LEGAL UPDATE FOR WASHINGTON LAW ENFORCEMENT

Law Enforcement Officers: Thank you!

July 2016

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ANNOUNCEMENT: THE FOLLOWING MATERIALS BY JOHN WASBERG HAVE BEEN UPDATED THROUGH JULY 1, 2016 AND ARE AVAILABLE ON THE CRIMINAL JUSTICE TRAINING COMMISSION'S INTERNET LED PAGE UNDER "SPECIAL TOPICS"

OUTLINE: "Law Enforcement Legal Update Outline: Cases On Arrest, Search, Seizure, And Other Topical Areas Of Interest to Law Enforcement Officers; Plus A Chronology Of Independent Grounds Rulings Under Article I, Section 7 Of The Washington Constitution"

OUTLINE: "Initiation of Contact Rules Under The Fifth Amendment"

ARTICLE: "Eyewitness Identification Procedures: Legal and Practical Aspects"

These documents by John Wasberg (retired Senior Counsel, Office of the Washington State Attorney General) are updated at least once a year.

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UNITED STATES SUPREME COURT

"ATTENUATION EXCEPTION TO FOURTH AMENDMENT EXCLUSIONARY RULE: WHERE TERRY STOP OF DRUG SUSPECT WAS UNLAWFUL BECAUSE STOP WAS MADE WITHOUT REASONABLE SUSPICION, AND A RECORDS CHECK THEN DISCLOSED THAT THE SUSPECT HAD AN OUTSTANDING ARREST WARRANT, METHAMPHETAMINE THAT WAS FOUND IN SEARCH OF PERSON INCIDENT TO ARREST WAS ADMISSIBLE UNDER THE BALANCING TEST OF THE "ATTENUATION" EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE; BEWARE: SUCH A RESULT SEEMS HIGHLY UNLIKELY UNDER WASHINGTON CONSTITUTION

Utah v. Strieff, 136 S.Ct. 2056 (June 20, 2016)

LEGAL UPDATE INTRODUCTORY EDITORIAL COMMENT: As I explain in greater depth in my editorial comment that follows the presentation of summaries of facts, proceedings and analysis by the United States Supreme Court majority and dissenting opinions, I see almost zero chance that the Washington Supreme Court would interpret the Washington constitution as supporting the result of not suppressing the evidence seized under the circumstances of this case.

Facts and Proceedings below: (Excerpted from the Court staff's syllabus, which is not a part of the opinions of the Court)

> Narcotics detective Douglas Fackrell conducted surveillance on a South Salt Lake City residence based on an anonymous tip about drug activity. The number of people he observed making brief visits to the house over the course of a week made him suspicious that the occupants were dealing drugs. After observing respondent Edward Strieff leave the residence, Officer Fackrell detained Strieff at a nearby parking lot, identifying himself and asking Strieff what he was doing at the house.
>
> He then requested Strieff's identification and relayed the information to a police dispatcher, who informed him that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell arrested Strieff, searched him, and found methamphetamine and drug paraphernalia.
>
> Strieff moved to suppress the evidence, arguing that it was derived from an unlawful investigatory stop. [The prosecutor conceded that the stop was unlawful

> because not supported by reasonable suspicion.] The trial court denied the motion, and the Utah Court of Appeals affirmed. The Utah Supreme Court reversed, however, and ordered the evidence suppressed [on grounds that the exclusionary rule requires suppression of evidence derived from an unlawful detention under these circumstances].

[Paragraphing revised for style and ease of reading]

ISSUE AND RULING: If officers unlawfully detain a suspect without reasonable suspicion to support the stop, and they learn from a records check that the person is wanted on an arrest warrant, must a court suppress any evidence discovered during a search incident to the arrest under the warrant? (ANSWER BY U.S. SUPREME COURT: No, rules a 5-3 majority, at least under the facts of this case that established, to the satisfaction of five of the Justices, the attenuation of a connection between the unlawfulness of the stop and the discovery of the evidence discovered during the search incident to arrest)

Result: Reversal of Utah Supreme Court suppression ruling; reinstatement of Utah trial court conviction of possession of illegal drugs for Edward Joseph Strieff, Jr.

ANALYSIS BY THE SUPREME COURT: (Excerpted from Court staff's syllabus, which is not part of the opinions of the Court)

Held: The evidence Officer Fackrell seized incident to Strieff's arrest is admissible based on an application of the attenuation factors from Brown *v.* Illinois, 422 U.S. 590 (1975)

> In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional investigatory stop and the evidence seized incident to a lawful arrest.
>
> .
>
> (a) As the primary judicial remedy for deterring Fourth Amendment violations, the exclusionary rule encompasses both the "primary evidence obtained as a direct result of an illegal search or seizure" and, relevant here, "evidence later discovered and found to be derivative of an illegality." Segura *v.* United States, 468 U.S. 796 (1984). But to ensure that those deterrence benefits are not outweighed by the rule's substantial social costs, there are several exceptions to the rule. One exception is the attenuation doctrine, which provides for admissibility when the connection between unconstitutional police conduct and the evidence is sufficiently remote or has been interrupted by some intervening circumstance. *See* Hudson *v.* Michigan, 547 U.S. 586 (2006) **Aug 06 LED:02**.
>
> (b) As a threshold matter, the attenuation doctrine is not limited to the defendant's independent acts. The doctrine therefore applies here, where the intervening circumstance is the discovery of a valid, pre-existing, and untainted arrest warrant. Assuming, without deciding, that Officer Fackrell lacked reasonable suspicion to stop Strieff initially, the discovery of that arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to his arrest.
>
> (1) Three factors articulated in Brown *v.* Illinois, 422 U.S. 590 (1975) lead to this conclusion. The first, "temporal proximity" between the initially unlawful stop and

> the search favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, "the presence of intervening circumstances, strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his search of Strieff incident to that arrest was undisputedly lawful. The third factor, "the purpose and flagrancy of the official misconduct," also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights. After the unlawful stop, his conduct was lawful, and there is no indication that the stop was part of any systemic or recurrent police misconduct. .
>
> (2) Strieff's counterarguments are unpersuasive. First, neither Officer Fackrell's purpose nor the flagrancy of the violation rises to a level of misconduct warranting suppression. Officer Fackrell's purpose was not to conduct a suspicionless fishing expedition but was to gather information about activity inside a house whose occupants were legitimately suspected of dealing drugs. Strieff conflates the standard for an illegal stop with the standard for flagrancy, which requires more than the mere absence of proper cause. Second, it is unlikely that the prevalence of outstanding warrants will lead to dragnet searches by police. Such misconduct would expose police to civil liability and, in any event, is already accounted for by Brown's "purpose and flagrancy" factor.

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

LEGAL UPDATE EDITORIAL NOTE REGARDING MAJORITY OPINION'S DISCUSSION OF THE "GOOD FAITH" NATURE OF THE POLICE ERROR IN THIS CASE:

The Majority Opinion in Strieff explains as follows the viewpoint of the majority jusitices that the officer's error in making the stop was at most negligent, was made in good faith, and was not a part of a larger pattern or plan of recurrent agency or individual misconduct:

> **Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell's stated purpose was to "find out what was going on [in] the house." Nothing prevented him from approaching Strieff simply to ask. See Florida *v.* Bostick, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions"). But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.**

While Officer Fackrell's decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer's decision to run the warrant check was a "negligibly burdensome precautio[n]" for officer safety. Rodriguez *v.* United States, 575 U. S. ___, 136 S. Ct. 1609 (2015) May 15 LED:02. And Officer Fackrell's actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

LEGAL UPDATE EDITORIAL NOTE AND COMMENT REGARDING THE DISSENTING OPINIONS' DISAGREEMENTS WITH THE MAJORITY OPINION:

There are two dissenting opinions in Strieff. Justice Kagan's dissent is joined by Justice Ginsburg. Justice Sotomayor's dissent is joined by Justice Ginsburg, except for the inflammatory section IV of the latter dissent.

Justice Kagan argues that the majority's approach practically invites police officers to make illegal stops. She argues that an officer who wants to search a suspect to help investigate a crime just needs to stop the suspect and ask for ID to see if he has an outstanding warrant. If there's no warrant out for his arrest, the officer can let him go and he's extremely unlikely to sue (she cites nothing in support of this claim). If there is a warrant, she argues, then the officer can arrest the suspect, search him incident to arrest, and question him later. The courts will be required under Strieff and the Fourth Amendment to admit that evidence because the officer was acting in good faith by trying to investigate the crime. She recognizes, of course, that the police academies will not teach officers to violate the law. But she argues that at the margins, officers will be encouraged to treat almost anything as reasonable suspicion to justify a stop. If in doubt, make the stop, she fears will be the rule of some officers.

Part IV of Justice Sonia Sotomayor's dissent contains inflammatory rhetorical flourishes and is not joined by any other Justice. She asserts that the Majority Opinion "implies that you are not a citizen of a democracy but the subject of a carceral [i.e., prison-like] state, just waiting to be cataloged." And she argues that the voices of those "who are routinely targeted by police . . . are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere." "Until their voices matter too," she argues, "our justice system will continue to be anything but."

LEGAL UPDATE EDITORIAL COMMENTS REGARDING WHAT THE WASHINGTON SUPREME COURT MIGHT DO WITH THE "ATTENUATION" ISSUE UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION

1. Defendants can try to make a record of systemic abuse

This case is not, as Justice Kagan suggests, support for officers making illegal detentions in the hope that the suspect will have an outstanding arrest warrant. It was

made clear by the Supreme Court that a determination of "flagrancy" takes into account whether a seizure is part of some "purposeful," "systemic," "recurrent police misconduct," or an individual officer's own suspicion-less fishing expedition. Defendants remain free to argue, and presumably to try to build a supporting record, that such is the case.

2. Does the Washington constitution, article I, section 7, recognize "attenuation"? Probably not as applied here by the U.S. Supreme Court majority.

As was contemporaneously pointed out by Pam Loginsky, Staff Attorney for the Washington Association of Prosecuting Attorneys in her weekly "Case Notes" relating to this case on the website of WAPA, the Washington Supreme Court has not yet committed by a majority opinion on the question of whether article I, section 7 of the Washington constitution includes the "attenuation" exception to the Exclusionary Rule that has been developed in the U.S. Supreme Court's interpretation of the Fourth Amendment in Brown v. Illinois and subsequent decisions. See generally State v. Smith, 177 Wn.2d 533, 552 (2013) ("The concurrence's use of the attenuation doctrine is equally concerning because we have not explicitly adopted it under article I, section 7."); State v. Eserjose, 171 Wn.2d 907, 919-920, 930 (2011) (plurality opinion in which four justices stating that the Court has "at least, implicitly adopted the attenuation doctrine"; the fifth vote to affirm the conviction, however, held that the author believes "the lead opinion applies an attenuation analysis where none is required"); State v. Ibarra-Cisneros, 172 Wn.2d 880, 885 n.2, 263 P.3d 591 (2011) ("The parties have not addressed whether the attenuation doctrine is a recognized exception to the exclusionary rule under article I, section 7 of the Washington State Constitution, and we do not reach that issue.").]

But I would be very surprised to see the Washington Supreme Court apply attenuation to circumstances like those in the Strieff case, even if the Court were to allow for some variation of an "attenuation" balancing test for application of the Exclusionary Rule under Washington's constitution. I doubt that a majority of the Justices on the Washington Supreme Court would weigh the elements of balancing test in the same way as the U.S. Supreme Court majority did in Strieff. I think that the Washington Supreme Court would apply the Exclusionary Rule of the Washington constitution where there is a Terry seizure not supported by reasonable suspicion that leads to discovery of an arrest warrant, that, in turn, leads to discovery of contraband or evidence in a search incident to arrest.

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NINTH CIRCUIT, UNITED STATES COURT OF APPEALS

INVOKING RIGHTS UNDER MIRANDA: "I DON'T WANT TO TALK NO MORE, MAN" WAS UNAMBIGUOUS ASSERTION OF RIGHT TO SILENCE BY SUSPECT, AND OFFICER'S RESPONSE – "I UNDERSTAND THAT, BUT THE BOTTOM LINE IS" – WHICH TRIGGERED SUSPECT TO TALK MORE – CONSTITUTED FURTHER INTERROGATION IN VIOLATION OF MIRANDA

Jones v. Harrington, ___ F.3d ___, 2016 WL 3947820 (9th Cir., July 22, 2016)

In Jones, a Ninth Circuit panel votes 2-1 to reverse the District Court's judgment denying California state prisoner Kevin Jones's habeas corpus petition challenging his murder

conviction. The Majority Opinion in Jones holds that U.S. Supreme Court precedent is clear that where, after hours of custodial police questioning in August of 2003 with little progress, a suspect told the officers "I don't want to talk no more," this was an unambiguous assertion of the Miranda right to silence and the officers were obligated to not further interrogate. Significantly, Jones did not include such qualifying words as "maybe" or "might," and nothing in Jones' answers to questions leading up to the statement provided context that would make his "don't want to talk no more" statement ambiguous.

The Majority Opinion also appears to hold that an officer's immediate response stating – "I understand that, but the bottom line is" – which triggered the suspect to talk more, was further interrogation in violation of Miranda.

The dissenting judge argues that the officer's response of "I understand that, but the bottom line is" did not constitute further interrogation, and therefore the suspect's further statement to the effect that what he was trying to say in telling the officers that he did not "want to talk no more" was a complaint to the officers that he wanted them to be more open to accepting as true his implausible, ever-changing story. He was, the Dissenting Opinion appears to argue, not unambiguously stating that he did not want to talk, but he instead was stating his annoyance at the officers' dogged efforts to poke holes in his story and to get him to adopt their different story of the event. Ironically, the Majority Opinion and the Dissenting Opinion seem to not be fully listening to the other's analysis, and the two opinions are therefore a bit confusing.

In Jones, officers arrested Jones as a suspect in a gang shooting that left one person dead and two other persons injured. The majority opinion in Jones describes as follows the events that occurred after the custodial arrest:

> Jones was brought to the police station some time between 9:00 and 9:40 p.m. He was read his Miranda rights and interviewed later that night, beginning at 12:33 a.m., by Detectives Kevin Jolivette and Bill Fallon. Jones was nineteen years old, had graduated from technical school, and worked full-time for UPS. The interview lasted between two and three hours.
>
> At the outset of the interview, Jones told the detectives that he owned his black Ford Escort, and that no one else drove it. He initially insisted that he had no knowledge of the shooting, and that on the day in question he had driven straight home after finishing work.
>
> The detectives lied to Jones, telling him they had incriminating evidence which did not actually exist. The detectives told Jones that witnesses had identified his car as the one used in the shooting and that the car appeared on surveillance video from the gas station. The detectives held consistently to the ruse, insisting to Jones that they already knew he and his car were involved with the shooting, and implored him to come clean about his role. The police told Jones that he would receive more lenient punishment if he admitted to being only the driver rather than the shooter or the person whose idea the shooting was.
>
> Over the course of the interview, Jones's story changed several times. First, he told the police that he had no personal knowledge of the shooting, and gave a somewhat inconsistent story about how he learned of the shooting from a barber on the street while driving home a few days after the shooting.

Jones stated that, on the day of the shooting, he came straight home from work, parked his car at his house around 5:00 p.m. or 5:30 p.m., and then walked to the gym. He stated that around 6:45 he noticed his car was missing, but assumed it would be returned, and went to the gym anyway. His explanations for why he assumed the car would be returned changed somewhat, but he said that by the time he got home from the gym, the car was back. As detectives continued to press Jones about his implausible story, the following exchange occurred:

> Detective Jolivette: Kevin, do you think – why don't you stop this man.
>
> Jones: All right.
>
> Detective Jolivette: Stop this. The thing is you drove a car, it shows that on the tape and that's all I'm going to put down, as far as what you were doing. You drove the car. You just didn't know it was going to happen like that. Kevin, sit up, man.
>
> **Jones: <u>I don't want to talk no more, man.</u>**
>
> **Detective Jolivette: *I understand that, but the bottom line is –***
>
> **Jones: You don't want to hear what I'm telling you.**
>
> **Detective Jolivette: I'm so sorry. I can't – you're mumbling, you got to speak up. I got bad hearing.**
>
> **Jones: I'm telling you all.**

From there, questioning continued as normal, and eventually Jones made incriminating statements. Most importantly, he admitted to driving the car during the shooting. He claimed that a stranger with a gun jumped into his car, ordered him to drive to the gas station, yelled at the teenagers, and then hopped out of his car at the intersection and began shooting.

Officers arrested Jones a few days later and interviewed him again. The detectives pressed him on the implausibility of his earlier statements about driving a stranger to the shooting, but Jones again stated that was what happened.

[Underlining signals the emphasis added by the Ninth Circuit Majority Opinion; bolding signals emphasis added by <u>Legal Update</u> Editor]

<u>Result</u>: Because the violation of <u>Miranda</u> was not harmless error under the circumstances, the Ninth Circuit panel grants habeas corpus relief from the California murder conviction.

<u>EDITORIAL COMMENT BY LEGAL UPATE EDITOR</u>: A suspect's assertion of the right to silence must be express and unambiguous in order to trigger the requirement that officers respect the assertion and cease interrogating. Case law permits officers to ignore a suspect's ambiguous statement about his or her <u>Miranda</u> rights. But <u>Smith v.</u>

Illinois, 469 U.S. 91 (1984) held that what a suspect says in response to further interrogation after making an unambiguous invocation of Miranda rights is irrelevant on the ambiguity issue. Officers cannot, through further interrogation, transform an unambiguous assertion of the right to silence or to an attorney into an ambiguous statement.

In Jones, while the Majority Opinion and Dissenting Opinion are a bit confusing, and I think that the issue of ambiguity was a close one. I think that the pivotal question is whether the officer violated Miranda by responding to "I don't want to talk no more" with the uncompleted sentence of "I understand that, but the bottom line is." In my view, while the officer's statement was not completed and was not a pure question, it was probably an effort to get the suspect to keep talking to the officers, and therefore a violation of Miranda. If the officer had waited a bit, and then, without any words from the officer or a clear expression from an officer that the assertion was being respected and questioning had ceased, the suspect had started talking further and complaining that he was saying that he was upset that he was not being listened to by the officers, then I think that the suspect's statement of "I don't want to talk no more" would have been deemed to be an ambiguous statement when considered in context with his clarification and what he had said previously.

Alternatively, the officer might have responded to the "I don't want to talk no more" statement by asking the suspect if the suspect's words meant that he was telling the officers to stop the interrogation at that point. While the case law does not allow officers to initiate further questioning by responding to an unambiguous assertion of Miranda rights with efforts to change the suspect's mind, sometimes courts will look at close facts differently when there is room for doubt about the ambiguity of the assertion, and the interrogator seeks clarification.

LEGAL UPDATE EDITORIAL NOTE ABOUT OTHER RESEARCH SOURCES: For general information on a wide range of Miranda issues, see pages 1-31 of "Confessions, Search, Seizure and Arrest: A Guide for Police Officers and Prosecutors May 2015, an annually updated collection of case law by Pamela Loginsky, staff attorney for the Washington Association of Prosecuting Attorneys. The collection of cases is accessible both on the website of WAPA and on the Criminal Justice Training Commission's Internet LED page.

Also accessible on the CJTC LED page is the Miranda-related article – "Initiation of Contact Rules Under the Fifth Amendment" by your Legal Update Editor.

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING JONES DECISION: The Jones decision is digested in the AGO/CJTC's July 2016 LED at pages 3-4.

CIVIL RIGHTS ACT CIVIL LIABILITY: BECAUSE FOURTH AMENDMENT CASE LAW NOT CLEARLY ESTABLISHED, QUALIFIED IMMUNITY IS GRANTED TO COURTROOM MARSHAL WHO, UNDER JUDGE'S DIRECTION TO "ESCORT" DISRUPTIVE AND DEFIANT PRIVATE BAIL BOND AGENT FROM COURTROOM, "GRABBED" AND "FORCEFULLY PUSHED" HIM THROUGH COURTROOM DOORS

In Brooks v. Clark County, ___ F.3d __, 2016 WL 3632372 (9th Cir., July 7, 2016), a 3-judge Ninth Circuit panel rules against a private bail enforcement agent who sued a courtroom

marshal on grounds that the marshal used excessive force, in violation of the Fourth Amendment, when executing a judge's order to remove from her courtroom the disruptive bail agent and his cohort bail agents. The bail agents had been very disruptive in expressing their intent, contrary to the judge's admonishment, to take two women in the courtroom into custody. The 3-judge panel (1) affirms the U.S. District Court's denial of absolute judicial immunity to the marshal (that ruling is not addressed in this Legal Update entry); and (2) reverses the District Court's denial of the marshal's qualified immunity defense. A significant factor in the ruling grating qualified immunity is that Mr. Brooks made only "extremely vague and insubstantial allegations about his injury."

An officer is entitled to qualified immunity if the officer's actions: (1) complied with the constitutional standard, or (2) the constitutional standard applicable to the circumstances was not "clearly established" at the time of the officer's actions. Thus, qualified immunity is denied only if an officer's actions violated a standard set under clearly established constitutional case law. Qualified immunity is denied only if officers' actions either were plainly incompetent or were knowing violations of the then-existing constitutional case law. In other words, qualified immunity is granted unless existing appellate case law at the time of the officers' actions placed the constitutional question clearly beyond debate in light of the factual contexts of the case law.

The Ninth Circuit panel in Brooks does not address whether the courtroom marshal met the applicable constitutional standard for use of force. Instead, the panel addresses only the issue of whether the constitutional standard was "clearly established" by Fourth Amendment case law at the time of the courtroom marshal's actions. The panel's analysis, in key part, is as follows:

!

> Brooks alleges that Keener employed excessive force by shoving him through the courtroom's double doors. On the merits, such excessive force claims are governed by an objective reasonableness standard derived from the Fourth Amendment. Graham v. Connor, 490 U.S. 386 (1989. To determine whether state officials used excessive force, courts balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." (quoting Tennessee v. Garner, 471 U.S. 1 (1985). Courts must examine the "facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Courts "also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state." Luchtel v. Hagemann, 623 F.3d 975 (2010) **March 11 LED:14**.
>
> In light of these principles, we must ask the following question: assuming the allegations Brooks has made are true, was it "beyond debate," at the time Keener seized him, that the amount of force Keener employed violated the Constitution? If the answer is no – if Keener's actions did not clearly violate Brooks's rights under the Fourth Amendment – then Keener is entitled to qualified immunity, and his motion to dismiss must be granted. . . .
>
> Given the standard governing excessive force claims, the allegations in Brooks's complaint are not sufficient to survive a qualified immunity defense even at the motion to dismiss stage. Assuming all of Brooks's allegations are true, it still cannot be said that Keener's use of force was indisputably unconstitutional. That

> is, a reasonable marshal could have believed that the Fourth Amendment permitted him to use the amount of force Brooks claims Keener employed, even if the circumstances were exactly as Brooks describes. For that reason alone, Keener is entitled to qualified immunity, and the district court should have granted his motion to dismiss.
>
> Brooks's complaint states merely that "Keener forcefully shoved [him] through double-doors of a courtroom injuring [his] back." His affidavit is similarly barebones, saying only that Keener "grabb[ed] [him] and forcefully push[ed] [him] out of the courtroom." Moreover, the transcript of proceedings in front of Judge Lippis demonstrates that before Keener shoved Brooks, Brooks had at least twice defied the judge's order to leave; had continued to resist Keener's verbal instructions to leave; and that two of Brooks's compatriots had similarly disrupted the court, harassing and intimidating two women in the courtroom, all in defiance of Judge Lippis's orders. Given the chaos in the courtroom and the undisputed evidence that Brooks was intent on disobeying the court's instructions – and given his extremely vague and insubstantial allegations about his injury – it is simply not "beyond debate" that Keener employed an unreasonable amount of force.
>
> Indeed, the Supreme Court has stated more than once that-on the merits – "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." . . . . Similarly, the Court has instructed that "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." The events here fit that description. And just as important, Brooks has cited nothing at all to establish that existing precedent silences all debate about whether Keener's shove violated the Fourth Amendment.

[Some citations omitted; others revised for style]

Result: Reversal of that part of ruling of U.S. District Court (Nevada) that denied qualified immunity to courtroom marshal Brooks.

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING BROOKS DECISION: The Brooks decision is digested in the AGO/CJTC's July 2016 LED at pages 1-2.

FOURTH AMENDMENT STANDARDS FOR IMPOUND AND INVENTORY: (1) LAS VEGAS METRO POLICE IMPOUND OF ILLEGALLY PARKED CAR OF ARRESTEE HELD REASONABLE WHERE NO IMMEDIATELY AVAILABLE PERSON COULD TAKE POSSESSION; AND (2) INVENTORY THAT EXTENDED TO AIR FILTER COMPARTMENT HELD OK AS CONSISTENT WITH LVMP PRACTICE; BEWARE: SUCH INVENTORY SCOPE WOULD BE HELD EXCESSIVE UNDER THE WASHINGTON CONSTITUTION IF SIMIILAR FACTS WERE PRESENTED UNLESS "MANIFEST NECESSITY" SUPPORTED THE SEARCH

United States v. Torres, __ F.3d __ , 2016 WL 3770517 (9th Cir., July 14, 2016)

Facts and Proceedings below:

Las Vegas Metropolitan Police (LVMP) officers responded to an anonymous call about a suspected DV incident in a moving car. The caller reported seeing a male driver pulling the hair of a female passenger. The caller gave a description of the car and said the driver had just pulled into the parking lot of a particular apartment complex.

The first officer to arrive drove into the parking area and found a car matching the description with a male driver and female passenger. The car was parked in a no-parking area in a manner that would have blocked emergency vehicles from entering the complex, and the car was also blocking two vehicles that were parked in stalls. The officer walked up to the driver's side and spoke with defendant Torres. The officer smelled alcohol on Torres' breath and arrested him after he failed FSTs. During the process, Torres was determined to be a convicted felon.

The car was impounded and an inventory search was done by a second officer. The officers' given reasons for impounding the vehicle were: (1) Torres was going to jail, (2) his car was blocking emergency vehicles and other parked cars, (3) the passenger did not have a driver's license, (4) the registered owner of the vehicle could not be determined, and (5) neither occupant lived in the apartment complex. LVMP regulations required that officers conduct a vehicle inventory search of all impounded vehicles, including searching the engine compartment. In searching the engine compartment, the officer unlatched the air filter and discovered a semiautomatic handgun in the air filter compartment.

Torres lost a motion to suppress the handgun. He then pleaded guilty to federal weapons charges (possession by a convicted felon), but he reserved his right to challenge the impound and inventory search on appeal.

ISSUES AND RULINGS: (1) Did officers have sufficient reason under the Fourth Amendment to impound the car and conduct an inventory search? (ANSWER BY NINTH CIRCUIT PANEL: Yes);

(2) Was the inventory search excessive in its scope under the Fourth Amendment? (ANSWER BY NINTH CIRUCUIT PANEL: No)

Result: Affirmance of U.S. District Court (Nevada) conviction of Jimmy Torres for unlawful possession of a firearm by a convicted felon.

ANALYSIS BY NINTH CIRCUIT PANEL:

1. Fourth Amendment justification for impound and inventory

THE IMPOUND: LVMP regulations require that officers impound a vehicle if, among other things, (1) the registered owner is not in the vehicle and cannot respond within 30 minutes or so, and (2) there is no licensed driver in the car and it is parked illegally. Legitimate purposes of impound are to promote other vehicles' convenient ingress and egress to the parking area, and to safeguard the car from vandalism or theft. These requirements were met because neither Torres nor his passenger were the current registered owner of the vehicle, the passenger did not have a valid license, the vehicle was not legally parked and was blocking traffic, and neither Torres nor his passenger lived in the apartment complex.

The Ninth Circuit panel also ruled that the inventory search was lawful because it is settled that "[o]nce a vehicle has been legally impounded, the police may conduct an inventory search without a warrant."

2. Fourth Amendment justification for the scope of the inventory search

Under Fourth Amendment case law, an inventory may not lawfully be primarily motivated by investigative purpose. In an inventory, officers may search any part of the vehicle that department regulations require or authorize them to search for the non-investigative purposes of (1) protecting the property from unauthorized interference; (2) guarding against false claims of theft, vandalism, or negligence; and (3) guarding against danger to police or others that may be posed by the property. The Ninth Circuit panel explained, "the record must at least indicate that police were following some 'standardized criteria' or 'established routine' when they elected to open the containers" in order to protect persons against general rummaging by police in search of evidence or contraband. See Florida v. Wells, 495 U.S. 1, 4 (1990) (search must be conducted in accordance with "standardized criteria or established routine").

Under LVMP regulations, officers are required to search, among other things, "all containers." The Ninth Circuit panel ruled the search was reasonable in its scope under the Fourth Amendment. That is because the LVMP policy "plainly contemplates that inventory searches of impounded vehicles will encompass closed spaces;" and the officers testified that "their standard practice when inspecting the engine cabin is to search the air filter compartment" and because the "air filter compartment was obviously large enough to hold a firearm."

The Ninth Circuit panel ruled that the LVMPD inventory search policy appears to have been reasonably "designed to produce an inventory," and ensures sufficient uniformity to protect the owners and occupants of impounded vehicles from the risk that officers will exercise discretion in performing an inventory search only when they suspect they will uncover the fruits of criminal activity. Florida v. Wells, 495 U.S. 1, 4 (1990) (explaining that officers may not conduct inventory searches solely to discover evidence of criminal activity).

LEGAL UPDATE EDITORIAL COMMENT THE GREATER RESTRICTIONS ON IMPOUND-INVENTORY OF ARTICLE I, SECTION 7 OF WASHINGTON CONSTITUTION:

The readers know that in many categorical circumstances, the Search & Seizure restrictions of article I, section 7 of the Washington constitution are greater than the restrictions of the Fourth Amendment. On rare occasion, the U.S. Attorney will prosecute a case (particularly a felon-with-a-gun case) where state or local officers did a search or seizure that would bring suppression in the state courts but will pass muster under the Fourth Amendment in the federal courts. However, that will not work for some inventory searches if the criminal defense is knowledgeable (which is not always the case). That is because Ninth Circuit panels held in United States v. Johnson, 936 F.2d 1082 (9th Cir. 1991) and United States v. Wanless, 882 F.2d 1459 (9th Cir. 1989), the Ninth Circuit that part of the Fourth Amendment standardized-procedure-or-practice test looks at whether Washington officers have followed the inventory standards set in independent grounds rulings under article I, section 7 of the Washington Constitution. The United States Supreme Court has never looked at (and probably never will) whether the Ninth Circuit has erroneously finessed the Fourth Amendment in this impound-inventory context. So even federal prosecutors must consider, in addition to the standardized procedures and practices test, the special independent grounds rulings of our Washington appellate courts.

The decision to do an impound and conduct an inventory likely would pass muster under the Washington constitution under the facts of Torres. But the scope of the inventory would, no doubt, be held unlawful by the Washington appellate courts. Absent a "manifest necessity" a vehicle inventory's scope may not lawfully go beyond the passenger area and open hatchback or unlocked trunk; the scope may not include a locked trunk or a closed or locked container in the vehicle unless there is "manifest necessity" to search those areas.

Note the following Washington appellate court decisions addressing impound/inventory:

State v. White, 135 Wn.2d 761 (1998) Sept 98 LED:08 (Washington Supreme Court held under the Washington constitution that an inventory's scope cannot extend to a locked trunk absent a "manifest necessity" to look in the trunk, even if there is a trunk release button in passenger area of vehicle).

State v. Dugas, 109 Wn. App. 592 (Div. I, 2001) March 02 LED:02 and State v. Wisdom, 187 Wn. App. 652 (Div. III, May 19, 2015) June 15 LED:06, two decisions where the Washington Court of Appeals held that under the Washington constitution that Inventory search authority does not permit inspection of contents of closed containers absent "manifest necessity" to do so.

State v. Dunham, ___ Wn. App. ___ , 2016 WL 3577382 (Div. II, June 28, 2016) June 16 LED:08 (Washington Court of Appeals held that search of locked backpack pocket per agency policy because of reasonable concern that the pocket contained knife that posed danger to jail staff was a lawful impound-inventory search justified by "manifest necessity")

State v. Tyler, 177 Wn.2d 690 (May 30, 2013) Aug 13 LED:08 (Washington Supreme Court held that impoundment of car that stopped on narrow shoulder in dangerous location and was driven by suspended driver was justified where reasonable alternatives to impoundment were considered; also lawful was inventory of contents of passenger area where operator of vehicle did not own vehicle, so plain view seizure of illegal drugs discovered in passenger area was lawful; Washington Supreme Court also held that there is no requirement under the inventory exception of the Washington constitution for officers to request consent in order to conduct a lawful inventory.)

State v. Reynoso, 41 Wn. App. 113 (1985) (Washington Court of Appeals holds that officers generally must consider reasonable alternatives to impoundment before impounding a vehicle based on community caretaking.)

All Around Underground, Inc. v. WSP, 148 Wn.2d 145 (2002) Feb 03 LED:02 (Washington Supreme Court rules, as a matter of statutory interpretation, that impound ordinances or WAC rules adopted under authority of RCW 46.55.113 provisions relating to vehicles that are driven by suspended or revoked drivers must allow officers to consider reasonable alternatives to impoundment.)

As always, officers are urged to consult their local own legal advisors and their local prosecutors on matters presented and commented on in the Legal Update.

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WASHINGTON STATE SUPREME COURT

ABANDONMENT DOCTRINE UNDER SEARCH AND SEIZURE LAW: VEHICLE THIEF LOST PRIVACY RIGHT IN HIS CELL PHONE THAT HE LEFT BEHIND IN STOLEN VEHICLE WHEN HE RAN FROM POLICE AFTER VEHICLE STOP; COURT DOES NOT ADDRESS THEORIES REGARDING EXIGENT CIRCUMSTANCES, COMMUNITY CARETAKING, OR THE ATTENUATION EXCEPTION TO EXCLUSIONARY RULE BECAUSE THOSE THEORIES WERE NOT RAISED AT TRIAL COURT LEVEL

State v. Samalia, ___ Wn.2d ___, 2016 WL 4053202 (July 28, 2016)

Facts and Proceedings below: (Excepted from Supreme Court majority opinion)

> [A police officer] observed what he believed to be a stolen vehicle while on patrol. He confirmed with dispatch that the vehicle was stolen and began to follow it. Eventually, the driver stopped, got out of the vehicle, and faced [the officer]. [The officer] gave the driver various commands, but the driver did not obey and ran away. [The officer] attempted to chase after the driver, but the driver successfully escaped.
>
> Failing to apprehend the driver, [the officer] returned to the stolen vehicle and began to search it without a warrant. [The officer] found a cell phone somewhere near the vehicle's center console, but he did not know to whom it belonged. He then began calling some of the contacts listed in the cel! phone.
>
> From the cell phone's contacts, [the officer] called Deylene Telles. He told Telles that he had found a cell phone and wanted to return it to its owner. Telles agreed to meet at a designated location. When Telles arrived at that location, [a sergeant] immediately arrested her. [The sergeant] seized Telles' cell phone and used the cell phone recovered by [the officer] to call it. Telles' cell phone displayed Samalia's name and photo, identifying him as the caller. [The officer who made the initial stop] then looked up Samalia's photo in a law enforcement database and identified Samalia as the driver who fled from the stolen vehicle.
>
> On these facts, the State charged Samalia with possession of a stolen vehicle. Samalia moved to suppress the cell phone evidence, arguing that the officers violated his constitutional rights when they seized and searched his cell phone with neither a warrant nor a valid exception to the warrant requirement. The State responded that the warrantless search was valid under the abandonment doctrine. The trial court denied Samalia's motion, agreeing with the State that no warrant was required under the abandonment doctrine. The trial court held that Samalia voluntarily abandoned any privacy interest that he had in the cell phone by leaving it in the stolen vehicle, which he also voluntarily abandoned, while fleeing from [the officer]. After denying Samalia's suppression motion and subsequent motion for reconsideration, the trial court found Samalia guilty as charged in a bench trial.
>
> Samalia appealed, and the Court of Appeals Division Three affirmed the trial court in a split decision. State v, Samalia, 186 Wn. App. 224, 226 (2015) **April 15 LED:03**. The Court of Appeals affirmed for three reasons: (1) the

abandonment doctrine applied, (2) the exigent circumstances doctrine applied, (3) and the attenuation doctrine [relating to the Exclusionary Rule] applied.

ISSUES AND RULINGS: (1) Under the abandonment doctrine, abandoned property has no privacy protection under the Washington or federal constitution. A cell phone and the information that it contains are "private affairs" under article I, section 7 of the Washington Constitution, and also are generally protected as private under the Fourth Amendment. Police generally may not search a cell phone without a warrant or consent or exigent circumstances.

After a police officer stopped Samalia in a stolen car, Samalia ran on foot from the officer and left his cell phone behind in the car. Officers retrieved the cell phone from the stolen car and used the contacts information in the phone to track down Samalia as the owner of the phone and as the car thief. Does substantial evidence and case law support the trial court's determination that the "abandonment doctrine" applies such that neither a search warrant nor a warrant exception was required for the officers to conduct the search that they conducted of the cell phone? (ANSWER BY SUPREME COURT: Yes, rules a 6-3 majority, the abandonment doctrine applies);

(2) Where the State did not submit evidence or raise arguments in the trial court regarding the theories of exigent circumstances (to quickly find the car theif), community caretaking (to return the cell phone to its owner), and the attenuation exception to the Exclusionary Rule, should the Supreme Court address any of those theories? (ANSWER BY SUPREME COURT: No, agree all nine justices, for policy reasons the Court should not address those theories)

Result: Affirmance of the decision of the Washington Court of Appeals, Division Three, affirming the Yakima County Superior Court conviction of Adrian Sutlej Samalia for possession of a stolen vehicle.

ANALYSIS BY SUPREME COURT:

Abandonment doctrine: Key parts of the analysis in the Supreme Court Majority Opinion on the abandonment doctrine are as follows:

> Cell phones and the information they contain are "private affairs" under article I, section 7 of the Washington Constitution
>
> Given the intimate information that individuals may keep in cell phones and our prior case law protecting that information as a private affair, we hold that cell phones, including the data that they contain, are "private affairs" under article I, section 7. As private affairs, police may not search cell phones without first obtaining a warrant unless a valid exception to the warrant requirement applies.
>
> Therefore, we hold that Samalia initially had a constitutionally protected privacy interest in his cell phone to the extent that the officers could not have searched his cell phone without a search warrant or the application of an exception to the warrant requirement. But as we next discuss, Samalia abandoned his privacy interest in his cell phone when he left it in a stolen vehicle while fleeing a lawful traffic stop.
>
> The abandonment doctrine applies to Samalia's case

Samalia argues that the abandonment doctrine should not apply to cell phones or that there should be at least a heightened showing of intent to abandon. We hold that the abandonment doctrine applies to cell phones and that the trial court appropriately found that Samalia abandoned his cell phone.

Under the common law, a person loses normal privacy interests in property upon abandonment. See State v. Kealey, 80 Wn. App. 162, 170-72 (1995) **May 96 LED:05**. The abandonment doctrine is not rooted in any obligation by law enforcement to find the owner of property. See State v. Evans, 159 Wn.2d 402, 408 (2007) **March 07 LED:15** ("'[L]aw 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.'" (quoting State v. Reynolds, 144 Wn.2d 282, 287 (2001))). In this sense, voluntarily abandoned property is different from lost or mislaid property, in which the owner maintains a privacy interest in the property and the finder may have an obligation as a bailee to seek out the owner to return the property. Kealey, 80 Wn. App. at 171-73. Thus, when an individual flees from law enforcement and leaves a cell phone behind in a stolen vehicle, a trial court may find that the cell phone is no less abandoned than any other item that was also left in the stolen vehicle.

Based on the amount of private information that cell phones may hold, Samalia argues that article I, section 7 requires that cell phones either be excluded from the abandonment doctrine or that we should require at least a heightened showing of intent to abandon. [Court's footnote: *Amicus American Civil Liberties Union of Washington (ACLU-WA) argues that we should create an exception for cell phones from the abandonment doctrine. ACLU-WA states that if we do not create an exception, we "threaten[] the privacy of anyone who accidentally leaves their phone in a public place-including parks, buses, and ride- or car-sharing services, " which is "incompatible with article I, section* 7." *Amicus Curiae Br. of ACLU-WA at 10. ACLU-WA is incorrect; ACLU-WA fails to recognize the difference between abandoned property and lost or mislaid property.* See Kealey, *80 Wn.App. at 172-75. ACLU-WA's hypothetical describes lost or mislaid property, which is not subject to the abandonment doctrine.*]

These arguments rely on [State v. Hinton, 179 Wn.2d 862 (2014) **May 14 LED:08**] and [Riley v. California, 134 S. Ct. 2473 (2014) **Aug 14 LED:04**] as examples of courts' limitations on the government's authority to search cell phones under an exception to the warrant requirement. However, Riley and Hinton do not create exceptions for cell phones. Rather, the Hinton and Riley rulings demonstrate that no special rules are necessary for cell phones because they can be analyzed under established rules.

In Riley, the United States Supreme Court held that the justifications for the "search incident to arrest" exception to the warrant requirement are not implicated in cell phone searches. . . . The Court held that "the search incident to arrest exception does not apply to cell phones." However, the Court expressly limited its holding to the search incident to arrest exception. . . .

In Hinton, we analyzed whether an individual loses his or her privacy interest in a text message by sending that message to a third party under principles of

voluntary disclosure. We held that an individual does not lose his or her privacy expectations in a sent text message by applying established article I, section 7 principles rather than creating a special exception for cell phones. . . .

Neither Riley nor Hinton can be read for the proposition that the abandonment doctrine should not apply to cell phones or should be limited in its application to cell phones. . . . [I]n this case and for the abandonment doctrine, there has been no advancement in technology to cause one to abandon property in stolen vehicles while attempting to flee from police. Moreover, the rationale driving the abandonment doctrine fits cell phone searches. [Court's footnote: *We do not address the use of a cell phone to access remote data or services because this case does not present that question. We leave that issue for another day*.]

When an individual voluntarily abandons an item, not as a facet of modern communication but to elude the police, that individual voluntarily exposes that item – and all information that it may contain – to anyone who may come across it. Cell phones are no different in this respect than for any other item; the abandonment doctrine applies to all personal property equally.

Therefore, we decline to find an exception to the abandonment doctrine for cell phones. We consider, then, whether the trial court properly found abandonment under these facts.

The trial court's finding that Samalia abandoned his cell phone is supported by substantial evidence

Voluntary abandonment is an ultimate fact or conclusion based on a combination of act and intent. . . . A trial court finds intent as an inference from objective factors. . . . As a factual determination, we review a trial court's finding of voluntary abandonment for substantial evidence. . . . Determining the reasonableness of an inference of intent from proven facts is the province of the factfinder, not the appellate court. . . . . In this case, the trial court's finding that Samalia abandoned his cell phone is supported by substantial evidence and our case law.

The trial court's finding that Samalia voluntarily abandoned his cell phone reasonably follows from the undisputed facts of the case: Samalia was driving a stolen vehicle, and when Samalia stopped, he got out of the vehicle and faced [the officer]. Then, instead of obeying [the officer's] commands, Samalia ran away, abandoning the vehicle and its contents. [The officer] attempted to catch Samalia, but Samalia escaped, and [the officer] returned to the stolen vehicle. Inside the stolen vehicle, [the officer] found the cell phone. Indeed, there is nothing in the record to suggest that Samalia protected the information on his cell phone by any security measures.

The trial court's finding of voluntary abandonment is also consistent with Washington case law, further demonstrating that its finding is supported by substantial evidence. Washington courts generally find voluntary abandonment when a defendant leaves an item in a place in which the defendant has no privacy interest as an attempt to evade the police. For example, in State v. Young, a police officer noticed the defendant in the street engaged in suspicious

behavior. 86 Wn. App. 194, 197 (1997) (cited with approval by Evans, 159 Wn.2d at 410), aff'd, 135 Wn.2d 498 (1998). The officer turned on his patrol lights and drove toward the defendant. As the officer approached, 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." . . . . Suspecting involvement in drug activity, the officer retrieved and immediately searched the package. . . . The officer discovered drugs in the package and arrested the defendant. . . . The defendant moved to suppress all evidence from the search and arrest. . . . However, the Court of Appeals held that the search of the package did not violate the defendant's article I, section 7 private affairs rights because the defendant had voluntarily abandoned the package. . . .

Conversely, Washington courts generally do not find voluntary abandonment if a defendant exhibits the intent to recover the property. In [State v. Kealey, 80 Wn. App. 162, 170-72 (1995) **May 96 LED:05**],a woman inadvertently left her purse on a couch in a store's shoe department. A clerk found the purse and put it in a back room after opening it and smelling marijuana. Shortly after the clerk removed the purse, the woman frantically returned to the shoe department, asked about her purse, and continued to search throughout the store until the store closed. Store employees contacted the police the next morning, and the police searched the bag without a warrant, finding drugs.
.
Upon being charged, the woman moved to suppress all evidence gathered from the warrantless search of her purse. The trial court suppressed the purse, and the Court of Appeals affirmed, looking to the common law to determine whether the woman voluntarily abandoned her purse or merely lost or misplaced it. The Court of Appeals ruled that the woman did not voluntarily abandon her purse, as demonstrated by her attempt to find the purse shortly after leaving it where she was trying on shoes. [The woman] had no intention of divesting herself of the purse or [she] would not have returned to retrieve the purse or behaved so frantically in searching for it. Rather, the Court of Appeals held that the woman's actions demonstrated that she mislaid her purse. Because the woman did not voluntarily abandon her purse, the purse could not be searched without a warrant. [**LEGAL UPDATE EDITORIAL COMMENT: This is not an accurate description of the ruling in Kealey. The Court of Appeals actually held that, while the purse could not be deemed to have been abandoned, the officer lawfully searched the mislaid purse in order to identify the owner of the purse, and therefore the drugs seen in the purse were lawfully seized and searched.]**

In contrast to Kealey, the trial court reasonably inferred Samalia's intent to abandon his cell phone by his flight from the stolen vehicle despite Officer Yates' commands. This is unlike Kealey, where the woman's actions objectively demonstrated her intent to retrieve her property. Further, given that the area of the search is of critical importance, Samalia had no privacy interest in the stolen vehicle. See State v. Zakel, 61 Wn. App. 805, 810 (1991). Samalia had no privacy interest in the stolen vehicle because it was stolen and he fled in an attempt to escape from law enforcement. Similarly in Young, the court found that the defendant voluntarily abandoned a box by placing it in a public space to avoid law enforcement. Accordingly, we affirm the holdings of the superior and

> appellate courts that the police search of Samalia's cell phone did not violate any constitutionally protected privacy interest.

[Some citations omitted; some other citations revised for style; one footnote omitted; some paragraphing revised to make footnotes less distracting.]

Issues regarding exigent circumstances, community caretaking doctrine and attenuation exception to exclusionary rule are not addressed in the Majority Opinion

The Supreme Court Majority Opinion notes that, for policy reasons, appellate courts should not generally consider a constitutional theory where the State did not offer facts and argument at the trial court to support the theory. In this case, the State did not present at the trial court theories of exigent circumstances, community caretaking and attenuation. The Majority Opinion therefore declines to address those issues.

Dissenting Opinion

Justice Yu writes a Dissenting Opinion that is joined by Justices Gordon McCloud and Stephens. This Legal Update entry will not address the Dissenting Opinion other than to note here that the opinion argues in vain that the Court should have adopted an exception to the abandonment doctrine for abandoned cell phones and should have held that a search warrant was required to search the phone under the Samalia facts.

LEGAL UPDATE EDITORIAL COMMENTS: 1. The "abandoned property doctrine" is not an exception to the search warrant requirement but instead is a doctrine, like "open view" that determines whether a search has occurred.

The Court of Appeals in Samalia, and some prior Washington court decisions, referred to the abandoned property doctrine as an exception to the search warrant requirement. The Majority Opinion and Dissenting Opinion (which cites to Professor LaFave's Search and Seizure discussion of the concept) from the Washington Supreme Court do not repeat that mistake in Samalia, referring instead to the doctrine as a common law (case-law based) doctrine that establishes that a privacy right cannot be claimed in abandoned property.

2. May a mislaid cell phone be searched to determine ownership of the cell phone?

As noted in the Samalia Majority Opinion, there is a Washington Court of Appeals decision that supports law enforcement searching an apparently lost or mislaid item to determine the true owner and return the item to that person. See State v. Kealey, 80 Wn. App. 162, 175 (1995) May 96 LED:05. See also Chapter 63.21 (Generally authorizing the "chief law enforcement officer" of the entity where property is found to determine ownership and return the property to the owner). There is also authority from other jurisdictions supporting a search of lost or mislaid property for this purpose. See generally 3 W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 5.5(d).

The Samalia case leaves open the question of how the Washington Supreme Court will deal with this much more common scenario of searching a cell phone to determine the owner of a lost or mislaid cell phone. There was briefing on the issue, but, as noted above, because the issue was not litigated in the trial court, the Supreme Court chose not to address the issue. I would think that a search of a cell phone to find the owner will

be allowed, but I also think that officers should take care to reasonably limit the search to steps that seem reasonable for that purpose, and to explain in a report what they did and why.

LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING SAMALIA DECISION: The Samalia decision is digested in the AGO/CJTC's July 2016 LED at pages 4-5.

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WASHINGTON STATE COURT OF APPEALS

ACCESS DEVICE, SUFFICIENCY OF EVIDENCE: ACTIVATED GIFT CARD IS AN "ACCESS DEVICE" UNDER CHAPTER 9A.56 RCW

State v. Nelson, ___ Wn. App. ___ , 2016 WL 3999883 (Div. II, July 26, 2016)

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

> Nelson was a Kmart employee. A surveillance video showed that Nelson left her cash register three times to retrieve an empty gift card, then activated each card by adding funds to it without adding cash to the cash register. She activated an Amazon.com gift card for $100, a MasterCard gift card for roughly $205, and a JoAnn's Fabric & Craft Store gift card for $25. She later used at least two of these cards.
>
> The State charged Nelson with one count of second degree theft of an access device[1] and one count of second degree possession of a stolen access device. Nelson moved to dismiss the charges . . . . She argued that the term "access device" could not include gift cards. The superior court granted Nelson's motion, ruling that, as a matter of law, a gift card is not an access device.

ISSUE AND RULING: Is an activated gift card an "access device" for purposes of chapter 9A.56 RCW? (ANSWER BY COURT OF APPEALS: Yes)

Result: Reversal of Lewis County Superior Court dismissal order; case remanded for trial.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Nelson and the State disagree about the definition of "access device." RCW 9A.56.010(1) defines "access device" as follows:
>
> > "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument.
>
> Nelson argues that any "access device" must be a "means of account access." The State appears to argue that the statute does not require an access device to

be a means of account access so long as the device meets the other prongs of the definition. On this point, we agree with Nelson.

. . . .

Having held that the statute requires an access device to be a means of account access, we turn to considering whether a gift card can be such a means. Nelson contends that it cannot. Instead, she argues that the "account" to which the statute refers must be a credit or checking account. We hold that gift cards can access an account because the plain meaning of the word "account" is broad enough to cover a gift card's balance.

. . . . Under [the] dictionary definition, the plain meaning of "account" broadly includes records of a business relationship involving ongoing credits and debits or obligations. And while it <u>may</u> refer to a customer's balance in the bank, this is only one of several meanings.

Turning to the question of whether a gift card can access an account, ... [a] gift card can be used to receive goods or services of a specified value. A gift card thus shows a resulting balance. It is a device that can be used to access a record of a business relationship with outstanding credits, debits, or obligations, and a sum of money – that is, an account.

Our holding that a gift card can be an access device is in accord with federal case law. [The Court of Appeals then addresses federal case law and some additional arguments by the defendant.]

. . . .

The State argues that sufficient evidence exists to defeat the [motion to dismiss] because Nelson used the gift cards to purchase items. We agree with the State.

Both theft of an access device and possession of a stolen access device require proof that the stolen item is an access device. RCW 9A.56.040(1)(d), 160(1)(c). As discussed above, an item must access an account to be an access device. The State presented evidence that Nelson activated the gift cards, placed funds on them, and then "used" at least two of them. This evidence, viewed in the light most favorable to the State, shows that Nelson used the funds she placed on the gift cards to access funds available with the third party vendors – in other words, that she accessed an account with those vendors. After she activated the gift cards at Kmart, she then used the cards to buy goods that the vendors made available to her because the gift card was a record of credits available to the holder of the gift card.

<u>LEGAL UPDATE EDITORIAL NOTE REGARDING LAW ENFORCEMENT DIGEST ENTRY ADDRESSING NELSON DECISION</u>: The <u>Nelson</u> decision is digested in the AGO/CJTC's July 2016 <u>LED</u> at page 6.

PRIVACY ACT, CHAPTER 9.73 RCW: ONE-ON-ONE CONVERSATION IN AN OFFICE AT WORK WITH NO ONE ELSE PRESENT OR LISTENING WAS "PRIVATE," AND ALL

EVIDENCE REGARDING A SECRET RECORDING AND THE CONTENTS OF THE CONVERSATIONS MUST BE EXCLUDED FROM EVIDENCE

Marin v. King County, ___ Wn. App. ___, 2016 WL ___ (Div. I, unpublished opinion of June 6, 2016 ordered published on July 11, 2016)

Facts and Proceedings below:

On two occasions, Marin and his supervisor had lengthy conversations in an office at work. The conversations involved only the two of them, with no third party present or listening. Marin secretly recorded both of the conversations.

Marin later sued his employer, King County (Wastewater Treatment Division), on wrongful discharge and a variety of other civil liability theories. During pre-trial discovery, King County learned of the recordings and moved to exclude them from evidence on grounds that the recordings were of "private" conversations without justification under any exclusion in the Privacy Act, chapter 9.73 RCW. The trial court agreed with the County and excluded the recordings. The result of trial was (1) dismissal by the trial judge of some claims, and (2) findings for the County on other claims.

ISSUE AND RULING: On two occasions, Marin and his supervisor had lengthy conversations in an office at work. Marin secretly recorded the conversations that involved only the two of them, with no third party present or listening. Were the conversations "private" for purposes of the Privacy Act, chapter 9.73 RCW, such that the recordings and evidence of the conversations must be excluded from evidence under the Act? (ANSWER BY COURT OF APPEALS: Yes, the conversations were private and the recordings and any evidence regarding the conversations must be excluded from evidence.)

Result: Affirmance of King County Superior Court judgment for King County.

ANALYSIS: (Excerpted from Court of Appeals opinion)

> Marin first contends that his conversations with Sagnis were not "private" under RCW 9.73.030. No statute defines the term "private." To determine whether a conversation is private under the privacy act, we consider "(1) the subject matter of the communication, (2) the location of the participants, (3) the potential presence of third parties, (4) the role of the interloper, (5) whether the parties "manifest a subjective intention that it be private," and (6) whether any subjective intention of privacy is reasonable." . . . .
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> Here, Marin and Sagnis had lengthy conversations in an office at work that involved only the two of them. No third party was present. Marin does not meaningfully distinguish Smith v. Employment Security Department, 155 Wn. App. 24 (2010), where the court found conversations between public employees in an office to be private as a matter of law. Nor does he cite to authority to support his argument that the conversations were "public in nature" because they were between two government employees who each later revealed parts of what was said. We distinguish the cases Marin does cite on the basis that they involve documents rather than conversations. [Citing cases decided under Public Disclosure Act]. Following Smith, we conclude that Marin's conversations with his supervisor were "private" under RCW 9.73.030. A violation of the privacy act

> requires exclusion of "all evidence" of the contents of the illegally recorded conversations. RCW 9.73.050; Schonauer v. DCR Entm't, 79 Wn. App. 808, 819 (1995). Thus, the trial court did not err in excluding the recordings and other evidence regarding the meetings.

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

LEGAL UPDATE EDITORIAL NOTE: Marin v. King County is a civil case involving an unlawful recording by a private citizen, but the Privacy Act's exclusionary provisions generally apply equally to: (1) unauthorized recordings by civilians and government officers alike; and (2) both civil and criminal matters. Secretly recording a private conversation – where, as here, no exemption supports the recording conduct (whether by a government actor or civilian) – not only is subject to a broad statutory exclusionary rule under RCW 9.73.050, but the violation also generally supports a criminal prosecution for a gross misdemeanor (RCW 9.73.080), as well as a civil action for damages (RCW 9.73.060).

PRIVACY ACT, CHAPTER 9.73 RCW: PRIVACY ACT PERMITS RECORDING OF CALLS FROM KING COUNTY JAIL UNDER JAIL PROTOCOL FOR CALLS, AND THAT APPLIES TO BOTH THE CALLERS AND THE RECIPIENTS OF THE CALLS; ALSO, STATE AND FEDERAL CONSTITUTIONS PERMIT THE RECORDINGS

State v. Dere, ___Wn. App. ___, 2016 WL ___ (Div. I, July 25, 2016)

Facts and Proceedings below:

Before his trial on a robbery charge, Dere posted bail and was released from custody. Dere received several calls from Mohamed Ali, a codefendant who remained in jail.

Signs posted near the jail telephones warned that the system recorded every outgoing call and tracked every number dialed. An automated message repeated that warning to both those making and receiving the calls. Similar signs were posted and a similar warning was given by an automated message. Each time Dere received a call from Ali, the jail telephone system played an automated message stating as follows:

> Hello. This is a free call from [name of inmate], an inmate at King County Correctional Facility. This call is from a correctional facility and is subject to monitoring and recording. If this call is being placed to an attorney, it should not be accepted unless the attorney name and number is on the do not record list. If an attorney name and number is not on the do not record list, this call will be recorded. If the attorney name and number is not on the do not record list, contact the jail immediately and have that attorney's name and number added to the attorney list. After the beep, press 1 to accept this policy or press 2 and hang up.

Also, Dere had been an inmate himself and was aware of the recording policy. The calls from Ali to Dere were recorded by the jail's telephone system. The recordings provided evidence of Dere's complicity in the robbery.

The recordings were used by the State at trial. Dere was convicted of first degree robbery.

ISSUES AND RULINGS: (1) Were Dere's rights under the Privacy Act, chapter 9.73 RCW, violated by the recording of the phone calls from Ali to Dere? (ANSWER BY COURT OF APPEALS: No, because. In light of the King County Jail's warnings system, the conversations were not "private" within the meaning of the Privacy Act)

(2) Were Dere's rights under the Washington constitution or the federal constitution violated by the recording of phone calls from Ali to Dere? (ANSWER BY COURT OF APPEALS: No)

Result: Affirmance of King County Superior Court robbery conviction of Zakaria Weis Dere.

ANALYSIS BY COURT OF APPEALS: (Excerpted from Court of Appeals opinion)

1. The recorded phone conversations were not private within the meaning of the Privacy Act

> Recordings obtained in violation of the act are inadmissible for any purpose at trial. RCW 9.73.050. The act makes it unlawful to intercept or record private communications transmitted by telephone without first obtaining the consent of all participants in the communication. RCW 9.73.030(1); State v. Modica. 164 Wn.2d 83 (2008) **Sept 08 LED:13**. A communication is private when parties manifest a subjective intention that it be private and where that expectation is reasonable. State v. Christensen, 153 Wn.2d 186, 193 (2004) **Feb 05 LED:09**.
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> Dere's conversations with Ali were not private communications. Dere and Ali did not have a reasonable expectation of privacy in their telephone conversations because they knew their calls were recorded and subject to monitoring. See Modica.
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> In Modica, the defendant was arrested and jailed for punching his wife in the face. The defendant called his grandmother from jail to enlist her help in arranging for his wife to evade the prosecutors and not appear in court. The jail recorded the calls between the defendant and his grandmother, and the State used the recordings to convict the defendant of witness tampering. The conviction was affirmed against an appeal asserting that the recordings violated the privacy act. Because the defendant and his grandmother both knew their calls were recorded and subject to monitoring, the court rejected the argument that the calls were private communications.
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> In Modica, signs posted near the jail telephones warned that the system recorded every outgoing call and tracked every number dialed. An automated message repeated that warning to both those making and receiving the calls. The same was true in this case. Similar signs were posted and a similar warning was given by an automated message. Each time Dere received a call from Ali, the jail telephone system played an automated message stating [as set forth in the description of the facts above]
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> In Modica, the court noted that the presence of signs or automated recordings "do not, in themselves, defeat a reasonable expectation of privacy." "However, because Modica was in jail, because of the need for jail security, and because Modica's calls were not to his lawyer or otherwise privileged, we conclude he had no reasonable expectation of privacy." Dere argues that to the extent the Modica

rationale depends on the "need for jail security," his case is distinguishable because nothing that he and Ali discussed in their recorded conversations had any connection to matters of jail security.

The argument that recordings are inadmissible when they are requested by the prosecutor for the purpose of investigation rather than because of safety concerns was rejected in State v. Hag. 166 Wn. App. 221 (2012) **Aug 12 LED:19**. The jail records all inmate calls because jail authorities cannot know in advance which calls may contain information pertaining to plans of escape, tampering with witnesses, and other potential breaches of security. Thus, the need for jail security is a generalized rationale. Because an outsider's conversations with an inmate have the potential to affect the security of the jail, the State is not required to identify a security concern individualized to a specific inmate to remove a recorded jail phone call from the realm of private communications.

In Modica, the recordings were admitted against a defendant who was an inmate when he participated in the recorded call. Dere claims that Modica does not govern the admissibility of recordings the State seeks to use against a non-inmate. The point of Modica, however, is that except for attorneys, anyone who uses the jail telephone system to carry on a telephone conversation with an inmate is subject to the inmate's diminished expectation of privacy. Just as Modica's grandmother did not have a reasonable expectation that her conversations with him would be private, Dere did not have a reasonable expectation that his conversations with Ali would be private.

. . . .

Following Modica and Haq, we conclude Dere did not have a reasonable expectation of privacy in his telephone conversations with Ali. Because the calls were not private communications, the privacy act does not apply.

2. The recorded phone conversations were not constitutionally protected

Dere also claims that the recording of his calls from Ali violated his constitutionally protected privacy rights. Article I, section 7 of the Washington Constitution generally protects the privacy of telephone conversations, but calls from a jail inmate are not private affairs deserving of article I, section 7 protection. State v. Archie, 148 Wn. App. 198 (2009) **March 09 LED:22**. A jail recording system serves an important institutional security interest and its operation typically demonstrates that at least one participant in a conversation has consented to the recording. The inspection of other forms of communication with inmates, such as ingoing and outgoing mail and packages, is not an invasion of a privacy interest protected by the Washington Constitution so long as the inmate is informed of the likelihood of inspection. The security concerns are the same whether the inmate is a pretrial detainee or is being incarcerated after trial and they do not depend upon whether the communication is by mail or telephone. The facts here are similar to those in Archie, and like in Archie, there was both notice and consent. The trial court found that both Ali and Dere "expressly consented to the recording" when they pressed the number that

allowed the call to continue after they heard the automated message quoted above.

Likewise, a warrantless monitoring of conversations does not violate the Fourth Amendment to the United States Constitution when one party to the conversation gives consent. State v. Corliss, 123 Wn.2d 656 (1994) **June 94 LED:02**. The practice of automatically taping and randomly monitoring telephone calls of inmates in the interest of institutional security is not an unreasonable invasion of the privacy rights of pretrial detainees. United States v. Willoughby, 860 F.2d 15 (2d Cir. 1988) Willoughby rules out Dere's contention that under the Fourth Amendment his own privacy rights as a non-inmate were entitled to greater protection than Ali's. "Contacts between inmates and non-inmates may justify otherwise impermissible intrusions into the non-inmates' privacy, "given the strong interest in preserving institutional security." Willoughby.

Dere compares the State's use of the recordings as a tool of investigation to the warrantless search of a cellphone in Riley v. California. 134 S.Ct. 2473 (2014) **Aug 14 LED:04**, and the warrantless eavesdropping described in Katz v. United States. 389 U.S. 347 (1967). Those cases are inapposite. Consent is a well-recognized exception to the warrant requirement. Dere consented to having his conversation recorded.

[Subheadings added; some citations omitted; some other citations revised for style]

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FUTURE LEGAL UPDATE ENTRIES

In the August 2016 Legal Update or a later 2016 Legal Update, I will digest:

(1) City of Lakewood v. Willis, ___ Wn.2d ___ , 2016 WL ___ (July 21, 2016), a Washington Supreme Court decision addressing an appeal from a citation for violating a City of Lakewood ordinance prohibiting "begging in restrictive [sic] areas," including at freeway on and off ramps and at intersections of major arterials; the Supreme Court held in split voting and a confusing mix of opinions that the ordinance violates Free Speech protection, apparently on grounds that it is a content-based restriction on speech in public forums;

(2) State v. Cruz, ___ Wn. App. ___ , 2016 WL ___ (Div. II, July 26, 2016), a Washington Court of Appeals decision holding that an officer's protective search of a fish-snagging arrestee's vehicle for firearms that the officer knew to be in the vehicle was not justified under Terry or under the exigent circumstances exception; the Court held that the circumstances of the contact with the suspect at the recreational fishing parking area did not justify the officer's perception of danger (note that at the point in late August of finalization of the July 2016 Legal Update, a motion for reconsideration was pending at the Court of Appeals in Cruz);

(3) State v. Horton, ___ Wn. App. ___, 2016 WL ___ (Div. II, July 26, 2016), a Washington Court of Appeals decision making the following Miranda-invocation holdings: (A) a suspect's confusing references to having or not having an attorney were ambiguous and therefore were not invocations of the Fifth Amendment right to an attorney; and (B) the Washington Constitution does not provide greater protection than the U.S. Constitution regarding the invocation of the right to counsel during custodial interrogation.

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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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