have a privacy interest in his cousins' DNA in the database. In addition, Hartman's relatives had voluntarily uploaded their DNA into the GEDmatch database, and the DNA that Hartman left at the crime scene was abandoned and not private. The trial court denied the motion to suppress. After a bench trial on stipulated facts, the trial court convicted Hartman.
>
> Hartman appeals his conviction. He argues that analyzing the DNA sample from the crime scene and comparing it with the GEDmatch database to look for his relatives' DNA disturbed his private affairs in violation of article I, section 7 of the Washington Constitution. Thus, he argues that he had standing to challenge the DNA comparison. In oral argument, he asserted for the first time that he has a privacy interest in the DNA from the semen abandoned at the crime scene.
>
> We affirm. There is no privacy interest in commonly held DNA that a relative voluntarily uploads to a public database that openly allows law enforcement access. And there is no privacy interest in DNA that one abandons at a crime scene. Absent a privacy interest, Hartman did not have standing to challenge the comparison of the crime scene DNA with the GEDmatch database. But the legislature could adopt statutory restrictions and the companies that run consumer DNA databases could adopt policies limiting law

enforcement access to genetic information in those databases without a warrant. Indeed, GEDmatch did just that in 2019 after the investigation at issue in this case.

Result: Affirmance of Pierce County Superior Court conviction of Gary Charles Hartman for first degree felony murder.

****

BRIEF NOTES REGARDING AUGUST 2023 UNPUBLISHED WASHINGTON COURT OF APPEALS OPINIONS ON SELECT LAW ENFORCEMENT ISSUES

Under the Washington Court Rules, General Rule 14.1(a) provides: "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate."

Every month I will include a separate section that provides brief issue-spotting notes regarding select categories of unpublished Court of Appeals decisions that month. I will include such decisions where issues relating to the following subject areas are addressed: (1) Arrest, Search and Seizure; (2) Interrogations and Confessions; (3) Implied Consent; and (4) possibly other issues of interest to law enforcement (though generally not sufficiency-of-evidence-to-convict issues).

The twelve entries below address the August 2023 unpublished Court of Appeals opinions that fit the above-described categories. I do not promise to be able catch them all, but each month I will make a reasonable effort to find and list all decisions with these issues in unpublished opinions from the Court of Appeals. I hope that readers, particularly attorney-readers, will let me know if they spot any cases that I missed in this endeavor, as well as any errors that I may make in my brief descriptions of issues and case results. In the entries that address decisions in criminal cases, the crimes of conviction or prosecution are italicized, and parts of the descriptions of the holdings/legal issues are bolded.

1. State v. Abdulkadir Gargar: On August 7, 2023, Division One of the COA affirms the King County Superior Court conviction of defendant for *unlawful possession (by a previously convicted person) of a firearm in the first degree*. **Among other rulings, the Court of Appeals determines that the community caretaking exception for health and safety concerns justified an officer's actions under the following facts described in the Court's Opinio**n:

> On the morning of June 23, 2020, [Officer A] was conducting a routine patrol in the parking lot of the Sunset Motel in Kent, Washington, known to be a high-crime area. Noticing Abdulkadir Gargar in a car, apparently asleep, [Officer A] stopped his patrol vehicle to exit and check on Gargar.
>
> Gargar's car was backed into a parking spot on an incline, with its front angled down toward the parking lot. Almost immediately after exiting his patrol vehicle, [Officer A] noticed that Gargar's car was running—a fact captured by video footage from [Officer A's] body camera. [Officer A] then reentered his vehicle and parked it in front of Gargar's car, preventing it from exiting the parking space. [Officer A] that he did so to prevent the car from rolling away if Gargar "had left the [car] in drive and [his foot was]

> just sitting on [his] brake," citing a concern for the safety of the various pedestrians in the parking lot that morning and for Gargar himself.
>
> After repositioning his patrol vehicle, [Officer A] approached Gargar's car to determine if it was in park and to check on Gargar. Looking into the car, [Officer A] noticed an open can of Mike's Hard Lemonade in the center console and a half-consumed but capped bottle of vodka in the passenger seat. [Officer A] called for backup before waking Gargar, and [Officer B] responded.
>
> Officers [A] and {B] positioned themselves on the passenger and driver sides of Gargar's car, respectively. [Officer A] then awoke Gargar by tapping on his window. After Gargar rolled his window down at [Officer A's] request, [Officer A] asked him several questions concerning his residence at the motel and the ownership of his car.
>
> Roughly a minute or so into this interaction, [Officer A] noticed a gun in Gargar's car, tucked between the driver's seat and center console by Gargar's right leg. [Officer A] immediately asked Gargar to place his hands on the steering wheel, then to unlock the car, and eventually to exit the car.
>
> Gargar followed [Officer A's instructions without incident. [Officer A] placed Gargar in handcuffs, told him he was detained, and read him his Miranda rights. Upon retrieving and running Gargar's identification, [Officer A] discovered that Gargar had an outstanding warrant and arrested him.

[Some paragraphing revised for readability]

The Court's Opinion in State v. Gargar can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/827499.pdf

2. In the Matter of the Personal Restraint Petition of Christopher R. Johnson: On August 8, 2023, Division Two of the COA declines, in a case that arose from an on-line sting operation, to set aside the Kitsap County Superior Court convictions of defendant for (*A) attempted rape of a child in the third degree, (B) attempted sexual abuse of a minor, and (C) communication with a minor for immoral purposes.* Among other rulings, the Court of Appeals rejects defendant's argument that the Washington State Supreme Court decision in Sate v. Arbogast, 199 Wn.2d 356 (2022) did not announce a new standard for qualifying for an entrapment instruction in sting cases, and that Division Two's 2020 published decision in Johnson's case correctly denied his request for a retrial with an entrapment instruction to the jury. **The Court of Appeals declares that Johnson is not entitled to a jury instruction on entrapment because the State merely afforded him an opportunity to commit his crime and did not induce him to commit the crime where it Johnson who initiated the contact by responding to the on-line post.**

The Court's Opinion in In the Matter of the Personal Restraint Petition of Christopher R. Johnson can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2057021-1-II%20Unpublished%20Opinion.pdf

3. State v. Timothy W. Torrez: On August 15, 2023, Division Three of the COA affirms the Asotin County Superior Court convictions of defendant for *(A) possession of a controlled substance with intent to deliver, and (B) conspiracy to possess a controlled substance with intent to deliver.* Among other rulings, **the Court of Appeals rules that an affidavit for a warrant to search the defendant's vehicle established probable cause to search the**

vehicle. The Court of Appeals thus explains as follows in a key part of the probable cause analysis:

> The original and supplemental search warrant affidavits provided probable cause to believe that the SUV was being used in the commission of a crime and contained evidence of a crime. The original affidavit explained that during one of the controlled buys, Jones [the defendant's girlfriend and also his partner in dealing drugs] drove to the location in a black SUV that did not have permanent plates. Twenty-one days after this controlled buy, the CI informed law enforcement that [the defendant's girlfriend/drug-dealing partner] had said she had left to get more methamphetamine and "was almost back to town." [The detective] then drove to [the residence of the defendant's girlfriend/drug-dealing partner] and observed the same black SUV parked in the carport with wet tire tracks leading into the carport. Shortly thereafter, Torrez drove the black SUV away from the residence [and he was stopped in the vehicle, and the vehicle was searched under a warrant]. The probable cause to search the SUV applied regardless of who was driving the vehicle.

The Court's Opinion in State v. Torrez can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/389995_unp.pdf

4. State v. Michael Angel Amaro: August 15, 2023, Division Two of the COA affirms the Kitsap County Superior Court convictions of defendant for *first degree possession of depictions of a minor engaged in sexually explicit conduct*. **Among other rulings, the Court of Appeals rules that defendant had waived his expectation of privacy for a search by government personnel in the contents of his cell phone in light of the rules of the Puget Sound Naval Shipyards (PSNS) by entering the PSNS restricted area carrying a cell phone.** The facts are described in the Court's Opinion as follows:

> PSNS prohibits camera capable cell phones and routinely performs security sweeps. When entering PSNS, employees pass the following warning signs: (1) a sign stating that all devices with cameras are prohibited and featuring photos of a cell phone, camera, and iPad with a red line through them; (2) a sign stating that authorized personnel who enter the restricted area consent to the search of personnel and property under their control; and (3) a sign stating that photography in the industrial area is prohibited and violation of that policy is subject to criminal prosecution and/or confiscation of film, media and camera.
>
> PSNS has established procedures and protocols for when security finds camera capable cell phones. PSNS policy states that PSNS will review any photographs that may contain classified material, along with any transmission of classified materials via text messaging or other electronic communication. If PSNS finds classified material on a camera capable cell phone, PSNS will apply a higher level of scrutiny in its review of the cell phone.
>
> On September 16, 2021, security personnel entered Amaro's work building and announced they were conducting a security sweep. Security personnel saw Amaro frantically trying to put a cell phone into his backpack. Security personnel asked Amaro to remove the cell phone from his backpack and tell them if it was a camera capable cell phone. Amaro handed the cell phone to security personnel and told them it was a camera capable cell phone.

> One security employee, Jennifer Young, told Amaro she was taking custody of his cell phone because it was a violation of PSNS policy to be in possession of a camera capable cell phone. Amaro provided Young with the swipe pattern or password for accessing the phone. Young wrote the swipe pattern or password on an evidence property receipt for storage and review of the phone. Amaro then signed the evidence property custody receipt.
>
> Young reviewed the contents of the cell phone for any contraband related to PSNS security. Young found two photos of classified shipyard documents in the photo section of the phone, which triggered a heightened degree of scrutiny for her review of the phone.
>
> Young then reviewed the text messages on the phone and found a conversation that appeared to be between Amaro and an 11-year-old girl that occurred on September 7, 2021. In the text conversation, the girl said she was happy Amaro wanted to spend time with her even though she is 11 years old. The girl also stated that she would not tell her mother that she and Amaro had sex. Amaro responded in the conversation that he could not believe she was only 11 years old and that he had a good time with her. The text conversation also included a photo of a nude female from the rear who was bent over facing away from the camera. Young did not know the age of the female in the photo.
>
> Young immediately notified her supervisor of the text conversation. PSNS transferred the phone to the Naval Criminal Investigative Service, who then transferred the phone to Washington State Patrol (WSP) [which then applied for a warrant to search the cell phone]

In key part, the legal analysis by the Court of Appeals is as follows:

> A person may lose a constitutionally protected privacy interest. . . . For example, a person loses their privacy interest in their cell phone when they voluntarily abandon the cell phone. [State v. Samalia, 186 Wn.2d 262 (July 28, 2016)] (defendant voluntarily abandoned cell phone when defendant left cell phone behind in stolen vehicle to elude police). Additionally, a person can waive their privacy interest by voluntarily exposing an item to the public or voluntarily disclosing information to a stranger. . . .In such situations, no warrant is required for the government to conduct a search of the item. See Samalia, 186 Wn.2d at 272-73, 279.
>
> Here, Amaro agreed to work at PSNS, which prohibits camera capable cell phones in the restricted areas, and PSNS has a policy of reviewing any camera capable cell phones that security finds in the restricted areas, with extra scrutiny if security finds classified material on the cell phone. When entering PSNS, Amaro passed several signs warning him that camera capable cell phones are prohibited; Amaro entered an area that was clearly marked as any entry constituted a consent to the search of his person and property; and the area Amaro entered clearly warned that photography of the restricted industrial area could result in confiscation of his film, media, and camera.
>
> Despite these policies and warning signs, Amaro brought a camera capable cell phone into the restricted premises, apparently took photos of classified documents, then got caught trying to put his cell phone back into his backpack during a security sweep. Amaro admitted that his cell phone was camera capable, handed the cell phone to security personnel, provided security personnel with the swipe pattern or password for

accessing the phone, then signed the evidence property custody receipt for storage and review of the cell phone where the swipe pattern or password to access the cell phone was documented.

Also, Amaro does not challenge the trial court's conclusion

> [t]hat under the totality of the circumstances, defendant impliedly consented to a search of his cellphone when he entered a level II restricted facility, passed barbed-wire fencing, passed access-controlled points of entry, and passed multiple warning signs that clearly stated that camera capable devices are prohibited, and that authorized entry constituted consent to search of personnel and their property.

Under the unique facts of this case, no warrant was required because Amaro, by his conduct, had waived any privacy interest he had in the contents of the cell phone; thus, no warrant was necessary.

[Some citations omitted; some paragraphing revised for readability]

The Court's Opinion in State v. Amaro can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056915-9-II%20Unpublished%20Opinion.pdf

5. State v. Samuel A. Sweet: On August 15, 2023, Division Two of the COA reverses the Cowlitz County Superior Court convictions of defendant for *(A) one count of possession with intent to deliver heroin and (B) one count of possession with intent to deliver methamphetamine.* The Court of Appeals remands the case for dismissal of charges with prejudice. Among other rulings**, the Court of Appeals holds in highly fact-based analysis that (1) a Terry stop of the defendant was not supported by reasonable suspicion, and (2) a search warrant for his vehicle was not supported by probable cause. Along the way, the Court of Appeals indicates that the trial court misplaced reliance for its contrary rulings on a confidential informant who was not shown to be credible and his conclusory assertions were not shown to have been corroborated by investigation or other sources.**

The Court's Opinion in State v. Sweet can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=568420MAJ

6. State v. William Patrick McBride: On August 17, 2023, Division Three of the COA affirms the Whitman County Superior Court conviction of defendant for *one count of possession of methamphetamine with intent to deliver*. The case arose from a sting by a Whitman County deputy sheriff who posed on social media as a woman seeking to purchase methamphetamine. Among other rulings, **the Court of Appeals rules that the defendant was not entrapped as a matter of law within the meaning of RCW 9A.16.070, and that the trial court correctly allowed the jury to determine factually that he was not entrapped; and (2) that the sting operation did not involve any outrageous government conduct that would require that the drug-dealing charges be dismissed.**

The Court's Opinion in State v. McBride can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=388727MAJ

7. State v. L.D.E.P.: On August 21, 2023, Division One of the COA rejects the challenge of the juvenile defendant (13 years-old when charged) to Snohomish County Superior Court

findings of guilt as a juvenile for *(A) three counts of guilt for attempted arson in the first degree, and (B) two counts of arson in the first degree.* **The Court of Appeals rules in lengthy analysis of the facts and the relevant case law that L.D.E.P. was not in "custody" for Miranda purposes under the facts of this case, and that therefore L.D,E,P.'s statements during police questioning are admissible.** The Court discusses the question of whether RCW 13.40.740 (addressing "Juvenile access to an attorney") – a 2021 statute that became effective on January 1, 2022 – applies in the case. The effective date of the statute came after the occurrence of the police questioning of L.D.E.P. in this case. The L.D.E.P. Court discusses whether the statute is retractive but does not commit on that question, indicating that it would not matter in this case because L.D.E.P. was not in custody during the questioning (this seems to be a bit simplistic on the Court's part in light of the alternative circumstances that trigger application of the attorney access right in RCW 13.40.740).

The Court's Opinion in State v. McBride can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/841505.pdf

8. State v. Nathan Scott Smith.: On August 21, 2023, Division One of the COA reverses the defendant's Snohomish County Superior Court conviction for *rape of a child in the first degree*, and his case is remanded to Superior Court for a re-trial. The reversal is based on defendant's supported claim that a biased juror should not have been seated in his trial. That ruling will not be addressed in the Legal Update. **Because the case will likely be retried on remand to the Snohomish County Superior Court, the Court addresses and rejects defendant's other arguments. The Court includes extended analysis of the facts and the law on both of the following fact-intensive issues: (1) the Court rules that child hearsay was properly admitted at defendant's trial under the well-established case-law-based tests in Washington for admissibility of child hearsay; and (2) under equally well-established tests for competency of witnesses to testify, a five-year-old child witness was competent to testify at defendant's trial despite the child's memory gaps and some other vulnerabilities as a witness.**

The Court's Opinion in State v. Smith is accessible on the Internet at:
https://www.courts.wa.gov/opinions/pdf/831879.pdf

9. State v. Eddie Hershell West, Jr.: On August 22, 2023, Division Two of the COA affirms the defendant's Pierce County Superior Court convictions of *three counts of third degree assault* relating to his altercation with law enforcement officers outside of a bar where officers had responded to a shooting not involving West outside a Tacoma bar. West had fought the officers who were trying to get him to leave the crime scene. **The West Court rejects West's argument that he was deprived of Due Process because the officers had not tried to obtain video surveillance tapes from the bar; the Court rules that the officers had no legal duty to gather such evidence**. In key part, the Court's analysis of the Due Process issue is as follows:

> Washington's "due process clause affords the same protection regarding a criminal defendant's right to discover potentially exculpatory evidence as does its federal counterpart." State v. Wittenbarger, 124 Wn.2d 467, 474 (1994). Under the Fourteenth Amendment, a criminal defendant must be afforded "a meaningful opportunity to present a complete defense." Accordingly, the State has a duty to disclose and preserve material exculpatory evidence in its possession.

> The State has no duty, however, to collect exculpatory evidence. See State v. Armstrong, 188 Wn.2d 333, 345 (2017). The police do not have "'an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.'" Wittenbarger, 124 Wn.2d at 475 . . .
>
> Here, West attempts to frame his argument as a preservation issue; however, such an argument fails because the State does not have a duty to collect evidence nor can it preserve evidence it never possessed. . . . West cites no authority establishing a duty to collect. . . . Furthermore, where the State never had possession of the evidence, it follows that there is no duty to preserve the evidence. The surveillance footage was in the possession of a third party, and was never collected by the officers. In the absence of such a duty, West's claim necessarily fails.

[Some citations omitted and some others revised for style; some paragraphing revised for readability]

The Court's Opinion in State v. West can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056817-9-II%20Unpublished%20Opinion.pdf

10. State v. Corey Justin Thompson: On August 28, 2023, Division One of the COA reverses the Skagit County Superior Court order that dismissed the criminal charge for *felony indecent exposure* against Thompson under RCW 9A.88.0110 on the basis of the Superior Court's conclusion that the indecent exposure statute is unconstitutionally vague under the facts of the case, where defendant was allegedly touching his erect penis over his clothing while watching three 12-year-old girls who were playing on a playground.

RCW 9A.88.010 provides:

> (1) A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm. The act of breastfeeding or expressing breast milk is not indecent exposure.
> (2)(a) Except as provided in (b) and (c) of this subsection, indecent exposure is a misdemeanor.
> (b) Indecent exposure is a gross misdemeanor on the first offense if the person exposes himself or herself to a person under the age of fourteen years.
> (c) Indecent exposure is a class C felony if the person has previously been convicted under this section or of a sex offense as defined in RCW 9.94A.030.

The Thompson Court declares that the statute (A) does not make nudity an element of the crime, (B) is not void for vagueness, and (C) prohibits the conduct that is alleged in this case. The case is remanded for trial. The Thompson Court's Opinion is lengthy and complicated. This Legal Update entry will not attempt to summarize the Court's analysis and will not excerpt at great length from the Opinion. I will provide only the following excerpts from the Thompson Court's discussion of State v. Vars, 15 Wn. App. 482 (2010) and State v. Stewart, 12 Wn. App. 2d 236 (2020).

> In Vars, the defendant was seen walking around residential neighborhoods naked, but no particular witness could testify they saw his genitals. . . . [Defendant] Thompson makes much of the fact that, . . . this court mentioned the defendant's actual nudity. However, in Vars, this court was addressing the narrow issue of whether a witness must

> observe naked genitalia as an element of the crime of indecent exposure. This court found the witness did not need to observe the actual genitalia when circumstantial evidence was sufficient to infer the defendant's genitalia was likely "exposed." The question here is different: whether a defendant's genitals must be nude. Vars did not need to reach or define the phrase "any open and obscene exposure of his or her person." Vars simply returned to the understanding of obscenity first announced in [State v. Galbreath, 69 Wn.2d 664 (1966)], when finding that "the gravamen of the crime is an intentional and 'obscene exposure' in the presence of another that offends society's sense of 'instinctive modesty, human decency, and common propriety.'" Vars at 491 (quoting Galbreath, 69 Wn.2d at 668). Vars does not disturb our more holistic understanding of the phrase "obscene exposure" above.
>
> The second case [defendant] Thompson relies on is [State v. Stewart, 12 Wn. App. 2d 236 (2020)], where this court examined again whether there was substantial evidence of indecent exposure. In Stewart, the defendant was seen crouching in an alleyway (from behind) with his hand moving "rapidly" in front of his pants. Witness testimony was unclear for whether his pants were on. The witness did not see his genitalia. The court concluded, despite that fact, there was substantial evidence he was indecently exposing himself in public "outside his pants," through the totality of the evidence. As in Vars, however, this court was not preoccupied with the question whether, and did not find as a matter of law, masturbation must occur on the outside of the pants to find a defendant guilty of indecent exposure.

[Some citations omitted and others revised for style; footnote omitted]

The Court's Opinion in State v. Thompson can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/843664.pdf

11. State v. Elias Joseph Longoria: On August 29, 2023, Division Two of the COA affirms the defendant's Grant County Superior Court convictions for *(A) one count of burglary in the second and (B) one count of criminal trespass in the first degree*. The Court of Appeals rejects defendant's Miranda-based arguments for suppression of his statements to police. The Longoria Court rules, among other things, that **a police interview of the defendant in his backyard was not custodial.**

The Longoria Court describes as quoted below some of the trial court's findings that supported the conclusion that defendant was not in custody for Miranda purposes. Elsewhere in the Opinion, the Longoria Court notes (1) that the presence or absence of probable cause to arrest is irrelevant in relation to the Miranda custody issue, and (2) that the question of custody instead turns on whether a reasonable person in the suspect's position, in light of all of the circumstances, would feel restrained to the degree associated with formal arrest. Some of the trial court's key findings regarding custody are described by the Longoria Court as follows:

> Relevant findings from Mr. Longoria's suppression hearing that are verities on appeal include its finding that Mr. Longoria "was walking into his backyard and Deputy [A] asked Defendant if Defendant had time to talk to Deputy [A] about a burglary investigation." They include its finding, "During the conversation, Defendant and Deputy [A] were about five or six feet away from each other, it was still daylight, and there was one other officer around the scene, possibly another [officer] as well, though not right in the area where Defendant and Deputy [A] were having a conversation."

> They include its finding, "Deputy [A] told Defendant that Defendant was free to walk away or ask Deputy [A] to step off Defendant's property at any time and that Defendant could stop talking at any time and that Defendant did not have to answer any questions." They include its finding that when Mr. Longoria said he would rather have a lawyer with him before saying anything, and "Wouldn't that be the smart thing to do?" Deputy [A] again responded by giving Defendant the choice as to whether Defendant wanted to have a lawyer with him by stating, "It's completely up to you. . . ."
>
> Mr. Longoria encourages us to find contrary facts, but the "absence of a finding of fact in favor of the party with the burden of proof as to a disputed issue is the equivalent of a finding against the party on that issue. . . . The bodycam video strongly supports the testimonial support for the trial court's findings about the open, public setting and the lack of a police presence or other circumstances suggestive of formal arrest.

In the Opinion's legal analysis, the Longoria Court notes that defendant made an additional "Miranda custody" argument based on the 2022 Washington State Supreme Court decision in State v. Sum. The Longoria Opinion rejects the argument under the following analysis:

> Mr. Longoria argues that the Washington Supreme Court's decision in State v. Sum, 199 Wn.2d 627, 653 (2022), holds that courts must consider a person's race and ethnicity in the totality of circumstances reviewed to determine if a reasonable person would believe they were free to leave. The decision in Sum was filed in June 2022, a year after the CrR 3.5 hearing in this case. It addressed a "seizure," under article I, section 7 of the Washington Constitution, and applied reasoning from other cases and contexts that an "objective observer" is aware that "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts, investigative seizures, and uses of force against Black, Indigenous, and Other People of Color . . . in Washington."
>
> In the "seizure" context, [Sum] held, relevant considerations include, among others, "'the number and types of questions posed' or requests made of the allegedly seized person, and the extent to which similar law enforcement encounters are 'disproportionately associated with a race or ethnicity.'" Aspects of the analysis in Sum could have application in Fifth Amendment cases like this one, but Mr. Longoria does not provide a disciplined analysis of how any particular aspect of Sum applies in this appeal.
>
> He engages in no legal analysis of how the state constitutional analysis in Sum translates to the Fifth Amendment context, in which Washington applies [the U.S. Supreme Court standard announced in Berkemer v. McCarty, 484 U.S. 420 (1984)]. Nor does [Sum] address the difference in the interests involved.
>
> A significant interest addressed in Sum (arguably the most significant) is that "[w]hen it comes to police encounters without reasonable suspicion, 'it is no secret that people of color are disproportionately victims of this type of scrutiny.'" . . . Justice Sotomayor emphasized that [Utah v. Strieff, 579 U.S. 232, 254 (2016)] she was speaking of "suspicionless stop[s], one in which the officer initiated this chain of events without justification."
>
> While people of color might be disproportionately subject to custodial interviews, it cannot be said to be a matter of common understanding, as it is in the seizure context. Even on appeal, Mr. Longoria makes no effort to identify numbers of questions, types of

> questions, requests, or anything else about Deputy [A's] interview that should have caused the trial court to conclude—on its own, without request or suggestion by defense counsel—that an objective observer, aware of implicit, institutional, or unconscious bias, would view Mr. Longoria's freedom of action during the interview at the top of the driveway to his home as curtailed to a degree associated with formal arrest.
>
> The trial court's findings support its conclusion that Mr. Longoria was not in custody.

[Some citations omitted and some citations revised for style; some paragraphing revised for readability]

Defendant Longoria also argued that his Miranda rights were violated because, during the questioning by the officer in his backyard, he said some words that purportedly invoked his right to an attorney. The Opinion by the Longoria Court engages in extended analysis of case law regarding what constitutes such an invocation, and the Court concludes that the words by the defendant did not unambiguously invoke his right to an attorney.

The Court of Appeals completely ignores the reality that the State's brief pointed out to the Curt that law enforcement questioning may lawfully continue where a person who is not in custody attempts to invoke his or her right to an attorney. The State's brief in this case pointed the Court to the clear, on-point, controlling U.S. Supreme Court decision on this issue – Bobby v. Dixon, 132 S.Ct. 26 (2011) – but, as noted, the Longoria Court ignores that controlling argument and case law on the question. This Legal Update entry will not further address the extended discussion by the Court of Appeals on the question of what constitutes an unambiguous invocation of the right to an attorney.

The Court's Opinion in State v. Longoria can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/388115_unp.pdf

12. State v. Mnason Rancourt: On August 31, 2023, Division Three of the COA affirms the defendant's Spokane County Superior Court convictions of one count each of *(A) first degree child molestation, and (B) attempted first degree child molestation*. **The Court includes extended analysis of the facts and the law on the fact-intensive issue of whether child hearsay was properly admitted at defendant's trial under the well-established case-law-based tests in Washington for admissibility of child hearsay.**

The Court's Opinion in State v. Rancourt can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/389201_unp.pdf

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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 is 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 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 (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]. For information about access to the Criminal Justice Training Commission’s Law Enforcement Digest and for direct access to some articles on and compilations of law enforcement cases, go to [cjtc.wa.gov/resources/law-enforcement-digest].

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