LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

JANUARY 2024

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UNITED STATES SUPREME COURT

SUPREME COURT WILL REVIEW NINTH CIRCUIT'S 2022 JOHNSON V. CITY OF GRANTS PASS DECISION THAT HELD TO BE A VIOLATION OF THE EIGHTH AMENDMENT THE POSSIBLE APPLICATION AGAINST HOMELESS PERSONS – IN CIRCUMSTANCES WHERE FREE PUBLIC SHELTER UNAVAILABLE – OF AN ANTI-CAMPING ORDINANCE

On January 12, 2024, in City of Grants Pass v. Johnson (U.S. Supreme Court docket number 23-175), the United States Supreme Court accepted discretionary review of the Ninth Circuit's decision in Johnson v. City of Grants Pass, 50 F.4th 787 (9th Cir., September 28, 2022).

The relevant history of appellate rulings in the case to date is as follows.

- On September 28, 2022, a three-judge Ninth Circuit panel voted 2-1 to apply the 2018 Ninth Circuit precedent of Martin v. Boise, 902 F.3d 1031 (9th Cir., 2018). The September 18, 2022, Ninth Circuit ruling was that the Eighth Amendment's prohibition against cruel and unusual punishment precludes, where public shelter is not available, enforcement of a city ordinance of Grants Pass (Oregon) that prohibits homeless persons from camping, including using a blanket, pillow, or cardboard box for protection from the elements. Here is a link to the September 28, 2022, Ninth Circuit decision: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/20-35752.pdf

- On July 5, 2023, in split voting involving a panel of at least 15 Ninth Circuit judges, the Ninth Circuit decided not to review the 2-1 decision of September 28, 2022, by the original three-judge Ninth Circuit panel.

- On January 12, 2024, as noted above, the United States Supreme Court accepted discretionary review of the case. Because the appealing party in the case is the City of Grants Pass, the order of the listing of the parties has been flipped from that used at the Ninth Circuit level of review. The case is now titled City of Grants Pass v. Johnson with a Supreme Court case docket number of 23-175.

Oral argument will likely occur in April of 2024, and a decision likely will be issued by June 28, 2024.

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT: GOING FORWARD, THE STATE-CREATED DANGER DOCTRINE MAKES IT A DUE PROCESS VIOLATION FOR A LAW ENFORCEMENT OFFICER TO DISCLOSE TO THE ALLEGED ABUSER A DV VICTIM'S CONFIDENTIAL REPORT OF ABUSE; HOWEVER, QUALIFIED IMMUNITY IS GRANTED IN THIS CASE BECAUSE NO PREVIOUS CONTROLLING APPELLATE DECISION HAD MADE THAT HOLDING

In Martinez v. High, ___ F.4th ___ , 2024 WL ___ (9th Cir., January 26, 2024), a three-judge Ninth Circuit panel votes to grant qualified immunity to a law enforcement officer who (assuming the truth of the Plaintiff's allegations for purposes of summary judgment analysis) disclosed the confidential allegations of domestic violence by Plaintiff to the Plaintiff's abuser, a fellow law enforcement officer.

The Lead Opinion signed by two of the Ninth Circuit judges declares that qualified immunity is granted in this case because these facts have not arisen in past controlling Opinions. The lead Opinion declares that if this factual scenario arises in a future case, the officer who makes such a disclosure will be held under the "state-created danger doctrine" to have committed a constitutional Due Process violation actionable in a section 1983 Civil Rights Act lawsuit. The third judge on the Ninth Circuit panel asserts that the other judges should not have addressed the "state-created danger" issue and should have just granted qualified immunity based on the absence of controlling case law on these facts.

In key part, the analysis in the Lead Opinion of the state-created danger issue is as follows:

1. *Officer High's affirmative conduct placed Ms. Martinez in actual, foreseeable danger.*

   First, Officer High's affirmative conduct increased Ms. Martinez's risk of abuse by Mr. Pennington. An officer's statements about a victim to a violent perpetrator can increase the risk of retaliation. In [an earlier Opinion in this case], for example, this court held that Officer Hershberger's disclosure of Ms. Martinez's reported abuse "provoked" Mr. Pennington, and her "disparaging comments" about Ms. Martinez emboldened Mr. Pennington "to believe that he could further abuse Martinez, including by retaliating against her for her testimony, with impunity." . . . And in Kennedy v. City of Ridgefield, this court held that officers "affirmatively created a danger to" the plaintiff that "she otherw ise would not have faced" when they notified an alleged perpetrator about the plaintiff's allegations against him "before the [plaintiff and her family] had the opportunity to protect themselves from his violent response to the news." 439 F.3d 1055, 1063 (9th Cir. 2006).

   So too here. Officer High told Mr. Pennington about Ms. Martinez's confidential domestic violence report. She did so after hearing Ms. Martinez answer "no" when Mr. Pennington—the alleged abuser—asked her whether she was "telling the cops" about his abuse.

   Officer High also shared other information endangering Ms. Martinez, including that Ms. Martinez had a romantic relationship with another police officer. In other words, Officer High's disclosure was coupled with comments that Ms. Martinez was lying and also had a relationship with Mr. Pennington's colleague. A reasonable jury could find that Officer High's comments put Ms. Martinez at risk of violent retaliation.

The risk was also foreseeable. Officer High obviously knew that Mr. Pennington was an alleged abuser because the information she disclosed to him was a domestic violence report against him. And when Officer High spoke with Mr. Pennington, he had been arrested for domestic violence and was subject to a restraining order.

Officer High also admitted in her deposition that she knew the Clovis Police Department put Mr. Pennington on leave because of "something involving a female." Worse, Officer High knew Ms. Martinez was in the room with Mr. Pennington when Officer High disclosed the report. The danger was obvious.

Shortly after learning from Officer High that Ms. Martinez reported his abuse to the police, Mr. Pennington brutally sexually and physically assaulted Ms. Martinez. The assaults Ms. Martinez suffered after Officer High's disclosure "were objectively foreseeable" as "a matter of common sense." . . .

Construing the facts in Ms. Martinez's favor, Officer High placed her "in greater danger" by disclosing her confidential complaint to Mr. Pennington while conveying contempt for Ms. Martinez. . . .

2. *Officer High was deliberately indifferent to a known or obvious risk*

Second, Officer High "acted with deliberate indifference toward the risk of future abuse." . . . . In non-detainee cases like this one, the deliberate indifference standard is subjective: The officer must "know that something is going to happen but ignore the risk and expose the plaintiff to it." . . .That does not mean the officer must "know with certainty that the risk will materialize or intend for the plaintiff to face the risk." . . . The officer need only "take an intentional action with knowledge that his actions will expose the plaintiff to an unreasonable risk." . . .

This court has held that knowledge about an abuser's history of violence constitutes deliberate indifference. For example, in [Kennedy v. City of Ridgefield], the officers knew that an alleged perpetrator "had a predilection for violence and was capable of the attack he in fact perpetrated" on the plaintiff's family. . . .The officers thus "knew that telling [the perpetrator] about the allegations against him without forewarning the [plaintiff's family] would place them in a danger they otherwise would not have faced." . . .

So too in [a previous Opinion in this case], this court held that—given Mr. Pennington's "violent tendencies"—"a reasonable jury could find that disclosing a report of abuse while engaging in disparaging small talk with Pennington . . . constitutes deliberate indifference." . . . . And most recently in [Murguia v. Langdon, 61 F.4th 1096, 1116 (9th Cir. 2023)], this court held that a state official "was aware of the obvious risk of harm [a mother] presented" to her children because the official knew about the mother's "history of abuse."

Like the officials in Kennedy, Martinez I, and Murguia, Officer High knew Mr. Pennington was violent. She knew Mr. Pennington was under investigation for domestic violence. She worked in the Clovis Police Department's records unit and saw Ms. Martinez's report of Mr. Pennington's abuse.

> Not only was the department already investigating Mr. Pennington for domestic violence against an ex-girlfriend, . . . but there was an active criminal case against him for assaulting Ms. Martinez. Officer High had also completed domestic violence training and understood that a victim's confidential reports should not be disclosed to the abuser.
>
> Yet she took Mr. Pennington's call and told him about Ms. Martinez's confidential report for no apparent reason other than to discredit Ms. Martinez. And she knew Ms. Martinez was in the room with Mr. Pennington and would thus be exposed to his violent reaction. These facts no doubt show "deliberate indifference to a known or obvious danger." . . . .

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

Result: Affirmance of grant of summary judgment by the U.S. District Court (Eastern District of California) to law enforcement Officer Channon High.

FBI LOSES "INVENTORY SEARCH" ARGUMENT IN CIVIL CASE INVOLVING FBI AGENTS' WARRANTLESS DRAGNET SEARCHES OF THE CONTENTS OF THE VAULTS OF A LAW-SKIRTING PRIVATE VAULTS COMPANY

In Snitco v. U.S., ___ F.4th ___ , 2024 WL ___ (January 23, 2024), the Ninth Circuit Opinion describes the factual origins of the case as follows:

> USPV operated a business in Beverly Hills, California, which rented safe deposit boxes to customers. . . . Unlike banks, which also rent safe deposit boxes, USPV did not require customers to provide personal information, social security numbers, driver's licenses, or any other form of identification in order to rent a box. Customers kept all keys to the boxes. USPV's facility featured significant security measures, including iris-scan vault access, 24/7 electronic monitoring, 24/7 armed response, and a time lock on the vault itself.
>
> Protection of customers' anonymity was USPV's main selling point. On its website, the company explained: "Our business is one of very few where we don't even want to know your name. For your privacy and the security of your assets in our vault, the less we know the better." The website even went so far as to say that it "would only cooperate with the government under court order."
>
> Perhaps unsurprisingly, investigations by various government agencies of individual criminals resulted in the execution of search warrants at USPV. For example, past searches pursuant to a warrant of individual safe deposit boxes at USPV have uncovered proceeds of crimes such as drug trafficking, illegal gambling, and prostitution rings.
>
> . . . .
>
> After years of investigating individual USPV boxholders, agencies like the FBI, DEA, and USPIS concluded that the individual investigations "weren't doing anything effective" because the "real problem" was USPV, which they believed served as a "money laundering facilitator." Accordingly, the agencies opened an investigation into USPV's business and its principals in April 2019.

> The investigation confirmed that the owners of USPV knew of its use by criminals to launder money, solicited illicit business, and committed several crimes themselves, not limited to money laundering. The agencies thus began discussions about obtaining indictments and warrants against the company. Internally, the agencies discussed taking "[USPV's] business out," which they believed involved seizing "eye scanners, the money counter," and "the nest[s] of safe deposit boxes."

[Footnote omitted]

A Ninth Circuit staff summary (which is not part of the Court's Opinion) provides the following synopsis of the three-judge panel's Opinion in the Snitco case:

> The panel reversed the district court's judgment holding that plaintiffs' Fourth Amendment rights were not violated when the FBI "inventoried" 700 safe deposit boxes at US Private Vaults (USPV), and remanded for the FBI to sequester or destroy the records of its inventory search pertaining to the class members.
>
> USPV operated a business which rented safe deposit boxes to customers. The government obtained a warrant to search and seize USPV's facilities, including its safe deposit boxes, as part of its investigation of USPV for various criminal activities. The warrant explicitly did not authorize a criminal search or seizure of box contents, and required agents to follow their written policies to inventory items and contact box owners so that they could claim their property after the search.
>
> Following the seizure of their property, plaintiffs filed suit alleging claims for return of property pursuant to Federal Rule of Criminal Procedure 41(b) and violations of their Fourth and Fifth Amendment rights. Although plaintiffs' property was returned, they continued to seek equitable relief requiring the government to return or destroy records of the inventory search. The district court denied plaintiffs' requested relief, finding that the government's "inventory" of the safe deposit contents was a constitutionally proper inventory search.
>
> In Part I of its analysis, the panel held that the inventory search doctrine, an exception to the warrant requirement that allows authorities to search items within their lawful custody, did not apply. One of the most important features of the doctrine is the existence of standardized instructions, which limit the discretion of officers and apply consistently across cases. Here, in support of its warrant application, the government, in addition to submitting standardized instructions, also submitted Supplemental Instructions that were designed specifically for the USPV raid. The panel held that the Supplemental Instructions took this case out of the realm of a standardized "inventory" procedure.
>
> In Part II of its analysis, the panel held that the government exceeded the scope of the warrant, which did not authorize a criminal search or seizure of the contents of the safe deposit boxes.
>
> Concurring, Judge M. Smith wrote separately to address plaintiffs' additional argument that the origins and rationale of the inventory search doctrine makes it inapplicable to safe deposit boxes in a locked vault. Judge M. Smith would hold that given the greater privacy interests and the implications of the rights of third parties, the inventory search doctrine does not extend to searches of the box contents in a locked vault.

Concurring in part, Judge VanDyke joined the majority's opinion except as to Part II of its analysis, which he viewed as unnecessary given the panel's resolution of Part I.

LEGAL UPDATE EDITOR'S COMMENT: I think that the Ninth Circuit was correct in rejecting the FBI's "inventory search" theory under Fourth Amendment analysis in the factual context of the Snitco case; and I also think that such a theory would not get anywhere in a case in the Washington courts in analysis under article I, section 7 of the Washington constitution.

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WASHINGTON STATE COURT OF APPEALS

WHAT CONSTITUTES A "SEIZURE" OF THE PERSON UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION: IN A 2-1 VOTE (JUDGE FEARING DISSENTING), DIVISION THREE PANEL RULES THAT IT IS NOT PER SE A SEIZURE FOR A LAW ENFORCEMENT OFFICER MAKING A SOCIAL CONTACT: (1) TO ASK THE CONTACTED PERSON TO VOLUNTARILY PROVIDE IDENTIFICATION, (2) TO NOT WALK AWAY WITH THE IDENTIFICATION, AND (3) TO HOLD THE IDENTIFICATION ONLY LONG ENOUGH TO CHECK ON THE ID INFORMATION WITH DISPATCH FOR A DATABASE CHECK

State v. Taylor, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. III, January 23, 2024)

Facts: (Excerpted from Court of Appeals Opinion)

> On February 2, 2021, at around 9:00 p.m., [a law enforcement officer] received a report of a theft from the local Lowe's hardware store. Dispatch advised the officer that the suspect was wearing jeans and a white sweatshirt and that he was carrying items from the store. The officer drove to an open field behind Lowe's after a store employee reported the suspect had headed in that direction.
>
> Once in the field, [the officer] located a parked Toyota pickup truck. He looked through the windows of the truck for the suspect or the stolen merchandise but found neither. He then ascended a 20-foot high dirt mound near the truck to gain a better view of the field. At the top of the mound, [the officer] encountered Jarod Roland Taylor, who was sleeping.
>
> The officer shined a flashlight on Mr. Taylor because it was dark and asked for his identification. At this point, the officer's body camera audio begins. Mr. Taylor asked, "What is going on?" The officer replied,
>
> > So someone saw someone running out the back of Lowe's over here in the field with a bunch of stuff in their hands . . . and you don't match the description or anything, but we just gotta, I just gotta get your name just so we have that in case we need to contact you again at some point.
>
> Mr. Taylor handed his identification to [the officer]. After the two had a brief cordial discussion, the officer provided Mr. Taylor's name and birthdate to dispatch. [The officer] returned Mr. Taylor's identification to him. Mr. Taylor then said the truck was his

> and asked if it was all right—him being there. The officer responded it was, unless someone complained.
>
> Soon after, dispatch reported the information to [the officer], and the officer asked Mr. Taylor if he knew he had a felony warrant. Mr. Taylor said he did not, and the officer arrested Mr. Taylor.
>
> Around the same time, [a second officer] arrived and looked inside the windows of the truck where he saw the barrel of a rifle and two boxes of ammunition. After [the second officer] obtained a warrant, he seized the rifle.

Proceedings below:

Mr. Taylor lost a motion to suppress the firearm on grounds that it was the fruit of an unlawful seizure of him. He was convicted by a jury of second degree unlawful possession of firearm.

ISSUE AND RULING: A law enforcement officer made a social contact with Mr. Taylor and requested identification while telling Mr. Taylor that he was not a suspect. Mr. Taylor voluntarily gave the officer his identification. The officer remained in place near Mr. Taylor as the officer transmitted information from the identification to dispatch a database check. The officer then returned Mr. Taylor's identification to him. Dispatch soon informed the officer that Mr. Taylor had an outstanding felony warrant.

Did the contact become a "seizure" under article I, section 7 of the Washington constitution at the point when the officer transmitted information from the identification document to dispatch?

(ANSWER BY COURT OF APPEALS: No, rules a 2-1 majority, the contact did not become a seizure until after the warrant information came back to the officer from dispatch, and the officer acted on that warrant information to make an arrest on an outstanding warrant.)

Result: Affirmance of Grant County Superior Court conviction of Jarod Roland Taylor for unlawful possession of a firearm in the second degree.

ANALYSIS IN MAJORITY OPINION

The following are key excerpts from the Majority Opinion's analysis under article I, section 7 of the Washington constitution:

> "A seizure occurs only 'when, in view of all the circumstances surrounding the incident, a reasonable person would have believed [they were] not free to leave' or 'free to otherwise decline an officer's request and terminate the encounter' due to an officer's use of 'physical force or a show of authority.'" State v. Meredith, 1 Wn.3d 262, 270 (2023) . . . . The relevant question is whether a reasonable person in the individual's position would feel he or she was being detained. . . .
>
> Washington courts distinguish between a warrantless social contact, which article I, section 7 generally permits, and a warrantless seizure, which it generally prohibits. . . . During a social contact, an officer need not warn the citizen of his right to remain silent or walk away. . . . . Because courts have not defined a social contact, the term "occupies an amorphous area in our jurisprudence, resting someplace between an officer's saying

'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." . . .

Interactions that our Supreme Court has confirmed do not indicate a seizure include officers asking for identification, or obtaining identification, or calling dispatch for information about the subject. . . . Conversely, interactions that our Supreme Court has confirmed might indicate a seizure includes "'the threatening presence of several officers, the display of a weapon by an officer, physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" . . .

. . . .

Mr. Taylor argues he was unconstitutionally seized when [the officer] obtained his identification and called dispatch for an identification check. The State points to State v. Hansen, 99 Wn. App. 575, 994 P.2d 855 (2000) as refuting Mr. Taylor's argument.

In Hansen, the court analyzed whether a seizure occurred when two police officers approached Mr. Hansen and asked for his identification. . . . Although the officers were not in uniform, their guns and badges were visible. . . . One officer asked Mr. Hansen for his identification. . . . Mr. Hansen complied by handing the officer his driver's license. The first officer passed the license to the second officer, who then wrote down Mr. Hansen's name and date of birth and handed the license back to him. The second officer held onto Mr. Hansen's license for "approximately five to 30 seconds." . . . The first officer continued to talk with Mr. Hansen while the second officer conducted a warrants check.

We concluded that the encounter did not ripen into an unlawful detention, explaining, "There is no reason handing the license to another officer standing beside the first would have led a reasonable person to believe that he was not free to leave."

Mr. Taylor argues this case is less like Hansen and more like State v. Crane, 105 Wn. App. 301 (2001) . . . In Crane, a police officer was monitoring a house while other officers obtained a warrant to search the residence for stolen property. The officer saw a car pull into the driveway. The officer pulled his patrol car into the driveway and blocked the car as three men got out and walked toward the house.

The officer got out of his car and "asked or told" the men to stop. The men complied and walked toward the officer. . At that point, a woman came out of the house to ask what was going on. The officer told the woman to remain inside and not come out and that the police were not allowing people to come in and out of the house because they were obtaining a warrant.

The officer asked each man for his identification and stood with the men while he radioed to check for warrants. The warrants check took a couple of minutes and returned a warrant for Mr. Crane. At that point, the officer arrested Mr. Crane and located a bag of cocaine that had fallen from his wallet.

Mr. Crane moved the trial court to suppress the cocaine, arguing he was illegally seized. The trial court denied his motion and found him guilty of possession of a controlled substance.

On appeal, we explained that Mr. Crane's case "falls between the situation . . . where the officer walks away with the identification and runs a warrants check and the situation in Hansen, where the officer merely records information from the identification and returns it." We determined that a reasonable person in Mr. Crane's position would not feel free to leave because the contact did not occur in public, the officer parked his car behind the car Mr. Crane arrived in, the officer retained Mr. Crane's identification while he ran the warrant check, and the officer made Mr. Crane aware that he had entered an area that the police had secured.

Our review of Crane convinces us of a more principled reason why a seizure had occurred: a reasonable person in Mr. Crane's position would not feel free to leave due to the police officer's show of authority. There, the officer displayed his authority by blocking the car in the driveway, directing the home's occupant to go back inside, and telling everyone they were not allowed to go in or out of the house because a warrant was being obtained.

We believe this case is similar to Hansen and distinguishable from Crane. As in Hansen, [the officer in this case] held onto Mr. Taylor's identification briefly and spoke with him while dispatch obtained information about Mr. Taylor. As opposed to the officer in Crane, [the officer here] did not display his authority by blocking Mr. Taylor from leaving nor did he issue any verbal commands. Because [the officer here] did not use physical force or display authority, a reasonable person in Mr. Taylor's position would not have believed he was unable to leave or terminate the encounter "due to an officer's use of 'physical force or a show of authority.'" . . . .

. . . .

Our dissenting colleague would proffer a new rule: whenever an officer retains a citizen's driver's license, no matter how brief, the citizen is seized. Dissent at 9. This new rule is premised on the notion that an officer's request for identification is sufficiently coercive to amount to a show of authority. Dissent at 9. It would apply to all encounters, whether the citizen is a suspect, a witness, or a crime victim.

Later, to render this new rule "consistent" with [State v. O'Neill, 148 Wn.2d 564, 571 (2003)], the dissent amends it to: a seizure occurs when the officer has the driver's license and calls dispatch for a warrants check. Dissent at 10- 11. This is not the law in Washington. A show of authority requires more than obtaining a subject's driver's license and calling dispatch for information about the subject. See, e.g., [State v. Armenta, 134 Wn.2d 1, 6, 11, 21 n.10 (1997)] (seizure did not occur when officer obtained Armenta's driver's license and called dispatch for a driver's check, especially, as in the case here, when not investigating criminal activity).

> [Majority Opinion's footnote 3 responding to an element of Judge Fearing's dissent: *The dissent attempts to distinguish this case from Armenta by saying here, the officer requested a warrants check while the officer in Armenta requested a driver's check. Not so. Here, the recorded video shows the officer providing only Mr. Taylor's name and date of birth to dispatch; he did not ask dispatch to check for warrants. It is mere semantics, whether one refers to such calls as a "driver's check," an "identification check," or a "warrants check."*

> *Regardless of semantics, invariably, the officer provides dispatch with a name and date of birth, and dispatch runs them through its database*.]
>
> We reject Mr. Taylor's arguments that he was unconstitutionally seized. We conclude that the trial court did not err when it denied Mr. Taylor's suppression motion.

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

Result: Affirmance of Grant County Superior Court conviction of Jarod Roland Taylor for unlawful possession of a firearm in the second degree.

SIXTH AMENDMENT RIGHT TO COUNSEL THAT IS TIED TO THE ATTORNEY-CLIENT PRIVILEGE IS HELD TO HAVE BEEN VIOLATED WHERE RECORDINGS WERE MADE OF MEETINGS BETWEEN DEFENDANT AND COUNSEL AND LEGAL MAIL WAS INADVERTENTLY OPENED – THESE WERE PER SE VIOLATIONS REGARDLESS OF WHETHER ANY GOVERNMENT ACTORS LISTENED TO THE RECORDINGS OR READ THE CONTENTS OF THE MAIL

In State v. Couch, ___ Wn. App. 2d ___ , 2024 WL ___ (Div. II, January 23, 2024), Division Two of the Court of Appeals rules that the Grays Harbor County Superior Court failed to understand the legal requirements upon the prosecutor in this case where there was a violation of a defendant's Sixth Amendment right that is tied to the attorney-client privilege.

The violation were the mere facts that (1) multiple jail phone calls between an incarcerated defendant and his legal counsel were recorded by a government system; (2) several meetings between defendant and counsel were video recorded by a government system; and (3) at least one piece of legal mail was opened by a government actor. The Couch Court declares that under the Sixth Amendment it does not matter if no government actors actually reviewed the recordings or the legal mail.

Included in the Couch Opinion's analysis in this case is the following critical assessment of how the proceedings at the trial court level failed to hold the State to its burden of proving beyond a reasonable doubt that the Sixth Amendment violations did not prejudice defendant in the case:

> The courts in [the leading Washington cases] all remanded for the trial court to address whether the State was able to prove the absence of prejudice beyond a reasonable doubt. . . . However, we conclude as a matter of law under the facts of this case that the State did not prove beyond a reasonable doubt that Couch was not prejudiced.
>
> Couch presented testimony showing how he had been prejudiced by the state actors' intrusion on his attorney-client communications. He testified that after he found out about the intrusions, he stopped talking to [Defense Attorney 1] on the phone, he stopped meeting with [Defense Attorney 2] over video, and he stopped using mail to communicate with his lawyers. As a result, his communications with his lawyers – which focused on trial preparation – were chilled.
>
> At the hearing [regarding the Sixth Amendment violations], the State made no effort to refute this testimony. The State presented no evidence that Couch had been able to fully communicate with his lawyers despite the intrusion on their attorney-client

communications. Therefore, the State was unable to prove that Couch was not prejudiced in this way.

Instead, the State focused on whether anyone had listened to the recorded telephone calls, viewed the recorded video conferences, or read the opened legal mail. But the State's evidence on this issue was inadequate.

[The Chief Corrections Deputy] testified he did not know whether or not anyone had viewed the videos. [A Corrections Sergeant] testified that she did not know if anyone read the opened mail. The State did not call as witnesses any of the prosecutors or police investigators handling the case as to whether they had seen the videos or the opened legal mail.

The State also did not call as a witness the employee who had opened the mail to testify as to whether she read the mail or shared it with anyone else. As a result, the State was unable to prove that nobody involved in Couch's case had seen the attorney-client communications.

The record demonstrates that the State did not prove beyond a reasonable doubt that Couch was not prejudiced by state actors' intrusion on his attorney-client communications. Therefore, we hold that the trial court erred in failing to grant Couch's CrR 8.3(b) motion based on government misconduct.

Accordingly, the Couch Court remands the case to the Grays Harbor County Superior Court for further proceedings in which the Superior Court must determine in its discretion whether to dismiss Couch's case or order a new trial with sufficient remedial safeguards to ensure that he was not prejudiced by the Sixth Amendment violations.

Result: Reversal of Grays Harbor Superior Court convictions of Anthony Lynn Couch for second degree rape and second degree assault; case is remanded for further proceedings in the Superior Court.

RCW 9A.64.020, WHICH, AMONG OTHER THINGS, CRIMINALIZES "SEXUAL INTERCOURSE" AND "SEXUAL CONTACT" BETWEEN CLOSE BLOOD RELATIVES, IS HELD TO NOT BE FACIALLY UNCONSTITUTIONAL; COURT REJECTS DEFENDANT'S ARGUMENT THAT, WHILE HIS PROSECUTED CONDUCT INVOLVED A CHILD (OR AT LEAST A PERSON UNDER AGE 18), THE STATUTE ON ITS FACE IS UNJUSTIFIABLY BROAD IN CRIMINALIZING ALL SUCH SEXUAL CONDUCT BETWEEN CONSENTING ADULTS WITH CERTAIN BLOOD RELATIONSHIPS

In State v. Gantt, ___ Wn. App. 2d ___ , 2024 WL ___ (January 2, 2024), Division One of the Court of Appeals upholds the convictions of defendant for five felonies committed against his daughter, who he molested up through her reaching the age of 17.

Among other unsuccessful theories, defendant argued that the incest statute, RCW 9A.64.020, is unconstitutional because, among other purported defects, the statute on its face unjustifiably prohibits all consensual "sexual intercourse" and all "sexual contacts" between consenting adults of certain specified blood relationships, regardless of the adult participants' ages. The Court of Appeals rejects all of his arguments seeking to escape application of the incest statute to his acts against his daughter. The Opinion of the Court leaves open a constitutional

challenge in a hypothetical future case where two consenting adults might be prosecuted for having sexual intercourse or sexual contact.

The Gantt Opinion also concludes, after extended legal analysis focused on the particular circumstances of this case, that defendant's past uncharged sex crimes against his children were lawfully admitted under the evidence-law theory that the acts were part of a common scheme or plan.

Result: Affirmance of King County Superior Court convictions of Ian Anthony Gantt for: (A) two counts of incest in the first degree under RCW 9A.64.020(1); (B) one count of child molestation in the second degree; (C) one count of rape of a child in the second degree; and (D) one count of rape of a child in the third degree.

TRIAL COURT IS HELD TO HAVE LAWFULLY ADMITTED EVIDENCE OF DEFENDANT'S PAST UNCHARGED CRIMES AGAINST THE VICTIM BECAUSE THE PRIOR CRIMES WERE PART OF A COMMON SCHEME OR PLAN

In State v. Johnson, ___ Wn. App. 2d ___ , ___ WL ___ (Div. I, January 2, 2024), Division One of the Court of Appeals rejects the appeal of defendant Brennaris Maquis Johnson from his convictions for: (A) second degree assault against his one-time-significant other, Nichole Trichler; and (B) felony violation of a no-contact order protecting Ms. Trichler. Among other things, the Court of Appeals rules that the trial court lawfully admitted evidence of defendant's unprosecuted assaults against Ms. Trichler that were committed prior to the assault at issue in this case.

In contacts with EMTs and medical personnel, Ms. Trichler blamed her own voluntary consumption of drugs for a brain bleed that led to surgery and hospitalization. She denied to these responders and treatment providers that she had suffered any assault or trauma.

But after talking with her mother, Trichler realized the severity of her injuries and decided to report that she believed that her medical condition was not due to taking drugs, but that it was the result of a physical assault by the defendant. Johnson was subsequently charged with second degree assault for the attack that had led to the surgery and hospitalization.

The trial court allowed the State to present evidence of prior assaults by Johnson against Ms. Trichler on the rationale that evidence of such assaults was relevant to an assessment by the jury of her credibility in having given inconsistent accounts about the day at issue (giving one account to EMTs and medical staff on the day at issue and giving a different account later to the police and at trial). The Superior Court judge gave a limiting instruction to the jury that the evidence was admissible only for the purpose of assessing the credibility of Ms. Trichler's testimony.

In key part, the Johnson Court provides the following general framework for analysis on the admissibility issue:

> ER 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." But this evidence may be used for another purpose, such as proof of motive, plan, or identity. . . . Evidence that a defendant previously assaulted a victim is generally inadmissible if the defendant assaults the same victim on a later occasion. . . . However, such evidence

> may be admissible to "assist the jury in judging the credibility of a recanting victim." . . . . And the victim's credibility need not be an element of the charged offense. . . To determine if ER 404(b) evidence is admissible, Washington courts use a four-part test:
>
> > "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect."
>
> . . . .

In explaining why the test for relevance, which is the third prong of the four-part test for admissibility under ER 404(b), is met in this case, a key part of the Johnson Court's discussion is as follows:

> Here, the trial court found that, "with regard to [Trichler's] credibility and her allegation in this case," evidence of prior domestic abuse was "relevant as to how she behaves in this relationship." The State contends that evidence of prior assaults and Trichler's response to those assaults were relevant to explain her inconsistent statements and conduct. We agree.
>
> Johnson contends that the prior assaults are not relevant because they show only that "sometimes [Trichler] reports alleged assaults and sometimes she does not." But Trichler's inconsistent reporting is exactly what is relevant. As is reflected in this case, victims of domestic violence often minimize, deny, or lie about abuse in an effort to protect themselves and avoid repeated violence from their batterer. Anne L. Ganley, Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases, in DOMESTIC VIOLENCE MANUAL FOR JUDGES ch. 2, at 41 (2016), https://www.courts.wa.gov/ content/manuals/domViol/chapter2.pdf [https://perma.cc/UA2L-STVU].
>
> This is particularly true when domestic violence issues go public, such as in court proceedings, and batterers try to increase their coercive control over the abused party. Ganley, supra, ch. 2 at 41. And sometimes, the abused party's minimization or denial is actually a survival mechanism: when asked by others if they were injured, they may honestly answer no because they have been so successful in blocking out the event. Ganley, supra, ch. 2, at 42. This is not to say that victims of domestic violence are less credible. We merely acknowledge the tremendous emotional toll that a relationship plagued by domestic violence may have on a person.
>
> These dynamics are present in this case. The State offered evidence of two prior assaults to demonstrate that Trichler had a pattern of inconsistently reporting past abuse and later recanting. After the first prior assault, Trichler decided not to report it to authorities, despite Johnson having strangled her until she was "out cold." And after the second prior assault, Trichler reported the incident to police but "ran off" before they arrived. She later wrote a letter to the trial court recanting her earlier report of assault.
>
> Trichler's conduct in this case mirrors her past conduct. After the present assault, Trichler denied repeatedly to emergency medical personnel and hospital staff that she had been assaulted or suffered any trauma. But at trial, Trichler testified repeatedly that Johnson had hit her. Trichler also waited several days to report the assault, and testified that she did not initiate the reporting—her mother called the police for her. Moreover,

once Trichler was discharged from the hospital, she continued to communicate with Johnson and even went to his apartment.

Trichler's inconsistent statements before and at trial, along with her actions after the assault, undercut her credibility at trial. Contrary to Johnson's assertion that evidence of past abuse "does nothing" to assist the jury, this evidence allows the jury to evaluate Trichler's credibility in the context of a relationship marked by domestic violence.

[Some paragraphing revised for readability]

Result: Affirmance of Snohomish County Superior Court conviction of Brennaris Marquis Johnson for second degree assault and for felony violation of a no-contact order.

WASHINGTON CHILD PORN LAW VIOLATOR LOSES ARGUMENT THAT HIS PRIOR AUSTRALIAN SEX OFFENSE CONVICTIONS ARE NOT INCLUDED IN SENTENCING UNDER THE WASHINGTON STATUTORY SCHEME

In State v. Lewis, ___ Wn. App. 2d ___. 2024 WL ___ (Division Two, January 23, 2024), Division Two of the Court of Appeals summarizes the Court's ruling as follows in the first three paragraphs of the Court's Opinion:

Matthew Lewis was sentenced to 102 months of confinement after pleading guilty to two counts of dealing in depictions of a minor engaged in sexually explicit conduct and one count of possession of depictions of a minor engaged in sexually explicit conduct. His offender score was 9-plus, accounting for three prior sex offense convictions that Lewis pleaded guilty to in Australian court in 2017.

Lewis now appeals his sentence, arguing that the trial court erred when it included his Australian convictions in his offender score calculation. He argues that the plain language of the offender score statute unambiguously excludes prior convictions from outside the United States. He argues in the alternative that if the statute is ambiguous, the rule of lenity requires us to exclude foreign country convictions. Finally, he argues that even if foreign country convictions may generally be included in one's offender score, his Australian convictions should be excluded from his score as facially invalid.

We hold that the term "out-of-state" as used in the offender score statute is unambiguous and does not exclude foreign country convictions. We further hold that Lewis' Australian convictions are not facially invalid. We therefore affirm Lewis' sentence.

Result: Affirmance of Grays Harbor Superior Court's sentencing of Matthew Adam Lewis in relation to his convictions for (A) two counts of dealing in depictions of a minor engaged in sexually explicit conduct, and (B) one count of possession of depictions of a minor engaged in sexually explicit conduct.

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RESEARCH NOTE

CJTC LAW ENFORCEMENT DIGEST PAGE'S COMPILATION OF PAST LEDS GOING BACK TO 2009 IS NOW COMPLETE BACK TO 2009
The LED page link is
https://www.cjtc.wa.gov/resources/law-enforcement-digest

For many years, the compilation of past LEDs on the CJTC LED page has been incomplete. Thanks to much-appreciated work by Mercer Island PD Sergeant David Canter and by staff of the Attorney General's Office and the Criminal Justice Training Commission, the compilation of past LEDs is now complete going back to 2009.

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BRIEF NOTES REGARDING JANUARY 2024 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 six entries below address the January 2024 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 brief descriptions of the holdings/legal issues are bolded.

1. State v. Joseph Drew Huntsman: On January 3, 2024, Division Two of the COA rejects the appeal of defendant from his Pierce County Superior Court conviction for *third degree assault* based on defendant's unarmed physical attack on a law enforcement officer. **On appeal, the State conceded that the trial court erred when it allowed the officer to offer opinion testimony of defendant's guilt of assault. The Court of Appeals agrees with the State both (1) that the opinion-as-to-guilt testimony was improperly allowed by the trial court, and (2) that the trial court's error was harmless in light of the weight of the untainted other evidence of guilt.**

The Court of Appeals Opinion in Huntsman describes and quotes from the erroneously admitted opinion testimony as follows:

> On cross examination of [the officer], defense counsel asked [the officer] to describe a segment of the video from his body camera footage. The question was open ended and invited [the officer] to narrate what he saw in the video. The following exchange took place:
>
> > Q. (By [Defense counsel]) So can you tell us again what happened in this portion of the video?
> >
> > A. [Officer] So at that portion he pushes into me. At that point with my hand already on him it's unwanted contact. It turns into an assault at that point with me being a commissioned law enforcement officer and—
> >
> > [Defense counsel]: Objection. He's rendering an opinion on the—
> >
> > THE COURT: Well, he can testify as to his understanding.
> >
> > A. [Officer] So at that point I deemed it to be an assault. I did not want him to touch me that way. And I'm a law enforcement officer in the performance of my duties, which makes it an Assault 3 which is a felony.
> >
> > [Defense counsel]: Objection, Your Honor.
> >
> > THE COURT: Again, the jury will be instructed on what the law is.
> >
> > A. [Officer] So at that point I deemed that there was probable cause to arrest him for Assault 3. And so he continued to push against me. [The other officer] moved in to try to help me detain him.

Here is a link to the Opinion in State v. Huntsman:
https://www.courts.wa.gov/opinions/pdf/D2%2057414-4-II%20Unpublished%20Opinion.pdf

2. State v. Tien Lam: On January 8, 2024, Division One of the COA rejects the appeal of defendant from his Snohomish County Superior Court convictions for *(A) two counts of possession of a controlled substances with intent to manufacture or deliver, and (B) one count of possession of drug paraphernalia.* The Court of Appeals rejects defendant's argument that he was unlawfully seized. He based his seizure argument on the fact that uniformed law enforcement officers approached a vehicle in which defendant, a self-described Vietnamese person (and thus a person of color), was a passenger. Lam's argument is hinged in significant part on the Washington Supreme Court decision in State v. Sum, 199 Wn.2d 627, 631 (2022), where the Supreme Court capsulized as follows why the Court requires consideration of BIPOC status in the constitutional test of "seizure" under article I, section 7 of the Washington constitution:

> For purposes of analysis under [the objective test of "seizure"], 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 (BIPOC) in Washington.

A key part of the legal analysis in Lam rejecting the defendant's Sum-based "seizure" argument is as follows:

Relying on the objective observer standard articulated in Sum, Lam insists that he "was seized when the police approached the BMW and before the police saw the foil in his satchel." According to Lam, "At no point after the police started approaching the BMW would an objective observer believe Lam could leave."

This is so, Lam contends, because he is a person of color who was known to [the officer] and "[a] person of color, known to the police does not walk away." While we agree that Lam's race and ethnicity are relevant considerations, they are by no means the only ones that we consider. Sum, 199 Wn.2d at 654.

Here, the undisputed facts establish that [the two officers] drove to the Wendy's parking lot and parked their vehicles without either activating their emergency lights or blocking the BMW's exit. Moreover, there was no interaction, verbal or physical, between the officers and Lam until [one of the officers] saw the crumpled-up foil with burn marks on it through the vehicle window, ordered the occupants out of the BMW, and placed Lam under arrest pursuant to the county code [prohibiting possession of drug paraphernalia].

Under article I, section 7, a seizure requires that "law enforcement's display of authority or use of physical force" causes a person to believe they are not free to leave, Sum, 199 Wn.2d at 653, and though the degree of authority or force required may fluctuate depending on the totality of the circumstances, the mere approach of the officers in this situation falls plainly short of an unlawful seizure.

Perhaps more critically, the record does not establish that Lam was even aware of approaching officers until the moment he was observed with the drug paraphernalia and placed under arrest. On appeal, Lam does not engage with this additional aspect of the seizure analysis or otherwise demonstrate how he could have been seized at the moment of the officers' approach to the BMW if he was not, in fact, aware of their presence.

Accordingly, the trial court did not err in finding that Lam was not seized until [the officer] observed the drug paraphernalia in the satchel in Lam's lap through the vehicle window and placed him under arrest.

The Court of Appeals in Lam also analyzes and rejects Lam's argument that the officers did not have probable cause to arrest him based on their open view through the car window of him in possession of drug paraphernalia in apparent violation of a county ordinance.

Here is a link to the Opinion in State v. Lam:
https://www.courts.wa.gov/opinions/index.cfm?fa=opinions.showOpinion&filename=839292MAJ

3. State v. Jorge Hernandez Mendieta: On January 9, 2024, Division Two of the COA rejects *the appeal of defendant from the Kitsap County Superior Court's denial of his motion to dismiss charges against him for possessing controlled substances (28 grams of methamphetamine and 10 grams of heroin) with intent to deliver*. In the trial court and on appeal, the defendant invoked the "corpus delicti rule" and argued that the prosecution lacked independent evidence of the charged crime necessary to corroborate his incriminating statements and establish the corpus delicti of possession with intent to deliver.

The common law/court-created corpus delicti rule originated in English common law and was developed by courts over the centuries in order to preclude persons from being convicted based almost entirely on their incriminating statements. For prosecutions in federal courts and in many states other than Washington, the rule has been relaxed somewhat to require only that the evidence meet a "trustworthiness" standard, but the Washington Supreme Court has expressly declined to follow that approach.

Under Washington case law, there are three specific requirements for establishing corpus delicti: (1) the evidence must independently corroborate, or confirm, the fact of a defendant's incriminating statement; (2) the independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence; and (3) the evidence must corroborate not just a crime but the specific crime, which in the Hernandez Mendieta case is possession with intent to deliver methamphetamine.

In Washington prosecutions for possessing controlled substances with intent to deliver, the Washington corpus delicti precedents hold that the quantity or volume of drugs possessed generally does not help establish corpus delicti despite the common sense observation that possessing a large amount of illegal drugs tends – at some high level of quantity or volume – to suggest a purpose other than mere use.

In the Hernandez Mendietta Opinion, in key part, the analysis by the Court of Appeals explains as follows that there was sufficient evidence to meet the requirements of the Washington corpus delicti rule for possessing controlled substances with intent to deliver, and therefore that a jury could consider the defendant's inculpatory statements to a law enforcement officer:

> Here, when the evidence is viewed in the light most favorable to the State and all reasonable inferences are construed in the State's favor, there was more than the mere quantity of drugs Hernandez Mendieta possessed to support the corpus delicti of the crime charged.
>
> First, the heroin was in a powder form and not tar, which is uncommon if intended for personal use. This was further supported by [a detective's expert] testimony.
>
> Second, no personal use paraphernalia was found.
>
> Lastly, the fact that methamphetamine and heroin were found together, in large quantities, coupled with [the detective's expert] testimony that it is uncommon to use methamphetamine and heroin together, is sufficient to satisfy the low burden of corpus delicti.
>
> And, although "an officer's opinion on what quantity of a controlled substance is 'normal for personal use' cannot alone support an inference of intent to deliver," [the detective's] additional opinions regarding the nature of the drugs seized is sufficient to satisfy the low burden under corpus delicti. . . .
>
> Accordingly, the State presented sufficient corroborating evidence to establish corpus delicti in this possession with intent to deliver case.

[Paragraphing revised for readability; citations omitted]

Here is a link to the Opinion in State v. Hernandez Mendieta:
https://www.courts.wa.gov/opinions/pdf/D2%2057415-2-II%20Unpublished%20Opinion.pdf

4. State v. Heather D. Troutman: On January 8, 2024, Division One of the COA rejects the appeal of defendant from her Whatcom County Superior Court conviction for *felony driving under the influence (DUI)* following a trial in which the key factual question was whether the defendant was the driver of a car that was discovered off the road shortly after what appeared to be a one-car accident.

At trial and on appeal, the defendant invoked the corpus delicti rule to challenge the admission of her inculpatory statements that she had made to an EMT and a responding law enforcement officer. The witnesses regarding the accident scene were (1) a passerby who, it appears, came upon the scene very shortly after the accident; (2) an EMT who arrived a few minutes later; and (3) a responding law enforcement officer who arrived about 10 minutes after the EMT arrived.

The Opinion in Troutman includes the following fact-intensive analysis to support the Court's conclusion that the corpus delicti rule does not bar admission of the defendant's statements to the EMT and the responding law enforcement officer:

> Unlike the independent evidence in [State v. Sprague, 16 Wn. App. 2d 213 (2021)] which was consistent with both mere possession and with possession with intent to deliver [controlled substances], here the independent evidence is inconsistent with the conclusion that Troutman was not the driver. [The passerby witness] observed a single person, Troutman, in the car's driver's seat. The car was still running, and the keys were still in the car's ignition, so the logical and reasonable inference is that the accident had just happened when [that passerby] encountered the car.
>
> [The passerby] and the EMT, who arrived within two minutes of the 911 call [from the passerby], observed no other persons at the scene. Though Troutman testified [at trial that a male friend and that friend's friend] had been in the car, she did not ask for help finding them at the scene. As the area was remote, it was a reasonable inference that no one else had been the driver and had left the scene.
>
> [The responding law enforcement officer], who arrived ten or fifteen minutes after the 911 call, found the keys still in the car and observed that the car's seat was adjusted to fit a person of Troutman's height. [The officer] also observed no other people at the remote scene who could have been the car's driver.
>
> Viewed in the light most favorable to the State, the evidence independent of Troutman's statements supports a logical and reasonable inference that Troutman was the car's driver. Therefore, we conclude that the corpus delicti rule is satisfied.

[Some paragraphing revised for readability]

Here is a link to the Opinion in State v. Troutman:
https://www.courts.wa.gov/opinions/pdf/840541.pdf

5. State v. Anrio Demetreous Adams, Sr.: On January 16, 2024, Division One of the COA accepts the State's concession of prosecutorial misconduct and reverses the defendant's Lewis County Superior Court convictions for *(A) residential burglary and (B) felony violation of a no-contact order*. The State did not oppose the remand of the case for re-trial.

One of the instances of misconduct was the prosecutor's improper eliciting of opinion testimony of the two police witnesses to establish guilt. The Court of Appeals explains as follows some of the circumstances of this trial court error:

> Here, in order to prove both charges, the State had to establish that Adams, the defendant, was the same person who was subject to a no-contact order and had two prior convictions for violating court orders. Former RCW 26.50.110 (1)(a), (5) (2019); RCW 9A.52.025.
>
> > [Court's footnote 2: The State relied on the violation of the no-contact order to establish that Adams entered or remained in the residence unlawfully for purposes of residential burglary.]
>
> To satisfy its burden of proof, the State was required to do more than rely on court orders and judgments that bore the same name as the defendant on trial. State v. Huber, 129 Wn. App. 499, 501-03, 119 P.3d 388 (2005) **(because multiple individuals may share the same name, the prosecution must show by independent evidence that the person named in the document is the defendant on trial and can meet its burden by, for example, presenting booking photographs, fingerprints, eyewitness identifications, a certified copy of a driver's license, or other distinctive personal information**).
>
> But in questioning both officers, the State repeatedly elicited opinion testimony to establish identity, by asking, for instance, whether the person the officers arrested was the "same person that was the subject of a no-contact order." The State also questioned the officers about "verifying" Adams's prior convictions for violating no-contact orders, and as to each of the criminal judgments admitted, elicited testimony that the documents "relate" to Adams, the defendant.
>
> Adams's criminal liability depended on him being the person to whom the no-contact order and prior judgments pertained. The only disputed issue in the case was whether the "Adams" who was on trial was the same "Adams" as was referenced in the various documents. In the specific context of this case, and especially in view of the witnesses' law enforcement status and the lack of factual foundation for the line of questioning, the elicited testimony amounted to improper opinion testimony as to defendant Adams's guilt.

[Some paragraphing and formatting revisions were made for readability]

Here is a link to the Opinion in State v. Adams:
https://www.courts.wa.gov/opinions/pdf/859137.pdf

6. State v. Robert Lorne Harrison: On January 17, 2024, Division One of the COA rejects the appeal of defendant from his King County Superior Court convictions for *(A) two counts of robbery in the first degree and (B) one count of unlawful possession of a firearm in the first degree*. The defendant's theory of defense was a highly implausible claim that someone else did the armed robbery, and that he just happened along moments later and plundered the victims' unlocked car before being seized for investigation by responding officers.

The primary legal issues in the case relate to show-up identifications that two officers carried out in tandem when they responded to a street robbery in Seattle. The Harrison Opinion's descriptions of the facts and the trial court testimony and procedures are necessarily complicated, and this Legal Update entry will focus narrowly on the mistakes that the two officers made during the course of conducting show-up identifications of the mistakes (and the consequences, or lack thereof, of the mistakes). Readers are urged to read the Court's Opinion in its entirety to get the full context.

Very shortly after the crime occurred, and very close to the scene of the crime, Officer A told the two victims while they were together when he first made contact with them that "We have a possible person in custody." A bit later, Officer A told Victim 1, "we caught these people."

Officer B then took Victim 2 back to his patrol car and told him on the way to the car that they had someone "detained." In the ensuing show-up procedure at the car, Victim 2 identified Harrison as the perpetrator. After Officer A learned through his earpiece of this identification by Victim 2, Officer A told Victim 1 that "this guy's going to jail. He's going to be arrested."

Officer B then returned from the patrol car show-up and took Victim 1 back to the patrol car for Victim 1 to participate in a show-up ID of defendant Harrison. After Officer B and Victim 1 left for the patrol car, Officer A said to Victim 2, "so it looks like we found him, right?" After Victim 2 replied "okay," Officer A added "he's going to jail tonight." Victim 1 was not able to identify Harrison in her participation in a show-up with Harrison.

The Court of Appeals rules – in light of the officers' procedural mistakes in conducting the show-ups and other evidence – that the only *admissible* evidence in the case that is tied to the two victims was evidence relating to the show-up identification by Victim 2 of Harrison. As to that evidence, while the procedure used by the police prior to that ID was improperly *suggestive*, the identification was *reliable* in light of the totality of the circumstances.

On the other hand, although the trial court had allowed Victim 2 to make an in-court identification of Harrison as the robber, the Court of Appeals rules that Victim 2's in-court identification was inadmissible because his "identification was tainted by the officers' confirming statements at the scene after his show-up identification."

Ultimately, however, the Court of Appeals rules that, in light of the totality of the other evidence of Harrison's guilt that is untainted by the show-up ID mistakes, the conviction of Harrison is allowed to stand under the "harmless error" rule.

LEGAL UPDATE EDITOR'S COMMENT: Note that the WASPC and WAPA Model Policies "Eyewitness Identification: Minimum Standards" include the following admonition:

> **"Part E Witness Contamination**
>
> **'Administrators should not provide any feedback to a victim/witness regarding their decision in an identification procedure.'"**

Also, in an article by your Legal Update editor that is posted on the Criminal Justice Training Commission's Law Enforcement Digest Internet site, "EYEWITNESS IDENTIFICATION PROCEDURES: LEGAL AND PRACTICAL ASPECTS," the following statement is provided:

"Part III. C. Avoid suggestiveness after the identification

The officer must be very careful to avoid suggestive words or actions after the identification procedure has been conducted. Telling a witness that he or she picked the "right" or "wrong" person out of a live lineup or photo lineup can jeopardize admissibility of a later in-court identification.

See State v. McDonald, 40 Wn. App. 743 (Div. I, 1985) (where witness picked one person from live lineup and detective told witness immediately afterward that the person arrested was a different person participating in the lineup, this fact, combined with the weakness of the identification on the other identification-reliability factors discussed elsewhere in this article, made the in-court identification of the arrestee/defendant inadmissible).

In State v. Courtney, 137 Wn. App. 376 (Div. III, 2007) May 2007 LED:08, the Court of Appeals' analysis suggests that undue suggestiveness likely occurred where, after each of the two victims identified the defendant in a photo lineup as the person who murdered their friend, officers (1) told each victim that the other victim had picked the same person, and (2) told one of the victims that the person picked was in custody. But the Court of Appeals upheld the identifications as being nonetheless sufficiently reliable because the trial court had found that each of the victims had a long, clear look at the perpetrator at the time of the crime.

Here is a link to the Opinion in State v. Harrison:
https://www.courts.wa.gov/opinions/pdf/836382.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 Assist ant 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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