LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

December 2016

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COURT OF APPEALS ADDRESSES OTHER-SUSPECTS ISSUE IN TWO CASES

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

MIRANDA: PANEL RULES 2-1 THAT JAIL OFFICER ASKING MURDER ARRESTEE WHO HAD EARLIER INVOKED HIS ATTORNEY RIGHT WHETHER ARRESTEE WAS GANG-AFFILIATED WAS INTERROGATION THAT DID NOT COME WITHIN MIRANDA EXCEPTIONS FOR "BOOKING QUESTIONS" OR "PUBLIC SAFETY;" WASHINGTON SUPREME COURT'S 2016 DELEON RULING IS EVEN BROADER IN EXCLUDING ANSWERS TO GANG-AFFILIATION HOUSING QUESTIONS AT JAIL

INTRODUCTORY LEGAL UPDATE EDITORIAL COMMENT: In State v. DeLeon, 185 Wn.2d 478 (May 5, 2016) May 16 LED:08, the Washington Supreme Court ruled that booking questions about gang affiliation for safe-housing purposes produce involuntary responses because an inmate's safety hinges on the answer. The Washington Supreme Court ruled in DeLeon that, while asking such questions in this context is not unconstitutional, it is error to admit the gang-affiliation statements at trial. In light of DeLeon (based on the broader concept of voluntariness, not on the Miranda procedural requirements at issue in the Ninth Circuit's decision in U.S. v. Williams digested below), the Williams decision is essentially irrelevant in a Washington State criminal case involving competent defense counsel who raises DeLeon where a defendant has admitted gang affiliation to jail personnel who ask the question for housing assignment purposes.

In United States v. Williams, 842 F.3d 1143 (9th Cir., December 5, 2016), a 3-judge panel upholds by a 2-1 vote a District Court order suppressing defendant's admission to a jail officer that he is a member of a particular gang.

Facts

Antonio Gilton was arrested for murder. When Mirandized, he invoked his right to an attorney. Several hours later, after Gilton had been taken from police headquarters to a jail, a jail officer, seeking to determine Gilton's housing assignment, asked him whether he was a member of a criminal gang. Gilton answered that he was a member of a particular gang.

Procedural Background

After Gilton was charged (along with Alfonzo Williams and other defendants) with federal racketeering crimes related to his gang involvement, he successfully moved the U.S. District Court to suppress his admission to gang membership, arguing that the jail officer violated Miranda by interrogating him after he had invoked his attorney right and had since remained in continuous custody. The District Court granted the suppression motion.

Analysis:

Once a Mirandized custodial suspect indicates unambiguously to police that the suspect wishes to consult an attorney before speaking, there can be no further police-initiated interrogation while the suspect remains in continuous custody. The term "interrogation" under Miranda refers generally to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the suspect. The government argued in this case, in the alternative: (A) that the "booking questions exception" to Miranda applies; or (B) the "public safety" exception to Miranda applies. The majority opinion in Williams rejects both arguments. The dissent in Williams, not digested here, would accept both arguments.

1. Booking Questions Exception

The "booking questions exception" exempts questions to obtain the biographical data (e.g., name, address, height, weight, eye color, date of birth, and current age) necessary to complete booking or pretrial services. Because such questions rarely elicit an incriminating response, routine gathering of biographical data generally does not constitute interrogation sufficient to trigger constitutional protections.

But the booking questions exception is subject to an important qualification: When an officer has reason to know that a suspect's answer may incriminate him, even routine questioning may amount to interrogation. For example, when there is reason to suspect that a person is in the country illegally, questions regarding citizenship do not fall under the booking exception because a response is reasonably likely to be incriminating. Likewise, when a person is under suspicion of murder, questions about gang affiliation are likely to be incriminating, the Ninth Circuit majority opinion in Williams concludes.

2. Public Safety Exception

The government also argued in Williams for application of the "public safety exception" discussed in New York v. Quarles, 467 U.S. 649 (1984). In Quarles, a rape victim approached police officers, described her assailant, stated that he was armed with a gun, and said that he had just entered a grocery store. An officer approached the suspect in the store, frisked him, and found that "he was wearing a shoulder holster which was then empty." Without telling the suspect of his Miranda rights, the officer asked him where the gun was, the suspect told him, the officer immediately retrieved the loaded gun, and the officer placed the suspect under arrest.

The Quarles Court held on these facts that there is a "public safety" exception to the warnings requirement. The police "in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket." The Court concluded that in such a "kaleidoscopic situation . . . where spontaneity rather than adherence to a police manual is necessarily the order of the day," officers should not be placed "in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the Miranda warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them."

In determining whether the public safety exception to Miranda applies, courts ask whether there was an objectively reasonable need to protect the police or the public from any immediate danger. The Williams majority opinion cites two Ninth Circuit decisions in which the Court held

the exception applied to: (1) asking a defendant whether he had any drugs or needles on his person – prior to a body search – because of an objectively reasonable need to protect the officer from immediate danger; and (2) asking whether a suspect had a gun in his car because the officer had to control a dangerous situation in which a crowd had gathered and the defendant's car stood with its door open and the keys in the ignition.

The Williams majority opinion asserts that there was no similar danger here. The deputy retrieved Gilton from a locked holding cell around 2:30 a.m. – hours after Gilton arrived at the jail. There was no "kaleidoscopic situation," nor was the deputy put to the Hobson's choice of deciding within seconds whether society was best served by asking the questions without a Miranda warning or giving such a warning and damaging his ability to neutralize a "volatile situation" per Quarles. The majority opinion states that while the questions may have been asked in the general interests of inmate safety, this does not mean that there was an urgent need to protect either the jail officer or others against immediate danger. Thus, the majority opinion concludes, the narrow "public safety exception" does not apply.

Concluding paragraph of majority opinion

The majority opinion concludes with a paragraph that include the following explanation that the holding of Williams is a limited one. That explanation is as follows:

> We do not hold that prison officials may not inquire into a prisoner's gang membership in the interests of inmate safety. See, e.g., Florence v. Bd. of Chosen Freeholders of Cty. of Burlington, 566 U.S. 318 (2012) ("Gang rivalries spawn a climate of tension, violence, and coercion.") . . . . Nor do we hold that the responses to such questions cannot be used for purposes of inmate housing. Rather, we hold only that when a defendant charged with murder invokes his Miranda rights, the government may not in its case-in-chief admit evidence of the prisoner's unadmonished responses to questions about his gang affiliation. [Court's footnote: *The government does not suggest that the deputy was otherwise unable to secure information needed to house Gilton safely. Indeed, even had Gilton refused to answer the questions, he apparently would nonetheless have been classified as a member of CDP on the basis of his arrest record and officer intelligence.*]

Result: Affirmance of U.S. District Court (Northern District of California) suppression order; case remanded for trial.

LEGAL UPDATE EDITORIAL NOTE REGARDING LED ENTRY ON THIS DECISION: The Williams decision is addressed in the AGO/CJTC's November 2016 Law Enforcement Digest at pages 3-4.

SECOND AMENDMENT: U.S. CONSTITUTION DOES NOT BAR CALIFORNIA STATUTE REQUIRING 10-DAY WAIT FOR ALL LAWFUL FIREARMS PURCHASES

In Silvester v. Harris, ___ F.3d ___ , 2016 WL ___ (9th Cir., December 14, 2016), a three-judge panel of the Ninth Circuit unanimously rules that the U.S. constitution's Second Amendment does not preclude a California statute that requires a 10-day waiting period for all lawful purchases of firearms. The Ninth Circuit staff's summary of the lead opinion reads as follows (the staff's summary is not part the panel's opinion):

> The panel reversed the district court's bench trial judgment and remanded for entry of judgment in favor of the State of California in an action challenging a California law establishing a 10-day waiting period for all lawful purchases of guns.
>
> The panel first stated that this case was a challenge to the application of the full 10-day waiting period to those purchasers who have previously purchased a firearm or have a permit to carry a concealed weapon, and who clear a background check in less than ten days. The panel held that the ten-day waiting period is a reasonable safety precaution for all purchasers of firearms and need not be suspended once a purchaser has been approved. The panel determined that it need not decide whether the regulation was sufficiently longstanding to be presumed lawful. Applying intermediate scrutiny analysis, the panel held that the law does not violate plaintiff's Second Amendment rights because the ten-day wait is a reasonable precaution for the purchase of a second or third weapon, as well as for a first purchase.

Result: Reversal of ruling against the State of California by the U.S. District Court (Eastern District of California).

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WASHINGTON STATE SUPREME COURT

IMPLIED CONSENT: OFFICER'S OMISSION FROM WARNING OF IRRELEVANT LANGUAGE ABOUT TESTING FOR MARIJUANA THAT WAS INCLUDED IN A FORMER VERSION OF RCW 46.20.308 DOES NOT REQUIRE SUPPRESSION OF TEST RESULTS

In State v. Murray, State v. Robison, 187 Wn.2d 115 (December 8, 2016), the Washington Supreme Court is unanimous in reversing decisions of Division One of the Court of Appeals in two cases that were consolidated for appeal. The Supreme Court disagrees with a DUI defendant who unsuccessfully argued to the Supreme Court that breath test results must be suppressed where he was not given the full implied consent warnings under the version of RCW 46.20.308 that was in effect when he was arrested for DUI on June 29, 2013.

The opening paragraph of the Washington Supreme Court, broken into two paragraphs here to make it more readable, summarizes the Court's ruling as follows:

> Washington State citizens decriminalized the recreational use of cannabis by initiative. The main psychoactive compound in cannabis istetrahydrocannabinol (THC). The initiative established a legal limit for THC concentration in the blood while driving and amended the implied consent statute to direct officers to warn drivers of the legal consequences of a breath test that revealed that concentration. Unfortunately, no breath test available at the time measured THC concentrations in the blood. Our legislature has since amended the implied consent statute so it no longer requires officers to give a warning that suggests the current breath test will measure something it cannot. Before that amendment, Judith Murray and Darren Robison were given implied consent warnings that conformed to the ability of the breath test but not to the specific language of the statute.

> We must decide whether the breath test results should be suppressed because the THC warnings were not given. We find that for the breath tests given, the warnings did not omit any relevant part of the statute, accurately expressed the relevant parts of the statute, and were not misleading. Accordingly, the warnings substantially complied with the implied consent statute and the test results were properly admitted. We reverse the Court of Appeals and reinstate Murray's and Robison's convictions.

Result: Reinstatement of Snohomish County District Court DUI convictions of Darren J. Robison and Judith E. Murray.

LEGAL UPDATE EDITORIAL COMMENT: Law enforcement should consult legal advisors and/or local prosecutors on this and other issues addressed in the Legal Update. This case presented an unusual circumstance. As a general rule, best practice is to read the specific statutory language of the implied consent statute to the arrestee.

IMPLIED CONSENT: REFUSAL OF BREATH TESTS BY DUI ARRESTEES MAY BE ADMITTED AGAINST THEM IN DUI TRIALS BECAUSE: (1) CONSTITUTIONALLY, THE BREATH TEST IS PER SE A LAWFUL SEARCH INCIDENT TO ARREST; AND (2) STATUTORILY, EXERCISING THE RIGHT TO REFUSE COMES WITH THE CONSEQUENCE OF ADMISSIBILITY OF THE REFUSAL

In State v. Baird, State v. Adams, ___ Wn.2d ___ , 2016 WL ___ (December 22, 2016), in two cases consolidated for appeal purposes, a 6-3 majority of the Washington Supreme Court, reverses on direct review two King County District Court suppression orders in DUI prosecutions. In the DUI case involving Dominic Baird, the District Court had suppressed a breath alcohol test on the theory that implied consent warnings essentially made his compliance with a breath alcohol test coerced in violation of the constitution. In the DUI case involving Collette Baird, the District Court ruled that Baird's refusal of a breath test could not be admitted because she was exercising her constitutional right in refusing a breath test.

The 6-member Supreme Court majority breaks into two parts, with four Justices joining a lead opinion, and two other Justices joining a concurring opinion that takes a less complicated route in its analysis than does the lead opinion. It appears that differences in the legal analysis in those two opinions is not significant in terms of how future cases might be decided. So this Legal Update entry will not attempt to explore any differences between the analysis in the lead opinon and concurring opinion.

The thrust of the core analysis of the lead and concurring opinions in Baird are that:

(1) a breath alcohol test is a search;

(2) the search is not per se justified as exigent despite the fact that alcohol dissipates fairly rapidly in the human bloodstream (compare Missouri v. McNeely, 133 S.Ct. 1552 (2013) **June 13 LED:03**);

(3) the search is always per se justified as a search incident to a lawful arrest for DUI (see Birchfield v. North Dakota, 136 S.Ct. 2160 (June 23, 2016) **June 16 LED:02**); and

(4) there is no constitutional right to refuse a lawful search incident to arrest, and, while there is a statutory right under Washington's implied consent statute to refuse a breath test, this refusal has consequences, including loss of license and admissibility at DUI trial of the refusal.

A dissenting opinion by Justice Gordon McCloud is joined by Justices Stephens and Fairhurst. The dissent argues that the Washington Supreme Court should have interpreted the Washington constitution, article I, section 7, as providing greater privacy protection against breath alcohol testing than was held by the U.S. Supreme Court in Birchfield v. North Dakota to be provided under the Fourth Amendment.

Result: Reversal of King County District Court order suppressing the results of a breath alcohol test of Dominic Xavier Baird in his prosecution for DUI; reversal of King County District Court order suppressing evidence of the refusal by Collette Adams to take a breath alcohol test in her prosecution for DUI; both cases are remanded for trial.

COUNTY COMMISSIONERS IN WASHINGTON STATE LACK AUTHORITY TO HIRE OUTSIDE COUNSEL OVER OBJECTION OF ABLE AND WILLING PROSECUTOR

In State ex rel. Banks v. Drummond, 187 Wn.2d 157 (December 15, 2016), the Washington Supreme Court rules unanimously that county boards of commissioners do not possess statutory authority to appoint outside counsel over the objection of an able and willing prosecuting attorney. The Court asserts that: "Even if a board of commissioners had statutory authority to hire outside counsel over the objection of an able and willing prosecuting attorney – which it does not – the appointment would unconstitutionally deny the electorate's right to choose who provides the services of an elected office." (Emphasis added by Legal Update Editor)

Result: Reversal of Island County Superior Court decision that rejected an action brought by the Island County Prosecuting Attorney against the Island County Board of County Commissioners.

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WASHINGTON STATE COURT OF APPEALS

THIRD PARTY CONSENT TO SEARCH VEHICLE UNDER FOURTH AMENDMENT: OWNER'S CONSENT OVERRIDES BORROWER'S EXPRESS OBJECTION TO SEARCH

State v. Vanhollebeke, 197 Wn. App. 66 (Div. III, December 13, 2016)

Facts and Proceedings below:

During a lawful investigatory seizure that followed a lawful traffic stop of Vanhollebeke, law enforcement officers developed reasonable suspicion that the truck that Vanhollebeke was driving: (1) was stolen (based on an apparent punched ignition); and (2) contained drug paraphernalia (based on a glass pipe in open view). Vanhollebeke told officers that he had borrowed the truck from its owner. An officer asked Vanhollebeke for consent to search the truck. Vanhollebeke refused consent to search the truck.

Officers were able to contact the truck's owner. The owner confirmed that he had lent the truck to Vanhollebeke. The truck's owner gave officers a key and consented to a search of the truck. Officers searched the truck and found a revolver and a glass pipe with methamphetamine residue. Officers confirmed through dispatch that Vanhollebeke had a prior felony conviction.

The State charged Mr. Vanhollebeke with first degree unlawful possession of a firearm. Mr. Vanhollebeke moved to suppress the physical evidence on the grounds that he had refused to give the officers consent to search the truck. The trial court denied his motion, and a jury convicted him of first degree unlawful possession of firearm.

ISSUE AND RULING: Under the federal constitution's Fourth Amendment, does a vehicle owner's consent to search the owner's vehicle override the objection of a borrower to a search of the vehicle? (ANSWER BY COURT OF APPEALS: Yes)

Result: Affirmance of Adams Coun ty Superior Court conviction of Justin Dean VanHollebeke for first degree unlawful possession of a firearm.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> To grant valid consent, [a] third party must have common authority over the place or thing to be searched. Common authority does not mean that the third party has a mere property interest in the place or thing being searched. . . . Rather, "[t]o establish lawful consent by virtue of common authority 'a consenting party must be able to permit the search in his own right' and (2) 'it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search.'" . . .
>
> Our Supreme Court addressed a somewhat similar situation in [State v. Cantrell, 124 Wn.2d 183 (1994)]. In that case, Rudell Cantrell and his friend, Ingo Schweitzer, were driving in a car that Mr. Schweitzer's parents owned. A state trooper stopped them for speeding and then asked if they had any contraband in the vehicle. Knowing that Mr. Schweitzer's parents owned the vehicle, the trooper asked Mr. Schweitzer for permission to search his parents' car. Mr. Schweitzer read and signed a consent form allowing the trooper to search the car. The trooper did not ask Mr. Cantrell to sign a similar form. Mr. Cantrell did not object when the trooper searched the car. The trooper found marijuana, paraphernalia, and methamphetamine. Mr. Cantrell was convicted.
>
> On appeal, the Cantrell court considered whether the police must obtain affirmative consent from all occupants who have approximately equal control over a vehicle before searching it without a warrant. The court had previously held that the police must obtain affirmative consent from all cohabitants in an office building before searching the office without a warrant. Cantrell at 189 (citing State v. Leach, 113 Wn.2d 735 (1989)). The main question in Cantrell was whether that prior holding [in Leach] should be extended to automobile searches.
>
> The Cantrell court held that the Fourth Amendment does not require all occupants of a vehicle to independently consent to a search and that the consent of one who possesses common authority over a vehicle is sufficient. The court reasoned that third party consent cases tum on the suspect's reasonable

expectation of privacy, and if the suspect has willingly allowed another person common authority over the place or thing, then he or she runs the risk that the third party will expose it to another person. The court recognized that a person has a privacy interest in an automobile, but concluded that this expectation of privacy is less than the expectation of privacy in either a home or an office.

This case is different from Cantrell in at least one important respect. Here, Mr. Vanhollebeke objected to the search whereas the defendant in Cantrell did not. Thus, this case presents the situation like the one the Cantrell court expressly declined to reach. We find no Washington authority addressing this situation.

The parties do not dispute that Mr. Vanhollebeke had a privacy interest in the truck. Nor do they dispute that Mr. Casteel had common authority to consent to the search. Thus, the central question is whether Mr. Casteel's consent overrode Mr. Vanhollebeke's express objection. The State argues it did because Mr. Casteel was the truck's registered owner and, therefore, Mr. Casteel had an equal or superior interest in it.

Mr. Vanhollebeke's right to use the truck was dependent on the owner's unrevoked permission. This, we believe, limits Mr. Vanhollebeke's reasonable expectation of privacy. Some courts have utilized the law of bailments when analyzing whether an owner's consent to search overrides a borrower's refusal. *See* 4 WAYNER LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.6(b) (consent by bailor) (5th ed. 2012).

. . . .

Here, as bailee [i.e., the person borrowing the truck], Mr. Vanhollebeke had the actual right to exclude all others from the truck except for Mr. Casteel. For this reason, Mr. Vanhollebeke did not have a reasonable expectation of privacy if Mr. Casteel wanted to search his own truck or allow another person to do so.

Mr. Vanhollebeke urges us to reach a contrary result, and cites Georgia v. Randolph, 547 U.S. 103 (2006). In Randolph, the United States Supreme Court addressed the question of whether a warrantless search of a home based on one co-occupant's consent is valid if the other co-occupant was present at the scene and expressly refused to consent." There, the defendant's estranged wife consented to a search of the marital residence after the defendant had "unequivocally refused" to give consent to search the house. The Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."

The Randolph Court reasoned that "[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules." When a cotenant is present and objects to a visitor's entry into the home, social expectations require exclusion of the visitor. The Court further explained that "[u]nless the people living together fall within some recognized hierarchy, like a household of parent

> and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior."
>
> It would be inappropriate to extend Randolph to this situation for several reasons. First, Randolph recognized that different societal expectations may arise when cotenants belong to a recognized hierarchy. The fact that Mr. Casteel owned the truck and gave Mr. Vanhollebeke permission to only borrow it created a "societal understanding of superior and inferior," so that he had the "right or authority to prevail over the express wishes" of Mr. Vanhollebeke.
>
> Second, other courts that have considered whether to extend Randolph to vehicles have declined to do so because of society's lessened expectation of privacy in vehicles as compared to homes. . . .
>
> Finally, Randolph's holding expressly drew a "fine line" and was intended to affect only those cotenants who were physically present at the threshold and expressly refused consent. "Because the Supreme Court did not extend the holding in Randolph to those people who were nearby or inside the home but not at the threshold, it appears the Court intended to limit its holding to the narrowly drawn parameters of a residential search." [State v. Copeland. 399 S.W.3d 159, 166 (Tex. Crim. App. 2013)].
>
> We conclude Mr. Casteel's consent to search his truck overrode Mr. Vanhollebeke's objection. Therefore, [the law enforcement officers'] search did not violate Mr. Vanhollebeke's reasonable expectation of privacy, and the trial court did not err in denying Mr. Vanhollebeke's CrR 3.6 motion to suppress.

[Footnote omitted; some citations omitted; other citations revised for style]

LEGAL UPDATE EDITORIAL COMMENTS: 1. The Court of Appeals does not analyze this case under article I, section 7 of the Washington constitution: The Vanhollebeke Court limits its search and seizure analysis to the Fourth Amendment. I believe, however, that the Washington appellate courts would hold that the Washington constitution does not a require different result under the facts of the Vanhollebeke case. Compare the ruling in State v. Witherrite, 184 Wn. App. 859 (Div. III, 2014) Jan 15 LED:02, review denied by Washington Supreme Court, 182 Wn.2d 1026 (2015) (Because less privacy protection is provided for vehicles than for homes under article I, section 7, Ferrier warnings, while the best practice, are not mandated in order to obtain first-party consent).

2. If items appear to belong to non-owner occupant of car, consider obtaining consent or a search warrant before opening: I agree with the following comment by Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys, in her "Case Note" on the WAPA website:

> **The evidence removed from the vehicle was all in plain sight. The court, therefore, did not reach whether the vehicle owner's consent will allow a warrantless entry into items that the officer knows or should know belong to the borrower. See, e.g., State v. Rison, 116 Wn. App. 955 (2003) (tenant's consent to search the apartment did not authorize the police to search a closed eyeglass case belonging to a guest).**

LEGAL UPDATE EDITOR'S RESEARCH NOTE: For summaries/outlines of the law of consent searches under both the Washington and federal constitutions, see the following publications on the Internet LED page of the Criminal Justice Training Commission:

(1) "Confessions, Search, Seizure, and Arrest: A Guide for Police Officers," May 2015, by Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys (see pages 284-299);

(2) "Law Enforcement Legal Update Outline," July 1, 2016, by John Wasberg, retired Senior Counsel, formerly of Washington Attorney General's Office (see pages 40-45).

LEGAL UPDATE EDITORIAL NOTE REGARDING LED ENTRY ON THIS DECISION: The Vanhollebeke decision is addressed in the AGO/CJTC's November 2016 Law Enforcement Digest at pages 5-6.

PROTECTIVE SWEEP ISSUE RESOLVED AGAINST THE STATE, BUT TRIAL COURT'S ERROR HELD HARMLESS; ALSO, STATE WINS ON THE MERITS ON A MIRANDA ISSUE OF POLICE RE-INITIATION OF CONTACT WITH A CONTINUOUS-CUSTODY SUSPECT WHO HAD INITIALLY INVOKED HIS RIGHT TO SILENCE

State v. Chambers, 197 Wn. App. 96 (Div. I, December 1, 2016)

Facts and Proceedings below:

Seattle PD officers were investigating a fatal shooting near a favorite bar of defendant Chambers. There were several helpful witnesses at the scene. Officers quickly developed probable cause to arrest Chambers. He had been observed driving a BMW from the scene of the shooting. The evidence indicated that Chambers had acted alone. The officers drove to Chambers' home. Within one hour of the shooting, officers arrested and handcuffed Chambers while they were on the uncovered, unenclosed, front porch of his home. Officers took him out to the street and seated him on the bumper of a police car.

After the arrest, the front door remained open and the police could see a woman, later identified as Sara Chambers, in the living room. The front door of the house opens directly into the living room of the house. The entry to the kitchen is approximately 20 feet from the front door.

At least four police officers entered the house to perform "a cursory sweep for other suspects." In the kitchen, one officer saw "a .45 caliber handgun, car keys, [and] a bullet magazine" on a table. After obtaining a search warrant, the police seized the gun, the magazine clip, and the keys to the BMW that Chambers had been seen driving away from the scene of the shooting.

Within a few minutes of the arrest, a police officer at the scene gave Chambers Miranda warnings. Chambers said that he understood the warnings. He then answered "no" when the officer asked him if he wanted to speak to the police. The Court of Appeals describes as follows what happened next as relates to the Miranda issue in the case:

> When [an officer at the scene of the arrest] asked Chambers [at 10:51 p.m.] if he wanted to speak to police, Chambers said, "[N]o." Another officer drove

> Chambers to the Southwest Precinct and then to Seattle Police Headquarters. "No questions were asked of the defendant during the trip from his home to the precinct, from the precinct to headquarters." The police placed Chambers in an interview room at Seattle Police Headquarters at approximately 12:28 a.m. "Upon entry into the room," Chambers was "taken out of handcuffs" and "accepted the officer's offer of a glass of water." He was "left alone in the interview room for about two-and-a-half hours." The police did not ask Chambers any questions while at police headquarters.
>
> After obtaining a warrant to draw blood, [Detectives A and B] drove Chambers to Harborview for a blood draw at 3:07 a.m. [The detectives] did not ask Chambers any questions during the trip to Harborview. But on the way, Chambers made the unsolicited statement that "I don't want to talk about this."
>
> After the blood draw, Chambers "appeared to have substantially sobered up." When they "reached the detectives' car at about 3:50 a.m." Detective [A] read Chambers his Miranda rights again. Chambers said he understood the rights and did not invoke his right to remain silent. While driving to the jail, Detective [A] told Chambers that he "wanted to hear [Chambers'] side of the story." Chambers said, "'Man, I don't even remember what happened. I was just,. I don't know what's going on. I don't remember anything that happened tonight."
>
> When they arrived at the King County jail, Detective [A] asked Chambers if he remembered what had happened that night. Chambers said he was trying to remember. Chambers then said, "I don't know who this dude is. Do you have a picture of the dude? I need to see a picture of the guy.'" Detective [A] said that he had a picture and "asked if they should go back to his office and have a talk." Chambers replied, "Yeah, let's go.'" They left the jail and [Detectives A and B} drove Chambers to Seattle Police Headquarters. Before the recorded interview, the detectives read Chambers his Miranda rights. Chambers stated he understood his rights and agreed to talk to the detectives.

Chambers moved pre-trial to suppress the evidence that was the fruit of the unlawful sweep of his home. He also moved to suppress statements that he made to detectives after he waived his Miranda rights following their re-initiation of contact. The trial court denied his suppression motions, and a jury convicted him of first degree manslaughter.

ISSUES AND RULINGS: (1) Officers were investigating a shooting apparently committed by a lone gunman, Chambers, with no accomplices. They had already arrested and handcuffed Chambers while on the uncovered, unenclosed porch of his home. They had taken him to the street and seated him on the bumper of a police car. They saw a woman inside the home, but they had no reason to believe that she posed a threat t to them. Do these circumstances justify a protective sweep of the home under the Fourth Amendment? (ANSWER BY COURT OF APPEALS: No, because it was not reasonable for the officers to believe that safety reasons justified a sweep of the home for other suspects or persons otherwise posing a threat to the officers)

(2) Was the trial court's error in not suppressing evidence that was the fruit of the unlawful sweep harmless because it did not prejudice the defendant? (ANSWER BY COURT OF APPEALS: Yes, because overwhelming untainted evidence supported the conviction)

(3) Within a few minutes of the arrest, Chambers was given Miranda warnings. He answered "no" when he was asked if he wanted to speak to the police. No attempt was made to question Chambers during the next four hours as detectives pursued, among other things, a search warrant for blood. On the drive to the blood draw, without solicitation by anyone, Chambers volunteered that he didn't want to "talk about this." After the blood draw was completed about four hours after the point of arrest, a detective re-Mirandized Chambers, who again said that he understood his rights but did not invoke his Miranda rights to silence or to counsel. The detectives subsequently talked to Chambers about the shooting. Do these circumstances present a violation of Chambers' Miranda right to silence? (ANSWER BY COURT OF APPEALS: No, because the detectives scrupulously honored Chambers' original assertion of his right to silence, and they waited a reasonable period prior to attempting again to question Chambers)

LEGAL UPDATE EDITORIAL NOTE: On an issue not addressed in this Legal Update entry other than in this note, the Court of Appeals rules that the trial judge did not err by instructing the jury on the lesser included offense of first degree manslaughter. Viewed in the light most favorable to the State, the evidence shows that the defendant, who subjectively believed he was in imminent danger from his victim and acted in perceived self-defense, acted recklessly or negligently by using more force than necessary.

Result: Affirmance of King County Superior Court conviction of Lovett James Chambers for first degree manslaughter.

Status: A petition for discretionary Washington Supreme Court review is pending.

ANALYSIS:

(1) Protective sweep

The Court of Appeals' analysis of the protective sweep issue, in key part, is as follows:

> One recognized exception to the warrant requirement is a "protective sweep" of the home. Maryland v. Buie, 494 U.S. 325, 327, 334 (1990). The [United States] Supreme Court describes a "protective sweep" as a limited cursory search incident to arrest and conducted to protect the safety of police officers or others. [Buie explains:]
>
> > A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.
>
> The [U.S. Supreme Court in Buie] identifies two different circumstances that justify a protective sweep. The Court held incident to the arrest of a suspect in his home, "as a precautionary matter and without probable cause or reasonable suspicion, 'the police could look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.'" But the Court cautions the protective sweep does not amount to "a full search of the premises." The second type of protective sweep requires "articulable facts" to support the presence of another person who might pose a threat to the police. [Buie explains:]

> Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.

. . . .

The Buie rule has been extended to include protective sweeps within a suspect's home when a suspect is arrested just outside his home. While there is no Washington authority specifically adopting this extension in Washington, in State v. Hopkins, 113 Wn. App. 954 (Div. III, 2002) **Jan 03 LED:06** the court twice cited U.S. v. Henry, 48 F.3rd 1282 (C.A.D.C, 1995) which extended the Buie rule to allow protective sweeps of a defendant's residence when the arrest is made just outside the suspect[']s residence.

The footnote in Hopkins states, in pertinent part:

> Buie specifically addressed an arrest inside a person's home, but other courts have expanded its rationale to areas just outside a residence. . . . .

The court erred in concluding the police had the authority to conduct a protective sweep of the house incident to arrest for two reasons. First, a warrantless search of "spaces immediately adjoining the place of arrest" without probable cause or reasonable suspicion does not apply when the police arrest an individual outside his home. . . .

Second, the footnote in Hopkins does not support the [trial] court's conclusion [in this case] that a protective sweep incident to arrest applies. . . .

In the alternative, the trial court [in this case] concluded the police were justified in conducting a protective sweep of the kitchen because they had "a reasonable suspicion" that "the area to be searched may harbor an individual posing a danger."

Buie also allows the police to make a search of areas not directly adjoining the place of arrest when the police have a reasonable belief, based on articulable facts, which warrant a reasonably prudent officer in believing that the area to be searched may harbor an individual posing a danger to those on the arrest scene. . . . . Alternatively, the officers were authorized to conduct the sweep of the kitchen because they had a reasonable suspicion at the time of the arrest, that Chambers or another person in the house could have access to the yet undiscovered weapon and pose a danger to them. These articulable facts were a) the officers at the time of the sweep knew that the defendant was a suspect in a serious shooting incident involving a gun; b) the officers did not know where the gun was; and c) the officers knew there was someone else in the house.

To justify a protective sweep when a suspect is arrested outside his home, there must be articulable facts that warrant a police officer in believing "the area to be

> swept harbors an individual posing a danger to those on the arrest scene." Buie To establish the second type of a protective sweep is justified, more than a general suspicion of the possibility of danger is required.
>
> The record does not support the conclusion that there were "articulable facts" that the kitchen harbored "an individual posing a danger." The police had information that only Chambers shot Hood and was alone when he drove away. The findings establish the only individual in the house when police arrested Chambers was his spouse Sara. "[T]he front door was open" after the arrest and "[t]he police could see" Sara was sitting on the living room couch watching television and remained in the living room.

[Footnotes omitted; some citations omitted, other citations revised for style]

(2) Harmless error by trial court on protective sweep issue

The Court explains as follows why it concludes that the State met its burden of proving beyond a reasonable doubt that the trial court's mistake in admitting evidence relating to the sweep was not prejudicial to the defendant:

> We conclude that absent the evidence seized from the house, the overwhelming untainted evidence leads to a finding of guilt beyond a reasonable doubt and the jury verdict would have been the same absent the error. Chambers testified he acted in self-defense when he shot Hood with the Colt .45. Chambers admitted that he parked his BMW in front of the Beveridge Place Pub on January 21, that he kept a .45 caliber gun under the passenger seat of the BMW, and that he used the Colt .45 to shoot Hood near Morgan Junction Park.

(3) Initiation of contact with custodial suspect after his invocation of right to silence

The Miranda opinion declares that where suspects assert their Fifth Amendment right to counsel or to remain silent during a custodial interrogation, the interrogation must cease immediately. Initiation-of-contact cases deal with the issue of whether police may later resume interrogation with a suspect who has asserted one of these rights during custodial interrogation and has since remained in continuous custody. (Note that the initiation-of-contact rule is not triggered (1) where the rights are asserted in non-custodial questioning, nor (2) where custodial contact is made after the person has been released from custody for 14 days).

There are two lines of cases regarding the initiation of further interrogation after suspects have stopped custodial questioning by asserting their rights. In Michigan v. Mosley, 423 U.S. 96 (1975) the U.S. Supreme Court held that in some circumstances it is permissible for police to initiate further contact even though a suspect who has remained in continuous custody after asserting the right to silence. On the other hand, in Edwards v. Arizona, 451 U.S. 477 (1981) , the U.S. Supreme Court created a "bright line" rule prohibiting police from initiating contact with a suspect who had remained in continuous custody after stopping questioning by asserting the right to an attorney.

The Chambers decision here by the Washington Court of Appeals addresses the "right to silence" case law under the initation-of-contact restrictions.

In Michigan v. Mosley, the U.S. Supreme Court ruled that police did not violate an continuous custody arrestee's Fifth Amendment right to silence where, two hours after the arrestee had terminated an interrogation with one officer by asserting his right to silence on one crime, a second officer approached him and obtained a waiver of rights on an unrelated crime. The court held that the statements that the arrestee made on the unrelated crime were admissible because: (1) Miranda warnings were carefully given on each contact, (2) the first officer immediately ceased questioning when Mosley asked him to do so, (3) there was a significant time lapse between the two contacts, and (4) the second contact concerned an unrelated crime.

In U.S. v. Hsu, 852 F.2d 407 (9th Cir. 1988), the Federal Court held the following scenario to be lawful: in-custody drug suspect tells DEA agent #1 following Miranda warnings that he does not want to talk; thirty minutes later, DEA agent #2, not knowing of the continuous-custody suspect's earlier assertion of the right to silence to the other agent, contacts the suspect, Mirandizes him, and gets a confession.

In key part, the analysis of the Chambers Court on the initiation-of-contact issue is as follows:

> [I]n Hsu, the Ninth Circuit adopted an approach that considers all of the relevant factors with no one factor dispositive.
>
> > Mosley envisioned an inquiry into all of the relevant facts to determine whether the suspect's rights have been respected. Among the factors to which the Court looked in that case were the amount of time that elapsed between interrogations, the provision of fresh warnings, the scope of the second interrogation, and the zealousness of officers in pursuing questioning after the suspect has asserted the right to silence. See Mosley, 423 U.S. at 104-06. At no time, however, did the Court suggest that these factors were exhaustive, nor did it imply that a finding as to one of the enumerated factors – such as, for example, a finding that only a short period of time had elapsed – would forestall the more general inquiry into whether, in view of all relevant circumstances, the police "scrupulously honored" the right to cut off questioning.
>
> Hsu, 852 F.2d at 410.
>
> The touchstone of the analysis under Mosley is whether a "review of the circumstances" leading up to the statements made to police show the '"right to cut off questioning' was fully respected." Mosley.
>
> . . . .
>
> Because the circumstances leading up to the interview show the police scrupulously honored Chambers' right to cut off questioning, the court did not err in denying the motion to suppress the statements Chambers made to [Detectives A and B].
>
> The record shows the police advised Chambers of his Miranda rights at 10:51 p.m. when he was arrested on January 21. Chambers stated he understood his rights and unequivocally said he did not want to talk to the police. The record

> establishes the police did not "ask the defendant any questions or persist in repeated efforts to wear him down or change his mind after he invoked his rights." After he invoked his right to remain silent at 10:51 p.m. on January 21, the police did not question Chambers while at police headquarters. And while driving to Harborview to obtain a blood draw at 3:07 a.m. on January 22, the detectives did not ask Chambers any questions. Nonetheless, on the way to Harborview, Chambers said he did not want to talk about what happened. While at Harborview, Chambers seemed to have "sobered up." When they left Harborview approximately 45 minutes later, Detective [A] advised Chambers of his Miranda rights again. Chambers stated he understood his rights and did not invoke the right to remain silent. We conclude the undisputed facts support the conclusion that the right to cut off questioning was scrupulously honored under Mosley.

[Some citations revised for style]

LEGAL UPDATE EDITOR'S RESEARCH NOTE: For summaries/outlines on the law enforcement issues involved in this case, see the following publications on the Internet LED page of the Criminal Justice Training Commission:

(1) "Confessions, Search, Seizure, and Arrest: A Guide for Police Officers," May 2015, by Pam Loginsky, Staff Attorney, Washington Association of Prosecuting Attorneys (see pages 1-64 on a variety of issues in the broad area of Miranda, interrogations and confessions; see page 153 on protective sweeps);

(2) "Initiation of Contact Rules Under the Fifth Amendment," July 1, 2016, by John Wasberg, retired Senior Counsel, formerly of Washington Attorney General's Office (see the article).

FOUR KEY RULINGS: (1) PER STATE'S CONCESSION, DISTRICT COURT WARRANT OBTAINING OUT-OF-STATE CELL PHONE RECORDS WAS INVALID, BUT AN UNTAINTED FOLLOW-UP SUPERIOR COURT WARRANT FOR SAME RECORDS WAS VALID; (2) NOT INCLUDING RCW 10.96.020(2) LANGUAGE IN SEARCH WARRANT DOES NOT INVALIDATE WARRANT; (3) PROBABLE CAUSE TO GET CELL PHONE RECORDS IS ESTABLISHED IN AFFIDAVIT DESCRIBING MURDER-FOR-HIRE PLOT FOR LIFE INSURANCE PROCEEDS; (4) JAIL SEARCH VIOLATING ATTORNEY-CLIENT PRIVILEGE DID NOT TAINT PROSECUTION BECAUSE INFORMATION WAS NOT SHARED

State v. Blizzard, 195 Wn. App. 717 (Div. III, September 1, 2016)

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

> On May 25, 2013, real estate broker Vern Holbrook was found lying in a pool of blood in a vacant house he reportedly showed to a couple earlier that day. He had been severely beaten and his throat was cut. Mr. Holbrook later died as a result of the injuries sustained in the attack.
>
> An investigation of Mr. Holbrook's cell phone records and witness interviews led law enforcement to Mr. Blizzard. The State's theory was essentially a murder for hire scheme. Mr. Holbrook and Mr. Blizzard were former business partners.

Although there had been a falling out between the two men, Mr. Blizzard was the beneficiary of Mr. Holbrook's life insurance policy [with proceeds of $1.58 million].

Prior to the May 2013 attack, Mr. Blizzard tried recruiting various people to kill Mr. Holbrook. As part of this effort, he enlisted the help of his sometimes-girlfriend, Jill Taylor. Ms. Taylor also happened to be Mr. Holbrook's former daughter-in-law. Eventually, Mr. Blizzard recruited Ms. Taylor's roommate, Adriana Mendez, and Ms. Mendez's boyfriend, Luis Gomez-Monges, to pose as prospective homebuyers and attack Mr. Holbrook during a home tour.

Mr. Blizzard, Ms. Mendez, Mr. Gomez-Monges, and Ms. Taylor were charged in connection with Mr. Holbrook's murder. During the pretrial phase of the case, Mr. Blizzard moved to suppress records related to his cell phone. He argued the warrants authorizing seizure of his cell phone records were invalid due to procedural and substantive flaws.

[LEGAL UPDATE EDITORIAL NOTE: The "Analysis" section of the Court of Appeals opinion includes the following description of the facts relating to the probable cause issue concerning the search warrant for Mr. Blizzard's cell phone records (the PC facts paragraph is repeated immediately below in the "Analysis" section of this Legal Update entry):

> **The superior court warrant set forth numerous facts linking Mr. Blizzard's cell phone lines with the Holbrook investigation. The affidavit disclosed that Mr. Blizzard's company held a $1.58 million life insurance policy on Mr. Holbrook. The affidavit also recited Ms. Mendez's confession that she and Mr. Gomez-Monges had posed as fake homebuyers and that Mr. Gomez-Monges had attacked Mr. Holbrook while viewing a prospective property. Although at the time Ms. Mendez denied the existence of a conspiracy, she admitted to knowing Mr. Blizzard. In addition, Ms. Mendez's phone records showed text messages between herself and Mr. Blizzard on the day of the attack. The manager at Ms. Mendez's hotel identified Mr. Blizzard as the individual who had been paying Ms. Mendez's rent. The manager recalled Mr. Blizzard stating he was suing Mr. Holbrook's real estate company and was expecting to come in to a large sum of money. This comment tended to corroborate the statements from Mr. Holbrook's family members, alleging bad blood between Mr. Blizzard and Mr. Holbrook.**

. . . [T]he trial court denied his motion to suppress the cell phone records. The court ultimately ruled on numerous additional motions, including a . . . motion to dismiss based on an allegation the State had intercepted attorney-client communications. [T]he judge denied this . . . motion to dismiss . . .

At trial, codefendants Adriana Mendez and Jill Taylor turned state's evidence and testified against Mr. Blizzard. Codefendant Luis Gomez-Monges was tried separately. A jury found Mr. Blizzard guilty of first degree murder. By special verdict, it also found (1) Mr. Blizzard was armed with a deadly weapon, and (2) Mr. Holbrook was particularly vulnerable or incapable of resistance. . . .

ISSUES AND RULINGS; (1) Per the State's concession, a District Court warrant that obtained out-of-state cell phone records of the defendant was invalid. Was an untainted follow-up Superior Court warrant to get those same records valid? (ANSWER BY COURT OF APPEALS: Yes, because the first warrant was not exploited to obtain the second warrant)

(2) RCW 10.96.020(2) provides: "Criminal process issued under this section must contain the following language in bold type on the first page of the document: 'This [warrant, subpoena, order] is issued pursuant to RCW [insert citation to this statute]. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply.'" Did failure to include this language on the Superior Court warrant in this case invalidate the search warrant where no prejudice due to the omission has been shown by the Defendant? (ANSWER BY COURT OF APPEALS: No, The object of the search was not transitory or changeable or stale, and thus the dangers inherent in delay in execution were not implicated.)

(3) Did the affidavit for probable cause support government access to cell phone records in the affidavit's description of the target's involvement in a murder-for-hire plot to get life insurance proceeds (see the bolded text above under "facts and proceedings" describing the probable cause information in the affidavit)? (ANSWER BY COURT OF APPEALS: Yes)

(4) A jail search violated the defendant's attorney-client privilege, but no information was shared by jail officers with law enforcement officers or anyone in the prosecutor's office. Does the violation of the defendant's attorney-client privilege nonetheless require dismissal of the charges against him? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of Yakima County Superior Court first degree murder conviction of Daniel Blizzard and affirmance of sentence under special verdict.

Status: Decision final; petition for discretionary Washington Supreme Court review denied.

ANALYSIS: (Excerpted from Court of Appeals opinion)

(1) Invalid District Court search warrant did not taint follow-up Superior Court warrant

> The warrants under review were issued by the Yakima County Superior Court after similar warrants had been issued by the district court. The reason for reissuance was that the State became concerned the district court lacked jurisdiction to issue warrants for out-of-state corporations. Because the State does not attempt to defend the district court warrants, we operate under the assumption they were invalid.
>
> Mr. Blizzard challenges the superior court warrants on the basis that they were obtained in reliance on information learned from the invalid district court warrants. Were this argument factually accurate, there would be a strong argument for suppression. Illegally obtained information cannot be used to support probable cause for a warrant. . . . But the facts are not as suggested by Mr. Blizzard. The new information referenced by Mr. Blizzard pertains to a change in the company that owned Mr. Blizzard's cell phone lines. According to the record, the State learned Mr. Blizzard's cell phone lines had been sold to a new company through a series of law enforcement phone calls to cell phone company representatives. This new information was not obtained by reviewing

search warrant returns. Nor was it obtained by exploiting the existence of the invalidly issued warrants. [Court's footnote: *Because the State independently discovered the change in phone companies, this information was properly included in the superior court warrant application and does not provide a basis for suppression.*]

Because the State independently discovered the change in phone companies, this information was properly included in the superior court warrant application and does not provide a basis for suppression. State v. Gaines, 154 Wn.2d 711 (2005) **Oct 05 LED:04**.

(2) Omission of RCW 10.96.020(2) language was not prejudicial so no suppression

Mr. Blizzard next argues the superior court warrant was invalid because it lacked the following statutorily mandated language: "This warrant is issued pursuant to RCW 10.96.020. A response is due within twenty business days of receipt, unless a shorter time is stated herein, or the applicant consents to a recipient's request for additional time to comply." RCW 10.96.020(2). **LEGAL UPDATE EDITORIAL NOTE: The Court of Appeals omitted the following language that prefaces the above-quoted language in RCW 10.96.020(2): "Criminal process issued under this section must contain the following language in bold type on the first page of the document . . . ."]**

Unless constitutional considerations are in play, the rules for the execution and return of a search warrant are basically ministerial in nature. . . . Generally, unless a defendant can show prejudice, procedural noncompliance with these rules does not invalidate a warrant or otherwise require suppression of evidence. [citing cases]. Mr. Blizzard has not shown or argued the warrants' failure to specify the time of its execution and return prejudiced him in any way. The object of the search was not transitory or changeable or stale. The dangers inherent in delay in execution were not implicated. The search warrant was valid, despite the absence of the required language.

(3) Probable cause is established in the search warrant affidavit

Substantively, Mr. Blizzard claims the search warrants were not supported by probable cause. Probable cause to support a search warrant requires sufficient facts and circumstances establishing a reasonable inference that the defendant participated in criminal activity and that evidence of the crime will be found in the area to be searched. . . .

The superior court warrant set forth numerous facts linking Mr. Blizzard's cell phone lines with the Holbrook investigation. The affidavit disclosed that Mr. Blizzard's company held a $1.58 million life insurance policy on Mr. Holbrook. The affidavit also recited Ms. Mendez's confession that she and Mr. Gomez-Monges had posed as fake homebuyers and that Mr. Gomez-Monges had attacked Mr. Holbrook while viewing a prospective property. Although at the time Ms. Mendez denied the existence of a conspiracy, she admitted to knowing Mr. Blizzard. In addition, Ms. Mendez's phone records showed text messages between herself and Mr. Blizzard on the day of the attack. The manager at Ms. Mendez's hotel identified Mr. Blizzard as the individual who had been paying Ms.

Mendez's rent. The manager recalled Mr. Blizzard stating he was suing Mr. Holbrook's real estate company and was expecting to come in to a large sum of money. This comment tended to corroborate the statements from Mr. Holbrook's family members, alleging bad blood between Mr. Blizzard and Mr. Holbrook.

[Although] the information set forth in the affidavit may not have been enough to secure a conviction, it was sufficient to establish probable cause. The affidavit established motive and an apparent conspiracy between Mr. Blizzard and Mr. Holbrook's attackers. Because Mr. Blizzard and Ms. Mendez were contacting each other via text message on the day of the attack, it was reasonable to infer that evidence about the attack would be found on Mr. Blizzard's cell phone.

(4) Attorney-client communications information was not shared, so no sanction

While Mr. Blizzard was in pretrial custody, staff from the Yakima County jail confiscated paperwork from his cell during a routine security sweep. The paperwork turned out to be trial preparation materials, including discovery documents, defense investigative memos, and handwritten notes. Based on this intrusion into his private paperwork, Mr. Blizzard filed a motion to dismiss for governmental misconduct under CrR 8.3(b).

Dismissal under CrR 8.3(b) is an "extraordinary remedy." State v. Puapuaga, 164 Wn.2d 515, 526 (2008). Even in the context of an improper intrusion into confidential attorney-client communications, dismissal is unwarranted if there is "no possibility of prejudice to the defendant." State v. Pena Fuentes, 179 Wn.2df 808, 819 (2014) **April 14 LED:20**. The State bears the heavy burden of proving lack of prejudice beyond a reasonable doubt. State v. Pena Fuentes.

The trial judge considered Mr. Blizzard's CrR 8.3(b) motion after conducting a lengthy evidentiary hearing. At the close of the hearing, the judge found the contents of the confiscated materials had never been shared with anyone involved in the prosecution team, including law enforcement officers. The lead case agent did not even know Mr. Blizzard's documents had been confiscated until the defense filed a motion to dismiss. The trial judge found that while some jail staff saw Mr. Blizzard's documents, no one looked at the materials in detail. In addition, no one with access to Mr. Blizzard's documents discussed the contents with anyone else.

Mr. Blizzard assigns no error to the trial court's factual findings; as such, they are verities on appeal. . . . . The trial judge's findings are sufficient to justify denial of the motion to dismiss. What little information was obtained by jail staff was never shared with the prosecution or law enforcement investigators. Because there was no possibility that seizure of Mr. Blizzard's documents benefited the State or prejudiced the defense, dismissal was unwarranted. . . .

[Some citations omitted, others revised for style; subheadings added by Legal Update Editor]

LEGAL UPDATE EDITORIAL COMMENT REGARDING NO-PREJUDICE RULING AS TO VIOLATION OF RCW 10.96.020(2): Of course, officers and prosecutors should not take any chances that a contrary legal ruling will be made in the future, or that facts in a future

case will be held to be distinguishable. All drafters of search warrants should follow the statute and include the statutory language on the search warrant.

FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION: NO VIOLATION OF RIGHT TO SILENCE IN STATE'S PRESENTING OF EVIDENCE THAT, PRIOR TO ARREST, DEFENDANT HAD BEEN A NO-SHOW FOR A SCHEDULED MEETING WITH POLICE, BECAUSE THE 2013 RULING OF THE UNITED STATES SUPREME COURT IN SALINAS V. TEXAS CONTROLS OVER CONTRARY WASHINGTON PRECEDENTS

State v. Magana, 197 Wn. App. 189 (Div. III, December 20, 2016)

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

> Fourteen-year-old Y.L. first met Sergio Magana, Jr. through Facebook. Y.L. described Mr. Magana as being in his 20's. After exchanging text messages, Y.L. and Mr. Magana made plans to meet at Y.L.'s home. Mr. Magana had expressed a desire to be alone with Y.L. When the day they planned to meet arrived, Mr. Magana went inside L.'s home and forcibly raped her. Not long after leaving, Mr. Magana texted and told Y.L. not to mention his name and to delete all of their text messages because her "age scare[d] him."
>
> After approximately two weeks, Y.L. reported Mr. Magana"s conduct to the police. Y.L. identified Mr. Magana from a photo lineup and submitted her phone so text messages could be extracted.
>
> The police then began looking for Mr. Magana. After about six weeks, Mr. Magana made contact with the police and spoke to a detective over the telephone. The detective described Mr. Magana as "fishing for information." During the call, Mr. Magana arranged to meet with the police. However, he never showed up for his appointment. About a month later, Mr. Magana finally met with a police detective in person. He was advised of his *Miranda* rights and acknowledged that he had met Y.L. over Facebook, but he denied having intercourse.
>
> Mr. Magana was charged with one count of third degree rape of a child. Fallowing a mistrial and then a second trial, he was found guilty by a jury and sentenced by the trial court. A number of community custody conditions were imposed as part of Mr. Magana's sentence.

ISSUE AND RULING: Was Mr. Magana's right against self-incrimination under the Fifth Amendment violated when the trial court allowed the State to present testimony regarding Magana's failure to appear for his initial police interview that he had arranged? (ANSWER BY COURT OF APPEALS: No, because (1) the U.S. Supreme Court decision in Salinas v. Texas, 133 S. Ct. 2174 (2013) overruled Washington Supreme Court precedents that erroneously interpreted the Fifth Amendment, and (2) the Washington constitution does not provide greater protection of the right against self- incrimination on this issue.)

Result: Affirmance of Franklin County Superior Court conviction of Sergio Magana for third degree rape of a child; reversal of some community custody sentencing conditions not addressed in this Legal Update entry.

Status: The decision of the Court of Appeals is final.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Mr. Magana argues the State violated his right against self-incrimination by eliciting testimony regarding his failure to appear for his initial police interview. He claims this was an improper comment on his right to silence, in violation of the Fifth Amendment to the United States Constitution. In support of his position, Mr. Magana cites Washington Supreme Court cases which hold the Fifth Amendment rule on silence applies to a suspect's interactions with police prior to arrest. State v. Easter, 130 Wn.2d 228 (1996) **Jan 97 LED:13**; State v. Lewis, 130 Wn.2d 700 (1996) **May 97 LED:03**.
>
> While the Washington cases cited by Mr. Magana provide persuasive support, they are ultimately unhelpful as they have been overruled by subsequent precedent from the United States Supreme Court. In Salinas v. Texas, 133 S. Ct. 2174 (2013), the United States Supreme Court addressed a long-standing conflict between various state and federal courts over whether the Fifth Amendment bars introduction of a defendant's pre-arrest silence as evidence of guilt. In a 5-4 plurality decision, the Court found no prohibition.
>
> Salinas did not resolve all questions regarding how the Fifth Amendment rule applies prior to arrest. Three justices recognized the Fifth Amendment's protections might apply if explicitly invoked; the other two justices in the plurality concluded no constitutional issue could apply outside of a custodial interview. But this difference is immaterial here. The rule from Salinas is that, absent an express invocation of the right to silence, the Fifth Amendment is not an obstacle to the State's introduction of a suspect's pre-arrest silence as evidence of guilt.
>
> Salinas controls Mr. Magana's case. Legally, this is not an area where our state's constitution affords greater protection than the federal constitution. Easter, 130 Wn.2d at 235; State v. Earls, 116 Wn.2d 364, 375, 805 P.2d 211 (1991). Accordingly, after Salinas the Fifth Amendment analysis set forth in Easter, Lewis, and their progeny is no longer good law. Factually, Mr. Magana was not under arrest or any sort of police custody. His scheduled police interview was voluntary. To the extent Mr. Magana's failure to appear for the interview was relevant, the State was entitled to present this evidence.

[Some citations revised for style]

LEGAL UPDATE EDITORIAL COMMENT: In Salinas the U.S. Supreme Court did not decide (because the facts did not raise the question) whether a suspect's non-custodial express assertion of the right to silence prior to arrest might make a difference to the constitutional issue before the Court (i.e., admissibility of relevant pre-arrest silence). I think that such a non-custodial assertion of the right to silence would not make a difference to a majority of the U.S. Supreme Court. The general rule is that a person who

is not in custody and being interrogated cannot anticipatorily assert Fifth Amendment rights. That approach would likely control on this issue not addressed in Salinas.

BAIL RECOVERY AGENTS' PRIVILEGE TO ENTER LAND AND DWELLINGS TO RECAPTURE BAIL ABSCONDER INCLUDES PRIVILEGE TO FORCIBLY ENTER PROPERTY OF THIRD PERSON; COURT REVIEWS BAIL AGENT RCWS AND CASE LAW

In Applegate v. Lucky Bail Bonds, Inc., 197 Wn. App. 153 (Div. I, December 19, 2016), the Court of Appeals holds, among other things, that a bail recovery agent's privilege of entry onto land and dwellings in an effort to recapture the person sought to be taken into custody is not limited to the property of the criminal fugitive. A bail recovery agent may forcibly enter another's land and/or house if the agent reasonably believes the fugitive is there.

The Applegate Court describes the facts and the procedural background of the case as follows:

> Elizabeth was arrested for shoplifting and misdemeanor assault. In August 2011, Dorothy Applegate – Elizabeth's mother and Ron's wife – signed a bail bond indemnity agreement with Lucky to get Elizabeth released from custody. The agreement listed separate addresses for Dorothy and Elizabeth. Elizabeth missed two court dates in September 2011. Lucky was notified of Elizabeth's failure to appear.
>
> Lucky would have to forfeit the $4,000 bond amount if Elizabeth was not surrendered to the public authorities within 60 days. Elizabeth was not at the address given for her residence. Dorothy told Lucky's owner she did not know where Elizabeth was.
>
> Lucky hired Greg Peterson, Cesar Luna, and John Wirts as bail bond recovery agents to locate, apprehend, and surrender Elizabeth to law enforcement officials. On the evening of October 27, 2011, Luna received a tip that Elizabeth was at that moment staying in a trailer near the Applegate residence. Luna called Peterson and Wirts. The agents met on a street near the Applegate property around 10:30 p.m. They saw some trailers on the side of the driveway and made a plan to start looking for Elizabeth there.
>
> As they approached, Applegate came out of his house onto the porch and began to yell at them to get off his property. Wirts came toward him. As he reached the porch stairs, a scuffle began. Applegate kicked Wirts. Wirts put his hands on Applegate. Luna came to the aid of Wirts. They struggled with Applegate and pinned him to the ground. In the fracas, they crashed through the doorway and into the house. Applegate sustained broken ribs, and the doorway was damaged.
>
> Elizabeth, it turned out, was inside the house. She came forward and submitted. The agents took her into custody, handcuffed her, and departed.
>
> Applegate's civil cause of action went to a jury trial in superior court. The jury rendered a defense verdict.

Result: Affirmance of Whatcom County Superior Court judgment on jury verdict in favor of Lucky Bail Bonds, Inc.

Status: Petition for discretionary review is pending in the Washington Supreme Court.

LEGAL UPDATE EDITORIAL NOTE: The authority and responsibilities of bail recovery agents are governed by a combination of (1) common law court decisions (historical case law development), and (2) statutory standards under chapter 18.185 RCW. The Court of Appeals extensively discusses the governing law. This Legal Update entry does not comprehensively address that discussion.

VEHICULAR HOMICIDE AND VEHICULAR ASSAULT HELD TO BE STRICT LIABILITY CRIMES IN THE SENSE THAT NO MENTAL STATE ELEMENT, NOT EVEN MERE ORDINARY NEGLIGENCE, NEED BE PROVEN BY THE STATE WHERE THE CRIMES ARE CHARGED BASED ON DRIVING WHILE UNDER THE INFLUENCE

In State v. Burch, ___ Wn. App. ___ , 2016 WL ___ (Div. II, December 28, 2016), a defendant convicted of vehicular homicide and vehicular assault stemming from a drunk driving accident loses her appellate argument that the jury should have been instructed that the State must prove that a defendant was negligent in the operation of her vehicle where the charges are based on the defendant causing an accident while under the influence of alcohol or drugs.

The Burch Court describes the facts as follows:

> In December 2014, Burch was driving across an icy bridge when her truck spun out, slid off the road, and hit two men who were investigating the scene of an earlier accident. One of the men died and the other received serious injuries, including multiple broken bones and a severe ear laceration.
>
> Burch was uncooperative with law enforcement officers who responded to the scene. During their contact with Burch, the officers noticed that she smelled strongly of intoxicants. They restrained Burch and brought her to a hospital to draw blood to test for intoxicants. Testing of that sample showed a blood alcohol concentration of .09, indicating a concentration between .11 and .14 two hours after the accident.

The vehicular homicide statute, RCW 46.61.520, provides in relevant part:

> (1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:
>
> (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
>
> (b) . . . .

The vehicular assault statute, RCW 46.61.522, provides in relevant part:

> (1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:
>
> (a) . . . . or
>
> (b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another.

After a lengthy discussion of case law and legislative history relating to the relevant language in the two statutes, the Burch Court concludes that both of these DUI-accident crimes are strict liability crimes. No mental state, not even mere ordinary negligence, need be proven by the State.

Result: Affirmance of Mason County Superior Court conviction of Docie E. Burch for vehicular homicide and vehicular assault.

Status: Petition for discretionary Washington Supreme Court review is pending.

LEGAL UPDATE EDITORIAL NOTE: Note also that Washington case law establishes that, in prosecutions for vehicular homicide and vehicular assault, if the charge is based on driving under the influence, the State is not required to causally connect the defendant's intoxicated condition with the accident or the injury or death of a victim. The mere fact of being under the influence while driving is sufficient where the act of driving is one of the proximate causes of the accident (assuming that no superseding cause is involved).

FIREARMS SENTENCING ENHANCEMENT: SPLIT OF DIVISIONS OF COURT OF APPEALS CONTINUES ON WHETHER STATE MUST PROVE THAT FIREARM WAS OPERABLE IN ORDER TO QUALIFY AS A "FIREARM" UNDER RCW 9.41.010(9)

In State v. Crowder, 196 Wn. App. 861 (Div. III, December 1, 2016), Division Three of the Court of Appeals interprets the RCW firearms sentencing enhancement that incorporates the definition of "firearm" in RCW 9.41.010(9). The Court of Appeals rules that, while the State must prove that a defendant possessed a real firearm at the time of the crime, the State is not required to prove that the firearm was operable at the time of the crime. Division Three relies on its decision earlier this year in State v. Tasker, 193 Wn. App. 575 (Div. III, April 28, 2016), review denied, 186 Wn.2d 213 (2016).

The Crowder Court briefly explains its ruling on this issue as follows:

> As explained in Tasker, evidence that a device appears to be a real gun and is wielded during commission of a crime is sufficient circumstantial proof that the device is an actual firearm, as defined by RCW 9.41.010. I.D.'s testimony provided sufficient circumstantial proof in this case. She testified Mr. Crowder threatened her with a gun and placed it to her head. She described the gun as having a "spinning barrel," and later identified the gun as a revolver seized from Mr. Crowder's house. The totality of these circumstances sufficiently established that Mr. Crowder was armed with a real gun as required by RCW 9.94A.533(3) and 9.41.010(9).

Result: Affirmance of Yakima County Superior Court convictions of John Mark Crowder for first degree kidnapping, first degree robbery and first degree unlawful possession of a firearm; affirmance of firearm sentencing enhancement.

Status: Petition for discretionary Washington Supreme Court review is pending.

LEGAL UPDATE EDITORIAL NOTE: There is a split on the firearm-operability issue among the divisions of the Washington Court of Appeals. The definition of "firearm" in RCW 9.41.010(9), applies to a number of statutes in Titles 9 and 9A, not just the sentencing provisions at issue in Crowder and Tasker. Because precedential effect of decisions of the three divisions of the Washington Court of Appeals is not geographically restricted: (1) superior courts for the 39 Washington counties apparently are not bound by a precedent on the operability issue; and (2) I hope that the Washington Supreme Court will grant review and resolve this question in favor of the State if review is requested on this issue.

COURT OF APPEALS ADDRESSES OTHER-SUSPECTS ISSUE IN TWO CASES

In two recent decisions, Division One of the Court of Appeals resolves the highly-fact-dependent issue of whether the trial judge committed reversible error in prohibiting defendants from introducing evidence and arguing that a specific person other than the defendant committed the crime. The State loses in one case and prevails in the other.

In State v. Ortuno-Perez, 196 Wn. App. 745 (Div. I, November 28, 2016), the Court rules that it was reversible error for the trial court judge to prohibit the defendant from introducing evidence that another person, who the evidence established was armed and at the murder scene, actually committed the murder at issue.

On the other hand, in State v. Giles, 196 Wn. App. 771 (Div. I, November 28, 2016), the Court rules that the trial judge did not abuse the judge's discretion in excluding evidence of three "other suspects" where the defendant could not point to sufficient evidence of a connection between the other would-be suspects and the murder at issue.

Both opinions are authored by the same Court of Appeals judge. The opinions contain lengthy discussions of the facts and of the applicable law. Readers seeking understanding of this subject area may wish to read the opinions.

The development of the case law in the United States on the other-suspect-did-it issue has been in part guided by the Sixth Amendment right to counsel for defendants. Because the premise underlying the introduction of "other suspect" evidence is to show that someone other than the defendant committed the charged crime, the standard for admission is whether the proffered evidence about another suspect supports a reasonable doubt as to the defendant's guilt. Such proffered evidence must be both (1) material (the fact to be proved must be of consequence in the context of the other facts and the applicable substantive law) and (2) probative (the evidence must provide some supporting proof or disproof of a fact).

Results: Reversal of King County Superior Court conviction of Santiago Ortuno-Perez for second degree murder for a 2013 homicide; case remanded for re-trial. Affirmance of Snohomish County Superior Court conviction of Danny Ross Giles for first degree murder for a 1995 homicide.

Statuses: The Court of Appeals decision in Ortuno-Perez is final. A petition for discretionary Washington Supreme Court review is pending in Giles.

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LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT IS ON WASPC WEBSITE

Beginning with the September 2015 issue, the most recent monthly Legal Update for Washington Law Enforcement will be placed under the "LE Resources" link on the Internet Home Page of the Washington Association of Sheriffs and Police Chiefs. As new Legal Updates are issued, the current and three most recent Legal Updates will be accessible on the site. WASPC will drop the oldest each month as WASPC adds the most recent Legal Update.

In May of 2011, John Wasberg retired from the Washington State Attorney General's Office. For over 32 years immediately prior to that retirement date, as an Assistant Attorney General and a Senior Counsel, Mr. Wasberg was either editor (1978 to 2000) or co-editor (2000 to 2011) of the Criminal Justice Training Commission's Law Enforcement Digest. From the time of his retirement from the AGO through the fall of 2014, Mr. Wasberg was a volunteer helper in the production of the LED. That arrangement ended in the late fall of 2014 due to variety of concerns, budget constraints and friendly differences regarding the approach of the LED going forward. Among other things, Mr. Wasberg prefers (1) a more expansive treatment of the core-area (e.g., arrest, search and seizure) law enforcement decisions with more cross references to other sources and past precedents and past LED treatment of these core-area cases; and (2) a broader scope of coverage in terms of the types of cases that may be of interest to law enforcement in Washington (though public disclosure decisions are unlikely to be addressed in depth in the Legal Update). For these reasons, starting with the January 2015 Legal Update, Mr. Wasberg has been presenting a monthly case law update for published decisions from Washington's appellate courts, from the Ninth Circuit of the United States Court of Appeals, and from the United States Supreme Court.

The Legal Update does not speak for any person other than Mr. Wasberg, nor does it speak for any agency. Officers are urged to discuss issues with their agencies' legal advisors and their local prosecutors. The Legal Update is published as a research source only and does not purport to furnish legal advice. Mr. Wasberg's email address is jrwasberg@comcast.net. His cell phone number is (206) 434-0200. The initial monthly Legal Update was issued for January 2015. Mr. Wasberg will electronically provide back issues on request.

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INTERNET ACCESS TO COURT RULES & DECISIONS, RCWS AND WAC RULES

The Washington Office of the Administrator for the Courts maintains a website with appellate court information, including recent court opinions by the Court of Appeals and State Supreme Court. The address is [http://www.courts.wa.gov/]. Decisions issued in the preceding 90 days may be accessed by entering search terms, and decisions issued in the preceding 14 days may be more simply accessed through a separate link clearly designated. A website at [http://legalwa.org/] includes all Washington Court of Appeals opinions, as well as Washington State Supreme Court opinions. The site also includes links to the full text of the RCW, WAC, and many Washington city and county municipal codes (the site is accessible directly at the address above or via a link on

the Washington Courts' website). Washington Rules of Court (including rules for appellate courts, superior courts, and courts of limited jurisdiction) are accessible via links on the Courts' website or by going directly to [http://www.courts.wa.gov/court_rules].

Many United States Supreme Court opinions can be accessed at [http://supct.law.cornell.edu/supct/index.html]. This website contains all U.S. Supreme Court opinions issued since 1990 and many significant opinions of the Court issued before 1990. Another website for U.S. Supreme Court opinions is the Court's own website at [http://www.supremecourt.gov/opinions/opinions.html]. Decisions of the Ninth Circuit of the U.S. Court of Appeals since September 2000 can be accessed (by date of decision or by other search mechanism) by going to the Ninth Circuit home page at [http://www.ca9.uscourts.gov/] and clicking on "Opinions." Opinions from other U.S. circuit courts can be accessed by substituting the circuit number for "9" in this address to go to the home pages of the other circuit courts. Federal statutes are at [http://www.law.cornell.edu/uscode/].

Access to relatively current Washington state agency administrative rules (including DOL rules in Title 308 WAC, WSP equipment rules at Title 204 WAC, and State Toxicologist rules at WAC 448-15), as well as all RCW's, is at [http://www.leg.wa.gov/legislature]. Information about bills filed since 1991 in the Washington Legislature is at the same address. Click on "Washington State Legislature," "bill info," "house bill information/senate bill information," and use bill numbers to access information. Access to the "Washington State Register" for the most recent proposed WAC amendments is at this address too. In addition, a wide range of state government information can be accessed at [http://access.wa.gov]. The internet address for the Criminal Justice Training Commission (CJTC) Law Enforcement Digest (LED) is [https://fortress.wa.gov/cjtc/www/led/ledpage.html].

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