LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

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

NOVEMBER 2023

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NINTH CIRCUIT OF THE UNITED STATES COURT OF APPEALS

CIVIL RIGHTS ACT SECTION 1983 CIVIL LIABILITY FOR LAW ENFORCEMENT GROUNDED IN CLAIM OF EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT: OFFICERS AVOID LIABILITY IN 2-1 VOTE BASED ON THE LAW-NOT-CLEARLY-ESTABLISHED PRONG OF QUALIFIED IMMUNITY STANDARD IN CASE WHERE THEY SHOT AND KILLED AN APPARENTLY UNARMED DV SUSPECT IN HIS HOME (1) WITHOUT WARNING (2) AS HE RAN AT THE OFFICERS IN A HALLWAY (3) WHILE THE ALLEGEDLY INJURED VICTIM WAS STILL PRESENT IN THE HOME

In Waid v. County of Lyon, ___ F.4th ___ , 2023 WL ___ (9th Cir., November 21, 2023), a three-judge Ninth Circuit panel votes 2-1 to affirm a U.S. District Court summary judgement order granting qualified immunity to two law enforcement officers. The section 1983 Civil Rights Act lawsuit was brought by representatives of the estate of a man who officers shot inside his home during a law enforcement response to a 911 domestic violence call. The caller had not reported the now-deceased man to be armed, but the officers knew that the alleged female DV victim was still inside the home.

Qualified immunity will be granted to officers on excessive force claims where, considering the allegations in the best light for Plaintiff, if: (Prong 1) the level of law enforcement force is held to have been justified under the multi-factor analysis of Graham v. Connor, 490 U.S. 386 (1989); or (Prong 2) (A) there is no clear precedent that has held on closely analogous facts that the use of force was not justified, and (B) one cannot say without doubt that it is patently obvious that the use of force was not justified.

The Majority Opinion does not analyze the factual allegations of Plaintiffs to determine whether a jury could weigh those facts to determine if the use of deadly force was justified under the multi-factor analysis of Graham v. Connor, 490 U.S. 386 (1989). Instead, as is permitted by U.S. Supreme Court precedent, the Majority Opinion looks only at the second prong of the qualified immunity test, and the Majority Opinion emphasizes certain key facts of the case and compares them to facts in some Ninth Circuit precedents. This leads the two judges signing the Majority Opinion to conclude that there is no precedent closely on point, and that the use of deadly force in this situation was not obviously unlawful.

The Dissenting Opinion sharply criticizes the Majority Opinion for not engaging in any analysis under Graham v. Connor. The Dissent asserts that under Connor analysis, the facts alleged by Plaintiffs create a jury issue where one considers in combination (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the officers or others, (3) whether the suspect was actively resisting arrest or attempting to avoid arrest by flight, (4) whether a warning was feasible but was not given, (5) whether less intrusive alternatives were available, and (6) what was the length of time before officers escalated to the use of deadly force.

A Ninth Circuit staff summary (which is not part of the Ninth Circuit Opinion) provides the following synopses of the Majority Opinion and of the Dissenting Opinion:

Staff Summary of the 14-page Majority Opinion Rejecting Plaintiffs' (A) Fourth Amendment Excessive Force Claims, and (B) Fourteenth Amendment Substantive Due Process Claims

> After officers arrived at Anderson's home, Anderson's two minor children exited the house and told the officers that their parents were fighting, that their mother needed an ambulance, and that there were no weapons in the house other than a BB gun. When officers entered the house, Anderson shouted "Fuck you, punks," ignored a command to get to the ground, and ran down a short hallway towards the officers, at which point the officers shot him five times.
>
> The [Majority Opinion holds] that [the officers] were entitled to qualified immunity on plaintiffs' Fourth Amendment excessive force claim because plaintiffs' rights were not clearly established. First, it was not obvious that [the officers] were constitutionally precluded from firing given that they were responding to an active domestic violence situation, lacked the benefit of having time to fully assess the circumstances, and needed to make split-second decisions as they were being charged [by the deceased].
>
> Second, plaintiffs failed to show controlling authorities (or a consensus of persuasive ones) that would have put every reasonable officer on notice that [the officers'] conduct violated the Fourth Amendment. Distinguishing this case from other cases, the panel noted that Anderson was in a narrow hall and rapidly approaching the officers, with no barrier between them. He could have accessed the officers' weapons at any time or otherwise harmed them.

> Further, if the officers took the option to retreat to the house's entryway, they would have left Jennifer Anderson—for whom they had just called an ambulance—alone with her husband or risked injury themselves if Anderson obtained a weapon from somewhere in his home.
>
> The [Majority Opinion also holds] that [the officers] did not violate plaintiffs' Fourteenth Amendment substantive due process rights because there was no evidence suggesting that the officers acted with a purpose to harm unrelated to the legitimate law enforcement objective of defending themselves.

[Some of the bracketed language revises the staff's references to "the panel held" to "the Majority Opinion holds]

Staff Summary of the 21-page Dissenting Opinion (A) Disagreeing with the Majority Opinion's Ruling on the Fourth Amendment Excessive Force Claims, and (B) Agreeing with the Majority Opinion's Ruling on the Fourteenth Amendment Substantive Due Process Claims

> Concurring in part and dissenting in part, Judge Berzon would hold that defendants' use of force was unconstitutionally excessive, and they were not entitled to qualified immunity on the Fourth Amendment claim. [The Dissenting Opinion asserts that the] officers' repeated, rapid use of deadly force was objectively unreasonable given that Anderson was unarmed, shirtless, empty handed, outnumbered, tactically disadvantaged, not reaching for the officers' guns, and, [at the point] when the last two shots were fired, not moving toward the officers.
>
> Additionally, [the Dissenting Opinion asserts that the Ninth Circuit precedent of] A.K.H. ex rel. Landeros v. City of Tustin, 837 F.3d 1005 (9th Cir. 2016), established that an officer may not shoot an unarmed suspect within seconds, multiple times, in rapid succession, and without warning, if the suspect is not reaching for a gun—even when the suspect was recently involved in a domestic violence incident, has not complied with commands, and quickly closes a short distance between the officer and the suspect.
>
> [The Dissenting Opinion by] Judge Berzon agree[s] with the [Majority Opinion] that the officers were properly granted qualified immunity on plaintiffs' Fourteenth Amendment claim.

The Majority Opinion and the Dissenting Opinion have somewhat differing renditions of the factual allegations in the case (note that both of the officers were equipped with body cameras that did their job). Here is the Majority Opinion's rendition of the factual allegations and the initiation of the lawsuit:

> The events leading to Anderson's death began with a 911 call. The caller—who did not request emergency medical care or report any weapons—sought help with a domestic violence incident. Officers Wright and Willey responded, and both wore body cameras that recorded the encounter with Anderson.
>
> Once they arrived at Anderson's home, Wright knocked on the door and announced himself. The Andersons' two minor children, both distressed, exited the house and spoke to Wright in the front yard. They told Wright that their parents were fighting and that their mother needed an ambulance. Wright called for medics. The Andersons' son stated that there were no weapons in the house other than a BB gun.

Wright walked back to the front door, leaving the children behind. Willey joined Wright on the porch in front of the door. Wright recounted what the children had told him and explained that Anderson was "throwing [Jennifer Anderson] around." The officers then entered the home, with Wright entering first and again announcing himself. Willey, directly behind Wright, drew his weapon and pointed it forward as he entered.

As the officers entered the kitchen, Anderson, out of view, shouted, "Fuck you, punks." Willey, with his gun still drawn, moved past Wright toward a hallway to the left of the kitchen, saw Anderson at the other end of the hallway, and told him to get on the ground. Wright, now behind Willey, also drew and pointed his gun in front of him.

Anderson ignored the commands and ran down the short hallway toward the officers. Willey fired three shots in quick succession at Anderson as Anderson crossed the threshold between the short hallway and the kitchen. Wright fired his weapon twice. Anderson fell to the ground and began to bleed from his chest as Willey continued to shout at him, "Get on the ground!" Willey reported the shots and that the suspect was down. Anderson, who had been shot five times, died from his injuries.

Plaintiffs sued the officers for (1) violating the Fourth Amendment by using excessive force; (2) violating the Fourth Amendment through denying medical care; and (3) violating the Fourteenth Amendment through unwarranted state interference with the familial relationship between Anderson and his wife and children. They also brought three state-law claims against the officers and the County. The district court granted qualified immunity to defendants on all constitutional claims and declined to exercise supplemental jurisdiction over the state-law claims. Plaintiffs appeal only the grant of summary judgment on the Fourth Amendment excessive force claim and the Fourteenth Amendment claim against the officers.

Result: Affirmance of summary judgment order by U.S. District Court (Nevada) granting qualified immunity to the two deputy sheriffs.

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WASHINGTON STATE COURT OF APPEALS

DIVISION THREE COA PANEL ALLOWS NEGLIGENCE SUIT TO GO FORWARD BASED ON COUNTY'S DUTY TO PROVIDE A LEVEL OF PROTECTION FOR JAIL INMATES WHERE JAIL PERSONNEL ALLEGEDLY FAILED TO ADEQUATELY SEARCH A PRISONER FOR DRUGS AT INTAKE WHERE A SECOND PRISONER OVERDOSED ON HEROIN SUPPLIED BY THE FIRST PRISONER

In Anderson v. Grant County, ___ Wn. App. 2d ___ , ___ WL ___ (Div. III, November 28, 2023), a three-judge panel of Division Three of the Court of Appeals is unanimous in affirming a ruling of the Grant County Superior Court that denied the County's motion for summary judgment dismissal of a lawsuit against the County.

In August of 2018, Derek Batton, while incarcerated at the Grant County Jail, died after ingesting heroin that was smuggled in by his cellmate, Jordan Tebow. In February 2022, Mr. Batton's parents, Barbara Anderson and Rod Batton, individually and as co-personal

representatives of the estate of Derek Batton (collectively Estate), sued Grant County (County), alleging negligence based on the County's failure to adequately search Mr. Tebow for drugs.

The Anderson Court describes the key factual allegations of the case as follows:

> On August 10, 2018, Derek Batton was booked into the Grant County Jail. The next day, Jordan Tebow was booked into jail. Mr. Tebow had an "extensive" history with the Grant County Sheriff's Office. He had been booked into the Grant County Jail over 40 times by some counts.
>
> Mr. Tebow was arrested for felony drug charges multiple times and, in at least one instance, had attempted to smuggle contraband into the jail. Although these facts would have authorized the booking officers to strip search Mr. Tebow, they neglected to do so. Consequently, Mr. Tebow successfully smuggled heroin into the jail.
>
> After being booked, Mr. Tebow was assigned a cell with Mr. Batton. Allegedly, Mr. Tebow offered heroin to another inmate, who declined. Mr. Tebow then offered heroin to Mr. Batton. Mr. Batton, who struggled with drug addiction, accepted the offer and was captured on video surveillance snorting a fatal amount of heroin in the late evening of August 11.
>
> The following day, at approximately 10:45 a.m., Mr. Batton was found dead in his cell. An autopsy report later attributed Mr. Batton's death to "[a]cute morphine intoxication (likely heroin)." As a result of Mr. Batton's death, Mr. Tebow pleaded guilty to controlled substance homicide on October 11, 2019.

The County moved for summary judgment dismissal of the lawsuit by the family of the deceased, claiming total immunity under Washington's felony defense statute, RCW 4.24.420, and/or under the comparative fault provisions of RCW 5.40.060. The trial court denied the County's motion.

The Court of Appeals resolves the case by holding that the special relationship between the County, as operator of the jail, and Mr. Batton, as prisoner, precludes the County from asserting a complete defense of immunity under either the felony defense provisions of RCW 4.24.420 (which provides in certain circumstances for immunity from a lawsuit that is based on the death or injury to a person who died or was injured while engaged in the commission of a felony) or under the comparative fault provisions of RCW 5.40.060.

Result: Affirmance of Grant County Superior Court order that denied the motion of Grant County for summary judgment dismissal of the Estate's lawsuit.

DANGEROUS DOGS – STATE HAS NOT PREEMPTED FIELD OF REGULATING DOMESTIC ANIMALS, SO LOCAL ORDINANCES MAY IMPOSE BROADER OR STRICTER STANDARDS INCLUDING (1) DEFINING "DANGEROUS DOG" MORE BROADLY AND (2) PLACING GREATER LIMITS ON DOG OWNERS

In State v. Richards, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. II, November 7, 2023), Divisio9n Two of the Court of Appeals affirms the conviction of defendant Richards under a Wahkiakum County dangerous dogs ordinance that defines "dangerous dog" more broadly than the definition in RCW 16.08.070. The Court of Appeals thus confirms defendant's conviction of

a gross misdemeanor violation of the ordinance even though her conduct and that of her dog, Thor, did not fall within the state statute. The Court of Appeals rejects a constitutional vagueness challenge and other challenges to the conviction.

However, the Court of Appeals rules that the Wahkiakum County District Court and Superior Court unlawfully sentenced Richards to serve 364 days in jail if she did not immediately turn Thor over to county animal control (which the Court of Appeals deems, in effect, to be a court order to have the dog destroyed). The Superior Court granted a stay pending appeal.

The Richards Opinion rules that the lower courts erred in requiring defendant to turn the dog over to animal control where neither the state statute nor the county ordinance authorize such a sentence. The Court of Appeals explains as follows:

> Regardless, neither the statute nor the county code permitted the animal control authority to destroy Thor without Richards' permission unless it gave Richards a chance to cure the violation of RCWC 16.08.050(F). The record does not show that the animal control authority confiscated Thor, gave Richards notice of the reasons for the confiscation, and then gave Richards 20 days to correct the deficiencies, as RCW 16.08.100(1) requires. Nor does the record show that Thor was confiscated and Richards failed to redeem him by paying fees and providing evidence of compliance with the county code within 96 hours under RCWC 116.08.110(D) and (E). And the record does not show that Thor was "suffering from a serious injury or disease" and that destroying Thor immediately was "in the interest of public health and safety," as RCWC [the county ordinance] 16.08.110(F) requires.
>
> While the crime of dangerous dog at large is a gross misdemeanor, under the plain language of RCW 16.08.100(1) and RCWC 16.08.110 [the county ordinance], Thor is not subject to destruction as a direct punishment for Richards' violation of the ordinance until the express prerequisites have been met. The district court acted outside the scope of its discretion by imposing a condition for achieving a suspended sentence that was untethered from these state and county laws. The district court, therefore, abused its discretion when it imposed Richards' sentence.

Result: Affirmance of Wahkiakum County District Court gross misdemeanor conviction of Jennifer A. Richards for violating the Wahkiakum County "dangerous dogs" ordinance. The Court of Appeals, however, reverses the sentence that includes contingent dog destruction, and the case is remanded to the District Court for a new sentencing hearing. The Court of Appeals also directs the District Court to clarify that the conviction is under the county ordinance and not under the state statute.

DEFENDANT LOSES HIS SECOND AMENDMENT CHALLENGE TO HIS FIRST DEGREE UNLAWFUL FIREARM POSSESSION CONVICTION THAT WAS BASED ON HIS PRIOR CONVICTION FOR SECOND DEGREE BURGLARY

State v. Ross, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, November 6, 2023)

On November 6, 2023, Division One of the Court of Appeals affirms defendant's conviction for committing the Class B felony of being in possession of a firearm after having been previously convicted of a "serious offense" as defined by statute. The first paragraph of the Opinion in Ross summarizes the ruling as follows:

> RCW 9.41.040(1) makes it a class B felony for a person previously convicted of a serious offense to possess a firearm. Howard Ross was convicted of first degree unlawful firearm possession under RCW 9.41.040(1) based on a prior conviction for second degree burglary—a defined serious offense. Ross appeals and argues that under the Second Amendment to the U.S. Constitution and New York State Rifle & Pistol Ass'n v. Bruen, 597 U.S. ___, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), RCW 9.41.040 is unconstitutional as applied. We disagree and affirm.

Result: Affirmance of King County Superior Court conviction of Howard Lee Ross for first degree unlawful firearm possession in violation of RCW 9.41.040(1).

"CRIME VICTIMS' COMPENSATION ACT" (CVCA), CHAPTER 7.68, RCW DOES NOT ALLOW THE TRIAL COURTS TO WAIVE RESTITUTION TO THE CVCA FUND OR TO REQUIRE LESS RESTITUTION THAN THE AMOUNT OF CVCA BENEFITS PAID

In State v. Morgan, ___ Wn. App. 2d ___ , 2023 WL ___ (Div. I, November 13, 2023), Division One of the Court of Appeals rules in a statutory construction holding that the trial court in the case correctly ruled that the court's have no discretion in a restitution order to waive or reduce the RCW obligation of a defendant to reimburse the full amount of benefits paid to the victim under the Crime Victims Compensation Act. The first paragraph of the Opinion of the Morgan summarizes the ruling as follows:

> The sentencing court generally has broad discretion when imposing restitution. But when restitution is based on benefits paid under the "Crime Victims' Compensation Act" (CVCA), chapter 7.68 RCW, to compensate victims for losses resulting from an offense, the applicable statutes do not allow the court to waive restitution or to impose less restitution than the amount of benefits paid. Montreal Morgan appeals a restitution order and argues that the sentencing court should have exercised discretion to reduce the amount owed under the crime victims' compensation (CVC) program. We disagree and affirm.

Result: Affirmance of King County Superior Court restitution award and order against Montreal Leanthony Morgan, Sr.

DIVISION TWO HOLDS TO BE UNCONSTITUTIONALLY VAGUE A 12-MONTH COMMUNITY CUSTODY CONDITION PROHIBITING DEFENDANT FROM HAVING "HOSTILE CONTACT" WITH LAW ENFORCEMENT OFFICERS OR FIRST RESPONDERS

In State v. Shreve, ___ Wn. App.2d ___ , 2023 WL ___ (Div. II, November 21, 2023), Division Two of the Court of Appeals reverses a Pierce County Superior Court's community custody condition that declared that the defendant was to have "no hostile contact" with "law enforcement/first responders" for the one-year period of the community custody period. The Court of Appeals rules that the condition violates constitutional Due Process protections by being too vague.

The community custody period of one year had expired by the time that the Court of Appeals issued its decision, and thus the legal issue was "moot" because defendant was no longer subject to the order. However, the Court of Appeals states that the Court chooses to address

his challenge under what is known as the "public interest exception" to the mootness rule. Among other considerations, the Shreve Court indicates that such orders are likely to be given in future cases and are likely to evade appellate court review.

Result: Reversal of Pierce County Superior Court community custody condition prohibiting Joseph Allen Shreve from having hostile contact with law enforcement officers or first responders.

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BRIEF NOTES REGARDING NOVEMBER 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 nine entries below address the November 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 brief descriptions of the holdings/legal issues are bolded.

1. State v. Mary Margaret Mercedes: On November 6, 2023, the State of Washington wins its appeal when a three-judge panel of Division One of the COA votes 2-1 to reverse the Snohomish County Superior Court's *suppression ruling in a prosecution of defendant for two counts of first degree animal cruelty*. The Majority Opinion for the panel concludes that the Superior Court erred in concluding that **the special warnings requirement for knock-and-talk consent requests per State v. Ferrier, 136 Wn.2d 103 (1998) for searches of homes does not apply where law enforcement officers seek consent to search a fenced pasture that is adjacent to the home of the defendant**.

Some of the appellate court decisions, other than Ferrier, cited in the Mercedes Opinion regarding applicability of the Ferrier decision are:

- State v. Witherrite, 184 Wn. App. 859 (Div. III, Dec. 9, 2014) (Ferrier "knock and talk" warnings are not required to obtain single-party consent to search a vehicle, but the Court of Appeals suggested that giving such warnings whenever seeking consent is "best practice")

- State v. Bustamonte-Davila, 138 Wn.2d 964 (1999) (Ferrier rule does not apply to request for residential entry where officer's intent is to make arrest on INS order, not to search)

- State v. Williams (Harlan M.), 142 Wn.2d 17 (2000) (Request to homeowner to search residence for a felon-guest wanted on an arrest warrant is not subject to the Ferrier rule)

- State v. Khounvichai, 149 Wn.2d 557 (2003) (Ferrier warnings were not required for officers to obtain valid consent from a suspect's grandmother for purposes of entry of the grandmother's home just to "talk to" her grandson (1) who lived there and (2) who was a suspect in a malicious mischief case; the majority opinion suggests, however, that if probable cause for a search had developed in this situation, the officers would have been required to obtain a search warrant rather than then obtaining consent to search)

- State v. Tagas, 121 Wn. App. 872 (Div. I, 2004) (Ferrier warnings were not required to obtain consent to search purse of person to whom officer had offered a ride from the freeway to a nearby restaurant)

The Majority Opinion and Dissenting Opinion in State v. Mercedes can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/844695.pdf

2. State v. Terrance Jon Irby: On November 6, 2023, Division One of the COA affirms the Skagit County Superior Court convictions of defendant for (A) *first degree murder* and (B) *first degree burglary.* This case involving defendant Irby was previously before the Court of Appeals, but in 2018 the Court of Appeals sent the case back to Skagit County Superior Court. In the 2018 Court of Appeals Opinion that was digested in the Legal Update in 2018, the Court of Appeals held that the trial court in the earlier trial had not given full consideration to all aspects of the question of whether the defendant had been provided in the trial court with an adequate remedy for law enforcement's violation of the Sixth Amendment right of defendant to consult his attorney.

In the earlier ruling, the State conceded that jail personnel and others in the criminal justice system violated the Sixth Amendment when they viewed defendant's attorney-client protected papers. In the November 6, 2023, Opinion, the Court of Appeals rejects defendant's argument that the trial court was required to dismiss the charges based on the "governmental misconduct" prohibition of CrR 8.3(b). **The Court of Appeals rules in this 2023 Opinion in Irby that: (1) the Superior court on remand was correct when the trial court vacated Irby's earlier conviction after the trial court found that the State did not meet its burden to show Irby was not prejudiced by the interception of his attorney-client communications; but that (2) the prejudice to defendant did not "rise to a level that requires dismissal."**

The November 6, 2023, Opinion in State v. Irby can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/830180.pdf

3. State v. Nathan O. Beal: On November 7, 2023, Division Three of the COA affirms the Spokane County Superior Court conviction of defendant for *first degree murder* of his ex-wife. The Court in Beal holds that **a detective's remark during his testimony at trial was a comment on Beal's right to remain silent. However, the Court rules, in light of the**

"overwhelming evidence of guilt," that the State met its burden to show that the error was harmless beyond a reasonable doubt.

Prior to trial, Beal was interviewed by the police. The State requested a CrR 3.5 hearing to determine the admissibility of some of Beal's statements to the police. The court found that Beal waived his constitutional right to remain silent and began answering questions. However, Beal stated at one point during the interview that, "I'm not answering any more questions," at which time the detective who was interviewing Beal terminated the interview. The court ruled that Beal's statements, up until he expressly stated that he did not want to answer more questions, were admissible. At trial, the detective lawfully testified about the interrogation up to the point when defendant stopped the questioning and asserted his right to silence.

However, due to some confusion by the detective in responding to a further question by the deputy prosecutor, the detective testified that defendant had stopped the interview and declined to answer more questions. The Court of Appeals rules that this testimony violated the defendant's right to remain silent. But, as noted in the first paragraph of this Legal Update entry, the admission of this testimony was determined to be harmless error in light of the totality of the other evidence in the case.

The Opinion in State v. Beal can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/388441_unp.pdf

4. State v. Justice Tariq Green: November 7, 2023, Division Two of the COA reverses the Pierce County Superior Court convictions of defendant for (A) *two counts of first degree robbery with a firearm, and* (B) *one count of second degree unlawful possession of a firearm.* The Court of Appeals rules that a law enforcement officer was improperly allowed to tell the jury that he had determined that defendant was the person depicted in a surveillance photo from a restaurant robbery. The Court of Appeals also rules that the trial court's error in allowing the officer to give this testimony was not a harmless error, and therefore that the case must be remanded for re-trial.

The officer had arrested defendant on a warrant in a contact with defendant three days after the restaurant robbery. The trial court allowed the officer to testify to his opinion, based on that contact with defendant several days after the restaurant robbery, that the person depicted in the surveillance photo was the defendant. The Court of Appeals states that the photo of the man with a gun in the photo was low-to-moderate quality and showed only the man's hands, eyebrows, eyes, and some skin around the eyebrows and eyes. The rest of the man's body was covered by items of clothing.

Evidence law allows a lay witness to opine regarding the identity of a person in a surveillance photograph if there is some basis to conclude that the witness is more likely than the jury to correctly identify the defendant from the surveillance photograph. The Green Court concludes under this standard that there was insufficient evidence in the case to support admissibility of the officer's opinion testimony. In key part, the Green Court's analysis reads;

> Here, [the officer] only observed Green [in person] on one occasion—during the gas station incident and arrest. One week after [the officer] had the opportunity to observe Green, [the officer] viewed a low to moderate quality surveillance photo that showed the man's hands, eyebrows, eyes, and the top of his nose. [The officer] believed this man to be Green based on his single interaction with Green one week prior.

> [The officer's] brief contact with Green was, at best, on par with the contacts held to be insufficient in [State v. George, 150 Wn. App. 110 (2009)]. And there is also no indication in the record that Green had altered his appearance before trial such that [the officer would be more likely to correctly identify him than the jury. Thus, under the facts of this case, there is no evidence that [the officer] was more likely than the jury to correctly identify Green in the surveillance photo. Therefore, we hold that the trial court erred by allowing [the officer] to testify regarding his identification of Green in the law enforcement bulletin.

[Footnote omitted; some paragraphing revised for readability]

The Opinion in State v. Green can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/D2%2056841-1-II%20Unpublished%20Opinion.pdf

5. Marlene Gonzales and others v. DOC: On November 9, 2023, Division Three of the COA affirms the Franklin County Superior Court order and judgment that granted *summary judgment to DOC on the Plaintiffs' claims of violation of their right to privacy*. The right-to-privacy claims were grounded in the fact that DOC subjected to decontamination procedures some personnel who opened envelopes that contained crystalline substances.

The Gonzales Court explains as follows that, under Washington "common law" (i.e., court-made decisional law), the Plaintiffs' civil action for invasion of privacy fails because that theory requires proof of intent on the part of government to invade privacy rights, and there is no evidence of DOC staff's intent to invade the privacy rights of the Plaintiffs:

> Under Washington's common law right of privacy, precedent is clear – intent is a factor even when the intruder is the government. . . . The Plaintiffs' argument that they need not prove that the DOC or its agents intentionally invaded their privacy is unpersuasive.
>
> Based on the record, reasonable minds could reach but one conclusion – that the DOC or its agents lacked any intent to invade the Plaintiffs' right of privacy. None of the Plaintiffs were able to confirm that anyone other than [Ms. A], who was in charge of the decontamination, saw them unclothed.
>
> Further, in response to the Plaintiffs' allegation that they were made to move to the DOC van while visibly in a state of undress, the DOC produced deposition transcript excerpts from each plaintiff conceding they were, in fact, given blankets or clothing to cover themselves as they made their way to the van.
>
> The Plaintiffs have failed to produce any evidence that the DOC or its agents acted with intent to invade their privacy. Other than allegations made in their complaint, the Plaintiffs lack evidence demonstrating that the decontamination was inappropriate or that DOC or its agents acted deliberately to violate their right to privacy.

[Citations omitted; some paragraphing revised for readability]

The Opinion in Gonzales v. DOC can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/394107_unp.pdf

6. State v. Rickie G. Millender: On November 13, 2023, Division One of the COA affirms the Pierce County Superior Court conviction of defendant for *first degree unlawful possession of a firearm*. **Among other things, the Court of Appeals rules that evidence supports the trial court's determination that defendant abandoned his privacy interest in his backpack and its contents when he tossed that backpack on the top of a trailer during his flight.**

On the constitutional "abandonment" issue, the Millender Court addresses as follows the case law supporting its ruling:

> The trial court . . . found the particular circumstances here to be analogous to those in State v. Reynolds, 144 Wn.2d 282, 27 P.3d 200 (2001) and State v. Young, 86 Wn. App. 194, 200, 935 P.2d 1372 (1997).
>
> In Reynolds, a law enforcement officer conducted a traffic stop and while speaking to the driver, noticed a green coat lying on the passenger side floorboard in front of the defendant, who was the vehicle's only passenger. The officer later arrested the driver and asked the defendant to remain in the vehicle.
>
> The officer then came back to the defendant and asked him to step outside so he could search the vehicle. The officer noticed the coat was no longer on the floorboard but was lying on the ground, stuffed underneath the passenger side of the vehicle.
>
> The defendant claimed the coat was not his and denied placing it under the vehicle. . After searching the coat, the officer found a white powdery substance, which yielded a positive field test for the presence of a controlled substance, and drug paraphernalia.
>
> The trial court denied the defendant's motion to suppress, and the Reynolds court affirmed, rejecting the defendant's contention that he involuntarily abandoned the coat in response to alleged unlawful police conduct. The court held, "Needing neither a warrant nor probable cause, law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution."
>
> In Young, a law enforcement officer made social contact with the defendant in an area known for high drug activity. As the officer drove away, he requested a criminal records check and discovered that the defendant had an extensive criminal background involving drugs.
>
> The officer turned around and activated the car spotlight, illuminating the defendant and the surrounding area. The defendant walked rapidly toward some trees, tossed " 'an apparent package or something' " behind a tree, walked quickly away from the trees, and then resumed a normal walk down the sidewalk.
>
> The officer stopped the defendant, detained him, and retrieved the object, which was a charred can containing a substance the officer believed to be crack cocaine. The trial court granted the defendant's motion to suppress all evidence gained from the arrest, ruling the defendant's seizure occurred at the time the officer flashed his spotlight.
>
> The Young court reversed, holding the officer properly retrieved the charred can as voluntarily abandoned property and the trial court erred in excluding the evidence. The court said, "Discarded property is voluntarily abandoned unless there is unlawful police

conduct, and a causal nexus exists between that conduct and the abandonment." State v. Young, 86 Wn. App. at 201 (citing State v. Whitaker, 58 Wn. App. 851, 856, 795 P.2d 182 (1990)).

> [Court's footnote 3: *This quotation from Young reflects, as Reynolds also held, that the principle supporting warrantless retrieval and search of voluntarily abandoned property is limited by the corollary that "property cannot be deemed voluntarily abandoned (and thus subject to search) if a person abandons it because of unlawful police conduct*."]

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

The Opinion in State v. Millender can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/856821.pdf

7. Rogerson v. State of Washington and City of Seattle: On November 27, 2023, Division One of the COA affirms the King County Superior Court ruling that *dismisses the lawsuit of a female rape victim alleging negligent investigation by the Seattle Police Department following her report of a rape*.

The Plaintiff alleged that the City's police officers breached a duty to exercise reasonable care (1) by not promptly submitting for testing the forensic evidence obtained when she underwent a sexual assault examination, and (2) by not taking further steps to identify her assailant. or summary judgment. **The Court of Appeals agrees with the superior court ruling that "there is no claim for negligent investigation" in the State of Washington**.

The Opinion in Rogerson v. State of Washington and City of Seattle, can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/846469.pdf

8. City of Wenatchee v. Frank E. Stearns: On November 27, 2023, Division Three of the COA rules for the criminal defendant by affirming, in a 2-1 decision, the Chelan County Superior Court order that reversed the District Court's denial of defendant's suppression motion. The ruling has the effect of setting aside the defendant's District Court convictions for *(A) DUI, (B) failure to obey a police officer, and (C) operating a vehicle without an ignition interlock device*. The Majority Opinion holds that **an officer did not have reasonable suspicion to stop a driver suspected of driving under the influence**.

An identified citizen informant's report to the police was deemed not to be sufficiently reliable or sufficiently corroborated, according to the Majority Opinion. On the other hand, the Dissenting Opinion would have ruled that the citizen informant's tip did provide reasonable suspicion for the stop. The Dissent asserts that under the totality of the circumstances, the tip by a self-identified, though previously unknown, citizen was sufficiently reliable and sufficiently detailed to provide the officer with reasonable suspicion to stop Stearns and investigate him for driving under the influence.

The Majority Opinion in Stearns describes the facts in the case as follows:

> On July 12, 2019, at approximately 6:39 p.m., [Officer A] of the Wenatchee Police Department was dispatched to the parking lot of Cascade Motorsports. An individual,

who identified himself as David Gilliver, had called 911 to report that he saw a man staggering through the parking lot.

Mr. Gilliver advised that the staggering man got into a black pickup truck and moved it within the parking lot. Mr. Gilliver believed the man was intoxicated. Mr. Gilliver had described the staggering individual as a white male in his mid-thirties wearing sunglasses, a gray hat, a blue shirt, and jeans.

When Officer [A] arrived at the Cascade Motorsports parking lot, she encountered a man standing next to a black truck. The man pointed to another black truck in the parking lot and said something like, "That's him! He's wasted!"

[Officer A] did not know Mr. Gilliver and failed to verify he was the individual she encountered in the parking lot. [The officer] could only speculate that the individual pointing to the black truck must have been the person who called in the tip because "he was standing there on the phone." [The officer] believed this man was "shocked" and "wanted" her "to go take action."

Officer [A] could see the driver of the black truck through the rolled-down driver's side window. She observed that the driver—later identified as Frank Stearns— was a white male wearing a gray hat, sunglasses, and a blue shirt, which she noted matched the physical description provided by [the 911 caller]. [The officer] did not observe Mr. Stearns staggering.

Based on Mr. Gilliver's description of him "staggering," [the officer] felt she needed to do her "due diligence to observe him and see if this man was impaired." [The officer] believed that the informant's tip was insufficient to seize Mr. Stearns and that she needed to observe Mr. Stearns's driving to corroborate Mr. Gilliver's assumption that Mr. Stearns was impaired.

[The officer] attempted to position her vehicle behind Mr. Stearns's truck but due to heavy traffic, when she pulled out of the parking lot onto Worthen Street, there were approximately four cars between her vehicle and the truck. Mr. Stearns's vehicle, as well as the four cars between [the officer] and Mr. Stearns, each had to stop at a four-way stop at the intersection of Worthen Street and Orondo Avenue, a process that allowed Mr. Stearns to put more distance between himself and [the officer]. \

As [the officer] followed Mr. Stearns, she saw his truck "drift toward the centerline" but, due to her distance, she could not tell if the truck touched or crossed the centerline.

Around the same time, [the officer] suspected the truck may have been traveling faster than the posted speed limit. She had been driving "near" the speed limit, yet she perceived the truck as pulling away from her.

[The officer's] patrol vehicle lacked a radar speed measurement device. The only means for [the officer] to measure the speed of another vehicle was by pacing the other vehicle. [The officer] did not pace Mr. Stearns's truck, so she could not validate her hunch that he was exceeding the posted speed limit.

In the hopes of obtaining a better vantage point, [the officer] activated her emergency lights so she could pass the cars in front of her. She traveled at approximately 60 m.p.h.

> for about 20 seconds and caught up with the truck. As [the officer] closed in on the truck, she deactivated her emergency lights and noted Mr. Stearns was traveling below the speed limit.
>
> The truck then entered a roundabout at Fifth Street and Riverside Drive. As the truck exited the roundabout, [the officer] believed the truck was going to strike a curb or cross the centerline. Her concerns were alleviated when, "at the very last second," the truck continued straight in what [the officer] considered a jerky maneuver.
>
> [The officer] did not witness any part of the truck touch or cross the centerline, nor did the vehicle strike the curb. [The officer] later agreed that she did not consider Mr. Stearns's movements within his lane a sufficient basis to conduct a traffic stop.
>
> Eventually, it appeared to [the officer] that Mr. Stearns was preparing to pull over. As Mr. Stearns applied his brakes, [the officer] noticed one of the brake lights was inoperable. [The officer] then activated her emergency lights with the intent to initiate a traffic stop. Mr. Stearns responded by stopping his vehicle. Additional law enforcement officers arrived on scene to assist [Officer A].

[Citations to the record omitted; some paragraphing revised for readability]

The Majority Opinion and Dissenting Opinion in City of Wenatchee v. Stearns can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/389812_unp.pdf

9. State v. Claude L. Merritt: On November 28, 2023, Division Three of the COA rules for the criminal defendant on several issues and reverses for various reasons some of his many Pend Oreilles County Superior Court convictions. However, the Division Three panel affirms his convictions for one count each of *(A) first degree felony murder, (B) unauthorized removal or concealment of a body, and (C) unlawful disposal of remains*. One of the convictions that is reversed on appeal is defendant's conviction *for violating RCW 68.50.020 which requires that a person with knowledge of the location of the human remains notify the coroner in certain circumstances specified in the statute.* The Merritt Court concludes that **applying the statute to the defendant murderer in this case violates his right to silence under the Fifth Amendment of the U.S. Constitution.**

The Opinion in State v. Merritt can be accessed on the Internet at:
https://www.courts.wa.gov/opinions/pdf/387631_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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